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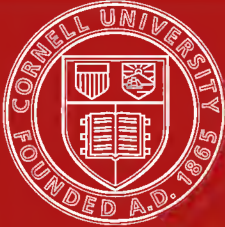

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PRINCIPLES

OF THE

LAW OF PERSONAL PROPERTY,

INTENDED FOR

THE USE OF STUDENTS IN CONVEYANCING;

BY JOSHUA WILLIAMS, ESQ.,

OF LINCOLN'S INN, ONE OF HER MAJESTY'S COUNSEL.

AMERICAN EDITORS,

BENJAMIN GERHARD AND SAMUEL WETHERILL.

Fourth American

FROM THE

SEVENTH LONDON EDITION.

WITH

ADDITIONAL NOTES AND REFERENCES

BY

SAMUEL WETHERILL.

PHILADELPHIA:

T. & J. W. JOHNSON & CO.,

LAW BOOKSELLERS AND PUBLISHERS,

No. 535 CHESTNUT STREET.

1872.

Entered, according to Act of Congress, in the year 1872, by

T. & J. W. JOHNSON & CO.,

In the Office of the Librarian of Congress at Washington, D. C.

Entered, according to Act of Congress, in the year 1866, by

T. & J. W. JOHNSON & CO.,

In the Clerk's Office of the District Court for the Eastern District of Pennsylvania.

HENRY B. ASHMEAD, PRINTER,

1102 & 1104 Sansom Street.

PREFACE

TO THE AMERICAN EDITION.

THE object of the present edition of this work has been to accommodate Mr. Williams's Treatise to the United States, by incorporating in the notes the American law; so as to make the book useful to the American profession, both as an elementary composition for the student, and as a book of reference for the practitioner. The editor, in endeavoring to accomplish this purpose, has not indulged in original researches, but has, for the most part, confined himself to the path prescribed by the author. In most instances where a citation has been made, the original book has been consulted, and when practicable, the opinions of the Judges have been quoted, rather than the syllabus of the reporter of their decisions, or any abstract of such judgments. In citing the statutes of the United States, or of the States, the Digests have been referred to, rather than the Statutes at Large —the former having been found more accessible than the latter; in some instances, where neither the more recent statutes of the States, nor Digests of them, were within reach, the decisions of the courts pertinent to the subject have been referred to.

The notes on the subject of bankruptcy were prepared by

Joseph Mason, Esq., Register in Bankruptcy in the Eastern District of Pennsylvania, and the editor hereby desires to express his most grateful acknowledgment for the very valuable assistance thus rendered. The references in the notes on this subject are principally to the Bankruptcy Register.

If it be true, as the author modestly tells his readers in the preface to the first edition of his work, that no text-book of the law can be completely accurate, how very much less must be the approach to perfection by annotators.

With this brief introduction, the work is submitted to the profession; should it prove useful, the object had in view will have been attained.

131 South Fifth Street, Philadelphia,
May 6, 1872.

PREFACE

TO THE FIRST EDITION.

THE following pages are intended as supplementary to the author's "Principles of the Law of Real Property." At the time when that work was written, the plan of the present treatise was not matured, and a chapter "On Personal Property and its Alienation" was inserted in that work. The contents of that chapter will be found interspersed in parts of the present volume; and should a second edition of the "Principles of the Law of Real Property" be called for, it is the author's intention to omit that chapter of his former work, and to supply its place by some further remarks on such elementary parts of the law of real property as may appear to have been but slightly touched upon before. The very favorable reception which the author's work on the law of real property has met with from the profession has encouraged him to undertake, in the present work, a task, he believes, hitherto unattempted: for it is singular that, notwithstanding the rapid growth and now enormous value of personal property in this country, no treatise has yet appeared having for its object the introduction of the student in conveyancing to that large and increasing portion of his study

and practice which comprises the law relating to such property. As to real property, he may take his choice amongst three or four publications, all having the same object of facilitating his studies; but the law of personal property, though sufficiently treated of in all that relates to it as purely mercantile, has not yet had any elementary treatise on its principles, so far as they affect the practice of conveyancing. The present work is an attempt to supply this deficiency, and, in conjunction with the author's "Principles of the Law of Real Property," to afford the student a brief and simple introduction to the whole system of modern conveyancing. The novelty of the attempt has, however, increased the difficulty of the task. The author has endeavored proportionably to increase his diligence and care. He can, however, scarcely hope to have escaped all errors. And here he would caution the student against too implicit a reliance on the dicta of text-books. Elementary books cannot, from their nature, be completely accurate. As helpers to more perfect knowledge, they may be most valuable. But it would be as great a mistake for a student to remain satisfied with his knowledge of a text-book, as for an author to compress into an elementary work all that could possibly be said on the subject.

7, New Square, Lincoln's Inn,
23d May, 1848.

ADVERTISEMENT

TO THE SEVENTH EDITION.

In this Edition the alterations which have taken place in the Law since the publication of the last Edition have been incorporated in the Text. The chapters on Bankruptcy and part of the chapter on Debts have been re-written.

3, Stone Buildings, Lincoln's Inn,
Dec. 1869.

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PRINCIPLES

OF THE

LAW OF PERSONAL PROPERTY.

INTRODUCTORY CHAPTER.

OF THE SUBJECTS AND NATURE OF PERSONAL PROPERTY.

THE English law of property is divided into two great branches,—the law of real property, and the law of personal property. The feudal rules, which respected the holding and culture of land, were the elements of the common law of real property; the rules relating to the disposition of goods were the origin of the law of personal property. Such property was anciently of little importance, and its laws were consequently few and simple. It did not, however, escape the ecclesiastical influence which spread so widely in the middle ages; and it has thence derived that subjection to the rules of the civil law by which it is characterized when transmitted by will or distributed on intestacy.

The division of property into real and personal, though now well recognised, and constantly referred to even in the acts of the legislature, is comparatively of modern date. In ancient times property was divided into *lands, tenements and hereditaments* on the one hand, and *goods* **and chattels* on the other. These two last terms appear to be synonymous. [*2] In process of time, however, certain estates and interests in land grew up, which were unknown to the ancient feudal system, and could not conveniently be subjected to its rules. Of these the most important were leases for years.[1] Such interests, therefore,

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[1] A lease for any number of years is, in the common law, of no higher dignity than a lease or term for one year. Both are mere chattels, and pass to the personal representatives of a decedent: 7 Sm. & Marsh. 479; Gay's Case, 5 Mass. 419; Reynold's Heirs *v.* Com'rs of Stark Co., 5 Ohio 204; Lessee of Bisbee *v.* Hall, 3 Id.

were classed among chattels; but as they savoured, as it was said, of the realty, they acquired the name of *chattels real*.(*a*) In more modern times, chattels real have been classed, with other chattels, within the division of personal property; but as chattels real, though personal property, are in fact interests in land, the laws respecting them have been noticed in the author's treatise on the Principles of the Law of Real Property.(*b*) Chattels real will therefore be only incidentally noticed amongst the subjects treated of in the present work.

When leases for years, and other interests in land of the like nature, were admitted into the class of chattels as chattels real, it became necessary that such goods as had previously constituted the whole class, should be distinguished from them by some further name; and the title of *chattels personal* was accordingly applied to all such chattels as did not savor of real estate. For this title, the choice of two reasons is given to the reader by Sir Edward Coke, "because, for the most part, they belong to the person of a man, or else for that they are to be recovered by personal actions."(*c*)[1] The former of these two reasons has been chosen by

(*a*) Co. Litt. 118 b.

(*b*) Principles of the Law of Real Property 315 et seq., 1st ed.; 307, 2d ed.; 322, 4th ed.; 333, 5th ed.; 350, 6th ed.; 357, 7th ed.; 373, 8th ed.

(*c*) Co. Litt. 118 b.

499; Brewster *v.* Hill, 1 N. H. 351. In Massachusetts, by the Revised Statutes of 1860, ch. 90, § 20, p. 471, it is declared that the lessees and assignees of lessees of real estate, for the term of one hundred years or more, in cases where there is an unexpired residue of fifty years or more of the term, shall be regarded as freeholders, and the estate subject like freehold estates to descent, devise, dower, and execution. In Ohio, Revised Statutes, 1860, ch. 36, § 20, p. 505, and ch. 87, § 1, p. 1142, permanent leasehold estates, renewable for ever, are subject to the same law of descent and distribution as estates in fee. See Northern Bank of Kentucky *v.* Roosa, 13 Ohio 334; McLean *v.* Rockey, 3 McL. 235.

In relation to terms to attend the inheritance, although on the death of the ancestor, the legal title to these vests in his personal representatives, yet in equity, they belong to the heir, and are considered part of the inheritance: Lovet *v.* Needham, 2 Vern. 138; Whitchurch *v.* Whitchurch, 2 P. Wms. 236; Villiers *v.* Villiers, 2 Atkins 71; Maundrell *v.* Maundrell, 7 Ves. Jr. 577; and see post, p. 259, note 1.

[1] However unimportant any discussion may be as to the origin of the term personal, as ascribed to chattels, it is conceived that the reason of the designation as given by Blackstone, is the correct one. All chattels formerly known to the law were by their nature movable, and a very large class of them, such as debts, obligations, and the like, had no tangible existence, and were supposed by the law to "attend the person," and are subject to the incidental laws of the domicil of the owner, in the case of intestacy and insolvency; while real estate being immovable, is only governed by the laws of the place where it is situated, independently of the actual domicil of the owner. This would seem to be a more probable reason, than the mere fact of their being the subject of actions called personal.

Mr. Justice Blackstone.(*d*) But it is submitted that the latter reason is most probably the true one. When goods and *chattels began to [*3] be called personal, they had become too numerous and important to accompany the persons of their owners. On the other hand, the bringing and defending of actions has always been the most prevailing business of lawyers; from the different natures of actions, the nomenclature of the law is therefore most likely to have proceeded. Now actions were long divided into three classes,—real actions, personal actions, and mixed actions. Real actions were brought for the recovery of lands, and, by their aid, the *real land* was restored to its rightful owner. Mixed actions, as their name imports, were real and personal mixed together. Personal actions were brought in respect of goods for which, as they are in their nature destructible, nothing but pecuniary *damages* could with certainty be recovered from the *person* against whom the action was brought. Accordingly, by the ancient law of England, there never were more than two kinds of personal actions in which there was a possibility of recovering, by the judgment of the Court, the identical goods in respect of which the action was brought. One of these was the action of *detinue*, where goods, having come into a man's possession, were unlawfully detained by him; in which case, however, the judgment was merely conditional, that the plaintiff recover the said goods, or (*if they could not be had*) their respective values, and also the damages for detaining them.(*e*) The other was the action of *replevin*, brought for goods which had been unlawfully distrained; but in this case the goods were never beyond the custody of the sheriff, who is an officer of the law, and their safe return could therefore be secured.(*f*)[1] Goods therefore

(*d*) 2 Black. Com. 16, 384; 3 Black. Com. 144.
(*e*) 3 Black. Com. 152. (*f*) Ibid. 146.

[1] In the United States generally, the action of replevin lies, wherever one claims goods in the possession of another; and on a claim of property, the defendant can retain the goods if he gives security to produce them, and, where the property is so retained, the plaintiff's right is turned into a *chose in action*, and his right to the property absolutely gone: Fisher *v.* Whoolery, 25 Penn. St. 197; and see also, Pugh *v.* Calloway, 10 Ohio N S. 488; but even in England it was not formerly the case, as is stated in the text, that the goods were in the custody of the sheriff: 1 Saund. (by Williams) 347 *a*, note 2. See also 12 Mass. 180, note.

In New York, replevin lies for any *tortious* taking of goods; Pangburn *v.* Partridge, 7 Johns. 140; Gardner *v.* Campbell, 15 Id. 402; Mills *v.* Martin, 19 Id. 31; Clark *v.* Skinner, 20 Id. 467; Judd *v.* Fox, 9 Cowen 259; Dodworth *v.* Jones, 4 Duer 201.

But it will not lie for illegal detention of property, where the party comes to possession by delivery from a person having a special property in the goods: Marshall *v.* Davis, 1 Wend. 109.

As against wrongdoers and trespassers, it has been decided in North Carolina, that a paramount right of property is not necessary to support the action, but a naked

seem to have been called personal, because the remedy for their abstraction was against the *person* who had taken them away, or because, in the

possession, or a right of possession coupled with the beneficial interest, will be sufficient: Freshwater *v.* Nichols, 7 Jones's Law 251.

In Pennsylvania, wherever one man claims goods in the possession of another, replevin will lie: Weaver *v.* Laurence, 1 Dall. 157; Shearick *v.* Huber, 6 Binn. 3; Stoughton *v.* Rappalo, 3 S. & R. 562; Snyder *v.* Vaux, 2 Rawle 428; Pearce *v.* Humphries, 14 S. & R. 25; Bower *v.* Tallman, 5 W. & S. 561; Harlan *v.* Harlan, 15 Penn. St. 513; Boyle *v.* Rankin, 22 Id. 168; but see Bonsall *v.* Comly, 44 Id. 442. It is effectual for the delivery of personal property only; Roberts *v.* Dauphin Deposit Bank, 19 Id. 71; and it will not lie by one, claiming land against another in the actual adverse possession thereof, under claim of title for fixtures, *aliter*, where there is no claim of adverse title: Mather *v.* Trin. Church, 3 S. & R. 509; Bowen *v.* Caldwell, 10 Id. 114; Harlan *v.* Harlan, 15 Penn. St. 513; and see Green *v.* Iron Co., 62 Penn. St. 97.

Replevin will not lie by one joint owner of a chattel, but the objection can only be taken by a plea in abatement, where he sues for the whole: Reinheimer *v.* Hemingway, 35 Penn. St. 432. If he sues for a moiety, the court will abate the writ, *ex officio:* D'Wolf *v.* Harris, 4 Mason 515. And by the same case it was held, that an assignment of goods at sea, and their proceeds, if *bonâ fide*, is sufficient to pass the legal title to the goods, and also to the proceeds, so that replevin will lie for the latter. But in case of an express contract for delivery, one partner may bring this action against the other: Kahle *v.* Sneed, 59 Penn. St. 388.

If trees cut down be converted by defendant into rails and posts, this is not such an alteration of the property as will prevent recovery in replevin: Snyder *v.* Vaux, 2 Rawle 423; and see Lee *v.* Gould, 47 Penn. St. 398.

In Massachusetts it has been held, that as a general principle, the owner of a chattel may take it by replevin from any person whose possession is unlawful, unless it be in the custody of the law, or unless it had been taken by replevin from him by the party in possession: Ilsley *v.* Stubbs, 5 Mass. 280. In order to maintain it, the plaintiff must have the right of property and of possession, at the time of taking or suing out his writ: Wheeler *v.* Train, 3 Pick. 255; Walcot *v.* Pomeroy, 2 Id. 121. But where goods which had been leased by the owner, were attached as the property of the lessee while they were in his possession under the lease, and the owner replevied them from the officer, and before judgment the lease expired, the defendant had judgment for costs only, and not for a return: Wheeler *v.* Train, 3 Pick. 255. If goods be obtained by means of false and fraudulent pretences, the owner of the goods may reclaim them by this action: Buffington *v.* Gerrish, 15 Mass. 156. So replevin will lie for goods which are unlawfully detained, though the taking be lawful: Badger *v.* Phinney, 15 Mass. 359; Baker *v.* Fales, 16 Id. 147; Marston *v.* Baldwin, 17 Id. 606. [*Contra*, Meany *v.* Head, 1 Mason 319.] And when goods are delivered in pursuance of a conditional sale, and the condition is not performed, the vendor may reclaim the goods by this action: Marston *v.* Baldwin, 17 Mass. 606.

But if the property is not in the plaintiff at the time of the taking, or if he then had no right to the possession against the defendant, replevin cannot be maintained, unless a demand has been made upon the defendant by the plaintiff for the chattels since he acquired the property in them: Gates *v.* Gates, 15 Mass. 310. Such a demand, however, will be sufficient if made on the day of the date of the writ, before it is served, although after its delivery to an officer: Badger *v.* Phinney, 15 Mass. 359.

In Maine, either a general or special

words of Lord *Coke, they were to be recovered by personal actions.(g) By recent statutes,(h) however, provision has been [*4]

(g) See Principles of the Law of Real Property 7.
(h) Stats. 17 & 18 Vict. c. 125, s. 78; 19 & 20 Vict. c. 97, s. 2.

ownership of property will sustain the action: School Dist. No. 5 v. Lord, 44 Maine 374; and it may be maintained for goods unlawfully detained, though the taking was lawful: Seaver v. Dingley, 4 Greenleaf 306; but there must be a demand for the article and refusal to deliver in this case, or other evidence of conversion: Newman v. Jeune, 47 Maine 520.

The mere right of possession is sufficient to sustain this action in the State of Vermont: Sprague v. Clark, 41 Vt. 6.

In New Jersey, where goods are so taken as to entitle the owner to an action of trespass, replevin can be maintained: Bruen v. Ogden, 6 Halst. 370; or for goods taken and unlawfully detained: Nixon's Dig., ed. 1868, p. 810; but there must be both the unlawful taking and the unlawful detention: Harwood v. Smethurst, 5 Dutch. 195. And it will lie for such articles as "mills, barns, steam-engines, offices, and sheds:" Breasley v. Cox, 4 Zabr. 287.

In Ohio, replevin lies in all cases unless excepted by statute: Stone v. Wilson, Wright 159.

In Indiana, demand may be necessary where the defendant has goods by license of the plaintiff; but where there is a wrongful possession of goods, as where they were obtained by fraud, force, or otherwise without the owner's consent, no demand need be made: 8 Blackf. 244. Replevin cannot, however, be maintained against a purchaser in good faith from a wrongful taker: Conner v. Comstock, 17 Ind. 90.

In Delaware, it may be used wherever one claims personal property in possession of another: Clark v. Adair, 3 Har. 113. A purchaser at sheriff's sale may maintain replevin after demand and refusal: 16 Id. 62.

In Maryland, replevin lies in all cases where the plaintiff seeks to try the title to personal property and recover its possession: Brooke v. Berry, 1 Gill 163.

In Kentucky, it will not lie to recover goods held adversely to plaintiff: Dillon v. Wright, J. J. Marsh. 10; nor where the legal title is not in the plaintiff: Daniel v. Daniel, 6 B. Mon. 231.

In Missouri, replevin will lie for goods unlawfully taken or detained when trespass will: Skinner v. Stouse, 4 Mo. 93; Crocker v. Man, 3 Mo. 345, 472; but the plaintiff must have the title to the property or the right of possession: Pilkington v. Trigg, 28 Mo. 95.

In Tennessee, to support replevin, the plaintiff must show right of possession as against the defendant: Bogard v. Jones, 9 Hump. 739; Bradley v. Mitchell, 1 Smith 346; Shaddon v. Knott, 2 Swan 358.

In Arkansas, under the Revised Statutes (same as that of New York on replevin), replevin may be maintained for an unlawful taking or detention of a chattel, but the plaintiff must show title: Beebe v. De Baun, 3 Eng. 566; Rev. Stat. 695; Cox v. Marrow, 14 Ark. 603. The owner of property may bring replevin against a purchaser where his property has been sold under execution against a third person: 3 Eng. 83. As in New York, possession of chattels and actual wrongful taking by defendant will support replevin. It may be brought wherever trespass *de bonis asportatis* will lie: Trapnall v. Hattier, 1 Eng. 21.

In Virginia, replevin is confined by statute (1823) to cases of distress for rent: 1 Robinson's Pr. 408.

As also in Mississippi: Wheelock v. Cozzens, 6 Howard 279; and to maintain the action under the statute of 1842, it is necessary that the plaintiff should

made for enforcing the delivery of goods, in actions for their detention or for breach of contract to deliver them for a price in money; and if they cannot be found, all the lands and chattels of the defendant may be distrained till they are delivered.

Chattels personal, then, are the subjects of the present treatise. In ancient times they consisted entirely of movable goods, visible and tangible in their nature, and in the possession either of the owner or of some other person on his behalf. Nothing of an incorporeal nature was anciently comprehended within the class of chattels personal. In this respect the law of personal property strikingly differs from that of real property, in which, from the earliest times, incorporeal hereditaments occupied a conspicuous place. But although there was formerly no such thing as an incorporeal chattel personal, there existed not unfrequently a right of action, or the liberty of proceeding in the courts of law either to recover pecuniary damages for the infliction of a wrong or the non-performance of a contract, or else to procure the payment of money due. Such a right was called, in the Norman French of our early lawyers, a *chose* or thing *in action*, whilst movable goods were denominated *choses in possession*. Choses in action, though valuable rights, had not in early times the ordinary incident of property, namely, the capability of being transferred;[1] for, to permit a transfer of such a right was, in the

have the right to immediate possession, as at common law: 27 Miss. 198.

The writ lies in Michigan and Illinois by statute, for goods wrongfully taken or detained: 2 Compiled Laws of Michigan (1857), p. 1330; Grose's Statutes of Illinois (1869), p. 569.

In Iowa, if the plaintiff is not entitled to present possession, he cannot prevail: Marienthal *v.* Shafer, 6 Clarke 223; and if the possession of the defendant was rightful at its inception, the plaintiff must make a demand before bringing his action: Gilchrist *v.* Moore, 7 Clarke 9.

In Rhode Island, the action of replevin is maintainable by virtue of the statute "regulating proceedings in replevin," for goods and chattels unlawfully detained, though not unlawfully taken, as well as for goods and chattels unlawfully taken: Waterman *v.* Matteson, 4 R. I. 539.

It may be brought in California where personal property is wrongfully detained, by one having the right of possession: Lazard *v.* Wheeler, 22 Cal. 132.

[1] A right of action for a tort is not assignable: Gardner *v.* Adam, 12 Wend. 297; Com. *v.* Tuqua, 3 Litt. 41; Comegys *v.* Vasse, 1 Peters 123; People *v.* Tioga, 19 Wend. 73; Oliver *v.* Walsh, 6 Cal. 258; and this is true even after verdict: Brooks *v.* Hanford, 15 Abbott's Pr. 342. But a cause of action, to recover money which plaintiff had been induced to pay to defendant, by means of false representations made by the latter, is assignable: Byxbie *v.* Wood, 24 N. Y. 607; and by a statute of 1858 of the State of New York, the right of action which one has, who has been induced by fraud to execute a conveyence and part with the possession of real estate, may be assigned: McMahon *v.* Allen, 34 Barb. 275. And see Weir *v.* Davenport, 11 Iowa 49.

The general rule is, that personal torts which die with the party, and do not survive to personal representatives, are in-

simplicity of the times, thought to be too great an encouragement to litigation;(i) and the attempt to make such a transfer involved the guilt of *maintenance* or the *maintaining of another person in his [*5] suit. It was impossible, however, that this simple state of things should long continue. Within the class of choses in action was comprised a right of growing importance, namely, that of suing for money due, which right is all that constitutes a *debt*. That a debt should be incapable of transfer was obviously highly inconvenient in commercial transactions; and in early times the custom of merchants rendered debts secured by bills of exchange assignable by endorsement and delivery of the bills.

(i) 10 Rep. 48 a.

capable of passing by assignment: Comegys *v.* Vasse, 1 Peters 193; North *v.* Turner, 9 S. & R. 244; Sommers *v.* Wild, 4 Id. 19; O'Donnell *v.* Seybert, 13 Id 54; Freeman *v.* Newton, 3 E. D. Smith 246; Grant *v.* Ludlow, 8 Ohio N. S. 1; and the converse has been held true: Sears *v.* Conover, 34 Barb. 330; Gould Gould, 36 Id. 270. It seems however in New York, that whether a cause of action is assignable depends mainly upon the question whether it would survive: Denning *v.* Fay, 38 Barb. 18. And in that state it has been held, that the right of a mother in the damages given by the statute of 1847, for the death of her son, is capable of assignment: Quin *v.* Moore, 15 N. Y. 432.

But other choses in action may be assigned in equity: Dix *v.* Cobb, 4 Mass. 511; Parker *v.* Grout, 11 Id. 157, note; Wheeler *v.* Wheeler, 9 Cowen 34; Eastman *v.* Wright, 6 Pick. 316; Welsh *v.* Mandeville, 1 Wheat. 236; Brackett *v.* Blake, 7 Metc. 335; Fletcher *v.* Pratt, 7 Blackf. 522; Powell *v.* Powell, 10 Ala. 900; Wooden *v.* Butler, 10 Miss. 716; Blier *v.* Pierce, 20 Vt. 25; 26 Maine 448; Merriweather *v.* Herran, 8 B. Mon. 162; 29 Maine 9; Kerr *v.* Day, 2 Har. 212; Anderson *v.* De Soer, 6 Gratt. 363; Ensign *v.* Kellogg, 4. Pick. 1; Champion *v.* Brewer, 6 Johns. Chan. 398; Lowry *v.* Tew, 3 Barb. Ch. 407; Mitchell *v.* Manufacturing Co., 2 Story 660; Calkins *v.* Lockwood, 14 Conn. 226; Cannaday *v.* Shepard, 2 Jones L. 224; and an oral transfer, with notice from the assignee to the debtor, has been held sufficient: Noyes *v.* Brown, 33 Vt. 431; the assignee takes subject to the equities of him who issued the security assigned; Bush *v.* Lathrop, 22 N. Y. 535; Robert *v.* Carter, 24 How. Pr. 44; Faull *v.* Tinsman, 36 Penn. St. 108; Smith *v.* Rogers, 14 Ind. 224; Eldred *v.* Hazlett, 33 Penn. St. 307; Warner *v.* Whilliaker, 6 Mich. 133; Cornish *v.* Bryan, 2 Stockt. 146; Horstman *v.* Gerker, 49 Penn. St. 281.

A contingent debt may be assigned in equity: Crocker *v.* Whitney, 10 Mass. 316; and a judgment and execution: Dunn *v.* Snell, 15 Mass. 481; Allen *v.* Holden, 9 Id. 133; Brown *v.* Maine Bk., 11 Id. 153; Pearson *v.* Talbot, 4 Litt. 435; Vanhouten *v.* Reilly, 6 Sm. & Marsh. 440; Faull *v.* Tinsman, 36 Penn. St. 108; McDonald *v.* McDonald, 5 Jones's Eq. 211.

To make an assignment valid at law, that which is the subject of it must have an existence actual or potential, at the time of assignment: Mitchell *v.* Winslow, 2 Story 630.

An interest created by a pledge of personal property can be assigned: Russell *v.* Fillmore, 15 Vt. 130.

The legal interest in a judgment is not assignable either by statute or comnon law: Richardville v. Cummins, 5 Blackf. 48.

But choses in action, not so secured, could only be sued for by the original creditor, or the person who first had the right of action. In process of time, however, an indirect method of assignment was discovered, the assignee being empowered to sue in the name of the assignor; and in the reign of Henry VII. it was determined that a "chose in action may be assigned over for lawful cause as a just debt, but not for maintenance, and that where a man is indebted to me in 20*l*., and another owes him 20*l*. by bond, he may assign this bond and debt to me in satisfaction, and I may justify for suing it *in the name of the other* at my own costs."(*j*)[1] Choses in action, having now become assignable, became an

(*j*) Bro. Abr. tit. Chose in Action, pl. 3, 15 Hen. VII. c. 2.

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[1] The assignee of a chose in action, has an equitable right, enforcable at law, in the assignor's name: Dix *v.* Cobb, 4 Mass. 511; Parker *v.* Grout, 11 Id. 157, note; Wheeler *v.* Wheeler, 9 Cowen 34; Eastman *v.* Wright, 6 Pick. 316; Welch *v.* Manderville, 1 Wheat. 236; Hendrick *v.* Glover, Geo. Decis. part 1, 63; Marcune *v.* Hereford, 8 Dana 1; Dunklin *v.* Wilkins, 5 Ala. 109; Rawson *v.* Jones, 1 Scam. 291; Van Houten *v.* Reily, 6 Sm. & M. 440; Broughten *v.* Badgett, 1 Kelly 75; Sims *v.* Radcliffe, 3 Rich. 287; Pollard *v.* Somerset, Mut. Fire Ins. Co., 42 Maine 221; Hooker *v.* Eagle Bk., 30 N. Y. 83. But the assignee of a bond cannot, at common law, sue thereon in his own name: Skinner *v.* Somers, 14 Mass. 107; Smock *v.* Taylor, Coxe 177; Sheppard *v.* Stites, 2 Halst. 94; Sayre *v.* Lucas, 2 Stew. 259; Flanagan *v.* Camden Mutual Insurance Co., 1 Dutch. 506; and a creditor cannot by assigning portions of his claim to different persons, give them separate rights of action: The Hull of a new Ship, Dav. 199.

The bearer of a negotiable promissory note may sue on it in his own name: Mauran *v.* Lamb, 7 Cowen 174; Pearce *v.* Austin, 4 Whart. 489; Barbarin *v.* Daniels, 7 La. 481; Denton *v.* Duplesis, 12 Id. 92; Hill *v.* Holmes, Id. 96; Story on Prom. Notes, 465; Rankin *v.* Woodworth, 2 Watts 134; Leidy *v.* Tammany, 9 Id. 353.

If a negotiable note be assigned and delivered, for a valuable consideration, without endorsement, the title passes, and the assignee may recover in the name of the payee: Jones *v.* Willett, 3 Mass. 304. But a certificate of deposit payable to the depositor, or order, in currency, is not a negotiable instrument, and the endorsee thereof cannot maintain an action upon it in his own name: Loudon, &c. Soc. *v.* Hagerstown, &c. Bk., 36 Penn. St. 498.

And "the holder of bonds issued by a corporation, payable to bearer, may maintain an action on them in his own name. Such bonds are not strictly negotiable under the law merchant, as are promissory notes and bills of exchange. They are, however, instruments of a peculiar character, and being expressly designed to be passed from hand to hand, and by common usage actually so transferred, are capable of passing by delivery so as to enable the holder to maintain an action on them in his own name. Possession is *prima facie* evidence of ownership:" Carr *v.* Le Fevre, 27 Penn. St. 418. And see also on the same subject: Gregory *v* Dozier, 6 Jones L. 4; Morris Canal Co. *v.* Fisher, 1 Stockt. 667; McCoy *v.* The County, 7 Am. L. Reg. 193; Mercer Co. *v.* Hacket, 1 Wall. U. S. 83; Gelpeke *v.* Dubuque, Id. 175; Meyer *v.* Muscatine, Id. 384; Murray *v.* Lardner, 2 Id. 110; Co. of Beaver *v.* Armstrong, 8 Penn. St. 63. Where bonds were issued by a railway company in blank, it was held by the Supreme Court of the United States to be the intention of the company to make the bonds negotiable, and

important kind of personal property; and their importance was increased by an act of the following reign,(*k*) whereby the taking of in-

(*k*) Stat. 37 Hen. VIII. c. 9.

payable to the holder as bearer, and that the holder might fill up the blank with his own name, or make them payable to himself or bearer, or order. White *v.* Vt. & Mass. R. R. Co., 21 How. 575.

A right to property held adversely, or a right growing out of an executory contract, is unsusceptible of legal assignment: Greely *v.* Willcocks, 2 Johns. 1; Flint, &c., R. R. Co. *v.* Dewey, 14 Mich. 477; Kendall *v.* United States, 7 Wall. U. S. 113.

An obligation of record, or under seal, may be equitably assigned by a writing, unsealed: Morange *v.* Edwards, 1 E. D. Smith 414; Dunn *v.* Swell, 15 Mass. 485; Dawson *v.* Coles, 16 Johns. 51; or by parol: Ford *v.* Stuart, 19 Johns. 342; Jones *v.* Witter, 13 Mass. 304; Licey *v.* Licey, 7 Penn. St. 251; Sexton *v.* Fleet, 2 Hilt. 477.

In New York, an assignee of a right of action, may by statute maintain an action therefor in his own name; and the same is true in Massachusetts: Currier *v.* Howard, 14 Gray 511; Butler *v.* N. Y. & Erie R. R. Co., 22 Barb. 110; but in New York this has been held only where the right was assignable at law or in equity, before the code was adopted; and hence it was there decided, that the assignee of a claim for damages for personal injuries, cannot maintain an action in his own name: Purple *v.* Hudson River R. R. Co., 4 Duer 74.

In Pennsylvania, by an act of May 28, 1817, the assignees of bonds, specialties, and notes, can sue in their own names, by statute; but such assignments must be under hand and seal, and executed in the presence of two or more credible witnesses: Purd. Dig. edit. 1861, p. 112, §§ 3, 7; and this is true also in the State of Delaware: Kinniken *v.* Dulaney, 5 Harring. 384.

In New Jersey, the assignee of a bond may maintain an action thereon in his own name: Bennington Iron Co. *v.* Rutherford, Harr. 158. And the assignment need not be in writing: Allen *v.* Pancoast, 1 Spencer 68; but in all other choses in action, except for the payment of money, the assignee cannot maintain an action in his own name: Ruckman *v.* Outwater, 4 Dutch. 571.

In Missouri, by the Rev. C., 1855, p. 319, the assignees of bonds may sue in their own names, but the assignment must be in writing; and the chose assigned must be negotiable as prescribed by the act: Labadies Exec. *v.* Choteau, 37 Mo. 413; Miller *v.* Paulsell, 8 Id. 355; Smith *v.* Schebel, 19 Id. 140.

In Mississippi, the statute making bonds, bills single, &c., assignable by endorsement, so that the assignee may maintain an action in his own name, does not require the endorsement to be under seal: 3 Sm. & M. 647.

In Arkansas (under the statute) an action upon an assigned bond *must* be brought in the name of the assignee: Block *v.* Walker, 2 Pike 4; Gamblin *v.* Walker, 1 Id. 220.

In South Carolina, the assignee of a bond is not compelled to sue in his own name, under the statute: Coachman *v.* Hunt, 2 Rich. 450.

In Ohio, the holder of bonds payable to order or bearer, can sue in his own name: Logue *v.* Smith, Wright 10.

In Illinois, the legal interest in a bond can only be transferred by endorsement in writing, and an action can only be maintained in the name of the person who has such legal interest: Chadsey *v.* Lewis, 1 Gilman 153.

In Indiana, under the new code, all assignees take precisely the same rights which they would have taken before, with this addition, that they can have their remedy in their own name: Patterson *v.* Crawford, 12 Ind. 241.

And by the law of Georgia, a bond paya-

terest for money, which had previously been unlawful, was rendered legal to a limited extent. Loans and mortgages soon became common, forming a kind of incorporeal personal property unknown to the ancient law. In the reign of Queen Anne, promissory notes were rendered, by act of parliament, assignable by endorsement and delivery, in the same manner as inland bills of exchange.(*l*) More recent statutes have enabled [*6] *the endorsee of a bill of lading,(*m*)[1] and the assignee of a life(*n*) or sea(*o*) policy of insurance, to sue in his own name. But other choses in action continue to this day assignable at law only by empowering the assignee to sue in the name of the assignor.

In addition to the mass of incorporeal personal property, which now exists in the form of choses in action recoverable by action at law, there exist also equitable choses in action, or rights to be enforced by suit in equity; of these a pecuniary legacy is a familiar instance, for which, if the executor withhold payment, the legatee can maintain no action at law,(*p*)[2] but must bring a suit in equity. This kind of chose in action

(*l*) Stat 3 & 4 Anne, c. 9 made perpetual by stat. 7 Anne, c. 25, s. 3.

(*m*) Stat 18 & 19 Vict. c. 111, s. 1. (*n*) Stat. 30 & 31 Vict. c. 144.

(*o*) Stat. 31 & 32 Vict. c. 86.

(*p*) Deeks *v.* Strutt, 5 Term Rep. 690; Braithwaite *v.* Skinner, 5 M. & W. 313. Legacies under fifty pounds may now be recovered in the county courts, under the acts for the more easy recovery of small debts and demands in England, unless the validity of the bequest be disputed. Stats. 9 & 10 Vict. c 95, ss. 58, 65; 13 & 14 Vict. c. 61; 19 & 20 Vict. c. 108. These courts have now an equitable jurisdiction. Stats. 28 & 29 Vict. c. 99; 30 & 31 Vict. c. 142.

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ble to one "and his assigns," is negotiable by the terms of the act of 1799 of that State, and passes by endorsement: Prioleau *v.* S. W. R. R. Bk., 16 Geo. 587.

[1] By an Act of the Legislature of the State of Pennsylvania, approved September 24th, 1866, warehouse receipts for merchandise, or bills of lading for the same when in transit to any warehouseman, shall be negotiable, and may be transferred by endorsement and delivery, unless said receipts and bills of lading shall be stamped "not negotiable;" and any person to whom the said receipt or bill of lading may be so transferred, shall be considered the owner of the merchandise therein specified: Purd. Dig. Suppl. 1449. And see post p. 62, note 2.

[2] An action at law for a pecuniary legacy, has been maintained in some of the States, and in some is expressly given by statute: 3 Barb. Ch. 466; Beeker *v.* Beeker, 7 John. 99; Farwell *v.* Jacobs, 4 Mass. 634; Pettigrew *v.* Pettigrew, 1 Stew. 580; Morrow *v.* Breinzet, 2 Rawle 185; App *v.* Driesbach, Id. 301; Colt *v.* Colt, 32 Conn. 422; Gilliland *v.* Beedin, 63 Penn. St. 393; but in Pennsylvania the question of assets, and in what proportion, in case of a deficiency, the claimant is to be paid, is to be determined by the Orphans' Court: Bredin *v.* Gilliland, 28 Leg. Intell. p. 285; Burt *v.* Herron, 66 Penn. St. 400. In which state it has also been decided, that an action at common law will not lie on a decree of the Orphans' Court, for the payment of a legacy out of the funds in the hands of an executor: 34 Penn. St. 354; nor to recover a distributive share of a de-

may be assigned directly from one person to another, and the assignee may sue in equity in his own name. For equity, being of more modern origin than the common law, is guided in its practice by rules more adapted to the exigencies of modern society.

In modern times also several species of property have sprung up which were unknown to the common law. The funds now afford an investment, of which our forefathers were happily ignorant, whilst canal and railway shares, and other shares in joint stock companies, and patents and copyrights, are evidently modern sources of wealth. These kinds of property are all of a personal nature, many of them having been made so by the acts *of parliament under the authority of which they have originated. For want of a better classification, these subjects of personal property are now usually spoken of as *choses in action*. They are, in fact, personal property of an incorporeal nature, and a recurrence to the history of their classification amongst *choses in action* will, as we shall hereafter see, help to explain some of their peculiarities. [*7]

Such is the general outline of the subjects of modern personal property. They are distinguished from real property by being unaffected by the feudal rules of tenure, by being alienable by methods altogether different, by passing in the first instance to the executors, when bequeathed by will, and by devolving, on their owner's intestacy, not on his heir, but on an administrator appointed formerly by the Ecclesiastical Court, but now by the Court of Probate, by whom they are distributed amongst the next of kin of the deceased. On the first of these characteristics, however, mainly depends the nature of the property which exists in things personal. The first lesson to be learned on the nature of real property is this—that of such property there can be no such thing as an absolute ownership; the utmost that can be held or enjoyed in real property is an estate.(*q*) There may be an estate for life, or an estate tail, or an estate in fee simple; but, according to the law of England, there cannot exist over landed property any absolute and independent dominion. All the land in the kingdom is the subject of tenure; and if the estate is not holden of any subject, at any rate it must be held of the crown. With regard to personal property, however, the primary rule is precisely the reverse. Such property is essentially the subject of absolute ownership, and cannot

(*q*) Principles of the Law of Real Property 16.

cedent's estate: Ashford *v.* Ewing, 25 Id. 213. In Mississippi, a specific legacy may be recovered by an action at law: Wooten *v.* Howard, 2 Sm. & Marsh 527.

[*8] be held for any estate. It is true that the *phrase *personal estate* is frequently used as synonymous with personal property; but this general use of the term *estate* should not mislead the student into the supposition that there can be any such thing as an estate in personalty properly so called. The rule that no estate can subsist in personal property would seem to have originated in the nature of such property in early times. Goods and chattels of a personal kind, in other words, movable articles, then formed, as we have seen, the whole of a man's personal estate. And such articles, it is evident, may be the subjects of absolute ownership, and have not those enduring qualities which would render them fit to be holden by any kind of feudal tenure. As personal property increased in value and variety, many kinds of property of a more permanent nature became, as we have seen, comprised within the class of personal, such as leases for years, of whatever length, and Consolidated Bank Annuities. But the rule that there can be no estate in chattels, the reason of which was properly applicable only to movable goods, still continues to be applied generally to all sorts of personal property, both corporeal and incorporeal. The consequences of this rule, as we shall hereafter see, are curious and important. But in the first place it will be proper to consider the laws respecting those movable chattels, or choses in possession, which constitute the most ancient and simple class of personal property; the class, however, which has given to the rest many of the rules for regulating their disposition.

*PART I. [*9]

OF CHOSES IN POSSESSION.

CHAPTER I.

OF CHATTELS WHICH DESCEND TO THE HEIR.

CHOSES in possession are movable goods, such as plate, furniture, farming stock, both live and dead, locomotive engines and ships. These, as has been before remarked, are essentially the subjects of absolute ownership, and cannot be held by estates; they are alienable by methods altogether different from those employed for the conveyance of landed property, and they devolve in the first instance on the executor of the will of their owner, or on the administrator of his effects, if he should die intestate. There are, however, some kinds of choses in possession which form exceptions to the general rule: these consist of certain chattels so closely connected with land that they partake of its nature, pass along with it, whenever it is disposed of, and descend along with it, when undisposed of, to the heir of the deceased owner. The chattels which thus form exceptions are the subject of the present chapter: they consist principally of *title deeds*, *heir-looms*, *fixtures*, *chattels vegetable*, and *animals feræ naturæ*. Of each in their order.

Title deeds, though movable articles, are not strictly speaking chattels. They have been called the sinews of the land,(*a*) and are so closely connected with it that they will pass, on a conveyance of the land, without *being expressly mentioned: the property in the deeds passes out [*10] of the vendor to the purchaser simply by the grant of the land itself.(*b*) In like manner a devise of lands by will entitles the devisee to the posession of the deeds; and if a tenant in fee simple should die intestate, the title deeds of his lands will descend along with them to his

(*a*) Co. Litt. 6 a.

(*b*) Harrington *v.* Price, 3 B. & Ad. 170 (E. C. L. R. vol. 23); Philips *v.* Robinson, 4 Bing. 106 (E. C. L. R. vol. 13); s. c. 12 Moore 308.

heir at law.(c) In former times, when warranty was usually made on the conveyance of lands,(d) the rule was that the feoffer should retain all deeds containing warranties made to himself or to those through whom he claimed, and also all such deeds as were material for the maintenance of the title to the land.(e) But if the feoffment was made without any warranty, the feoffee was entitled to the whole of the deeds; for the feoffor could receive no benefit by keeping them, nor sustain any damage by delivering them.(f) Warranties have now fallen into disuse; but the principle of the rule above stated still applies when the grantor has any other lands to which the deeds relate, or retains any legal interest in the lands conveyed; for in either of these cases he has still a right to retain the deeds.(g) And if the grantor should retain merely an equitable right to redeem the lands, as in the case of a mortgage in fee simple, it has been said that this equitable right is a sufficient interest in the lands to authorize him to withhold the deeds, unless they are expressly granted to the mortgagee.(h) It is very questionable, however, [*11] *whether a legal right ought to be attached to an interest merely equitable. And the doctrine last mentioned is opposed by more recent decisions in another court.(i)[1]

(c) Wentworth's Office of an Executor, 14th ed. 153; Williams on Executors, pt. 2, book 2, c. 3, s. 3.

(d) See Principles of the Law of Real Property 344, 1st ed.; 346, 2d ed.; 365, 4th ed.; 376, 5th ed.; 399, 6th ed.; 407, 7th ed.; 426, 8th ed.

(e) Buckhurst's Case, 1 Rep. 1 b.

(f) 1 Rep. 1 a.

(g) Bro. Abr. tit. Charters de Terre, pl. 53; Yea *v.* Field, 2 T. Rep. 708; see, however, Sugd. Vend. & Pur. 367, 13th ed.; 2 Prest. Conv. 466.

(h) Davies *v.* Vernon, 6 Q. B. 443, 447 (E. C. L. R. vol. 51).

(i) Goode *v.* Burton, 1 Exch. Rep. 189; Newton *v.* Beck, 3 H. & N. 220.

[1] Since the recording acts, which are in universal operation in the American States, the different questions which have arisen in England as to the possession of title-deeds have become comparatively unimportant, as the recording is, in all cases, for the purposes of evidence, and of notice to subsequent purchasers, made of the same validity as the production, or possession of the title papers: Wilt *v.* Franklin, 1 Binn. 522. "In one case only," it was said by McKean, C. J., "can the mortgagee be affected by suffering the title-deeds to remain in the hands of the mortgagor, and that is, where, after the execution of the mortgage, and before the same is recorded, the mortgagor, on the strength of the title papers in his hands, borrows money on a second mortgage. If this second loan was made without knowledge of the first incumbrance, and before the first mortgage was put into the recorder's office, then I should apprehend the first mortgage should be postponed:" Evans *v.* Jones, 1 Yeates 172. These remarks were made under the Pennsylvania Act of 1715, which gave the mortgagee six months within which to record his deed, and if correct, would apply in Pennsylvania to the case of vendees, who have also six months.

Under the present acts of Assembly of that State, a mortgage, unless to secure purchase-money, is not a lien until recorded; purchase-money mortgages con-

If a conveyance of lands should be made by way of use, thus, if lands should be granted to A. and his heirs to the use of B. and his heirs, it has been said that the title deeds of the land will belong to A., the grantee; because, although the Statute of Uses(*k*) conveys the legal estate in the lands from A. to B., it does not affect the title deeds, which must consequently still remain vested in A.(*l*) But this doctrine has been justly questioned, on the ground that the legislative conveyance from A. to B., effected by the Statute of Uses, ought to be at least as powerful as the common law conveyance of the lands to A.; and if the latter conveyance can carry with it the deeds relating to the land, the former conveyance should be considered as powerful enough to do the same;(*m*) and it has accordingly been so decided in a case in Ireland.(*n*)

The tenant of an estate in fee simple in lands possesses the highest interest which the law of Eugland allows to any subject; and such a tenant possesses also an absolute property in the title deeds, which he may destroy at his pleasure, or sell for the value of the parchment.(*o*) But if the lands to which deeds relate should be settled on any person for life or in tail, a qualified ownership will arise with respect to the deeds, different in its nature from that simple property which is usually held in chattels personal. As the lands are now held for a limited estate, so a limited interest in the deeds *belongs to the tenant. The tenant [*12] for life or in tail, when in possession of the lands, being the freeholder for the time being, is entitled also to the possession of the deeds;(*p*) [1]

(*k*) 27 Hen. VIII. c. 10.
(*l*) 1 Sand. Uses, 4th ed. 119; 5th ed. 117.
(*m*) Sugd. Vend. & Pur. 366, 13th ed.; Co. Litt. 6 a, n. (4).
(*n*) Nalone *v.* Minoughan, 14 Ir. Com. Law Rep. 540, dissentiente Hayes, J.
(*o*) Cro. Eliz. 496.
(*p*) Ford *v.* Peering, 1 Ves. jun. 76; Strode *v.* Blackburne, 3 Ves. 225; Garner *v.* Hannyngton, 22 Beav. 627; Allwood *v.* Hewood, Exch. 11 W. R. 291; 1 Hurlst. & Colt. 745.

stitute valid liens from their date, if recorded within sixty days; but it is presumed that such an instrument must appear on its face to be a purchase-money mortgage, and it may be doubted if the lien of such a mortgage would be valid before the date of its record, as against a subsequent *bonâ fide* lien creditor or purchaser, having no notice of it, if the deed of conveyance has been recorded, or is exhibited to him, acknowledging in its body and in the receipt at its foot, payment of the consideration-money. See Hendrickson's Ap., 24 Penn. St. 366; Britton's Ap., 45 Id. 172.

[1] The tenant for life is *prima facie* entitled to the possession of the title-deeds, and although in a proper case the court will grant an inspection of them to the remainder-man, the precise object of the motion must be set forth, and the court will exert a paternal authority to see that it is for no improvident or improper purpose. Shaw *v.* Shaw, 12 Price's Exchequer, p. 163; Allwood *v.* Haywood; 1 Hurlst. & Colt. 745.

whereas the tenant for a mere term of years of whatever length, not having the freehold or feudal possession of the lands, has no right to deeds which relate to such freehold;(*q*) although deeds relating only to the term belong to such a tenant, and will pass, without any express grant, to the assignee of the term.(*r*) The tenant for life or in tail in possession, though entitled to the possession or custody of the deeds which relate to the inheritance, has no right to injure or part with them:(*s*) he has an interest in the title deeds correspondent only to his estate in the lands; and if he should part with the deeds, even for a valuable consideration, the remainder-man, on coming into possession of the lands, will nevertheless be entitled to the possession of the deeds, just as if the tenant for life or in tail had kept them in his own custody.(*t*)

Heir-looms strictly so called, are now very seldom to be met with. They may be defined to be such personal chattels as go, by force of a *special custom*, to the heir, along with the inheritance, and not to the executor or administrator of the last owner.(*u*) The owner of an heir-loom cannot by his will bequeath the heir-loom, if he leave the land to descend [*13] to his heir; for in such a *case the force of the custom will prevail over the bequest, which, not coming into operation until after the decease of the owner, is too late to supersede the custom.(*x*) According to some authorities heir-looms consist only of bulky articles, such as tables and benches fixed to the freehold;(*y*) but such articles would more properly fall within the class of fixtures, of which we shall next speak. The ancient jewels of the crown are heir-looms.(*z*) And if a nobleman, knight or esquire be buried in a church, and his coat armor or other ensigns of honor belonging to his degree be set up, or if a tombstone be erected to his memory, his heirs may maintain an action against any person who may take or deface them.(*a*) The boxes in

(*q*) Churchill *v.* Small, 8 Ves. 323; Harper *v.* Faulder, 4 Mad. 129, 138; Wiseman *v.* Westland, 1 You. & Jerv. 117; Hatham *v.* Somerville, 5 Beav. 360.

(*r*) Hooper *v.* Ramsbottom, 6 Taunt. 12 (E. C. L. R. vol. 1).

(*s*) Bro. Abr. tit. Charters de Terre, pl. 36. As to production see Davis *v.* Earl of Dysart, 20 Beav. 405.

(*t*) Davies *v.* Vernon, 6 Q. B. 443 (E. C. L. R. vol. 51); Easton *v.* London, Exch. 12 W. R. 53; 33 L. J. Exch. 34.

(*u*) See Co. Litt. 18 b.

(*x*) Co. Litt. 185 b.

(*y*) Spelman's Glossary, voce Heir-Loom. See Williams on Executors, pt. 2, bk. 2, ch. 2, s. 3.

(*z*) Co. Litt. 18 b.

(*a*) Ibid.

The right to title-deeds goes with the land; Lord Buckhurst's Case, 1 Co. Rep. 2; Atkinson *v.* Baker, 4 T. R. 229; and they are so completely part of the realty that at common law no larceny could be committed of them: 3 Inst. 109.

which the title deeds of land are kept are also in the nature of heir-looms, and will belong to the heir or devisee of the lands; for such boxes "have their very creation to be the houses or habitations of deeds";(*b*) and accordingly a chest made for other uses will belong to the executor or administrator of the deceased, although title deeds should happen to be found in it. In popular language the term "heir-loom" is generally applied to plate, pictures or articles of property which have been assigned by deed of settlement or bequeathed by will to trustees, in trust to permit the same to be used and enjoyed by the persons for the time being in possession, under the settlement or will, of the mansion-house in which the articles may be placed. Of this kind of settlement more will be said hereafter.

Fixtures are such movable articles or chattels personal as are fixed to the ground or soil, either directly, or indirectly by being attached to a house or other *building. The ancient common law, regarding land as of far more consequence than any chattel which could [*14] be fixed to it, always considered everything attached to the land as part of the land itself,—the maxim being *quicquid plantatur solo, solo cedit*.(*c*) Hence it followed that houses themselves, which consist of aggregates of chattels personal (namely, timber and bricks) fixed to the land, were regarded as land, and passed by a conveyance of the land without the necessity of express mention; and this is the case at the present day.(*d*)[1]

(*b*) Wentworth's Office of an Executor, 157, 14th ed.

(*c*) See 4 Rep. 64 a; 1 Lord Raymond 738; Mackintosh *v.* Trotter, 3 Mee. & Wels. 184, 186; Williams on Executors, pt. 2, bk. 2, ch. 3, s. 2.

(*d*) See Principles of the Law of Real Property, 13.

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[1] And in the United States, generally, permanent machinery, such as the main wheel and its gearing, an engine attached to a building, a cotton gin fixed to its place, will vest in the grantee of the real estate to which they belong.

It is not necessary that the machinery shall be actually affixed to the realty in order to pass with it, where it is of course, to have it occasionally detached, as, for instance, a set of rolls in an iron rolling mill, temporarily detached in order to insert others: Voorhis *v.* Freeman, 2 Wat. & Serg. 719; Powell *v.* Manufacturing Co., 3 Mason 459; Farrar *v.* Stackpole, 6 Greenleaf 154; Sparks *v.* State Bk., 7 Blackf. 469; Bratton *v.* Clawson, 2 Strobh. 478; Degraffenreid *v.* Scruggs, 4 Humph. 431; English *v.* Foote, 8 Smed. & Marsh. 444; Trull *v.* Fuller, 28 Maine 545; Corliss *v.* McLagin, 29 Id. 115; Preston *v.* Briggs, 16 Vt. 124; Miller *v.* Plumb, 6 Cowen 665; Harlan *v.* Harlan, 20 Penn. St. 303; Parsons *v.* Copeland, 23 Maine 537; Baker *v.* Davis, 19 N. H. 325. And the rolling stock of a railroad is a fixture: Minnesota Co. *v.* St. Paul Co., 2 Wall. U.S. 609, note.

The same rule will hold in the case of a mortgage, and such articles will be bound by it: Union Bk. *v.* Emerson, 15 Mass. 159; Voorhis *v.* Freeman, 2 Wat. & Serg. 116; Despatch Line of Packets *v.* Bellamy, 12 N. H. 205; Sparks *v.* State

So now, a conveyance of a house or other building, whether absolutely or by way of mortgage, will comprise all ordinary fixtures, such as stoves, grates, shelves, locks, &c.,(*e*) and also fixtures erected for the purposes of trade,(*f*) without any express mention, unless an intention to withhold the fixtures can be gathered from the context.(*g*) So on the decease of a tenant in fee simple, the devisee of a house, or the heir at law in case of intestacy, will be entitled generally to the fixtures set up

(*e*) Colegrave *v.* Dias Santos, 2 Barn. & Cress. 76 (E. C. L. R. vol. 9); s. c. 3 Dowl. & Ry. 255; Longstaff *v.* Meagoe, 2 Ad. & Ell. 167 (E. C. L. R. vol. 29); Hitchman *v.* Walton, 4 Mee. & Wels. 409; Ex parte Barclay, 5 De G., M. & G. 403; Mathew *v.* Fraser, 2 Kay & John. 536; Williams *v.* Evans, 23 Beav. 239; Walmesley *v.* Milne, 7 C. B. N. S. 115 (E. C. L. R. vol. 97); Metropolitan Counties &c. Society *v.* Brown, 26 Beav. 454.

(*f*) Cullwick *v.* Swindell, M. R., L. Rep. 3 Eq. 249; Climie *v.* Wood, Law Rep. 3 Exch. 257.

(*g*) Hare *v.* Horton, 5 Barn. & Adol. 715 (E. C. L. R. vol. 27).

Bk., 7 Blackf. 469; Day *v.* Perkins, 2 Sandf. Ch. 359; Winslow *v.* Merchants' Ins. Co., 4 Met. 306; Butler *v.* Paige, 7 Id. 40; Sands *v.* Pfeiffer, 10 Cal. 258; Haskin *v.* Woodward, 45 Penn. St. 42; Harris *v.* Haynes, 34 Vt. 220. And even though put up after the mortgage was given: Burnside *v.* Twitchell, 43 N. H. 390; Roberts *v.* Dauphin Bank, 19 Penn. St. 71. The doctrine has been carried to its farthest extent in Pennsylvania, where all machinery necessary to constitute a manufactory, passes with the land on which it stands; but it must have been once affixed as machinery, in order to become a constituent element of the realty: Johnson *v.* Mehaffey, 43 Penn. St. 308. The criterion is not the permanent fastening to the freehold: Harlan *v.* Harlan, 15 Penn. St. 513; Heaton *v.* Findlay, 12 Id. 304; Pyle *v.* Pennock, 2 Wat. & Serg. 390; Voorhis *v.* Freeman, 2 Id. 116; Christian *v.* Dripps, 28 Penn. St. 271; Overton *v.* Williston, 31 Id. 155; Meig's Ap., 62 Id. 33.

But in New York, under the Revised Statutes, the rule is that nothing personal will pass as a *fixture* unless it be permanently fixed to the freehold. And the machinery in a woollen factory is personal property: Walker *v.* Sherman, 20 Wend. 636; Kelsey *v.* Durkee, 33 Barb. 410; Murdock *v.* Gifford, 18 N. Y. 28 It is, however, the permanent and habitual connection, and not the manner of fastening, which determines the question: Laflin *v.* Griffiths, 35 Barb. 58; Tabor *v.* Robinson, 36 Id. 483.

And this would seem to be the rule in Connecticut and Massachusetts, where machinery which can be removed without injury to the building, is personal property as respects creditors and purchasers: Swift *v.* Thomson, 9 Conn. 63; Gale *v.* Ward, 14 Mass. 352. And in Vermont, and Ohio: Brennan *v.* Whitaker, 15 Ohio 446; Fullam *v.* Stearns, 30 Vt. 443; Hill *v.* Wentworth, 28 Id. 428.

In Maine, it has been held that a dwelling-house partially erected on land of another, under a parol agreement to purchase, but left unfinished and not underpinned, remains the personal property of the builder: Pullen *v.* Bell, 40 Maine 314. And see, Fuller *v.* Heath, 39 Maine 437; Preston *v.* Briggs, 16 Vt. 124; Stockwell *v.* Marks, 5 Shepley 455; Beers *v.* St. John, 16 Conn. 522; Shepard *v.* Spaulding, 4 Metc. 416; The State *v.* Elliott, 11 N. Hamp. 340; White *v.* Arndt, 1 Whart. 91; Bartlett *v.* Wood, 32 Vt. 372; Murdock *v.* Harris, 20 Barb. 407; Richardson *v.* Copeland, 6 Gray 536.

in it.(*h*) The ancient rule respecting fixtures has been greatly relaxed in favour of tenants for terms of years, who are now permitted to remove articles set up by them for the purposes of trade or of ornament or domestic convenience,(*i*) provided they remove them before the *expiration of their their tenancy.(*j*)[1] But the old rule still prevails with regard to agricultural fixtures, which, though set up by the tenant, become, by being fixed to the soil, the property of the landlord;(*k*)[2] unless they are put up with the consent *in writing* of the landlord for the time being, in which case it is provided by an act of the present reign(*l*) that they shall be the property of the tenant, and shall be removable by him on giving to the landlord or his agent one month's previous [*15]

(*h*) Shep. Touch. 470.

(*i*) Grymes *v.* Boweren, 6 Bing. 437 (E. C. L. R. vol. 19).

(*j*) Lyde *v.* Russell, 1 Barn. & Adol. 394 (E. C. L. R. vol. 20); Leader *v.* Homewood, 5 C. B. N. S. 546 (E. C. L. R. vol. 94).

(*k*) Elwes *v.* Maw, 3 East 38.

(*l*) Stat. 14 & 15 Vict. c. 25, s. 3.

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1 Some of the American cases to this point are: Gaffield *v.* Hapgood, 17 Pick. 192; Ex parte Quincy, 1 Atk. 477; Holmes *v.* Tremper, 20 Johns. 29; Whiting *v.* Braston, 4 Pick. 310; Lelane *v.* Gasset, 17 Vt. 463; Cook *v.* Champlain Co., 1 Denio 91; Van Ness *v.* Pacard, 2 Pet. 153; Russell *v.* Richards, 1 Fairfield 429; Tapley *v.* Smith, 18 Maine 12; Cresson *v.* Stout, 17 Johns. 116; Tobias *v.* Frances, 3 Vt. 425; Taffe *v.* Warnick, 3 Blackf. Ind. 111; Reynolds *v.* Shutter, 5 Cowen 323; Raymond *v.* White, 7 Id. 318; Wetherbee *v.* Foster, 5 Vt. 136; Taylor *v.* Townsend, 8 Mass. 411; Blood *v.* Richardson, 2 Kent Comment. 404, n.; White's Appeal, 10 Penn. St. 253; Case of the Olympic Theatre, 2 Br. 285; Ross's Appeal, 9 Penn. St. 494; White *v.* Arndt, 1 Whart. 91; Gray *v.* Holdship, 17 S. & R. 415; 1 Missouri 508; Vaugh *v.* Haldeman, 33 Penn. St. 522; Wall *v.* Hinds, 4 Gray 256; Montague *v.* Dent, 1 Rich. Law 135; Ombony *v.* Jones, 21 Barb. 520.

2 This doctrine has not been directly overruled in the United States, but has been strongly questioned. Whenever the question has been before the courts, they have leaned in favour of the agricultural tenant, though deciding as for a manufacturing tenant: Van Ness *v.* Pacard, 2 Pet. 137; Whiting *v.* Braston, 4 Pick. 310; Holmes *v.* Tremper, 20 Johns. 29.

Farm fences, however, belong to the realty: Mott *v.* Palmer, 1 Comst. 564; Walker *v.* Sherman, 20 Wend. 646; Glidden *v.* Bennett, 43 N. H. 306.

The same policy of encouraging agricultural improvements, will not permit the outgoing tenant to remove manure which has accumulated during the term: Lassell *v.* Reed, 5 Greenleaf 222; Middlebrook *v.* Corwin, 15 Wend. 169; Daniels *v.* Pond, 21 Pick. 367; Lewis *v.* Jones, 17 Penn. St. 262; Kitteridge *v.* Rhodes, 3 N. H. 508; Parsons *v.* Campbell, 11 Conn. 525.

The outgoing tenant of a nursery, has the right to take up and carry away trees and shrubs, as personal property: Miller *v.* Baker, 1 Metc. 27; King *v.* Wilcomb, 7 Barb. S. C. 263. But although this is true as between landlord and tenant, the contrary is the case as between mortgagor and mortgagee: Maples *v.* Millon, 31 Conn. 598; Price *v.* Brayton, 19 Ia. 309. And see next note.

notice in writing of his intention so to do, subject to the landlord's right to purchase the same by valuation in the manner provided by the act. This act extends to farm buildings either detached or otherwise, and to engines and machinery, either for agricultural purposes or for the purposes of trade and agriculture, although built in or permanently fixed to the soil, so as the tenant making any such removal do not in anywise injure the land or buildings belonging to the landlord, or otherwise do put the same in like plight and condition, or as good plight and condition as the same were in before the erection of anything so removed. A relaxation of the old rule has also been made in favour of the executors of a tenant for life, who appear to be allowed to remove fixtures set up by their testator for the purposes of trade or of ornament or domestic convenience.(*m*) But the rule of the common law still retains much of its force as between the devisee or heir of a tenant in fee simple and his executor or administrator. Thus a tenant for years may remove ornamental chimney-pieces set up by him during his tenancy;(*n*) but if erected by a tenant in fee simple, they will pass with the house to the devisee [*16] *or heir.(*o*) So machinery employed in carrying on iron works or collieries may be removed by a lessee for years, if erected by him; but if erected by a tenant in fee simple, such machinery, even though removable without injury to the freehold, will belong to the heir or the devisee of the land.(*p*) However it seems that pier glasses, fixed by nails, and not let into panels, and hangings fastened up for ornament, will now belong to the executor or administrator of a tenant in fee simple as part of his personal estate.(*q*)[1]

(*m*) Lawton *v.* Lawton, 3 Atk. 14. See D'Eyncourt *v.* Gregory, M. R, 36 Law Journ. N. S. 107; L. Rep., 3 Eq. 382.

(*n*) Bishop *v.* Elliot, Ex. Ch. 1 Jur. N. S. 962; 24 Law J. Exch. 229; 11 Ex. Rep. 113.

(*o*) Dudley *v.* Warde, Amb. 113.

(*p*) Fisher *v.* Dixon, 12 Cl. & Fin. 312.

(*q*) Cave *v.* Cave, 2 Vern. 508; Squire *v.* Mayor, 2 Eq. Ca. Abr. 430, pl. 7; s. c. 2 Freem. 249.

[1] In New York, by the Rev. Stat., the executor is put on the same footing as the tenant, as to the right to fixtures: House *v.* House, 10 Paige 163.

The law of fixtures has, in derogation of the original rule of the common law, which subjected everything affixed to the freehold to the law governing the freehold, made the right of removing fixtures the general rule instead of the exception: 2 Kent's Comment. p. 343. In the leading case of Elwes *v.* Mawe, 3 East 38, Lord Ellenborough divided the questions respecting the right to what are ordinarily called fixtures into three classes—1st, those arising between different descriptions of representatives of the same owner of the inheritance, viz., the heir and executor, in which case the rule obtains with most rigor in favour of the inheritance, and against the right to disannex therefrom, and to consider as a personal chattel, anything which has been affixed thereto. 2d, between the executors of tenant for life or

Where fixtures are demised to a tenant along with the house, mill or other building in which they may happen to be, the property in the fix-

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in tail, and the remainderman or reversioner, in which case the right to fixtures is considered more favorably for the executor. 3d, between landlord and tenant, in which in favour of trade and to encourage industry, the greatest latitude and indulgence has been allowed in favour of the claim of the tenant, to have particular articles considered as personal chattels, as against the owner of the freehold, although in the case last referred to, the rule laid down was held to apply as between landlord and tenant, only to the case of fixtures set up for trading purposes, and not to extend to agricultural ones; the tendency has been both in this country and in England to extend it to the latter also, and to treat the occupation of agriculture as a trade: Lawten *v.* Lawten, 3 Atk. 113; Dudley *v.* Warde, Amb. 13; in which last case Lord Hardwicke appears to have considered the privilege in question as belonging to fixtures, by means of which the owner, a tenant for life, carried on a species of trade, by which he rendered the produce of his own land available to his own profit. See also, Penton *v.* Robart, 2 East 91; Mansborough *v.* Maton, 4 A. & E. 884; R. *v.* Ottey, 1 B. & Ald. 161; Whiting *v.* Braston, 4 Pick. 310; Holmes *v.* Tremper, 20 Johns. 29; Waterfall *v.* Penistone, 37 Eng. L. & Eq. 156; McGreary *v.* Osborne, 9 Cal. 119; Crane *v.* Brigham, 3 Stockt. (N. J.) 29; Van Ness *v.* Pacard, 2 Pet. U. S. 137. This last case was a question between landlord and tenant. The defendant, the tenant, had erected a wooden dwelling-house, two stories high in front, with a shed of one story, a cellar of stone or brick foundation, and a brick chimney. The defendant and his family dwelt in the house from its erection until near the expiration of the lease, when he took the same down and removed all the materials. The defendant was a carpenter, and he gave evidence that upon obtaining the lease he erected the building above mentioned, with a view to carry on the business of a dairyman, and for the residence of his family and servants engaged in his said business; and that the cellar, in which there was a spring, was made and exclusively used for a milk-cellar, in which the utensils of his said business were kept, and scalded, and washed, and used; and that feed was kept in the upper part of the house, which was also occupied as a dwelling for his family. The defendant also had his tools and apprentices in the house, and carpenter work was done there. He had also built a stable for his cows, of plank and timber fixed upon posts fastened into the ground; which stable he removed with the house, before the expiration of his lease. It was held, that he had a right to remove these structures, as they had been erected for the accommodation and beneficial operation of trade.

The strict rule as to fixtures which applies between heir and executor, also applies as between vendor and vendee, and mortgagor and mortgagee: Winslow *v.* Merchants' Insurance Co., 4 Metc. 306; Preston *v.* Briggs, 16 Vermont 124; Miller *v.* Plumb, 6 Cowen 665; Hare *v.* Herton, 2 Neville & Manning 428; Pyle *v.* Pennock, 2 Wat. & Serg. 396, even when affixed to the freehold after the mortgage was executed: Cullwick *v.* Swindell, Law R. 3 Eq. 249. The same rule applies in favour of one claiming fixtures under an execution as real estate: Goddard *v.* Chase, 7 Mass. 432; Voorhis *v.* Freeman, 2 Wat. & Serg. 116; Baker *v.* Davis, 19 N. H. 325; Murdock *v.* Harris, 20 Barb. 407; Harkness *v.* Sears, 26 Ala. 493; Gardner *v.* Finley, 19 Barb. 317; Walmsley *v.* Milne, 7 C. B. N. S. 115. But, when a tenant is entitled to remove them from the freehold and treat them as personalty, the same right may be exercised as against the owner of the freehold, by an assignee or an execution creditor: Lemar *v.* Mills, 3 Watts 232; Doty *v.* Gerham, 5 Pick. 487; 17 S. & R. 413; Hey *v.* Bruner, 61 Penn. St. 87.

tures still remains in the landlord, subject to the tenant's right to the possession and use of them during his term;(r) and if they should be severed from the building by the tenant or any other person, or should be separated by accident, the landlord will acquire an immediate right to the possession of them.(s) In this respect they are subject to the same rules as timber, which, as we shall see, is equally a part of the inheritance until severed, and when cut becomes the personal property of the owner of the fee. Fixtures, which would descend with the house or building to the heir of the owner of the fee on intestacy, are not in fact his goods and chattels properly so called.(t)

Chattels vegetable consist, as their name imports, of moveable articles of a vegetable origin, such as timber, underwood, corn and fruit. All [*17] these articles, so long *as they remain unsevered from the land, are for many purposes considered as part of it; and they will pass by a conveyance or devise of the land without express mention.(u) If, however, the trees should be expressly excepted out of the conveyance, they will remain the personal property of the grantor, although severed only in contemplation of law;(x) and in like manner the trees alone may be granted by a tenant in fee simple, and will then form the personal property of the grantee, even before they are cut down.(y) But if a tenant of lands in fee simple should die without having sold or devised them,(z) the law then draws a distinction between such vegetable products as are the annual results of agricultural labour, and such as are not. The former class are called by the name of *emblements*,[1] and the right to reap them belongs to the executor or administrator of the deceased in exclusion of the heir;(a) whilst the latter class descend to the heir along with the land.[2] The reason of the distinction appears to be, that as

(r) Boydell v. M'Michael, 1 Cro. Mee. & Rosc. 177; Hitchman v. Walton, 4 Mee. & Wels. 409.

(s) Farrant v. Thompson, 5 Barn. & Ald. 826 (E. C. L. R. vol. 7).

(t) Winn v. Ingilby, 5 Barn. & Ald. 625 (E. C. L. R. vol. 7).

(u) Com. Dig. tit. Biens (H).

(x) Herlakenden's Case, 4 Rep. 63 b.

(y) Wentworth's Office of an Executor, 14th ed. 148; Williams on Executors, pt. 2, bk. 2, ch. 2, sect. 2.

(z) As to a devisee, see Rudge v. Winnall, 12 Beav. 357; Cooper v. Woolfit, 2 Hurl. & Norm. 122.

(a) Com. Dig. tit. Biens (G).

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[1] From the Norman word *emblear*—to sow.

[2] In England, it would appear that the outgoing tenant of a farm, has a right to take away the manure, unless the landlord would pay him its value: Roberts v. Barker, 1 C. & M. 809; Gibbons on Dilapidations, 76. But in this country, in several instances it has been held, that manure made on a farm is not only an appurtenance

annual crops are mainly the result of labour incurred at the expense of the owner's personal estate, his personal estate ought to reap the benefit of the crop which results.(*b*) Accordingly crops of corn, and grain of all kinds, flax, hemp, and everything yielding an artificial annual profit produced by labour, belong to the executor or administrator, as against the heir; whilst timber, fruit trees, grass, and clover, which do not repay within the year the labour by which they are produced, belong to the heir as part of the land.(*c*) The right to *emblements also belongs to the executor or administrator of a tenant for life,(*d*) and to a tenant at will if dismissed from his tenancy before harvest.(*e*)[1] The [*18]

(*b*) Wentworth's Office of an Executor, 14th ed. 147.

(*c*) See Graves *v.* Weld, 5 Barn. & Adol. 105 (E. C. L. R. vol. 27); s. c. 2 Nev. & Man. 725.

(*d*) Principles of the Law of Real Property, 24, 2d ed.; 25, 3d & 4th eds.; 27, 5th, 6th, 7th and 8th eds.

(*e*) Ibid. p. 310, 2d ed.; 325, 4th ed.; 336, 5th ed.; 353, 6th ed.; 360, 7th ed.; 376, 8th ed.

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of the realty, which passed with a conveyance of the land from the grantor to the grantee, but that it is so inseparably incident to the freehold, that it forms an exception to the usual rule as to fixtures, and cannot be removed by an outgoing tenant at the end of his term: Lassell *v.* Reed, 6 Greenl. 222; Middlebrook *v.* Corwin, 15 Wendell 169; Daniels *v.* Pond, 21 Pick. 367; Kitteridge *v.* Wood, 3 N. Hamp. 503; Parsons *v.* Campbell, 11 Conn. 525; Goodrich *v.* Jones, 2 Hill 142; Lewis *v.* Jones, 9 Penn. Leg. Intel. 18; Waln *v.* O'Connor, Id. 67; Barrington *v.* Justice, 4 Id. 289; Lewis *v.* Jones, 17 Penn. St. 262; Plumer *v.* Plumer, 10 Foster 558. In New Jersey, it has been regarded as personal property until spread upon the ground: Ruckman *v.* Outwater, 4 Dutch. 581.

[1] It is a doctrine of the common law, that where a tenant sows the land, with the expectation of gathering the harvests, no sudden and unlooked for termination of his estate, either by the act of God or the act of the lessor, shall deprive him or his representatives, of the fruit of his labour; but if the tenant's interest is to determine at a fixed time, or if he by his own act has brought his lease to a conclusion, he cannot claim the profits, for it is by his own folly that he has sowed that which he could not reap. This doctrine of the emblements, as it is called, is pretty generally received in the United States, it having been held, that where the lease is to expire at a fixed time, or is terminated by the act of the lessee, he is not entitled to the emblements: Hawkins *v.* Skegg, 10 Hump. 31; Harris *v.* Carson, 7 Leigh 632; Debow *v.* Colfax, 5 Halst. 128; Kitteridge *v.* Woods, 3 N. H. 504; Whitmarsh *v.* Cutting, 10 Johns. 360; Bain *v.* Clark, Id. 424. On the other hand, where the estate is of an uncertain termination, and it is suddenly concluded by the act of God or that of the lessor, the lessee or his legal representatives, may claim the emblements: Comfort *v.* Duncan, 1 Miles 229; Davis *v.* Thompson, 13 Maine 209; Sherburne *v.* Jones, 20 Id. 70; Davis *v.* Brockenbank, 9 N. H. 73; Debow *v.* Colfax, 5 Halst. 128; Kitteridge *v.* Woods, 3 N. H. 504; Rising et al. *v.* Stannard, 17 Mass. 287; Stewart *v.* Doughty et als., 9 Johns. 108; Weem's Exec. *v.* Bryan et ux., 21 Ala. 303; Bennett *v.* Bennett, 34 Id. 53. And in several of the States there are statutory provisions on this subject: Freeman *v.* Tompkins, 1 Strob. Eq. 53; Gage *v.* Rogers, Id. 370; Thompson *v.* Thompson,

claims of tenants at rack rent, whose tenancies may determine by the death or cesser of the estate of tenants for life, or for any other uncertain interest, are now provided for by a recent enactment, giving the tenants at rack rent a right to continue to hold until the expiration of the current year of their tenancy.(*f*)

(*f*) Stat. 14 & 15 Vict. c. 25, s. 1. See Principles of the Law of Real Property, p. 25, 3d & 4th eds.; 27, 5th, 6th, 7th and 8th eds.

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6 Munf. 514; Green *v.* Cutwright, Wright 738. In Pennsylvania, New Jersey, and Delaware, the local custom which prevails in certain parts of England, of allowing all tenants a way going crop, has been adopted as the law of those States. Under it, the tenant is entitled to his "way going crop," even though his estate may have been limited to expire at a fixed time, as, for example, at the end of one year: Demi *v.* Bossler, 1 Penn. 224; Stultz *v.* Dickey, 5 Binn. 285; Carson *v.* Blazer, 2 Id. 475; Briggs et als. *v.* Brown, 2 S. & R. 14; Rank *v.* Rank, 5 Penn. St. 213; Craig *v.* Dale, 1 W. & R. 509; Forsythe *v.* Price, 8 Watts 282; Iddings *v.* Nagle, 2 W. & S. 22; Comfort *v.* Duncan, 1 Miles 229; Deaver *v.* Rice, 4 Dev. & Bat. 431; Diffendorfer *v.* Jones, cited 5 Binn. 289; Van Doren *v.* Everitt, 2 South. 460; Templeman *v.* Biddle, 1 Harring. 522; Borrell *v.* Dewart, 37 Penn. St. 134; the principle of which decisions may be gathered from the words of C. J. Tilghman, in the case of Shultz *v.* Dickey, where he says that "In the nature of the thing, it is reasonable, that where a lease commences in the spring of one year, and ends in the spring of another, the tenant should have the crop of winter grain sown by him the autumn before the lease expired, otherwise he pays for the land one whole year without having the benefit of a winter crop." But the "way going crop," is the crop of wheat which is sown in the autumn and reaped the following summer, and never that crop of wheat which is sown in the spring of the year: Demi *v.* Bossler, 1 Penn. 224; Howell *v.* Schenck, 4 Zabr. 89.

But the right of the tenant to his "way going crop," or to his emblements, may be defeated by a sale of the premises under a judgment or mortgage against his landlord, the lien of which is anterior to the lease: Pitts *v.* Hendrix, 6 Geo. 452; Gillett *v.* Balcom, 6 Barb. S. C. 370; Jones *v.* Thomas, 8 Blackf. 428; Shepard *v.* Philbrick, 2 Denio 174; Lane *v.* King, 8 Wend. 584; Crews *v.* Pendleton, 1 Leigh 297; King *v.* Fowler, 14 Pick. 238; Howell *v.* Schenck, 4 Zabr. 89; but see to the contrary, Cassily *v.* Rhodes, 12 Ohio 88, which decides that a lessee is entitled to the emblements as against a purchaser of lands sold under a decree of foreclosure: Houts *v.* Showalter, 10 Ohio N. S. 124; and see also Miller *v.* Clement, 40 Penn St. 484; and Bittinger *v.* Baker, 29 Id. 66, overruling Sallade *v.* James, 6 Id. 144; Groff *v.* Levan, 16 Id. 179. But it has been held that where lands are devised, the growing crops on the land will go to the devisee, and not to the executor, unless a contrary intention is expressed in the will: Budd *v.* Hiler, 3 Dutch. 43; Shafner *v.* Shafner, 5 Sneed 94. As between the successful plaintiff, in an action of ejectment and the evicted defendant, they are a part of the realty: Altes *v.* Hinckler, 36 Ill. 275.

The doctrine of emblements dees not apply to the public lands of the United States: Boyer *v.* Williams, 5 Mo. 335; Rasor *v.* Qualls, 4 Blackf. 286.

For further on the subject of emblements, see Foster *v.* Fletcher, 7 Mon. 534; Green *v.* Cartwright, Wright 738; Humphries *v.* Humphries, 3 Ired. 362; Evans *v.* Inglehart, 6 G. & Johns. 190; Singleton *v.* Singleton, 5 Dana 92; Toby *v.* Reed, 9 Conn. 225; Moorhead *v.* Snyder, 33 Penn. St. 251; Walmsley *v.* Milne, 7 C. B. N. S. 115; Reiff *v.* Reiff, 64 Penn. St. 134.

When lands are let to a tenant for years or for life, if no exception is made of the timber, the property in the timber will still remain in the owner of the inheritance, subject to the tenant's right to have the mast and fruit growing upon it, and the loppings for fuel, and the benefit of the shade for his cattle.(*g*) Accordingly all fruit which may be plucked, or bushes or trees, not being timber, which may be cut or blown down, will belong to the tenant;(*h*) but timber trees, which may be cut or blown down, will immediately become the property of the owner of the first estate of inheritance in the land, whether in fee simple or in tail.(*i*) Timber trees are oak, ash, and elm in all places; and in some particular parts of the country, by local custom, where *other trees are generally used for building, they are for that reason considered as timber.(*k*) But if the tenant should be a tenant *without impeachment of waste* (*sine impetitione vasti*), timber cut down by him in a husband-like manner will become his own property when actually severed,(*l*) but not before;(*m*) for the words "without impeachment of waste" imply a release of all *demands* in respect of any waste which may be committed.(*n*) If, however, the words should be merely *without being impleaded for waste*, the property in the trees when cut would still remain in the landlord, and the action only would be discharged, which he might otherwise have maintained against the tenant for the waste committed by the act of felling the timber.(*o*)

[*19]

Animals *feræ naturæ*, or wild animals, including game, are exceptions from the rules which relate to other movables, on the ground that until they are caught there is property in them. If therefore the owner of land in fee simple should die, the game on his land, or the fish in any river or pond upon the land, will not belong to his executor or administrator(*p*.) And if a man should have a park or warren, he has no true property in the deer, conies, pheasants, or partridges; but they belong to him only

(*g*) Lilford's Case, 11 Rep. 48 b.

(*h*) Channon *v*. Patch, 5 Barn. & Cress. 897 (E. C. L. R. vol. 11); s. c. 8 Dow. & Ry. 651; Berriman *v*. Peacock, 9 Bing. 384 (E. C. L. R. vol. 23); s. c. 2 Moo. & Scott, 524; Pidgley *v*. Rawling, 2 Coll. 275.

(*i*) Herlakenden's Case, 4 Rep. 63 a.; Whitfield *v*. Bewitt, 2 P. Wms. 240; 3 P. Wms. 268; Lushington *v*. Boldero, 15 Beav. 1. See, however, Earl Cowley *v*. Wellesley, M. R., 1 Law Rep. Eq. 656, qu.?

(*k*) 2 Black. Com. 281.

(*l*) Lewis Bowles' Case, 11 Rep. 82 b. See Principles of the Law of Real Property, 23, 2d ed.; 24, 3d & 4th eds.; 25, 5th, 6th, 7th and 8th eds.

(*m*) Cholmeley *v*. Paxton, 3 Bing. 207 (E. C. L. R. vol. 11); 10 Barn. & Cress. 564 (E. C. L. R. vol. 21).

(*n*) 11 Rep. 82 b.

(*o*) Walter Idle's Case, 11 Rep. 83 a.

(*p*) Co. Litt. 8 a; The Case of Swans, 7 Rep. 17 b.

"*ratione privilegii* for his game and pleasure so long as they remain in the privileged place"(*q*.) But a property in wild animals may be obtained by reclaiming or catching them (*propter industriam*,) or by reason [*20] of their being unable to get away *(*propter impotentiam*) (*r*.) Thus deer, even though in a legal park, may be so tame and reclaimed as to pass to the executors of the owner of the park on his decease;(*s*) so rabbits in a hutch, fish in a box, and young pigeons in a dove house, unable to fly, will belong to the executor or administrator of the owner, and not to his heir. It appears to have been formerly thought that hawks and hounds were not subjects of personal property, but would descend with the lands to the heir; but this opinion is not now law. "For," observes the author of the Office of an Executor,(*t*) "although they be for the most part but things of pleasure, *that* hindereth not but they may be valuable as well as instruments of music, both tending to delight and exhilarate the spirits; a cry of hounds hath to my sense more spirit and vivacity than any other music."

The occupier of land for the time has now the sole right of killing and taking the game upon the land, unless such right be reserved to the landlord or any other person.(*u*) Where the landlord has reserved to himself the right of killing game he may authorize any person or persons, who shall have obtained certificates, to enter upon the land for the purpose of pursuing and killing game thereon.(*x*) And a recent enactment provides, that where the landlord or lessor of any land has reserved to himself, by any deed or writing, the exclusive right to the game on such land, then such landlord or lessor, for the purpose of prosecuting all persons [*21] *for trespassing in pursuit of game on such land without his consent, shall deemed the legal occupier of the said land; and any person who shall enter or be upon the said land in search of or in pursuit of game, without the consent of such landlord or lessor, shall be deemed a trespasser.(*y*) And the lord of any manor or reputed manor has the right to pursue and kill the game upon the wastes or commons within the manor, and to authorize any other person or persons, who shall have obtained certificates, to enter upon such waste or commons for the same purpose.(*z*)

(*q*) 7 Rep. 17 b; Year Book 4 Hen. VI. 55 b, 56 a; F. N. B. 87, n. (*a*)

(*r*) 2 Black. Com. 391, 394; Williams on Executors, pt. 2, bk. 2, ch. 2, sect. 1.

(*s*) Morgan *v.* The Earl of Abergavenny, 8 C. B. 678 (E. C. L. R. vol. 65).

(*t*) Wentworth's Office of an Executor, 143, 14th ed. The author of this work is supposed to have been Mr. Justice Doddridge.

(*u*) Stat. 1 & 2 Will. IV. c. 32. See as to hares, stat. 11 & 12 Vict. c. 29.

(*x*) Stat. 1 & 2 Will. IV. c. 32, s. 11. (*y*) Stat. 27 & 28 Vict. c. 67.

(*z*) Stat. 1 & 2 Will. IV. c. 32, s. 10.

When game or other wild animals were killed on any land by any other person than the rightful owner, the law, with respect to the property in the game, was formerly as follows: If a man started any game within his own grounds and followed it into another's, and killed it there, the property remained in himself. And so if a stranger started game in one man's chase or free warren, and hunted it into another liberty, the property continued in the owner of the chase or warren; this property arising from privilege, and not being changed by the act of a mere stranger. Or if a man started game on another's private grounds, and killed it there, the property belonged to him on whose ground it was killed. Whereas, if, after being started there, it was killed in the grounds of a third person, the property belonged not to the owner of the first ground, because the property was local; nor yet to the owner of the second, because it was not started in his soil; but it vested in the person who started and killed it, though guilty of a trespass against both the owners.(*a*) And this appears to be still the law with respect to wild animals which are not *game.(*b*) But with respect to game an alteration appears to have been made by the last Game Act,(*c*) which seems to vest the property in game killed on any land by strangers, in the person having the right to kill and take the game upon the land.(*d*) [*22]

(*a*) 2 Bl. Com. 419; Churchward *v.* Studdy, 14 East 249.

(*b*) See Blades *v.* Higgs, 12 C. B. N. S. 501 (E. C. L. R. vol. 104); 13 C. B. N. S. 844 (E. C L. R. vol. 106); 11 Jur. N. S. 701.

(*c*) Stat. 1 & 2 Will. IV. c. 32.

(*d*) Sect. 36. Rigg v. Earl of Lonsdale, 1 H. & N. 923

[*23] *CHAPTER II.

OF TROVER, BAILMENT AND LIEN.

HAVING now considered those movable articles of property which form exceptions to the rules by which chattels personal are in general governed, let us proceed to notice some circumstances in which chattels personal may be placed, so as to form not real but apparent exceptions to the primary rule already noticed,(a) that personal property is essentially the subject of absolute ownership, and cannot be held for any *estate.* The property in goods can only belong to, or be vested in, one person at one time: in this respect it resembles the seisin or feudal possession of lands.(b) Lands however may be so conveyed that several persons may possess in them, at the same time, several distinct vested *estates* of freehold, one of them being in possession, and the others in remainder, or the last perhaps being in reversion.(c) But the law knows no such thing as a remainder or reversion of a chattel. It recognizes only the simple *property* in goods, coupled or not with the right of immediate possession. This simple principle of law, if carefully borne in mind, will serve to explain many points which would otherwise appear difficult or even contradictory. It must be remembered, however, that it does not strictly apply to the movable articles noticed in our first chapter, which, from their connection with the land, [*24] *are often governed by the principles of real, rather than those of personal property.

1. When the property in goods is coupled with the possession of them, the ownership is of course complete. This is the common and usual case of the ownership of chattels personal: the owner knows that the goods are his own, and in his own possession, and that is sufficient for him. Circumstances may, however, arise to change this state of things. An article may be lost. In this case the owner still retains his property in the thing, but he has lost the possession of it. The property, however, which still remains in him, entitles him to the possession of the article,

(a) *Ante*, p. 7.

(b) See Principles of the Law of Real Property, 111, 2d ed.; 116, 3d & 4th eds.; 121, 122, 5th ed.; 127, 128, 6th ed.; 130, 131, 7th ed.; 136, 8th ed.

(c) Ibid. p. 198, 2d ed.; 206, 4th ed.; 215, 5th ed.; 225, 6th ed.; 234, 7th ed.; 241 8th ed.

whenever he can meet with it; or, in legal phraseology, the property draws with it the right of possession.(*d*) If therefore another person should find the article lost, he will have no right to convert it to his own use, if he has any means of knowing to whom it belonged, but must on demand deliver it up to the rightful owner, in whom the property is already vested. If he should refuse to do so, such refusal will argue that he claims it as his own, and will accordingly be evidence of a conversion of the thing to his own use.(*e*) For the wrong or *trespass* thus committed, a specific remedy has been provided by the law, in the shape of an action of *trover and conversion*, or more shortly an action of *trover*, which is one of those actions comprised within the technical class of *trespass on the case*. The word *trover* is from the French *trouver*, to find; and the word *conversion* is added, from the conversion of the goods to the use of the defendant being the gist of the action thus brought against him. That the defendant should have found the article lost is not his fault, but his conversion of it to his own use is a trespass and renders him liable *to the action we are now considering. This action accordingly [*25] is now constantly brought to recover damages for withholding the possession of goods whenever they have been wrongfully converted by the defendant to his own use, without regard to the means, whether by finding or otherwise, by which the defendant may have become possessed.(*f*) This action can be maintained only when the plaintiff has been in possession of the goods,(*g*) or has such a property in them as draws to it the right to the possession. If the goods have been wrongfully converted by the defendant to his own use, the plaintiff will succeed, if he should prove either way his own right to the immediate possession of the goods;(*h*) if he should not prove such right, he will fail.(*i*) The property in the goods is that which most usually draws to it the right of possession; and the right to maintain an action of trover is therefore often said to depend on the plaintiff's *property* in the goods; the right of immediate possession is also sometimes called itself a special kind of

(*d*) 2 Wms. Saunders, 47 a.

(*e*) Ibid. 47 e; Agar *v.* Lisle, Hob. 187; Bac. Abr. tit. Trover (B).

(*f*) 3 Black. Com. 153; stat. 15 & 16 Vict. c. 76, s. 49, sched. (B) 28.

(*g*) Addison *v.* Round, 4 Ad. & Ell. 799 (E. C. L. R. vol. 31); s. c. 6 Nev. & Man. 422; Brooke *v.* Mitchell. 6 N. C. 349; s. c. 8 Scott 739.

(*h*) Wilbraham *v.* Snow, 2 Saund. 47; Armory *v.* Delamirie, 1 Str. 505; Roberts *v.* Wyatt, 2 Taunt. 268; Legg *v.* Evans, 6 Mee. & W. 36; Stephen on Pleading, 354, 5th ed.

(*i*) Gordon *v.* Harper, 7 T. Rep. 9; Ferguson *v.* Cristall, 5 Bing. 305 (E. C. L. R. vol. 15); Leake *v.* Loveday, 4 Man. & Gr. 972 (E. C. L. R. vol. 43); Bradle *v.* Copley, 1 C. B. 685 (E. C. L. R. vol. 58).

property ;(*k*) but these expressions should not mislead the student. The action of trover tries only the right to the immediate possession, which, as shall now see, may exist apart from the *property* in the goods.

For let us suppose that the finder of the article lost, whilst ignorant of the true owner, should have been wrongfully deprived of it by a third [*26] person. In this *case the owner being absent, the finder is evidently entitled to the possession of the thing; and he will accordingly succeed in an action of trover brought by him against the wrongdoer.(*l*)[1] Here the property in the thing which was lost evidently belongs still to the original owner; but the right of possession is in the finder, until the owner makes his appearance. The owner's property then draws with it the right of possession; and should the finder convert the article found to his own use, he in his turn will be liable to an action of *trover* in respect of the owner's right of possession. Thus, so far as we have

(*k*) Rogers *v.* Kennay, 9 Q. B. 592 (E. C. L. R. vol. 58).

(*l*) Armory *v.* Delamirie, 1 Str. 505; 1 Smith's Leading Cases 151; Bridges *v.* Hawkesworth, 15 Jur. 1079. See Buckley *v.* Gross, 3 B. & S. 566 (E. C. L. R. vol. 113), Bourne *v.* Fosbrook, 18 C. B. N. S. 515 (E. C. L. R. vol. 114).

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[1] The finder of a chattel has a special property in it, and may maintain trover against any one who shall convert it, except the true owner. But this rule does not apply to the finder of a chose in action, *e. g.*, a promissory note or lottery ticket: McLaughlin *v.* Waite, 9 Cowen 670; see Brandon *v.* Huntsville Bank, 1 Stew. 320; Boyle *v.* Roche, 2 E. D. Smith 335; and so of money in specie, or bank bills: 20 N. Y. 76; Aurentz *v.* Porter, 56 Penn. St. 115; though it is otherwise where the money can be identified, as specie on special deposit, or bank bills by proof of denomination, letter, &c.: Chapman *v.* Cole, 12 Gray (Mass.) 141; Norton *v.* Kidder, 54 Maine 189. For the law on this subject, in regard to those securities known on the stock exchanges as bonds payable to bearer, with or without coupons for interest, attached to them, see *ante*, note (1), p. 5.

The possession of a certificate given by the keeper of the public warehouse, that one is entitled to so many hogsheads of merchandize of such a weight and quality, in the warehouse, to be delivered to bearer, is evidence that the merchandize is in the defendant's possession, so as to support an action of trover for it, by one holding the certificate: Hance *v.* McCormick, 1 Cr. C. C. 522.

Possession whether rightfully or wrongfully obtained, is a sufficient title in the plaintiff, as against a mere stranger or wrongdoer: Knapp *v.* Winchester, 11 Vt. 351; Coffin *v.* Anderson, 4 Blackf. 395; Cook *v.* Patterson, 35 Ala. 102; Jeffries *v.* Great Western R. R. Co., 34 Eng. L. & Eq. 122. But not as against the real owner: Sylvester *v.* Girard, 4 Rawle 185.

The finder of a chattel may maintain trover for it: Clark *v.* Mallory, 3 Harring. 68.

Trover may be maintained against a stranger, upon a mere prior possession obtained by a purchaser of chattels, under a void execution: Duncan *v.* Spear, 11 Wend. 54. But where a chattel is converted by a bailee, who sells or leases it without authority, the bailor may maintain trover for it, even against a vendee or lessee in good faith and without notice: Crocker *v.* Gullifer, 44 Maine 491.

already proceeded, we have found nothing more than a simple property in goods, existing with or without the right of possession. The action of *trover* tries the right of possession, and may or may not determine the property. For, strange as it may appear, there is no action in the law of England by which the property either in goods or lands is alone decided.

2. But the article in question, instead of being lost and found, may become the subject of *bailment.* Bailment is defined by Sir William Jones, in his admirable and classical Treatise on the Law of Bailment,(*m*) to be a delivery of goods in trust, on a contract expressed or implied that the trusts shall be duly executed, and the goods redelivered as soon as the trust or use for which they were bailed shall have elapsed or be performed. The term *bailment* is derived from the French word *bailler*, to deliver. The person who delivers the goods is called the bailor; the person to whom they are delivered the bailee. The trusts on which goods may be delivered are various. The principal are the following. They may merely be lent to a friend, or left in the custody *of a [*27] warehouseman or wharfinger, or they may be entrusted to a carrier to convey to a distance, or to an agent or factor to sell; or they may be pawned for money lent, with or without a power to sell them,(*n*) or let out to hire.(*o*) In all cases of bailment, however, the simple rule still holds, that the *property* in goods can belong to one party only ; and when any goods are *bailed*, the property still remains in the bailor.(*p*) The possession of the goods, however, is evidently for the time being with the bailee. But if, while goods are in bailment, a third person should become possessed of them, and should wrongfully convert them to his own use, the right to recover possession will in some degree depend upon the nature of the bailment.

If the bailment should be what is called a *simple bailment*, as in the four first instances above mentioned, that is, a bailment which does not confer on the bailee a right to exclude the bailor from possession, in such a case either the bailee or the bailor may maintain an action of trover against the wrong-doer.(*q*)[1] The bailee may maintain this action, because

(*m*) P. 117.
(*n*) See Pigot *v.* Cubley, 15 C. B. N. S. 701 (E. C. L. R. vol. 109).
(*o*) See Coggs *v.* Bernard, 2 Ld. Raym. 909–912.
(*p*) Franklin *v.* Neate, 13 Mee. & W. 481.
(*q*) Nicholls *v.* Bastard, 2 C. M. & R. 659; Manders *v.* Williams, 4 Exch. Rep. 339.

[1] A. of Liverpool shipped goods, which, by the bill of lading, were to be delivered to D. or his assigns, in Philadelphia. The freight was payable in Liverpool, and it appeared that the goods were shipped on account of A. Held, that the bill of lading

the action depends only on the right to possession which the bailee has by virtue of the bailment made to him ;(*r*) and the bailor may also maintain the action, because his property in the goods draws with it the right of possession, and the bailment is not of such a kind as to vest this right in the bailee solely. The bailee is rather in the situation of servant to the bailor, and the possession of the one is equivalent in construction of law to the possession of the other. But as it would be unjust that the [*28] wrong-doer should *pay damages twice over for his offence, the recovery of damages either by bailee or bailor deprives the other of his right of action.(*s*) If, however, the bailment should not be of the simple kind, but should confer on the bailee the right to exclude the bailor from the possession, here, though the property in the goods still remains in the bailor, the bailee alone can maintain an action of trover against any person who may have taken the goods and converted them to his own use. Thus the pawnee or hirer of goods can alone maintain an action of trover so long as the pawning or hiring continues.(*t*) Here again we have the property in the goods still vested in one person, the bailor, drawing with it, in the case of simple bailment, the right to the possession, and in the case of other bailments, temporararily disconnected from that right. If however, any bailee, whatever be the nature of his bailment, should convert the goods bailed to him to his own use, he will by that act have determined the bailment: the property in the bailor will draw to it the right to immediate possession, and the bailor may accordingly recover damages for the act by an action of trover.(*u*)

3. The last case requiring notice in which goods may be in the possession of a person who has no property in them, is the case of the existence of a *lien* on the goods. A lien is the right of a person in possession of goods to retain them until a debt due to him has been satisfied.(*v*) A lien is either *particular* or *general*. A particular lien is a right to retain

(*r*) Sutton *v.* Buck, 2 Taunt. 202.
(*s*) Bac. Abr. tit. Trover (C.)
(*t*) Gordon *v.* Harper, 7 T. R. 9; Burton *v.* Hughes, 2 Bing. 173 (E. C. L. R. vol. 9); Ferguson *v.* Cristall, 5 Bing, 305 (E. C. L. R. vol. 15); Pain *v.* Whitaker, Ry. & Moo. 99.
(*u*) Cooper *v.* Willomatt, 1 C. B. 672 (E. C. L. R. vol. 50); Johnson *v.* Stear, 15 C. B. N. S. 330 (E. C. L. R. vol. 109); Pigot *v.* Cubley, 15 C. B. N. S. 701, (E. C. L. R. vol. 109).
(*v*) 2 East 235; 2 Rose 357; Smith's Compendium of Mercantile Law 534, 5th ed.; 563, 6th ed.

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vested the property in B., who might maintain an action in his own name against the owner of the ship, for the negligent carriage of the goods: Griffith *v.* Ingledew, 6 S. & R. 429.

the particular goods in *respect of which the debt arises. A [*29] general lien is a right to retain goods in respect of a general balance of an account. The former kind of lien is favored in law; but the latter, having a tendency to prefer one creditor above another, is taken strictly.(x) A particular lien is given by the common law over goods which a person is compelled to receive; thus carriers(y) and innkeepers(z) have a lien on the goods in their care; although an innkeeper cannot detain his guest's person, or take his coat off his back, to secure payment of his bill.(a) A particular lien is also given by law to every person who by his labor or skill has improved or altered an article intrusted to his care: thus a miller has a lien on the flour he has ground for the cost of grinding:(b) and a shipwright has a lien on a ship intrusted to him to repair for the costs of repairing it.(c)[1] So a lien may

(x) 3 Bos. & Pul. 494. (y) Skinner v. Upshaw, 2 Lord Raym. 752.

(z) Thompson v. Lacey, 3 B. & Ald. 283 (E. C. L. R. vol. 5).

(a) Sunbolf v. Alford, 3 M. & W. 248. The lien of innkeepers on the goods of their guests is now regulated by stat. 26 & 27 Vict. c. 41.

(b) Ex parte Ockenden, 1 Atk. 235.

(c) Franklin v. Hosier, 4 B. & Ald. 341 (E. C. L. R. vol. 6).

[1] By the civil law, and the general admiralty law, material-men have a lien upon the vessel: Domat's Civil Law, book 3, tit. 1, sec. 5.

But by the common law of England, which is binding on the Admiralty Court, those who build, repair or supply a domestic vessel, have no lien upon the vessel herself, except the common law lien of the mechanic, arising from his mere possession, and only coextensive with such possession: Franklin v. Hosier, 4 B. & A. 341; The Neptune, Cumberlege, 3 Harr. 136, 139; Bland, Ex parte, 2 Rose 91; The Harmonie, 1 W. Rob. 178; Raitt v. Mitchell, 4 Camp. R. 146; The Browmina, 1 Dodson 235; The Alexander, Id. 280; The Zodiac, 1 Harr. 325; The Vibilia, 1 W. Rob. 6; Buxton v. Snec, 1 Vesey 154; Hoare v. Clement, 2 Show. 338.

But under the general admiralty law in England, this country, and elsewhere, mechanics, material-men, and others, doing work on, or furnishing materials, or supplies for a foreign vessel, have a lien on such vessel, without any limit as to its duration in point of time: Justin v. Ballam, Salk. 34; Ex parte Shank and others, 1 Atk. 234; Wilkins v. Carmichael, 1 Doug. 101; Witkinson v. Bernardistson, 2 Wms. 367; Ex parte Halket, 3 Ves. & B. 135; 2 Rose 194, 228; The Ship Fortitude, 3 Sumner 228; The Brig Nestor, 1 Id. 74, 79; The Schooner Marion, 1 Story C. C. 68; Reed v. The Hull of a New Brig, Id. 246; Buddington v. Stewart, 14 Conn. 404; Davis v. A New Brig, 1 Gilpin 473; The General Smith, 4 Wheat. 438; Shrewsbury v. The Sloop Two Friends, Bee's Adm. 433; Gardner v. The Ship New Jersey, 1 Peters Adm. 22, 23; The Jerusalem, 2 Gallis. 345; The Young Mechanic, 2 Curtis C. C. 404; Monsoon, Sprague's Decs. 37; Perkins v. Pike, 42 Maine 141; The Active, Olcott Adm. 271; The Tackle, &c., of the America, 1 Newb. Adm. 195; and liens existing by the maritime law of foreign jurisdictions can be enforced here, though all parties are foreigners: The Maggie Hammond, 9 Wall. U. S. 435. Whether a vessel is domestic or foreign depends upon the residence of her owners: The Golden Gate, 1 Newb. Adm. 308; and vessels belonging to one State, when in the ports of another, are deemed foreign: The

be claimed for training a horse, because he is improved by the labor and skill thus bestowed upon him;(*d*) but no lien can arise merely for

(*d*) Bevan *v.* Walters, 1 Moo. & Mal. 236.

Chusan, Sprague's Decs. 39. Although there is no fixed time within which this lien must be enforced, yet it may be lost by negligence or delay, and when the rights of third parties are compromised, courts of admiralty will require vigilance in parties who seek their aid, and will not sit to enforce stale and dormant claims: The Eastern Star, Ware 186, 212; Packard *v.* The Louisa, 2 Wood. & M. 48; The Mary, 1 Paine 180; The Margaret, 3 Harr. 238; The Nestor, 1 Sumner 71; Ex parte Foster, 2 Story 145; The Rebecca, Ware 212; Lillie Mills, Sprague's Decs. 307.

The regular sale of such property, under a decree of the court, gives a good title against all the world, and where the property was affected by a lien, the proceeds are still affected by it in whosesoever hands they may be: Benedict's Adm. 309; Gilpin 189, 549; Gardner *v* The Ship New Jersey, 1 Peters Adm. 223; The John, 3 Rob. 288, and so of a sale made in good faith by the master in a foreign port, and with a necessity for it: The Amelia, 6 Wall. U. S. 18. But it has been held that the sale of a steamboat by the order of court in Illinois, would not prevent a citizen of Missouri, from enforcing against the boat in the hands of the purchaser his lien created by the laws of Missouri: Phegley *v.* David Tatum, 33 Mo. 461. Captures *jure belli*, however, override all previous liens: The Battle, 6 Wall. U. S. 498.

In many of the states of this country, mechanics and material-men have by positive statutory enactment, a lien on domestic vessels for work done on or materials furnished for such vessel: Grose's Stats. Ill. (1869) p. 39; 2 Garvin & Hord's Stats. of Indiana, p. 301; Louisiana, Civil Code, Art. 2748. A similar law exists in Missouri and in Maine, though the lien only continues for four days from the time the work was completed or materials furnished: Revis. Stats. Maine (1857), p. 569. In Pennsylvania, the lien continues until the vessel shall have proceeded on the voyage next after the work done, or materials furnished, and no longer: Purdon's Dig. (1861), p. 62; and by an act of the 20th of April, 1858, vessels navigating the rivers Alleghany, Monongahela or Ohio, are made liable to a like lien, provided suit shall be commenced on said lien within two years after the work is done, or materials furnished: Id. p. 64; but "barges" are neither ships, boats or vessels within the meaning of these acts; Nease's Ap., 3 Grant 110.

In New York it ceases at the expiration of six months after the debt was contracted, unless the vessel shall be then absent from the port where it was contracted, when it shall continue until ten days after the return of the vessel to the said port; but said lien shall cease when said vessel leaves port, unless within twelve days thereafter, the person having such claim shall cause sworn specifications thereof to be filed: 4 N. Y. Revis. Stats. 651, s. 2; the debt, however, must amount to fifty dollars or upwards for sea going vessels, and fifteen dollars for other vessels. But as to vessels navigating the western and northwestern lakes, the lien ceases at six months after the first day of January next succeeding the time when such debt was contracted, unless during said six months, said vessel shall be absent from port, in which case the lien shall continue for ten days after the vessel's return, but in order that the lien may subsist, specifications as aforesaid must be filed before the first Tuesday of February next after said debt was contracted: 6 N. Y. Stats. at Large, p. 151, chap. 422.

In New Hampshire, it exists for four days after the work is completed: Gen. Stats. of N. H. p. 261. sec. 9; in Florida, 30 days; Thompson's Dig. 412. In New Jersey, debts of twenty dollars and upwards, for work and materials, are made liens for the period of nine months. Nix.

his keep,(*e*) unless he has been kept by an innkeeper, who is compelled to take him in.(*f*)[1] A lien on goods is not sufficient to warrant the sale of them,(*g*) nor does it authorize the possessor to charge for their standing.(*h*) A particular lien also arises in the case of salvage, or rescuing a ship *or its lading from the perils of the sea or the queen's [*30] enemies, for the trouble and risk incurred;(*i*) but this kind of lien has been modified by the Merchant Shipping Act, 1854, which provides for the appointment of public receivers of all wreck, into whose hands any person, not being the owner, who finds or takes possession of any wreck, is bound to deliver it as soon as possible.(*j*) The lien of a shipowner for freight is now regulated by the Merchant Shipping Act Amendment Act, 1862.(*k*)

A general lien, when it does not arise by express contract, or from a contract implied by the course of dealing between the parties,(*l*) accrues in consequence of the custom of some trade or profession; and it may be local also, that is, confined to some particular place.(*m*) It obtains in many trades, such as wharfingers,(*n*) dyers,(*o*) calico printers,(*p*) fac-

(*e*) Wallace *v.* Woodgate, 1 Ry. & Moo. 293. See Sanderson *v.* Bell, 2 Cro. & Mee. 304, 311; 4 Tyr. 244, 252.

(*f*) Johnson *v.* Hill, 3 Stark. 172 (E. C. L. R. vol. 3); Allen *v.* Smith, 12 C. B. N. S. 638 (E. C. L. R. vol. 104), affirmed in Ex. Ch., 9 Jur. N. S. 1284, 11 W. R. 440.

(*g*) Thames Iron Works Company *v.* Patent Derrick Company, 1 John. & H. 93.

(*h*) British Empire Shipping Company *v.* Somes, 1 E. B. & E. 353 (E. C. L. R. vol. 96).

(*i*) Hartford *v.* Jones, 1 Lord Raym. 393; Baring *v.* Day, 8 East 57.

(*j*) Stat. 17 & 18 Vict. c. 104; amended by stats. 18 & 19 Vict. c. 91; 24 Vict. c. 10, and 25 & 26 Vict. c. 63.

(*k*) Stat. 25 & 26 Vict. c. 63, ss. 66, 78.

(*l*) Simond *v.* Hibbert, 1 Rus. & Myl. 719.

(*m*) Holderness *v.* Collinson, 7 B. & C. 212 (E. C. L. R. vol. 14).

(*n*) Naylor *v.* Mangles, 1 Esp. 109.

(*o*) Savill *v.* Barchard, 4 Esp. 53. See, however, Close *v.* Waterhouse, 6 East 523, n.

(*p*) Weldon *v.* Gould, 3 Esp. 268.

Dig. (1868), p. 576. In Massachusetts, the lien may be for any amount, and will continue until the debt is paid: Gen. Stats. Mass. (1860), p. 768. But these liens are generally postponed to the claims of mariners for wages.

[1] In Pennsylvania a livery-stable keeper has a lien for the keep of a horse: Young *v.* Kimball, 23 Penn. St. 193; and so has a groom for his feed, keep, and shoeing: 52 Id. 522; and the statute law of that state authorizes a sale under the terms of the act, to satisfy the lien of livery-stable-keepers and innkeepers: Purd. Dig. 536. A power of selling goods, wares, merchandise or other property, for the satisfaction of their liens, for the costs or expenses of carriage, storage or labor bestowed on the same, is likewise given to commission merchants, factors and all common carriers, by an act of the legislature of that State: Purd. Dig. Suppl. 1344.

tors,(*q*)[1] policy brokers,(*r*) and bankers,(*s*) and perhaps also common carriers.(*t*) Solicitors and attorneys have also a lien on all the deeds and documents of their clients in their possession for their professional [*31] charges generally;(*u*) but this doctrine *is to be taken in connection with the peculiar nature of title deeds, which being the sinews of the land, follow the seisin of it, and may therefore be held by the client only for a limited interest. Thus, if a tenant for life should leave the title deeds of the land in the hands of his solicitor, the lien of the solicitor for his professional charges would be coextensive only with his client's interest, and on the client's decease the solicitor would be bound to deliver up the deeds to the remainder-man, although his charges

(*q*) Houghton *v.* Matthews, 3 Bos. & Pul. 488; Cowell *v.* Simpson, 16 Ves. 280.

(*r*) Man *v.* Shiffner, 2 East 523.

(*s*) Davis *v.* Bowsher, 5 T. R. 488; Brandao *v.* Barnett, 3 C. B. 519, 530 (E. C. L. R. vol. 54).

(*t*) See Rushforth *v.* Hadfield, 6 East 519; 7 East 224; Aspinall *v.* Pickford, 3 Bos. & Pul. 44, note. As to railways, see stat. 8 & 9 Vict. c. 20, s. 97.

(*u*) Stevenson *v.* Blakelock, 1 Mau. & Sel. 535; Ex parte Sterling, 16 Ves. 258; Ex parte Pemberton, 18 Ves. 282.

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[1] A factor, is sometimes said to be one, who buys or sells upon commission, or as an agent for others: 3 Kent's Com. 622; but more strictly, the term is only applicable to a consignee for sale: Story on Agency, § 111. At least, only such a factor as is last described, has a lien for the general balance of his account against his principal, or, in other words, a general lien: Russell on Factors, 204, 212.

In the year 1755, this right to a lien for the general balance of a factor's account, seems first to have been solemnly adjudged in England, in the case of Kruger *v.* Wilcox, Ambler 252.

Any agent or broker, however, has a particular lien upon the goods of his principal while in his possesssion. This lien, is a right to retain any article of his principal, for some charge or claim growing out of, or connected with, that identical thing; such as for labor, or services, or expenses, upon it: Story on Agency, § 354.

The liens above referred to, whether general or particular, are implied by law, unless they have been waived by agreement.

But the general lien of a factor proper is not favored by the law. Thus in Houghton *v.* Matthews, 3 Bos. & Pul. 485, it was held that a general lien did not attach, in respect to a debt which arose prior to the time of the commencement of the relation of principal and factor; and there does not seem to be any authority for extending the lien over any property of the principal in the hands of the factor, other than that which has been consigned for sale by the former to the latter, so as, for example, to embrace goods purchased by the factor for his principal. See also Wilmerding *v.* Hart, Hill & Denio 305.

It has been held by Lord Ellenborough, at Nisi Prius, in Boardman *v.* Sill, cited 1 Camp. 410, note, that a factor or broker will lose his lien, if, when the property is demanded of him, he claims to retain it on a different ground than that of the lien—making no mention of it; but the correctness of this decision may well be doubted. But see White *v.* Gainer, 2 Bing. 23. But if a factor consent to a sale by the owner, or conceal from the purchaser his claim on the property, his lien is gone: Gragg *v.* Brown, 44 Maine 157.

might remain unpaid.(*v*) So if the client should be a mortgagee, the solicitor having the deeds would be bound to deliver them to the mortgagor, on the reconveyance of the property, on payment to the mortgagee of all principal and interest; for on such reconveyance the mortgagee ceased to have any interest in the lands.(*x*) And in like manner if the client should be a mortgagor, the solicitor would have no right to retain the deeds as against the prior claim of the mortgagee:(*y*) and if the client should be a trustee, the deeds must be given up for the purposes of the trust.(*z*) This lien also extends only to charges strictly professional,(*a*) and to documents in the possession of the attorney or solicitor in his professional character;(*b*) but it has been held that such lien is assignable, together with the debt and documents, to a third person not a solicitor or attorney.(*c*) A mere certificated conveyancer has no general lien on the documents in his hands.(*d*) It is now provided that in *every case in which an attorney or solicitor shall be employed to prosecute or defend any suit, matter or proceeding in [*32] any court of justice, it shall be lawful for the court or judge, before whom any such suit, matter or proceeding has been heard, or shall be depending, to declare such attorney or solicitor entitled to a charge upon the property recovered or preserved; and upon such declaration being made, such attorney or solicitor shall have a charge upon and against, and a right to payment out of the property, of whatsoever nature, tenure or kind the same may be, which shall have been recovered or preserved through the instrumentality of any such attorney or solicitor, for the taxed costs, charges and expenses of or in reference to such suit, matter or proceeding.(*e*)

Lien, then, of whatever kind, is merely a right to retain the *possession* of the goods. This right of possession enables the person who has been in possession by virtue of the lien to maintain an action of trover for the

(*v*) Davies *v.* Vernon, 6 Q. B. 443, 447 (E. C. L. R. vol. 51).

(*x*) Wakefield *v.* Newbon, 6 Q. B. 276 (E. C. L. R. vol. 51).

(*y*) Smith *v.* Chichester, 2 Dr. & War. 393; Blunden *v.* Desart, Id. 405; Pelly *v.* Wathen, 7 Hare 351; 1 De Gex, Mac. & Gord. 16.

(*z*) Baker *v.* Henderson, 4 Sim. 27.

(*a*) The King *v.* Sankey, 5 Ad. & Ell. 423 (E. C. L. R. vol. 31); Worrell *v.* Johnson, 2 Jac. & Walk. 218.

(*b*) Champernown *v.* Scott, 6 Madd. 93; Balch *v.* Symes, T. & Russ. 87.

(*c*) Bull *v.* Faulkner, 2 De. G. & S. 772, *sed qu.*

(*d*) Hollis *v.* Claridge, 4 Taunt. 807; Steadman *v.* Hockley, 15 M. & W. 553.

(*e*) Stat. 23 & 24 Vict. c. 127, s. 28; Wilson *v.* Hood, 3 Hurlst. & C. 148; Haymes *v.* Cooper, 33 Beav. 431.

goods;(*f*) but the *property* in the goods still remains with the owner; and if the person having the lien should give up the possession of the goods, his lien will be lost;(*g*) the owner's property in them will draw to it the right of posesssion, and enable him to maintain an action of trover.(*h*) And if the person having the lien should take a security for his debt, payable at a distant day, his lien would on that account be lost, as it would be unreasonable that he should detain the goods till such future time of payment;(*i*) and in this case also an action of trover may be maintained by the owner *of the goods, by virtue of the right of possession now accrued to him in respect of his property.(*k*)

[*33]

When goods are taken under a distress for rent, the property in the goods still remains in the owner, until a sale is made pursuant to the statute(*l*) by which a sale is authorized.(*m*)

In all the above cases of finding of goods, bailment, lien and distress, it appears clear, therefore, that the property in the goods is still simply vested in one party only, although the right to their immediate possession may be in another party, and the actual possession possibly in a third.

(*f*) Legg *v.* Evans, 6 M. & W. 36.
(*g*) Kruges *v.* Wilcox, Amb. 254.
(*h*) Sweet *v.* Pym, 1 East 4.
(*i*) Cowell *v.* Simpson, 16 Ves. 275.
(*k*) Hewison *v.* Guthrie, 2 New Cas. 756, 759.
(*l*) Stat. 2 Wm. & Mary, Sess. 1, c. 5, s. 2.
(*m*) King *v.* England, 4 B. & S. 782 (E. C. L. R. vol. 116).

*CHAPTER III. [*34]

OF THE ALIENATION OF CHOSES IN POSSESSION.

CHOSES in possession have always been freely alienable from one person to another. The feudal principles of tenure, which in ancient times opposed the alienation of landed estates, could have no application to the then insignificant subjects of personal property; although the full right of testamentary disposition was not, as we shall hereafter see, enjoyed in early times. But, though the property in personal chattels may be freely aliened, it is impossible for a man to make a valid grant in law of that in which he has no actual or potential property, but which he only expects to have.[1] A person who has an interest in land may

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[1] An agreement to sell a chattel which is in an unfinished state, to be delivered at a future time, when finished, is an executory contract, upon which a present property does not pass, though an action will lie for a breach of the agreement: Pritchett *v.* Jones, 4 Rawle 260. When, therefore, A. (a tanner in the country), on the 31st of July, 1828, in consideration of a pre-existing debt, contracted to sell to B. (a currier in the city), a quantity of hides and skins, then in the vats of the vendor, undergoing the process of tanning, but which were susceptible of immediate delivery, and agreed to deliver them on or before the 12th of November following, some of them at fixed prices, and others at the market price, to be passed to the credit of A., to settle his account, it was held, that no immediate property vested in B., and that the goods were liable to execution as the property of A.; notwithstanding that the transaction was an open one, and there was proof that it had long been the course of business, for curriers in the city to purchase leather of tanners in the country while in process of manufacture, to be delivered when tanned, and that advances were frequently made on such purchases: Ibid. And to the same principle see Nesbit *v.* Burry, 25 Penn. St. 208; Dickson *v.* Forsyth, 1 Grant 26; Andrews *v.* Durant, 1 Kernan 35; Hewlet *v.* Flint, 7 Cal. 264; Pettengill *v.* Merrill, 47 Maine 109; Green *v.* Hall, 1 Houston (Del.) 506, 546.

A sale is an executed contract, to constitute which delivery in fact, or in law, is indispensable, and it cannot be given of a thing which has not yet fully come into existence: Winslow *v.* Leonard, 24 Penn. St. 14; Clemens *v.* Davis, 7 Id. 263. But, where a contract is made for the purchase of an article to be delivered when finished, and afterwards while the article is still in an unfinished state, the original contract is abandoned, and the purchaser agrees to take the article as unfinished, a delivery under the new contract is good as against an execution subsequently levied: Ibid.; West Jersey R. R. Co. *v.* Trenton, &c., Co., 3 Vroom 517.

A contract by a merchant to deliver hides to a tanner, to be charged at cost and five per cent. commission, and interest after six months, and when tanned to be returned to the merchant to be sold by him, and out of the sale the first cost and five per cent. to be deducted, and the balance to be paid to the manufacturer, is

grant all the fruit which may grow upon it hereafter.(*a*) So a grant of the next year's wool of all the sheep which a man now has is valid, because he has a potential property in such wool.(*b*) But a grant of the wool of all the sheep which a man ever shall have is void.(*c*) And in the same manner the assignment of a man's stock in trade passes only such articles as are his property at the time he executes such assignment, and will not comprise any other articles which he may afterwards purchase;(*d*) not even if the instrument of assignment should purport to convey all goods which should at any time thereafter be in or upon his dwelling-house.(*e*) The property in goods to be hereafter acquired [*35] *may however be effectually passed by an assignment thereof in equity coupled with a license to seize them.(*f*)

(*a*) Grantham *v.* Hawley, Hob. 132; Petch *v.* Tutin, 15 M. & W. 110.

(*b*) Per Pollock, C. B., 15 M. & W. 116.

(*c*) Com. Dig. tit. Grant (D).

(*d*) Taphill *v.* Hillman, 6 M. & G. 245 (E. C. L. R. vol. 46); s. c. 6 Scott N. R. 967.

(*e*) Lunn *v.* Thornton, 1 C. B. 379 (E. C. L. R. vol. 50); Gale *v.* Burnell, 7 Q. B. 850 (E. C. L. R. vol. 53); Belding *v.* Read, Exch. 11 Jur. N. S. 547; 3 H. & C. 955.

(*f*) Congreve *v.* Evetts, 10 Exch. 298; Hope *v.* Hayley, 5 E. & B. 830 (E. C. L. R. vol. 85); Allatt *v.* Carr, Exch. 6 W. R. 578; Chidell *v.* Galsworthy, 6 C. B. N. S. 471 (E. C. L. R. vol. 95); Holroyd *v.* Marshall, 10 H. of L. Cas. 191; 9 Jur. N. S. 213; Reeve *v.* Whitmore, L. C. 12 W. R. 113; 9 Jur. N. S. 1214; Brown *v.* Bateman, Law Rep. 2 C. P. 272; Blake *v.* Izard, C. P. 16 W. R. 108.

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such a sale, as will subject the hides to levy as the property of the manufacturer: Pritchett *v.* Cook, 62 Penn. St. 193; Jenkins *v.* Eichelberger, 4 Watts 121. But see Hyde *v.* Cookson, 21 Barb. 92.

Where wheat was sent to a miller, upon a contract that the sender might have the same amount back again, or as much flour as it would make, or the price thereof, the miller to mix that sent with his own; it was held that it was a sale to the miller: Carlisle *v.* Wallace, 12 Ind. 255. And see Dick *v.* Lindsay, 2 Grant's Cases 431. But a delivery of an article with the privilege of retaining it at a stated price, is not a sale, but a bailment: Camberlain *v.* Smith, 44 Penn. St. 431; Rowe *v.* Sharp, 51 Id. 26.

An agreement whereby goods are consigned by A. to B., to be sold at not less than the invoice prices, the invoice prices to be paid over to A., and that all the goods should sell for above those, to be retained by B., and such portion of the goods as remained to be returned to A., does not vest the property in B.: McCullough *v.* Porter, 4 W. & S. 179.

A coal company agreed with a contractor, to sell him a scow-boat on the conditions expressed in the company's printed regulations, one of which was, that the company would furnish its contractors with boats for cash at cost, or on credit, with interest, but that the ownership should remain in the company till all the instalments of the price were paid, when a bill of sale should be made out; the company were to pay the tolls, and the contractor to take freight from no other quarter. The boat still continued in the register of the company; its original number being painted in letters and figures on the stern, and was in no way distinguishable from the other boats of the company. Held, that the property did not pass as against creditors of the contractors, until the boat was paid for: Lehigh Co. *v.* Field, 8 W. & S. 232. See also, Clough *v.* Ray, 20 N. H. 558.

The manner in which the alienation of personal chattels is effected, is in many respects essentially different from the modes of conveying real estate. In ancient times, indeed, there was more similarity than there is at present. The conveyance of land was then usually made by feoffment, with livery of seisin, which was nothing more than a simple gift of an estate in the land accompanied by delivery of possession.(*g*) This gift might then have been made by mere word of mouth;(*h*) but the Statute of Frauds(*i*) made writing necessary; and now every conveyance of landed property is required to be by deed.(*j*) Personal chattels, on the contrary, are still alienable by mere *gift and delivery;* though they may be disposed of by *deed;* and they are also assignable by *sale*, in a manner totally different from the conveyance requisite on the transfer of real estate.[1] Each of these three modes of conveyance deserves a separate notice.

1. And first, personal chattels are alienable by a mere gift of them, accompanied by delivery of possession. For this purpose no deed or writing is required, nor is it *essential that there should be a consideration for the gift. [*36] Thus, if I give a horse to A. B., and at the same time deliver it into his possession, this gift is complete and irrevocable, and the property in the horse is thenceforward vested in A. B.(*k*) But if I purport to assign the horse, and yet retain the possession, the gift, though made by writing (so that it be not a deed), is absolutely void at law,(*l*) and equity will give no relief to the donee.(*m*) It may, however, be observed, that if the donor should not attempt to part with the subject of gift, but should declare that he keeps possession of it *in trust* for the donee, equity will seize on and enforce this trust, although voluntarily created.(*n*) In some cases it is not possible to

(*g*) See Principles of the Law of Real Property 113, 2d ed.; 118, 3d & 4th eds.; 121, 5th ed.; 127, 6th ed.; 130, 7th ed.; 138, 8th ed.

(*h*) See Principles of the Law of Real Property 117, 2d ed.; 122, 3d & 4th eds.; 128, 5th ed.; 134, 6th ed.; 137, 7th ed.; 143, 8th ed.

(*i*) Stat. 29 Car. II. c. 3, ss. 1, 2.

(*j*) Stat. 8 & 9 Vict. c. 106, s. 3.

(*k*) 2 Black. Com. 441.

(*l*) Irons *v.* Smallpiece, 2 B. & Ald. 551; Miller *v.* Miller, 3 P. Wms. 356; Bourne *v.* Fosbrooke, 18 C. B. N. S. 515 (E. C. L. R. vol. 114). See also Shower *v.* Pilck, 4 Ex. Rep. 478.

(*m*) Antrobus *v.* Smith, 12 Ves. 39, 46; Edwards *v.* Jones, 1 My. & Cr. 226; Dillon *v.* Coppin, 4 My. & Cr. 647, 671.

(*n*) Ellison *v.* Ellison, 6 Ves. 656; Ex parte Dubost, 18 Ves. 140, 150; Vandenberg *v.* Palmer, 4 Kay & John. 204; Jones *v.* Lock, L. C. 11 Jur. N. S. 913, correcting Scales *v.* Maude, 6 De G., M. & G. 43, 51.

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[1] By the law of Pennsylvania, the title to a ship, passes by actual sale and delivery, as in the case of other personal chattels, without a written bill of sale: Weaver *v.* The Susan G. Owens, 1 Wall. Jr. 366.

make an immediate and complete delivery of the subject of gift; and in these cases, as near an approach as possible must be made to actual delivery; and if this be done the gift will be effectual. Thus, if goods be in a warehouse, the delivery of the key will be sufficient;(*o*) timber may be delivered by marking it with the initials of the assignee,(*p*) and an actual removal is not essential to the delivery of a haystack.(*q*) But the delivery of a part of goods capable of actual delivery, is not a sufficient delivery of the whole.(*r*)[1]

(*o*) West *v.* Skip, 1 Ves. sen. 244; Ryall *v.* Rowles, 1 Ves. sen. 362; 1 Atk. 171; Ward *v.* Turner, 2 Ves. sen. 443.

(*p*) Stoveld *v.* Hughes, 14 East 308.

(*q*) Chaplin *v.* Rogers, 1 East 190. See Young *v.* Matthews, Law Rep. 2 C. P. 127.

(*r*) Per Pollock, C. B., 14 M. & W. 37, correcting a dictum of Taunton, J., 2 A. & E. 73 (E. C. L. R. vol. 29).

[1] When there is a contract for a finished article, as a steam engine, a delivery of its various parts as they are made, will not change the property: Shell *v.* Heywood, 4 Penn. St. 529. This was the case of a contract entered into with machinists, for the construction of a steam engine and fixtures for a grist-mill; portions of the machinery, viz., the boilers and balance-wheel, were delivered, and the boilers fixed in a building attached to the mill. The purchaser became embarrassed, and in an agreement in writing between him and the attorney of the manufacturers, it was stated that the boilers, and the machinery attached, or to be attached to them, were the property of the manufacturers, and they, by their attorney, agreed to leave the same where they were for three months, in order to give time to the purchaser to make an arrangement with his creditors; and in the event of his inability to make such arrangement, then the manufacturers were to be left to their legal remedy for the materials already furnished, or to the removal of the same, at their option. The sheriff subsequently levied on and sold the boilers and wheel, under an execution against the mill-owner, as personal property, notwithstanding notice given to him of the claim of the machinists. Held, that the property had remained in the latter, and that trespass would lie by them against the sheriff, for selling the machinery: Ibid.

Where A. agreed to furnish B. with a machine, to be put up by A. in the mill of B., B. to cart the machine to the mill, and if B. was satisfied with the way it worked, to pay for it, otherwise A. to take it away, and, before it was entirely put up, it was tried and found not to work satisfactorily, and on the same day was attached as the property of B., it was held, that the property had not been transferred: Phelps *v.* Willard, 16 Pick. 29. A. delivered cotton-yarn to B., on a contract that the same should be manufactured into plaids; B. was to find the filling, and was to weave so many yards of the plaids, at 15 cents per yard, as was equal to the value of the yarn at 65 cents per pound. Held, that by the delivery of the yarn to B. the property thereof vested in him: Buffum *v.* Merry, 3 Mason 478. Where one contracted to burn a kiln of bricks, for which he was to receive 10,000 of them when burnt, and he performed his part of the contract, it was held, that he had no vested interest in the bricks, which his creditor could attach, till actual or constructive delivery: Brewer *v.* Smith, 3 Greenl. 44. A contract was made in France between A. and B., by which certain goods were to be procured to be manufactured by A., and transmitted by him through B.'s agents at Havre, with

*When goods are in the custody of a simple bailee, such as a wharfinger or carrier, the possession of such bailee is, as we have seen,(s) constructively the possession of the bailor; and either the bailor or bailee may maintain an action of trover in respect of the goods. This constructive possession of the bailor may be delivered by him to a third person, by making as near an approach to actual delivery as is possible under the circumstances of the case. By the custom of Liverpool the delivery of goods in another person's warehouse is effected by merely handing over a delivery order;(t) and the property in wines in the London Docks appears to pass by the endorsement and delivery of the dock warrant.(u) But in the absence of a custom to the contrary, it would seem that there can be no legal delivery of goods into the hands of a third person without the consent of the warehouseman or wharfinger in [*37]

(s) *Ante*, p. 27.

(t) Dixon *v.* Yates, 5 B. & Ad. 313 (E. C. L. R. vol. 27); and see Greaves *v.* Hepke, 2 B. & Ald. 131; Kingsford *v.* Merry, 1 H. & N. 503.

(u) Ex parte Davenport, Mon. & Bl. 165. Delivery orders are now subject to a stamp duty of one penny, and dock warrants to a stamp duty of threepence, by statutes 23 Vict. c. 15, and 23 & 24 Vict. c. 111.

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instructions as to their further transmissions; two cases of goods were sent to Havre, and forwarded by B.'s agents, with bills of lading, in one vessel, the invoice of one of the cases having been sent by a previous vessel. The latter case, having arrived in a different vessel from that in which the invoice was sent, was not claimed, and was sent to the public storehouse, where it was burnt. Held, that there was no sale by A. to B., but only a contract to deliver goods: Low *v.* Andrews, 1 Story 38.

It is true that the sale of a thing not in existence, is, upon general principles, inoperative, being merely executory, and when the thing afterwards to be produced, is the product of land, or anything of like nature, the owner of the principal thing may retain the general property of the thing produced, unless there be fraud in the contract: Smith *v.* Atkins, 18 Vt. (3 Washb.) 461: but when the identical thing delivered is to be restored, though in an altered form, the property is not changed: Moore *v.* Holland, 39 Maine 307. When the owner of coal-pits, which were in process of burning, sold the charcoal which might be taken therefrom, at a specified price for each 100 bushels, and agreed that he would complete the burning and draw the coal to the vendee's place of business, and the vendor accordingly continued to have charge of the coal unti lit was attached by his creditors, before it had been measured and delivered to the vendee, it was held, that the vendee acquired by the contract no property in the coal, even as between himself and the vendor: Hale *v.* Huntley, 21 Vt. (6 Washb.) 147.

A contract was made with a coachmaker, to make a buggy for a specified price, and, before the completion of the buggy, the parties came to a settlement, and the price was paid, with an understanding that it was to be finished, and then delivered. Held, that the property in the buggy vested in the purchaser from the time of the payment of the money: Butterworth *v.* McKinly, 11 Humph. 206.

See *ante*, note (1), p. 34.

whose custody the goods are.(*x*) When goods are at sea, the delivery of the bill of lading, after its endorsement, is a delivery of the goods themselves;(*y*) for it is not possible, in this case, to make any nearer approach to an actual delivery.(*z*)

2. The next method of alienating chattels personal is by deed. Every [*38] deed imports a consideration;(*a*) for *it was anciently supposed, that no person would do so solemn an act as the sealing and delivery of a deed without some sufficient ground. The presence of this implied consideration renders a deed sufficient of itself to pass the property in goods.(*b*) It supplies on the one hand the want of delivery, and on the other the want of that actual consideration which always exists in the third and most usual mode of alienation of chattels personal, which is,

3. By sale. It is in this last and most usual method of alienation that the contrast presents itself between the means to be employed for the alienation of real property and chattels personal. When a contract has been entered into for the sale of lands, the legal estate in such lands still remains vested in the vendor; and it is not transferred to the vendee until the vendor shall have executed and delivered to him a proper deed of conveyance. In *equity*, it is true, that the lands belong to the purchaser from the moment of the signature of the contract; and from the same moment the purchase-money belongs, in equity, to the vendor.(*c*) But at *law* the only result of the signature of a contract for the sale of lands is, that each party acquires a right to sue the other for pecuniary damages, in case such contract be not performed. Not so, however, the case of a contract for the sale of chattels personal. Such a contract immediately transfers the legal property in the goods sold from the vendor to the vendee, without the necessity of anything further.(*d*) In order to this, it is of course necessary, that the transaction have within itself all

(*x*) Zwinger *v*. Samuda, 7 Taunt. 265 (E. C. L. R. vol. 2); Lucas *v*. Dorrien, Ibid. 278; Bryans *v*. Nix, 4 M. & W. 775, 791; M'Ewan *v*. Smith, 2 H. of L. Cases, 309, And see Pearson *v*. Dawson. 1 E. B & E. 448 (E. C. L. R. vol. 96).

(*y*) Mitchell *v*. Ede, 11 A. & E. 888 (E. C. L. R. vol. 39); and see stat. 18 & 19 Vict. c. 111.

(*z*) 1 Ves. sen. 362; 1 Atk. 171.

(*a*) Plowd. 308; 3 Burr. 1639; 1 Fonb. Eq. 342; 2 Fonb. Eq. 26; Principles of the Law of Real Property 118, 2d ed.; 123, 3d & 4th eds.; 128, 5th ed.; 134, 6th ed.; 137, 7th ed.; 144, 8th ed.

(*b*) Carr *v*. Burdiss, 1 C., M. & R. 782, 788; s. c. 5 Tyrw. 309, 316.

(*c*) Principles of the Law of Real Property 133, 2d ed.; 137, 3d & 4th eds.; 143, 5th ed.; 150, 6th ed.; 153, 7th ed.; 159, 8th ed.

(*d*) Com. Dig. tit. Biens (D), 3.

the legal requisites for a sale; and these requisites *will accordingly form the next subject for our consideration.(*e*) [*39]

The requisites for the sale of goods partly depend upon their value. Goods under the value of 10*l.* sterling may now be sold in the same manner as goods of whatever value were anciently saleable; whereas goods of the value of 10*l.* or upwards are now regulated in their sale by an enactment contained in the Statute of Frauds.(*f*)[1] And first, with regard to such goods and chattels as do not fall within this enactment, there can be no sale without a tender or part payment of the money, or a tender or part delivery of the goods, unless the contract is to be completed at a future time. Thus if A. should agree to pay so much for the goods, and B., the owner, should agree to take it, and the parties should then separate without anything further passing, this is no sale.(*g*) But if A. should tender the money, or pay but a penny of it, or B. should tender the goods, or should deliver any, even the smallest portion, of them to A., or if the payment or delivery or both should be postponed by agreement till a future day, the sale will be valid, and the property in the goods will pass at once from the vendor to the vendee.(*h*) If, however, any act should remain to be done on the part of the seller previously to the delivery of the goods, the property will not pass to the vendee until such act shall have been done. Thus, if goods, the weight of which is unknown, are sold by weight,(*i*) or if a given weight or measure is sold out of *a larger quantity,(*k*) the property will not pass to the vendee until the price shall have been ascertained by weighing the goods in the one case, or the goods sold shall have been separated by weight or measure in the other.[2] So if an article be ordered to be manu- [*40]

(*e*) In the recent cases of Thompson *v.* Pettitt, 10 Q. B. 101 (E. C. L. R. vol. 39); and Flory *v.* Denny, 7 Ex. Rep. 581, the property in goods was held to pass by a mere written memorandum by way of *mortgage*, without any delivery; *sed qu.*

(*f*) 29 Car. II. c. 3, s. 17.

(*g*) 2 Bla. Com. 447; Smith's Mercantile Law 461, 5th ed.; 488, 6th ed.

(*h*) Shep. Touch. 224; Martindale *v.* Smith, 1 Q. B. 389, 395 (E. C. L. R. vol. 41).

(*i*) Hanson *v.* Meyer, 6 East 614; Swanwick *v.* Southern, 9 A. & E. 895 (E. C. L. R. vol. 36).

(*k*) Busk *v.* Davis, 2 Man. & Selw. 397; Shepley *v.* Davis, 5 Taunt. 617 (E. C. L. R. vol. 1).

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[1] See post, p. 40, note.

[2] The title to goods sold, will not pass from vendor to vendee, without actual or constructive delivery of the same: Outwater *v.* Dodge, 7 Cowen 85; Vining *v.* Gilbreth, 39 Maine 496; Haynes *v.* Hunsicker, 26 Penn. St. 58; Samuels *v.* Gorham, 5 Cal. 226; Hugus *v.* Robinson, 24 Penn. St. 9; Steelwagon *v.* Jefferies, 44 Id. 407. What will amount to a constructive delivery, is a question of fact to be ascertained by evidence, and certain rules of law: Hondlette *v.* Tallman, 14 Maine 400; Smith *v.* Craig, 3 W. & S. 14;

factured, the property in it will not vest in the person who gave the order, until it shall, with his assent, have been appropriated for his

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Atwell *v.* Miller, 6 Md. 10; Chase *v.* Ralston, 30 Penn. St. 539; Caldwell *v.* Garner, 31 Mo. 131. But a constructive delivery, where an actual one is reasonably practicable, is of no avail: Billingsley *v.* White, 59 Penn. St. 464; McKibbin *v.* Martin, 64 Id. 352; and it has been held that as to third persons, there can be no sale, so long as the vendor retains possession: Davis *v.* Bigler, 62 Id. 242.

As a general rule, the goods sold must be ascertained and designated, and for this purpose, where they form a part of a stock, or are mixed with any quantity of like goods, they must be separated therefrom before the property in them can pass; and generally, if anything remains to be done to goods for the purpose of ascertaining their price, such as weighing, measuring, or testing them, the price depending upon their quality or quantity, the performance of these acts, would seem to be a condition precedent to the transfer by a sale of the property in them, although the individual goods be ascertained; Hutchinson *v.* Hunter, 7 Penn. St. 140; Hale *v.* Huntley, 21 Vt. 50; Stevens et al. *v.* Ewe, 10 Barb. S. C. 95; Dixon *v.* Myers et al., 7 Gratt. 240; Cunningham *v.* Ashbrook, 20 Mo. 553; Banchor *v.* Warren, 33 N. H. 183; Gilman *v.* Hill, 36 N. H. 311; Nicholson *v.* Taylor, 31 Penn. St. 128; Chapin *v.* Potter, 1 Hilton 366; but weighing, measuring, or setting apart, has been held to be essential only when necessary to define the subject-matter of the contract: Leonard *v.* Winslow, 2 Grant's Cas. 139; Penna. R. R. *v.* Hughes, 39 Penn. St. 521; and delivery of a bill of sale has been held a sufficient identification: Barrows *v.* Harrison, 12 Iowa 588.

Where goods were partly measured off, and subsequently stolen, those measured were held to be the property of the buyer, and the remainder as belonging to the seller: Crawford *v.* Smith, 7 Dana 59; but where a number of barges of oil were purchased at so much per barrel, and the barges having been partly filled, were consumed by fire, it was held that the barrels of oil on the barges had not been delivered: Oil Co. *v.* Hughey, 56 Penn. St. 322; and the fact that a part of the price has been paid, will not alter the circumstances, so as to make the contract complete, provided there is still something to be ascertained: Rapelye *v.* Mackie, 6 Cowen 250; Joyce *v.* Adams, 4 Seld. 291; even in a case where the vendee has resold the goods before they had been separated, it was held that the property had not passed from the original vendor: Hunter *v.* Hutchinson, 7 Penn. St. 140; Scudder *v.* Worster, 11 Cush. 573. Where, however, a horse was sold at a certain price, or such other price as a third person should name, and the third party refused to name a price, it was held that the sale was determined at the sum mentioned by the parties: Hollingsworth *v.* Bates, 2 Blackf. 340; Moore *v.* Piercy, 1 Jones 131; so, too, in the case of a sale of 625 bags of corn, part of a larger lot, being the 625 bags which should first arrive in port, it was held that this was a sufficient separation to pass the title to the 625 bags: Sahlman *v.* Mills, 3 Strob. 384. And a contract to sell all the corn in a certain mill house, and a payment of the part of the money, vests the property in the buyer, even though it was not measured out to him: Morgan *v.* Perkins, 1 Jones 171. And see Jordan *v.* Harris, 31 Miss. 257.

Where a paper manufacturer sold 2000 pieces of wall paper, a part of a larger lot, all of the same size, description, and value, and the purchaser paid the price, and took away at the time 1000 pieces, it being agreed that the other 1000 should remain until called for, but were not selected by the buyer, nor separated and set aside for him, it was held that no property passed; and that, even if there had been no other pieces on hand than those in the particular lot, and no more than the exact number, they would not have passed without a

benefit.(*l*)[1] It is not, however, necessary that a price should actually be named. A contract to sell without naming a price is a contract to sell at

(*l*) Atkinson *v.* Bell, 3 B. & C. 277 (E. C. L. R. vol. 10); Wilkins *v.* Bromhead, 5 M. & G. 963, 973 (E. C. L. R. vol. 44).

specific act of appropriation, equivalent to a delivery in contemplation of law. But if the paper had been sold in a separate lot, or in gross, or if the pieces had been separated from the rest, and pointed out to the buyer as his 2000, the property would have passed, though there had been a small excess: Golder *v.* Ogden, 15 Penn. St. 528.

In determining when the title to goods which are the object of a contract, passes, regard is of course to be had to the intention of the parties, and if by anything it appears that it was designed that the title should pass, notwithstanding there was still something to be done, the contract will be determined in accordance with that intention: Amber *v.* Hamlet, 12 Pick. 76; Leedom *v.* Phillips, 1 Yeates 529; Bowen *v.* Burk, 13 Penn. St. 148; Clemens *v.* Davis, 7 Id. 263; Riddle *v.* Varnum, 20 Pick. 280; Harris *v.* Smith, 3 S. & R. 20; Denis *v.* Alexander, 3 Penn. St. 50; Boswell *v.* Green, 1 Dutch. 390; Beller *v.* Block, 19 Ark. 566; Chapin *v.* Potter, 1 Hilton 366; Sewall *v.* Eaton, 6 Wis. 490; Leonard *v.* Winslow, 2 Grant's Cas. 139; Susquehanna Co. *v.* Finney, 58 Penn. St. 200.

Even the converse of the proposition, that delivery, actual or constructive, is necessary to pass title where goods are sold, is not always true, for in the case of an actual delivery of personal chattels after a sale, the property may not pass, as when, for instance, the delivery has been conditional: Andrew *v.* Dieterick, 14 Wend. 31; Davis *v.* Hill, 3 N. H. 382; Young *v.* Austin, 6 Pick. 280; Bennett *v.* Platt, 9 Id. 558; Lester *v.* McDowell, 18 Penn. St. 91; Outwater *v.* Dodge, 7 Cowen 85; Riddle *v.* Varnum, 20 Pick. 280; Houdlette *v.* Tallman, 14 Maine 400; Devane *v.* Fennell, 2 Ired. 36; Deshon *v.* Bigelow, 8 Gray 159; Henderson *v.* Lauck, 21 Penn. St. 359; Sargent *v.* Metcalf, 5 Gray 306; Fleeman *v.* McKean, 25 Barb. 474; Herring *v.* Hoppock, 3 Duer 20; Hunter *v.* Warner, 1 Wis. 141; Bryant *v.* Crosby, 36 Maine 562; McFarland *v.* Farmer, 42 N. H. 386; for delivery is but the evidence of a transfer of title: McCandlish *v.* Newman, 22 Penn. St. 460; Henderson *v.* Lauck, 21 Id. 359; hence, where it was agreed that the plaintiffs should deliver to a railroad a certain quantity of iron rails, which should be laid in a designated part of the tract, and upon payment should become the property of the road, and the rails were laid, it was held that they did not become the property of the road until paid for, and that the plaintiffs were entitled to hold them against subsequent mortgagees of the road: Haven *v.* Emery, 33 N. H. 66; but ordinarily in case of a conditional sale, with delivery, there is no lien for the purchase-money: Haak *v.* Linderman, 64 Penn. St. 499.

As a general test of the transfer of the title of goods by a sale, it is only necessary to inquire whether the vendee can bring trover or replevin for them, or take them into his possession, without committing a trespass: Lester *v.* McDowell, 18 Penn. St. 91; McDowell *v.* Hewett, 15 Johns. 349; Smith *v.* Smith, 5 Penn. St. 254; Leedom *v.* Phillips, 1 Yeates 529. See also, generally, Eagle *v.* Eichelberger, 6 Watts 29; Brewer *v.* Smith, 3 Greenl. 44; Mason *v.* Thompson, 18 Pick. 305; Barnard *v.* Poor, 21 Id. 378; Dunlap *v.* Berry, 4 Scam. 327; Frazier *v.* Hilliard, 2 Strob. 309; Williams *v.* Allen, 10 Humph. 337; Lehigh Co. *v.* Field, 8 W. & S. 232; Macomber *v.* Parker, 13 Pick. 175; Scott *v.* Wells, 6 W. & S. 357; Waldo *v.* Belcher, 11 Ired. 609; Sawyer *v.* Nichols, 40 Maine 212; Scudder *v.* Worster, 11 Cush. 573; Penn. R. R. *v.* Hughes, 39 Penn. St. 521.

[1] See *ante*, note (1), p. 36.

a reasonable price; and the property in goods may well pass by such a contract.(*m*) So a contract to sell by weight may pass the property in the goods before they are actually weighed, if such appear to be the intention of the parties.(*n*)

But with regard to goods of the value of 10*l.* or upwards, additional requisites have been enacted by the seventeenth section of the Statute of Frauds,(*o*) which provides, "that no contract for the sale of any goods, wares and merchandises for the price of 10*l.* sterling or upwards shall be allowed to be good, except the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the bargain, or in part of payment, or that some note or memorandum in writing of the said bargain be made and signed by the parties to be charged by such contract, or their agents thereunto lawfully authorized."[1] And by a modern statute,(*p*) this enactment "shall extend to all contracts for the sale of goods of the *value* [*41] *of 10*l.* sterling and upwards, notwithstanding the goods may be intended to be delivered at some future time, or may not at the time of such contract be actually made, procured or provided, or fit or ready for delivery, or some act may be requisite for the making or completing thereof, or rendering the same fit for delivery."

The above section of the Statutes of Frauds has been interpreted by a vast number of cases decided on almost every one of the phrases it contains.(*q*) The chief difficulty has been to determine the exact meaning of the acceptance of part of the goods and actual receipt of the same, required on the part of the buyer, and to ascertain in each particular

(*m*) Joyce *v.* Swann, 17 C. B. N. S. 84 (E. C. L. R. vol. 112).
(*n*) Turby *v.* Bates, 2 H. & N. 200.
(*o*) 29 Car. II. c. 3.
(*p*) Stat. 9 Geo. IV. c. 14, s. 7. See Hoadley *v.* M'Laine, 10 Bing. 482, 486 (E. C. L. R. vol. 25).
(*q*) See Smith's Mercantile Law 468 *et seq.* 5th ed.; 495 *et seq.* 6th ed.

[1] The provision of the English Statute of Frauds, on this subject, is in force in South Carolina and Georgia: Cason *v.* Cheely et al., 6 Geo. 554; and in many of the States of the Union, analogous laws are in operation, by which contracts for the sale of chattels, beyond a certain value, are declared void, unless there be delivery, or earnest, or the contract be in writing; thus, in Arkansas, Maine, and New Jersey, this sum is fixed at $30; in Massachusetts, Michigan, and New York, at $50; in New Hampshire at $33 33; in Vermont at $40, and in California at $200, while in Florida all contracts for the sale of personal property, no matter what may be the value, must be in writing. In Alabama, Delaware, Kentucky, Maryland, Ohio, Pennsylvania and Virginia, the seventeenth section of the English statute, respecting the sale of chattels above the value of 10*l.*, is not in force; nor does it apply in North Carolina, Texas, or Missouri.

case whether such acceptance and actual receipt have taken place or not. The acceptance required appears not to be necessarily such as shall preclude the purchaser from afterwards objecting to the quality of the goods,(*r*) and it may be prior to the receipt.(*s*)[1] Actual receipt seems, according to the great preponderance of authority, to mean receipt of the *possession* of the goods, and to be merely correlative to delivery of possession on the part of the vendor.(*t*) There must, therefore, be an actual transfer of the article sold, or some part thereof, by the seller, and an actual taking possession of it by the buyer.(*u*) The possession of a simple bailee is, however, as we have seen,(*v*) constructively the possession of the bailor. If therefore the vendor should change his character and become the bailee of the purchaser, there may be a sufficient actual receipt in law on the part of the *purchaser, although the goods [*42] still remain in the possession of the vendor.(*x*) So if any part of the goods be delivered to an agent of the vendee, or to a carrier named by him, this is a sufficient receipt by the vendee himself:(*y*) and if the goods should be in the possession of a warehouseman or wharfinger at the time of sale, the receipt by the purchaser of a delivery order, provided it were coupled with the assent of the bailee, would be a sufficient receipt of the goods within the statute.(*z*) The wharfinger holds the goods as the agent of the vendor, until he has agreed with the purchaser to

(*r*) Morton *v.* Tibbett, 15 Q. B. 428 (E. C. L. R. vol. 69); Bushell *v.* Wheeler, 15 Q. B. 442 (E. C. L. R. vol. 69); Currie *v.* Anderson, 2 E & E. 592, 600 (E. C. L. R. vol. 105). See, however, Hunt *v.* Hecht, 8 Exch. 814; Nicholson *v.* Bower, 1 E & E. 72 (E. C. L. R. vol. 102); Smith *v.* Hudson, Q. B. 11 Jur. N. S. 622; 6 B. & S. 431 (E. C. L. R. vol. 118).

(*s*) Cusack *v.* Robinson, 1 B. & S. 299 (E. C. L. R. vol. 101).

(*t*) Smith's Mercantile Law, 472, n. (*g*), 5th ed.; 499, n. (*m*), 6th ed. Saunders *v.* Topp, 4 Ex. Rep. 390.

(*u*) Baldy *v.* Parker, 2 B. & C. 37, 41 (E. C. L. R. vol. 9).

(*v*) *Ante*, p. 27.

(*x*) Castle *v.* Sworder, Exch. Chamb. 6 H. & N. 828, reversing the judgment of the Court of Exchequer, 5 H. & N. 281.

(*y*) Dawes *v.* Peck, 8 T. Rep. 330; Hart *v.* Bush, 1 E. B. & E. 494, 498 (E. C. L. R. vol. 96). See however Norman *v.* Phillips, 14 M. & W. 277; Coombs *v.* Bristol and Exter Railway Company, 3 H. & N. 510.

(*z*) Bentall *v.* Burn, 3 B. & C. 423 (E. C. L. R. vol. 10); Pearson *v.* Dawson, 1 E. B. & E. 448 (E. C. L. R. vol. 96). See *ante*, p. 37.

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[1] In Georgia it has been held that there is no acceptance, so long as the buyer has the right to object to the quantity or quality: Lloyd *v.* Wright, 25 Geo. 215. And in New Hampshire, no promise or declaration of the buyer, that he will take the goods, then left for him at another place, at a future day, can be held an acceptance, or an admission of acceptance; Shepherd *v.* Pressey, 32 N. H. 49.

hold for him. Then, and not till then, the wharfinger is the agent or bailee of the purchaser, and the possession of such wharfinger is that of the purchaser; and then only is there a constructive delivery to him.(*a*)

The requisitions of the statute, it will be observed, are in the alternative. Either the buyer must accept part of the goods sold, and actually receive the same, *or* he must give something in earnest or in part of payment, *or* some note or memorandum in writing must be signed. The two former alternatives are left as they were before the statute; but the last is a new requisition which must be observed in the absence of either of the former.(*b*) The effect of the statute, therefore, is to abolish tender and mere words as sufficient for a sale, and to substitute for them the more exact evidence of a note or memorandum in [*43] writing.(*c*) But as the *memorandum may be signed by an agent lawfully authorized, the bought or sold notes given by a broker are a sufficient memorandum within the meaning of the statute.(*d*) And it is held that the entry of a purchaser's name by an auctioneer's clerk at an auction is also sufficient to satisfy the statute, as the clerk is, for that purpose, the authorized agent of the purchaser.(*e*) But one of the contracting parties to a sale cannot be the agent for the other for the purpose of signing a memorandum of the bargain.(*f*)

If the agreement is not to be performed within the space of one year from the making thereof, then, however small be the value of the goods, no action can be brought upon it, unless the agreement, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully

(*a*) Farina *v.* Horne, 16 M. & W. 119, 123.

(*b*) Lee *v.* Griffith, 1 B. & S. 272 (E. C. L. R. vol. 101); Wilkinson *v.* Evans, Law Rep. 1 C. P. 407. See Vanderbergh *v.* Spooner, Law Rep. 1 Ex. 316.

(*c*) Every memorandum, letter, or agreement made for or relating to the sale of any goods, wares or merchandise, is exempt from all stamp duty; stat. 55 Geo. III. c. 184, Sched., Part I. tit. Agreement.[1]

(*d*) Grove *v.* Aflalo, 6 B. & C. 117 (E. C. L. R. vol. 13); Barton *v.* Crofts, 16 C. B. N. S. 11 (E. C. L. R. vol. 111).

(*e*) Bird *v.* Boulter, 4 B. & Ad. 443 (E. C. L. R. vol. 24).

(*f*) Farebrother *v.* Simmons, 5 B. & Ald. 333 (E. C. L. R. vol. 7).

[1] The Stamp Duty under the Internal Revenue Act, is five cents for every sheet or piece of paper upon which an agreement or contract shall be written, provided that if more than one agreement or contract shall be written on the same sheet or piece of paper, five cents is to be paid for every additional agreement or contract: Act of Congress of June 30, 1864, sec. 170, Schedule B., title Agreement, 2 Brightly's U. S. Dig., p. 377, sec. 356.

authorized.[1] This is another provision of the Statute of Frauds,(*g*) and will be hereafter noticed more particularly.

Although the property in goods sold passes, as we have seen,(*h*) from the vendor to the vendee, immediately upon the execution of a valid contract for sale, yet the possession of the goods of course remains with the vendor until he deliver them, which he is bound to do when the purchaser is ready to pay the price,(*i*) but not before.(*k*) And so long as the vendor retains actual or constructive possession of the goods, he has a lien upon them for so much of the purchase-money as may remain *unpaid.(*l*) But when the goods are once delivered by the vendor out of his own actual or constructive possession, his lien is gone; for lien in law is, as we have seen,(*m*) merely a right to retain possession, and not to recover it when given up. [*44]

Under certain circumstances, however, the vendor of goods has a right to resume their possession, with which he had previously parted under a contract for sale. This right is called the right of *stoppage in transitu;* and it occurs when goods are consigned entirely or partly(*n*) on credit from one person to another, and the consignee becomes bankrupt or insolvent before the goods arrive.[2] In this event the consignor(*o*) has a right

(*g*) 29 Car. II. c. 3, s. 4.

(*h*) *Ante*, p. 38.

(*i*) Rawson *v.* Johnston, 1 East 203.

(*k*) Bloxam *v.* Sanders, 4 B. & C. 941 (E. C. L. R. vol. 10).

(*l*) Dixon *v.* Yates, 5 B. & Ad. 313 (E. C. L. R. vol. 27); Lackington *v.* Atherton, 7 M. & G. 360 (E. C. L. R. vol. 49).

(*m*) *Ante*, p. 28.

(*n*) Hodgson *v.* Loy, 7 T. R. 440.

(*o*) Bird *v.* Brown, 4 Ex. Rep. 786.

[1] A similar provision to that stated in the text, and transcribed from the English statute of Frauds and Perjuries, has been incorporated into the statute laws of almost all the states. The statutes of North Carolina and Pennsylvania are, however, an exception to this rule, and do not contain this restriction upon contracts.

[2] Three circumstances must concur, in order that the vendor of goods may have the right of *stoppage in transitu.* 1. The vendee must have become insolvent: Jordan *v.* James, 5 Ham. 88; Stanton *v.* Eager, 16 Pick. 467; White *v.* Welsh, 38 Penn. St. 396. 2. The purchase-money must not have been paid: Jordan *v.* James, 5 Ham. 88; Stanton *v.* Eager, 16 Pick. 467; and, 3. The *transitus* of the goods must not have been determined, by a delivery to the vendee, either actual or constructive: Newhall *v.* Vingas, 1 Shep. 93; Buckley *v.* Furness, 17 Wend. 504; Covell *v.* Hitchcock, 23 Wend. 611; s. c. 20 Id. 167; Mottram *v.* Heyer, 1 Denio 483, s. c. 5 Id. 629; Sawyer *v.* Joslin, 20 Vt. 172; Frazier *v.* Hilliard, 2 Strobh. 309; Donath *v.* Broomhead, 7 Penn. St. 301; Lane *v.* Robinson, 18 B. Mon. 623; White *v.* Welsh, 38 Penn. St. 396.

1st. The vendee must have become insolvent. It is only where the vendee becomes insolvent after the sale has been effected, and before delivery, that the

to direct the captain of the ship, or other carrier, to deliver the goods to himself or his agent instead of to the consignee, who has thus become

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right of *stoppage in transitu* exists. If the vendee was insolvent at the time of the consignment, whether that fact be known or unknown to the consignor, the right of retaking the goods does not exist: Rogers *v.* Thomas, 20 Conn. 53; Buckley *v.* Furness, 15 Wend. 137; Naylor *v.* Dennie, 8 Pick. 198. But see Benedict *v.* Schaettle, 12 Ohio N. S. 515; Reynolds *v.* Roston, &c., R. R., 43 N. H. 580. To constitute insolvency, it is not necessary that the consignees should have been declared bankrupt, or taken the benefit of the insolvent laws; any competent evidence that will satisfy a jury is sufficient: Hayes *v.* Mouille, 14 Penn. St. 48. But there must be some visible change in the pecuniary situation of the vendee, and some open notorious act on his part, calculated to affect his credit; some change in his apparent circumstances which would operate as a surprise on the vendor, and which, if he had known, he would not have given credit to the vendee: Rogers *v.* Thomas, 20 Conn. 63; such as pecuniary embarrassment, and probable inability to pay his debts: Secomb *v.* Nutt, 14 B. Mon. 324. The fact of the goods having been sold on credit, will not deprive the consignor of his right: Ilsley *v.* Stubbs, 9 Mass. 65; Stubbs *v.* Lund, 7 Id. 453; Newhall *v.* Vingas, 1 Shep. 93; Atkins *v.* Colby, 20 N. H. 154; nor charging commission for doing the business, nor the acceptance of part payment; nor is he obliged to refund the payment or pay the freight.

2d. The purchase-money must not have been paid; but the taking of bills on the vendee, drawn by his agent, will not defeat the right. When, however, goods are purchased and paid for by the order, note, or accepted bill of a third party, without the endorsement or guarantee of the purchaser, it has been held that the vendor has no right of stoppage *in transitu*: 32 Vt. 58.

3d. The *transitus* of the goods must not have been determined by delivery to the vendee, either actual or constructive.

The question of delivery is often difficult to determine, and must necessarily depend, to a certain extent, upon the interpretation of the contract in each particular case; but it has been held, that the delivery to the vendee of a bill of sale, will defeat the vendor's right of stopping the goods: Davis *v.* Bradley, 24 Vt. 55; Ridgway *v.* Bowman, 7 Cush. 268; and, where the vendee intercepted the goods on their passage, before they had reached their ultimate destination, and took possession of them, it was held that the delivery was complete: Jordan *v.* James, 5 Ham. 88; Secomb *v.* Nutt, 14 B. Mon. 324; on the other hand, if the goods on the passage be seized by a creditor of the purchaser, that will not deprive the vendor of his right of stoppage: Buckley *v.* Furness, 15 Wend. 137; Wood *v.* Yeatman, 15 B. Mon. 270; Kitchen *v.* Spear, 30 Vt. 545; O'Brien *v.* Norris, 16 Md. 122; and, although goods may come to the hands of a carrier of a purchaser, at a point intermediate between the residences of the vendor and vendee, that will not be considered such a delivery to the vendee, as to deprive the vendor of his right: Buckley *v.* Furness, 15 Wend. 137; Cabeen *v.* Campbell, 30 Penn. St. 254; Pottinger *v.* Hecksher, 2 Grant's Cas. 309. So of the possession of a warehouseman, at a point intermediate between consignor and consignee, even though it may be mentioned as the place where the goods are to be sent, provided it is not their ultimate destination: Covell *v.* Hitchcock, 23 Wend. 611; s. c. 20 Id. 167; Harris *v.* Pratt, 17 N. Y. 249; but if goods are sent to a forwarding merchant, to await in his hands the instructions of the purchaser respecting any further transit, their transit is at an end when they reach his hands: Biggs *v.* Barry, 2 Curtis C. C. 259; Guilford *v.* Smith, 30

unable to pay for them. The right of stoppage in transitu was first allowed and enforced only by the Court of Chancery, which, in the exercise of its equitable jurisdiction, considered that, under the circumstances above mentioned, it was very allowable in equity for the consignor to get his goods again into his own hands.(*p*) But the right was subsequently acknowledged by the courts of law; and it is now constantly enforced by them. As this right was originally of equitable origin it cannot be expected to depend on strictly legal principles; and the doctrines of law on this particular subject are in fact unlike its usual doctrines on other

(*p*) Wiseman *v.* Vandeputt, 2 Vern. 203; Snee *v.* Prescot, 1 Atk. 245.

Vt. 49; Pottinger *v.* Hecksher, 2 Grant's Cas. 309, and see also Cartwright *v.* Wilmerding, 24 N. Y. 521; Hoover *v.* Tibbits, 13 Wis. 79; Blackman *v.* Pierce, 23 Cal. 508; even where the goods, transported by water, were in the port where the vendee resided, and had been there attached by creditors, but had not yet come to the actual possession of the vendee, it was held that the right of stoppage remained: Naylor *v.* Dennie, 8 Pick. 198; but unless it is provided in the bill of lading, that the consignee shall have possession at the conclusion of the voyage, the right of stoppage is concluded on the shipment: Stubbs *v.* Lund, 7 Mass. 453.

Where, before the delivery of the goods, they have been *bonâ fide* sold by the original purchaser, so that all the right is in a third person, it has been held that the vendor's right of stoppage is gone; thus, a *bonâ fide* assignment by endorsement of the bill of lading, will defeat the original vendor's right: Stanton *v.* Eager, 16 Pick. 467; Stubbs *v.* Lund, 17 Mass. 453; Ilsley *v.* Stubbs, 9 Id. 65; The Mary Ann Guest, 1 Blatch. 358; Walton *v.* Ross, 2 Wash. C. C. 283; Boyd *v.* Mosely, 2 Swan 661; Dows *v.* Perrin 16 N. Y. 325; *v.* Lee *v.* Kimball, 45 Maine 172; Dowe *v.* Greene, 32 Barb. 490; Schumacker *v.* Eby, 24 Penn. St. 521.

So, where goods are shipped on account, and at the risk, of the consignee, the bill of lading transfers to him the legal right to the goods, subject only to the equitable right of the consignor, to stop them *in transitu*, if they are not paid for, and the consignee becomes insolvent. If goods be once actually delivered to a servant or correspondent of the vendee, authorized by him to receive them, the right of the vendor to stop them, in the event of the insolvency of the vendee, is gone: Bolin *v.* Huffnagle, 1 Rawle 9; Biggs *v.* Barry, 2 Curtis C. C. 259; Caheen *v.* Campbell, 30 Penn. St. 254. See also Wengar *v.* Barnhait, 55 Id. 305.

Where the vendor shipped the goods on board of a packet vessel, the master of which refused to deliver them, on his arrival, to the vendee, until he was paid a balance due to him for antecedent freights; and the vendee declining to pay it, the goods were brought back by the master; it was held, that the vendor had still the right to stop the goods, the *transitus* not being determined: Allen *v.* Mercier, 1 Ash. 103. The *transitus* of the goods, and the right of stoppage *in transitu*, is determined by delivery to the vendee, either actual or constructive, or by circumstances which are equivalent to such delivery: Donath *v.* Broomhead, 7 Penn. St. 301. Where goods sold, to be paid for on delivery, were put on board a vessel appointed by the vendee, not to be transported to him, or delivered for his use at a place of his appointment, but to be shipped by such vessel in his name, from his place of residence and business to a third person, it was held, there was no right of stoppage *in transitu* after the goods were embarked: Rowley *v.* Bigelow, 12 Pick. 307; and see, also, Stubbs *v.* Lund, 7 Mass. 453; Hollingsworth *v.* Napier, 3 Caines 182.

matters. Thus it is at variance with the general principles of law that [*45] a man should be allowed to transfer to another a right which he has not, or that a second purchaser should *stand in a better position than his vendor ;(*q*) but the consignee of goods may, by endorsing the bill of lading to a *bonâ fide* endorsee, defeat the consignor's right to stop in transitu.(*r*) So a delivery of goods into the possession of a carrier appointed by the vendee is, in construction of law, a delivery to the vendee himself, and divests the vendor's lien for the unpaid purchase-money ;(*s*) but until the *transitus* is completely ended, or the goods come to the actual possession of the vendee, the vendor's right to stop them in transitu may still be exercised in the event of the bankruptcy or insolvency of the vendee,(*t*) unless indeed such right be defeated, as we have said, by a *bonâ fide* endorsement of the bill of lading. Thus, although by the sale of the goods the property in them, involving the risk of their loss, passes to the purchaser, and although the possession of them be delivered to a carrier named by him, still such possession may be resumed by the vendor during the journey, in the event of the bankruptcy or insolvency of the vendee. As this right is a departure from legal principles on the vendor's behalf, it is allowed only in one of the two cases of bankruptcy or insolvency, by which latter term appears to be here meant a general inability to pay, evidenced by stopping of payment.(*u*) When possession of goods has been resumed by the vendor under his [*46] right of stoppage in transitu, he is restored to *the lien for the unpaid purchase-money which he had before he parted with such possession ; but, according to the better opinion, the contract for sale is not thereby rescinded.(*x*)[1]

(*q*) Dixon *v.* Yates, 5 B. & Ad. 339 (E. C. L. R. vol. 27).

(*r*) Lickbarrow *v.* Mason, 2 T. R. 63 ; 1 H. Bl. 357 ; 6 East 21 ; 1 Smith's Leading Cases 388 ; Jenkyns *v.* Usborne, 7 M. & G. 678, 699 (E. C. L. R. vol. 49).

(*s*) Dawes *v.* Peck, 8 T. R. 390 ; *ante*, p. 40 ; Wilmshurst *v.* Bowker, in error, 7 M. & G. 882 (E. C. L. R. 49).

(*t*) Holst *v.* Pownal, 1 Esp. 240 ; Northey *v.* Field, 2 Esp. 613 ; Jackson *v.* Nichol, 5 New Cas., 508, 519. See Van Casteel *v.* Booker, 2 Ex Rep. 691 ; Heinekey *v.* Earle, 8 E. & B. 410 (E. C. L. R. vol. 92) ; Smith *v.* Hudson, Q. B. 11 Jur. N. S. 622 ; 6 B. & S. 431 (E. C. L. R. vol. 118) ; Berndtson *v.* Strang, L. C. 16 W. R. 1025 ; Law Rep. 3 Ch. 588.

(*u*) See Smith's Merc. Law, 525, n. (*b*), 5th ed. ; 554, n. 6th ed. The case of Wilmshurst *v.* Bowker, 5 New Cas. 541; 7 Scott 561 ; 2 M. & G. 812 (E. C. L. R. vol. 40), was reversed in error, 7 M. & G. 882 (E. C. L. R. vol. 49.)

(*x*) Bloxam *v.* Sanders, 4 B. & C. 949 (E. C. L. R. vol. 10) ; 1 Smith's Leading Cases 432 ; Schotsmans *v.* Lancashire and Yorkshire Railway Company, Law Rep. 2 Ch. 332, 340; 36 L. J. N. S. 361, 366.

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[1] See also Wilmshurst *v.* Bowker, 5 Bing. N. C. 541 (E. C. L. R. vol. 35, 218). It appears never to have been expressly decided in England, whether the effect of

There is one case in which the property in goods passes from one person to another by payment of their value without any actual sale. In any action of trover(*y*) the plaintiff is entitled to damages equal to the value of the property he has lost, but not further, unless he has sustained any special damage.(*z*) The defendant therefore, having paid the amount of the damages, is entitled to retain the goods in respect of which the action is brought; and the property in them vests in him accordingly.(*a*)[1]

The alienation of personal chattels is prohibited to be made by certain persons and for certain objects. And first with respect to persons. An *alien* or foreigner is under great restrictions as to the acquirement of real estate;(*b*) but with respect to personal chattels he stands on the same footing as a natural-born subject; for by the act to amend the laws relating to aliens,(*c*) it is enacted(*d*) that from and after the passing of this

(*y*) See *ante*, p. 24.

(*z*) Bodley *v.* Reynolds, 8 Q. B. 779 (E. C. L. R. vol. 55).

(*a*) Cooper *v.* Shepherd, 3 C. B. 266, 272 (E. C. L. R. vol. 54). See Buckland *v* Johnson, C. P. 18 Jur. 775; 15 C. B. 145 (E. C. L. R. vol. 80).

(*b*) See Principles of the Law of Real Property 56, 2d ed.; 58, 3d & 4th eds.; 61, 5th & 6th eds.; 62, 7th & 8th eds.

(*c*) Stat. 7 & 8 Vict. c. 66, explained by stat. 10 & 11 Vict. c. 83.

(*d*) Sect. 4.

stoppage *in transitu*, is entirely to rescind the contract or only to replace the vendor in the same position as if he had not parted with the possession, and entitle him to hold the goods until the price be paid down: Clay *v.* Harrison, 10 B. & C. 106; Wentworth *v.* Outhwaite, 10 M. & W. 452. In Bloxam *v.* Saunders, 10 E. C. L. R. 477, the defendants refused to deliver hops, on account of the bankruptcy of the vendee, and afterwards resold them. The court held that the plaintiffs could not maintain trover, without payment or tender of the price, but that if the vendor resold the hops wrongfully, they might bring a special action for the injury sustained by such wrongful sale, and recover damages to the extent of that injury; and the same reasoning was held in Wilmhurst *v.* Bowker, which was also an action of trover, in which a similar decision was given. These cases indicate that the Courts have shown a disposition to hold that stoppage *in transitu* does not rescind the contract, but only gives or restores to the vendor a lien for the price: Schotsmans *v.* Lancashire, &c. R. R., 2 L. R. Ch. Ap. Cas. 340. The following American authorities support the doctrine taken in the text, and decide that this right of stoppage *in transitu*, does not proceed on the ground of rescinding the contract, but on the ground of an equitable lien; the contract remains in force, at least to such an extent that the vendee may still have the goods by paying the price of them: Jordan *v.* James, 5 Ham. 88; Rowley *v.* Bigelow, 12 Pick. 307; Newhall *v.* Vargas, 3 Shep. 314.

[1] The action of replevin will also determine the title to personal chattels, for it may be brought wherever one claims personal property in the possession of another. See Morris on the Law of Replevin, p. 68, &c., where the cases are collected.

For the statutes of Pennsylvania and other states, on the subject of Replevin, see Morris on the Law of Replevin, Appx.

act, any alien, being the subject of a friendly state, shall and may take and hold by purchase, gift, bequest, representation or otherwise, every [*47] species of personal property, *except chattels real, as fully and effectually to all intents and purposes, and with the same rights, remedies, exceptions, privileges and capacities, as if he were a natural-born subject of the united kingdom. The gift of an *infant* or person under the age of twenty-one years is voidable,(*e*) and that of an *idiot* or *lunatic* appears to be absolutely void:(*f*) in this respect the law of personal chattels is now the same as that of real estate.(*g*) Married women also are incapable of making any disposition of personal chattels, except such as may be settled in equity in trust for their own *separate use;* for marriage is an absolute gift in law of all the wife's choses in possession to her husband, as well as those she is possessed of at the time of the marriage, as those which come to her during her coverture.(*h*)[1] Persons convicted of treason or felony forfeit on such conviction the whole of their goods and chattels to the crown: and nothing but a *bonâ fide* alienation for a valuable consideration, made previously to conviction, can avert such forfeiture.(*i*) When a felony is not capital, the punishment

(*e*) Bac. Abr. tit. Infancy and Age (I), 3. (*f*) Ibid. tit. Idiots and Lunatics (F).

(*g*) See Principles of the Law of Real Property 57, 2d ed.; 59, 3d and 4th eds.; 62, 5th ed.; 63, 6th ed.; 64, 7th & 8th eds.

(*h*) Co. Litt. 300 a; 1 Rop. Husb. and Wife 169. See *post*, the chapter on Husband and Wife.

(*i*) 3 Rep. 82 b; 4 Bla. Com. 387, 388; Perkins *v.* Bradley, 1 Hare 219; Chowne *v.* Baylis, 31 Beav. 351.

[1] By an act of the legislature of Pennsylvania, passed April 11, 1848, all property, whether real or personal, owned by or belonging to any married woman, shall be owned, used and enjoyed by her as her own separate property, freed from any liability for the debts of her husband: Purd. Dig. (1861), p. 699.

The statutes of the State of New York contain the following provision, 3 Revis. Stat. of N. Y., Banks & Bro.'s fifth ed., p. 239: "The real and personal property of any female, who may hereafter marry, and which she shall own at the time of marriage, and the rents, issues, and profits thereof, shall not be subject to the disposal of her husband, nor be liable for his debts, and shall continue her sole and separate property, as if she were a single female."

A similar provision is found in the statute law of Massachusetts: Gen. Stats. Mass. (1860), p. 537.

In California, the property of the wife, acquired before the marriage, and all such as shall be acquired by her after coverture, by gift, bequest, devise or descent, may become her separate property, by a full and complete inventory thereof being made, and acknowledged and proved in the manner required by law for a conveyance of land; but property acquired in any other manner than above specified, during coverture, by the wife, shall be the common property of husband and wife. But in all cases the husband shall have the management of his wife's estate, during the coverture, unless he shall be guilty of wasting or squandering it: Act of 17 April, 1850, Wood's Cal. Dig. (1860), p. 487.

endured has the effect of a pardon ;(*k*) but the restoration to civil rights does not take effect till the determination of the period of punishment. All personal property, therefore, which accrues to a felon during his transportation is forfeited to the crown ;(*l*) but a mere contingent interest will not be forfeited, if it do not vest until the expiration of the period of banishment.(*m*)

[*48] *With regard to the objects for which the alienation of chattels personal is prohibited, gifts to charitable purposes are not restricted, neither are corporations excepted objects, as in the case of landed property.(*n*)[1] But by a statute of the reign of Elizabeth,(*o*) the gift or alienation of any lands, tenements, hereditaments, *goods and chattels*, made for the purpose of delaying, hindering or defrauding creditors, is rendered void as against them, unless made upon *good*, which here means *valuable*, consideration, and *bonâ fide* to any person not having at the time of such gift any notice of such fraud. There are also more stringent provisions to the same effect contained in the bankrupt laws, to which reference will be hereafter made in the chapter on bankruptcy. The fraudulent purpose intended by the statute of Elizabeth can of course only be judged of by circumstances. Thus it has been held that if the owner of goods make an absolute assignment of them by deed to one of his creditors, and yet remain in the possession of the goods, such remaining in possession is a badge of fraud, which renders the assignment void, by virtue of the statute, as against the other creditors.(*p*) But if the assignment be made to secure the payment of money at a future day, with a proviso that the debtor shall remain in possession of the goods until he shall make default in payment, the possession of the debtor, being then consistent with the terms of the deed, is not regarded in modern times as rendering the transaction fraudulent within the meaning

(*k*) Stat. 9 Geo. IV. c. 32, s. 3. (*l*) Roberts *v*. Walker, 1 Russ. & M. 752.

(*m*) Stokes *v*. Holden, 1 Keen 145; Thompson's Trusts, 22 Beav. 506.

(*n*) See Principles of the Law of Real Property 58, 2d ed.; 60, 61, 3d & 4th eds.; 64, 65, 5th ed.; 69, 6th ed.; 72, 7th & 8th eds.

(*o*) Stat. 13 Eliz. c. 5.

(*p*) Twyne's Case, 3 Rep. 80 b; 1 Smith's Leading Cases 1; Edwards *v*. Harben, 2 T. Rep. 587.

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[1] By an act of the legislature of the State of Pennsylvania, passed April 26, 1855, no bequest, devise, or conveyance for religious or charitable uses, shall be valid unless made by will or deed at least one calendar month before the decease of the testator or alienor. And such dispositions of property, must conform in other respects with the provisions and restrictions of the said act: Purd. Dig. (1861), p. 146, sec. 6.

of the statute.(q) Such a transaction is in fact a *mortgage* of the goods, analogous to a mortgage of lands.(r)[1] The property in the [*49] *goods passes at law by the deed to the mortgagee,(s) whilst the posses-

(q) Edwards *v.* Harben, 2 T. Rep. 587; Martindale *v.* Booth, 3 B. & Ad. 498 (E. C. L. R. vol. 23); Reed *v.* Wilmot, 7 Bing. 577 (E. C. L. R. vol. 20).

(r) See Principles of the Law of Real Property 332, 2d ed.; 349, 4th ed.; 360, 5th ed.; 382, 6th ed.; 389, 7th ed.; 407, 8th ed.

(s) Gale *v.* Burnell, 7 Q. B. 850 (E. C. L. R. vol. 53).

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[1] It is a generally established rule, that, as regards third persons, there cannot be a sale or mortgage of personal property, without a transfer of the possession: Waters' Exrs. *v.* McClellan et al., 4 Dall. 208 note (*a*); Noyes *v.* Brent, 5 Cr. C. C. 656; Kater *v.* Steinrack, 40 Penn St. 501. But this rule is subject to many exceptions; thus, in several of the states there may be a mortgage of personalty, without a notorious and visible change of possession: Whitney *v.* Lowell, 33 Maine 318; Thayer *v.* Stark, 6 Cush. 11; Whitney *v.* Hepwood, Id. 82; Prior *v.* White, 12 Ill. 261; Rugg *v.* Barnes, 2 Cush. 591; Ballume *v.* Wallace, 2 Rich. 80; Smith *v.* Turcher, 9 Ala. 208; Smith *v.* Acker, 23 Wend. 653; Cole *v.* White, 26 Id. 511; Hall *v.* Carnley, 2 Duer 99; Gay *v.* Bidwell, 7 Mich. 519; Morrow *v.* Turney, 35 Ala. 131; Hackett *v.* Manlove, 14 Cal. 85; Crosswell *v.* Allis, 25 Conn. 301; Adler *v.* Claflin, 17 Iowa 89; the mortgage must, however, be recorded, in order to render it valid as regards third parties: Witham *v.* Butterfield, 6 Cush. 217: Brigham *v.* Weaver, Id. 298; Stowell *v.* Goodale, Id. 452; Bishop *v.* Cook, 13 Barb. S. C. 326; Frost *v.* Willard, 9 Id. 440; Wilson *v.* Leslie, 20 Ohio 161; Brown *v.* Webb, Id. 389; Cook *v.* Thayer, 11 Ill. 617; Travis *v.* Bishop, 13 Metc. 304; Shapleigh *v.* Wentworth, Id. 358; Vaughn *v.* Bell, 9 B. Mon. 447; Burditt *v.* Hunt, 25 Maine 419; Appleton *v.* Bancroft, 10 Metc. 231; Camp *v.* Camp, 2 Hill 628; Fadden *v.* Turner, 3 Jones 481; Barfield *v.* Cole, 4 Sneed 465; 465; Call *v.* Gray, 37 N. H. 428; but, as between the parties themselves, it has been held, that the mortgage would be good without being recorded, or without a transfer of the possession: Smith *v.* Moore, 11 N. H. 55; Winsor *v.* McLellan, 2 Story 492; Hall *v.* Snowhill, 2 Green 8; Merrick *v.* Avery, 14 Ark. 370; Wescott *v.* Gunn, 4 Duer 107; Johnson *v.* Jeffries, 30 Miss. 423; Fuller *v.* Paige, 26 Ill. 358; Brooks *v.* Ruff, 37 Ala. 371; Lockwood *v.* Slevin, 26 Ind. 124.

But a mortgage of chattels executed in the state of New York, and valid by the laws of that state without a change of possession, will not protect the property from attachment in the state of Massachusetts, by creditors of the mortgagor, if found there in the possession of the mortgagor, though brought there by him for a temporary purpose: Wentworth *v.* Leonard, 4 Cush. 414. And see to the same principle: Blystone *v.* Burgett, 10 Ind. 28; Bowman *v.* McKleroy, 14 La. An. 587.

To some extent the mortgage of personal property seems subject to the rules governing the mortgage of real estate; thus, it may be sold on execution against the mortgagor, and the purchaser will take it subject to the mortgage: Bank of Lansingburgh *v.* Crary, 1 Barb. S. C. 542; or the mortgagee will have the right to recover possession of the mortgaged property from any person holding under him through such sale: Mercer *v.* Tinsley, 14 B. Mon. 273. Again, a mortgage of personalty is good, and will have effect against any other title inferior to it, except a sale or mortgage of the same goods from the same person, previously recorded: Youngblood *v.* Keadle, 1 Strob. 121; White's Bank *v.* Smith, 7 Wall. U. S. 646.

sion of them rightly remains with the mortgagor. The mortgagee therefore cannot maintain an action of trover for the goods against a stranger, until default has been made by the mortgagor in payment of the money secured.(*t*) In this respect a mortgage of goods differs from a mere pledge, in which the property in the goods remains with the pledgor, and the pledgee, although he may have power to sell them, obtains possession only,(*u*) the right to retain which enables him to maintain an action of trover.(*v*) The chief disadvantage in a mortgage of goods is, that, as the goods continue in the possession of the mortgagor as reputed owner, they will, by virtue of provisions in one of the bankrupt acts, become liable, in the event of his bankruptcy, to be sold for the benefit of his creditors

(*t*) Bradley *v*. Copley, 1 C. B. 685 (E. C. L. R. vol. 50); Brierley *v*. Kendall, 17 Q. B. 937 (E. C. L. R. vol. 79). If the mortgagor should retain possession *after* default in payment at the time specified, it may possibly be doubted whether the security would not then be void as against creditors under the statute of Elizabeth, for, by the terms of the deed, the mortgagor is only to enjoy possession *until* default. But the better opinion is that the deed will still be good. See 2 Davidson's Precedents 609, 2d ed.; Ex parte Sparrow, 2 De G., M. & G. 907.

(*u*) *Ante*, p. 27.

(*v*) Legg *v*. Evans, 6 M. & W. 36.

A mortgage of personal property to secure future advances, as well as an existing debt, has been held valid for the sum due at the time the mortgagees assert their title: Fairbanks *v*. Bloomfield, 5 Duer 434. And see also 23 How. U. S. 14; Googins *v*. Gilmore, 47 Maine 9; McClelland *v*. Remsen, 36 Barb. 622; Speer *v*. Skinner, 35 Ill. 282.

In Florida, there must be a delivery within twenty days, in order to render the mortgage valid: Sanders *v*. Pepoon, 4 Fla. 465.

In Pennsylvania, the old rule seems generally to prevail, that in order to render a mortgage or sale of personal property valid, as against the creditors of the mortgagor or vendor, in general, a corresponding change of possession thereof must accompany the same. But if such change of possession be impracticable, it must be dispensed with, for the law never requires that which is impossible; for that possession of the thing pledged, which its nature and the circumstances will admit of, is the kind of possession only which the law demands: Fry *v*. Miller, Penn. St. 441; Roberts' Ap., 60 Id. 400; McKibbin *v*. Martin, 64 Id. 352. By an act of the legislature of that state, passed April 5, 1853, Pamp. L. 295, it is provided, that the lessees of coal mines in Schuylkill county, "may mortgage their interests in such rights, or property demised, together with all machinery and fixtures appurtenant or belonging thereto." And see Pamph. L. 1855, p. 362, sec. 8.

See also on the subject of mortgage of chattels: Beaumont *v*. Yeatman, 8 Humph. 542; Provost *v*. Wilcox, 17 Ohio 359; Jewett *v*. Preston, 27 Maine 400; Ferguson *v*. Thomas, 26 Id. 499; Hubby *v*. Hubby, 5 Cush. 515; Weld *v*. Cutler, 2 Gray 195; McTaggart *v*. Rose, 14 Ind. 230; Gregg *v*. Sanford, 24 Ill. 17; State *v*. D'Oench, 31 Misso. 433.

As to the necessity of a transfer of possession in the case of a levy and execution upon personal property: see Levy *v*. Wallis, 4 Dall. 167, note.(*a*)

generally.(*x*)[1] By recent acts of parliament(*y*) every bill of sale of personal chattels, whereby the grantee shall have power to take possession of any effects therein comprised, or a true copy thereof, must be registered in the office of the Court of Queen's Bench within twenty-one days; otherwise such bill of sale is rendered void, so far as regards any [*50] of the goods in the apparent possession *of the grantor, as against the assignees of the grantor, in case of his bankruptcy, or under any assignment for the benefit of his creditors, and as against all sheriff's officers and other persons seizing the effects in execution of any process of any court of law or equity issued against the goods of the grantor, and also as against any subsequent duly registered bill of sale.(*z*) Such bills of sale before the act were valid as against an execution creditor, though void as against assignees under the bankruptcy of the grantor, and the act does not appear to give to such bills of sale as are filed under it any greater validity than they had before.(*a*) But if the bill of sale be not filed, the goods may now be taken in execution, which they could not have been before the act. The act does not apply to fixtures, when they pass by a conveyance of the premises to which they are affixed.(*b*) And as seizure of the goods of a trader under an execution for an amount not less than fifty pounds has now been made an act of bankruptcy,(*c*) a bill of sale of the goods of a trader, whether filed or not, now affords a very unsatisfactory security. The Bills of Sale Act, 1866,(*d*) now pro-

(*x*) Ryall *v.* Rolle, 1 Atk. 165, 170; s. c. nom. Ryall *v.* Rowles, 1 Ves. sen. 348; stat. 6 Geo. IV. c. 16, s. 72, repealed and re-enacted by stat. 12 & 13 Vict. c. 106, s. 125, repealed by stat. 32 & 33 Vict. c. 83, but the provision in question in substance re-enacted by the Bankruptcy Act, 1869, stat. 32 & 33 Vict. c. 71, s. 15, par. 5 (see *post*, p. 54); Freshney *v.* Carrick, 1 H. & N. 653; Spackman *v.* Miller, 12 C. B. N. S. 659 (E. C. L. R. vol. 104); Hornsby *v.* Miller, 1 E. & E. 192 (E. C. L. R. vol. 102).

(*y*) Stats. 17 & 18 Vict. c. 36; 29 & 30 Vict. c. 96.

(*z*) Richards *v.* James, Law Rep. 2 Q. B. 285. By the Bankruptcy Act, 1869, stat. 32 & 33 Vict. c. 71, a trustee is substituted for the assignees in case of bankruptcy.
Jur. N. S. 377; 2 E. & E. 472 (E. C. L. R. vol. 105.)

(*a*) Stansfeld *v.* Cubitt, 2 De G. & Jones 222; Badger *v.* Shaw, Q. B., 8 W. R. 210; 6

(*b*) Mather *v.* Fraser, 2 Kay & J. 536; Waterfall *v.* Pennistone, 6 E. & B. 876 (E. C. L. R. vol. 88); Boyd *v.* Shorrock, V. C. W., Law Rep. 5 Eq. 72. The bill of sale must be duly stamped before it can be registered. Stat. 24 & 25 Vict. c. 91, s. 34.

(*c*) Stat. 32 & 33 Vict. c. 71, s. 6. (*d*) Stat. 29 & 30 Vict. c. 96.

[1] By the fourteenth section of the Bankrupt Act of the United States, it is provided that "no mortgage of any vessel, or of any other goods or chattels made as security for any debt or debts, in good faith and for present consideration, and otherwise valid and duly recorded, pursuant to any statute of the United States, or of any state, shall be invalidated or affected" by the assignment of all the bankrupts property to the assignee in bankruptcy, under the provisions of that section: Brightly's Dig. L. U. S. p. 77.

vides for the renewal every five years of the registration of bills of sale, by an affidavit to be filed in a given form that the security is still subsisting, without which the prior registration will cease to be of any effect.

Choses in possession have long been liable to involuntary alienation for the payment of the debts of their *owner. [*51] On the decease of any person, his personal property generally has always been liable, in the first place, to the payment of his debts of every kind. And if a creditor take proceedings against his debtor in the debtor's lifetime, a sale of his goods and chattels may be procured by means of a writ of *fieri facias* (*fi. fa.*) issued in *execution* of the *judgment* of the court. This writ is of very ancient date, and is usually said to be given by the common law; though some suppose that its name arose from the wording of the statute of Edward I.,(*e*) by which the writ of *elegit* was provided.(*f*) The writ directs the sheriff to cause the debt to be realized out of the goods and chattels of the debtor, *quod fieri facias de bonis et catallis*, &c.: and a sale of the goods is made by the sheriff accordingly. And the seizure of the goods of a trader is now an act of bankruptcy whenever the debt or damages recovered are not less than fifty pounds.(*h*)[1] Goods however are not, as lands formerly were, affected by the mere entry of a *judgment* of a court of law against the owner. The debtor was always allowed to alienate his goods until the writ of execution was issued; although, by a fiction of law, all judicial proceedings, writs of execution included, formerly related back to the first day of the term to which they belonged.(*i*) Goods, therefore, which had been sold after the first day of a term, *might yet practically have been [*52] seized under a writ of *fi. fa.* relating back to that day, but subsequently issued. To remedy this evil, it was enacted by one of the sections of the Statute of Frauds,(*j*) that no writ of *fieri facias* or other writ of execution shall bind the property of the goods against which it is sued, but from the time that such writ shall be delivered to the sheriff, under-sheriff, or coroner, to be executed; and the officer is required, upon re-

(*e*) Stat. 13 Ewd. I. c. 18, called the Statutes of Westminster the Second. See Principles of the Law of Real Property 63, 2d ed.; 66, 3d and 4th eds.; 71, 5th ed.; 75, 6th ed.; 78, 7th and 8th eds.

(*f*) Bac. Abr. tit. Execution (C).

(*h*) Stat. 32 & 33 Vict. c. 71, s. 6; Woodhouse *v.* Murray, Law Rep. 2 Q. B. 634.

(*i*) Com. Dig. tit. Execution (D. 2); Anon., 2 Vent. 218. See 2 Sugd. Vend. & Pur 9th ed. 198.

(*j*) Stat. 29 Car. II. c. 3, s. 16.

[1] See post p. 132, note 2*k*. and p. 134, note 1.

ceipt of the writ, to endorse on it (without fee) the day of the month and year on which he received it. Goods and chattels might therefore be safely alienated, although judgment might exist against the owner, provided a writ of execution were not actually in the hands of the sheriff. And a recent statute now provides that no writ of execution shall prejudice the title to goods acquired by any person *bonâ fide*, and for a valuable consideration, before the actual seizure thereof by virtue of such writ; provided such person had not, at the time when he acquired such title, notice that such writ, or any other writ under which the goods might be seized, had been delivered to the officer and remained unexecuted in his hands.(*k*) It has been decided that an alienation to secure or satisfy another creditor is not void within the above-mentioned statute of the 13 Elizabeth,(*l*) although made with the intention of defeating an expected execution of the judgment creditor.(*m*)[1] Besides the sale of goods under the writ of *fieri facias*, there might also be a writ of *levari facias*, now disused, by which the sheriff levied the corn and other present profit which grew on the lands, together with the rents then due, and the cattle thereon.(*n*) And by the writ of *elegit*, the goods of the debtor [*53] are delivered to his *creditor at an appraised value, together with possession of his lands.(*o*) It has however been enacted that the wearing apparel and bedding of any judgment debtor or his family, and the tools and implements of his trade (not exceeding in the whole the value of five pounds), shall not be liable to seizure under any execution or order of any court against his goods and chattels.(*p*)[2] And the

(*k*) Stat. 19 & 20 Vict. c. 97, s. 1. See Hobson *v.* Thelluson, Law Rep. 2 Q. B. 642, *qu.?*

(*l*) Stat. 13 Eliz. c. 5.

(*m*) Wood *v.* Dixie, 7 Q. B. 892 (E. C. L. R. vol. 53); Hale *v.* Saloon Omnibus Company, 4 Drew. 492.

(*n*) 2 Wms. Saunders, 68 a, n. (1).

(*o*) Pullen *v.* Purbecke, 1 Ld. Raym. 346. See the present forms of this writ and of the writ of fi. fa., 9 A. & E. 986 (E. C. L. R. vol. 36) *et seq.*, 5 New Cas., 366 *et seq.*

(*p*) Stat 8 & 9 Vict. c. 127, s. 8.

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[1] See post p. 132, note 2*h*.

[2] Provisions analogous to that stated in the text, and more or less liberal to the debtor, are in force in almost all the states of the Union: Gen. Stats. N. H. (1867), pp. 415, 416; Thompson's Dig. Laws of Fla., p. 356, sec. 3; 3 Revis. Stats. of N. Y. 645, and 6 N. Y. Stats. at Large, pp. 367, 830; Revis Stats. of Vt. (1839), p. 240, sec. 13; 2 Compiled Laws of Mich. (1857), p. 1211; Code of Ala. (1852), p. 453, sec. 2462; Gen. Stats. Mass. (1860), p. 68, sec. 32; Nix. Dig. Laws of N. J. (1868), p. 295, secs. 9, 13; Revis. Code of N. C. (1855), p. 276, sec. 8; 1 Revis. Stats. Ky. (1860), p. 495, Sup. to Revis. Stats. Ky. p. 714. See sec. 1, 6 Stats. of S. C., pp. 213, 214; Caruth. and Nichol. Stat. Laws of Tenn., p. 533, and Laws of Tenn. Sup. (1846), pp. 230, 231; Laws of Del., Revis. Code, 1852,

Common Law Procedure Act, 1860, now provides, that where goods or chattels have been seized in execution by a sheriff or other officer under process of the superior courts of common law, and some third person claims to be entitled under a bill of sale or otherwise to such goods or chattels by way of security for a debt, the court or a judge may order a sale of the whole or part thereof, upon such terms as to payment of the whole or part of the secured debt or otherwise as they or he shall think fit, and may direct the application of the proceeds of such sale in such manner and upon such terms as to such court or judge may seem just.(q)

Choses in possession are also liable to involuntary alienation on the bankruptcy of their owner. In this event, all such property as may belong to or to be vested in the bankrupt at the commencement of the bankruptcy, or may be acquired by or devolve on him during its continuance, except property held by him on trust for any other person, and except the tools (if any) of his trade and the necessary wearing apparel and bedding of himself, his wife and children, to a value inclusive of tools and apparel and bedding, of twenty pounds in the whole, vest first in the registrar of the Court of Bankruptcy, and then in the trustee appointed by the creditors under the Bankruptcy Act, 1869.(r) Under the previous bankruptcy act the property of the bankrupt *vested first in the official assignee, and then in the creditors' assignees.(s) And in order to prevent traders from obtaining false credit from the posses- [*54]

(q) Stat. 23 & 24 Vict. c. 126, s. 13.
(r) Stat. 32 & 33 Vict. c. 71, ss. 17, 83, paragraph (6). See post, the chapter on Bankruptcy.
(s) Stat. 24 & 25 Vict. c. 134, ss. 108, 117.

pp. 393, 394; Dig. of the Stats. of Ark., pp. 496, 497; Revis. Stats. Ohio (1860), p. 1143, sec. 1.

In Pennsylvania, the exemption law is somewhat peculiar, it being enacted by the act of the 9th of April, 1849, sec. 1, that, "In lieu of the property now exempt by law from levy and sale on execution, issued upon any judgment obtained upon contract and distress for rent, property to the value of three hundred dollars, exclusive of all wearing apparel of the defendant and his family, and all Bibles and school-books in use in the family (which shall remain exempted as heretofore), and no more, owned by or in possession of any debtor, shall be exempt from levy and sale on execution or by distress for rent." Pur. Dig. (1861), p. 432, sec. 20. And by the act of the 4th of March 1870, sewing machines used and owned by private families are also exempted. Purd. Dig. Sup. p. 1606, sec. 1.

By the constitution of the state of Michigan, it is provided, Art. xvi. sec. 1, that "the personal property of every resident of this state, to consist of such property only as shall be designated by law, shall be exempted to the amount of not less than five hundred dollars, from sale on execution, or other final process of any court;" &c. 1 Comp. Laws. Mich. (1857), 72.

See post page 132, note 2 b. and 149 note 2.

sion of property which was not their own, it was provided by the former bankruptcy acts,(*t*) that if any bankrupt at the time he became bankrupt should by the consent and permission of the true owner thereof have in his *possession*, *order*, *or disposition*, any goods or chattels, whereof he was reputed owner, or whereof he had taken upon him the sale, alteration or disposition as owner, the Court of Bankruptcy should have power to order the same to be sold and disposed of for the benefit of the creditors under the bankruptcy. But it was held that, until an order for the sale of such goods had been made by the court, no property in them vested in the assignees;(*u*) and the order was required to specify the particular goods which were to be sold.(*x*) The above provision was apparently extended by the Bankruptcy Act, 1851,(*y*) to all persons whether traders or not. And now by the Bankruptcy Act, 1869,(*z*) the property of the bankrupt divisible amongst his creditors comprises all goods and chattels being at the commencement of the bankruptcy in the possession, order or disposition of the bankrupt, *being a trader*, by the consent and permission of the true owner, of which goods and chattels the bankrupt is reputed owner, or of which he has taken upon himself the sale or disposition as owner; provided that things in action, other than debts due to him in the course of his trade or business, shall not be deemed goods and chattels within the meaning of this clause.

(*t*) Stats. 6 Geo. IV. c. 16, s. 72; 1 & 2 Will. IV. c. 56, s. 7; 5 & 6 Vict. c. 122, s. 59 *et seq.*, repealed and consolidated by stat. 12 & 13 Vict. c. 106, s. 125; Hamilton *v.* Bell, 10 Ex. Rep. 545; 18 Jur. 1109; Reynolds *v.* Hall, 4 H. & N. 519; Holderness *v.* Rankin, 2 De G., F. & J. 258.

(*u*) Heslop *v.* Baker, 6 Ex. Rep. 740; 15 Jur. 684. See Ex parte Heslop, 1 De G., M. & G. 477; Ex parte Wood, 4 De G., M. & G. 861; Ex parte Young, 4 De G., M. & G. 864.

(*x*) Quartermaine *v.* Bittleston, 13 C. B. 133 (E. C. L. R. vol. 76); Fielding *v.* Lee, 18 C. B., N. S. 499 (E. C. L. R. vol. 114).

(*y*) Stat. 24 & 25 Vict. c. 134, s. 232.

(*z*) Stat. 32 & 33 Vict. c. 71, s. 15, par. (5).

*CHAPTER IV. [*55]

OF SHIPS.

THERE is one important class of choses in possession which the policy of the law has rendered subject to peculiar rules, namely, ships and vessels. The whole of the acts relating to Merchant Shipping were repealed by the Merchant Shipping Repeal Act, 1854,(*a*) and the law on this subject is now contained in the Merchant Shipping Act, 1854,(*b*) as amended by the Merchant Shipping Act Amendment Acts, 1855(*c*) and 1862.(*d*) Every British ship, with a few unimportant exceptions, is required to be registered,(*e*) and no ship is to be deemed a British ship unless she belongs wholly to natural born British subjects, or to persons made denizens or duly naturalized. But no natural born subject who has taken the oath of allegiance to any foreign state can be owner, unless he has subsequently taken the oath of allegiance to her Majesty, and continues during his ownership resident within her Majesty's dominions, or, if not so resident, member of a British factory, or partner in a house actually carrying on business within her Majesty's dominions. And every denizen and naturalized person must continue during his ownership resident within her Majesty's dominions, or, if not so resident, must be a member of a British factory, or partner in such a house of business as above mentioned. But bodies corporate established under *and subject to the laws [*56] of the United Kingdom or any British possession, and having their principal place of business therein, may be owners.(*f*) The registration is made by the collector, comptroller or other principal officer of customs for the time being at any port or other place in the United Kingdom approved by the commissioners of customs for the registry of ships, and by other officers in the colonies and possessions abroad.(*g*)

The property in every ship is divided into sixty-four shares; and, subject to the provisions of the act with respect to joint owners or owners by

(*a*) Stat. 17 & 18 Vict. c. 120. (*b*) Stat. 17 & 18 Vict. c. 104.

(*c*) Stat. 18 & 19 Vict. c. 91. (*d*) Stat. 25 & 26 Vict. c. 63.

(*e*) Stat. 17 & 18 Vict. c. 104, s. 19. As to colonial shipping, see stat. 31 & 32 Vict. c. 129.

(*f*) Stat. 17 and 18 Vict. c. 104, s. 18. (*g*) Sect. 30.

transmission, not more than thirty-two individuals shall be entitled to be registered at the same time as owners of any one ship; but this rule is not to affect the beneficial title of any number of persons, or of any company, represented by or claiming under any registered owner or joint owner.[1] And no person is entitled to be registered as owner of any fractional part of a share in a ship; but any number of persons not exceeding five may be registered as joint owners of a ship, or of a share or shares therein. And joint owners are to be considered as constituting one person only, as regards the foregoing rule relating to the number of persons entitled to be registered as owners, and shall not be entitled to dispose in severalty of any interest in any ship, or in any share or shares therein, in respect of which they are registered. A body corporate may be registered as owner by its corporate name.(*h*) No notice of any trust, express, implied, or constructive, shall be entered in the register book or receivable by the registrar; and, subject to any rights and powers appearing by the register book to be vested in any other party, the registered owner of any ship, or share *therein, shall have power absolutely to dispose of such ship or share in the manner prescribed by the act, and to give effectual receipts for any money paid or advanced by way of consideration.(*i*) But the intention of the act is, that, without prejudice to the provisions contained in the act for preventing notice of trusts from being entered on the register, and without prejudice to the powers of disposition and of giving receipts, conferred by the act on registered owners and mortgagees, and without prejudice to the provisions contained in the act relating to the exclusion of unqualified persons from the ownership of British ships, equities may be enforced against owners and mortgagees of ships in respect of their interest therein, in the same manner as equities may be enforced against them in respect of any other personal property.(*k*) Upon the completion of the registry of any ship, the registrar gives a certificate of registry in the form prescribed by the act. And whenever any change takes place in the registered ownership of any ship, then if such change occurs when the ship is at her port of registry, a memorandum of such change is forthwith endorsed by the registrar on the certificate of registry. But if the ship is absent from her port of registry, then, upon her first return to such port, the master must deliver the certificate of registry to the registrar, and he is to en-

[*57]

(*h*) Sect. 37. (*i*) Sect. 43.

(*k*) Stat. 25 & 26 Vict. c. 63, s. 3. See Ward *v.* Beck, C. P. 9 Jur. N. S. 912; 13 C. B N. S. 668 (E. C. L. R. vol. 106); Stapleton *v.* Haymen, 2 H. & C. 918.

[1] There are no provisions in the registry laws of the United States, restricting the number of owners, or regulating the fractional parts of their ownership.

dorse thereon a like memorandum of the change. Or if she previously arrives at any port where there is a British registrar, such registrar shall, upon being advised by the registrar of her port of registry of the change having taken place, endorse a like memorandum thereof on the certificate of registry, and may for that purpose require the certificate to be delivered to him, so that the ship be not thereby *detained.(*l*) Provision [*58] is also made for the granting of a new certificate in the place of any which may be delivered up, or may be mislaid, lost or destroyed.(*m*) The certificate of registry is to be used only for the navigation of the ship, and is kept in the custody of the master, and is not subject to detention by reason of any title, lien, charge, or interest whatsoever which any owner, mortgagee or other person may have or claim to have in the ship described in such certificate.(*n*)[1]

A registered ship or any share therein, when disposed of to persons qualified to be owners of British ships, must be transferred by bill of sale, and such bill of sale must contain such a description of the ship as is contained in the surveyor's certificate, or such other description as may be sufficient to identify the ship to the satisfaction of the registrar, and must be according to the form set out in the schedule to the act, or as near thereto as circumstances permit, and must be executed by the transferor in the presence of and be attested by one or more witnesses.(*o*) And in case any bill of sale, mortgage or other instrument for the disposal or transfer of any ship or any share or interest therein, is made in any form or contains any particulars other than the form and particulars prescribed and approved for the purpose by or in pursuance of the Merchant Shipping Act, 1854, no registrar shall be required to record the same without the express direction of the commissioners of her Majesty's customs.(*p*) And no individual can be registered as transferee of a ship, or of any share therein, until he has made a declaration in a prescribed form, stating his qualification to be registered as owner of a share in a British ship. And if a body corporate be *transferee, the secretary or other duly [*59] appointed public officer of such body corporate must make a similar declaration.(*q*) The bill of sale, together with the required declaration, must then be produced to the registrar of the port at which the ship is registered, who thereupon enters in the registrar the name of the

(*l*) Stat. 17 & 18 Vict. c. 104, s. 45.
(*m*) Sects. 47, 48, 53.
(*n*) Sect. 50.
(*o*) Sect. 55.
(*p*) Stat. 18 & 19 Vict. c. 91, s. 11.
(*q*) Stat. 17 & 18 Vict. c. 104, s. 56.

[1] For the laws of the United States, on the subject of certificates of registry, see Brightly's Dig. of the Laws of the U. S., p. 826 *et seq.*

transferee as owner of the ship or share comprised in the bill of sale, and also endorses on the bill of sale the fact of such entry having been made, with the date and hour thereof. All bills of sale are entered in the register book in order of their production to the registrar.(*r*)[1]

All mortgages of any ship, or share therein, are to be in a form prescribed by the act, or as near thereto as circumstances permit; and on the production of such instrument, the registrar of the port at which the ship is registered is to record the same in the register book.(*s*) Every such mortgage is to be recorded by the registrar in the order of time in which the same is produced to him for that purpose, and the registrar shall by memorandum under his hand notify on the instrument of mortgage that the same has been recorded by him, stating the day and hour of such record.(*t*) If there is more than one mortgage registered, the mortgagees are entitled to priority one over the other according to the date at which each instrument is recorded in the register book, and not according to the date of each instrument itself, notwithstanding any express, implied or constructive notice.(*u*) No mortgagee is to be deemed by reason of his mortgage to be the owner of a ship, or of any share therein, nor is the mortgagor to be deemed to have ceased to be owner, [*60] except in so far as may be necessary for making *such ship or share available as a security for the mortgage debt.(*x*) Every

(*r*) Sect. 57. (*s*) Sect. 66. (*t*) Sect. 67. (*u*) Sect. 69.

(*x*) Sect. 70. See European Co. *v.* Royal Mail Co., 4 K. & J. 676; Dickinson *v.* Kitchen, 8 E. & B. 789 (E. C. L. R. vol. 92); Marriott *v.* The Anchor Reversionary Company, Limited, 2 Giff. 457; Collins *v.* Lamport, L. C. 11 Jur. N. S. 1; 13 W. R. 283; 34 L. J. Chan. 196; Rusden *v.* Pope, 37 L. J. N. S. Exch. 137; Law Rep. 3 Exch. 269.

[1] "Our Registry Act requires, that upon every transfer of a registered ship, in whole or in part, to any other citizen, there shall be some instrument of writing in the nature of a bill of sale, which shall recite at length the certificate of registry; otherwise, the ship shall be incapable of being registered anew. Act of 1792, ch. 45, § 14. But the act does not invalidate any contract of conveyance made between the parties, unless the certificate is recited, but leaves such contract to be decided upon, according to the general principles of the common law: Wendover *v.* Hogeboom, 7 Johns. 308; Hatch *v.* Smith, 5 Mass. 42; Weston *v.* Penniman, 1 Mason 306. Our act, however, requires every ship to be registered anew upon every transfer; and further declares, that in case she is not so registered anew, she shall not be entitled to the privileges and benefits of a ship of the United States. Act of 1792, ch. 45, § 14. The consequence of the non-registry is, that the ship becomes a foreign ship." Abbott on Shipping, by Story, p. 96, n. 2.

The intention of the Act of March 2, 1831, on the subject of enrolled and licensed vessels, was to enable such vessels in certain cases, to engage in foreign and domestic commerce at one and the same time, without the formality of a registry, not exacting the restrictions, nor enforcing the penalties imposed on registered vessels. The Forrester, 1 Newb. Adm. 81.

registered mortgagee is to have power absolutely to dispose of the ship or share in respect of which he is registered, and to give effectual receipts for the purchase-money; but if more persons than one are registered as mortgagees of the same ship or share, no subsequent mortgagee shall, except under the order of some court capable of taking cognizance of such matters, sell such ship or share without the concurrence of every prior mortgagee.(*y*) Mortgages of ships are not to be affected by the bankruptcy of the mortgagor ;(*z*) and a form is provided for the transfer of mortgages.(*a*) And whenever any registered mortgage shall have been discharged, the registrar, on production of the mortgage deed with a receipt for the mortgage money endorsed thereon, duly signed and attested, makes an entry of the discharge of such mortgage in the register book ; and upon such entry being made, the estate, if any, which passed to the mortgagee, vests in the same persons in whom the same would (having regard to intervening acts and circumstances, if any) have vested if no such mortgage had ever been made.(*b*)[1]

(*y*) Stat. 17 & 18 Vict. c. 104, s. 71.
(*z*) Sect. 72.
(*a*) Sect. 73.
(*b*) Sect. 68.

[1] Congress has provided for the recording of any mortgage or conveyance of a vessel, by an act entitled "An act to provide for recording the conveyances of vessels, and for other purposes," passed the 29th July, 1850. The incidental effects of this act upon mortgages and conveyances of vessels, will be found to be very extensive.

Sec. 1. "That no bill of sale, mortgage, hypothecation, or conveyance of any vessel, or part of any vessel, of the United States, shall be valid against any person other than the grantor or mortgagor, his heirs and devisees, and persons having actual notice thereof; unless such bill of sale, mortgage, hypothecation or conveyance, be recorded in the office of the collector of the customs where such vessel is registered or enrolled. *Provided*, That the lien by bottomry on any vessel, created during her voyage, by a loan of money or materials, necessary to repair or enable such vessel to prosecute a voyage, shall not lose its priority, or be in any way affected by the provisions of this act.

Sec. 2. "*And be it further enacted*, That the collectors of the customs shall record all such bills of sale, mortgages, hpyothecations or conveyances, and also, all certificates for discharging and cancelling any such conveyance, in a book or books to be kept for that purpose, in the order of their reception; noting in said book or books, and also on the bill of sale, mortgage, hypothecation or conveyance, the time when the same was received, and shall certify on the bill of sale, mortgage, hypothecation or conveyance, or certificate of discharge or cancellation, the number of the book and page where recorded; and shall receive, for so recording such instrument of conveyance, or certificate of discharge, fifty cents.

Sec. 3. "*And be it further enacted*, That the collectors of the customs shall keep an index of such records, inserting alphabetically the names of the vendor or mortgagor, and of the vendee or mortgagee, and shall permit said index and books of record to be inspected during office hours, under such reasonable regulations as they may establish, and shall, when required, furnish to any person, a certificate, setting forth the names of the owners of any vessel registered or enrolled, the parts or

Provision is made enabling any registered owner to empower any other person or persons to sell any entire ship, or to mortgage any ship or any share therein, at any place out of the country or possession in which the port of registry of the ship is situate. For this purpose what are called [*61] certificates of sale or mortgage are *granted by the registrar on certain conditions mentioned in the act, and in forms set out in the schedule thereto.(*c*) The above are the principal provisions of the act so far as relates to the conveyance of ships. For more particular information the reader must be referred to the acts themselves, which are of great length. It may, however, be added, that all instruments used in carrying into effect that part of the act which relates to British ships, their ownership and registry, are exempt from stamp duty.(*d*)[1]

The Admiralty Court Act, 1861,(*e*) confers on the High Court of Admiralty jurisdiction to decide all questions arising between the co-owners, or any of them, touching the ownership, possession, employment and earnings of any ship registered in any port in England or Wales, or any share thereof; and it empowers that court to settle all accounts outstanding and unsettled between the parties in relation thereto, and to direct the ship or any share thereof to be sold, and to make such order in the premises as to the court shall seem fit.(*f*)[2] The same act also gives

(*c*) Sects. 76 et seq. See Orr *v.* Dickinson, 1 John. 1.
(*d*) Stat 17 & 18 Vict. c. 105, s. 9. (*e*) Stat 23 Vict. c. 10.
(*f*) Sect. 8.

proportions owned by each (if inserted in the register or enrolment), and also the material facts of any existing bill of sale, mortgage, hypothecation, or other incumbrance upon such vessel, recorded since the issuing of the last register or enrolment, viz., the date, amount of such incumbrance, and from and to whom, or in whose favor made; the collector shall receive for each such certificate, one dollar." Brightly's Dig. Laws U. S. p. 833.

[1] The United States stamp duty on the bill of sale of a ship or vessel, is fifty cents for every five hundred dollars of the consideration thereof, or fractional part of the sum of five hundred dollars when the consideration is less than five hundred dollars, or greater than five hundred dollars, or a multiple thereof. Act of Congress of June 30, 1864, § 170, Sched. B, 2 Brightly's U. S. Dig. p. 377, § 356.

[2] Previously, however, to the above Act of Parliament, the English Court of Admiralty, without, however, otherwise disclaiming this authority, declined to exercise it, inasmuch as it had been asserted by the Court of King's Bench, in the reign of George II., that the Court of Admiralty had no authority to compel a sale, in any case of disagreement between part owners.

In this country this power has been asserted, and in two reported cases at least, has been exercised by the courts. In the early case of Skinner *v.* The Sloop Hope, Bee's Adm. 2, in the District Court of the United States for the District of South Carolina, Judge Bee decreed a sale, on the petition of the owner of one moiety, against the owner of the other moiety of the vessel. And in the case of Davis Brooks *v.* The Brig Seneca, Gilp. 10, where the owners were equally di-

the Court of Admiralty jurisdiction over any claim in respect of any mortgage duly registered according to the provisions of the Merchant Shipping Act, 1854.(*g*)

(*g*) Sect. 11. See also sects. 10, 12 and 13. By Stats. 31 & 32, Vict. c. 71, and 32 & 33 Vict. c. 51, admiralty jurisdiction is given to some of the County courts.

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vided in opinion, each wishing to employ the brig upon a distinct voyage, the learned Judge of the District Court of the United States for the Eastern District of Pennsylvania, having, in an elaborate opinion, decided against the jurisdiction, his judgment was reversed by Justice Washington, on appeal to the Circuit Court. 1 Conkl. U. S. Admiralty, p. 324.

But it has been held that the United States courts sitting in admiralty, have no power to decree the sale of a ship to satisfy a mortgage: Bogart *v.* Steamboat John Jay, 17 How. U. S. 399.

In order to avoid disputes between the different owners of a ship or other vessel, on the subject of her management, it frequently happens that the owners unite in appointing or selecting one of their number to be her manager, who is called the ship's husband. A ship's husband is a common expressive maritime phrase, to denote a peculiar sort of agency, created and delegated by the owner in regard to the repairs, equipment, management, and other concerns of the ship. He is understood to be the general agent of the owners, in regard to all the affairs of the ship in her home port: Story, Agency, § 35, and notes; 3 Kent 175.

The ship's husband, or managing owner, may bind the other owners for the outfit, care, and employment of the vessel, but he has no power to purchase a cargo on their credit, without authority from them: Hewitt *v.* Buck, 17 Maine 147; Bell *v.* Humphries, 2 Stark. 286.

It is not his duty as ship's husband to insure a vessel, and neither he, nor part owners, who insure the interest of their co-owners in a vessel without express authority, can recover the premium paid by them: Turner *v.* Burrows, 8 Wendell 144; Abbott on Shipping, p. 136, n. p.

Sims *v.* Brittain, 4 B. & Ad. 375. Law Magazine article, "Mercantile Law," No. 13. See Kent's Commentaries, p. 147. See also Story's Commentaries on Agency, p. 32. "The ship's husband," says Beawes (Lex Mercatoria, p. 52), "is, as it were, a steward at land, to the owner of the ship, as the officer bearing that name is on board, when the ship is at sea." "The ship's husband," says Mr. Bell (Principles of the Law of Scotland, p. 449), "is the agent or commissioner for the owners. He may be a part owner or a stranger. His powers are by mandate or written commission by the owners, or by verbal appointment; the latter chiefly, where he is also part owner. His duties are,—1. To arrange everything for the outfit and repair of the ship, stores, repairs, furnishings; to enter into contracts of affreightment; to superintend the papers of the ship. 2. His powers do not extend to the borrowing of money; but he may grant bills for furnishings, stores, repairs, and the necessary engagements, which will bind the owners, although he may have received money wherewith to pay them. 3. He may receive the freight, but is not entitled to take bills instead of it, giving up the lien by which it is secured. 4. He has no power to insure for the owner's interest, without special authority. 5. He cannot give authority to a law agent that will bind his owners, for expenses of a lawsuit. 6. He cannot delegate his authority." See also 1 Bell's Commentaries, p. 411; Abbott on Shipping, p. 136, n. p.

Where a person supplied stores to a ship on the order of one of several owners, who acted as the ship's husband, and took his note in payment, and gave a receipt in full, it was held that all the owners were liable, the note not being paid: Schemerhorn *v.* Loines, 7 Johns. 311.

Sometimes a vessel is hired for a given voyage. The instrument by which such hiring is effected is termed a charter-party.(*h*) Whether the legal possession of the ship passes to the hirer (or charterer, as he is called) depends on the stipulations contained in the charter-party, such as [*62] whether the charterer or the owner is to *provide the seamen, and keep the vessel in order.(*i*) Where a merchant ship is open to the conveyance of goods generally, it is called a *general ship.*[2] The receipt for the goods given by the master is called the *bill of lading*:[3] it states

(*h*) The stamp duty on a charter-party is now sixpence. Stat. 28 & 29 Vict. c. 96, s. 7.[1]

(*i*) Dean *v.* Hogg, 10 Bing. 345 (E. C. L. R. vol. 25); Fenton *v.* City of London Steam Packet Company, 8 A. & E. 835 (E. C. L. R. vol. 35).

The managing owner of a vessel represents the interests of all, and has the same power which the major part in interest have, with respect to the change of employment, and the preparation and outfit of the vessel, in a manner suited to her profitable employment, in the business to which she is destined: Hall *v.* Thing, 10 Shep. 461.

The ship's husband, or managing owner may bind the other owners for the outfit, care, and employment of the vessel, but he has no power to purchase a cargo on their credit, without authority from them: Hewett *v.* Buck, 5 Shep. 147.

In the absence of any special agreement on the subject, the ship's husband is presumed to have authority to do everything necessary to be done for the employment of the vessel; Revens *v.* Lewis, 2 Paine 202; and the fact of one acting as such, is sufficient evidence of his appointment without any formal proof: 6 H. & N. 145.

For further description of the proper functions and powers of a ship's husband, see Collyer on Partnership, B. 5, ch. 3, § 1213, 4th ed.

[1] The United States stamp duty on a charter-party, is one dollar where the registered tonnage of the vessel does not exceed one hundred and fifty tons; three dollars, where exceeding one hundred and fifty tons it does not exceed three hundred tons; five dollars, where exceeding three hundred tons it does not exceed six hundred tons; and ten dollars where it exceeds six hundred tons. Act of Congr. of June 30, 1864, § 170, Sched. B, 2 Brightly's U. S. Dig. p. 377, § 356.

[2] It is usual for the mate to sign a receipt for the goods shipped, at the time of their delivery at or on board the vessel, and to deliver it to the shipper. This again is surrendered, when the bill of lading has been signed by the master and delivered to the shipper.

[3] A bill of lading is the written acknowledgment of the master of a vessel, that he has received certain specified merchandise from the shipper, to be conveyed, on the terms therein expressed, to their destination, and at that place to be delivered to the parties therein designated: Abbott on Shipp. 323. Much legal learning and talent have been exercised in developing the law of this instrument, the principal heads of which may be succinctly enumerated as follows:

1st. The effect of a bill of lading, as evidence of the ownership of the goods by the consignees.

A., of Liverpool, shipped goods, which, by the bill of lading, were to be delivered to B. or his assigns, in Philadelphia. The freight was payable in Liverpool, and it appeared that the goods were shipped on account of A. Held, that the bill of lading vested the property in B., who might maintain an action in his own name against the owner of the ship for the negligent carriage of the goods: Griffith *v.* Ingledew,

that the goods are to be delivered to the consignee or his assigns; and by the custom of merchants, the bill of lading, when endorsed by the consignee

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6 S. & R. 629. See also Sammerell *v.* Elder, 1 Binn. 106; Ryberg *v.* Snell, 2 Wash. C. C. 403; Arbuckle *v.* Thompson, 37 Penn. St. 175; The Sally Magee, 3 Wall. U. S. 451. But the property will not vest in the consignee, until the bill of lading has been delivered to him by the consignor, or some one authorized by him to make this delivery: Walter *v.* Ross, 2 Wash. C. C. 283; Stille *v.* Traverse, 3 Wash. C. C. 43; Allen *v.* Williams, 12 Pick. 297; Low *v.* De Wolf, 8 Id. 100; Graham *v.* Ledda, 17 La. Ann. 45.

2d. The effect of an endorsement of a bill of lading, as a transfer of property.

Bills of lading are transferable by endorsement; and when thus transferred by a consignee, to a *bonâ fide* purchaser for a good consideration, without notice of adverse claims, they pass the legal title of the property, to the endorsee. And where the endorsee, without any laches on his part, takes possession of the property as soon as its arrival from sea is known to him, an attachment levied on the property after the assignment, will be ineffectual and inoperative: Winslow *v.* Norton, 29 Maine (16 Shep.) 419; The Mary Ann Guest, Olcott's Adm. 498. So, where the master of a vessel signs bills of lading to third parties, *bonâ fide* assignees of such bills, for value, will be entitled to hold the property as against the charterer of the vessel: Zachrisson *v.* Ahman, 2 Sandf. Sup. Ct. 68. See also, Chandler *v.* Belden, 18 Johns. 157; Dawes *v.* Cope, 4 Binn. 258; Walter *v.* Ross, 2 Wash. C. C. 294; Dows *v.* Rush, 28 Barb. 157. But though a bill of lading is *primâ facie* evidence of property, in the hands of a *bonâ fide* endorsee for a valuable consideration, yet the endorsement may be explained in certain circumstances, according to the the intention of the party: Low *v.* De Wolf, 8 Pick. 107; Hibbert *v.* Carter, 1 T. R. 745; and a fraudulent holder of the bill, can pass no title to the goods in such bill, to a purchaser for value, without notice of the fraud: Decan *v.* Shipper, 35 Penn. St. 239; Dows *v.* Green, 24 N. Y. 638.

Nor will the endorsement of a bill of lading, without a delivery of it, transfer the property in the goods mentioned in it, as against the attaching creditors of the endorser: Buffington *v.* Curtis, 15 Mass. 528. See also, on this head, the cases cited in Abbott on Shipp. by Story p. 534, note (1); and, that possession of one of the three usual bills of lading, is not of itself sufficient evidence of the ownership of the goods, see Graff *v.* Caldwell, 8 Rich. 529; s. c. 9 Id. 325; Blossom *v.* Champion, 37 Barb. 554; and the fact that the bill has been delivered without tndorsement, to another than the consignee, to cover advances made upon it by him, cannot convey to him any other right than a lien for the advances: Bissell *v.* Steel, 28 Leg. Intel. 157. See further on the subject of a transfer of a bill of lading by endorsement and delivery, *ante* p. 6, note 1.

3d. The effect of a bill of lading, as a contract.

(A) As to the condition, contents, and quantity of the goods specified in the instrument.

An acknowledgment in a bill of lading, that certain cases of goods were "shipped in good order," "contents unknown," extends only to the external condition of the cases, and not to the condition or package of the goods: Clark *v.* Barnwell, 12 Howard 272; and so of bales of cotton described in a bill of lading as "in good order and well-conditioned:" Bradstreet *v.* Heran, 2 Blatch. C. C. 116; and so far as a bill of lading is a receipt, as distinguished from a contract, it may be explained by parol evidence: The Lady Franklin, 8 Wall. U. S. 325; and see West *v.* Berlin, 3 Clarke 532. But in an action against the owners of a steamboat, to recover for the loss of a quantity of molasses contained in barrels, which the captain of the vessel had received on board

with his name, becomes a negotiable instrument, the delivery of which passes the property in the goods;(k) but it was formerly held that the

(k) Caldwell v. Ball, 1 T. Rep. 205, 216.

at New Orleans, and for which he signed a bill of lading, stating it to have been received in good order and well-conditioned, and to be deliverable to the plaintiff in Pittsburgh, it was held, that the defendant could not go into evidence to prove that the barrels were not full when delivered on board, and that they were in so bad order as to leak. In such case, the loss of hoops, and leakage occasioned thereby, which occurred while the consignor was carrying the casks to the wharf, and unloading them from the drays, so that the captain might put them in his boat, when seen and known by the carrier, was not such a latent defect as would excuse the carrier: Warden v. Greer, 6 Watts 424. And see also Bowman v. Kennedy, 1 Am. L. Reg. 119; Ship Howard v. Wissman, 18 How. U. S. 231; Zarega v. Poppe, 1 Abb. Adm. 397; Nelson v. Stephenson, 5 Duer 538; Columbo, 3 Blatch. C C. 521.

And although, as between the shipper of goods and the owner of the vessel, the bill of lading may be explained, so far as to show the quantity of the goods, their condition, and the like; yet, as between the owner of the vessel, and an assignee for a valuable consideration, paid on the strength of the bill of lading, it may not be explained: Dickerson v. Seelye, 12 Barb. S. C. 99; Bradstreet v. Heron, 1 Abb. Adm. 209; White v. Van Kirk, 25 Barb. 16.

As a general rule, an action founded on the express contract contained in a bill of lading, should be instituted by the shipper, with whom the master contracted, or by the owner of the goods, where the shipper acted as his agent. An endorsement of the bill of lading, does not assign the contract contained in it. When a bill of lading, by which goods are made deliverable to a consignee by name, is transmitted to him for advances, or to indemnify him against liabilities in respect to the consignment which they represent, it vests in him a property in the goods, general or special, at the time of the delivery on board, and renders the master responsible to him: Dows v. Cobb, 12 Barb. S. C. 310.

A charter-party was made between A. and B., by which A. agreed to bring from Pictou, to New York, a cargo of coal, the freight of which should be paid at the rate of four dollars per chaldron, Pictou measure of thirty cwt., by an approved acceptance within thirty days from discharging, for which twelve days were allowed. The bill of lading stated the cargo at four hundred chaldrons, weight of which was unknown. It turned out that there were nearly four hundred and sixty chaldrons, of thirty cwt. B.'s agent offered to pay in cash for four hundred chaldrons at the agreed rate, which was refused by A. Held, that the words "thirty cwt." were descriptive of the weight of a chaldron, and therefore that A. was entitled to freight for four hundred and sixty chaldrons, and that B.'s offer to pay but for four hundred chaldrons, and his refusal to pay any more, released A. from his obligation to wait thirty days after the discharge, within which time he began this suit: Ward v. Whitney, 3 Sandf. Sup. Ct. 399.

(B) The effect of a bill of lading, as a contract, and who may sue on it.

A bill of lading promising to deliver goods to A. or his assigns, was sent by A. to B., unendorsed, in a letter containing no words of transfer. Held, that B. could maintain no action against C., the owner of the vessel, as surviving owner or as assignee of the goods, and that C. having delivered part of the goods to B. was not thereby estopped to deny his claim to the residue: Stone v. Swift, 4 Pick. 389.

Where the master of a vessel signed a bill of lading to deliver the whole of a

right to sue upon the contract contained in the bill of lading to carry and deliver the goods did not pass by the endorsement.(*l*) It is, however, now enacted, that every consignee of goods named in a bill of lading, and every endorsee of a bill of lading, to whom the property in the goods therein mentioned shall pass upon or by reason of such consignment or endorsement, shall have transferred to and vested in him all rights of suit, and be subject to the same liabilities in respect of such goods, as if the contract contained in the bill of lading had been made with himself.(*m*) The money payable for the hire of a ship, or for the carriage of goods in it, is the *freight* which, whether accrued or accruing, is assignable in the same manner as any other ordinary chose in action.(*n*) The delivery of goods imported from foreign parts, and the lien of the ship owner for their freight, are now regulated by the provisions of the Merchant Shipping Act Amendment Act, 1862.(*o*)

(*l*) Thompson *v.* Dominy 14 M. & W. 403. (*m*) Stat. 18 & 19 Vict. c. 111, s. 1.

(*n*) Douglas *v.* Russel, 4 Sim. 524 1 M. & K. 488; Leslie *v.* Guthrie, 1 New Cases 697; Lindsay *v.* Gibbs, 22 Beav. 522.

(*o*) Stat. 25 & 26 Vict. c. 63, ss. 66–78.

quantity of coffee, shipped on board his vessel, to one party, and subsequently signed another bill of lading, to deliver a part of the same to another party, held, that he was liable to the second party, although he had delivered the whole of the coffee to the first: Stille *v.* Traverse, 3 Wash. C. C. 43.

A., an agent of B., contracted with C., a common carrier, to deliver a quantity of wheat to B., in New York. A bill of lading was drawn and signed, containing the agreement. The wheat having been delivered to D., in New York, for whom A. was also agent, B. sued C. for damages, for breach of contract, and evidence was offered, that A. gave parol directions to C., to deliver the wheat to D. Held, that a bill of lading was of a twofold character; as far as it was a receipt, that it could be explained by parol evidence, but as a contract for forwarding, it could not be altered by parol testimony, and that such evidence, therefore, in this case was inadmissible: Wolfe *v.* Myers, 3 Sandf. Sup. Ct. 7. And see also Meyer *v.* Peck, 33 Barb. 532; Steamboat John Owen *v.* Johnson, 2 Ohio N. S. 142; Fitzhugh *v.* Wiman, 5 Selden 559.

It is a doctrine of the English courts, that carriers who receive merchandise to be transported beyond the line of their own route, without any special agreement, do not limit their liability to their own route only, but are held liable for losses which may occur beyond it: Scotthorn *v.* The So. Staffordshire Railw. Co., 18 Eng. L. & Eq. 553; Muschamp *v.* The Lancaster, &c., 8 M. & W. 421; Croach *v.* The London & N. Western Railw. Co., 25 Eng. L. & Eq. 287. But the rule to be deduced from the American decisions, is not so stringent, merely holding the carrier bound to transport and deliver according to the established usages of business: Van Sautvoord *v.* St. John, 25 Wend. 669; Farmers' Bk. *v.* Champlain Trans. Co., 18 Vt. 140, and 23 Id. 209; Hood *v.* N. Y. & New Haven R. R., 22 Conn. 508–512; Nutting *v.* Connecticut River R. R. Co., 1 Gray 502; Perkins *v.* Portland, &c., R. R. Co., 47 Maine 573; Angle *v.* Mississippi, &c., R. R. Co., 9 Iowa 487; and that his engagement as to any other route than his own is merely to forward: Camden & A. R. R. Co. *v.* Forsyth, 61 Penn. St. 81.

[*63]

*PART II.

OF CHOSES IN ACTION.

CHAPTER I.

OF ACTIONS EX DELICTO.

IN addition to movable goods, *choses in possession*, we have observed,(*a*) that there existed also in ancient times *choses in action*, or the liberty of proceeding in the courts of law either to recover pecuniary damages for the infliction of a wrong or the non-performance of a contract, or else to procure the payment of money due. The actions to be thus brought were, of course, not real, but purely personal actions. Real actions were brought for the recovery of land or real property; but the above-mentioned actions were against persons only, and the object was merely to obtain from them money, being the only recompense then generally available. In this respect, however, the law has recently undergone some change: for the Common Law Procedure Act, 1854, now enables the plaintiff in any action, except replevin and ejectment, in any of the superior courts, to claim a writ of mandamus commanding the defendant to fulfil any duty in the fulfilment of which the plaintiff is personally interested, and by the non-performance of which he way sustain damage.(*b*)[1] And it also provides, that in all cases of breach of contract

(*a*) *Ante*, p. 4.

(*b*) Stat. 17 & 18 Vict. c. 125, ss. 68, 69; Norris *v.* Irish Land Company, 8 E. & B. 512 (E. C. L. R. vol. 92).

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[1] The appropriate functions of a writ of *mandamus*, are the enforcement of duties to the public, by officers and others, who neglect or refuse to perform them, and for which there is no other special legal remedy; Commonwealth *v.* Commissioners, &c., 37 Penn. St. 237; Gillespie *v.* Wood, 4 Humph. 437; Board of Police *v.* Grant, 9 Sm. & Marsh. 97. Its office is to stimulate, not to restrain, the exercise of official functions: School Directors *v.* Anderson, 45 Penn. St. 388; Howe *v.* Commissioners, 47 Id. 361; City *v.* Johnson, Id. 382; Lamb *v.* Lynd, 44 Id. 336; but it does not lie to compel a judge of a lower court to seal a bill of exceptions, the remedy being by special writ: Consow *v.* Schloss, 55 Penn. St. 28; People *v.* Jameson, 40

or other injury, where the party injured is entitled to maintain and has brought an action, he may claim a writ of injunction against the *repetition or continuance of such breach of contract or other [*64] injury, or the committal of any breach of contract or injury of a like kind, arising out of the same contract or relating to the same property or right;(c) and the Common Law Procedure Act, 1860, requires that in the above cases the costs of the writ of mandamus or injunction shall be paid by the defendant, unless otherwise ordered by the court or a judge.(d) But the rights thus given do not appear to have materially interfered with the wider and more ancient jurisdiction of the Court of Chancery in issuing an *injunction* to restrain the wrongdoer from continuing his wrong, or in decreeing the *specific performance* of a contract. By a recent statute the Court of Chancery is empowered to award pecuniary damages, either in addition to or in substitution for an injunction or specific performance.(e)[1] In many cases, however, money alone is a

(c) Stat. 17 & 18 Vict. c. 125, ss. 79–82. (d) Stat. 23 & 24 Vict. c. 126, s. 32.

(e) Stat. 21 & 22 Vict. c. 27, s. 2; Lewers v. Earl of Shaftesbury, V.-C. W., 2 Law Rep. Eq. 270.

Ill. 93; or to control judicial action in the approval of a bond: E. v. Milwaukee R. R. Co., 5 Wall. U. S. 188; as a remedy to enforce mere private rights of property, it is restricted to cases where the applicant has no adequate remedy, by action, in the due course of the common law: Wilkinson v. Providence Bank, 3 R. I. 22; Evans v. Philadelphia Club, 50 Penn. St. 107; and where there is a remedy by action there cannot be a *mandamus:* Green v. Wood, 35 Barb. 653.

Where a private right is the object of *mandamus*, the person interested should be the relator; but where the object is the execution of a public statute, any citizen may be a relator, and he is not bound to show a special interest in the object: County of Pike v. The State, 11 Ill. 202. But the writ does not lie against a private citizen: The State v. Powers, 14 Geo. 388.

In California, it lies by statute, where it is the only means of putting one in possession of property, to which he is entitled under a decree: Fremont v. Crippen, 10 Cal. 211.

[1] In Hatch v. Cobb, 4 Johns. Ch. 560, it was said by Chancellor Kent, that "though equity, in very special cases, may possibly sustain a bill for damages, on a breach of contract, it is clearly not the ordinary jurisdiction of the Court." Hence, where a contract has been made, and the defendant has disabled himself from performing it, and a specific performance is asked, compensation will be given: Lee v. Howe, 27 Misso. 521; Hook v. Ross, 1 Hen. & M. 310; Dustin v. Newcomer, 6 Ham. 49; Mitchell v. Sheppard, 13 Texas 484; Woodward v. Harris, 2 Barb. S. C. 439; Barlow v. Scott, 24 N. Y. 40; Davis v. Parker, 14 Allen 94, and in cases of defective execution, if the contract can be substantially executed, equity regards compensation as equivalent to performance: Philadelphia & Reading R. R. Co. v. Lehigh Nav. Co., 36 Penn. St. 311; but see Lewis v. Yale, 4 Florida 418. If, however, the plaintiff knew when he filed his bill for a specific performance of the contract, that the defendant could not perform it, equity will not decree damages for its non-performance, but leave the plaintiff to his remedy at law: McQueen v. Chouteau, 20 Misso. 222; Hatch v. Cobb, 4 Johns. Ch. 560; Doan v. Mauzey, 11 Ill. 227.

sufficient recompense; and then the right to bring an action at law, in other words a legal chose in action, constitutes a valuable kind of personal property.

The infliction of a wrong, and the non-performance of a contract, are evidently the two grand sources from which personal actions ought to proceed. If one man commits a wrong against another, justice evidently requires that he should give him satisfaction; and if one man enters into a contract with another, he certainly ought to keep it, or make reparation for its breach; or if the contract be to pay a sum of money, the money ought to be duly paid. Personal actions are accordingly divided by the law of England into two great classes, actions *ex delicto*, and actions *ex contractu*.(*f*) The [*65] *former arises in respect of a wrong committed, called in law French a *tort;* the latter in respect of a contract made for the performance of some action, which thus becomes a *duty*, or for the payment of some money, which thus becomes a *debt*. Let us consider, in the present chapter, the right of action which occurs *ex delicto*, or in respect of a *tort*.

The ancient law, in its dread of litigation, confined the remedy by action for a *tort* or wrong committed, to the joint lives of the injurer and the injured. If either party died, the right of action was at an end, the maxim being *actio personalis moritur cum personâ*.(*g*) In this rule, actions *ex delicto* only were included; of which, however, there seem to have been more than any other in early times. But, by an early statute,(*h*) the same action was given to the executor for any injury done to the personal estate of the deceased in his lifetime, whereby it became less beneficial to the executor, as the deceased himself might have brought in his lifetime.[1] And by a modern statute,(*i*) an action is given

(*f*) 3 Black. Com. 117.

(*g*) 1 Wms. Saund. 216 a, n. (1).

(*h*) Stat. 4 Edw. III. c. 7, *de bonus asportatis in vitâ testatoris*, extended to executors by stat. 15 Edw. III. c. 5.

(*i*) Stat. 3 & 4 Will. IV. c. 42, s. 2.

[1] The provisions of the statute 4th Edw. III., c. 7, if not the statute itself, and the judicial interpretations of it, have been adopted in almost every state of the Union. Under this enactment, it is held, that an action of tort survives to the representatives of one whose personal property has been injured. Thus in Alabama: Nettles *v*. Barnett, 8 Porter 181; Coker, Admr. *v*. Crozier, 5 Ala. 369; 16 Id. 698. In Kentucky: Kennedy et al. *v*. McAfiel's Exrx., 1 Lit. 169; Lynn's Admr. *v*. Lisk, 9 B. Monroe 135. In Maine: Hill, Admr., *v*. Penny, 17 Maine 410. In Maryland: Fister *v*. Beale's Admrs., 1 Har. & Johns. 31; Kennerly, Exrx., *v*. Wilson, 1 Mary. 102. In Missouri: Higgins *v*. Breen, Admr, 9 Misso. 500; Smith, Admr., *v*. Grove, 12 Id. 52; Kingsbury *v*. Lane, 21 Id. 115. In New Hamp-

to the executors or administrators of any person deceased for any injury to the real estate of such person, committed within six calendar months

shire: French, Admr., *v.* Merrill, 6 N. H. 465. In New Jersey: Norcross *v.* Boulton, 1 Harrison 312; Stewart *v.* Richey, 2 Id. 164. In New York: Babcock *v.* Booth, 2 Hill 184; Snyder et al., Exrs., *v.* Croy, 2 Johns. 227. In North Carolina: Arnold *v.* Exrx. of Lanier, 1 Carol. L. Reg. 529; McKinnis's Exrs., *v.* Oliphant's Exrs., 1 Hayw. 3. In Pennsylvania: Clarke *v* McClelland, 9 Penn. St. 128; Kline *v.* Guthart, 2 Penn. St. 491; Keito, Admr., *v.* Boyd, 16 S. & R. 300; Nicholson et al., Exrs., *v.* Elton, Admr., 13 Id. 415; Reist, Admr., *v.* Heibbrenner, 11 Id. 131; Kater *v.* Steinruck, 40 Penn. St. 501. In Massachusetts: Pitts *v.* Hale, 3 Mass. 321; Jenney *v.* Jenney, 14 Id. 232; Mellen et al. *v.* Baldwin, 4 Id. 480; Towle, Admrx., *v.* Lovet, 6 Id. 394. In Georgia: Robinson *v.* McDonald, 2 Kelly 120. So in Connecticut: Kirby, Admr., *v.* Clark, 1 Root 389. So in South Carolina, Exrs. of Middleton *v.* Robinson, 1 Bay 58. So in Tennessee: Douglass *v.* Morford, 7 Yerg. 84; Cheep *v.* Wheatley, 11 Humph. 557. In Vermont: Hall, Admr., *v.* Walbridge, 2 Aiken 215; Manwell, Admrx., *v.* Briggs, 17 Vt. 181; Admr. of Barrett *v.* Copeland, 20 Id. 247; Dana, Admr., *v.* Lull, 21 Id. 389; Bellows *v.* Admr. of Allen, 22 Id. 108. In Illinois: Read *v.* Peoria & Oquawka R. R. Co., 11 Ill. 403. In California: Halleck *v.* Mixer, 16 Cal. 574. In Delaware: Waples *v.* McIlvaine, 5 Harring. 381. And in Virginia: Morris, Admr., *v.* Dawney et al., Admrs., 3 Hen. & Munf. 127; Vaughan's Admr. *v.* Winklee's Exr., 4, Munf. 136. This principle has also been sanctioned by the Supreme Court of the United States: U. S. *v.* Daniel et al. 6 How. 13; and see also, Hatch *v.* Eustice, 1 Gall. C. C. 160. In Ohio, it has been decided, that the representatives of a decedent can only maintain such action as their testator or intestate might, if living: Benjamin *v.* Le Baron's Admr., 15 Ohio 526; Jones *v.* Vanzandt, 4 McL. 599.

In Connecticut, it has been held, that an action for false warranty, is founded on the contract of warranty, and is therefore not abated by the death of the plaintiff during its pendency, although in form an action of tort: Booth *v.* Northrop, 27 Conn. 325.

In many of the States, it is also held, that an action for a tort may be maintained against the representatives of the wrongdoer, for an injury done to personal property; where this rule prevails, it depends for the most part on the acts of the legislatures of the states. Even where this doctrine is denied, if the property of the decedent has been benefited by the wrongful act, some other remedy may be had, to recover the amount by which the estate has been benefited; or, the specific thing, or its value, which the estate has gained.

The courts of Kentucky, Maryland, Missouri, New Jersey, and North Carolina, have decided, that tort for an injury to personal property, will survive against the representatives of the wrongdoer: Kennedy et al. *v.* McAfiel's Exrx., 1 Lit. 169; Lynn's Admr. *v.* Sisk, 9 B. Monroe 135; Brummett *v.* Golden et al. Admrs., 9 Gill 95; Higgins *v.* Breen, Admr., 9 Mo. 500; Jewett *v.* Weaver, Admr., 10 Id. 234; Mount *v.* Exrs. of Cubberly, 4 Harrison (N. J.) 124; Tahume *v.* Exrs. of Bray, 1 Id. 53; Arnold *v.* Exrx. of Lanier, 1 Caro. L. Reg. 529; Helme *v.* Sanders, 3 Hawk. 565; Cutler et al. *v.* Brown's Exrs. 2 Hayw. 182; Spivey *v.* Farmer's Admr., Id. 339; McKinnis's Exrs. *v.* Oliphant's Exrs., 1 Id. 3; Decrow *v.* Monis's Exrs., Id. 21; Clark *v.* Keenan et al., Id. 308; Avery *v.* Moore's Exrs., Id. 362. So also, it seems, tn Virginia: Vaughan's Admr. *v.* Winkler's Exr., 4 Munf. 136. In Georgia, an action of deceit may be brought against an administrator for the fraud of his intestate: Admr. of Gruse *v.* Bryant, 2 Kelly 66. But see Irwin *v.* Sterling, 27 Geo. 563; Glisson *v.* Carter, 28 Id. 516. By the law of New York,

before his death, for which an action might have been maintained by him; so that the action be brought within one year after the death of such person; and the damages, when recovered, are to be part of the personal estate of such person.[1] And by a later statute,(*k*) it is pro-

(*k*) Stat. 9 & 10 Vict. c. 93, amended by stat. 27 & 28 Vict. c. 95. See Pym *v.* The Great Northern Railway Company, 2 B. & S. 759 (E. C. L. R. vol. 110).

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though an action of tort may be brought, yet it can only be in those cases, where the estate of the wrongdoer is increased or benefited by his trespass: Troup *v.* Exrs. of Smith, 20 Johns. 23; The People *v.* Gibbs et al., Exrs., 9 Wend. 29; 2 Kt. Com. 416. The law of Pennsylvania is somewhat singular; while an action of replevin may be maintained against the representatives of a decedent: Harlan *v.* Harlan, 17 Penn. St. 513; Keito, Admr. *v.* Boyd, 10 S. & R. 300; Sharick *v.* Huber, 6 Binn. 3; Weaver *v.* Lawrence, 1 Dal. R. 157, and also an action on the case for deceit: Boyd's Exrs. *v.* Browne, 6 Penn. St. 311; and, an action for neglect, begun against an attorney in his lifetime, has been held to survive against his representative: Miller *v.* Wilson, 24 Penn. St. 122; an action of trover, or trespass *vi et armis*, cannot be brought: Heuch et ux., Admrs. *v.* Metzer et al., Exrs., 6 S. & R. 272; Keito, Admr. *v.* Boyd, 16 Id. 300; Lattimore et al. Exrs. *v.* Simmons, 13 Id. 184; Nicholson et al. Exrs. *v.* Elton, Admr. 13 Id. 415. In Arkansas, an action of replevin, begun against one who dies, will survive by statute, against one who might originally be prosecuted for the same cause of action. Dixon *v.* Thatcher's Heirs, 3 Eng. 137.

In almost all of those States in which an action of tort will not lie against the executor or administrator, of a testator or intestate, who has committed some injury to personal property, some other remedy is available to the injured party, if the estate of the wrongdoer has been benefited by his wrong. Thus in Alabama: Nettles *v.* Barnett, 8 Porter 181; Coker, Admr. *v.* Crozier, 5 Ala. 369; 16 Id. 398. So in Massachusetts: Cravarth *v.* Plympton, Admr., 13 Mass. 394; Jarvis, Admr. *v.* Roger, 15 Id. 398; Pitts *v.* Hale, 3 Id. 321; Jenney *v.* Jenney, 14 Id. 232; Barnard *v.* Harrington, 3 Id. 228; Badlam, Exr. *v.* Tucker, 1 Pick. 284; Perry *v.* Wilson, 7 Mass. 395; Mellen et al. *v.* Baldwin, 4 Id. 480. So also in South Carolina: Exrs. of Middleton *v.* Robinson, 1 Bay 58. In Tennessee, by the Act of 1835-6, c. 77, all actions, except for wrongs affecting the person or character of the plaintiff, commenced by or against a deceased person in his lifetime, may be revived by or against his representatives; and even before that statute, the law would give a remedy for injury to personal property, though an action of tort, technically speaking, might not survive: Norment *v.* Smith, 1 Humph. 46; Jones *v.* Littlefield, 3 Yerg. 144; Cocke *v.* Trotter, 10 Id. 213. In Maine it has been held, that upon the death of the defendant in replevin, the suit abates, the administrator not being authorized to come in and defend: Merrit *v.* Lumbert, 8 Greenl. 128. In Indiana, although an action of waste cannot be brought by an administrator *de bonis non*, against the administrator of the original administrator, yet it may be maintained by the creditors of the original intestate: Ferguson et al. *v.* Sweeney, 6 Black. 547; Lewis, Admr., *v.* Houston, 7 Id. 335; Young *v.* Kimball, 8 Id. 167. In Mississippi and Louisiana, actions commenced do not abate by the death of either party: Torry et. al. *v.* Robinson, 2 Cush. (Miss.) 193; Purtevant *v.* Pendleton's Admr., 1 Id. 41; 1 La. 111; 6 Id. 301; 11 Id. 357; 6 Robinson 44; 1 Id. 522.

[1] Whether an action of tort can be maintained by the representatives of a decedent, for an injury done to his real property; as also whether the representatives of a trespasser upon real property, can be made

vided, that whenever the death of a person shall be caused by such wrongful act, neglect or default, as would (if death had not ensued) *have entitled the party injured to maintain an action and recover damages in respect thereof, the wrongdoer shall be liable [*66] to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony. Under this act, one action only can lie for the same subject-matter of complaint; and such action must be commenced within twelve calendar months after the death of the deceased,(*l*) in the name of his executor or administrator,(*m*) and must

(*l*) Stat. 9 & 10 Vict. c. 93, s. 3. (*m*) Sect. 2.

defendants in a suit brought to recover damages for such an injury, has not been so generally decided by the courts of the several States, as the inquiries concerning the surviving of actions for injuries to personal property.

The former question has been decided in the affirmative by the courts of Maryland, Massachusetts, Vermont, Connecticut, South Carolina, Tennessee and Mississippi: Kennerly, Exrx., *v.* Wilson, 1 Md. 102; Wilbur, Exr., *v.* Gilmore, 21 Pick. 250; Boynton et al. *v.* Rees, 9 Id. 528; Goodridge *v.* Rodgers, Admr., 22 Id. 495; Stanley, Admr., *v.* Gaylord, 10 Metc. 82; Northampton Paper Mills *v.* Ames et al., 6 Id. 422; Griswold, Admr., *v.* Brown et al., 1 Day 180; Bellow's Admr. *v.* Allen, 22 Vt. 108; Admr. of Barrett *v.* Copeland, 20 Id. 247; Chalk *v.* McAlly, 10 Rich. 92; Winters *v.* McGhee, 3 Sneed 128; N. O., &c., R. R. Co. *v.* Moye, 39 Miss. 374. The authority of Maine, California, Illinois, and perhaps of Virginia, is in the negative: Hill, Admr., *v.* Penny, 17 Maine 410; O'Conner *v.* Corbit, 3 Cal. 370; Read *v.* Peoria & Oquawka R. R. Co., 18 Ill. 403; Harris *v.* Crenshaw, 3 Rand. 14; though in the latter State it has been held that on the death of a plaintiff, in proceedings to recover damages to land, caused by the erection of a dam, under a statute, the proceedings may be revived by the administrator, Upper Appomattox Co. *v.* Hardings, 11 Gratt. 1; and as to the law of California, see Haight *v.* Green, 19 Cal. 113.

In Pennsylvania, the authorities are conflicting: Keito, Admr., *v.* Boyd, 16 S. & R. 300, giving an action to the representatives of a decedent for a trespass *de bonis asportatis*, and Lattimore et al., Exrs., *v.* Simmons, 13 S. & R. 184, deciding that no action will survive to the representatives for an injury to the freehold.

That tort for injuries to real property, will survive against the representatives of the wrongdoer, has been held in Kentucky: Kenney et al. *v.* McAfiel's Exrx., 1 Lit. 169. So also, perhaps, in North Carolina and Vermont: Dobbs *v.* Gullidge, 3 & 4 Dev. & Bat. 68; McPherson *v.* Leguire, 3 Dev. 153; Arnold *v.* Exrx. of Lanier, 1 Caro. L. Reg. 529; Burgess *v.* Gates, Exrx., 20 Vt. 326. In New York and New Jersey this action may also be maintained, provided a benefit has accrued to the estate of the wrongdoer: 2 Kent Com. 416; Cooper *v.* Crane, 4 Halst. 177; but it has been held in New York, that trespass for mesne profits will not survive against the wrongdoer's personal representative: Campbell *v.* Renwick, 2 Bradf. 80. In Texas, the administration of the whole estate, both real and personal, is by law cast upon the administrator, who can therefore bring and maintain suits for lands belonging to his intestate: Graham *v.* Vining, Admr., 2 Texas 433.

be for the benefit of the wife, husband, parents, grandfather and grandmother, stepfather and stepmother, children, grandchildren and stepchildren of the deceased, in such shares as the jury shall direct.(*n*) And if there shall be no executor or administrator of the person deceased, or, there being such executor or administrator, no action shall have been brought in his name within six calendar months from the death of the deceased, then such action may be brought by and in the name or names of all or any of the persons (if more than one) for whose benefit such action would have been, if it had been brought by or in the name of such executor or administrator.(*o*) Previously to this statute, a man who had been maimed by another could recover compensation for the injury; but if he died of his wound, his family could obtain no recompense for the [*67] the loss of a *life which might have been their only dependence.[1] And even now, when the death of a person is not *caused*, no action can be brought by his executor or administrator for any injury which affected him personally, if it did not touch his property. Thus it has been held, that an executor or administrator cannot have an action

(*n*) Sects. 2, 5. This act is a specimen of the common absurdity of modern acts of parliament, in introducing an interpretation clause in one section just to vary the meaning of another. It enacts in one section that the action shall be for the benefit of the wife, husband, parent and child; and in another section that the word "parent" shall include father and mother, and grandfather and grandmother, and stepfather and stepmother; and the word "child" shall include son and daughter, and grandson and granddaughter, and stepson and stepdaughter. Now the words "parent" and "child" occur only in the one place just mentioned besides this interpretation clause. Why not therefore say at once what is really intended?

(*o*) Stat. 27 & 28 Vict. c. 95, s. 1.

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[1] An Act of the Legislature of Pennsylvania, of the 15th April, 1851, provides, that no action for injuries to the person, happening through negligence, default, or violence, shall abate by the death of the plaintiff; the words of the act are: "No action hereafter brought, to recover damages for injuries to the person, by negligence or default, shall abate by reason of the death of the plaintiff; but the personal representatives of the deceased may be substituted as plaintiff, and prosecute the suit to final judgment and satisfaction."

"Whenever death shall be occasioned by unlawful violence or negligence, and no suit for damages be brought by the party injured during his or her life, the widow of any such deceased, or if there be no widow, the personal representatives may maintain an action and recover damages for the death thus occasioned." Purd. Dig. (1861) 286.

A statute of Massachusetts (1842, c. 89, § 1), is somewhat similar, providing that actions on the case for damages to the person, shall survive; but the courts of that State have decided, that the personal damages mentioned in this statute, mean only physical injuries: Smith *v.* Sherman, 4 Cush. 408: Walters *v.* Nettleton, 5 Id. 544; Nettleton *v.* Dinehart, 5 Id. 543. Laws of a like character are also existing in other of the States, most of them being comparatively recent enactments.

for a breach of promise of marriage with the deceased, where no special damage can be stated to have accrued to her personal estate.(*p*)

Not only the death of the injured party, but also that of the wrong-doer, formerly put an end to every action which arose from a *tort* or wrong; and this was the case up to a very recent period; although if the executor or administrator had profited by the wrong done, the injured party was able to recover from him the money or goods he had thus gained.(*q*)[1] But by a modern statute(*r*) an action may now be maintained against the executors or administrators of any person deceased, for any wrong committed by him within six calendar months before his death against another person, in respect of his property real or personal; so as such action be brought within six calendar months after such executors or administrators shall have taken upon themselves the administration of the estate and effects of such person.[2] And the damages to be recovered in such action are to be payable in the like order of administration as the simple contract debts of such person. The remedy afforded by this statute does not preclude such action as might have previously been brought against the executor or administrator.(*s*)

There is one peculiar action founded on *tort*, to which, from the nature of the case, the deceased himself cannot *be liable, but which is maintainable by the common law against his executors or administrators. [*68] This is the action for dilapidations of the houses or buildings on a benefice; and it is brought by the new incumbent, whether of a rectory, vicarage or perpetual curacy,(*t*) against the executors or administrators of his predecessor. This action cannot be said to be an exception to the rule *actio personalis moritur cum personâ*, for the deceased is not liable during his lifetime; the plaintiff must be the succeeding incumbent; and an action cannot be said to die which never had or could have any existence.(*u*) However, in the case of resignation or exchange, the preceding incumbent is himself liable for dilapidations.(*v*) In estimating the damages to be recovered in this action, the rule is as follows:—The incumbent is bound to maintain the parsonage, farm buildings, and chancel in good and substantial repair, restoring and rebuilding when necessary, according

(*p*) Chamberlain *v*. Williamson, 2 M. & Selw. 408, 415.
(*q*) Powell *v*. Rees, 7 Ad. & E. 426 (E. C. L. R. vol. 34).
(*r*) Stat. 3 & 4 Will. IV. c. 42, s. 2. (*s*) Powell *v*. Rees, ubi supra.
(*t*) Mason *v*. Lambert, 12 Q. B. 795 (E. C. L. R. vol. 64).
(*u*) Sollers *v*. Lawrence, Willes 421. (*v*) Downes *v*. Craig, 9 M. & W. 166.

[1] See *ante*, p. 65, note. [2] Ibid.

to the original form, without addition or modern improvement; and he is not bound to supply or maintain anything in the nature of ornament to which painting (unless necessary to preserve exposed timbers from decay) and whitewashing and papering belong.(*x*) And no damages can be recovered on account of neglect to cultivate the glebe lands in a husbandlike manner.(*y*) If the incumbent commit any act of waste, such as could not be committed by any ordinary tenant for life,(*z*) he may be restrained by an injunction out of the Court of Chancery;(*a*)[1] but it has recently been decided that his executors will not be liable in an action for dilapidations for waste committed [*69] *by him in digging gravel in pits which were opened by his predecessor.(*b*) Whether they would be liable if the incumbent himself opened the pits appears doubtful.(*c*) Claims for dilapidations have this peculiarity, that they are not to be satisfied by the executor until after payment of all the debts of the testator, including those merely by simple contract.(*d*)

(*x*) Wise *v.* Metcalf, 10 B. & C. 299 (E. C. L. R. vol. 21).
(*y*) Bird *v.* Ralph, 4 B. & Ad. 826 (E. C. L. R. vol. 24).
(*z*) See Principles of the Law of Real Property, p. 23, 4th, 5th, 6th, 7th & 8th eds.
(*a*) The Duke of Marlborough, *v.* St. John, 5 De G. & Sm. 174.
(*b*) Ross *v.* Adcock, Law Rep. 3 C. P. 655.
(*c*) See Huntley *v.* Russell, 13 Q. B. 572 (E. C. L. R. vol. 66); Ross *v.* Adcock, ubi supra.
(*d*) Bryan *v* Clay, 1 E. & B. 38 (E. C. L. R. vol. 72). But as to equitable assets, see Bissett *v.* Burgess, 23 Beav. 278.

[1] By the laws of Pennsylvania, a writ of estrepement, to stay waste, may be issued on the application of a remainderman against a tenant for life; and also at the suit of a creditor, against the tenant, or person in possession of a decedent debtor's real estate, upon the allegation that the personal estate of said decedent is not sufficient to pay his debts, and that the person in possession of the freehold has committed waste, or allowed it to be done by others: Purd. Dig. (1861), p. 1008, secs. 5 & 7; Act of April 10, 1848, sec. 1; Act of April 22, 1850, sec. 1.

*CHAPTER II. [*70]

OF CONTRACTS.

PERSONAL actions, we have observed,(*a*) may be brought not only on account of the infliction of a wrong, but also to recover pecuniary damages for the non-performance of a contract, or to procure the payment of money due, if the payment of a specific sum be the subject of the contract. As the payment of money is the law's ultimate remedy in personal actions, an action for a given debt will be effectually satisfied by a judgment that the plaintiff do recover his debt; and this is the judgment accordingly given in an action of debt, which lies for the recovery of a specific sum due from the defendant to the plaintiff.(*b*) But when no specific sum is claimed, the action can only, in the law phrase, *sound in damages;* and the amount of the damages to be recovered must, until recently, have been assessed by a jury according to the injury sustained.(*c*) But the Common Law Procedure Act, 1852, now provides, that, in actions in which it shall appear to the court or a judge that the amount of damages sought to be recovered by the plaintiff is substantially a matter of calculation, the court or a judge may direct that the amount for which final judgment is to be signed shall be ascertained by one of the masters of the court;(*d*)[1] and further, that, in all actions where the plaintiff recovers a sum of money, the amount to which he is entitled may be awarded to him by the judgment generally, without any distinction being therein made as to whether such sum is recovered by way of a *debt or damages.(*e*) It is, however, competent to the parties to a contract to agree between themselves, that, in the event of a breach by either party, a given sum shall be recovered from him by the other as stipulated or liquidated damages; and in this case the whole of the sum thus agreed on may, on a breach of the contract, be recovered [*71]

(*a*) *Ante*, p. 4.
(*b*) Stephen on Pleading 116.
(*c*) Ibid. p. 117.
(*d*) Stat. 15 & 16 Vict. c. 76, s. 94.
(*e*) Ibid.

[1] A rule of court somewhat resembling this, has been adopted by the Supreme Court of the Commonwealth of Pennsylvania, whereby the prothonotary is authorized to assess the damages, in case of judgment by default in actions upon note, bill, or book account; and in all cases founded on contract and sounding in damages, where the defendant does not object.

from the defaulter.(*f*) The sum so agreed on is not properly called a penalty; for, as we shall see hereafter when speaking of bonds, the law regards a penalty as a security only for the damage actually sustained; although the use of the word *penalty* will not prevent the whole sum from being recovered, if this be clearly the intention.(*g*) But where a sum of money is stipulated to be recovered as liquidated damages in case of the breach of an agreement to do several acts, and such sum will, in case of breaches of the agreement, be in some instances too large and in others too small a compensation for the injury occasioned, such sum will not be allowed to be recovered in case of any breach, but damages only, proportioned to the actual injury which the breach has occasioned.(*h*) In such a case, if the parties wish to bind themselves to pay liquidated damages, they must contract in clear and express terms, that for the breach of each and every stipulation contained in the agreement a sum certain is to be paid; and in that case, although the stipulations may be of various degrees of importance, the parties will be held to their contract.(*i*)[1]

(*f*) Reilly *v.* Jones, 1 Bing. 302 (E. C. L. R. vol. 8); s. c. 8 Moore 244; Sugd. Vend. & Pur. 221, 11th ed.; Leighton *v.* Wales, 2 M. & W. 545; Price *v.* Green, 16 M. & W. 346, 354; Galesworthy *v.* Strutt, 1 Exch. Rep. 659; Atkyns *v.* Kinnier, 4 Exch. Rep. 776.

(*g*) Sainter *v.* Ferguson, 7 C. B. 716 (E. C. L. R. vol. 62); Sparrow *v.* Paris, 7 H. & N. 594.

(*h*) Kemble *v.* Farren, 6 Bing. 141 (E. C. L. R. vol. 19); s. c. 3 M. & P. 425; Davies *v.* Penton, 6 B. & C. 216, 223 (E. C. L. R. vol. 13), s. c. 9 Dowl. & Ry. 369; Horner *v.* Flintoff, 9 M. & W. 678, 681; Reindel *v.* Schell, 4 Scott N. S. 97; Betts *v.* Burch, 4 H. & N. 506.

(*i*) Per Parke, B., 9 M. & W. 680. See Atkins *v.* Kinnier, 4 Exch. Rep. 776; Mercer *v.* Irving, 1 E. B. & E. 563 (E. C. L. R. vol. 96).

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[1] In interpreting a contract, which provides, that upon its non-fulfilment, a sum agreed upon shall be paid by the defaulting party, it is often a matter of great difficulty, to determine whether the sum so specified to be paid, is a penalty, or liquidated damages. This difficulty is not lessened, by the fact, that the use of the words "penalty" or "liquidated damages," affords no sufficient aid in arriving at a conclusion; it having been frequently decided, where the parties have called the specific sum "liquidated damages," it is, nevertheless, a penalty," and *vice versa;* the only safe rule of interpretation, in this country as in England, is based upon the inquiry, What is the intention of the parties to the contract? and this question must be answered by taking a comprehensive view of the whole contract, and not by confining the examination to any isolated word or sentence: Watt's Exrs. *v.* Sheppard, 2 Ala. 425; Carpenter et al. *v.* Lockhart, 1 Carter (Ind.) 435; Heard *v.* Bowers et al. 23 Pick. 455; Shute *v.* Taylor, 5 Metc. 51; Brown *v.* Bellows, 4 Pick. 179; Beale *v.* Hayes, 5 Sandf. S. C. 641; Hosmer *v.* True, 19 Barb. 106; Foley *v.* McCeegan, 4 Iowa 1; Streeper *v.* Williams, 48 Penn. St. 450; Shreeve *v.* Brereton, 51 Id. 175. The tendency, however, of the decisions of the courts, is towards determin-

*So much then for the legal remedies for a breach of contract. Let us now inquire more particularly of what a contract itself [*72]

ing the sum specified in the contract, to be a penalty: Shute *v.* Taylor, 5 Metc. 51; Moore et al. *v.* Platte Co., 8 Mo. 467; Cheddick's Exr. *v.* Marsh, 1 Zab. 463; Wallis *v.* Carpenter, 13 Allen 19; Tayloe *v.* Sandiford, 7 Wheat. 13; and consequently, where the word "penalty" is used, it must clearly appear that the parties intend it should be liquidated damages, or it will be interpreted to be a penalty.

In 2d Greenleaf's Evidence, §§ 258, 259, certain rules will be found to ascertain the intention of the parties to a contract, as to this point.

Thus it has been held to be a penalty, First, "Where the parties in the agreement have *expressly declared* the sum to be intended as a forfeiture, or penalty, and no other intent is to be collected from the instrument:" Stearns *v.* Barrett, 1 Pick. 443; Brown *v.* Bellows, 4 Id. 179; Abrams *v.* Kounts et al., 4 Ohio 214; Robeson et al., Exrs., *v.* Whitesides, 16 S. & R. 320; Tayloe *v.* Sandiford, 7 Wheat. 13.

Second. "Where it is *doubtful*, whether it was intended as a penalty, or not; and a certain damage, or debt, less than the penalty, is made payable, on the face of the instrument:" Dakin et al. *v.* Williams et al., 17 Wend. 447: s. c. 22 Id. 201; Baird *v.* Tolliver et al., 6 Humph. 186; Waller *v.* Long, 6 Munf. 71; Watt's Exrs. *v.* Sheppard, 2 Ala. 425; Number of cases, Ala. 209; Plummer *v.* McKean, 2 Stew. (Ala.) 423; Hamilton *v.* Overton et al., 6 Blackf. 266; Taul *v.* Everett, 4 J. J. Marsh. 10; Churchwardens et al., *v.* Peytavin, 2 Condens. R. S. C. La. 493; Reynolds *v.* Yarborough, 7 La. 193; Baxter et al., Exrs., *v.* Wales, 12 Mass. 365; Beale *v.* Hays, 5 Sandf. S. C. 641; Brockaway *v.* Clark, 6 Ohio 50; Allen *v.* Brazier et al., 2 Bailey 293; Kellogg *v.* Curtis, Admr., 9 Pick. 534; United States *v.* Gurney et al., 4 Cranch 333. But see to the contrary, Jordan *v.* Lewis, 2 Stew. 426, and Cutler *v.* How, 8 Mass. 257; Gower *v.* Carter, 3 Clark 244. Third. "Where the agreement was evidently made for the attainment of another object, to which the sum specified is *wholly collateral*:" Broadwell et al., to the use, &c., *v.* Broadwell, 1 Gilman (Ill.) 600; Nash *v.* Hermosilla, 9 Cal. 584; Burrage *v.* Crump, 3 Jones L. 330. Its has been so held where the principal contract was to convey a tract of land: Dyer *v.* Dorsey et al., 1 Gill & Johns. 44; Shute *v.* Taylor, 5 Metc. 51; Lindsay *v.* Anesley, 6 Ired. L. 186; Dennis *v.* Cummins, 3 Johns. Cas. 297; or, not to trade, or sell liquor under a certain measure, in a specified place: Lanhenheimer *v.* Maine, 19 Wis. 519; Perkins *v.* Lyman, 11 Mass. 76; or, to let the plaintiff have the use of a building: Merrill *v.* Merrill, 15 Mass. 488; Bearden *v.* Smith, 11 Rich. 554; or to submit to an award: Hoag *v.* McGinnis, 22 Wend. 163; Whitcomb *v.* Preston, 13 Vt. 53.

Fourth. Where the agreement contains *several matters of different degrees of importance*, and yet the sum named "is payable for the breach of any, even the least:" Watt's Exrs. *v.* Sheppard, 2 Ala. 425; Carpenter et al. *v.* Lockhart, 1 Cart. (Ind.) 435; Hamilton *v.* Overton et al., 6 Blackf. 206; McNair *v.* Thompson, 1 Condens. R. S. C. La. 413; Moore et al. *v.* Platte Co., 8 Mo. 467; Grover *v.* Saltmarsh, 11 Id. 271; Chaddick's Exr. *v.* Marsh, 1 Zab. 463; Bagley *v.* Peddie, 5 Sandf. S. C. 192; Beale *v.* Hayes, Id. 641; Carry *v.* Sarer, 7 Penn. St. 470; Allen *v.* Brazier et al., 2 Bailey 293; Tayloe *v.* Sandiford, 7 Wheat. 13; Danville Bridge Co. *v.* Pomroy et al., 15 Penn. St. 181; which last case is similar in principle to Faunce *v.* Burke et al., 16 Penn. St. 469, subsequently decided contrariwise: Niver *v.* Rossman, 18 Barb. 50; Berry *v.* Wisdom, 3 Ohio N. S. 241; Clement *v.* Cash, 21 N. Y. 253; Basye *v.* Ambrose, 28 Mo. 39; Thoroughgood *v.*

consists. A contract then, as defined by Blackstone,(k) is "an agreement upon sufficient consideration to do or not to do a particular thing."

(k) 2 Bla. Com. 442.

Walker, 2 Jones L. 15; Hammer v. Bradenbach, 31 Misso. 49; Daily v. Litchfield, 10 Mich. 29.

Fifth. "Where the contract is *not under seal, and the damages are capable of being certainly known* and estimated; and though the parties have expressly declared the sum to be as liquidated damages:" Watt's Exrs v. Sheppard, 2 Ala. 425; Spencer v. Tilden et at., 5 Cowen 144; Graham v. Bickham, 4 Dal. 149.

"On the other hand, it will be inferred that the parties intended the sum as *liquidated damages:* First. Where the *damages* are uncertain, and are *not capable of being ascertained*, by any satisfactory and known rule; whether the uncertainty lies in the nature of the subject itself, or in the particular circumstances of the case:" Watt's Exrs. v. Sheppard, 2 Ala. 425; Hamilton v. Overton et al., 1 Carter (Ind.) 484; Gammon v. Howe, 14 Maine 250; Bright v. Rowland, 3 Howard (Mo.) 398; Dakin et al. v. Williams et al., 17 Wend. 447; s. c. 22 Id. 201; Hoag v. McGinnis, Id. 163; Bagley v. Peddie, 16 N. Y. 469. It has been decided, that the sum specified, was liquidated damages, and not a penalty, where the agreement was not to carry on a trade in a specified place: Miller v. Elliott, 1 Carter (Ind.) 484; Peirce v. Fuller, 8 Mass. 223; Noble's Admx. v. Bates, 7 Cowen 307; Smith v. Smith, 4 Wend. 468; Mott v. Mott, 11 Barb. S. C. 127; Grasselli v. Lowden, 11 Ohio N. S. 349; Duffy v. Shockey, 11 Ind. 70; Jaquith v. Hudson, 5 Mich. 123; Streeter v. Rush, 25 Cal. 67, or to pay a certain rate per ton, for a certain amount of coal mined or not mined, within a definite time: Powell v. Borroughs, 54 Penn. St. 329; so, where it was agreed to pay a certain sum, for the delay of each week, month, &c., in finishing a work, stipulated to be completed at a certain time: Curtis et al. v. Brewer, 17 Pick. 513; Worrell v. McClinaghan et ux., 5 Strob. 115; Watt's Exrs. v. Sheppard, 2 Ala. 422; Hall v. Crowley, 5 Allen (Mass.) 304; and by the English authorities it has been held, that where it is agreed that a certain specified sum shall be paid in case any act amounting to waste shall be committed, it is a stipulation for liquidated damages: Aylett v. Dodd, 2 Atk. 239; Woodward v. Gyles, 2 Vern. 119; Rolfe v. Peterson, 2 Bro. P. C. 436.

Second. "Where from the nature of the case, and the tenor of the agreement, it is apparent, that the damages have already been the subject of actual and fair calculation and adjustment between the parties:" Alexander v. Troutman, 1 Kelley 472; McNair v. Thompson, 1 Condens. R. S. C. La. 413; McGlorin v. Henderson et al., 6 La. 720; Price et al. v. Tucker, 5 La. Ann. 514; Graham v. Bickham, 4 Dal. 149; Pierce v. Jung, 10 Wis. 30; Dunlop v. Gregory, 10 N. Y. 241; Dwinel v. Brown, 54 Maine 468. The cases exemplifying this principle are, where the agreement was to pay a sum of money, in goods, at a certain price: Braham et al. v. Le Roy Pope et al. 1 Stew. (Ala.) 135; Brooks v. Hubbard, 3 Conn. 58; or, to sell personal property, or to convey land, and in default thereof, to pay a specified sum: Tingley v. Cutler, 7 Conn. 291; Allen v. Brazier, 2 Bailey 293; Heard v. Bowers et al. 23 Pick. 455; Hodges's Exr. v. King, 7 Metc. 587; Cartwright et al. v. Gardener, 5 Cush. 273; Chamberlain v. Bagley, 11 N. H. 235; Mead v. Wheeler, 13 Id. 351; Hasbrouck v. Tappen, 15 Johns. 203; Stosson v. Beale, 7 Id. 72; Knapp v. Maltby, 13 Wend. 587; Gray v. Crosby, 18 Johns. 219; Pearson v. Williams's Admrs., 24 Wend. 244; s. c. 26 Id. 630; Sawyer v. McIntire, 18 Vt. 27; Mundy v. Culver, 18 Barb. 336; Williams v. Green, 14 Ark. 315; Fisk v. Fowler, 10 Cal. 512; Streeper v. Williams, 48 Penn. St. 450;

This agreement may be either express or implied; for the law always implies a promise to do that which a person is legally liable to perform, and the action of *assumpsit* on promises is constantly maintained for damages for the breach of such an implied contract.(*l*) Thus a person who takes the goods of a tradesman is liable in *assumpsit* for their market value; for, as he took the goods, the law will imply for him a promise to pay for them. So a person who employs another to work for him impliedly contracts to give him reasonable remuneration; and a man who borrows money impliedly promises to repay it. And in all these cases the plaintiff, until recently, plainly stated that the defendant promised the plaintiff to pay him the money on request, and that the defendant had disregarded his promise, and had not paid the same moneys or any part thereof. But the Common Law Procedure Act, 1852, now requires that all statements of this kind shall be omitted.(*m*)

Express contracts are either by parol, or word of mouth, which are called *simple contracts*, or by deed under seal, which are called *special contracts*;(*n*) although simple contracts may, and often must at the present day, be evidenced by writing. Let us consider first mere parol or simple contracts. A parol contract then is an agreement by word of mouth, upon sufficient *consideration, to do or not to do a particular thing. [*73] According to the law of England a *consideration* is an essential ingredient in every contract: a promise without a consideration is regarded as *nudum pactum*, and no recompense can be recovered for its breach,(*o*) neither will its performance be enforced in a court of equity.(*p*) Thus if a man promise to give me 100*l*. without any consideration, he is not bound to perform his promise, and I am without remedy if he should break his word. So even if I should have done him any service, his subsequent promise to pay me money, or otherwise bene-

(*l*) Stephen on Pleading 18.

(*m*) Stat. 15 & 16 Vict. c. 76, s. 49.

(*n*) Rann *v.* Hughes, 7 Term Rep. 351, n.

(*o*) Doctor & Student, dial. 2, c. 24; 2 Bla. Com. 445.

(*p*) 1 Fonb. Eq. 335 *et seq.*; Dipple *v.* Corles, 11 Hare 183.

Morse *v.* Rathburn, 42 Mo. 594; or that a security should become void, if put in suit before the time limited in a letter of license granted to the debtor: White *v.* Tingley, 4 Mass. 433; or, to pay a specified sum of money, if a certain receipt did not contain a true and proper method for making improved incorruptible teeth: Brewster *v.* Edgerly, 13 N. H. 275; or to pay double rent, for such time as a lessee held possession beyond the expiration of his term: Walker *v.* Engler, 30 Mo. 130; or to forfeit half the freight in case a vessel did not sail by a certain time: Sparrow *v.* Paris, 7 H. & N. 594.

See also, Chase *v.* Allen, 13 Gray 42; Dermott *v.* Wallack, 1 Wall. U. S. 61.

fit me, for a consideration already executed on my part, will not be binding, unless I should have done him the service at his request, in which case the promise will relate back to the request,(q) or unless a request can be implied from a subsequent allowance of the service, or from other circumstances;(r) and if the service rendered be of such a nature that the law will imply a promise in respect of it, any subsequent express promise different from that which the law will imply will be void as *nudum pactum*.(s) And if the service, or any part of it, has been illegal from being contrary to the common law or to any statute, such illegal consideration will not support a promise. Thus a promise made in consideration that the other party had published a libel at the request of the person making the promise, and had also at the like request incurred certain [*74] costs, was held void on account *of the illegality of part of the consideration, namely, publishing the libel, which vitiated the whole.(t) And in like manner the circumstance of a woman's having cohabited with a man is not of itself a valid consideration to support a promise made by him to pay her a sum of money.(u)

Considerations are divided in law into two classes, *good* (sometimes called meritorious) and *valuable*. A good consideration is that of *blood*, or the natural love and affection which a person has to his children, or any of his relatives.(v) A valuable consideration may be either pecuniary, namely, the payment of money; or the gift or conveyance of anything valuable; or it may be the consideration of the marriage of the party himself or of any relative;(w) or the compromise of a bonâ fide claim;(x) or any act of one party from which the other, or any stranger at his request, express or implied, derives any advantage; or any labor, detriment, inconvenience or risk sustained by the one party, if such labor be performed, or such detriment, inconvenience or risk be suffered

(q) Hunt v. Bate, Dyer 272 a; Lampleigh v. Brathwait, Hob. 105; 1 Smith's Leading Cases 67; Powle v. Gunn, 4 N. C. 445, 448; Eastwood v. Kenyon, 11 Ad. & E. 438, 451 (E. C. L. R. vol. 39); s. c. 3 Per. & Dav. 282; 1 Wms. Saund. 264, n. (1).

(r) The maxim is *omnis ratihabito retrotrahitur et mandato æquiparatur:* 1 Wms. Saund. 264 b. n. (e).

(s) Hopkins v. Logan, 5 M. & W. 241, 247.

(t) Shackell v. Rosier, 2 Bing. N. C. 634, 644 (E. C. L. R. vol. 29).

(u) Binnington v. Wallis, 4 B. & Ald. 650, 652 (E. C. L. R. vol. 6). See however Gibson v. Dickie, 3 M. & Selw. 463; Keenan v. Handley, 2 De G., J. & S. 283.

(v) 2 Black. Com. 297, 444.

(w) Campion v. Cotton, 17 Ves. 263; Fraser v. Thompson, 1 Giff. 49, 65; reversed on appeal, 4 De G. & J. 659.

(x) Lucy's Case, 4 De G., M. & G. 356; Cook v. Wright, 1 B. & S. 559 (E. C. L. R. vol. 101).

the one party at the request, express or implied, of the other, hough such other may himself derive no actual benefit.(y) A good ısideration is not of itself sufficient to support a promise, any more ın the moral obligation which arises from a man's passing his word; ther will the two together make a binding contract; thus a promise by ather to *make a gift to his child will not be enforced against n.(z) The consideration of natural love and affection is indeed [*75] ɔd for so little in law, that it is not easy to see why it should be called *ɿood* consideration; for in law it is considered as not good against ɔditors within the statute 13 Elizabeth,(a) in which the very phrase *ɔd consideration* is used; it is not good to support a contract; and a 't for such consideration is regarded as simply voluntary.(b) The only ɩson why such a consideration should be called *good* appears to be, ɩt in early times, previously to the passing of the Statute of Uses,(c) ɜ Court of Chancery enforced a covenant to stand seised of lands to the ɜ of any person of the blood of the covenantor, on account of the good- ɜs of the consideration; whence it has happened that, since that stat- ɜ, the legal estate (being by that statute annexed to the use)(d) will ss to a relative under a covenant to stand seised to his use.(e) But the .es that anciently governed the Court of Chancery do not now regulate proceedings;(f) although modern equity will still interfere in favor a wife or child in some cases in which it will not interpose on behalf of angers.(g)

A valuable consideration is, therefore, in all cases necessary to m a valid contract.[1] It has indeed been *thought that an ex- [*76]

y) Selwyn's Nisi Prius, tit. Assumpsit, 46; 1 Wms. Saund. 211 d, n. (2); 2 Wms. ınd. 137 h, n. (e).

z) Jeffery v. Jeffrey, 1 Craig & Ph. 138; Dillon v. Coppin, 4 Myl. & Cr. 647; Hollo- ɾ v. Headington, 8 Sim. 324; Meek v. Kettlewell, 1 Hare 464; 1 Phil. 342. See ɾever Ellis v. Nimmo, Lloyd & Goold 333.

ɜ) Twyne' Case, 3 Rep. 80 b; *ante*, p. 48.

b) 2 Black. Com. 297.

(c) 27 Hen. VIII. c. 10.

d) Principles of the Law of Real Property 126 *et seq.*, 2d ed.; 131, 3d & 4th eds.; , 5th ed.; 143, 6th ed.; 147, 7th ed.; 153, 8th ed.

e) Ibid. p. 159, 2d ed.; 164, 3d ed.; 166, 4th ed.; 173, 5th ed.; 181, 6th ed.; 185, ed.; 194, 8th ed.

f) Ibid. p. 131, 2d ed.; 135, 3d & 4th eds.; 141, 5th ed.; 148, 6th ed.; 151, 7th ; 157, 8th ed.

ɿ) Ibid. p. 239, 2d ed.; 246, 3d ed.; 248, 4th ed.; 258, 5th ed.; 270, 6th ed.; 276, ed.; 288, 8th ed.

The obligation of a contract cannot be ɩaired by subsequent legislation: Constitution of the United States, Art. 1, Sec, 10 Cl. 1; Constitution of Pennsylvania.

press promise, founded on a moral obligation is sufficient for this purpose.(*h*) This however appears to be a mistake. An express promise can give no original right of action, if the obligation on which it is founded could never have been itself enforced.(*i*) But in some cases a valuable consideration, which might have formed a contract by means of an implied promise, had its operation not been suspended by some positive rule of law, may be revived and made available by a subsequent express promise.[1] Thus a debt barred by the debtor's having become bankrupt and

(*h*) Lee *v.* Muggeridge, 5 Taunt. 36 (E. C. L. R. vol. 1). This case may now be considered as virtually overruled by subsequent authorities mentioned in the next note. See however Dawson *v.* Kearton, 3 Sm. & G. 190, *qu.?*

(*i*) Note to Wennall *v.* Adney, 3 Bos. & Pul. 252; Littlefield *v.* Shee, 2 B. & Ad. 811 (E. C. L. R. vol. 22); Meyer *v.* Haworth, 8 Ad. & E. 467 (E. C. L. R. vol. 35); s. c. 3 N. & P. 462; Monkman *v.* Shepherdson, 11 Ad. & E. 411, 415 (E. C. L. R. vol. 39); s. c. 3 Per. & Dav. 182; Jennings *v.* Brown, per Parke, B., 9 M. & W. 501; Eastwood *v.* Kenyon, 11 Ad. & E. 447 (E. C. L. R. vol. 39); s. c. 3 Per. & D. 276; 2 Wms. Saund. 137 f, n. (*e*); Beaumont *v.* Reeve, 8 Q. B. 483 (E. C. L. R. vol. 55).

Arb. IX. Sec. 17. Hence it has been held that a contract made before the passage of the Act of February 25, 1862, containing a covenant for the payment of gold and silver money, may be still enforced by insisting upon the payment of the stipulated coin, notwithstanding the said Act of Congress made the treasury notes of the United States a legal tender for debts: Bronson *v.* Rodes, 7 Wall. U. S. 229; Butler *v.* Harwitz, Id. 258; but a contract for the payment of lawful money made before the passage of said Act, is payable in United States notes: Knox *v.* Lee, and Parker *v.* Davis, 11 Id. 682; 29 Leg. Intel. 36; overruling Hepburn *v.* Griswold, 8 Id. 603.

[1] The general rule of law prevailing in the several States of the Union is, that a promise, made subsequent to the consideration upon which it is based, is not sufficient to support an action: Barlow *v.* Smith et al., 4 Vt. 139; Buckley et al. *v.* Laudon et al., 2 Conn. 404; s. c. 3 Id. 76; Jones *v.* Shorter et al., Admrs., 1 Kelley (Geo.) 294; Waters et al. *v.* Simpson et al., 2 Gilm. (Ill.) 574; Carson *v.* Clark, 1 Scammon 114; Hutsen *v.* Overturf, Id. 170; Roberts *v.* Garen, Id. 396; Townsend *v.* Briggs, Id. 472; Boston *v.* Dodge, 1 Blackf. 19; Carr *v.* Allison, 5 Id. 64; Head's Exr. and Exrx. *v.* Manner's Admrs., 5 J. J. Marsh 257; Balcolm, Exrx., *v.* Craggin, 5 Pick. 295; Andover, &c., *v.* Gould, 6 Mass. 43; Mills *v.* Wyman, 3 Pick. 207; Dodge *v.* Adams, 19 Pick. 429; Ridgway *v.* English, 2 Zabr. 416; Phetteplace *v.* Steere, 2 Johns. 443; Frear *v.* Hardenburgh, 5 Id. 272; Tioga *v.* Seneca, 13 Id. 380; Watkins *v.* Halstead, 3 Sandf. S. C. 311; Ehle *v.* Judson, 24 Wend. 97; 16 Johns. 283, n.; Comstock *v.* Smith, 7 Id. 87; Smith *v.* Ware, 13 Id. 257; Hatchell *v.* Odom, 2 Dev. & Bat 302; Johnson *v.* Johnson, 3 Hawks. 556; Snevily *v.* Read, 9 Watts 396; Garrett *v.* Stuart, 1 McCord 515; Massey *v.* Craine, Id. 489; Hanley *v.* Farrer, 1 Vt. 420; Parker *v.* Carter et al., 4 Munf. 273; Bank of Washington *v.* Arthur et al., 3 Gratt. 173; Colter *v.* Greenhagen, 3 Min. 126; Ellison *v.* Jackson, &c., Co., 12 Cal. 542; Smith *v.* Mudgett, 20 N. H. 527; Robinson *v.* Marshall, 11 Md. 251; Amity Township *v.* Reed, 62 Penn. St. 442; Heslep *v.* Sacramento, 2 Cal. 580, which last was a suit brought by the administrator of one, who had been the Mayor of Sacramento, to recover $10,000, which the Common Council had voted him, in consideration of the expenses he had incurred in his illness, which was brought about by being wounded, while

obtained his certificate, might formerly have been enforced against him, if, after his bankruptcy, he had expressly promised to pay it;(j) but such

(j) Trueman v. Fenton, Cowp. 544; Kirkpatrick v. Tattersall, 13 M. & W. 766.

endeavoring to quell certain public disturbances. There are, however, many cases where a subsequent promise will support an action, and which, as exceptions to the general rule above stated, may be classified as follows:

First. Where a subsequent promise follows a previous request: Carson v. Clark, 1 Scam. 114; Ridgway v. English, 2 Zabr. 416; Frear v. Hardenburgh, 5 Johns. 272; Tioga v. Seneca, 13 Id. 380; Doty v. Wilson, 14 Id. 378; Livingston v. Rogers, 1 Caines 583; Comstock v. Smith, 7 Johns. 87; McMorris v. Herndon, 2 Bail. 56; Lonsdale v. Brown, 4 Wash. C. C. 150.

Second. Where there has not been a previous express request, but one may be implied, from a subsequent recognition of the service performed, which must be beneficial to the one party, or detrimental to the other; thus, where one person pays the debt of another, and the debtor, thereupon, promises to reimburse him: Keenan v. Halloway, 16 Ala. 53; Weekly v. Burnhan et al., 2 Stew. 500; Roundtree v. Holloway, 13 Ala. 359; Roundtree v. Weaver, 8 Id. 314; Bertrand v. Byrd, 2 Ark. 651; Stocking v. Sage et al., 1 Conn. 519; Gardner et al. v. Towsey, 3 Litt. 426; Nixon v. Jenkins, 1 Hilton 318; or, where merchandise is delivered at one's house, and he to whom the goods are sent, sanctions the act by retaining them: Gardner et al. v. Towsey, 3 Litt. 426; McMorris v. Herndon, 2 Bail. 56; so, also, where two go bail for a third, and one of them, at much expense, surrenders the principal, and the other surety promises to pay his proportion of the expense: Greeves v. McAllister, 2 Binn. 591; and, the past use of money, has been held a good consideration to support a promise to pay interest: Garland v. Lockett, 5 N. S. (La) 40; there are many other such cases: Webster et al. v. Drinkwater, 5 Greenl. 322; Farnham v. O'Brien, 22 Maine 481; Davenport v. Mason, 15 Mass. 74; R. & H. Stewart v. Eden, 2 Caines 150; Oatfield v. Waring, 14 Johns. 192; Doty v. Wilson, Id. 378; Parker v. Crane, 6 Wend. 647; Hicks v. Burhans et al., 10 Johns. 243; Cunningham v. Garvin, 10 Penn. St. 366; Seymour v. Marlboro, 40 Vt. 171.

Third. Where one is under a moral obligation to do a certain act, and subsequently, makes an express promise to do what he was bound by the prior moral obligation to perform: Commissioners of Canal Fund v. Perry, 5 Ohio 48; Hill v. Henry, 17 Id. 9; Shenk v. Mingle, 13 S. & R. 29; Nesmuth v. Drum, 8 W. & S. 9; McMorris v. Herndon, 2 Bail. 56; Glass v. Beach, 5 Vt. 176. But it is not every moral obligation that will support a subsequent promise; for a promise to feed the hungry, or clothe the naked, or to perform acts of benevolence and charity, will not support an action; as, where a son promised to pay for necessaries, which had been advanced to his father, if he did not, such promise was held not binding: Cook v. Bradley, 7 Conn. 57; Parker v. Carter et al., 4 Munf. 273; and the same was held of an agreement by a father, to pay for the expenses of the sickness of a son, who was of age, and away from home, made subsequently to their being incurred: Mills v. Wyman, 3 Pick. 207; and, of the same principle are: Dodge v. Adams, 19 Pick. 429; Ridgway v. English, 2 Zabr. 416; and Watkins v. Halstead, 3 Sandf. C. 311, which last was a promise by a married woman, made after her divorce from her husband, to pay for necessaries which had been furnished her during her coverture; but see Hemphill v. McClimans, 24 Penn. St. 367; Viser v. Bertrand, 14 Ark. 267; all of which cases, as well as the following, prove that by the term "moral obligation," as applied legally, is meant, what the moralist would call a perfect moral obligation, that is, an obligation of justice,

a promise was required, by the modern bankrupt acts,(*k*) to be made in writing signed by the bankrupt, or by some person thereto lawfully

(*k*) 6 Geo. IV. c. 16, s. 131; 5 & 6 Vict. c. 122, s. 43.

and not merely of benevolence and piety: Jones *v.* Shorter et al., Admrs., 1 Kelly 294; Farnham *v.* O'Brien, 22 Maine 481; Andover, &c., *v.* Gould, 6 Mass. 43; Davenport *v.* Mason, 15 Id. 74; Mercer *v.* Stark, Walk. (Miss.) 451; Tioga *v.* Seneca, 13 Johns. 380; Hatchell *v.* Odom, 2 Dev. & Bat. 302; McMorris *v.* Herndon, 2 Bail. 56; Hanley *v.* Farrar, 1 Vt. 420. But other cases indicate still more specifically, what is meant by the term "moral obligation," showing that "it is not expressive of any vague and undefined claim, but of those imperative duties, which would be enforceable at law, were it not for some positive rule of law, legal maxim, or statute provision, which, with a view to general benefit, exempts the party in that particular instance, from legal liability. On such duties, so exempted, the express promise operates to revive the liability, and take away the exemption, because if it were not for the exemption, they would be enforced at law through the medium of an implied promise:" Paul *v.* Stackhouse, 38 Penn. St. 304. And see also, Shepard *v.* Rhodes, 7 R. I. 470.

See also to the same point, one class of cases proving this, relative to bankrupts or insolvents, who, after obtaining a discharge, have promised their creditors to pay them in full: Maxim *v.* Morse, 8 Mass. 127; Trumbull *v.* Tilton, 1 Fost. (N. H.) 129; Graham *v.* Hunt, 8 B. Mon. 8; Shippey *v.* Henderson, 14 Johns. 178; Erwin *v.* Saunders et al., 1 Cowen 249; Stafford *v.* Bacon, 25 Wend. 384; Depuy *v.* Stewart, 3 Id. 135; Kingston *v.* Wharton, 2 S. & R. 208; Earnest *v.* Parke, 4 Rawle 452; Field's Estate, 2 Id. 351; Lonsdale *v.* Brown, 4 Wash. C. C. 150; Dearing *v.* Moffitt, 6 Ala. 776; Sconton *v.* Eislord, 7 Johns. 36; Brown et ux. *v.* Collins, 8 Hum. 511; Feeny *v.* Daly, 8 Cal. 84; but note a difference, between a release by provisions of positive law, and a discharge by the voluntary act of the creditor: Montgomery *v.* Lampton, 3 Metc. (Ky.) 519. Another class of cases has arisen from promises to pay debts barred by the statute of limitations, in which the promises were held valid: Carson *v.* Clark, 1 Scam. 114; Head's Exr. and Exrx. *v.* Manner's Admrs., 5 J. J. Marsh. 257; Harrison *v.* Handley, 1 Bibb 443; Gray *v.* Lawridge, 2 Id. 285; Bell *v.* Rowland's Admrs., Hard. 301; Guy *v.* Tams, 6 Gill 85; Bangs *v.* Hall, 2 Pick. 368; Davenport *v.* Mason, 15 Mass. 74; Dawes *v.* Shed et al., Exrs., 15 Id. 7; Exeter Bk. *v.* Sullivan et al., 6 N. H. 135; Kittredge *v.* Brown, 9 Id. 377; Walker *v.* Eastman, 6 Id. 367; Buswell *v.* Roby, 3 Id. 467; Stanton *v.* Stanton, 2 Id. 425; Atwood *v.* Coburn, 4 N. H. 315; Rice et al. *v.* Wilder et al., Id. 336; Belton, Admr., *v.* Cutts, Admr., 11 Id. 170; Ridgway *v.* English, 2 Zabr. 416; Exrs. of Conovers *v.* Conover et al., Sax. 404; Saltur *v.* Saltur's Admr., 1 Halst. 405; Danforth *v.* Culber, 11 Johns. 146; Sands *v.* Gelston, 15 Id. 511; Hatchell *v.* Odom, 2 Dev. & Bat. 302; Sherrod *v.* Bennet et al., 8 Ired. 309; Peebles *v.* Mason, 2 Dev. 367; Smallwood *v.* Smallwood, 2 Dev. & Bat. 330; Rainey *v.* Link, 3 Ired. 376; Turner *v.* Chrisman, 20 Ohio 332; Hill *v.* Henry, 17 Id. 9; Jones et al., Exrs. *v.* Moore, Admr., 5 Binn. 573; Suter *v.* Sheeler, 22 Penn. St. 308; Eckert *v.* Wilson, 12 S. & R. 393; Fries *v.* Boiselet, 9 Id. 128; Farly *v.* Rustenbaden, 3 Penn. St. 418; Haylebaker *v.* Reeves, 12 Id. 264; Forney *v.* Benedict, 5 Id. 225; Gilkyson *v.* Larue, 6 W. & S. 213; Davis *v.* Steiner, 14 Penn. St. 275; Harbold's Exrs. *v.* Kuntz, 4 Id. 210; Huff *v.* Richardson, 7 Id. 388; Reynolds *v.* Johnson, 9 Humph. 444; Coles *v.* Kelsey, 2 Texas 541; Burton *v.* Stevens, 24 Vt. 131; 22 Id. 179; Paddock *v.* Colby et al., 18 Vt. 485; Clementson *v.* Williams, 8 Cranch 72; Wetzell *v.* Bussard, 11 Wheat. 309; Bell *v.* Morrison, 1 Peters 351; Lonsdale *v.* Brown, 4 Wash.

authorized by him in writing; and the Bankrupt Law Consolidation Act, 1849, rendered all such promises void;(l) and a similar provision is con-

(l) Stat. 12 & 13 Vict c. 106, s. 204; Kidson v. Turner, 3 H. & N. 581.

C. C. 150; Raudon v. Toby, 11 How. 493; Chandler v. Glover's Admr., 32 Penn. St. 509; Pritchard v. Howell, 1 Wis. 131.

Upon the same principle, promises, made by one after arriving at full age, to do what he agreed to do while a minor, have been held to be legally operative: Bliss et al. v. Perryman, Scam. 484; Taylor v. Rundell, 2 Annual R. 367; Merriam et al. v. Wilkins et al., 6 N. H. 432; Wright v. Steele, 2 Id. 51; or, a promise made by a child who was heir to a large estate, to her brother-in-law, after she came of age, that she would indemnify him against all loss, by reason of a contract he had made with a third party, to be responsible for the charges of said child while a minor: Baker v. Gregory, 28 Ala. 544. And by analogy with the foregoing cases, if the consideration be still continuing, a subsequent promise will be valid: Carroll v. Nixon, 4 W. & S. 516; Carman v. Noble, 9 Penn. St. 366; Nesmuth v. Drum, 8 W. & S. 9; Lonsdale v. Brown, 4 Wash. C. C. 150; Grove v. McCalla, 21 Penn. St. 44; Bailey v. Bussing, 29 Conn. 1; so, a promise to pay the principal of a debt, void by the usury laws, is binding: Early v. Mahon, 15 Johns. 147; and this is also true of a promise made by an executor, relative to the debt of his testator, which affords sufficient ground for an action against the executor *de bonis propriis:* Clark v. Herring, 5 Binn. 33; but a promise by an administrator will not take a case out of the statute of limitations: Clark v. Maguire's Admrx., 35 Penn. St. 259; so, too, where money has been twice paid, through failure to produce the receipt given on first payment, a subsequent promise to refund will be binding: Bentley v. Morse, 14 Johns. 468. Another class of cases arises, where a promise to pay, has been made by an endorser of a promissory note, who has knowledge of a want of due diligence in the holder in giving him notice: Breed v. Hillhouse, 7 Conn. 523; Hopkins v. Liswell, 12 Mass. 52; Thornton v. Winn, 12 Wheat. 183. The consideration of a moral obligation, which seems to have given rise to more embarrassment than any other, is, where a promise has been made to pay a debt, subsequently to a voluntary release of the debt by the creditor; some of the cases are in favor of the validity of such a promise: Jamison v. Ludlow, 3 Ann. (La.) 493; Doty v. Wilson, 14 Johns. 378; Willing v. Peters, 12 S. & R. 182; McPherson's Admrs. v. Reeves, 2 Penna. R. 521: and others, against it: Warren v. Whitney et al., 24 Maine 561; Valentine v. Foster, 1 Metc. 520; Snevily v. Read, 1 Watts 396; the law is probably, upon principle, with the former cases; for of the latter, Valentine v. Foster, was a promise made by a witness, subsequent to a release, made in order to qualify him for giving testimony, and the court said that it would destroy all confidence in evidence given under such circumstances, if a subsequent promise by the witness, could revive his liability; and another, Snevily v. Read, was a case where a creditor had received satisfaction of his debt, by taking the body of his debtor, whom he subsequently released from arrest, and the debtor afterwards promised to pay; which was held not sufficient to support an action, for the arrest had been a satisfaction of the prior debt, and consequently, the subsequent promise was without consideration. Where the act to be done, is one, which the party who subsequently promises, is legally, as well as morally, bound to perform, the promise will be supported; as a promise to maintain a bastard child; or, an agreement by an executor, to pay the funeral expenses of his testator; or by a husband to pay for necessaries advanced to a wife, who had become a charge upon a parish, and the same is true of like examples: Hargrove et al., Exrs., v. Freeman, 12 Ga. 342; Car-

tained in the Bankruptcy Act, 1861; but by the Bankruptcy Act, 1869, where a debtor shall be adjudicated a bankrupt, no creditor to whom the bankrupt is indebted in respect to any debt provable under the bankruptcy shall have any remedy against the property or person of the bankrupt in respect of such debt except in manner directed by that act.(*m*) So a simple contract debt, which would otherwise have been barred by the Statute of Limitations,(*n*) from having been incurred upwards of six [*77] years, may be revived by a subsequent promise to pay, or even by an unconditional *acknowledgment of the debt;(*o*) but by modern statutes such promise or acknowledgment must be made or contained by or in some writing, to be signed by the party chargeable thereby, or by his agent.(*p*) And in like manner a debt incurred or contract made by a person during infancy and voidable on that account, may be confirmed by an express promise or ratification made when of full age;(*q*) although such a promise or ratification must now, by one of the statutes just mentioned,(*r*) be made by some writing signed by the party to be charged therewith.

By the ancient common law, every legal instrument in writing was a deed sealed and delivered;(*s*) and in accordance with this circumstance, contracts are, as we have seen,(*t*) now divided in law into two kinds only, namely, parol (that is verbal) or *simple* contracts, and *special* contracts made by deed. But as the art of writing became general, many parol

(*m*) Stat. 24 & 25 Vict. c. 134, s. 164; Stat. 32 & 33 Vict. c. 83, s. 12.

(*n*) Stat. 21 Jac. I. c. 16, s. 3.

(*o*) Bac. Abr. tit. Limitations of Actions (E.); Prance *v.* Sympson, 1 Kay 678; Sidwell *v.* Mason, 2 H. & N. 306–310; Holmes *v.* Mackrell, 3 C. B. N. S. 789 (E. C. L. R. vol. 91); Cornforth *v.* Smithard, 5 H. & M. 13; Francis *v.* Hawkesley, 1 E. & E. 1052 (E. C. L. R. vol. 102).

(*p*) Stat. 9 Geo. IV. c. 14, s. 1, called Lord Tenterden's Act; 19 & 20 Vict. c. 97, s. 13.

(*q*) Bac. Abr. tit. Infancy and Age (I) 8; Williams *v.* Moor, 11 M. & W. 256–263; Harris *v.* Wall, 1 Ex. Rep. 122.

(*r*) Stat. 9 Geo. IV. c. 14, s. 5.

(*s*) See Principles of the Law of Real Property 118, 2d ed.; 123, 3d & 4th eds.; 128, 5th ed.; 134, 6th ed.; 137, 7th ed.; 144, 8th ed.

(*t*) *Ante*, p. 72.

son *v.* Clark, 1 Scam. 114. Inhabitants of Alna *v.* Plummer, 4 Greenl. 258; Hanover *v.* Turner, 14 Mass. 227; Hapgood *v.* Houghton, Exr., 10 Pick. 154; Shenk *v.* Mingle, 13 S. & R. 29; Allen *v.* Davison, 16 Ind. 416; but it does not follow, that if the party who is legally and morally bound to perform a certain act, in such cases as have been just stated, executes it, it will give ground for the implication of a promise; but quite the contrary: Salsbury *v.* Philadelphia, 44 Penn. St. 303; Duffy *v.* Duffy, Id. 399; Lynn *v.* Lynn, 29 Id. 369; Musser *v.* Ferguson, 55 Id. 478.

contracts were, for greater certainty, put into writing, though not made by deed. And by some statutes of modern times, writing is required to most simple contracts respecting matters of importance. These statutes we shall now proceed to notice, premising that in all cases where writing is by any statute made necessary to a contract, the contract is still a *parol*[1] one, though evidenced by the writing ;(*u*) but when a contract is made by deed, *the *deed itself* is the contract.(*x*) The first and [*78] most important statute then, by which writing is required to many agreements, is the Statute of Frauds,(*y*) which enacts in its fourth section that no action shall be brought whereby to charge any executor or administrator upon any special promise to answer damages out of his own estate, or whereby to charge the defendant upon any special promise to answer for the debt, default or miscarriage of another person; or to charge any person upon any agreement made upon consideration of marriage; or upon any contract or sale of lands, tenements or hereditaments, or any interest in or concerning them; or upon any agreement that is not to be performed within the space of one year from the making thereof; unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized.[2] This enactment, it will be observed,

(*u*) Sugd. Vend. and Pur. 115, 13th ed.
(*x*) Dyer 305 a; Byron *v.* Byron, Cro. Eliz. 472 ; 1 Wms. Saund. 274 a, n. (3).
(*y*) 29 Car. II. c. 3.

[1] The word PAROL is generally a cause of much confusion to students, particularly in its application to written contracts not under seal; a parol contract, legally defined, is a contract made either verbally, or in writing not under seal, as distinguished from those which are under seal, bearing the name of deeds or specialties.

[2] The 4th section of the Statute of Frauds, 29 Car. II. c. 3, is in the following words : "And be it further enacted by the authority aforesaid, That from and after," &c., "no action shall be brought, whereby to charge any executor or administrator, upon any special promise, to answer damages out of his own estate ; (2) or whereby to charge the defendant, upon any special promise, to answer for the debt, default, or miscarriage of another person ; (3) or to charge any person upon any agreement made upon consideration of marriage ; (4) or upon any contract or sale of lands, tenements, or hereditaments, or, any interest in or concerning them ; (5) or upon any agreement, that is not to be performed within the space of one year from the making thereof; (6) unless the agreement upon which such action shall be brought, or some *memorandum* or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized."

The above section is in force in Florida, Georgia, Maine, Massachusetts, Maryland, New Jersey, Ohio, Vermont, and Virginia, by legislative adoption ; and its provisions have been received and acknowledged by nearly all the other states. By the enactment of the legislatures of Alabama,

does not give to writing any validity which it did not possess before. A written promise made since this statute, without any consideration, is

Kentucky, Mississippi, and Tennessee, the words "or make any lease thereof, for a longer term than one year," have been inserted in place of, "or any interest in or concerning them." In New Hampshire, the words "or any interest in or concerning them," are omitted. In Arkansas, the words "or to charge any person upon any lease of lands, tenements, or hereditaments, for a longer term than one year," follow the words, "or any interest in or concerning them." In North Carolina, the provisions respecting contracts in consideration of marriage, and those not to be performed within one year, are omitted; but in Texas these are retained, and it is also enacted that a parol lease for more than one year shall be invalid. The Civil Code of Louisiana, art. 2415, without adopting in terms the Statute of Frauds, declares generally, that all verbal sales of immovable property shall be void. By an act of the legislature of Delaware, one person shall not be liable to answer for the debt of another, of twenty-five dollars and upwards, unless the agreement is in writing,—nor shall one be liable to answer for another's debt of five dollars, and not exceeding twenty-five dollars, "unless such promise and assumption shall be proved by the oath or affirmation of one credible witness, or some memorandum or note in writing shall be signed by the party to be charged therewith." In Pennsylvania, the Statute of Frauds is not in force: Anon., 1 Dall. 1; McDowell *v.* Oyer, 21 Penn. St. 417; and the only provisions on the subject are to be found in an act entitled "An act for prevention of frauds and perjuries," passed March 21st, 1772, the first section of which is similar to the first three sections of the Statute of Charles II.; and the Acts of April 26, 1855, and April 22, 1856; the former of which enacts, that no executor or administrator shall be liable, upon any promise to answer out of his own estate, nor any person liable to answer for the debt of another, unless the said promise be in writing, or the debt less than twenty dollars; and the latter enjoins, that all declarations of trusts, and assignments thereof must be in writing.

The following are some of the decisions on this subject: Blount *v.* Hawkins, 19 Ala. 100; Turner *v.* Fenner et al., Id. 355; Brewer *v.* Brewer et al., Id. 482; Brainard *v.* McDevitt, 21 Id. 119; Martin *v.* Black's Exr., Id. 721; Blakeney *v.* Ferguson et al., 3 Eng. 260; Allen et al. *v.* Jarvis, 29 Conn. 38; Marvin *v.* Foxon, Id. 486; Clark *v.* Pendleton, Id. 495; Eaton *v.* Whittaker, 18 Id. 222; Russell *v.* Slade et al., 12 Id 455; Downey *v.* Hotchkiss, 2 Day 225; Scotien *v.* Brown, 4 Harr. 324; Dorman *v.* Bigelow, Exr., 1 Florida 281; Cameron et al *v.* Ward, 8 Ga. 245; Hollingshead, Admr., *v.* McKenzie, Id. 457; Thornton *v.* Heirs of Henry, 2 Scam. 219; Murphy et al. *v.* Merry, 8 Blackf. 295; Shirley *v.* Shirley, 7 Id. 452; Barickman *v.* Rhykendall, 6 Id. 24; Chandler et ux. *v.* Davidson, Id. 367; Johnston *v.* Glancy et al., 4 Id. 94; Huckleman, Admr., *v.* Miller et al., Id. 323; Carnutt *v.* Roberts, 11 B. Mon. 42; Tuttle *v.* Swett et al., 31 Maine 555; Preble *v.* Baldwin, 6 Cush. 549; Taney *v.* Bachtell, 9 Gill 205; Weed et al. *v.* Terry, 2 Doug. 344; Jones *v.* Palmer, 1 Id. 379; Gothard *v.* Flynn, 25 Miss. 58; Baily et al. *v.* Trustees of Mineral School District, 14 Mo. 499; Hart *v.* Rector et al., 13 Id. 497; Halsa *v.* Halsa, 8 Id. 303; Pitcher *v.* Wilson, 5 Id. 46; Greenleaf et al. *v.* Burbank, 13 N. H. 454; Sampson *v.* Burnside, Id. 265; Drake *v.* Newton, 3 Zabr. 111; Field et al. *v.* Runk, 2 Id. 525; Clark *v* Tucker et al., 2 Sandf. S. C. 157; Wyman *v.* Smith, Id. 331; Simms *v.* Kilian, 12 Ired. 252; Ledford *v.* Ferrell's Admr. et al., Id. 285; Reed *v.* Evans et al., 17 Ohio 128; Ewing *v.* Tees, 1 Bion. 450; Wilson *v.* Clark, 1 W. & S. 554; Boyer *v.* McCulloch, 3 Id. 429; Miller *v.* Hower, 2 Rawle 53; Eckert *v.* Eckert, 3 Penna. R. 332; Eckert *v.* Mace, Id. 364, n.; Galbraith *v.* Galbraith, 5 Watts

quite as much *nudum pactum* as it would have been before.(z) The statute merely adds a further requisite to the validity of certain contracts, namely, that they shall, besides being good in other respects, be put into writing, otherwise no action shall be maintained upon them.(a)

A great number of cases have been decided upon the above section of this celebrated statute. One of the *most important is that of [*79] Wain *v.* Warlters,(b) in which it was held that the statute, in requiring the *agreement* to be in writing, required that the *consideration*, which is part of the agreement, should be in writing, as well as the promise itself. And therefore a promise in writing to pay the debt of a third person, which did not state any consideration, was held to give no cause of action; and parol evidence of a consideration was not allowed to be given. This case was followed by many other decisions to the same effect.(c) But a recent statute now provides that no special promise to answer for the debt, default or miscarriage of another person, being in writing and duly signed, shall be invalid to support an action, by reason only that the consideration for such promise does not appear in writing, or by necessary inference from a written document.(d) The phrase in the statute, to *answer for* the debt, default or miscarriage of another person, means to answer for a debt, default or miscarriage *for which that other remains liable*.(e) Thus where one party to an agreement verbally

(z) See Williams on Executors, pt. 4, bk. 2, ch. 2, sect. 2; 1 Wms. Saund. 211, n. (2).

(a) Agreements, where the matter thereof is of the value of 5*l*., or upwards, are, with some exceptions, liable to a stamp duty of 6*d*., with a further progressive duty of the same amount for every *entire* quantity of 1080 words beyond the first 1080; stat. 23 Vict. 15.[1]

(b) 5 East 10; 2 Smith's Leading Cases 147.

(c) Saunders *v.* Wakefield, 4 B. & Ald. 595 (E. C. L. R. vol. 6); Morley *v.* Boothby, 3 Bing. 107 (E. C. L. R. vol. 11); Clancy *v.* Piggott, 2 Ad. & E. 473 (E. C. L. R. vol. 29); 1 Smith's Leading Cases 136; 1 Wms. Saund. 211, n. (*d*); Price *v.* Richardson, 15 M. & W. 539.

(d) Stat. 19 & 20 Vict. c. 97, s. 3. See Holmes *v.* Mitchell, 7 C. B. N. S. 361 (E. C. L. R. vol. 97); Williams *v.* Lake, 2 E. & E. 349 (E. C. L. R. vol. 105).

(e) 1 Wms. Saund. 211 b, n. (2); 1 Smith's Leading Cases 134; Green *v.* Cresswell, 10 Ad. & E. 453 (E. C. L. R. vol. 37); s. c. 2 Per. & Dav. 430; Cripps *v.* Hartnell, Ex. Ch. 11 W. R. 953; 10 Jur. N. S. 200.

146; Brawdy *v.* Brawdy, 7 Penn. St. 16; Taylor *v.* Drake, 4 Strob. 431; Compton *v.* Martin, 5 Rich. 14; Elfe *v.* Gadsden, 2 Id. 373; Bowles *v.* Woodson, 6 Gratt. 88; Ware *v.* Stephenson, 10 Leigh 171; Collins, Admrx. *v.* Row, Id. 114; Warnick *v.* Grosholz, 3 Grant's Cases 234; Kuns's Exrs. *v.* Young, 34 Penn. St. 60; Alger *v.* Scoville, 1 Gray 391; Woodford *v.* Paterson, 32 Barb. 630; Hutchinson *v.* Hutchinson, 46 Maine 154; Easter *v.* White, 12 Ohio (N. S.) 219.

[1] See *ante* p. 42, n.

promised the other, that in consideration of his discharging from custody a third person whom he had taken in execution for debt, he, the first party, would pay the debt, it was held that action might well be brought on this promise, although it was not put in writing.(*f*) For this was [*80] not a promise to answer for *the debt of another person, to which that other remained liable, but to pay a debt from which the other was discharged. It was an original promise to pay and not a collateral promise to guarantee, which is the meaning in the statute of the words "answer for." The words, "any agreement that is not to be performed within the space of one year from the making thereof," have been held to mean an agreement which appears from its terms incapable of performance within the year. Thus where one man promised another, for one guinea, to give him a certain number on the day of his marriage, it was held that a writing was unnecessary, for the marriage might have happened within the year.(*g*) So a contract by A. that his executor shall pay 10,000*l.*, need not be in writing;(*h*) for the death of A. and payment of the money may all take place within a twelvemonth. It has also been held that, in order to bring an agreement within this clause of the statute, so as to render writing necessary, both parts of the agreement must be such as are not to be performed within a year from the making thereof. Thus where a landlord agreed to lay out 50*l.* in improvements, in consideration of the tenant undertaking to pay him 5*l.* a year during the remainder of his term (of which several years were unexpired), it was held that writing was unnecessary;(*i*) for although the tenant's part of the agreement was not to be performed within a year, the landlord's part might reasonably have been so. These decisions have considerably narrowed the operations of the statute, and have left remaining much of the mischief arising from reliance on memory only, which it was the intention of the statute to obviate, by [*81] *requiring written evidence.(*k*) The last clause of the enactment has, however, received a very liberal construction. The words are "signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized." And it has been held that any insertion by the party of his name in any part of the agreement is a

(*f*) Goodman *v.* Chase, 1 B. & Ald. 297. See also Lane *v.* Burghart, 1 Q. B. 933 (E. C. L. R. vol. 41).

(*g*) Peter *v.* Compton, Skin. 353; 1 Smith's Leading Cases 142; Souch *v.* Strawbridge, 2 C. B. 808 (E. C. L. R. vol. 52).

(*h*) Wells *v.* Horton, 4 Bing. 40 (E. C. L. R. vol. 13); Ridley *v.* Ridley, 34 Beav. 478.

(*i*) Donellan *v.* Reid, 3 B. & Ad. 899 (E. C. L. R. vol. 23); Cherry *v.* Heming, 4 Ex. Rep. 631.

(*k*) See 1 Smith's Leading Cases 144 *et seq.*

sufficient signing within the statute,(*l*) provided the name be inserted in such a manner as to have the effect of authenticating the instrument;(*m*) and it is not necessary that both parties should sign the agreement. The whole of the agreement must be contained in the writing, either expressly or by reference to some other document, but the writing is required by the statute to be signed only by the party to be charged.(*n*) And as a "memorandum or note" of the agreement is allowed, a writing sufficient to satisfy the statute may often be made out from letters written by the party,(*o*) or from a written offer, accepted, without any variation,(*p*) before the party offering has exercised his right of retracting;(*q*) and when correspondence is carried on by means of the post, an offer is held to be accepted from the moment that a letter accepting the offer is put into the post, although it may never reach its destination.(*r*)

*The seventeenth section of the Statute of Frauds, which relates to contracts for the sale of goods, wares and merchandise [*82] for the price of 10*l.* or upwards, has been already noticed,(*s*) together with the clause in the statute of Geo. IV., next noticed,[1] called Lord Tenterden's Act, by which this enactment has been extended and explained.(*t*)

The next statute which requires our notice is intituled "An Act for rendering a written Memorandum necessary to the Validity of certain Promises and Engagements," and is commonly called Lord Tenterden's Act.(*u*) By this statute no acknowledgment or promise by words only can take any case of simple contract out of the operation of the Statute of Limitations,(*x*) or deprive any party of the benefit thereof, unless

(*l*) Ogilvie *v.* Foljambe, 3 Meriv. 62.

(*m*) Stokes *v.* Moor, 1 Cox 219; Selby *v.* Selby, 3 Meriv. 4, 6.

(*n*) Laythoarp *v.* Bryant, 2 Bing. N. C. 735, 742 (E. C. L. R. vol. 29). See Sugd. Vend. & Pur. c. 4, ss. 3, 4, 102 *et seq.*, 13th edit.

(*o*) Owen *v.* Thomas, 3 Myl. & K. 353.

(*p*) Holland *v.* Eyre, 2 Sim. & Stu. 194; Gibbons *v.* North-Eastern Metropolitan Asylum District, 11 Beav. 1.

(*q*) Routledge *v.* Grant, 4 Bing. 653 (E. C. L. R. vol. 13); s. c. 1 Moo. & P. 717; Gilkes *v.* Leonino, 4 C. B. N. S. 485 (E. C. L. R. vol. 93); Hebb's Case, M. R., Law Rep., 4 Eq. 9.

(*r*) Dunlop *v.* Higgins, 1 H. of L. C. 481; Duncan *v.* Topham, 8 C. B. 225 (E. C. L. R. vol. 65),

(*s*) *Ante*, p. 40.

(*t*) Stat. 9 Geo. IV. c. 14, s. 7; *ante*, p. 40.

(*u*) Stat. 9 Geo. IV. c. 14.

(*x*) Stat. 21 Jac. I. c. 16, s. 3.

[1] See *ante*, p. 40, note.

such acknowledgment or promise shall be made or contained by or in some writing to be signed by the party chargeable thereby.(*y*) The effect of such a promise has already been referred to.(*z*) The statute makes no mention of any signature by an agent; but by a recent statute the signature of an agent has been rendered sufficient.(*a*) And no joint contractor is to lose the benefit of the Statute of Limitations by reason only of any written acknowledgment or promise made and signed by any other joint contractor; but nothing therein contained is to alter, or take away, or lessen the effect of any payment of any principal or interest made by any person whatsoever.(*b*) However, no endorsement [*83] *or memorandum of any payment written or made upon any promissory note, bill of exchange or other writing, by or on behalf of the party to whom such payment shall be made, shall be deemed sufficient proof of such payment, so as to take the case out of the operation of the Statute of Limitations.(*c*) And by a recent statute payment of any principal or interest by a co-contractor or co-debtor will not deprive a debtor of the benefit of the Statute of Limitations.(*d*) Lord Tenterden's Act further enacts, as has been already mentioned,(*e*) that no action shall be maintained whereby to charge any person upon any promise made after full age to pay any debt contracted during infancy, or upon any ratification after full age of any promise or simple contract made during infancy, unless such promise or ratification shall be made by some writing signed by the party to be charged therewith. And it is further enacted,(*f*) that no action shall be brought whereby to charge any person upon or by reason of any representation or assurance made or given concerning or relating to the character, conduct, credit, ability, trade or dealings of any other person, to the intent or purpose that such other person may obtain *credit, money or goods upon*, unless such representation or assurance be made in writing signed by the party to be charged therewith. There appears to be some error in the word "*upon*" in this enactment, which, as it stands, is superfluous.(*g*) And it has been doubted whether

(*y*) See Lechmere *v.* Fletcher, 1 C. & M. 623; Bird *v.* Gammon, 3 Bing. N. C. 883 (E. C. L. R. vol. 32); Cheslyn *v.* Dalby, 4 You. & Coll. 238.

(*z*) *Ante*, p. 76.

(*a*) Stat. 19 & 20 Vict. c. 97, s. 13.

(*b*) Stat. 9 Geo. IV. c. 14, s. 1; Whinman *v.* Kynman, 1 Ex. Rep. 118; Cleave *v.* Jones, 6 Ex. Rep. 573; Bamfield *v.* Tupper, 7 Ex. Rep. 27; Fordham *v.* Wallis, 10 Hare 217; Nash *v.* Hodgson, 1 Kay 650; Edwards *v.* Janes, 1 Kay & John. 534.

(*c*) Sect. 3.

(*d*) Stat. 19 &. 20 Vict. c. 97, s 14, not retrospective; Jackson *v.* Woolley, 8 E. & B. 784 (E. C. L. R. vol. 92).

(*e*) Stat. 9 Geo. IV. c. 14, s. 5; *ante*, p. 77.

(*f*) Stat. 9 Geo. IV. c. 14, s. 6.

(*g*) See 1 M. & W. 104, 123.

a representation made to a purchaser by the trustee of some property, that the property was encumbered to a less extent than was actually the case, was a representation concerning the *ability* of the vendor [*84] *within the meaning of the statute.(*h*) The better opinion seems to be, that such a representation is within the statute, and ought, consequently, to be obtained in writing.

In addition to those contracts which by statute are required to be in writing, there exists a peculiar class of contracts, which in their nature are expressed in writing, and for which a consideration is presumed to have been given till the contrary is proved.(*i*) These are bills of exchange and promissory notes.(*k*) A bill of exchange is a written order from one person to another to pay to a third person, or to his order, or to the bearer, a certain sum of money. The person making the order is called the drawer, the person on whom it is made the drawee, and the person to whom the money is payable the payee. The bill is sometimes made payable to the drawer himself, or to his order, or to him or bearer. If the person on whom the bill is drawn undertakes to pay it, he writes on it the word "accepted,"[1] with his signature, and is then called the acceptor. A promissory note, or note of hand, as it is sometimes called, is a written promise from one person to pay to another, or to his order, or to bearer, a certain sum of money. The person making the promise is called the maker of the note. No negotiable or transferable bill or note can be lawfully drawn or made for any sum under 20*s*.;(*l*)[2] but any

(*h*) See Lyde *v.* Baroard, 1 M. & W. 101; Swann *v.* Phillips, 8 Ad. & E. 457 (E. C. L. R. vol. 35); Devaux *v.* Steinkeller, 6 Bing. N. C. 84 (E. C. L. R. vol. 37).

(*i*) See Mills *v.* Barber, 1 M. & W. 425.

(*k*) See Byles on Bills, and Bayley on Bills.

(*l*) Stat. 48 Geo. III. c. 88, s. 2.

[1] The word "accepted," should, in accordance with the custom of merchants, be written across the face of the bill, over the signature of the acceptor.

[2] Very few restrictions of this nature exist within the United States, and even in those states where provisions of this kind are in force, they have a view rather to obtaining a protest, or recovering damages, than to an absolute prohibition. Thus, in Alabama, "every bill of exchange, of the sum of $20 and upwards, drawn in, or dated at, or from any place in" the State, may be protested for non-acceptance, or non-payment: Clay's Alaba. Dig. 381. In Maine, "if a bill of exchange be drawn, accepted or endorsed, . . . for one hundred dollars or more, and payable in" the "State, at a place seventy-five miles distant from the place where drawn, the damages against the acceptor, drawer, or endorser, over and above the contents of the bill and interest, shall be one per cent. on its amount:" Revis. Stat. of Maine (1857), pp. 519, 520; and a similar provision exists in Massachusetts: Revis. Stats. of Mass. (1860), p. 294. By the laws of New Jersey, bills of exchange drawn within the State, upon any person within the State, for eight dollars or upwards, may

person may now draw upon his banker, who shall bonâ fide hold money for his use, any draft or order for the payment to the bearer, or to order, on demand, of any sum of money less than 20*s.*(*m*) Bills and [*85] notes *under 5*l.* cannot be made payable to bearer on demand, and were formerly subject to other stringent restrictions,(*n*)[1]

(*m*) Stat. 23 & 24 Vict. c. 111, s. 19.
(*n*) Stat. 17 Geo. III. c. 30, 7 Geo. IV. c. 6, s. 4.

be protested for non-acceptance or non-payment: Nixon's Dig. Laws N. J. (1868), p. 770. Two of the states, Massachusetts and South Carolina, prohibit the negotiating of notes under a certain sum, the first limiting them to five dollars, under a penalty of fifty dollars; and the latter to one dollar, under a penalty of ten dollars; the prohibition in South Carolina, being also extended to bills of exchange: Revis. Stats. of Mass. (1860), p. 810; Stats. of S. C., vol. 6, p. 34.

The only other enactments in the United States having any reference to this point, are those designed to prevent the issuing of notes, intended to perform the functions of currency, by others than corporations, specially created by authority of law, with this power. Thus, in Pennsylvania, by the 2d sec. of the Act of March 22, 1817, "No incorporated body, public officer, association or partnership, or private individual, other than such as have been expressly incorporated or established for the purpose of banking, shall make, issue, reissue or circulate, any promissory note, ticket, or engagement of credit in the nature of a bank note, of any denomination or amount whatsoever," &c.: Purd. Dig. (1861), p. 94, sec. 59. Similar provisions are in operation in many of the other states: Revis. Stats. of N. Y., vol. 2, p. 981; Revis. Stats. of Mass. (1860), p. 810; Revis. Stats. of Ohio (1860), vol. 1, pp. 152, 153.

[1] In connection with the subject of negotiable or transferable bills or notes, the comparatively recent English case of Bellamy et al. *v.* Majoribanks et al., 7 Ex. 389, relative to crossed checks, may not be entirely devoid of interest. The plaintiffs in this case, "were trustees of a gentleman named Frank; . . . they had opened an account with the defendants, Messrs. Coutts & Co., for the purpose of the trust. A suit was pending in the Court of Chancery with reference to the trust, in which Mr. Triston acted as solicitor for the plaintiffs. The other parties to the suit were the next of kin of Mr. Frank, and a Mr. Geary acted as solicitor for them. In June, 1845, Mr. Geary brought to Mr. Triston a check upon Messrs. Coutts, written out by him, for 2596*l.* 17*s.*, to be signed by the plaintiffs. It was, when delivered to Mr. Triston, in the common form. Mr. Triston sent the check to the plaintiff, Mr. Bellamy, at Brighton, who returned it signed, with the following addition in his own handwriting, namely, at the end of the body of the check, the words: 'General unpaid costs account,' and crossed as follows, 'Bank of England, for account of Accountant-General.' Mr. Triston then sent it to the other trustee (the plaintiff, Mr. Foster), to be signed by him, and having received it back, delivered it to Geary. In point of fact, the department of the Bank of England, in which the business of the Accountant-General is conducted, would not have received this check, it being the rule not to receive any, except one drawn on the Bank of England itself; and this rule is well known among the London bankers Upon the day on which Geary received the check, he struck out the crossing made by Mr. Bellamy, by running a pen through it, leaving it, however, perfectly legible, and crossed the check a second time, with the name of Messrs. Gossling & Co., his own bankers, and paid it into their bank, to the credit of his own account. Upon the following day, the clerk of Messrs. Gossling present-

which were repealed for three years from the 28th of July, 1863, and until the end of the then next session of Parliament;(o) and the repeal has been since regularly extended from year to year.(p) Bills and notes payable to bearer on demand are also prohibited from being issued by bankers, except by the banks and under the restrictions mentioned in the act passed to regulate the issue of bank notes.(q) Bills or notes payable to A. B. or order are transferable by a written order endorsed

(o) Stat. 26 & 27 Vict. c. 105.
(p) Last extended by stat. 32 & 33 Vict. c. 85.
(q) Stat. 7 & 8 Vict. c. 32, ss. 10, 11.

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ed it for payment at Messrs. Coutts & Co., who paid it, and charged it to the debit of the plaintiffs' account. The money was placed by Messrs. Gossling to the credit of Geary, in his own account with them. He never paid the money to the Accountant-General, and the plaintiffs were obliged to make it good. The following is a copy of the check, as produced at the trial."

London, June 23, 1845.
Messrs. Coutts & Co.
Pay to Edward Bryant Geary, or Bearer, two thousand five hundred and ninety-six pounds, seventeen shillings (General unpaid Costs Account.)
£2596 : 17 : 0.
Thos. C. Bellamy,
Chas. J. Foster.

[Crossed:] Bank of England, for Account of Accountant General. Gosling & Co.

Parke, B. "Where a check is crossed, bankers generally refuse to pay it to any one except a banker; and if they do pay it to a person not a banker, they consider that they do it at their peril, in the event of the party, to whom the payment was made, not being entitled to receive it. That the object is to secure the payment, not to any particular banker, but to a banker, in order that it may be easily traced, for whose use the money was received; and that it was not intended thereby, to at all restrict the negotiability or circulation of the check, but merely to compel the holder to present it through a quarter of known respectability and credit. We are strongly inclined to think that, on a full inquiry, the usage will turn out to be no more than this; and considering the custom in this point of view, the crossing is a mere memorandum on the face of the check, and forms no part of the instrument itself, and in no way alters its effect. There can be no doubt that such a usage is highly beneficial to the public. These instruments are, in their essential character, payable to bearer, they are in many respects treated as bank notes. . . . . It is manifestly, therefore, a great safeguard and protection to the real owner, that there should exist the means of tracing and ascertaining, for whose use the money paid on the check is received, and to whom the money actually goes; and the payment through a banker secures this object. . . . We think there is no legal objection to the custom, if thus limited, and understood, upon the ground of its being repugnant to the essential quality of a check, namely, its negotiability by delivery. There is no obligation upon any one to receive payment by a check, whether it be crossed or not crossed; but if a man receive a crossed check, he seems to us, not indeed to incur the obligation of presenting it for payment through a banker, as a condition precedent, but he ought not to complain if the drawee does not pay without previous inquiry. There is really no restriction upon its negotiability; but it is, in our opinion, a reasonable and lawful practice and usage, in order to secure, as far as possible, payment of checks to honest and *bonâ fide* holders."

thereon by A. B. The mere signature by A. B. of his name on the back, followed by the delivery of the bill or note,(*r*) is however sufficient for this purpose. This is called an endorsement in blank; and after such an endorsement, the bill or note, together with the right to sue upon it, may be transferred by mere delivery.(*s*) Any holder of the bill may, consequently, after such an endorsement, enforce payment to himself. The endorsement may, however, be special, as "Pay C. D. or order, A. B." And in this case the bill or note, in order to become transferable, must be endorsed by C. D. But if a bill be once endorsed in blank, it will always be payable to the bearer by any of the parties thereto, although it may subsequently be specially endorsed; but the special endorser will not be liable to the bearer without the endorsement of the person to whom he has specially endorsed it.(*t*)[1] With regard to bankers, an act of the present reign provides that any draft or order [*86] drawn upon a banker for a sum *of money payable to order on demand which shall, when presented for payment, purport to be endorsed by the person to whom the same shall be drawn payable, shall be a sufficient authority to such banker to pay the amount of such draft or order to the bearer thereof.(*u*) A bill or note payable to bearer is transferable by mere delivery without any endorsement.

The effect of accepting a bill, or making a promissory note, is to render the acceptor or maker primarily liable to pay the same to the person entitled to require payment. The effect of drawing a bill is to make the drawer liable to payment, if the acceptor make default. But in order to charge the drawer of a foreign bill, it must, by the custom of merchants, be protested by a notary public.(*v*) This protest is a declaration by him in due form that payment has been demanded and refused. A protest, however, is unnecessary for an inland bill or promissory note.(*x*) The effect of endorsing a bill or note is to make the endorser also liable to payment, if the acceptor of the bill or maker of the note should make default. The endorsement operates as against the endorser as a new drawing of the bill by him.(*y*) An endorsement, however,

(*r*) Bromage *v*. Lloyd, 1 Ex. Rep. 32

(*s*) Peacock *v*. Rhodes, 2 Doug. 333.

(*t*) Smith *v*. Clarke, 1 Peake 295; Walter *v*. Macdonald, 2 Ex. Rep. 527

(*u*) Stat. 16 & 17 Vict. c. 59, s. 19.

(*v*) Gale *v*. Walsh, 5 Term Rep. 239.

(*x*) Windle *v*. Andrews, 2 B. & Ald. 696.

(*y*) Penny *v*. Innes, 1 C., M. & R. 441.

[1] But the holder of a note endorsed in blank, may fill it up with any contract consistent with the character of an endorsement: Byles on Bills, 5th Am. ed. p. 146, note 1; Caruth *v*. Thompson, 16 B. Mon. 572; Webster *v*. Cobb, 17 Ill. 459; Watkins *v*. Kirkpatrick, 2 Dutch. 84; Becker *v*. Levy, 2 Am. L. Reg. 444; West *v*. Meserve, 17 N. H. 432; but see Newell *v*. Williams, 5 Sneed 208.

may be made without recourse to the endorser, or "sans recours," as it is generally expressed, in which case the endorser avoids all personal liability.(*z*) The drawer of a bill, or the endorser of a bill or note, will, however, be discharged from all liability, unless the person requiring payment should, within a reasonable time, give him notice that the bill or note has not been paid, or, as it is termed, has been dishonored, and give him to understand, *either expressly or by implication, [*87] that he looks to him for payment.(*a*) In consequence of the consideration being presumed to have been given for every bill or note till the contrary is shown, it follows, that if a bill or note should have been drawn, accepted or endorsed without any consideration, or for a consideration which is illegal, a bonâ fide holder for valuable consideration, or any endorsee from him, may, nevertheless, enforce payment; for when he took the security he was entitled to rely on the legal presumption of a proper consideration having been given.(*b*)[1] It is stated by Sir Wil-

(*z*) Byles on Bills 117, 6th ed.

(*a*) Hartley *v.* Case, 4 B. & C. 339 (E. C. L. R. vol. 10), Byles on Bills 213 *et seq.*, 6th ed.

(*b*) Collins *v.* Martin, 1 Bos. & Pul. 651; Morris *v.* Lee, Bayley on Bills 500; Robinson *v.* Reynolds, 2 Q. B. 196 (E. C. L. R. vol. 42); May *v.* Chapman, 16 M. & W. 355.

[1] In general, accommodation paper, as between others than the original parties to it, is to be governed by the rules of negotiable instruments founded upon a valuable consideration: Brown *v.* Fort, 1 Mart. 34; Harrod *v.* Lafarge, 12 Id. 21; Dorsey *v.* Their Creditors, 7 New Series (La.) 12; Church *v.* Barlow, 9 Pick. 549; Commercial Bank *v.* Cunningham, 24 Id. 276; Quinn *v.* Fuller, 7 Metc. 225; Perry *v.* Green, 4 Harrison 61; Jackson *v.* Richards, 2 Caines 243; Grandin *v.* Le Roy, 3 Paige 509; Clopper's Admr. *v.* The Union Bank, 7 Har. & Johns. 103; Lathrop *v.* Morris, 5 Sandf. S. C. 9; Appleton *v.* Donaldson, 3 Penn. St. 381; Snyder *v.* Wilt, 15 Penn. St. 65; Bank of Montgomery Co. *v.* Walker, 9 S. & R. 229; Aiken *v.* Cathcart, 3 Richard. 133; Holmes *v.* Paul, 6 Am. L. Reg. 482; s. c. 3 Grant's Cases, 299; Yates *v.* Donaldson, 5 Md. 389; Zwellweger *v.* Caffe, 5 Duer 87; Robins *v.* Richardson, 2 Bosw. 248; Work *v.* Kase, 34 Penn. St. 138; Post *v.* Tradesmen's Bank, 28 Conn. 420; Struthers *v.* Kendall et al., 41 Penn. St. 214; and even where the holder of the paper, knowing that it has been given or accepted for the accommodation of the endorser or drawer, gives time to such endorser or drawer, the maker or acceptor is not thereby discharged; for, having put himself on the paper, as principal debtor, he is not entitled to the privileges of a surety, as between himself and strangers: Bank of Montgomery *v.* Walker, 9 S. & R. 229; s. c. 12 Id. 382; White *v.* Hopkins, 3 W. & S. 99; Lewis *v.* Hauchman, 2 Penn. St. 416; Foard *v.* Womack, use, &c., 2 Ala. 368; Tarver *v.* Nance, 5 Id. 712; French *v.* Bank of Columbia, 4 Cranch 153; Parks et al. *v.* Ingram, et al., 2 Fost. 281; J. & T. Powell *v.* Waters, 17 Johns. 176; Murrah et al. *v.* Judah, 6 Cowen 484; Commercial Bank of Albany *v.* Hughes, 17 Wend. 94; Love et al. *v.* Brown et al., 38 Penn. St. 308; Ross *v.* Bedell, 5 Duer 462; Howard *v.* Welchman, 6 Bosw. 280; Melms *v.* Werdehoff, 14 Wis. 18; but see Clopper's Admr. *v.* The Union Bank, 7 Har. & Johns. 103; Perry *v.* Green, 4 Harrison 61. But this proposition is subject to certain modifications for,—First, where a bill is drawn

liam Blackstone,(c) "that every note, from the subscription of the drawer, carries with it an internal evidence of a good consideration." This however appears to be a mistake. The law does not give this effect to bills of exchange and promissory notes in respect of the undertaking being evidenced by writing, but in order to strengthen and facilitate that commercial intercourse which is carried on through the medium of such securities.(d) On this ground the law allows these instruments to form an exception to the general rule that a consideration must be shown for every agreement, although evidenced by writing. The remedies on bills of exchange and promissory notes have been facilitated by a recent act.(e)

(c) 2 Black. Com. 446.

(d) 1 Fonbl. Eq. 343, 344.

(e) Stat. 18 & 19 Vict. c. 67. The stamps on bills and notes are now regulated by stats. 17 & 18 Vict. c. 83, 23 Vict. c. 15, 23 & 24 Vict. c. 111, and 27 & 28 Vict. c. 56, s. 2.[2]

for the accommodation of the drawer, or endorser, he for whose benefit it is drawn, is not entitled to notice of non-acceptance or non-payment: Armstrong et al. *v.* Gray, 1 Stew. 175; Evans' Admr. *v.* Norris et al., 1 Ala. 511; Foard *v.* Womack, use, &c., 2 Id. 368; Tarver *v.* Nance, 5 Id. 712; Shirley *v.* Fellows et al., 9 Porter (Ala.) 300; Holman *v.* Whiting, 19 Ala. 704; French *v.* The Bank of Columbia, 4 Cranch 153; Gillespie et al. *v.* Cammack et al., 3 La. Ann. 248; Clopper's Admr. *v.* The Union Bank, 7 Har. & Johns. 103; Hoffman *v.* Smith, 1 Caines 160; Commercial Bank of Albany *v.* Hughes, 17 Wend. 94; Deny *v.* Palmer, 5 Ired. 610; Farmers' Bank *v.* Vanmeter, 4 Rand. 553; Reid *v.* Morrison, 2 W. & S. 406; Ross. *v.* Bedell, 5 Duer 462. Secondly, where one has paid value for an accommodation bill or note, he may recover upon it, even though he took it with the knowledge, that it was drawn for the accommodation of one or more of the parties: Townsley *v.* Sumrall, 2 Peters 183; Lambest *v.* Sandford, 2 Blackf. 137; Eldridge *v.* Duncan, 1 B. Mon. 102; Reawick *v.* Williams, 2 Md. 363; Brown *v.* Mott, 7 Johns. 361; Murrah et al. *v.* Judah, 6 Cowen 484; Grant et al. *v.* Ellicott, 7 Wend. 227; Perry et al. *v.* Crammond et al., 1 Wash. C. C. 100; Pierson *v.* Boyd, 2 Duer 33; Steckel *v.* Steckel, 28 Penn. St. 235; Pettigrew *v.* Chave, 2 Hilton 546; but this principle has been contradicted in Brown *v.* Fort, 1 Mart. 34; Commercial Bank *v.* Cunningham, 24 Pick. 276, and Quinn *v.* Fuller, 7 Metc. 225. And see Rochester *v.* Taylor, 23 Barb. 18.

Where an endorser has signed his name in blank before the payee, there is considerable diversity of opinion as to the nature of his liability, in the absence of extrinsic evidence on the subject, some cases holding that he is liable as a promisor, or surety: Norton *v.* Hall, 41 Vt. 471; Pearson *v.* Stoddard, 7 Gray 199; Essex Co. *v.* Edmands, 12 Id. 273; others, that it amounts to a guaranty that, with due diligence, the note will be collectable: Riddle *v.* Stevens, 32 Conn. 378; White *v.* Weaver, 41 Ill. 409; while others decide that his liability is that of second endorser: Lester *v.* Paine, 39 Barb. 616; Kamin *v.* Holland, 2 Oregon 59; Badger *v.* Barnabee, 17 N. H. 120; Smith *v.* Kessler, 44 Penn. St. 142; and that proof of a liability, different from that which the endorsement imports, cannot be made by parol: Shafer *v.* The Bank, 59 Id. 144. See, also, Murray *v.* McKee, 60 Id. 35.

[2] The law of the United States of America, in relation to stamps on bills and promissory notes, will be found in a schedule, at the end of sec. 170, of an Act

We now come to the second class of contracts, namely, special contracts, or contracts by deed. These contracts differ from mere simple contracts in the following important particular, that they of themselves import a consideration,(*f*) *whilst in simple contracts a consideration must be proved. [*88] For the law presumes that no man will put his seal to a deed without some good motive.(*g*) And when an agreement is once embodied in a deed, such deed becomes itself the agreement, and not evidence merely, as is the case when a parol agreement is reduced to writing. On this principle it appears to be that, after a deed has been executed, any alteration, rasure or addition made in any material point, even by a stranger, will render the deed void.(*h*)[1] It is true that by

(*f*) 1 Fonbl. Eq. 342.

(*g*) See Principles of the Law of Real Property 118, 2d ed.; 123, 3d & 4th eds.; 128, 5th ed.; 134, 6th ed.; 137, 7th ed.; 143, 8th ed.

(*h*) Pigot's Case, 11 Rep. 27 a.

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of Congress, entitled, "An act to provide internal revenue, to support the government, to pay interest on the public debt, and for other purposes," approved June thirtieth, eighteen hundred and sixty-four; and commonly known as the Internal Revenue Act; as amended by the fourth section of the Act of Congress, entitled "An Act to reduce Internal Taxes, and for other purposes," approved July 13, 1870.

[1] The ancient English doctrine on the subject of erasures, alterations, or interlineations, undoubtedly was, that the slightest change in any instrument of writing, subsequently to its execution, avoided it, whether the alteration was made by a party, or by a stranger; and the court decided, upon view of the instrument, whether it should be received or rejected. In this country, the doctrine, that an alteration, when made by a stranger, vitiates the document, is not sanctioned. It is now the general opinion, that a material alteration in any instrument of writing, will avoid it, if made by one of the parties to the contract, or, if it be unexplained; for then it is presumed, that it was made by the party having it in his custody: Steele's Lessee *v.* Spencer et al., 1 Peters 560; Inglish et al. *v.* Breneman, 5 Ark. 377; Shelton *v.* Deering, 10 B. Mon. 407; Letcher *v.* Bates, 6 J. J. Marsh. 525; Smith *v.* Crooker et al., 5 Mass. 538; Ford *v.* Ford, 17 Id. 418; Bowers *v.* Jewell, 2 N. H. 543; Vanauken *v.* Hornbeck, 2 Green 179; Jackson *v.* Malin, 15 Johns. 293; Woodworth *v.* Bank of America, 19 Id. 391; Vanhorne *v.* Dorrance, 2 Dall. 306; Henning *v.* Workheiser, 8 Penn. St. 518; Van Amringe *v.* Morton, 4 Whart. 382; Maise *v.* Garner, Mart. & Yerg. 383; Newell *v.* Mayberry, 3 Leigh 250; Adams et al. *v.* Frye, 3 Metc. 103; Bank U. S. *v.* Russell et al., 3 Yeates 391; Stephens *v.* Graham et al., 7 S. & R. 505; Wade *v.* Withington, 1 Allen 561; Burnhan *v.* Ayer, 35 N. H. 351; Heffner *v.* Wenrich, 32 Penn. St. 423; Southwark Bank *v.* Gross, 35 Id. 80; Hill *v.* Cooley, 46 Id. 259; Booker *v.* Stivender, 13 Rich. (So. Car.) 85; Sheldon *v.* Hawes, 15 Mich. 519; and this is so, even though it appears that the alteration was honestly made, for the purpose of correcting a mistake: Miller *v.* Gilleland, 19 Penn. St. 120; Getty *v.* Shearer, 1 Am. L. Reg. 119; s. c. 20 Penn. St. 12; Fay *v.* Smith, 1 Allen 477; but an immaterial alteration will not vitiate, unless it be made by one of the parties to the instrument altered: Johnson *v.* Bank of U. S., 2 B. Mon. 310; Bank of Limestone *v.* Penick, 5 Id. 29; Wright *v.* Wright et al., 2 Halst. 175; Jackson *v.* Malin, 15 Johns. 293; Morris's Lessee *v.* Vanderen,

recent decisions(*i*) this doctrine has been extended to a mere written agreement. But although it is no doubt highly important that all legal

(*i*) Davidson *v.* Cooper, 13 M. & W. 343, 352; Mollett *v.* Wackerbarth, 5 C. B. 181 (E. C. L. R. vol. 57). It is now held that immaterial alterations, though made by a party to an instrument, do not render it void: Aldous *v.* Cornwell, Law Rep. 3 Q. B. 573.

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1 Dall. 67; Herdman *v.* Bratten, 2 Harring. 396; Vanauken *v.* Hornbeck, 2 Green 179; Moore *v.* Bickham et al., 4 Binn. 1.

In accordance with this general rule on the subject of material alterations, it has been held, that one who claims under an instrument, which appears on its face to be altered, is bound to explain the alteration: United States *v.* Linn et al., 1 How. (U. S.) 104; Newcomb *v.* Presbrey, 8 Metc. 406; Gellett *v.* Sweat, 1 Gilm. 475; Humphreys *v.* Guillou et al., 13 N. H. 385; Acker *v.* Ledyard, 8 Barb. S. C. 514; Barrington et al. *v.* The Bank of Washington, 14 S. & R. 405; Adams et al. *v.* Frye, 3 Metc. 103; Hill *v.* Cooley, 46 Penn. St. 259; Paine *v.* Edsell, 19 Id. 178; Huntington *v.* Finch, 3 Ohio N. S. 445; and that a substantial erasure, is presumed to be false or forged, and must be accounted for before the writing can be given in evidence: McMicken *v.* Beauchamp, 2 La. 290; Fletcher et al. *v.* Cavelier et al., 4 Id. 270; Slocumb et al. *v.* Watkins, 1 Rob. 214; Chelsey *v.* Frost, 1 N. H. 145; Hills *v.* Barnes et al., 11 Id. 395; Jackson *v.* Osborn, 2 Wend. 555; Heffelfinger *v.* Shutz et al., 16 S. & R. 46; Prevost *v.* Gratz, et al., 1 Peters C. C. 364; Miller *v.* Reed, 3 Grant 51; and also, that where one offering a deed, proves as part of his evidence, that the deed has been fraudulently altered by him, it will be rejected: Babb *v.* Clemson, 10 S. & R. 419. On the other hand, it has been decided, that where an instrument is altered against the interest of the party claiming under it, the law will not presume that the alteration was improperly made, but the jury must determine the matter from all the circumstances of the case: Bailey *v.* Taylor, 11 Conn. 531; Whitmer *v.* Frye, 10 Misso. 348; Farlee *v.* Farlee, 1 Zabr. 280; Heffelfinger *v.* Shutz et al., 16 S. & R. 46. Nor is a party bound to explain an alteration, when it does not appear on the face of the deed, but is alleged by the opposite party: United States *v.* Linn et al., 1 How. (U. S.) 104; Warren *v.* Chickasaw, 13 Iowa 588; so also, if there is no suspicion leading to the belief that the alterations were made subsequent to the execution, it will be presumed that they were made before: Whitsell *v.* Womack, use, &c., 8 Alab. 482; Farlee *v.* Farlee, 1 Zabr. 280; Cumberland Bank *v.* Hall, 1 Halst. 213; Sayre *v.* Reynolds et al., Admr., 2 South. 737; Bank *v.* Sears, 4 Gray 95; Stover *v.* Ellis, 6 Ind. 182; Harlan *v.* Berry, 4 Greene (Iowa) 212; McCormick *v.* Fitzmorris, 39 Misso. 24.

As regards immaterial alterations, it has been held, that where it is so trivial, as not to affect in the slightest manner, the meaning of the original instrument, it will not vitiate it, even though the alteration has been done by one of the parties: Nichols *v.* Johnson, 10 Conn. 192; Shelton *v.* Deering, 10 B. Mon. 407; Hunt *v.* Adams, 6 Mass. 519; Bowers *v.* Jewell, 2 N. H. 543; Morril *v.* Otis, 12 Id. 466; Griffith *v.* Cox, Tenn. 210; Barrabine et al. *v.* Bradhears, 5 Mart. 190; Hale *v.* Russ, 1 Greenl. 334; Brown *v.* Pinkham, 18 Pick. 172; Knapp *v.* Maltby, 13 Wend. 587; Miller *v.* Read, 3 Grant's Cases 52; Dunn *v.* Clements, 7 Jones L. 58; Martin *v.* Good, 14 Md. 398; Gordan *v.* Tizer, 39 Miss. 805; Kountz *v.* Kennedy, 63 Penn. St. 187. When an immaterial alteration has been made by a stranger, it will not vitiate a deed: Lewis et al. *v.* Payne, 8 Cowen 71; Wright *v.* Wright et al., 2 Halst. 175; Jackson *v.* Malin, 15 Johns. 293, and other cases cited above; and even a substantial erasure, if proven to have been done by a third person, without the connivance of either of the parties, is not

instruments should be preserved in their integrity, it may perhaps be doubted whether the doctrine in question would ever have existed, had

material: Solibellas *v.* Reeves, Curator, 3 La. 55; Farlee *v.* Farlee, 1 Zabr. 280; Rees *v.* Overbaugh, 6 Cowen 746; Lewis et al. *v.* Payoe, 8 Id. 71; Smith *v.* Dunham, 8 Pick. 246; Ford *v.* Ford, 17 Id. 418; Arrison *v.* Harmstead, 2 Penn. St. 191; Boyd *v.* McConnell, 10 Humph. 68; Croft *v.* White, 36 Miss. 455; Terry *v.* Hazlewood, 1 Duvall (Ky.) 104.

The current of the decisions seems to show, that an erasure in a deed, does not make it *ipso facto* void; such an alteration will not render an instrument invalid, unless it was done under circumstances which the law does not allow: Speake et al. *v.* The United States, 9 Cranch 28; Ravisies *v.* Allston, 5 Ala. 301; Whitsell *v.* Womack, use, &c., 8 Id. 482; Gooch *v.* Bryant, 1 Shep. 386; Wickes's Lessee *v.* Caulk, 5 Har. & Johns. 36; Stewart *v.* Preston, 1 Florida 10; Wicker *v.* Pope, 12 Rich. 387; Vickery *v.* Benson, 26 Geo. 582; Farnsworth *v.* Sharp, 4 Sneed 55. Whether an erasure has been made, or not, and if so, when it was made, and with what intention or motive, are questions for the determination of a jury: Steele's Lessee *v.* Spencer et al., 1 Peters 560; Gellett *v.* Sweat, 1 Gilm. 475; Bowers *v.* Jewell, 2 N. H. 543; Hills *v.* Barnes et al., 11 Id. 395; Cumberland Bank *v.* Hall, 1 Halst. 213; Sayre *v.* Reynolds et al., Admr., 2 South. 737; Jackson *v.* Osborn, 2 Wend. 555; Acker *v.* Ledyard, 8 Barb. S. C. 514; Heffelfinger *v.* Shutz et al., 16 S. & R. 46; Hudson *v.* Reel, 5 Penn. St. 279; Vanhorn *v.* Dorrance, 2 Dall. 306; Marshall et al. *v.* Gougler, 10 S. & R. 164; Sigfried *v.* Swan, 6 Id. 312; Barrington et al. *v.* The Bank of Washington, 14 Id. 405; Stevens *v.* Martin, 18 Penn. St. 101; Jordan *v.* Stewart, 23 Id. 244; Printup *v.* Mitchell, 17 Geo. 558; Little *v.* Herndon, 10 Wall. (U. S.) 26. Whether an erasure is material or immaterial, is a question for the opinion of the court: Steele's Lessee *v.* Spencer et al, 1 Peters 560; Hale *v.* Russ, 1 Greenl. 334; Johnson *v.* The Bank of the United States, 2 B. Mon. 310; Brown *v.* Pinkham, 18 Pick. 172; Martendale *v.* Follett, 1 N. H. 95; Bowers *v.* Jewell, 2 Id. 543; Morrill *v.* Otis, 12 Id. 466; Humphreys *v.* Guillou et al., 13 Id. 385; Marshall *v.* Gougler, 10 S. & R. 164; Hill *v.* Cooley, 46 Penn. St. 259.

Although a writing may have been altered after its execution, still, if subsequently to the alteration, it be ratified by all the parties, it will be binding: Speake et al. *v.* The United States, 9 Cranch 28; Hale *v.* Russ, 1 Greenl. 334; Byers *v.* McClanahan, 6 Gill & Johns. 250; Johnson *v.* The Bank of the United States, 2 B. Mon. 310; Conwell *v.* Danridge's Admr., 8 Dana 272; Bank of Limestone *v.* Penick, 5 Mon. 29; Smith *v.* Crooker et al., 5 Mass. 538; Humphreys *v.* Guillou et al., 13 N. H. 385; Hills *v.* Barnes et al., 11 Id. 395; Camden Bank *v.* Hall et al., 2 Green 583; Woolley et al. *v.* Constant, 4 Johns. 54; Penny *v.* Corwithe, 18 Id 499; Barrington et al. *v.* The Bank of Washington, 14 S. & R. 405; Shippen's Heirs *v.* Clapp, 29 Penn. St. 265; Collins *v.* Makepeace, 13 Ind. 448; Ratcliffe *v.* Planters' Bank, 2 Sneed 425; Fitzpatrick *v.* Fitzpatrick, 6 R. I. 64.

A distinction has been drawn between deeds, or instruments under seal, and grants of estates lying merely in grant, or bills or notes, as respects loss of evidence of title, arising from erasures; thus, it has been held, that if a deed of conveyance be altered, the title to the land conveyed thereby, is not affected, but merely the evidence of that title, and the covenants of the deed: Barrett *v.* Thorndike, 1 Greenl. 73; Wallace *v.* Harmstead, 15 Penn. St. 462; Withers *v.* Atkinson, 1 Watts 236; Williams *v.* Van Tuyl, 2 Ohio N. S. 336; Babb *v.* Clemson, 10 S. & R. 419; and, "that where the subject-matter of the deed lies in grant, so that the estate created, cannot exist without the deed, because it is of the essence of the estate, any alteration in the deed, material or immaterial, by the party claiming the estate, avoids the deed as to him, to all intents and purposes, so that not only all remedy

there been no other reason for it than the duty of a person having the custody of an instrument made for his benefit, to preserve it in its original state.

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by action, but the estate itself, is gone:" Lewis et al. *v.* Payne, 8 Cowen 7. As regards deeds of conveyance of land, there can be no question, that a fraudulent alteration, or even a voluntary destruction, by a party, will not destroy his title, but merely vitiates his evidence, and destrnys the covenants of the deed: Barrett *v.* Thorndike, 1 Greenl. 73; Jackson *v.* Chase, 2 Johns. 87; Lewis et al. *v.* Payne, 8 Cowen 7; Jackson *v.* Gould, 7 Wend. 364; Withers *v.* Atkinson, 1 Watts 236; Wallace *v.* Harmstead, 44 Penn. St. 492; Greysons *v.* Richards, 10 Leigh 57; Babb *v.* Clemson, 10 S. & R. 419; Alexander *v.* Hickox, 34 Miss. 496.

If a note be altered by the promisee, its validity is destroyed, and as the evidence of the title to the note is gone, so is the remedy, and no other evidence can be resorted to for the purpose of maintaining an action: Martendale *v.* Follett, 1 N.H. 95; Blade *v.* Nolan, 12 Wend. 173; Bigelow *v.* Stilphen, 35 Vt. 521; and, a material alteration in any commercial paper, without the consent of the party to be charged, extinguishes his liability: Wood *v.* Stede, 6 Wall. 80.

There is yet another topic to be noticed, in connection with this subject, and that is, in relation to bonds or notes in blank, or drawn with blanks. It seems to be admitted, as respects notes, that where one writes his name upon a piece of paper, or draws a note with blanks, and gives the paper or writing to another, who draws a note, or fills up the blanks, it is valid, upon the principle of implied consent: Inglish et al. *v.* Brenneman, 4 Eng. 122; s. c. 5 Id. 377; Bank of Limestone *v.* Penick, 5 Mon. 59; Kitchen *v.* Place, 41 Barb. 465; Bank of St. Clairsville *v.* Smith, 5 Ohio 222. In this last case, a note was drawn with a blank sum, though there was a verbal stipulation, that it should not be filled to a greater amount than $200; it was, however, filled for $700, yet the note was held good. And see also, Worrall *v.* Gheen, 39 Penn. St. 388, which, however, in Neff *v.* Horner, 63 Id. 327, was held to be an exceptional case. But it has been held, that the blanks only are to be filled which will be sufficient to make it a valuable instrument, and hence where a blank bill of exchange was changed tn a promissory note, it was considered void: Bank *v.* Douglas, 31 Conn. 170; and see Ives *v.* Farmers' Bank, 2 Allen (Mass) 236.

On the subject of bonds, the cases are wholly irreconcilable; the following holding, that where one affixes his signature and seal to a piece of paper, and authorizes it to be filled, it will be binding: Boardman *v.* Goret, 1 Stew. 517; Wiley et al. *v.* More et al., 17 S. & R. 438; Bank of South Carolina *v.* Hammond, 1 Rich. 281; Gourdin *v.* Commander et al., 6 Id. 497; Hulty *v.* Commonwealth, 3 Grant 61, the contrary being maintained in Byers *v.* McClanahan, 6 Gill & Johns. 250; Ayers *v.* Harnes, 1 Ohio 372; Horry Dist. *v.* Harrison, 1 N. & McC. 554; Bnyd *v.* Boyd, 2 Id. 125; Duncan *v.* Hodges, 4 McC. 239; Parminter *v.* McDaniel, 1 Hill 267; Stoney *v.* McNeill, Harp. 156; Gilbert *v.* Anthony, 1 Yerg. 69; Drury *v.* Foster, 2 Wall. (U. S.) 24. The same diversity of opinion exists in relation to bonds executed with blanks; some of the cases holding them to be valid, as Smith *v.* Crooker, 5 Mass. 538; Ex parte Decker, 6 Cowen 59; Ex parte Kerwin, 8 Id. 118; Commercial Bank of Buffalo *v.* Cortwright, 22 Wend. 348; Vanhook *v.* Barnett et al., 4 Dev. 272; Whiting *v.* Daniel et al., 1 Hen. & Munf. 390; Duncan *v.* Hodges, 4 McC. 239; Norfleet *v.* Edwards, 7 Jones L. 455; and others deciding that they have no validity; Graham *v.* Holt, 3 Ired. 300; Davenport *v.* Sleight, 2 Dev. & Bat. 381; McKee *v.* Hicks, 2 Dev. 379; Harrisons *v.* Tivernans, 4 Rand. 187; People *v.* Organ, 27 Ill. 27; or, that at least, there must be some proof of author-

Having now spoken of the promise, whether express or implied, which is necessary to a contract, and also of the consideration, whether express or implied, by which such promise is sustained, let us consider some important *objects* for which a contract may be made, and which seem to require a special mention. The object for which a contract is made may be either lawful or unlawful; and if it be unlawful the contract will be void, and the illegality may be pleaded as a defence to an action brought upon such a contract.(*k*) A distinction was formerly *taken between contracts whose object was merely prohibited by the law under some given penalty, and those whose object was morally wrong. The former were termed *mala prohibita*, the latter *mala in se*;(*l*) and it was considered that, as the former involved no moral turpitude, a man might embrace either of the alternatives offered by the law, and either abstain from the offence and remain harmless, or commit it and suffer the penalty. This distinction, however, has long been exploded;(*m*) for it is considered to be equally unfit that a man should be allowed to take advantage of what the law says he ought not to do, whether the thing be prohibited because it is against good morals, or whether it be prohibited because it is against the interest of the state.[1] Whether, therefore, the object of a

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(*k*) Collins *v.* Blantern, 2 Wils. 341, 347; s. c. 1 Smith's Leading Cases 154; Paxton *v.* Popham, 9 East 408; Pole *v.* Harrobin, 9 East 416, n.; Begnis *v.* Armistead, 10 Bing. 107 (E. C. L. R. vol. 25); s. c. 3 M. & Sc. 516.

(*l*) See 1 Black. Com. 54, 57.

(*m*) Aubert *v.* Maze, 2 Bos. & Pul. 374, 375; Cannan *v.* Bryce, 3 B. & Ald. 183 (E. C. L. R. vol. 5); Bensley *v.* Bignold, 5 B. & Ald. 335, 341 (E. C. L. R. vol. 7); Cope *v.* Rowlands, 2 M. &. W. 149, 157; Fergusson *v.* Norman, 5 Bing. N. C. 76, 84 (E. C. L. R. vol. 35).

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ity to fill the blanks: Clendaniel *v.* Hastings, 5 Harring. 508.

In regard to letters of attorney, for commercial, banking, and ordinary business purposes, the necessities of trade have led to the adoption of such instruments with blanks, to a very large extent. The great convenience of their employment, together with their almost universal use for some purposes, for example, the transfer of stocks and loans, will probably induce the courts to recognise their validity, as executed under an implied agreement: Bridgeport Bank *v.* Railroad Co., 30 Conn. 231; and see Vliet *v.* Camp, 13 Wis. 198; German, &c., Association *v.* Sendmyer, 50 Penn. St. 67.

[1] There is probably no principle of law better settled, than that every contract must have a legal consideration: Pounds *v.* Richards et al., 21 Ala. 424; Marey *v.* Crawford, 16 Conn. 552; Coolidge *v.* Blake, 15 Mass. 430; Wheeler *v.* Russell, 17 Id. 258; Wilson et al. *v.* Education Soc., 10 Barb. S. C. 308; Weeks *v.* Lippincott, 42 Penn. St. 474; Stanley *v.* Nelson, 28 Ala. 514; Fireman's Ch. Association *v.* Berghaus, 13 La. Ann. 209; Short *v.* Shultz, 43 Penn. St. 207; Martin *v.* Iron Works, 35 Ga. 176; and it is immaterial whether the illegality of the consideration consists in its being prohibited by statute, or in its being contrary to good morals, or against public

contract be unlawful because morally wrong, or unlawful by the policy of the common law, or unlawful because a penalty is attached to it by

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policy; whether it be *malum prohibitum* or *malum in se;* for under either aspect, the contract is equally void. The leading case on this subject is, Armstrong *v.* Toller, 11 Wheat. 258; s. c. Toller *v.* Armstrong, 4 Wash. C. C. 297, in which Marshall, C. J., says, "Questions upon illegal contracts have arisen very often, both in England and in this country; and no principle is better settled, than that no action can be maintained on a contract, the consideration of which is either immoral in itself, or prohibited by law."

In like manner, if the original consideration of a contract is in any respect unlawful, any subsequent agreement founded upon it, and by which it is to be carried into effect, is likewise unlawful; but if the subsequent agreement can be entirely separated from the former illegality, it is valid: Walker *v.* Bank of Washington, 3 How. 62; Warren *v.* Crabtree, 1 Greenleaf 167; Smith *v.* Barstow, 2 Doug. 153; Early *v* Mahon, 19 Johns. 147; Bell *v.* Quinn, 2 Sandf. S. C. 146; Columbia Bridge Co. *v.* Kline, Bright. 320; Terry *v.* Bissell, 26 Conn. 23; Bates *v.* Watson, 1 Sneed 376; Shelton *v.* Marshall, 16 Texas 344; Boutelle *v.* Melendy, 19 N. H. 196; Barton *v.* Port Jackson & Union Falls Plank Road Co., 17 Barb. 397; Butler *v.* Myer, 17 Ind. 77; Campbell *v.* Sloan, 62 Penn. St. 481; Thornburg *v.* Harris, 3 Cold. (Tenn.) 157; and so, too, if the consideration is part lawful, and part unlawful, the good shall stand, and the bad only be avoided, unless it be of such a nature that the good and bad cannot be separated, in which case the whole contract will be void: Nicholson *v.* Fearson, 7 Peters 103; Moncure *v.* Dermott, 13 Id. 345; Whitsell *v.* Womack, 8 Ala. 466; Pond *v.* Smith, 4 Conn. 297; Terry et al. *v.* Olcott, Id. 442; Gardner *v.* Mazey, 9 B. Mon. 90; Irvine *v.* Stone et al., 6 Cush. 508; Hinds *v.* Chamberlain, 6 N. H. 225; Carleton *v.* Whitcher, 5 Id. 196; Roby *v.* West, 4 Id. 285; Crawford *v.* Merrell, 8 Johns. 253; Township of Nottingham *v.* Giles, 1 Penna. R. 120; Vroom *v.* Exrs. of Smith, 2 Green 479; Hook *v.* Gray, 6 Barb. S. C. 398; Brown *v.* Tappan, 9 Wend. 175; Hamilton *v.* Canfield, 2 Hall 526; Van Alstyne *v.* Wimple, 5 Cowen 162; Frazier *v.* Thompson, 2 W. & S. 235; Yundt *v.* Roberts, 5 S. & R. 138; Filson's Trustees *v.* Himes, 5 Penn. St. 452; Thomas *v.* Brady, 10 Id. 170; Buck *v.* Albee, 26 Vt. 184; Gelpeke *v.* Dubuque, 1 Wallace (U. S.) 221; Carleton *v.* Woods, 8 Foster 290; Rose *v.* Truax, 21 Barb. 361; Barker *v.* Parker, 23 Ark. 390, Doty *v.* Knox, &c., Bank, 1 Ohio 133; Treadwell *v.* Davis, 34 Cal. 601; Le Beerski *v.* Paige, 36 N. Y. 537; and although a contract tainted with fraud, may be ratified or confirmed, without a new contract founded on a new consideration; yet when the contract is in substance, or essential form, illegal, neither party can ratify it, because the wrong done is against the state, and it only can forgive it:" Pearsoll *v.* Chapin, 44 Penn. St. 15; Boutelle *v.* Melendy, 19 N. H. 196.

A distinction is to be noted on this subject between contracts executory, and those executed; in the former case the contract will not be enforced, by reason of the unlawful consideration or promise, and in the latter case the courts will not grant relief, but will suffer the *status* of the parties to remain, and particularly so, where the application is made by the party who has been guilty of the unlawful act: Adams *v.* Barrett, 5 Geo. 508; Musson et al. *v.* Fales et al., 16 Mass. 334; Ball *v.* Gilbert, 12 Metc. 397; Skinner *v.* Henderson, 10 Misso. 205; Kneeland *v.* Rogers et al., 2 Hall 579; Greene *v.* Godfrey, 44 Maine 25; Baily *v.* Milner, 35 Ga. 330; Dumont *v.* Dufore, 27 Ind. 263. But the guilty party will not be allowed to retain the fruits of the contract, at the expense of the innocent, and will be liable, not upon any valid portion of the express contract, but on the implied contract, to account for money or property received: Tracy *v.* Talmadge, 4 Sneed 429; Hunt *v.* Turner, 9 Texas 385.

But a contract which has been made in

any particular statute, in every case the contract is void; and it is indifferent, under such circumstances, whether the contract be made by

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a foreign country, and is in accordance with the laws of the place where it was made, may be carried into effect in this country, although contrary to our laws; unless it was entered into with the intention of being perfected here, in fraud of our statutes; or unless its enforcement would result in injury to our citizens, or afford a pernicious example: Greenwood *v.* Curtis, 6 Mass. 358; Thompson *v.* Ketchum, 8 Johns. 189; Hicks *v.* Brown, 12 Id. 142; Sconelle *v.* Canfield, 14 Id. 338; Lodge *v.* Phelps, 1 Johns. Cas. 139; Ruggles *v.* Keeler, 3 Johns. 263; Emory *v.* Greenough, 3 Dall. 370, n.; Adams *v.* Gay, 19 Vt. 358; Smith *v.* Godfrey, 8 Foster 379; Thatcher *v.* Morris, 1 Kernan 437; Jameson *v.* Gregory, 4 Metc. (Ky.) 363.

Where a statute contains a provision for the performance of a certain thing, other ways of accomplishing that thing are not necessarily void; if, indeed, the statute expressly says that the act shall be done in the manner pointed out, and not otherwise, then all other means are unlawful, but if it only directs, and does not enjoin, the matter may be accomplished in any other way, provided it be not contrary to the principles of the common law, or to good morals or public policy: Whitsell *v.* Womack, use, &c., 8 Ala. 466; Lugg *v.* Burgess et al., 2 Stew. 509; Bates et al. *v.* The Bank of the State of Alabama, 2 Ala. 487; Postmaster-General *v.* Early, 12 Wheat. 136; Smith *v.* The United States, 5 Peters 293; Farrar et al. *v.* The United States, Id. 273; Justices of Christian *v.* Smith et al., 2 J. J. Marsh. 474; Fant et al. *v.* Wilson, 3 Mon. 343; McCormick *v.* Young, 3 J. J. Marsh. 180; Baker *v.* Haley et al., 5 Greenl. 240; Kavanagh *v.* Saunders et al., 8 Id. 422; Purple *v.* Purple et al., 5 Pick. 226; Vroom *v.* Exrs. of Smith, 2 Green 479; Ellis *v.* Robinson, 2 Penna. R. 707; Howard *v.* Blackford, Id. 777; Day *v.* Hale, 7 Halst. 204; Woolwich *v.* Forrest et al., 1 Penna. R. 115; Township of Middleton *v.* McCormick et al., 2 Id. 200; Doll *v.* Bull et al., 2 Johns. Cas. 239; Closen *v.* Shaw, 5 Watts 468; Farmers' Bk. of Reading *v.* Boyer, 16 S. & R. 4; Anderson *v.* Foster, 2 Bail. 501; Hooe *v.* Tebbs et al., 1 Munf. 501.

And even where an act is expressly prohibited by the laws, it does not follow that every contract which may be tainted with the illegal matter is absolutely void, but it depends in each case upon a sound construction of the statute prohibiting it. Take, for instance, the subject of usury, which is generally, throughout the Union, forbidden by statutory enactment, yet usurious contracts are not usually held absolutely void, but the decisions on the subject are as various as the statutes, and in every case it depends upon the construction of the statute, whether the contract shall be void, or only void *pro tanto*. In a word, if the law does not avoid the instrument or contract, on account of such illegality, it will be valid for the legal, and void only for the illegal part of it: De Wolf *v.* Johnson et al., 10 Wheat. 367; Flecknor *v.* The U. S. Bank, 8 Id. 338; Higginson et al. *v.* Gray et al., 6 Metc. 212; Bank of Washington *v.* Arthur et al., 3 Gratt. 173; Tracy *v.* Talmadge, 4 Sneed 429. Thus in New Hampshire, three times the usurious interest is to be deducted from the claim, which will then be good for the balance: Simons *v.* Steele, 36 N. H. 75; Cole *v.* Hills, 44 Id. 227. In Indiana, Pennsylvania, Kentucky, Maine, Vermont, Tennessee, Ohio, Missouri, Alabama and Michigan, the interest over and above that which is allowed by law only, is forfeited, and an action may be brought for principal and lawful interest: Wycoff *v.* Loughead, 2 Dall. 92; Turner *v.* Calvert, 12 S. & R. 46; Berry *v.* Walker, 9 B. Mon. 467; Wood *v.* Kennedy, 19 Ind. 68; Cowry *v.* Lewis, Id. 121; Ellis *v.* Brannin, 1 Duvall (Ky.) 49; Pollock *v.* Glazier, 20 Id. 262; Larrabee *v.* Lambert, 32 Maine 97; Elworth *v.* Mitchell, 31 Id. 249; White *v.* The Franklin Bank, 22 Pick.

deed, or by parol merely. Thus if a bond under seal be given by a man to a woman in order to induce her to cohabit with him, it is void for

181; Hawkins *v.* Welsh, 8 Mo. 490; The State of Ohio, for the use, &c. *v.* Taylor et al., 10 Ohio 378; Busby *v.* Finn, 1 Ohio N. S. 410; Isler *v.* Brunson, 6 Humph. 277; Boyers *v.* Boddie, 3 Id. 666; Weatherhead *v.* Boyers, 7 Yerg. 545; Turney *v.* The State Bank, 5 Humph. 407, 410; Sawyer *v.* Phillips, 15 Ohio 218; McGhee *v.* George, 38 Ala. 323; Stevens *v.* Fisher, 23 Vt. 272; Burton *v.* Blin, 23 Id. 151; Nichols et al. *v.* Bliss, 22 Id. 581; Heath *v.* Page, 48 Penn. St. 130; Farmers' Bank *v.* Burchard, 33 Vt. 346; Smith *v.* Stoddard, 10 Mich. 148; and in Arkansas though the unlawful contract is void at law: Hogan *v.* Hensley, 22 Ark. 413, yet in equity the claim is good for the principal and lawful interest: Ruddell *v.* Ambler, 18 Id. 369: but in Pennsylvania, formerly, if any portion of the usurious interest had been received, the whole thing loaned was forfeited as a penalty, and could be recovered in a *qui tam* action: Philip *v.* Kirkpatrick, Addis. 124; Exrs. of Pawling *v.* Admrs. of Pawling, 4 Yeates 220; Large *v.* Passmore et al., 5 S. & R. 51; Evans *v.* Negley, 13 Id. 218; Agnew *v.* McElhare, 18 Penn. St. 484; but these decisions were made under the Act of the 2d of March, 1723, which has since been repealed by the Act of the 28th of May, 1858, Purd. Dig. (1861), p. 561; Fitzsimons *v.* Baum, 44 Penn. St. 32; Heath *v.* Page, 63 Penn. St. 108. In Illinois, Louisiana, Mississippi and South Carolina, the whole interest is forfeited, and the principal can only be recovered: Lalande *v.* Breaux et al., 5 Ann. 505; Richards *v.* Freesler, 2 Id. 265; Haynes *v.* Cobb, Id. 364; McLaurin *v.* Parker et al., 24 Miss. 511; Quarles *v.* Brannon, 5 Strob. 151; Lucas *v.* Spencer, 27 Ill. 15. But see as to the law of Illinois: Cushman *v.* Sutphen, 42 Ill. 256.

The principle seems to be, in accordance with what is above stated, that if the contract be part good and part bad, the good shall prevail and the bad be avoided, if they can be separated; and the statute points out what is good and what bad, or determines, that under certain circumstances, the contract is to be considered entire, and that therefore the good and bad cannot be separated, but the whole contract is void. If the basis of a subsisting contract is usurious, no subsequent agreement founded upon, and inseparable from, the former contract, will be free from the taint of usury: Jones *v.* Jackson, 14 Ala. 186; Bostford *v.* Sandford, 2 Conn. 276; Gibson *v.* Stearns, 3 N. H. 185; Tuthill *v.* Davis, 20 Johns. 284; Bridge *v.* Hubbard, 15 Mass. 96; Moter *v.* Dorsett, 1 McCord 350; Clark *v.* Badgely, 3 Halst. 233; Lee *v.* Peckham, 17 Wis. 383; but if a subsisting contract is good and legal, it cannot be destroyed by a subsequent agreement as to usurious interest: Stebbins *v.* Smith, 4 Pick. 97; Swartwout *v.* Payne, 19 Johns. 294; Johnson *v.* Johnson, 11 Mass. 359; Hughes *v.* Wheeler, 8 Cowen 77; Rice *v.* Welling, 5 Wend. 595; Hammond *v.* Hopping, 13 Id. 505; Mitchell *v.* Cotton, 2 Fla. 149; Troutman *v.* Barnett, 9 Geo. 30; Edgell *v.* Stanford, 6 Vt. 551; Donnington *v.* Meeker, 3 Stockt. 362; Smith *v.* Hollister, 1 McCarter (N. J.) 153; and it is not usury, to purchase a note, bond, or other security for money, at any rate of discount, as there is not a contract of loan; for usury is the taking of interest at an illegal rate upon a loan; but it must be a *bonâ fide* transaction, and the note or bill must not have been used, or made, as a mere device to avoid the statutes of usury: Saltmarsh *v.* Bank, 17 Ala. 761; s. c. 14 Id. 668; Brown *v.* Harrison, 17 Id. 774; Gregory *v.* Bewley, 2 Eng. 22; s. c. 5 Ark. 318; Caton *v.* Shaw, 2 Har. & G. 13; Belden *v.* Lamb, 17 Conn. 441; Freeman *v.* Brittin, 2 Harr. 191; Braman *v.* Hess, 13 Johns. 52; Mann *v.* Company, 15 Id. 44; Powell *v.* Waters, 17 Id. 176; Cobb *v.* Titus, 13 Barb, S. C. 47; Seymour *v.* Marvin, 11 Id. 80; Simpson *v.* Fullenwidder, 12 Ired. 334; Musgrove *v.* Gibbs, 1 Dall. 216; Parker *v.* Cousins, 2 Gratt,

the immorality of its object.(*n*) But a bond given to a woman in respect of the injury she has sustained by past cohabitation is valid.(*o*) For in

(*n*) Walker *v.* Perkins, 1 Wm. Black. 517; s. c. 3 Burr. 1568; Gray *v.* Mathias, 5 Ves. 286.

(*o*) Turner *v.* Vaughan 2 Wils. 339; Hill *v.* Spencer, 2 Amb. 641; Gray *v.* Mathias, 5 Ves. 286; Hall *v.* Palmer, 3 Hare 532; Kyne *v.* Moore, 1 Sim. & Stu. 61; 2 Sim. & Stu. 260; Ingre *v.* Moseley, 6 B. & C. 133 (E. C. L. R. vol. 13); 2 Sim. 161.

372; Sylvester *v.* Swan, 5 Allen (Mass.) 134; so, too, to determine whether or not a loan is usurious, reference must be had to the law of the place where it was made: Jacks *v.* Nichols, 5 Barb. S. C. 38; Sherill *v.* Hopkins, 1 Cowen 103; Smith *v.* Mead, 3 Conn. 253; De Wolf *v.* Johnson, 10 Wheat. 367; Rose *v.* Phillips, 53 Conn. 570.

For a further and full consideration of the subject of contracts void because unlawful, see the following cases:

As to contracts void on account of infringing some statutory provision or enactment: Hannay *v.* Eve, 3 Cranch 242; Patton *v.* Nicholson, 3 Wheat. 207; The Julia, 8 Cranch 181; The Aurora, Id. 263; The Hiram, Id. 444; s. c. 1 Wheat. 440; The Ariadne, 2 Id. 143; Craig *v.* The State, 4 Peters 411; Fales *v.* Mayberry, 2 Gall. 563; Cambioso *v.* Maffet, 2 Wash. C. C. 103; Kennett *v.* Chambers, 14 How. 39; Harris *v.* Runnels, 12 Id. 80; Munsell *v.* Temple, 3 Gilm. 93; Wheeler *v.* Russell, 17 Mass. 257; Bank *v.* Merrick, 14 Id. 322; Hunt *v.* Knickerbocker, 5 Johns. 327; Mitchell *v.* Smith, 1 Binn. 110; Fowler *v.* Throckmorton, 6 Blackf. 326; Steele *v.* Curle, 4 Dana 384; Dickerson *v.* Gordy, 5 Rob. 420; Rand *v.* Tobie, 32 Maine 420; Merrick *v.* Bank, 8 Gill 73; Richardson *v.* Company, 6 Mass. 111; Wickham *v.* Conklin, 8 Johns. 220; Bank *v.* Niles, 1 Doug. 411; Maybin *v.* Coulon, 4 Dall. 298; Duncanson *v.* McClure, Id. 308; Nichols *v.* Ruggles, 3 Day 145; Pratt *v.* Adams, 7 Paige 615; Odineal *v.* Barry, 24 Miss. 9; Merrell *v.* Legrand, 1 How. (Mo.) 150; Callagan *v.* Hallett, 1 Caines 104; Ludlow *v.* Van Rensselaer, 1 Johns. 94; Goodale *v.* Holridge, 2 Id. 193; Walt *v.* Harper, Id. 386; Love *v.* Palmer, 7 Id. 159; Richmond *v.* Roberts, Id. 319; Read *v.* Pruyn, Id. 426; Strong *v.* Tompkins, 8 Id. 98; Yeomans *v.* Chatterton, 9 Id. 295; Bruce *v.* Lee, 4 Id. 410; Graves *v.* Worrall, 14 Id. 146; Griswold *v.* Waddington, 15 Id. 57; s. c. 16 Id. 438; Seamen *v.* Waddington, 16 Id. 510; Beddis *v.* James, 6 Binn. 321; Eberman *v.* Reitzel, 1 W. & S. 181; Fox *v.* Mensch, 3 Id. 446; Kepner *v.* Keefer, 6 Watts 231; Yerger *v.* Rains, 4 Humph. 259, 267; Ohio Life and Insurance Trust Company *v.* The Merchants' Insurance and Trust Co., 11 Id. 1; Heirs of Hunt *v.* Heirs of Robinson, 1 Texas 758; Elkins *v.* Parkhurst, 17 Vt. 105; Spalding *v.* Preston, 21 Id. 9; Terrett et al. *v.* Bartlett, Id. 184; Case *v.* Riker, 10 Id. 482; Meyers *v.* Byerly, 45 Penn St. 368.

As to contracts void on account of being contrary to good morals, or because against public policy, or principles of the common law, see as well some of the above cases, as the following: Greenwood *v.* Exrs. of Colcock, 2 Bay 67; Denton *v.* Erwin et al., 6 La. Ann. 317; Denton *v.* Wilcox, 2 Id. 66; Slidell *v.* Pritchard et al., 5 Rob. 101; De Sohry *v.* De Laistre, 2 Har. & Johns. 228; Commonwealth *v.* Harrington, 3 Pick. 26; Columbia Bank *v.* Haldeman, 7 W. & S. 235; Pulse *v.* State, 5 Humph. 108; Hale *v.* Henderson, 4 Id. 199; Allen *v.* Dodd, Id. 132; Logan *v.* Austin, 1 Stew. 478; Grant et al. *v.* McLester, 8 Geo. 553; Harralson *v.* Dicking, 2 Car. L. Repos. 66; The First Congregational Church of the City of New Orleans *v.* Henderson, 4 Rob. 209; Shaw *v.* Reed, 30 Maine 105; Denny *v.* Lincoln, Admr., 5 Mass. 387; Churchill *v.* Perkins et al., Id. 541; Parsons *v.* Winslow, 6 Id. 169; Boynton *v.* Hubbard, 7 Id. 112; Sweet et al. *v.* Poor et. al., 11 Id. 549; Ayer *v.* Hutchin-

[*90] this case the object is not immoral; *and the consideration implied by the bond being a deed under seal supplies the want which would otherwise exist of a proper consideration.(*p*) If a contract have more than one object, and some of the objects are lawful whilst the others are unlawful, the unlawful objects will not vitiate the others,(*q*) provided the good part be separable from, and not dependent upon, that which is bad;(*r*) unless of course the whole contract should be rendered void by any enactment to the effect that all instruments containing any matter contrary thereto shall be void, in which case everything connected with the instrument will be vitiated.(*s*)[1] And if the good part of a contract be inseparable from the bad, as if a contract be made partly in consideration of the payment of money (which would be good), and partly for a consideration whose object is illegal, the illegal part of the consideration will vitiate the good, and render the whole contract void.(*t*)

(*p*) Binnington *v.* Wallis, 4 B. & Ald. 650, 652 (E. C. L. R. vol. 6); *ante*, p. 73.

(*q*) Gaskell *v.* King, 11 East 165; Wigg *v.* Shuttleworth, 13 East 87; Howe *v.* Synge, 15 East 440; in all which decisions unlawful covenants to pay the property tax were held not to vitiate other valid covenants in the same instrument. See also Kerrison *v.* Cole, 8 East 231; Mallen *v.* May, 11 M. & W. 653; Green *v.* Price, 13 M. & W. 695; affirmed 16 M. & W. 346; Nicholls *v.* Stretton, 10 Q. B. 346 (E. C. L. R. vol. 59).

(*r*) See Biddell *v.* Leeder, 1 B. & C. 327 (E. C. L. R. vol. 8), decided on the old Ship Registry Act.

(*s*) See 1 Smith's Leading Cases 169, and the statutes recited in the preamble to 5 & 6 Will. IV. c. 41.

(*t*) Fetherstone *v.* Hutchinson, Cro. Eliz. 199; Bridge *v.* Cage, Cro. Jac. 103. See also per Tindal, C. J., in Waite *v.* Jones, 1 Bing. N. C. 662 (E. C. L. R. vol. 27); Hopkins *v.* Prescott, 4 C. B. 578 (E. C. L. vol. 56).

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son, 4 Id. 370; Belding *v.* Pitkin, 2 Caines 149; Thurston *v.* Percival, 1 Pick. 415; Shelton *v.* Homer et al., 5 Metc. 462; Worcester *v.* Eaton, 11 Mass. 368; Doughty *v.* Owen, 24 Miss. 407; Plummer *v.* Smith, 5 N. H. 553; Sayles *v.* Sayles, 1 Fost. 312; Sterling *v.* Simmickson, 2 South. 756; Fanshor *v.* Stout, 1 Id. 312; Sharp et al. *v.* Teese, 4 Halst. 352; Gulick et al. *v.* Ward et al., 5 Id. 87; Jones *v.* Caswell, 3 Johns. Cas. 29; Doolin *v.* Ward, 6 Johns. 194; Wilbur *v.* How, 8 Id. 444; Thompson *v.* Davies, 13 Id. 112; Smith et al. *v.* Applegate, 3 Zabr. 352; Whitaker *v.* Cone, 1 Johns. Cas. 58; Sherman *v.* Boyce, 15 Johns. 443; Tuxbury *v.* Miller, 19 Id. 311; Hatch *v.* Mann, 15 Wend. 44; Preston *v.* Bacon, 4 Conn. 471; Shattuck *v.* Woods, 1 Pick. 175; Bassier *v.* Pray, 7 S. & R. 447; Carroll *v.* Tyler, 2 Har. & G. 54; Smith *v.* Smith, 1 Bail. 70; Harris *v.* Ross's Exrs., 10 Barb. S. C. 489; Hartzfield *v.* Garden, 7 Watts 152; Chippenger *v.* Hopbaugh, 5 W. & S. 315; Pingry *v.* Washburn, 1 Aik. 264; Cameron *v.* McFarland, 2 Car. L. Repos. 415; Stout *v.* Wren, 1 Hawk. 420; Oberman *v.* Clemmons, 2 Dev. & Bat. 185; Barbee *v.* Armstead et al., 10 Ired. 530; Roll *v.* Raguet, 4 Ohio 418; Conlon *v.* Morton et al., Exrs., 4 Yeates 24; Schenck *v.* Mingle, 13 S. & R. 29; Lidenbender *v.* Charles's Admr. 4 Id. 151; Crook *v.* Williams, 20 Penn. St. 344; Corley *v.* Williams, 1 Bail. 588; Vincent *v.* Groom, 1 Yerg. 430; Bowers *v.* Bowers, 28 Penn. St. 74; Tool Co. *v.* Norris, 2 Wall. (U. S.) 45; Coppell *v.* Hall, 7 Id. 542.

[1] See *ante*, p. 89, note 1.

The instance above given of a bond for future cohabitation is an example of a contract void on account of its object being *malum in se*, or morally wrong. In the same manner, no action can be maintained on any contract for the sale or publication of any libellous or *immoral book or print.(*u*) A striking instance of a contract, void [*91] on account of its object being contrary to the policy of the common law, occurs in the case of a contract in restraint of trade. It is for the advantage of the community that every person should be allowed the full exercise of his trade or profession; and any contract whereby a person is attempted to be restrained from following his usual calling, even for a limited time, is therefore absolutely void.(*x*)[1] But a contract is not rendered void by having for its object the restraint of a person from trading in a particular place,(*y*) or within a reasonable distance from any particular place,(*z*) for he may carry on his trade elsewhere; nor is a con-

(*u*) Forces *v.* Johnes, 4 Esp. 97; Stockdale *v.* Onwhyn, 5 B. & C. 173 (E. C. L. R. vol. 11); s. c. 7 D. & R. 625; Lawrence *v.* Smith, Jac. 471.

(*x*) Year Book, P. 2 Hen. V. pl. 26; Ward *v.* Byrne, 5 M. & W. 548; Hind *v.* Gray, 1 M. & G. 195 (E. C. L. R. vol. 39).

(*y*) Hitchcock *v.* Coker, 6 Ad. & E. 438 (E. C. L. R. vol. 33); s. c. 1 N. & P. 796; Archer *v.* Marsh, 6 Ad. & E. 959 (E. C. L. R. vol. 33); s. c. 2 N. & P. 562; Leighton *v.* Wales, 3 M. & W. 545.

(*z*) Davis *v.* Mason, 5 Term Rep. 118; Proctor *v.* Sergeant, 2 M. & G. 20 (E. C. L. R. vol. 40); s. c. 2 Scott, N. R. 289; Whittaker *v.* Howe, 3 Beav. 383; Pemberton *v.* Vaughan, 10 Q. B. 87 (E. C. L. R. vol. 59); Atkyns *v.* Kinnier, 4 Ex. Rep. 776; Elves *v.* Crofts, 10 C. B. 241 (E. C. L. R. vol. 70); Avery *v.* Langford, 1 Kay 663, 667, where the cases are collected; Harms *v.* Parsons, 32 Beav. 328; Brampton *v.* Beddoes, 13 C. B. N. S. 538 (E. C. L. R. vol. 106).

[1] A contract in restraint of trade is only held to be void when such an agreement is against public policy; if, therefore, the stipulations of the contract are such as to occasion no serious detriment to the interest of the public, the agreement will be binding; as, for example, a covenant, made by one not to carry on a trade within a specific and limited locality, or during a time limited, or otherwise partial in its operation, if based upon a consideration otherwise legal, is valid, because it is not considered of disadvantage to the public generally. For a full consideration of this point, see the following cases, which are believed to be the principal of the American decisions on the question: Pierce *v.* Fuller, 8 Mass. 223; Palmer *v.* Stebbins, 3 Pick. 188; Cuppell *v.* Brockway, 21 Wend. 158; Ross *v.* Sadybeer, Id. 166; Bowser *v.* Bliss, 7 Blackf. 345; Perkins *v.* Lyman, 9 Mass. 522; Stearns *v.* Barrett, 1 Pick. 443; Lawrence *v.* Kidder, 10 Barb. S. C. 641; Mott *v.* Mott, 11 Id. 127; Gilman *v.* Dwight, 13 Gray 396; Duffy *v.* Shockey, 11 Ind. 70; Grasselli *v.* Lowden, 11 Ohio N. S. 349; California Steam Nav. Co. *v.* Wright, 6 Cal. 258; Kinsman *v.* Parkhurst, 18 How. U. S. 289; Whitney *v.* Slayton, 40 Maine 224; Van Marter *v.* Babcock, 23 Barb. 633; Alcock *v.* Giberton, 5 Duer 76; Herchew *v.* Hamilton, 3 Iowa 596; Kellogg *v.* Larkin, 3 Chand. 133; Laubenheimer *v.* Mann, 17 Wis. 542; Warren *v.* Jones, 51 Maine 146; Clark *v.* Crosby, 37 Vt. 188; Hard *v.* Seeley, 47 Barb. 428; Keeler *v.* Taylor, 53 Penn. St 467; McClurg's Ap., 58 Id. 51; Taylor *v.* Blanchard, 13 Allen (Mass.) 370; Morris Run Coal Co. *v.* Barclay Coal Co., 28 Leg. Int. 156; Wright *v.* Rider, 36 Cal. 342.

tract void which restrains a person from serving a particular class of customers(a) (for there are plenty of others to be found), or which binds a person to be the servant for life in his trade to another,(b) for this is not in restraint of trade when it is to be carried on for his life. In a recent case(c) a person agreed that he would become assistant to a dentist for four years, and that after the expiration of that term he would [*92] not carry on the business *of a dentist in London, or any of the towns or places in England or Scotland where the dentist might have been practising before the expiration of the service. And it was held that the covenant not to practise in London was valid; but that the stipulation as to the other towns and places in England or Scotland was void. And according to the rule above mentioned,(d) that where some of the objects of a contract are lawful and others unlawful, the unlawful objects will not vitiate the others, it was held that the stipulation as to practising in London was not affected by the illegality of the remainder of the agreement.

The cases in which contracts may be void in consequence of their contravening some acts of parliament are too numerous to be here specified. As an instance may be mentioned contracts by clergymen holding benefices with cure of souls, made for the purpose of charging such benefices with any sum of money; which contracts are rendered void by a statute of Elizabeth.(e) And in these cases it has been held that any personal covenant for the payment of the money charged is not invalidated by being contained in the same deed as the attempted charge on the benefice.(f) Contracts for the sale or transfer of stock, of which the person contracting was not possessed at the time, and of which no transfer was intended to be made, were formerly void by the Stock Jobbing Act;(g)[1]

(a) Rannie *v.* Irvine, 7 M. & G. 969 (E. C. L. R. vol. 49).
(b) Wallis *v.* Day, 2 M. & W. 273.
(c) Mallan *v.* May, 11 M. & W. 653. See also Green *v.* Price, 13 M. & W. 695, affirmed, 16 M. & W. 346; Nicholls *v.* Stretton, 10 Q. B. 346 (E. C. L. R. vol. 59).
(d) *Ante*, p. 90.
(e) Stat. 13 Eliz. c. 20. See Shaw *v.* Pritchard, 10 B. & C. 241 (E. C. L. R. vol. 21); Long *v.* Storie, 3 De G. & S. 308.
(f) Monys *v.* Leake, 8 Term Rep. 411; Sloane *v.* Packman, 11 M. & W. 770.
(g) Stat. 7 Geo. II. c. 8, s. 8. See *post*, the chapter on Stock.

[1] This subject does not seem to have been considered of sufficient importance in several of he United States, to require statutory regulation. In Pennsylvania, however, it was enacted by the 6th sec. of an act of the legislature of May 22, 1841, that "If any person or persons whatsoever shall make or enter into any contract or agreement, written or oral, for the purchase, receipt, sale, delivery or transfer of

and money lent for the purpose of settling losses which had arisen from such illegal contracts could not be recovered back.(*h*) But this act is now repealed.(*i*) Securities for money won at play *or any game, [*93] or by betting on any game, or for money lent for gaming or betting at the time and place of such play, were declared by a statute of Anne to be utterly void;(*k*)[1] but by a later statute(*l*) such securities are

(*h*) Cannan *v*. Bryce, 3 B. & Ald. 179 (E. C. L. R. vol. 5).

(*i*) Stat. 23 Vict. c. 28.

(*k*) Stat. 9 Anne, c 14.

(*l*) 5 & 6 Will. IV. c. 41; Hawker *v*. Hallewell, 3 Sm. & G. 194.

any public loan or stock, or the stock of any corporation, institution or company, or other security in the nature thereof, or of any share or interest in any such loan or stock, or in the stock of any such corporation, institution or company, or other security in the nature thereof, or any bill, notes or other obligations of any corporation, institution or company, created or authorized, or that may be hereafter created or authorized as aforesaid, in which contract or agreement it may be stipulated or understood between the parties thereunto, his, her or their agent or agents, that the same may be executed or performed at any future period, exceeding five judicial days next ensuing the date of such contract or agreement; then, and in every such case, such contract or agreement shall be and the same is hereby declared to be null and void," &c.: Purd. Dig. (1861) 127. But this section has been repealed by the Act of the 17th of April, 1862: Purd. Dig. Suppl. 1266.

And in New York it was formerly the law that "all contracts, written or verbal, for the sale or transfer of any certificate, or other evidence of debt due, by or from the United States, or any separate State, or of any share or interest in the stock of any bank or of any company incorporated under any law of the United States, or of any individual State, shall be absolutely void, unless the party contracting to sell or transfer the same shall, at the time of making such contract, be in actual possession of the certificate or other evidence of such debt, share or interest, or be otherwise entitled in his own right, or be duly authorized by some person so entitled, to sell or transfer the said certificate or other evidence of debt, share or interest, so contracted for:" Rev. Stat. of N. Y., vol. i. p. 892. But this law has also been repealed: Rev. Stat. of N. Y., vol. ii. p. 980.

[1] Statutes against gaming exist in almost all the states in the Union; and even in those states where all betting and gaming has not been prohibited by statute, the judiciary have decided that, where it is of an immoral tendency, or detrimental to public policy, it is unlawful: Bevil, &c., *v*. Hix, 12 B. Mon. 142; Hickerson *v*. Benson et al., 8 Mo. 8; Sisk *v*. Evans, Id. 52; Dewes *v*. Miller, 5 Harring. 347: Trenton Ins. Co. *v*. Johnson, Zabr. 576; McDougall *v*. Walling, 48 Barb. 364; St. Ceran *v*. Sherman, 18 La. Ann. 520; Porter *v*. Sawyer, 1 Harring. 517; in this last case, the chief justice remarks, "As a general proposition, it is lawful to bet. Contracts of this kind may be entered into, and the obligations arising from such contracts must be enforced by courts and juries, if they be not such as to affect the good of society, corrupt public morals, or infringe upon the private rights or feelings of third persons." Thus, a bet on the age of a lady, or the sex of a person, or the issue of a general election, whilst pending, "would, undoubtedly, be illegal, as being against public policy, and hurtful to society." For a further consideration of the statutes against gaming, and the construction placed upon them by the courts of the several states, see the following cases: Finn et al. *v*. Barclay et al., 15 Ala. 627; Manning *v*. Manning, 8 Id. 138; Givens *v*. Rogers, 11 Id. 543; Stone *v*. Mitchell, 2 Eng. 91; Abrams et al. *v*. Camp, 3 Scam.

not to be utterly void, but are to be taken to have been given for an illegal consideration; they are consequently now void only as between the parties, but valid in the hands of any innocent holder, to whom they may have been transferred without notice of the illegality of the transaction in which they originated.(*m*) And by a more recent statute(*n*) it is enacted, that all contracts or agreements, whether by parol or in writing, by way of gaming or wagering, shall be null and void; and that no suit shall be brought or maintained in any court of law or equity for recovering any sum of money or valuable thing alleged to be won upon any wager, or which shall have been deposited in the hands of any person to abide the event on which any wager shall have been made. But this enactment is not to apply to any subscription or contribution, or agreement to subscribe or contribute, for or towards any plate, prize or sum of money to be awarded to the winner or winners of any lawful game, sport, pastime or exercise. Contracts for the payment of money, whereby there should be reserved more than five per cent. interest, were in like manner declared void by a statute of Anne, called the Usury Law;(*o*) but in order to protect innocent holders of securities given for usurious consideration, it was subsequently declared that such contracts should not be absolutely void, but should be considered to have been made for an illegal consideration.(*p*) However, by a statute of the reign of King William the Fourth,(*q*) it [*94] *was provided that no bill of exchange or promissory note made payable at or within three months after the date thereof, or not having more than three months to run, should be void by reason of any interest taken thereon or secured thereby, or any agreement to pay or receive or allow interest in discounting, negotiating or transferring the same. And by a subsequent statute,(*r*) all

(*m*) See *ante*, p. 87.

(*n*) Stat. 8 & 9 Vict. c. 109, s. 18.

(*o*) Stat. 12 Anne, st. 2, c. 16.

(*p*) Stat. 5 & 6. Will IV. c. 41.

(*q*) Stat. 3 & 4 Will. IV. c. 98, s. 7.

(*r*) 2 & 3 Vict. c. 37.

290; Parsons *v.* The State, 2 Port. (Ind.) 499; Danforth *v.* Evans, 16 Vt. 538; Mureau *v.* Langley et al., 21 Maine 26; Bevil, &c., *v.* Hix, 12 B. Mon. 142; McKinney *v.* Pope's Admr. 3 Id. 93; Lytle *v.* Lindsay, Id. 125; Ellis *v.* Beale, 18 Maine 337; Doyle *v.* The Commissioners of Baltimore County, 12 Gill & Johns. 484; Amory *v.* Gilman, 2 Mass. 1; White *v.* Buss, 3 Cush. 448; Williams *v.* Woodman, 8 Pick. 78; Terrall *v.* Adams, 23 Miss. 570; Rush *v.* Gott, 9 Cowen 173; Rrown *v.* Riker, 4 Johns. 438; Collins *v.* Ragrew, 15 Id. 5; Slate *v.* Black et al., 9 Ired. 378; Bledsoe *v.* Thompson, 6 Richard. 44; Rice *v.* Gist, 1 Strobh. 82; Russell *v.* Pyland, 2 Humph. 131; Swaggerty *v.* Stokely, 1 Swan 38; Tarleton *v.* Baker, 18 Vt. 9; Watson *v.* Fletcher, 7 Gratt. 19; Machir *v.* Moore, 2 Id. 257; Commonwealth *v.* Robbins, 26 Penn. St. 165; Collins *v.* Merrell, 2 Metc. (Ky.) 163; Mallett *v.* Butcher, 41 Ill. 382; Knight *v.* Gregg, 26 Texas 506; Welsh *v.* Cutler, 44 N. H. 561; Barnes *v.* Turner, 4 Metc. (Ky.) 114.

bills of exchange and promissory notes made payable at or within twelve months after the date thereof, or not having more than twelve months to run, and all contracts for the loan or forbearance of money above the sum of 10*l.* sterling, were exempted from the operation of the Usury Law.[1] Nothing, however, contained in the last-mentioned act was to extend to the loan or forbearance of any money upon security of any lands, tenements or hereditaments, or any estate or interest therein. And now, by an act passed on the 10th of August, 1854,(*s*) all the laws against usury are repealed. But where interest is now payable upon any contract, express or implied, for payment of the legal or current rate of interest, or where interest is payable by any rule of law, the same rate is recoverable as before the act.(*t*)

The above enactments are perhaps the most important statutory provisions by which contracts may be vitiated. Contracts whose objects are lawful are endlessly diversified, and many of them are regulated by laws

(*s*) Stat. 17 & 18 Vict. c. 90.

(*t*) Sect. 3.

[1] The rate of interest established by law in the several states is as follows: In Maine, New Hampshire, Vermont, Massachusetts, Rhode Island, Connecticut, Pennsylvania, Delaware, Maryland, Virginia, West Virginia, North Carolina, Tennessee, Kentucky, Ohio, Indiana, Illinois, Missouri, Arkansas, Iowa and Mississippi, six per cent. per annum; in New Jersey, Michigan, Wisconsin, Georgia, Minnesota, New York and Kansas, seven per cent.; in Alabama, Florida and Texas, eight per cent.; in Louisiana, five per cent. per annum; and in California, Nevada and Oregon, ten per cent. It does not, however, necessarily follow, that every contract by which a greater rate of interest is reserved, than what is allowed, by law, is usurious, for in some states, more than the amount of interest specified in the statute may be taken, by specific agreement between the parties as in Louisiana, eight per cent. per annum may be reserved and taken, if it be agreed upon between the parties; in Illinois, Iowa, Wisconsin, Missouri, Tennessee, Nevada, Indiana and Michigan, ten per cent; in Minnesota, Virginia, Kansas and Texas, twelve per cent. per annum, by a like arrangement; and in Arkansas, California, Massachusetts, Rhode Island and Nevada, any rate of interest specified in writing is legal; while in South Carolina, there is no interest law, but the interest is regulated by the contract, and when not so specified, it is by custom seven per cent.

The penalties and forfeitures for usury, are different in the different states; in some instances, three times the usurious interest is forfeited, in others the usurious interest only. A distinction, also, is to be noticed between an agreement to take usurious interest, and the actual taking of it, the latter only having been held in some states to be within the statutes of usury, and the agreement valid for principal and lawful interest.

See generally, on the subject of this note: Gen. Stats. N. H. (1867) c. 213, s. 2, p. 433; McGehee *v.* George, 38 Ala. 323; Pauska *v.* Daus, 31 Texas 67; Gen. Stat. Kansas (1868) c. 51, s. 1 & 2, p. 525; Catlin *v.* Knott, 2 Oregon 321; Williams *v.* Glasgow, 1 Nev. St. 537; 1 Wagner's Misso. Stat., p. 782–3; as to Tennessee, Ellis *v.* Branan, 1 Duval (Ky.) 49; as to Delaware and Florida, 4 Am. L. Reg. (N. S.) 323 note; and for the remaining states, 25 Bankers' Magazine, tit. "Maine," &c.

which it is not within the scope of the present work to enumerate. For the breach of any such contract pecuniary damages are, as we have seen,(*u*) the sovereign remedy prescribed by law, though equity not unfrequently administers more appropriate specifics. The person to whom money has become due, whether from any injury received, or from any contract broken, or from a contract to pay money itself, stands in a [*95] situation more or less advantageous *as regards his remedies for recovering the money, according to the nature of the *debt* which has thus become due to him. For by the law of England all creditors are not allowed equal rights, but are preferred the one to the other, partly according to accidental circumstances, and partly according to the degree of diligence and precaution which each may have used. The subject of debt is of sufficient importance to form a separate chapter.

(*u*) *Ante*, p. 63.

*CHAPTER III. [*96]

OF DEBTS.

DEBTS, by the law of England, are divided into different classes, conferring on the creditor different degrees of security for re-payment. The class which confers the highest privileges is that of debts of record, which class will accordingly first claim our attention.

A debt of record is a debt due by the evidence of a court of record.(*a*) Every court, by having power given to it to fine and imprison, is thereby made a court of record.(*b*)[1] Such courts are either supreme, superior or inferior. The supreme court is the Parliament. The superior courts of record are the House of Lords, the Court of Chancery, and the Courts of Queen's Bench, Common Pleas and Exchequer, which are the more principal courts. The courts of the Counties Palatine of Lancaster and Durham are also superior courts of record.(*c*) The Court of Bankruptcy and its district courts, and every commissioner thereof, also exercise and enjoy all the powers and privileges of a court of record as fully as the courts of law at Westminster.(*d*) The Court of Probate is also a court of record;(*e*) and so is the High Court of Admiralty.(*f*) The inferior courts of record may be said, generally, to consist of the numerous courts established throughout the country, under the acts for the more

(*a*) 2 Black. Com. 465.
(*b*) Bac. Abr. tit. Courts (D) 2.
(*c*) Ibid. (D) 1.
(*d*) Stat. 32 & 33 Vict. c. 71, s. 65.
(*e*) Stat. 20 & 21 Vict. c. 77, s. 23.
(*f*) Stat. 24 Vict. c. 10, s. 14.

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[1] By Article Third of the Constitution of the United States, the judicial power is vested in one Supreme Court, and in such inferior Courts as Congress shall from time to time establish. And in pursuance of the powers thus granted, the several District and Circuit Courts of the United States have been established by Acts of Congress.

The judicial power of the several states, is in like manner vested in such Courts as are created and organized under the Constitution and Laws of each state. These are either appellate or inferior. In questions which arise under the Constitution of the United States, an appeal may be taken from the judgment of the Supreme Court of a State to the Supreme Court of the United States.

[*97] easy recovery *of small debts and demands in England, now called the County Courts Acts.(*g*)

Debts of record do not, however, confer the same advantages on all creditors equally, for there is one creditor whose claims are paramount to all others, namely, the crown. In order to enjoy this priority, the crown debt was formerly required to be a debt of record, or a debt by specialty, that is, secured by deed;(*h*) though if the debt were by simple contract without such security, it would have had preference over the other simple contract creditors of the debtor, and, as some say, even over other creditors by specialty.(*i*)[1] But the distinction which formerly existed between specialty and simple contract debts has been abolished by a recent statute,(*k*) which reduces all specialty debts to the level of debts by simple contract. It seems, therefore, that a simple contract debt to the crown would now prevail over a specialty debt due to a private person. The lien of the crown on the lands of its debtors by record or specialty, and also on the lands of accountants to the crown, is mentioned in the author's Treatise on the Principles of the Law of Real Property.(*l*)

Of all debts which one subject may owe to another, that which confers the most important remedy is a *judgment debt*, or a debt which is due by the *judgment* of a court of record. As such a debt is due by the evidence of a court of record, it is of course a debt of record. [*98] *Such a debt may however now be incurred without any actual exercise of judgment on the part of the court. For, strange as it may appear, a judgment against a defendant in an adverse suit, though the most obvious, is yet not the most usual method of incurring a judgment debt. Such a debt may be incurred by the voluntary default of the de-

(*g*) Stats. 9 & 10 Vict. c. 95, s. 3; 12 & 13 Vict. c. 101; 13 & 14 Vict. c. 61; 15 & 16 Vict. c. 54; 17 & 18 Vict. c. 16; 19 & 20 Vict. c. 108; 21 & 22 Vict. c. 74; 22 & 23 Vict. c. 57; 28 & 29 Vict. c. 99; 29 & 30 Vict. c. 14; 30 & 31 Vict c. 142; 31 & 32 Vict. c. 71; 32 & 33 Vict. c. 51.

(*h*) Williams on Executors, pt. 3, bk. 2, ch. 2, s. 1.

(*i*) Bac. Abr. tit. Executors (L) 2.

(*k*) Stat. 32 & 33 Vict. c. 46.

(*l*) Page 62, 1st ed.; 65, 2d ed.; 70, 3d & 4th eds.; 76, 5th ed.; 81, 6th ed.; 84, 7th ed.; 85, 8th ed.

[1] The common-law prerogative of the king, to be paid in preference to all other creditors, is not universally adopted in this country. It prevails in the government of the United States, and in Maryland, North Carolina, Indiana, and Connecticut; in does not subsist in South Carolina: 1 Kent Com. pp. 243 to 248, and notes. For the law of Pennsylvania on this subject, see Purd. Dig. (1861) p. 284; Ramsey's Ap., 4 Watts 73; Arnold's Estate, 46 Penn. St. 277.

fendant in making no reply to the action, which is called *nihil dicit*, or by his failing to instruct his attorney, whose statement of that circumstance is called *non sum informatus*, or by a *cognovit actionem*, or more shortly *cognovit*, by which the defendant confesses the action, and suffers judgment to be at once entered up against him.(*m*) Of late years also it has become very usual for the parties to a suit to obtain by consent a judge's order, authorizing the plaintiff to enter up judgment against the defendant, or to issue execution against him, either at once and unconditionally, or more usually at a future time, conditionally on the non-payment of whatever amount may be agreed on. A judgment obtained on a judge's order for immediate judgment and execution is however the same thing as a judgment by *nihil dicit*, or confession.(*n*) The method formerly the most frequent of incurring a judgment debt is not however attended with the actual commencement of any adverse action. A *warrant of attorney* is given by the intended debtor, which consists of an authority from him to certain attorneys to appear for him in court, and to receive a declaration in an action of debt for the amount of the intended judgment debt, at the suit of the intended creditor, and thereupon to confess the action, or suffer judgment to go by default, and to permit judgment to be forthwith entered up against the intended debtor for the amount, besides costs of suit.[1] Such a warrant of attorney is generally

(*m*) 3 Black. Com. 397; Stephen on Pleading 120.

(*n*) Bell *v.* Bidgood, 8 C. B. 763; Andrews *v.* Diggs, 4 Ex. Rep. 827.

[1] In New York, judgments on warrants of attorney, may be entered within a year and a day of the date of the warrant, as a matter of course; after that time, and within ten years, an order of the court, or of a judge at chambers, must be obtained; between ten and twenty years after date, judgment can only be entered by order of court; and after twenty years, the order will not be made, unless a rule to show cause is first had, and notice given to the opposite party, if within the reach of service: Manufacturers' and Mechanics' Bank of the Northern Liberties in the County of Philadelphia *v.* St. John, 5 Hill 497; and sometimes, the court will refuse to allow a judgment to be entered on a bond and warrant, less than twenty years old, upon the presumption of payment: Exrs. of Clark *v.* Hopkins, 7 Johns. 556; upon a similar principle, a rule of the Supreme Court of Pennsylvania provides, that, "If a warrant to enter judgment be above ten years old, and less than twenty, application must be made to a judge for leave to enter judgment, founded on an affidavit of the due execution of the warrant, and that the money is unpaid, and that the defendant is living. If the warrant of attorney be above twenty years old, a rule to show cause must be obtained, of which, notice must be given, if the defendant be within the State of Pennsylvania." For analogous provisions see Hinds *v.* Hopkins, 28 Ill. 344.

There can be but one judgment entered on a warrant of attorney to confess judgment: Campbell *v.* Kent, 3 Penna. R. 72; Ely *v.* Karmany, 23 Penn. St. 314; but the second judgment is not void, though clearly irregular: Neff et al. *v.* Burr, 14 S. & R. 166; Ulrich, with notice, &c., *v.* Voneida, 1 Penna. R. 245; Campbell *v.* Canon, Add. 267; Adams *v.* Bush, 2 Watts 289;

[*99] executed as a *security for a smaller sum of money, usually one-half of the amount of the judgment debt; and it is accordingly

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Fairchild *v.* Camac, 3 Wash. C. C. 558; and, therefore, where two or more are jointly and severally bound, and judgment be entered against one on warrant, he cannot be joined with the others in a second judgment against all the defendants: Manufacturers' and Mechanics' Bank of the Northern Liberties in the County of of Philadelphia *v.* Cowden et al., 3 Hill 461; Averill *v.* Loucks, 6 Barb. S. C. 19.

By agreement between the parties, a judgment on warrant may cover future advances of money; Chapin *v.* Clemitson, 1 Barb. S. C. 311; Averill *v.* Loucks, 6 Id. 19; Monell *v.* Smith et al., 5 Cowen 441; Bank of Auburn *v.* Throop, 18 Johns. 505; Roosevelt *v.* Mark et al., 6 Johns. Ch. 279; Brinkerhoff et al. *v.* Marvin et al., 5 Id. 324; Austin et al. *v.* McInlay, 16 Johns. 165; Holden et al. *v.* Bull, 1 Penna. R. 460; Parmenter *v.* Gillespie, 9 Penn. St. 87; Troup *v.* Wood, 4 Johns. Ch. 247; St. Andrews' Ch. *v.* Thompson, 7 Id. 14; and such an agreement ought to be as precise as a bill of particulars, and must be strictly followed: Lawless *v.* Hackett, 16 Johns. 149; Chapin *v.* Clemitson, 1 Barb. S. C. 311; Nelson *v.* Sharp, 4 Hill 584; Nichols *v.* Hewitt, 4 Johns. 433; and where the warrant of attorney for the confession of judgment, was to be exercised upon a certain condition or contingency, it must appear that it has been fulfilled: Roundy *v.* Hunt, 24 Ill. 598; Harwood *v.* Hildreth, 4 Zabr. 51; Fullerton's Ap., 46 Penn. St. 144.

The Court will not set aside a judgment entered on a warrant of attorney, merely on account of irregularity: King *v.* Shaw, 3 Johns. 142; McFarland *v.* Irwin, 8 Id. 77; Haner's Appeal, 5 W. & S. 473; Lewis *v.* Smith, 2 S. & R. 142; Humphreys *v.* Rawn, 8 Watts 78; Roemer *v.* Denig, 18 Penn. St. 482; but if a warrant of attorney, made under, or by reason of, the provisions of a certain statute, does not strictly follow it, the judgment will be void, and so if the warrant has been obtained for an unlawful purpose, or upon an unlawful consideration: Ex parte Butler et al. *v.* Lewis, C. P. 10 Wend. 541; Judges *v.* The People, 15 Id. 110; Everitt *v.* Knapp, 6 Johns. 331; Richmond *v.* Roberts, 7 Id. 319; Bennett *v.* Davis et al., 6 Cowen 393; Bontel *v.* Owens, 2 Sandf. S. C. 655; The Manhattan Co. *v.* Brower, 1 Caines 511; Evans *v.* Begley, 2 Wend. 243; Truscott et al. *v.* King, 6 Barb. S. C. 346; Humphreys *v.* Rawn, 8 Watts 78; Hutchinson *v.* McClure, 20 Penn. St. 63; Davis *v.* Morris, 21 Barb. 152; Barrett *v.* Thompson, 5 Ind. 457; Richards *v.* McMillan, 6 Caines 419; and a judgment entered without filing the warrant, or formal confession of defendant, will be set aside for irregularity: Lytle *v.* Colts, 27 Penn. St. 193; Branning *v.* Taylor, 24 Id. 289; Jarrett *v.* Andrews, 19 Ind. 403; but this presupposes that a written authority has been given to enter judgment, for it is not necessary to the validity of a confession of judgment made by an attorney for his client, that his authority should be in writing: Flanigen *v.* City, 51 Penn. St. 491; Whelan's Ap., 57 Id. 331. Where there is a dispute about facts, the Court will direct a feigned issue to be formed: Frazier, Jr., *v.* Frazier, 9 Johns. 80; Wintringham *v.* Wintringham, 20 Id. 296; Morey *v.* Shearer, 2 Cowen 465; Neff et al. *v.* Burr, 14 S. & R. 166; Kindig *v.* March, 15 Ind. 248; and parol evidence is admissible to show that a judgment on a warrant, was entered after the death of the defendant: 38 Penn. St. 486.

In connection with the subject of warrants of attorney, the case of the Manf. & Mec. Bk. of Philadelphia *v.* St. John, 5 Hill 500, deserves notice on account of its singularity. In pronouncing the opinion of the Court, Bronson, J., says, "The authority to confess a judgment without process, must be clear and explicit, and must be strictly pursued. If the parties to this warrant of attorney intend to

accompanied by a *defeazance*, which must be written on the same paper or parchment as the warrant of attorney, otherwise the warrant will be void.(*o*) This defeazance, as its name imports, defeats the full operation of the warrant of attorney, by declaring that it is given only as a security for the smaller sum and interest, and that no execution shall issue on the judgment to be entered up in pursuance of the warrant of attorney, until default shall have been made in payment of such sum and interest at the time agreed on; but that, in case of default, execution may be issued.(*p*) The defeazance also until recently contained an agreement that it should not be necessary for the creditor to issue a writ of *scire*

(*o*) Reg. Gen. Hil. 1853, s. 27; stat. 3 Geo. IV. c. 39, s. 4; 32 & 33 Vict. c. 62, s. 26. Collateral securities must be noticed, Morell *v.* Dubost, 3 Taunt. 235.

(*p*) Warrants of attorney to confess judgment for securing any sum or sums of money are, with some exceptions, liable to the same duty (one-eighth per cent. on the money secured) as bonds for the like purpose. Stat. 13 & 14 Vict. c. 97. See *post*.[1]

authorize a judgment in any other State than Pennsylvania, which is very questionable, I think that they did not intend that a judgment should be entered in this State. Both the bond and the warrant describe two of the obligors as residents of the State of Pennsylvania, the third as a resident of New Jersey. The warrant is addressed "to John D. Smith, Esq., attorney of the Court of Common Pleas of Philadelphia, in the county of Philadelphia, in the State of Pennsylvania, or to any other attorney of the said Court, or of any other Court, there, or elsewhere, or to any prothonotary of any of the said Courts." The only thing which can carry the power beyond the Courts at "Philadelphia," is the word "elsewhere;" and although, if the parties had stopped there, the authority might have extended to our Courts, the scope of the word "elsewhere" is restricted by the words which immediately follow it, "or to any *prothonotary* of any *of the said Courts*." This shows that the parties were speaking of such Courts as had an officer called a "prothonotary," and such Courts only. The Pennsylvania Courts have an officer of that name, but we have not." The construction here given to the instrument in question, is so utterly contrary to the known and long received reading of a form in common use in Pennsylvania, and to the plain meaning of the words used, that it is difficult to understand how such a decision could have been made.

See further on the subject of warrants of attorney, and judgments thereon, the following cases: Montelius *v.* Montelius, 5 Penn. L. Jour. 92; Helvete *v.* Rapp, 7 S. & R. 306; Commonwealth to the use, &c. *v.* Conrad et al., 1 Rawle 249; Rabe *v.* Heslip et al., 4 Penn. St. 139; McCalmont, Admr., *v.* Peters, 13 S. & R. 196; Hays *v.* The Commonwealth, 14 Penn. St. 39; Chambers *v.* Denie, 2 Penn. St. 422; Enew *v.* Clark, Id. 234; Hall et al. *v.* Law, 2 W. & S. 135; Finney *v.* Ferguson, 3 Id. 413; Chambers *v.* Harger, 18 Penn. St. 16; James *v.* Jarrett, 5 Id. 370; Kirkbride et al. *v.* Durden, 1 Dall. 288; Baker *v.* Lukens, 35 Penn. St. 146; Hall *v.* Jones, 32 Ill. 38.

[1] By the Internal Revenue Law of the United States, a warrant of attorney accompanying a bond or note is exempt from stamp duty when such bond or note shall be stamped as required by law. Act of June 30, 1864, sec. 160, 2 Brightly's Dig. U. S., p. 343, sec. 341; and when the warrant is not so annexed it would, as a "power of attorney," require a stamp of fifty cents. Sec. 170, Sched. B.

facias, or do any other act for reviving the judgment or keeping the same on foot, although no proceedings should have been taken thereupon for the space of one year. Without such a provision, no execution could be issued after the expiration of a twelve-month from the date of the judgment, without the expense and trouble of a writ of *scire facias*, calling on the debtor to inform the court, or show cause, why execution should not be issued.(*q*) But the Common Law Procedure Act, 1852, now provides that during the lives of the parties to a judgment, or those of them during whose lives execution may at present issue within a year and a day without a *scire facias*, and within six years from the recovery [*100] of the judgment, execution may *issue without a revival of the judgment.(*r*) A warrant of attorney is also sometimes given for entering up judgment for a sum of money, in order to secure the regular payment of an annuity; in which case the defeazance of course expresses that no execution shall be issued until default shall have been made for so many days in some payment of the annuity, but that, in case of such default, execution may be issued from time to time.(*s*)

A warrant of attorney need not be under seal,(*t*) though it generally is so. In order to guard against any imposition in procuring debtors to execute warrants of attorney or *cognovits* in ignorance of the effect of such instruments, it is provided(*u*) that a warrant of attorney to confess judgment in any personal action, or *cognovit actionem*, given by any person, shall not be of any force, unless there is present some attorney of one of the superior courts on behalf of such person, expressly named by him and attending at his request, to inform him of the nature and effect of such warrant or cognovit, before the same is executed; which attorney shall subscribe his name as a witness to the due execution thereof, and thereby declare himself to be attorney for the person executing the same, and state that he subscribes as such attorney.[1] And a warrant of

(*q*) Stat. Westm. the second, 13 Edw. I. c. 45.

(*r*) Stat. 15 & 16 Vict. c. 76, s. 128.

(*s*) See Cuthbert *v.* Dobbin, 1 C. B. 278 (E. C. L. R. vol. 50).

(*t*) Kinnersley *v.* Mussen, 5 Taunt. 264 (E. C. L. R. vol. 1).

(*u*) Stat. 32 & 33 Vict. c. 62, s. 24, re-enacting stat. 1 & 2 Vict. c. 110, s. 9, repealed by stat. 32 & 33 Vict. c. 83.

[1] This doctrine has been applied in the State of New York, to the execution of a warrant of attorney by a person in custody; thus Mason, J., in Butel *v.* Owens, 2 Sandf. S. C. 655 says, "It has long been a rule of the English courts, that no warrant of attorney executed by any person in custody of any sheriff or other officer, for the confession of any judgment, shall be valid or of any force, unless there be present some attorney on behalf of such person in custody, to be named by him, and attending

attorney or cognovit not executed in manner aforesaid, shall not be rendered valid by proof that the person executing the same did in fact understand the nature and effect thereof, or was fully informed of the same.(*x*) Every acknowledgment of satisfaction of a *judgment [*101] is also required to be attested in a similar manner.(*y*)[1] Since the acts for registering writs of execution,(*z*) warrants of attorney have become much less frequent than before.

Not only was there a risk of debtors being imposed upon, in being prevailed on to execute warrants of attorney, but creditors also were formerly liable to be defrauded by their debtors giving secret warrants of attorney, cognovits, or judge's orders, to same favored creditors, to the prejudice of the others. In order to obviate this inconvenience, provision has been made by modern acts of parliament for the filing, in the office of the Court of Queen's Bench, of all warrants of attorney, with the defeazances thereto, and of all cognovits, and of all such judge's orders as before mentioned, or of copies thereof, within twenty-one days after their execution, otherwise the same shall be deemed fraudulent and shall be void.(*a*) And a list of such warrants of attorney, cognovits and judge's orders,(*b*) and also an index containing the names, additions and descriptions of the persons giving the same,(*c*) is directed to be kept by

(*x*) Stat 32 & 33 Vict. c. 62, s. 25, re-enacting stat. 1 & 2 Vict. c. 110, s. 10, repealed by stat. 32 & 33 Vict. c. 83: Potter *v.* Nicholson, 8 M. & W. 494; Everard *v.* Poppleton, 5 Q. B. 181 (E. C. L. R. vol. 48); Pocock *v.* Pickering, 18 Q. B. 789 (E. C.L. R. vol. 83).

(*y*) Reg. Gen. Hil. 1853, s. 80.

(*z*) Stats. 23 & 24 Vict. c. 38, 27 & 28 Vict. c. 112. See Principles of the Law of Real Property, p. 79, 6th ed., 81, 82, 7th ed., 82, 83, 8th ed.

(*a*) Stats. 3 Geo. IV. c. 39, ss. 1, 3, 32 & 33 Vict. c. 62, ss. 26, 27, 28. The twenty-one days are reckoned exclusively of the day of execution: Williams *v.* Burgess, 12 Ad. & E. 635 (E. C. L. R. vol. 40).

(*b*) Stat. 3 Geo. IV. c. 39, s. 5.

(*c*) Stats. 6 & 7 Vict. c. 66, 32 & 33 Vict. c. 62, s. 28.

at his request, to inform him of the nature and effect of such warrant of attorney, before the same is executed; and the attorney is required to subscribe his name to the due execution thereof. . . . This rule was never adopted in terms by the Supreme Court of this State, but the practice of the court appears to have always been in accordance with it." It is somewhat singular that this principle has not with us, as in England, been extended to cases of warrants of attorney other than those executed by prisoners; such a rule, applied to the execution of all warrants of attorney, could be productive of no injury, but would, on the contrary, tend to prevent fraud or imposition.

[1] By a rule of the Supreme Court of Pennsylvania, of the Court of Common Pleas, and of the District Court for the City and County of Philadelphia, no satisfaction of a judgment shall be entered of record, unless attested by the prothonotary, or by one of his clerks, with the date of the entry.

the officer of the Queen's Bench, open to public inspection and search on payment of a small fee.

Every judgment debt carries interest at the rate of 4*l.* *per cent. per annum* from the time of entering up the judgment until the same shall be satisfied, and such interest may be levied under a writ of execution on such [*102] *judgment.(*d*)[1] On the death of the debtor, his judgment debts must be paid in full by his executors or administra-

(*d*) Stat. 1 & 2 Vict. c. 110, s. 17.

[1] Neither debts due by contract, or by judgment, would bear interest, unless it were so provided by positive legislation: Hamer et al. *v.* Kirkwood et al., 25 Miss. 95; Barnes *v.* Crandell, 12 La. Ann. 112: Thompson *v.* Monrow, 2 Cal. 99; but it is believed, that in all of the states except North Carolina, interest has been made an incident to judgments: The Commonwealth, for the use, &c., *v.* Vanderslice et al., Admrs., 8 S. & R. 452; Ijams et al. *v.* Rice, use, &c., 17 Ala. 404; Thompson *v.* Thompson, 5 Ark. 18; Mayor, &c., of Macon *v.* The Trustees of the Bibb County Academy, 7 Geo. 205; Kintner *v.* The State, 3 Port. (Ind.) 92; Chamberlain *v.* Maitland & Co., 5 B. Mon. 449; Aubic *v.* Gill, 7 Rob. 50; Gwinn *v.* Whitaker, 1 Har. & Johns. 754; Williams, Admr., *v.* The American Bank et al., 4 Metc. 317; Hodgdon *v.* Hodgdon, 2 N. H. 169; Mahurin *v.* Bickford, 6 Id. 568; Sayre *v.* Austin, 3 Wend. 496; Graham *v.* Newton, 12 Ohio 210; Fitzgerald *v.* Caldwell's Exrs., 4 Dal. 251; The Commonwealth *v.* Miller's Admrs., 8 S. & R. 452; Mohn *v.* Heister, 6 Watts 53; Fishburne, Exr. of Snipes, *v.* Sanders, 1 Nott & McC. 242; Norwood *v.* Manning, 2 Id. 395; Admr. of Pinckney *v.* Singleton, 2 Hill S. C. 343; Gatewood *v.* Palmer, 10 Humph. 469; Crabb *v.* The Nashville Bank, 6 Yerg. 332; Grubb *v.* Brooke, 47 Penn. St. 485; Townsend *v.* Smith, 20 Texas 465; Bibend *v.* Liverpool, &c., Ins. Co., 30 Cal. 78. In North Carolina it has been decided, that interest is not to be calculated upon a judgment, but on the principal of the debt, until the time of payment: Satterwhite *v.* Carson, 3 Ired. 549; and, where judgment is entered for the penalty of a bond, interest can only be calculated upon the amount found due: Nice et al. *v.* Turrentine, 13 Ired. 212; in which last doctrine, however, North Carolina does not stand alone: Thomas *v.* Wilson, 3 McCord 166. See, however, to the contrary: Booth *v.* Ableman, 20 Wis. 602.

The rule that interest is incident to judgments, applies even in those cases where judgment has been rendered for a cause of action which does not bear interest, as for unliquidated damages: Marshall *v.* Dudley, 4 J. J. Marsh. 244; Klock *v.* Robinson, 22 Wend. 157; Lord *v.* The Mayor, &c., of New York, 3 Hill (N. Y.) 427; Harrington *v.* Glenn, 1 Hill S. C. 79.

In the case of a revival of a judgment, the original judgment, and the interest, form a new principal, upon which interest is to be subsequently calculated: Verree et al. *v.* Hughes, 6 Halst. 91; Fries *v.* Watson, 5 S. & R. 220; Meason's Estate, 5 Watts 464; Wilcher *v.* Hamilton, 15 Geo. 435; this doctrine applies, also, to a judgment in a *scire facias* against a garnishee, in foreign attachment: Flanagin *v.* Wetherill, 5 Whart. 280; though interest on a debt due by a garnishee, is suspended during the pendency of the proceedings, if there be no fraud, collusion, or wilful delay, on the part of the garnishee: Jackson's Exr. *v.* Lloyd, 44 Penn. St. 82; Rushton *v* Rowe, 64 Id. 63. It has been held in Pennsylvania, that where a judgment is affirmed by the Supreme Court, interest is not to be calculated on the aggregate of the judgment and interest then due; but

tors out of his personal estate before any of his debts on bond or by simple contract;(*e*)[1] but it is now provided that, in order to secure this

(*e*) Wentworth's Executors, 265 *et seq.* 14th ed., Williams on Executors, pt. iii. bk. 2, c. 2, s. 2; Barrington *v.* Evans, 3 You. & Col. 384.

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that the original judgment is the sum on which interest is to be charged: Kelsey *v.* Murphy, 30 Penn. St. 340, doubting McCausland's Admrs. *v.* Bell, 9 S. & R. 388; and in the same state, interest cannot be included with the principal of a verdict, for the time intervening between the verdict and the judgment: Irwin *v.* Hazleton, 37 Penn. St. 465; and this is also so in Iowa, Indiana and Louisiana; 20 Iowa 21; Bleckenstaff *v.* Perrin, 27 Ind. 527; Munson *v.* Butler, 18 La. Ann. 296; but it is otherwise in New Hampshire: Johnson *v.* Atlantic, &c., R. R., 43 N. H. 410; interest as well as principal can be collected on execution: Ijams et al. *v.* Rice, use, &c., 17 Ala. 404; Berryhill *v.* Wells, 5 Binn. 56; Admrs. of Kirk *v.* The Exrs of Richbourg, 2 Hill S. C. 352; Martin *v.* Kilbourne, 11 Vt. 93; Taylor *v.* Robinson, 2 Allen's (Mass.) 562; but in the state of Tennessee, in a *scire facias* on a judgment, no interest can be recovered: Allen *v.* Adams et al. *v.* 15 Humph. 16; Hall *v.* Hall, 8 Id. 156. And so, also, in New Hampshire: Barron *v.* Morrison, 44 N. H. 226.

In some of the states, it has been made lawful, for the parties to a contract, to stipulate for a greater rate of interest than that fixed by statute; yet, upon the judgment, only the statutory rate of interest shall be allowed: Borry *v.* Makepeace, 3 Port. (Ind.) 154; Burkhart *v.* Sappington, 1 Iowa 66; Hawkins et al. *v.* Ridenhour, 13 Mo. 125; Guernsey Bk. *v.* Kelley, 14 Ohio 367; White *v.* Haffaker, 27 Ill. 349; but see to the contrary: Hamer et al. *v.* Kirkwood et al., 29 Miss. 95; Byrd *v.* Gasquet, 1 Hemp. 261; in other states, where the parties have contracted for a rate of interest, that rate of interest shall be continued after judgment, not upon the judgment, but upon the principal of the debt or claim: Tindale *v.* Meeker, 1 Scam. 137; Aubic *v.* Gill, 7 Rob. 50.

In Alabama, in an action of debt upon a judgment obtained in a sister state, and judgment had by *nil dicit*, &c., interest cannot be calculated upon the original judgment, at the rate allowed by law in the state where it was obtained, unless a jury shall first find what that rate of interest is: Clarke *v.* Pratt, 20 Ala. 470; Mobile & Cedar Point R. R. Co. *v.* Talman et al., 15 Id. 472; Harrison et al. *v.* Harrison, 20 Id. 629; and in Massachusetts, interest will be allowed only on the rate of interest of that state: Barringer *v.* King, 5 Gray 9. See, also, for the same principle: Cavender *v.* Guild, 4 Cal. 250; Ingram *v.* Drinkard, 14 Texas 351; Nelson *v.* Felder, 7 Rich. Eq. 395; Deem *v.* Crume, 46 Ill. 69.

By No. 23 of the Revised Rules of the Supreme Court of the United States (21 How.), it is provided, that "In cases where a writ of error is prosecuted to the Supreme Court, and the judgment of the inferior court is affirmed, the interest shall be calculated and levied from the date of the judgment below, until the same is paid, at the same rate that similar judgments bear interest, in the courts of the state where such judgment is rendered," &c. See Perkins *v.* Fourniquet et al., 14 How. (U. S.) 328; but where a judgment of the Circuit Court in an admiralty case, was affirmed, by operation of law, in the Supreme Court, the court being equally divided, interest was not allowed on the judgment: Hemmenway *v.* Fisher, 20 How. 255.

[1] The order in which the debts of a decedent are to be paid, is regulated by the statute law of the several states, and in many of them, judgments have no precedence over debts due by specialty, or simple contract; but in the absence of any enactment on the subject, judgments have a legal priority, according to the rules of the common law: Nimmo's Exr. *v.* The

preference, the judgment must be registered or re-registered within five years before the death of the testator or intestate, in the same manner

Commonwealth, 4 Hen. & Munf. 57; and the decree of a court of equity is equivalent to the judgment of a court of law: In the matter of the estate of John Sperry, dec'd, 1 Ash. 347; Thompson *v.* Brown, 4 Johns. Ch. 619; and, if there be not assets sufficient to pay all the debts of the deceased, it is the duty of the executor or administrator to apply them rateably to the payment of all the debts, except such as operate as liens, and are entitled to a preference: Gay *v.* Lemele, 32 Miss. 309; Bennett *v.* Ives, 30 Conn. 329. On the subject of the payment of the debts of a decedent, see Robertson *v.* Demoss, Admx., 23 Miss. 300; Bason, Admx., *v.* Hughart, 2 Texas 476; Place, &c., *v.* Oldham's Admr., 10 B. Mon. 400; Smith et al. *v.* The State of Maryland, 5 Gill 45; The State of Maryland *v.* The Bank of Maryland, 6 Gill & Johns. 207; Thomas *v.* McElwee, 3 Strobh. 131; Williams, Admr., *v.* John W. & Wm. Benedict, trading, &c., 8 How. (U. S.) 107; Greenough's Ap., 9 Penn. St. 18; The State on the relation, &c., *v.* Johnson et al. 7 Ired. 231; Malis & Co. *v.* Admrs. of Jones, 2 Richard 393; Deichman's Ap., 2 Whart. 395; United states *v.* Duncan, 4 McLean 607; The Commonwealth, for the use, &c., *v.* Lewis, 6 Binn. 266; Martin's Ap., 33 Penn. St. 395; Smith *v.* Mallory, 24 Ala. 628; Kittera's Est., 17 Penn. St. 416; Mahone *v.* Central Bk., 17 Geo. 111.

The position, that the personalty of a decedent, is to be first applied to the payment of his debts, is well established. In Pennsylvania, it has been decided by the case of Hoover *v.* Hoover, 5 Penn. St. 351, that the assets shall be applied in the following order, to the payment of the debts: 1. The general personal estate not expressly, or by implication, exempted; 2. Lands expressly devised to pay debts; 3. Estates descended to the heir; 4. Devised lands, *charged* with the payment of debts *generally*, whether devised in terms general or specific (every devise of land being in its nature specific); 5. General pecuniary legacies, *pro rata;* 6. Specific legacies, *pro rata;* 7. Real estate devised; whether in terms general or specific. But see Hallowell's Est., 23 Penn. St. 229; and Loomis's Ap., 10 Id. 387. In New York, by Livingston *v.* Newkirk, 3 Johns. Ch. 312, the order of application was established, as, 1. The general personal estate; 2. Estates devised *expressly* for the payment of debts, *and for that purpose only;* 3. Estates descended. 4. Estates specifically devised, though *charged generally* with the payment of debts. Which last has also been decided to be the order of application in Kentucky, by McCampbell *v.* McCampbell, 5 Litt. 95, viz.: 1. The general personal estate; 2. The estate *especially* and *expressly* devised to be sold; 3. The estate descended; 4. The estate specifically devised, though *charged generally* with the payment of debts. In Massachusetts, by the case of Hayes *v.* Jackson, 6 Mass. 149, the order was settled, as follows; 1. The personal estate excepting specific bequests, or such of it as is exempted from the payment of debts; 2. The real estate, appropriated in the will as a fund for the payment of debts; 3. The descended estate, whether the testator was seized of it when the will was made, or it was afterwards acquired; 4. The rents and profits of it, received by the heir after the testator's death; 5. The lands specifically devised, although *generally charged* with debts, yet not specially appropriated for that purpose. And see Stuart *v.* Exr. of Carson, 1 Desaus. 500; Hall et ux. *v.* Sayre, 10 B. Mon. 46; Williams *v.* Price, 21 Geo. 507; Brant's Will., 40 Mo. 266.

As to the judgments of foreign states, and that they are not entitled to the priority due judgments obtained against the decedent, in the state where he resided, but on the contrary, rank with simple contract debts, see, Brengle *v.* McClellan, 7 Gill & Johns. 434; Hubbell *v.* Coudry, 5 Johns. 132; Cameron *v.* Wurtz, 4 McC. 278; Gainey *v.* Sexton, 29 Mo. 449; Brown *v.* Public Admr., 2 Bradf. 103.

as is required in order to affect lands in the hands of purchasers or mortgagees.(*f*)[1] The decree of a court of equity is equivalent to the judgment of a court of law.(*g*) And the privilege of priority of payment extends to the judgments of every court of record, whether superior or inferior; but the judgment of a foreign court is entitled to no precedence over a simple contract debt.(*h*) The remedies of the creditor by judgment of any of the superior courts, against the real estate of his debtor, are mentioned in the author's treatise on the Principles of the Law of Real Property.(*i*) The remedies against the choses in possession of the debtor have been referred to in a previous part of the present work.(*k*) The remedies in respect of the choses in action of the debtor will be hereafter mentioned. In addition to these remedies, such judgment creditor might formerly have imprisoned the person of his debtor by means of the writ of *capias ad satisfaciendum*;(*l*) but should he have done so, he would *have relinquished all right and title to the benefit of any charge or security which he might have obtained by virtue of his judgment.(*m*) If, however, the debt should not have exceeded 20*l.*, the debtor could not have been imprisoned(*n*) without a previous summons and examination before a commissioner of bankrupt or a judge of a county court, who would have ordered the commitment of the debtor only in a case of fraud or other ill behavior;(*o*) and the imprisonment

[*103]

(*f*) Stat. 23 & 24 Vict. c. 38, ss. 3, 4, not retrospective: Evans *v.* Williams, 2 Drew. & Smale 324. See Re Rigby, M. R., 12 W. 32; Jennings *v.* Rigby, 33 Beav. 198; Principles of the Law of Real Property, p. 75 *et seq.* 6th ed., 80 *et seq.* 7th ed., 81 *et seq.* 8th ed.

(*g*) Shafto *v.* Powe, 3 Lev. 355.

(*h*) Duplex *v.* De Proven, 2 Vern. 540. See also Smith *v.* Nicolls, 5 Bing. N. C. 208 (E. C. L. R. vol. 35).

(*i*) P. 63 *et seq.* 2d ed., 66 3d & 4th ed., 71 5th ed., 75 6th ed., 78 7th & 8th ed.

(*k*) *Ante*, p. 51.

(*l*) Bac. Abr. tit. Execution (C) 3.

(*m*) Bac. Abr. tit. Execution (D); stat. 1 & 2 Vict. c. 110, s. 16.

(*n*) Stat. 7 & 8 Vict. c. 96, s. 57.

(*o*) Stat. 8 & 9 Vict. c. 127; 9 & 10 Vict. c. 95, s. 99.

[1] The lien docket is not the *record* of judgments, but the essential index of them; it does not make a judgment, but refers to one supposed to be already made: Ferguson *v.* Staver, 40 Penn. St. 216; but the law requires judgments to be properly docketed and indexed, or in default of this, which amounts only to constructive notice, to bring home notice to a subsequent incumbrancer which shall be actual: Smith's Ap., 47 Penn. St. 140; otherwise, it will not be effectual as a judgment, as against subsequent lien creditors, whose liens are regularly docketed; Snyder County Ap., 3 Grant's Cas. 40; but a subsequent incumbrancer is not bound to verify the judgment index by the record: Coyne *v.* Southern, 61 Penn. St. 455.

would not then have operated as any satisfaction of the debt.(*p*) But an act has now been passed for the abolition of imprisonment for debt and for the punishment at the same time of fraudulent debtors.(*q*)[1] This act is styled "The Debtors Act, 1869," and the 1st of January, 1870, is the date of its commencement. It provides that, with the exceptions after mentioned, no person shall, after the commencement of the act, be arrested or imprisoned for making default in payment of a sum of money. The exceptions are:—(1.) Default in payment of a penalty, or sum in the nature of a penalty, other than a penalty in respect of any contract. (2.) Default in payment of any sum recoverable summarily before a justice or justices of the peace. (3.) Default by a trustee or person acting in a fiduciary capacity and ordered by a court of equity to pay any sum in his possession or under his control. (4.) Default by an attorney or solicitor in payment of costs when ordered to pay costs for misconduct as such, or in payment of a sum of money when ordered to pay the same in his character of an officer of the court making the order. (5.) Default in payment for the benefit of creditors of any portion of a salary or other [*104] income in respect of the payment of *which any court having jurisdiction in bankruptcy is authorized to make an order. (6.) Default in payment of sums in respect of the payment of which orders are in that act authorized to be made. But no person is to be imprisoned in any case excepted from the operation of that section for a longer period than one year.(*r*) Power is also reserved for any court to commit to prison for a term not exceeding six weeks, or until payment of the sum due, any person who makes default in payment of any debt, or instalment of any debt, due from him in pursuance of any order or judgment of that or any other competent court; but this power is guarded by many provisions which it is not here necessary to recite.(*s*) Arrest on mesne process is also allowed under certain circumstances, if the debtor is about to quit England.(*t*) Provision is also made for the punishment of fraudulent debtors by imprisonment for any time not exceeding two years with or without hard labor.(*u*) An act has recently been passed for rendering judgments obtained in the Superior Courts in Eng-

(*p*) Stat. 8 & 9 Vict. c. 127, s. 3; 9 & 10 Vict. c. 95, s. 103.
(*q*) Stat. 32 & 33 Vict. c. 62.
(*r*) Stat. 32 & 33 Vict. c. 62, s. 4.
(*s*) Sect. 5.
(*t*) Sect. 6.
(*u*) Sect. 11 *et seq.*

[1] In many of the States of the Union, imprisonment for debt has been abolished by acts of legislation. Suits for fines and penalties are excepted from the effect of these statutes, nor do they embrace actions for trespass or torts; and arrest is usually permitted where the debt has been fraudulently contracted, or where the debtors fraudulently conceal or dispose of their effects.

land, Scotland and Ireland effectual in any other part of the United Kingdom.(*v*)

Judgments of the inferior courts may be removed into the superior courts by order of any judge of the latter courts; and immediately on such removal the judgment has the same force, charge and effect as a judgment of the superior court;[1] but it cannot affect any lands, tenements or hereditaments, as to purchasers, mortgagees or creditors, unless registered in the same manner as judgments of the superior courts.(*w*) A registry is now *provided for judgments in the county courts for the sum of 10*l.* and upwards.(*x*) [*105]

In addition to judgment debts, the other debts of record are *recognisances* when duly enrolled,(*y*) and statutes merchant, statutes staple and recognisances in the nature of statutes staple. The three last are now quite obsolete. A recognisance is an obligation entered into before some court of record or magistrate duly authorized, with condition to do some particular act, as to appear at the assizes, to keep the peace, or to pay a debt.(*z*) It is payable out of the personal estate of the debtor, in the event of his decease, next after judgment debts.(*a*)[2]

(*v*) Stat. 31 & 32 Vict c. 54.

(*w*) Stat. 1 & 2 Vict. c. 110, s. 22; 18 & 19 Vict. c. 15, s. 7. See Principles of the Law of Real Property 74, 5th ed.; 78, 6th ed.; 80, 7th ed.; 81, 8th ed.

(*x*) Stat. 15 & 16 Vict. c. 54, s. 18.

(*y*) Glynn *v.* Thorpe, 1 B. & Ald. 153.

(*z*) 2 Bla. Com. 341.

(*a*) Williams on Executors, pt. iii. bk. 2, s. 2.

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[1] See Dickinson *v.* Smith, 25 Barb. 102; Hitchcock *v.* Long, 2 W. & S. 170. In Pennsylvania, although judgments obtained before a justice of the peace, when filed in the Common Pleas, or made known to the administrators, must be paid *pro rata* with judgments in a court of record: Scott, Admr., *v.* Ramsay, 1 Binn. 221; yet, where a judgment was obtained before a justice of the peace against the defendant, and, after his death, a transcript of the judgment was filed in the office of the Prothonotary of the Court of Common Pleas, and subsequently the real estate of the defendant was sold by his administrators, under an order of the Orphans' Court, the Court held that the judgment was not a lien on the lands of the intestate, and that it had no priority of payment out of the proceeds of the sale, over either "physic, funeral expenses, servants' wages," &c.: In the matter of the Estate of Wm. Patterson, dec'd, 1 Ash. 336.

[2] In New Jersey and Tennessee, a recognisance creates a lien on the lands of the recognisor, from the time of its acknowledgment: State *v.* Stout, 6 Halst. 362; State *v.* Winn, 3 Sneed 393; but, generally, a recognisance does not operate as a lien on the lands of the recognisors, until judgment on the recognisance: State *v.* Morgan, 2 Bailey 601; Dewit *v.* Osborn, 5 Harring. 480; People *v.* Lott, 21 Barb. 130; Gilmer *v.* Blackwell, Dudley 6; Pinckard *v.* The People, 1 Scam. 187; Graham *v.* State, 7 Blackf. 313; Allen *v.* Reesor, 16 S. & R. 11.

Next in importance to debts of record were formerly *specialty debts*, or debts secured by *special contract* contained in a *deed*.(*b*) These were of two kinds, debts by specialty in which the heirs of the debtors were bound, and debts by specialty in which the heirs were not bound. On the decease of the debtor, both these classes of specialty debts stood on a level so far as regarded their payment out of the personal estate of the debtor. They ranked next after debts of record, and took precedence of all debts by simple contract,(*c*) with the exception of money owing for arrears of rent, to which the feudal principles of our law have given an importance equal to that of debts secured by deed.(*d*) Debts by specialty in which the heirs were bound had, however, a precedence over those in which the heirs were not bound, in case the real estate [*106] of the debtor *should have been resorted to on his decease;(*e*) unless he should have charged his real estate by his will with the payment of his debts, in which case all the creditors of every kind would have been paid out of the produce of such real estates, without any preference.(*f*) An act, however, has recently passed to abolish the distinction as to priority of payment which formerly existed between the specialty and simple contract debts of deceased persons.(*g*) This act provides that in the administration of the estate of every person who shall die on or after the 1st of January, 1870, no debt or liability of such person shall be entitled to any priority or preference by reason merely that the same is secured by or arises under a bond, deed or other instrument under seal, or is otherwise made or constituted a specialty debt; but all the creditors of such person, as well specialty as simple contract, shall be treated as standing in equal degree, and be paid accordingly out of the assets of such deceased person, whether such assets are legal or equitable, any statute or other law to the contrary notwithstanding; provided that the act shall not prejudice or affect any lien, charge or other security which any creditor may hold or be entitled to for the payment of his debt.

For the sake of the advantage of priority which might have been gained on the decease of the debtor, his heirs were usually bound in every

(*b*) 2 Bla. Com. 465. See *ante*, p. 72.

(*c*) Pinchon's Case, 9 Rep. 88 b.

(*d*) Wentworth's Executors, 284, 14th ed.; Claugh *v.* French, 2 Coll. 277.

(*e*) See Principles of the Law of Real Property 60, 2d ed.; 63, 3d & 4th eds.; 68, 5th ed.; 72, 6th ed.; 77, 7th ed.; 78, 8th ed.; Richardson *v.* Jenkins, 1 Drew. 477, 483.

(*f*) 2 Jarm. Wills, 523, 2d ed.; 584, 3d ed.

(*g*) Stat. 32 & 33 Vic. c. 46. The public are indebted for this important act to Mr. J. Hinde Palmer, Q. C.

specialty debt. The deed creating the debt was either a deed of *covenant* or a *bond*. A covenant ran thus: "And the said (*debtor*) doth hereby for himself, his *heirs*, executors *and administrators, covenant with the said (*creditor*), his executors and administrators," to pay, &c. A bond was in the following form: "Know all men by these presents, that I (*debtor*), of (*such a place*), am held and firmly bound to (*creditor*), of (*such a place*), in the penal sum of 1000*l.* of lawful money of Great Britain, to be paid to the said (*creditor*), or to his certain attorney, executors, administrators or assigns, for which payment to be well and truly made I bind myself, my *heirs*, executors and administrators, and every of them, firmly by these presents. Sealed with my seal. Dated this 1st day of January, 1848." In both of the above cases it will be observed that the executors and administrators were bound as well as the heirs. This, however, was not absolutely necessary, and the covenant or bond would have been equally effectual if the heirs only had been named in it.(*h*)

[*107]

A bond in the form above mentioned, without any addition to it, was called a single bond. Bonds, however, had usually a condition annexed to them, that, on the person bound (called the obligor) doing some specified act (as paying money when the bond was to secure the payment of money), the bond should be void. The condition of an ordinary money-bond was as follows: "The condition of the above-written bond or obligation is such, that if the above-bounden (*debtor*), his heirs, executors, or administrators, should pay unto the said (*creditor*), his executors, administrators or assigns, the full sum of 500*l.* (*usually half the amount named in the penalty*) of lawful money of Great Britain, with interest for the same after the rate of 5*l.* *per cent. per annum*, upon the —— day of —— now next ensuing, without any deduction or abatement whatsoever, then the above-written bond or obligation shall be void, otherwise the *same shall remain in full force." Bonds with conditions of this kind were long in use. In former times, when the condition was forfeited, the whole penalty was recoverable.(*i*) Equity subsequently interfered, and prevented the creditor from enforcing more than the amount of the damage which he had actually sustained. The courts of law at length began to follow the example of the courts of equity; and according to a course of proceeding, of which there are many examples in the history of our law, the legislature more tardily adopted the rules which had already been acted on in the courts; and by a statute

[*108]

(*h*) Co. Litt. 209 a; Barber *v.* Fox, 2 Wms. Saund. 136.
(*i*) Litt. s. 340.

of the reign of Queen Anne it was provided, that, in case of a bond with a condition to be void upon payment of a lesser sum, at a day or place certain, the payment of the lesser sum with interest and costs should be taken in full satisfaction of the bond, though such payment were not strictly in accordance with the condition.(*j*) But if the arrears of interest should have accumulated to such an amount as, together with the principal, to exceed the penalty of the bond, the creditor could claim no more than the penalty either at law(*k*) or in equity.(*l*) If, however, there were special circumstances in the creditor's favor, as if he had a mortgage also for the principal and interest,(*m*) or if the debtor had been delaying him by vexatious proceedings,(*n*) equity would then have aided him to the full extent of his demand.(*o*)

[*109] *Bonds were frequently given, not only for securing the payment of money on a given day, but also with conditions to be

(*j*) Stat. 4 & 5 Anne, c. 16, ss. 12, 13. See 3 Burr. 1373; 2 Bla. Com. 341; Smith *v.* Bond, 10 Bing. 125 (E. C. L. R. vol. 25); s. c. 3 M. & Sc. 528; James *v.* Thomas, 5 B. & Ad. 40 (E. C. L. R. vol. 27).

(*k*) Wild *v.* Clarkson, 6 Term Rep. 303.

(*l*) Clarke *v.* Seton, 6 Ves. 411; Hughes *v.* Wynne, 1 Myl. & K. 20.

(*m*) Clarke *v.* Lord Abingdon, 17 Ves. 106.

(*n*) Grant *v.* Grant, 3 Sim. 430.

(*o*) 6 Ves. 416. By the Stamp Act, 13 & 14 Vict. c. 97, bonds and covenants for the payment of any definite and certain sum of money are, with some exceptions, charged with an *ad valorem* duty of one-eighth per cent. or half-a-crown per hundred pounds on the money secured, according to the following table contained in the act:—

				s.	*d.*
Not exceeding £50				1	3
Exceeding £50 and not exceeding £100				2	6
"	100	"	150	3	9
"	150	"	200	5	0
"	200	"	250	6	3
"	250	"	300	7	6
And where the same shall exceed £300, then for every £100, and also for any fractional part of £100				2	6

By stat. 30 & 31 Vict. c. 90, s. 23, tranfers of bonds are generally subject to an *ad valorem* duty of sixpence for every £100 and any fractional part of £100.[1]

[1] By the "Internal Revenue Law," being the Act of Congress of June 30, 1864, it is provided, that the stamp duty on any personal bond, given as security for the payment of any definite or certain sum of money not exceeding one thousand dollars, shall be fifty cents, and fifty cents for every additional sum of one thousand dollars, or fractional part thereof. The stamp duty for official bonds is one dollar; and all other description of bonds, except such as are required in legal proceedings, or used in connection with mortgage deeds and not otherwise charged, twenty-five cents: Sec. 170 Sched. B., tit. "Bond," 2 Brightly U. S. Dig., p. 378, s. 362.

void on the performance of many other acts agreed to be done, or on the payment of money by instalments. In such cases the law formerly was, that on the breach of any part of the condition, the whole penalty became due; and judgment and execution might be had thereon, subject only to the control of a court of equity on application to it for relief. But subsequently in such cases the obligee (or person to whom the bond is made) was required in bringing his action to state or *assign* the breaches which had been made by the obligor;(*p*) and although judgment was still recovered for the whole penalty, execution of such judgment was allowed to issue only for the damages in respect of the breaches actually committed; and the judgment remained as a further security for the damages to be sustained by any future breach.(*q*)[1] But now, since bonds and covenants have been deprived of all priority in administration, they will gradually become obsolete.

[*110] *The last and most numerous, though least important, class of debts in the eye of the law are debts by simple contract, which are all debts not secured by the evidence of a court of record, or by deed or specialty. On the decease of the debtor, these debts were formerly payable out of his personal estate, by his executor or administrator, subsequently to all debts of record or by specialty, except voluntary bonds, which were payable after all simple contract debts, but before any of the legacies.(*r*)[2] But now, as we have seen, all simple contract debts will be payable pari passu with debts secured by specialty. Voluntary bonds and covenants under seal will still be probably continued in use, inasmuch as

(*p*) See the judgment of Parke, B., in Grey *v.* Friar, 15 Q. B. 891, 910 (E. C. L. R. vol. 69); Wheelhouse *v.* Ladbrooke, 3 H. & N. 291.

(*q*) Stat. 8 & 9 Will. III. c. 11, s. 8; Hardy *v.* Bern, 5 Term Rep. 636; Willoughby *v.* Swinton, 6 East 550; 1 Wms. Saund. 57, n. (1); Hurst *v.* Jennings, 5 B. & C. 650 (E. C. L. R. vol. 11); s. c. 8 D. & R. 424.

(*r*) Lomas *v.* Wright, 2 Myl. & K. 769; Watson *v.* Parker, 6 Beav. 283.

[1] There is a difference as to the remedy on the sheriff's bond, or recognisance, in Pennsylvania, which are distinct securities: Commonwealth *v.* Montgomery, 33 Penn. St. 519; in the former case the judgment is for the penalty of the bond, in favor of the Commonwealth, and in favor of the individual party for his damages: Commonwealth *v.* Straub, 35 Penn. St. 137; but in a suit upon the recognisance, the judgment is not to be entered for the penalty for the use of those interested, but for the damage sustained by the party suing: McMicken *v.* Commonwealth, 58 Id. 213.

[2] A voluntary bond, in law as well as at equity, is good between the parties, but in the course of administration, it must be postponed to any just debts, though due by simple contract: Stephens *v.* Harris et al., 6 Ired. Eq. 57; Pringle *v.* Pringle, 59 Penn. St. 281; but if given for the purpose of defrauding creditors, it is void: Powell *v.* Inman, 8 Jones L. 436. And see Candor & Henderson's Ap., 27 Penn. St. 119; Archer *v.* Hart, 5 Florida 234.

every deed imports a consideration,(*s*) and an action at law may consequently be brought upon a voluntary deed which would not lie upon a mere voluntary contract. But in administration voluntary bonds and covenants will still be payable after other debts for valuable consideration, whether specialty or simple contract. Debts secured by bills of exchange and promissory notes have no preference over the other simple contract debts of the deceased.(*t*)

Thus it will be seen that until recently there were, according to the law of England, five principal kinds of debts, namely, crown debts, judgment debts, specialty debts in which the heirs were bound, specialty debts in which the heirs were not bound, and simple contract debts. Each of these classes had a law of its own, and remedies of varying degrees of efficacy. According to natural justice one would suppose that all creditors for valuable consideration should have an equal right to be paid; or if any difference were allowed, that those who could least afford to lose should be preferred to the others. [*111] *Our law, however, takes precisely the opposite course, and, for reasons which certainly illustrate the history of England, gives to the crown, representing the public in the aggregate, who can best afford to lose, a decided preference over private creditors, whose loss may be their ruin.[1] Again, a debt admitted without dispute gives the creditor far less advantage than a debt which has been contested and decreed to be paid by the judgment of a court of record. The proper function of a court of judicature would seem to be the settlement of disputes. In our law, however, the judgment of the court is permitted to be made use of not only to settle contested claims, but also as a better security for money admitted to be due. The reason of this perversion of the proper end of a judgment has been the superior advantages possessed by a creditor having a judgment in his favor. So long, however, as the court exercises its legitimate function of deciding on contested claims, there seems to be no reason why a debt established by the decision of the court should have any preference over one which has never been disputed. If this were the case, the use of judgments as mere securities, by collusion or agreement of the parties, would at once fall to the ground; and an end would be put to a very fruitful source of litigation and fraud. Practically there are but two reasons why payment of a debt is withheld, namely, either because the debtor, though able to pay, doubts his liability, or because he is un-

(*s*) *Ante*, pp. 87, 88.

(*t*) Yeoman *v.* Bradshaw, 3 Salk. 164.

[1] See *ante*, p. 97, note 1.

able to pay, though he knows he is liable. In the first case an action at law decides the question; but the judgment given by the court in exercise of its proper function is scarcely ever followed by the taking out of execution. The debt being established, the debtor pays it, and the judgment is immediately satisfied. The creditor has the advantage of the decision of the court, but he has no occasion for any of those extraordinary remedies to which his position as a judgment creditor entitles him. *If, however, the debtor is unable to pay, judgment is obtained merely for the sake of its fruit. The creditor endeavors, [*112] by suing out an execution, to obtain an advantage over other creditors, who may not have put themselves and the debtor to the same trouble and expense. But inability to pay one debt is presumptive evidence of inability to pay others; and when a man is unable to pay all his creditors in full, it is time that a distribution should be made of his property amongst his creditors rateably. The extraordinary privileges conferred on a judgment creditor seem, therefore, in most cases, practically to end in an undue preference of a pressing creditor over others who have as good a right to be paid. With respect to the three last classes of debts, namely, debts by specialty in which the heirs were bound, those in which the heirs were not bound, and simple contract debts, the distinctions between them serve principally to mark the steps of the struggle by which the rights of creditors have at length been obtained. The trophies of a victory so hardly won can scarcely be expected to present a very orderly appearance. The rights of these creditors accordingly varied with the accident of the death of the debtor, with the proportion which his real estate might have borne to his personalty, and with the circumstance of his having or not having charged his real estate by his will with the payment of his debts; although, as we shall see, he could bring them all to a level by becoming a bankrupt if he pleased. It was surely time that the law of debtor and creditor should be placed upon some more simple and reasonable footing. This has now been done to a great extent, so far as judgments are concerned, by a provision in the Bankruptcy Act, 1861,(*u*) by which, as we have seen, the seizure and sale of the goods of a trader debtor, on an execution for a sum exceeding fifty *pounds, was made an act of [*113] bankruptcy. And this, though now repealed,(*x*) has been re-enacted by the Bankruptcy Act, 1869,(*y*) with respect to sums *not less than* fifty pounds.[1] The act which has placed specialty and simple con-

(*u*) Stat. 24 & 25 Vict. c. 134, s. 73.

(*x*) Stat. 32 & 33 Vict. c. 83.

(*y*) Stat 32 & 33 Vict. c. 71, s. 6, par. (5).

[1] See *post*, p. 132, note (2*k*).

tract creditors on the same footing at the debtor's decease(*z*) is an important further step in the right direction. Further improvements, however, might still be made. There seems no reason why claims for dilapidations made by a succeeding incumbent against the personal representatives of his predecessor should rank subsequently to all other debts instead of rateably with them,(*a*) nor why a debt for rent should have priority in payment out of the personal estate of the deceased tenant over his other just debts;(*b*) and with regard to Crown debts and judgment debts the author's opinion has already been expressed.

The next subject which claims our attention is that of interest upon debts. The absurd prejudice which anciently caused interest, under the name of usury, to be considered unlawful, retained some hold upon our law long after the taking of interest was rendered lawful by act of parliament.(*c*) In ordinary cases a debtor was allowed to withhold payment of his debt, without being obliged to give to his creditor the poor recompense of interest on the money he was making use of for his own benefit, For until recently it was a general rule of law, that interest was not payable on any debts, whether by specialty or simple contract, unless expressly agreed on, or unless a promise could be implied from the usage of trade or other circumstances, or unless the debt were secured by a bill of exchange or promissory note, which, being mercantile securities [*114] always carried *interest.(*d*) But in equity interest was more frequently allowed.(*e*) And now, by an act of King William the Fourth,(*f*) interest is recoverable on all debts payable by virtue of any written instrument, at a certain time, from the time when such debts were payable, or if payable otherwise, then from the time when demand of payment shall have been made in writing, so as such demand give notice to the debtor that interest will be claimed from the date of such demand until the time of payment.[1]

The payment of a debt is sometimes secured by a *surety*, who makes

(*z*) Stat. 32 & 33 Vict. c. 46.

(*a*) *Ante*, p. 69. (*b*) *Ante*, p. 105.

(*c*) Stat. 37 Hen. VIII. c. 9. See *ante*, p. 5.

(*d*) Higgins *v*. Sargent, 2 B. & C. 348 (E. C. L. R. vol. 9); s. c. 3 D. & R. 613; Foster *v*. Weston, 6 Bing. 709 (E. C. L. R. vol. 19); Page *v*. Newman, 9 B. & C. 378 (E. C. L. R. vol. 17).

(*e*) See Lowndes *v*. Collins, 17 Ves. 27; 2 Fonb. Eq. 429; C. P. Cooper 426 *et seq.*

(*f*) Stat. 3 & 4 Will. IV. c. 42, ss. 28, 29; Hyde *v*. Price, 8 Sim.

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[1] See *ante*, p. 94, note 1, and p. 102, note 1.

himself liable, together with the principal debtor, for the payment.[1] If the surety should pay the debt, he will become the creditor of the prin-

[1] Although in the case of principal and surety, the liability of the latter is not of a primary character, yet the creditor is not bound to pursue the principal, before resorting to the surety: Abercrombie *v.* Knox, 3 Ala. 728; but in Pennsylvania, a distinction has been taken between surety and guarantee; where the latter term is used, and the contract is of that nature, the creditor must enforce his remedies against the principal debtor, before he resorts to the guarantor; or, he must show that the affairs of the principal debtor were in such condition, that any pursuit of him would have been utterly fruitless: Parker *v.* Culvertson, 1 Wall. Jr. 149; Margerger et al. *v.* Pott, 16 Penn. St. 9; Stroehecker *v.* The Farmers' Bank, 6 Penn. St. 44; Johnson *v.* Chapman, 3 Penna. R. 18; Rudy *v.* Wolfe et al., Admrs., 16 S. & R. 79; Koch *v.* Melhorn, 25 Penn. St. 89; Campbell *v.* Baker, 46 Id. 245; Gilbert *v.* Henck, 32 Id. 205; and this distinction is very clearly maintained in international contracts: Chitty's Vattel's Law of Nations, book 2, chap. 16, § 240; and see also, Mackie's Exr. *v.* Davis, &c., 2 Wash. 229; Berksdale *v.* Fenwick, 2 Hen. & Munf. 113, n.; Crumpston *v.* McNair, 1 Wend. 457; Reynolds *v.* Edney, 8 Jones (N. C.) 406; in which case it was held that even in case of insolvency, notice of default of the primary debtor must be given, before suit can be brought against one liable if the primary debtor did not pay; but the term "guaranty," will not make the contract of that character, when it is in the nature of a contract of surety: Sherman *v.* Roberts, 1 Grant's Cas. 261; Campbell *v.* Baker, 46 Penn. St. 245; and since the Act of Assembly of 29th of April, 1855, a parol contract of guaranty will not be enforced: Jack *v.* Morrison, 48 Id. 113. If the surety pays the debt, he has a right to call upon the principal for indemnification: Williams *v.* Williams, 5 Ohio 444; Odlin *v.* Greenleaf, 3 N. H. 270; Gibbs *v.* Bryant, 1 Pick. 118; Peters *v.* Barnhill, 1 Hill (S. C.) 234; Hunt *v.* Amidon, 4 Hill 345; Wesley Church *v.* Moore et al., 10 Penn. St. 273; McCrea *v.* Purmont, 16 Wend. 460; s. c. 5 Paige 620; Heart *v.* Johnson, 13 Vt. 19; Manri *v.* Hefferman, 15 Johns. 58; Pigou *v.* French, 1 Wash. C. C. 278; Bennett *v.* Buchanan, 3 Port. (Ind.) 47; Williamson's Admrs. *v.* Hall, 1 McCook 190; Collins, Admr., *v.* Boyd, 14 Ala. 505; Hommell *v.* Gamewell, 5 Blackf. 5; Shepherd *v.* Ogden, 2 Scam. 257; Hill *v.* Campbell, 10 B. Mon. 80; Laughlin *v.* Ferguson, 6 Dana 113; Clark *v.* Foxcroft, 7 Maine 348; Gillespie, Admr., *v.* Cresswell et al., 12 Gill & Johns. 27; Mowry *v.* Adams, 14 Mass. 327; Williams et ux. *v.* Moore, 9 Pick. 432; Appleton et al. *v.* Bascomb et al., 3 Metc. 171; Wood *v.* Leland, 1 Id. 389; Ford *v.* Keith, 1 Mass. 138; Johnson *v.* Johnson, 11 Id. 359; The State, to the use, &c., *v.* Reynolds et al., 3 Mo. 70; Jeffers et al. *v.* Johnson, 1 Zabr. 76; Chace *v.* Hinman, 8 Wend. 452; Aberdeen *v.* Blackwell, 6 Hill 324; Bonney *v.* Seely et al., 2 Wend. 481; Powell *v.* Smith, 8 Johns. 249; Tom *v.* Goodrich, 2 Id. 213; Gould *v.* Gould, 8 Cowen 168; Wynn, Admr., *v.* Brooke et al., 5 Rawle 106; Cornwell's Ap., 7 W. & S. 305; Pursel *v.* Ellis, 5 Id. 525; Baily *v.* Brownfield, 20 Penn. St. 41; Apgar *v.* Hiller, 4 Zabr. 812; Mundorff *v.* Wickersham, 63 Penn. St. 87; for by the very fact of payment, he becomes the creditor of the principal, taking the position which the original creditor held, and entitled to all the preferences which the original creditor claimed; the obligation of re-imbursement being founded either upon express contract between the parties, or the implied promise raised by the law upon the payment of money for another at his request: Hill *v.* Wright, 23 Ark. 530; Youghe *v.* Linton, 6 Richard. 275; Winchester *v.* Beardin, 10 Humph. 247; McDaniels *v.* The Flower Brook Manufacturing Company, 23 Vt. 274; Wescott *v.* King, 14 Barb. S. C. 33; Foster *v.* The Trustees

cipal debtor for the amount; but although the debt paid should have been secured to the original creditor by the bond under seal of the

of the Athenæum, 3 Ala. 310; Sanders et al. *v.* Watson et al., 14 Id. 198; McDowell *v.* The Bank of Wilmington and Brandywine, 1 Harring. 369; Pitzer *v.* Harmon, 8 Blackf. 112; Schoolfield's Admr. *v.* Rudd, &c., 9 B. Mon. 292; Grider *v.* Payne, 9 Dana 191; Patterson *v.* Pope, 5 Id. 243; Sargent *v.* Salmond et al., 27 Maine 348; Eppes et al., Exrs., *v.* Randolph, 2 Call 103; Graves *v.* Webb, 1 Id. 443; Tinsley *v.* Oliver's Admr., &c., 5 Munf. 419; Tinsley *v.* Anderson, 3 Call 329; Enders, &c., *v.* Brune, 4 Rand. 438; Watts et al. *v.* Kinney et ux., 3 Leigh 272; Cole Co. et al. *v.* Augbey et al., 12 Mo. 132; The New York State Bank *v.* Fletcher, 5 Wend. 85; Clason et al. *v.* Morris et al., Assignees, 10 Johns. 524; Waddington et al. *v.* Verdenburgh, 2 Johns. Ch. 227; Salmon *v.* Clagett, 3 Bland. 173; Farmers' Bank of Reading *v.* Gibson, 6 Penn. St. 51; Sears *v.* Laforce, 17 Iowa 473; and it has been held, that where the principal became insolvent, and made an assignment for the benefit of his creditors, previous to the payment by the surety, the surety was notwithstanding, entitled to full indemnification: Haddens *v.* Chambers, 2 Dall. 236; McMullen *v.* The Bank of Penn Township, 2 Penn. St. 343; Beaver *v.* Beaver, 23 Id. 167; for payment by a surety has such a reference back to the original undertaking, that it overrides all intermediate equities, as of an assignee of a claim against the surety, assigned by the principal, before payment: Barney *v.* Grover, 28 Vt. 391.

Not only is the surety who pays the debt of his principal, entitled to hold the position as to priority, which the original creditor occupied, but also to be subrogated to all the rights, privileges, or liens, which were enjoyed by the first creditor: King *v.* Baldwin et al., 2 Johns. Ch. 554; La Farge *v.* Herter et al., 11 Barb. S C. 159; McDaniels *v.* The Flower Brook Manufac. Co., 23 Vt. 274; Goodyear *v.* Watson, 14 Barb. S. C. 481; Bradley et al., *v.* Spafford, 3 Fost. 444; N. Y. Savings Bk. *v.* Colcord, 15 N. H. 119; Foster *v.* The Trustees of the Athenæum, 3 Ala. 310; Lumpkin, Admr., *v.* Mills, 4 Geo. 343; Perkins et al. *v.* Kershaw et al., 1 Hill 351; Burrows *v.* McWhann, 1 Dess. 409; Sprigg *v.* Braman, 6 La. 59; Cheeseborough *v.* Millard, 1 Johns. Ch. 413; Cuyler *v.* Ensworth, 6 Paige 32; Ontario Bk. *v.* Walker et al., 1 Hill (N. Y.) 652; State Bk. *v.* Fletcher, 5 Wend. 85; Mathews *v.* Aikin, 1 Comst. 599; Schnitzel's Ap., 49 Penn. St. 23; Irick *v.* Black, 2 Green (N. J.) 189; and the surety, also, may, after payment, claim the benefit of all collaterals, held by the creditor to secure his debt; McDaniels *v.* The Flower Brook Manufac. Co., 23 Vt. 274; In the matter of Samuel H. Babcock, 3 Story 393; N. Y. Savings Bk. *v.* Colcord, 15 N. H. 119; Foster *v.* The Trustees of the Athenæum, 3 Ala. 310; Lyon *v.* Leavit et al., Id. 430; Cullum *v.* Emanuel et al., 1 Id. 23; Brown *v.* Lang et al., 4 Id. 53; Hampton *v.* Levy, 1 McCord 112; Worthington *v.* Ferguson, 4 Har. & Johns. 522; Tankersley *v.* Anderson, 4 Dessaus. 44; Miller *v.* Pendleton, 4 Hen. & Munf. 436; McDowell *v.* The Bk. of Wilmington and Brandywine, 1 Harring. 369; Bradford, Admr., et al. *v.* Marvin et al., 2 Fla. 475; Patterson *v.* Pope, 5 Dana 243; Norton *v.* Soule, 2 Maine 341; Richardson *v.* The Washington Bk., 3 Metc. 540; Green *v.* Kemp, 13 Mass. 515; Bowditch *v.* Green, 3 Metc. 363; Miller *v.* Woodward et al., Admrs., 8 Mo. 169; Crump et al. *v.* McMurtry, Id. 408; Elwood et al. *v.* Deifendorf et al., 5 Barb. S. C. 398; Hodges *v.* Armstrong, Admr., 3 Dev. 253; Kinley *v.* Hill, 4 W. & S. 426; Knox *v.* Moatz, 15 Penn. St. 74; Erb's Ap., 2 Penna. R. 298; Cornwell's Ap., 7 W. & S. 398; Lathrop's Ap., 1 Penn. St. 512; Winebrenner's Ap., 7 Id. 333; Pott *v.* Nathans, 1 W. & S. 155; Rittenhouse *v.* Levering, 6 Id. 190; Yard *v.* Patton, 13 Penn. St. 287; Gossin *v.* Brown, 11 Id. 531; Miller et al., Assignees, *v.* Ord., Exr., 2 Binn. 382

debtor and his surety, the surety having paid the debt, would until recently have become the simple contract creditor only of the principal

Pride v. Boyce, Admr., Rice Eq. 275; Exrs. of Gadsden v. Exrs. of Lord, 1 Dess. 214; Uzzel v. Mack, 4 Humph. 319; Bower's Est., 23 Penn. St. 294; Brewer v. Franklin Mills, 42 N. H. 292; so where one of two sureties holds of the principal securities for indemnity, and the other surety pays the debt, he becomes entitled to the securities so held by his co-surety: Butler v. Birkey, 13 Ohio St. 514; Schmidt v. Coulter, 6 Minn. 492; and, it seems to be generally allowed in the American States, which have, in this respect, placed the doctrine of principal and surety on a wider and more liberal basis, than that prescribed by the law of England, that where the claim of the creditor is evidenced by bond, judgment, &c., the claim is not extinguished by the payment of the debt by the surety, but that it is still subsisting for his benefit, and he will be entitled to an assignment of the bond, judgment, or other evidence of the debt, or to deal with it as if it were actually assigned to him, and enjoy from it all the advantages which the original creditor could have obtained. In some of the States this right has been conferred upon the surety by equitable adjudication, and in others it is expressly given by statute: Edgerly v. Emerson, 3 Fost. 555: Grove v. Brien, 1 Md. 439; Carroll, Exr., v. Bowie, 7 Gill 34; Goodyear v. Watson, 14 Barb. S. C. 481; McDowell v. The Bank of Wilmington and Brandywine, 1 Harring. 369; Davenport v. Hardeman, 5 Geo. 580; Bailey v. Mizell, 4 Id 123; Harris v. Wynne, Id. 521; Morris v. Evans et al., 2 B. Mon. 86; Morris v. Page, 9 Dana 433; Norton v. Soule, 2 Maine 341; Creager v. Brengle, 5 Har. & Johns. 234; Merryman et al. v. The State, at the instance of Harris, Id. 423; Colegate, &c., v. The Fredericktown Savings Institution, &c., 11 Id 114; Hollingsworth, Admr., v. Floyd, 2 Har. & Gill 87; Erb's Ap., 2 Penna. R. 298; Gossin v. Brown, 11 Penn. St. 532; Croft v. Moore, 9 Watts 451; Morris v. Oakford, 9 Penn. St. 498; Lathrop's Ap., 1 Id. 517; Burns et al. v. The Huntingdon Bank, 1 Penna. R. 395; Exrs. of Gadsden v. Exrs. of Lord, 1 Dess. 214; Gunn et al. v. Tunnehill, 2 Yerg. 244; Floyds v. Goodwin, 8 Id. 494; Wade v. Green, and Green v. Wade, 3 Humph. 547 and 558; Robinson et al. v. Sherman et al., 2 Gratt. 181; Powell's Exrs. v. White et al., 11 Leigh 309; McCormick's Admrs. v. Irwin, 35 Penn. St. 111; Denny v. Lyon, 38 Id. 98; Jones v. Turcher, 15 Ind. 308; Hanner v. Douglass, 4 Jones Eq. 262; Fawcetts v. Kimmey, 23 Ala. 162; Connely v. Bourg, 16 La. Ann. 108; Neilson v. Fry, 16 Ohio 553; Furnold v. Bk. of State of Mo., 44 Mo. 336; Richter v. Cummings, 60 Penn. St. 441; but this last position is denied by several cases, favoring the recent English doctrine: Foster v. The Trustees of the Athenæum, 3 Ala. 310; Morrison et al. v. Marvin, 6 Id. 797; Sanders et al. v. Watson et al., 14 Id. 198; Uzzell v. Mack, 4 Humph. 319; Miller v. Porter, 5 Id. 298.

Inasmuch as the surety who pays the debt, is entitled to the benefit of all the collaterals held by the creditor, it follows as a consequence, that the creditor is bound to take care of them, and if he parts with them, or they become impaired in value, by his own act, the surety will be discharged, either absolutely, or *pro tanto*, in proportion to the value of the security, which has been lost: Hayes v. Ward, 4 Johns. Ch. 123; Baker v. Briggs, 8 Pick. 122; Goodloe v. Clay, 6 B. Mon. 226; Ward v. Vass, 7 Leigh 135; Payne v. The Commercial Bk., 6 Sm. & M. 24; Neff's Ap., 9 W. & S. 36; Everley v. Rice, 20 Penn. St. 297; Holt v. Body, 6 Id. 207; Smith v. Day, 23 Vt. 656; N. Y. Savings Bank v. Colcord, 15 N. H. 119; Pitts et al. v. Congdon, 2 Comst. 352; Bank of Gettysburg v. Thompson, 3 Grant's Cas. 117; Barrow v. Shields, 13 La. Ann. 57; Hurd v. Spencer, 40 Vt. 581; and so, where the creditor has it in his power to receive payment of the whole, or a part of his debt,

debtor; unless he should have taken the precaution to procure from such debtor a counter-bond for his own indemnity.(g) The surety, how-

(g) Copis *v.* Middleton, Turn. & Russ. 224.

and neglects his opportunity, the surety will be, *pro tanto*, discharged: Ramsey *v.* The Westmoreland Bank, 2 Penna. R. 203; Commonwealth *v.* Miller, 8 S. & R. 452; Lichtenthaler *v.* Thompson, 13 Id. 157; Pipher *v.* Lodge, 16 Id. 214; Commonwealth *v.* Haas, Id. 252; Dixon *v.* Ewing, 3 Ohio 230; Carpenter *v.* Devon, 6 Ala. 718; Smeed *v.* White, 3 J. J. Marsh. 525; Givens *v.* Briscoe, Id. 534; Jones *v.* Bullock, 3 Bibb 467; The Farmers' Bank of Canton *v.* Reynolds, 13 Ohio 84; Baker *v.* Fordyce, 9 Penn. St. 275; Talmage *v.* Burlingame, Id. 21; Ferguson *v.* Turner, 7 Mo. 497; Curan *v.* Colbert, 3 Ga. 239; Brown *v.* Riggins, 3 Id. 406; The State Bank *v.* Edwards et al., 20 Ala. 512; Exrs. of Riggins *v.* Brown, 12 Ga. 273; Everly *v.* Price, 20 Penn. St. 297; Richards *v.* Commonwealth, 40 Id. 146.

The fact that a surety has a right to look to his principal, for all payments made by that surety on the principal's behalf, furnishes one of the reasons, why a contract made between the principal and creditor, to postpone the day of payment (or other completion of the original agreement), to which the surety is not a party, will discharge the surety from his liability; for the creditor is bound to proceed against the principal at the desire of the surety, which is a privilege granted to the surety for his protection, and if, by his express agreement with the principal, the creditor is prevented from pursuing his remedy when requested, he is prevented from fulfilling his implied contract with the surety, who is thereby discharged, unless he be privy, or consent to, the new agreement; but see on this subject: King *v.* Baldwin et al., 2 Johns. Ch. 554; Brinager's Admr. *v.* Phillips, 1 B. Mon. 283; United States *v.* Samuel & Jno. L. Howell, 4 Wash. C. C. 620; The Bank of Steubenville *v.* Carrol et al., Admrs., 5 Ohio 207; The Trustees *v.* Miller, 3 Id. 261; Niblo *v.* Clark, 3 Wend. 24; s. c. 6 Id. 236; Bank of Washington *v.* Barrington, 2 Penna. R. 27; Walrath *v.* Thompson, 6 Hill 540; s. c. 2 Comst. 185; Birkhead *v.* Brown, 5 Hill 634; Dobbin *v.* Bradley, 17 Wend. 422; Fellowes *v.* Prentiss, 3 Denio 512; Hibbs *v.* Rue, 4 Penn. St. 348; Walsh *v.* Bailie, 10 Johns. 180; Wright *v.* Judson, 8 Wend. 512; Gifford *v.* Allen, 3 Metc. 255; Greely *v.* Dow, 2 Id. 176; Rathbone *v.* Warren, 10 Johns. 587; Crosby *v.* Wyatt, 10 N. H. 318; Hutchinson *v.* Moody, 18 Maine, 393; Leavitt *v.* Savage, 16 Id. 72; Davis *v.* The People, 3 Gilm. 409; Comegys *v.* Booth, 3 Stew. 14; Inge *v.* The Branch Bank, 8 Peters 108; Clippenger *v.* Cripps, 2 Watts 45; The Bank of Steubenville *v.* Hoge, 6 Ohio 17; Wayne *v.* Kirby, 2 Bail. 531; Denis *v.* Reeder, 2 McCord 451; Reddish *v.* Watson, 5 Ohio 510; Baldwin *v.* The Western Reserve Bank, Id. 273; Hunter's Admr. *v.* Jett, 4 Rand. 104; Dundas *v.* Sterling, 4 Penn. St. 73; Crosby *v.* Wyatt, 10 N. H. 318; The Stafford Bank *v.* Crosby, 8 Maine 191; Blackstone Bank *v.* Hill, 10 Pick. 129; Bagley *v.* Burzell, 19 Maine 88; Rhoads *v.* Frederick, 8 Watts 448; Payne *v.* The Commercial Bank of Natchez, 6 Sm. & M. 24; Wellington *v.* Gary, 7 Id. 522; Joslyn *v.* Smith, 15 Vt. 353; Waters *v.* Simpson, 2 Gilm. 576; Braman *v.* Hawk, 1 Blackf. 392; Cornan *v.* The State, 4 Id. 241; Horter *v.* Moore, 5 Id. 367; Parnell *v.* Price, 3 Rich. 121; Miller *v.* Stein, 2 Penn. St. 286; Munford *v.* The Overseers of the Poor, 2 Rand. 313; Harnsberger's Exr. *v.* Geiger's Admr., 2 Gratt. 144; Reynolds *v.* Ward, 5 Wend. 501; Bank of Utica *v.* Ives, 17 Id. 501; McKinney's Exr. *v.* Waller, 4 Leigh 434; Alcock *v.* Hill, 4 Id. 622; Nichols *v.* Douglass, 3 Mo. 49; Tudor *v.* Goodloe, 1 B. Mon. 322; Anderson *v.* Manon, 7 Id. 217; Duncan *v.* Reid, 8 Id. 382; Pyle *v.* Bestock, 10 Ala. 589; s c. 11 Id. 256; Vilas *v.* Pusey, 1 Comst. 274; Pyle *v.* Clark, 3 B. Mon. 262; Scott *v.* Hull,

ever, would have been entitled to the benefit of all collateral securities which the creditor, whom he had repaid, held for the debt; but he was

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6 Id. 285; Graves *v.* Graves, Id. 213; Mullin *v.* McCoan, 7 Paige 452; Bangs *v.* Strong, 11 Id. 11; s. c. 7 Hill 250; Huffman *v.* Hurlburt, 13 Wend. 377; Hallett *v.* Holmes, 18 Johns. 28; Fletcher *v.* Gamble, 9 Ala. 335; Bower *v.* Tiernan, 3 Denio 378; Yancey *v.* Littlejohn, 2 Hawk. 525; Branch Bank of Mobile *v.* James, 9 Ala. 949; Grafton Bank *v.* Woodward, 5 N. H. 99; Bailey *v.* Adams, 10 Id. 162; Fowler *v.* Brooks, 13 Id. 240; McComb *v.* Keteridge, 14 Ohio 348; Spring *v.* The Bank of Mount Pleasant, 10 Peters 257; McLemore *v.* Powell et al., 12 Wheat. 554; Bank of the United States *v.* Hatch, 6 Peters 250; United States *v.* The Admrs. of Hillegas, 3 Wash. C. C. 70; Miller *v.* Stewart, 4 Id. 26; s. c. 9 Wheat. 680; United States *v.* Tillotson et al., 1 Paine C. C. 306; Gass *v.* Stinson, 2 Sumn. 453; Suydam & Co. *v.* Vance, 2 McL. 99; The Seventh Ward Bank *v.* Hanrick, 2 Story 416; Low *v.* Underhill, 3 McL. 376; Musgrave et al. *v.* Glasgow, 3 Port. (Ind.) 31; Cheek et al. *v.* Glass, Id. 286; Herbert *v.* Dumont et al., Id. 346; Govan, Exrx., *v.* Binford, 25 Miss. 151; Thornton et al. *v.* Dobney, 23 Id. 559; Prescott *v.* Brinsley et al., 6 Cush. 233; Mottram et al. *v.* Mills, 2 Sandf. S. C. 189; Wagman et al. *v.* Hoag, 14 Barb. S. C. 232; La Farge *v.* Herter et al., 11 Id. 159; Turrill *v.* Boynton et al., 23 Vt. 142; Whittle *v.* Skinner, Id. 531; Wadsworth et al. *v.* Allen, &c., 8 Gratt. 174; Brubaker *v.* Okeson, 36 Penn. St. 519; Strickler *v.* Burkholder, 47 Penn. St. 476; Wright *v.* Storrs, 6 Bosw. 600; Pilgrim *v.* Dykes, 24 Texas 383; Cunningham *v.* Wrenn, 23 Ill. 64; Rowan *v.* Sharps, &c., Co. 33 Conn. 1; Winter's Ap., 61 Penn. St. 307.

That the surety will be discharged, where he is injured by the creditor neglecting to proceed against the principal upon the surety's request, see the following cases: Pain *v.* Packard et al., 13 Johns. 174; King *v.* Baldwin et al., 17 Id. 384; United States *v.* Simpson, 3 Penna. R. 437; Strader *v.* Houghton, 9 Port. 334; Towns *v.* Riddle, 2 Ala. 694; Cope *v.* Smith, 8 S. & R. 110; Gardner *v.* Ferree, 15 Id. 28; The Erie Bank *v.* Gibson, 1 Watts 143; Wilson *v.* Glover, 3 Penn. St. 404; Greenawalt *v.* Kreider, Id. 264; Wright *v.* Stockton, 5 Leigh 153; Parrish *v.* Gray, 1 Humph. 88; Braman *v.* Honck, 1 Blackf. 393; Morland *v.* The State Bank, 1 Breese 207; Howard *v.* Brown, 3 Geo. 523; Bolton *v.* Lundy, 6 Misso. 46; Brice *v.* Edwards, 1 Stew. 11; Goodman *v.* Griffin, 3 Id. 160; Sheban *v.* Hampton, 8 Id. 942; Huffman *v.* Hurlbert, 13 Wend. 377; Herrick *v.* Borst, 4 Hill 650; Beardsley *v.* Warner, 6 Wend. 610; s. c. 8 Id. 194; Beebe *v.* The West Branch Bank, 7 W. & S. 375; Bellows *v.* Lovell, 5 Pick. 307; Adams Bank *v.* Anthony, 18 Id. 238; Hubbard *v.* Davis, 1 Aiken 296; Montpelier Bank *v.* Dixon, 4 Vt. 599; Page *v.* Webster, 15 Maine, 249; Mahurin *v.* Pearson, 8 N. H. 539; Pintard *v.* Davis, 1 Spencer 205; Croughton *v.* Duval, 3 Call 61; Denis *v.* Rider, 2 McL. 451; Jenkins *v.* Clark, 7 Ohio 72; In the matter of Saml. H. Babcock, 3 Story 393; Overturf *v.* Martin, 2 Cart. (Ind.) 507; Wetzel *v.* Sponsler's Exrs., 18 Penn. St. 460; Merritt *v.* Lincoln, 21 Barb. 249; Taylor *v.* Davis, 38 Miss. 493. But unless so requested, the creditor is not bound to proceed against the principal, and mere delay, or inaction on the part of the creditor in pursuing his remedy, will not discharge the surety: King *v.* Baldwin et al., 2 Johns. Ch. 554; Fulton *v.* Matthews, 15 Johns. 433; The People *v.* Russell, 4 Wend. 570; Hunt *v.* Bridgham, 2 Pick. 581; Jordan *v.* Trumbo, 6 Gill & Johns. 103; Sebley *v.* McAllister, 8 N. H. 389; The Farmers' Bank of Canton *v.* Reynolds, 13 Ohio 84; Haynes *v.* Corrington, 9 Sm. & M. 479; Anderson *v.* Menon, 7 B. Mon. 217; Johnson *v.* Searcy, 4 Yerg. 182; Dawson *v.* The Real Estate Bank, 5 Ark. 283; United States *v.* Hunt, 1 Gall. 32; Townsend *v.* Riddle, 2 N. H. 448; Tudor *v.* Goodloe, 3 B. Mon. 332; Commercial

not to be entitled to the original bond executed by the debtor, because that was at an end by the very fact of the payment.(h) In the

(h) Turn. & Russ. 231; Dowbiggen v. Bourne, 2 You. & Col. 462; Jones v. Davids, 4 Russ. 277; Caulfield v. Maguire, 2 Jones & Lat. 164, 168.

Bank v. French, 21 Pick. 486; Alcock v. Hill, 4 Leigh 622; Harrison v. Lane, 4 Bibb 466; Spring v. The Bank of Mount Pleasant, 10 Peters 257; Reynolds v. Ward, 5 Wend. 501; Norris v. Crummie, 2 Rand. 328; Hunter's Admr. v. Jelt, 4 Rand. 104; McKinney's Exr. v. Waller, 1 Leigh 434; Alcock v. Hill, 4 Id. 622; Lenox v. Prout, 3 Wheat. 520; Doe v. The Postmaster-General, 1 Peters 318; Locke v. The Postmaster-General of the United States, 3 Mason 446; Luke v. Leland et al., 6 Cush. 259; Kirby v. Studebaker, 15 Ind. 45; Hunt v. Knox, 34 Miss. 655; Owen v. State, 25 Ind. 107; P., F. W. & C., Railroad v. Shæffer, 59 Penn. St. 350; and some of the cases have gone so far as to decide, that after a judgment has been obtained by the creditor against the principal, and a writ of execution placed in the hands of the sheriff, a subsequent direction given to the sheriff not to proceed, will not discharge the surety, unless there has been a levy made on the property of the principal debtor: Lennox v. Prout, 3 Wheat. 520; Sawyer v. Bradford, 6 Ala. 572; The Farmers' Bank of Canton v. Reynolds, 13 Ohio 84; The Union Bank of Tennessee v. Govan, 10 Sm. & M. 333; McKenney's Exrs. v. Waller, 1 Leigh 434; Morrisson v. Hartman, 14 Penn. St. 55; Creath's Admr. v. Sims, 5 How. 192; but if a levy has been made under the execution, a discontinuance of the proceedings by the creditor, will discharge the surety, because the creditor will have had it in his power to satisfy the debt: see Exrs. of Riggins v. Brown, 12 Geo. 273; The State Bank v. Edwards et al., 20 Ala. 512; Ferguson v. Turner, 7 Mo. 497; Jones v. Bulcock, 3 Bibb 467; Lichtenthaler v. Thompson, 13 S. & R. 157; Brown v. Kidd, 34 Miss. 291; Sherraden v. Parker, 24 Iowa 28; and other cases above cited; unreasonable delay in entering a judgment note, was held to discharge a guarantor, where it was not shown, that the money could not have been made by a diligent entry and pursuit of the judgment: Miller v. Beckley, 27 Penn. St. 317; and indulgence for a definite period, and founded on a new consideration, will discharge a surety, for this amounts to a change of the original contract: Clarke Company v. Covington, 26 Miss. 470. Some of the authorities, however, deny the position, that mere inaction or delay on the part of the creditor, will not discharge the surety, the chief among which seem to be, The People v. Jansen et al., 7 Johns. 332; Pennimann et al. v. Hudson, 14 Barb. S. C. 579; of which, the first has been overruled, and the last was a case of delay for seven months, without explanation, where the contract was "for a due and legal diligence." See on this point, Herrick v. Orange Company Bank, 27 Vt. 583; McCune v. Belt, 38 Mo. 281; and Spilman v. Smith, 15 B. Mon. 123; in which last case it was held, that by the statutes of Kentucky, sureties on judgments are released from liability, if execution is delayed to be sued out for twelve months after the judgment is due; but this statute has been held not to apply to judicial bonds: Rankin v. White, 3 Bush 545.

It has been said, that where a valid contract is made between the creditor and principal, essentially changing the terms of the original contract, the surety will be discharged, because among other considerations, the creditor disables himself, from proceeding against the principal, at the request of the surety, and consequently the surety is in danger of losing his chance of securing himself from loss; and so, on the other hand, if the creditor informs the surety that he will not look to him for payment, the surety will be discharged:

words of Lord Brougham,(i) the court admitted the surety's right, as *against the principal debtor, to stand in the shoes of the creditor, [*115] but said there were no shoes for him to stand in. But by a recent enactment every surety who pays a debt is now entitled to have assigned to him every judgment, specialty or other security which shall be held by the creditor in respect of such debt, whether such judgment, specialty or other security shall or shall not be deemed at law to have been satisfied by the payment of the debt; and such person shall be entitled to stand in the place of the creditor and to use all the remedies, and if need be and upon a proper indemnity the name, of the creditor in any action to obtain from the principal debtor indemnification for his loss; and the payment made by the surety shall not be pleadable in bar of any action or other proceeding by him.(k) If there should have

(i) Hodgson v. Shaw, 3 Myl. & K. 183, 194.

(k) Stat 19 & 20 Vict. c. 97, s. 5; Lockhart v. Reilley, 1 De Gex & Jones, 464.

Harris v. Brooks, 21 Pick. 195; Carpenter v. King, 9 Metc. 511; Bank v. Kligensmith, 7 Watts 523; Hogeboom v. Herrick, 4 Vt. 131; Baker v. Briggs, 8 Pick. 122; Deyell v. Odell, 3 Hill 215; Foster v. Walker, 34 Miss. 365.

But a mere naked agreement between creditor and principal, or a promise made to delay or give time, or to do any other thing changing essentially the original contract, if it be unsupported by a valid consideration, will not discharge the surety: Wheeler et al. v. Washburn, 24 Vt. 293; Joslyn v. Smith, 13 Id. 353; Montgomery v. Dillingham, 3 Sm. & M. 647; Tudor v. Goodloe, 1 B. Mon. 322; Blackstone Bank v. Hill, 10 Pick. 129; Bailey v. Adams, 10 N. H. 162; Wilson v. The Bank of Orleans, 9 Ala. 847; The Oxford Bank v. Lewis, 8 Pick. 458; The Stafford Bk. v. Crosby, 8 Maine 191; Freeman's Bk. v. Rollins, 13 Maine 202; Crosby v. Wyatt, 23 Id. 156; Weakley v. Bell, 9 Watts 273; Barker v. McClure, 2 Blackf. 14; Parmell v. Price, 3 Richard. 121; Miller v. Stem, 2 Penn. St. 286; McLemore v. Powel et al., 12 Wheat. 554; Bk. of United States v. Hatch, 6 Peters 250; Bk. of Utica v. Ives, 17 Wend. 501; United States v. Nicholl, 12 Wheat. 505; United States v. Kirkpatrick et al., 9 Id. 720; Wagman et al. v. Hoag, 14 Barb. S. C. 232; Cromwell et al., Admrs., v. Holly et al. Exrs., 5 Richard. 47; Draper v. Romeyn, 18 Barb. 163; Grover v. Hoppock, 2 Dutch. 191; Adams v. Way, 32 Conn. 160; Calvin v. Wiggam, 27 Ind. 489.

When a judgment has been obtained by the creditor against the principal, the relations of principal, surety, and creditor, are not thereby altered: The Commonwealth v. Miller, 8 S. & R. 42; Potts v. Nathans, 1 W. & S. 155; The Manufacturers' Bk. v. The Bk. of Penna., 7 Id. 335; Talmage v. Burlingame, 9 Penn. St. 21; Newell v. Price, 4 How. (Miss.) 684; Cowan v. Colbert, 3 Ga. 239; Carpenter v. Devon, 6 Ala. 710; The Commercial Bk. v. The Western Reserve Bk., 11 Ohio 444; La Farge v. Herter, 3 Denio 157; s. c. 11 Barb. S. C. 159; Naylor v. Moody, 3 Black. 93; Deberry v. Adams, 9 Yerg. 52; Findlay's Exrs. v. The Bk. of the United States, 2 McL. 44; Bangs v. Strong, 10 Paige 11; s. c 7 Hill 250; Boughton v. The Bk. of Orleans, 2 Barb. Ch. 458; Storms v. Thorn, 3 Barb. S. C. 314; Hubbell v. Carpenter, 5 Id. 520.

On the subject of *Discharge of Surety*, see American Leading Cases, volume second, 4th ed., from page 317 to page 450, where the American authorities are collected.

been more than one surety, any one surety, paying the whole debt, is entitled, according to the general principles of justice, to contribution from his co-sureties in equal shares, or if they should have been sureties to unequal amounts, then in proportion to the respective amounts to which they have made themselves liable.(*l*)[1] And the remedies given by

(*l*) Deering *v.* Earl of Winchelsea, 2 Bos. & Pul. 270, 272, 273; Brown *v.* Lee, 6 B. & C. 689 (E. C. L. R. vol. 13); s. c. 9 D. & R. 701.

[1] Where two are jointly bound, and the liability of one of the joint promisors is subsequently destroyed, no acknowledgment of the claim by the other will revive the debt against the one so discharged. This is expressly decided in the case of Levy *v.* Cadet et al., 17 S. & R. 126, in which the reason upon which this principle is founded is set forth by Rogers, J., in the following words: "To expose persons in such situations to the risk of being saddled with a debt at an indefinite length of time, which may have been discharged, by the acknowledgment of a person ignorant of the fact of payment, or from insolvency, or perhaps malice, reckless of consequences, is a principle which I am unwilling to sanction. Persons so exposed are those whom the statute was designed to protect." And so, too, in Exeter Bank *v.* Sullivan et al., 6 N. H. 136, Richardson, C. J., remarks: "It seems to be now become the general opinion, that an acknowledgment of a debt that will warrant the finding of a new promise, must be an unqualified and direct admission of a present subsisting debt, which the party is liable and willing to pay. If the debt be admitted, but the debtor at the same time refuses to pay, no promise can be raised by implication. The acknowledgment, or new promise, is not deemed to be a continuance of the original promise, but a new contract, supported by the original consideration, or evidence of such contract. This view of the operation of the acknowledgment of a debt is believed to be conformable to the general current of the English as well as of the American decisions, and has been explained and enforced by Mr. J. Story in a most able and satisfactory manner: 1 Peters 351. If, then, the admission of a debt does not, of itself, take the case out of the statute, but is only evidence of a promise which may have that effect, the principle, that an acknowledgment by one joint debtor will take a case out of the statute as to another, falls to the ground. There is nothing left to support it. For, although one joint debtor may admit the fact of the existence of the debt, which admission will be evidence of that fact against another joint debtor, still it by no means follows that by such admissions he can raise a new promise, that will bind another joint debtor. It is not pretended that one can make a new contract in such a case that will bind the other."

The same doctrine is applicable to principal and surety, who, in the eye of the law, are regarded as joint promisors, although the liability of the surety may be of a secondary nature; and hence, in Boyd, Exr., *v.* Grant et al., Exrs., 13 S. & R. 124 (which was the case of an acknowledgment made by the executor of a surety, which was not regarded as sufficiently clear to take the case out of the statute), Tilghman, C. J., says: "It is a circumstance of some weight that George Grant was but an executor of his father, who was surety for Martin, and therefore could not be supposed to have the same knowledge of the bonds being paid or not, as if it had been his own debt. If payment had been made, it would probably have been by Martin, the principal debtor." And see further, on this subject, Farnum *v.* Eastwick, 2 Am. L. Reg. 572, overruling Zents's Exrs. *v.* Heart, 8 Penn. St. 341; in which last-mentioned case it was decided that if the liability of one joint promisor, between whom the relation of principal

the act above mentioned are extended to co-sureties; provided that no co-surety shall be entitled to recover from any other co-surety, by the means aforesaid, more than the just proportion to which, as between those parties themselves, such last-mentioned person shall be justly liable.(*m*) In equity, if any surety has become insolvent, the others must contribute rateably to the payment of the whole debt.(*n*) But if the surety has paid no more than his own proportion of the debt he cannot *obtain [*116] contribution from any of the others;(*o*) nor will contribution be allowed when the suretyship of one person is a distinct transaction from that of the others.(*p*) A surety, however, may be discharged from his liability by the conduct of the creditor. As surety he has made himself liable only for the payment of a particular debt at a given time, or under certain given circumstances. If therefore the creditor, by any subsequent arrangement with the principal debtor, preclude himself from demanding payment of his debt at the time or under the circumstances originally agreed on, the surety will be at once discharged from all liability.(*q*) Thus if the creditor bind himself to give further time for payment to the principal debtor,(*r*) or compound with him, without expressly reserving his remedy against the surety,(*s*) the surety will be discharged.

(*m*) Stat. 19 & 20 Vict. c. 97, s. 5.

(*n*) Peter *v.* Rich, 1 Ch. Rep. 34; Hitchman *v.* Stewart, 3 Drew. 271.

(*o*) Ex parte Gifford, 6 Ves. 807; Davis *v.* Humphreys, 6 M. & W. 153, 168, 169.

(*p*) Coope *v.* Twyman, T. & Russ. 426; Craythorne *v.* Swinburne, 14 Ves. 160; Pendlebury *v.* Walker, 4 You. & Col. 424.

(*q*) Calvert *v.* London Dock Company, 2 Keen 638; Heath *v.* Key, 1 You. & Jer. 434; Nicholson *v.* Revill, 4 Ad. & E. 675, 683 (E. C. L. R. vol. 31); Blake *v.* White, 1 You. & Col. 420; Bowser *v.* Cox, 4 Beav. 879; 6 Beav. 110; and see Squire *v.* Whitton, 1 H. of L. C. 333.

(*r*) Samuel *v.* Howarth, 3 Meriv. 272; Eyre *v.* Bartrop, 3 Madd. 221; Moss *v.* Hall, 5 Ex. Rep. 46; Davis *v.* Stainbank, 6 De Gex, M. & G. 679; Bailey *v.* Edwards, 4 B. & S. 761 (E. C. L. R. vol. 116).

(*s*) Ex parte Gifford, 6 Ves. 807; Ex parte Carstairs, Buck 560; Maltby *v.* Carsstairs, 7 B. & C. 737 (E. C. L. R. vol. 14); s. c. 1 M. & R. 549; Thompson *v.* Lack, 3 C. B. 540 (E. C. L. R. vol. 54); Owen *v.* Homan, 4 H. of L. Cases 997; Close *v.* Close, 4 De Gex, M. & G. 176; Webb *v.* Hewitt, 3 Kay & John. 438; Boaler *v.* Mayor, 19 C. B. N. S. 76 (E. C. L. R. vol. 115).

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and surety subsists, has been destroyed, an acknowledgment by the other will revive it; and see Watts *v.* Deavor, 1 Grant's Cases 267; Carlton *v.* Ludlow Woollen Mill, 27 Vt. 496; Barger *v.* Durvin, 22 Barb. 68.

That the law of contribution between joint sureties is the same as that stated in the text, see the following American authorities: Stickel *v.* Stickel, 28 Penn. St. 233; Commonwealth *v.* Cox's Admrs., 36 Id. 442; Steele *v.* Mealing, 24 Ala. 284; Cutler *v.* Emery, 37 N. H. 567; Miller *v.* Sawyer, 30 Vt. 412; Kelly *v.* Page, 7 Gray 213; Paulin *v.* Kaighn, 3 Dutch. 503 Leary *v.* Cheshire, 3 Jones Eq. 170; Paulin *v.* Kaighn, 5 Dutch. 480; Spiller *v.* Creditors, 16 La. Ann. 292; Armitage *v.* Pulver, 37 N. Y. 494.

But the acceptance by the creditor from the principal debtor of a new and independent security for the debt will not discharge the surety.(*t*) Neither will the surety be discharged by the mere neglect of the creditor to enforce payment of the debt from the principal debtor at the time of [*117] its becoming due;(*u*) nor by the creditor's *express agreement to give time to the principal debtor, if such agreement fail in any of the requisites of a binding contract.(*x*)

We now approach the subject of the alienation of debts, to which some reference has already been made. We have seen that a debt was anciently considered as a mere right to bring an action against the debtor, and as such was incapable of being transferred.(*y*) In process of time, however, an assignment of a debt was permitted to take place by means of an authority from the creditor to his assignee to sue the debtor in the creditor's name. This authority is usually called a *power of attorney*, which need not be by deed, but may be by writing unsealed,(*z*) or even by parol;(*a*) and when a debt is a *legal* debt, recoverable only in a court of law, it cannot be effectually assigned without such a power. The assignment of debts by means of powers of attorney is now recognised and protected by the courts of law.[1] Thus in a case where the original

(*t*) Bell *v*. Banks, 3. M. & G. 258 (E. C. L. R. vol. 42).

(*u*) Eyre *v*. Everett, 2 Russ. 381; Peel *v*. Tatlock, 1 B. & P. 419.

(*x*) Philpot *v*. Briant, 4 Bing. 717 (E. C. L. R. vol. 13); Tucker *v*. Laing, 2 Kay & John. 745.

(*y*) *Ante*, p. 4.

(*z*) Howell *v*. M'Ivers, 4 Term Rep. 690.

(*a*) Heath *v*. Hall, 4 Taunt. 326.

[1] But that such a power will not be effectual, in case of the death of the grantor of the power, see Hunt *v*. Rousmanier, 8 Wheat. 174, and 1 Peters S. C. 1. The defendant, Rousmanier, executed to the plaintiff a power of attorney, authorizing him to make and execute a bill of sale of three-fourths of the vessels, Nereus and Industry, to himself or to any other person, and in the event of their being lost, to collect the money which should become due, under a policy upon them, and their freight; and in the power of attorney it was recited, that it was given as collateral security for the payment of certain notes, and was to be void on their payment; subsequently, Rousmanier died, and on the return of the vessels, they being taken possession of by the plaintiff, and the interest of the intestate in them offered for sale, the defendant's creditors forbade the sale, and this bill was brought to compel them to join. There was some evidence that the power had been given in place of a mortgage. At the first decision of this case, Chief Justice Marshall, remarks, "The general rule . . . is, that a letter of attorney may, at any time be revoked by the party who makes it; and is revoked by his death. But this general rule, which results from the nature of the act, has sustained some modification. Where a letter of attorney forms a part of a contract, and is a security for money, or for the performance of any act which is deemed valuable, it is generally made irrevocable in terms, or if not so, is deemed irrevocable in law. . . Rous-

creditor became bankrupt after he had assigned his debt, it was held that an action against the debtor might still be properly brought in the name of such original creditor, by virtue of the power of attorney which he had given to his assignee; although, if no assignment had been made, the assignees of the creditor under the bankruptcy would have been the proper parties to sue.(*b*) So if a power of attorney be given on an assignment of a debt for a valuable consideration, it is held to be irrevocable by the assignor.(*c*) When a debt or demand is *equitable* only, that is of a nature to be recoverable only in the Court of Chancery, *it may be assigned without a power of attorney; for equity will allow the assignee to sue in his own name. The same privilege [*118] has recently been extended by Parliament to moneys secured by policies of assurance of lives,(*d*) and also to policies of marine assurance;(*e*) and it is to be hoped that it may one day be extended to every other legal debt. When a debt is assigned, the title of the assignee is not complete until he has given to the debtor notice of the assignment;(*f*) for the debtor, if he has had no notice of the assignment, may lawfully pay his debt to the original creditor, and will be effectually discharged by his receipt.

Bills of exchange and promissory notes are, as we have already

(*b*) Winch *v.* Keeley, 1 Term Rep. 619; Parnham *v.* Hirst, 8 M. & W. 743. See De Pothonier *v.* De Mattos, 1 E. B. & E. 461 (E. C. L. R. vol. 96).

(*c*) Walsh *v.* Whitcomb, 2 Esp. 565.

(*d*) Stat. 30 & 31 Vict. c. 144.

(*e*) Stat 31 & 32 Vict. c. 86.

(*f*) See *post*, the chapter on Title.

manier, therefore, could not, during his life, by any act of his own, have revoked this letter of attorney. But does it retain its efficacy after his death? We think it does not. We think it well settled, that a power of attorney, though irrevocable during the life of the party, becomes extinct by his death. . . . This general doctrine, that a power must be executed in the name of a person who gives it, a doctrine founded on the nature of the transaction, is most usually ingrafted in the power itself. Its usual language is, that the substitute shall do that which he is empowered to do, *in the name of his principal*. . . . This general rule, that a power ceases with the life of the person giving it, admits of one exception. If a power be coupled with an interest, it survives the person giving it, and may be executed after his death. . . . It is, . . . deemed perfectly clear, that the power given in this case, is a naked power, not coupled with an interest, which, though irrevocable by Rousmanier himself, expired on his death."

And in the same case, reported in 1 Peters S. C. 1, upon the question whether equity would grant relief, it was decided it would not, Judge Washington delivering the opinion of the court. See also on this subject, Michigan Insurance Co. *v.* Leavenworth, 30 Vt. 11; Saltmarsh *v.* Smith, 32 Ala. 404; Hartshorn *v.* Day, 19 How. U. S. 211; MacGregor *v.* Gardner, 14 Iowa 326; Blackstone *v.* Buttermore, 53 Penn. St. 266; Barr *v.* Schrœder, 30 Cal. 609.

seen,(g) exceptions to the rule which requires a power of attorney to enable the assignee to sue the debtor for the debt assigned. The custom of merchants was in ancient times sufficiently powerful to countervail in this respect the strictness of the common law, and the holder of a bill of exchange was able to sue upon it in his own name. By a statute of Anne,(h) promissory notes were made assignable or endorsable over in the same manner as inland bills of exchange might be according to the custom of merchants.

Debts, being formerly considered as mere rights of action, could not be taken in execution on a judgment obtained against the creditor. But when they are secured by some check, bill, note, bond, specialty or other security,(i) the act for extending the remedies of creditors [*119] against the property of debtors(k) provides *that under the writ of *fieri facias*(l) the sheriff may seize not only money and bank notes, but also the securities above mentioned, and may sue upon them in his own name on the arrival of the time of payment; but the sheriff is not bound to sue, unless indemnified in the manner prescribed by the acts from the costs of the action.[1] And the Common Law Procedure

(g) *Ante*, p. 4.

(h) Stat. 3 & 4 Anne, c. 9, made perpetual by stat. 7 Anne, c. 25.

(i) Harrison *v.* Paynter, 6 M. & W. 387; Wood *v.* Wood, 4 Q. B. 397 (E. C. L. R. vol. 45).

(k) Stat. 1 & 2 Vict. c. 110, s. 12.

(l) See *ante*, p. 51.

[1] In the United States, this subject is regulated by the legislative provisions of the several States. And not only may a debt due to a defendant, be taken in satisfaction of his debt to the plaintiff, by an attachment in the nature of an execution; but a debt may also be attached, by process of foreign attachment, as a means of compelling an appearance on the part of a non-resident defendant, or by domestic attachment, which is of the general nature of a proceeding in bankruptcy. An attachment anterior to judgment may also be issued in some cases of fraudulent contract, or fraudulent disposition of the effects of the debtor. On the subjects, of foreign attachment, domestic attachment, or attachment in the nature of execution, see the following cases: Bostwick et al. *v.* Beach, 18 Ala. 80; Lawrence *v.* Sturdivent, 5 Eng. 130; The Stamford Bank *v.* Ferris, 17 Conn. 259; Davenport *v.* Lacon, Id. 278; Fitch *v.* Waite, 5 Id. 117; Grosvenor *v.* The Farmers' and Mechanics' Bank, 13 Id. 107; Insurance Co. *v.* Weeks et al., 7 Mass. 438; Perry *v.* Coates et al., 9 Id. 537; Andrews *v.* Ludlow et al., 5 Pick. 28; Lupton *v.* Cutler et al., 8 Id. 298; Jackson *v.* Willard, 4 Johns. 40; Denton et al. *v.* Livingston et al., 9 Id. 96; Hardy *v.* Dobbin, 12 Id. 220; Mann *v.* The Exrs. of Mann, 1 Johns. Ch. 231; Spencer *v.* Blaisdell, 4 N. H. 196; Insurance Co. *v.* Platt, 5 Id. 193; Rundlett *v.* Jordan, 3 Greenl. 47; Belcher *v.* Grubb, 4 Harring. 461; Willis & Co. *v.* Parsons & Co., 13 Geo. 339; Hodson et al. *v.* McConnel, 12 Ill. 172; Reinhard *v.* Keith, 3 Ind. 137; Burgess *v.* Clark, Id. 250; Wilson *v.* Albright, 2 Iowa 125; Harlan *v.* Moriarty, Id. 486; Cornett *v.* Doolittle, Id. 385; Weather *v.* Mudd, 12 B. Mon. 112; Woodruff & Co. *v.* French

Act, 1854, now enables the court or a judge to order the examination of any judgment debtor as to any and what debts are owing to him;(*m*) and a judge may, on the application of the judgment creditor, either before or after such examination, order that all debts owing from any third person (in the act called the garnishee) to the judgment debtor shall be attached to answer the judgment debt.(*n*) And payment made by the garnishee, or execution levied upon him under the provisions of the act, for the amount of his debt, is a valid discharge to him as against the judgment debtor to the amount paid or levied, although such proceedings may be set aside, or the judgment reversed.(*o*) And the Common Law Procedure Act, 1860, further provides that if it be suggested by the garnishee that the debt sought to be attached belongs to some third person who has a lien or charge upon it, the judge may order such third person to appear before him, and may order execution to issue to levy the amount due from such garnishee, or the judgment creditor to proceed against the garnishee; and he may bar the claim of such third person, or make such other order as he shall think just.(*p*)

In the event of bankruptcy, the assignees of the bankrupt were empowered to sue for debts owing to him *in their own names for the benefit of his creditors.(*q*) And now by the Bankruptcy [*120]

(*m*) Stat. 17 & 18 Vict. c. 125, s. 60. (*n*) Ibid. s. 61.

(*o*) Stat. 17 & 18 Vict. c. 125, s. 65. See Holmes *v.* Tutton, 5 E. & B. 65 (E. C. L. R. vol. 85).

(*p*) Stat. 23 & 24 Vict. c. 126, ss. 28–31.

(*q*) Stat 12 & 13 Vict. c. 106, s. 141, repealing stats. 6 Geo. IV. c. 16, s. 63, and 1 & 2 Will. IV. c. 56, s. 25; and now repealed by stat. 32 & 33 Vict. c. 83. And see stat. 15 & 16 Vict. c. 76, s. 142, as to the bankruptcy of a plaintiff in an action at law.

& Co. et al., 6 La. 62; Estell *v.* Goodloe, Id. 122; Bird *v.* Cain et al., Id. 248; Walker *v.* Curvey, Id. 535; Slatter *v.* Tiernan & Co., Id. 567; Lumbden *v.* Bourie, 2 Md. 324; Barr, Garnishee, *v.* Perry, 3 Gill 313; Webb *v.* Miller et al., 24 Miss. 638; Ridley *v.* Ridley, Id. 648; Gallis *v.* Kirby, 13 Mo. 157; Wood *v.* Edgar, Id. 451; Temple *v.* Cochran, Id. 116; Hanness *v.* Bonnell, 3 Zabr. 159; Castner *v.* Styer et al., Id. 236; Bracken *v.* Ballentine, 1 Harrison 484; Anderson *v.* Douk, 10 Ired. 295; Arrington *v.* Screws, 9 Id. 42; Myers *v.* Beeman, Id. 116; Weaver *v.* Russel et al., 18 Ohio 497; Lessee of Cochran's Heirs *v.* Loring, 17 Id. 409; Fuller *v.* Bryan, 20 Penn. St. 144; Sheetz *v.* Hobensack, Id. 412; Nichols *v.* Schofield, 2 R. I. 123; Arnold *v.* Frazier, 5 Strobh. 33; Lindau *v.* Arnold, 4 Id. 290; Kincaid *v.* Neall, 3 McCord 201; Wiggins *v.* Anderson, 1 Texas 73; Merritt et al. *v.* Clow, 2 Id. 582; Davis et al. *v.* Clayton et al., 5 Humph. 446; Nolen *v.* Crook, 5 Id. 312; Hogshead *v.* Carruth, 5 Yerg. 227; Gibbs et al. *v.* Bourland, 6 Id. 481; The Brandon Iron Co. *v.* Cleason, 24 Vt. 228; Goodrich *v.* Church, 20 Id. 187; Carrington et al. *v.* Didier et al., 8 Gratt. 260; Schofield *v.* Cox et al., Id. 533; McCheury & Co. *v.* Jackson, 6 Id. 96; Memphis Railroad Co. *v.* Wilcox, 48 Penn. St. 161; Coe *v.* Wilson, 46 Maine 314; Cooper *v.* Reynolds, 10 Wall. U. S. 308; Livermore *v.* Rhodes, 3 Rob. (N. Y.) 626.

Act, 1869,(r) a trustee of a bankrupt may sue and be sued by the official name of "The trustee of the property of A. B., a bankrupt." And any person, to whom anything in action belonging to the bankrupt is assigned in pursuance of that act, may bring or defend any action or suit relating to such thing in action in his own name.(s)

We have now to consider the payment of debts. And, in the first place, the payment of a smaller sum is no satisfaction of a larger one, unless there be some consideration for the relinquishment of the residue,(t) such as the payment at an earlier time than the whole is due,(u) or the concurrence of some(x) or all of the other creditors of the debtor in accepting a composition.(y)[1] But it seems that the acceptance of a

(r) Stat. 32 & 33 Vict. c. 71, ss. 22, 83, par. (7).
(s) Sect. 111.
(t) Cumber *v.* Wane, 1 Strange 425; s. c. 1 Smith's Leading Cases 146; Fitch *v.* Sutton, 5 East 230.
(u) Co. Litt. 212 b.
(x) Norman *v.* Thompson, 4 Ex. Rep. 755.
(y) Reay *v.* Richardson, 2 C., M. & R. 422; Pfleger *v.* Browne, 28 Beav. 391.

[1] It is a technical rule of law, that the giving of a less sum of money for a debt of greater amount, cannot operate in satisfaction or extinguishment of the debt: Deterick *v.* Leaman et al., 9 Johns. 333; Harrison *v.* Wilcox et al., 2 Id. 448; Johnson *v.* Brunnan, 5 Id. 268; Seymour *v.* Minturn, 17 Id. 169; Latapee *v.* Pecholier, 2 Wash. C. C. 180; White *v.* Jordan, 27 Maine 370; Warren *v.* Skinner, 20 Conn. 559; Eve *v.* Moseley, 2 Strobh. 203; Gurley *v.* Hiltshue, 5 Gill 218; Spruneberger *v.* Dentlee, 4 Watts 126; Kellogg et al. *v.* Dumont et al., 14 Wend. 116; Brooks et al. *v.* White, 2 Metc. 283; Molyneaux et al. *v.* Collier, 13 Geo. 407; Booth *v.* Campbell, 15 Md. 569; Sullivan *v.* Finn, 4 Greene (Iowa) 544; Harriman *v.* Harriman, 12 Gray 341; Bunge *v.* Koop, 5 Rob. (N. Y. 1; and so, a note for a less sum cannot be said to extinguish one of greater value: Canfield *v.* Ives, 18 Pick. 253; Smith *v.* Bartholomew, 1 Metc. 276. But, the delivery and acceptance of some collateral thing in satisfaction of a debt, will be construed a valid payment; as the delivery and acceptance of commodities: Jones *v.* Bullett, 2 Litt. 49; or, of the promissory note of a third person: Booth *v.* Smith, 3 Wend. 66; N. Y. State Bank *v.* Fletcher, 5 Id. 85; Bullen et al. *v.* McGillicuddy, 2 Dana 90; Pope *v.* Tunstall et al., 3 Ark. 209; James et al. *v.* Hackley et al., 16 Johns. 273; Brown *v.* Jackson, 2 Wash. C. C. 24; Tobey *v.* Barber, 5 Johns. 68; Johnson *v.* Weed et al., 9 Id. 310; Roget *v.* Merritt et al., 2 Caines 117; Van Epps *v.* Dilleye, 6 Barb. S. C. 245; Hays *v.* Stone, 7 Hill 128; Maze *v.* Miller, 1 Wash. C. C. 328; Harris et al. *v.* Lindsay, 4 Id. 271; Peter *v.* Beverley, 10 Peters 534; Glenn *v.* Smith, 2 Gill & Johns. 494; Gordon *v.* Price, 10 Ired. 385; Perit et al. *v.* Pitfields et al., 5 Rawle 166; McGuirn *v.* Holmes, 2 Watts 121; McLaughlin *v.* Bovard, 4 Id. 308; Moore *v.* Briggs, 15 Ala. 24; Fulford *v.* Johnston et al., Id. 386; Frisbie et al. *v.* Larned et al, 21 Wend. 451; Heidenheimer *v.* Lyon, 3 E. D. Smith 54; or a mortgage: Keeler *v.* Salisbury, 33 N. Y. 648; and so, of services rendered by the debtor, or real or personal property transferred to the creditor, or almost anything which the creditor shall agree to receive in satisfaction: Blinn

negotiable security for a small amount may be a good satisfaction for a larger debt;(z) and the payment of a small sum may be a good satisfac-

(z) Sibree *v.* Tripp, 15 M. & W. 23.

v. Chester, 5 Day 359; Watkinson *v.* Ingleby et al., 5 Johns. 386; Eaton *v.* Lincoln, 13 Mass. 424; Musgrove *v.* Gibbs, 1 Dall. 216; Smith *v.* Brown, 3 Hawks. 580; Brooks et al. *v.* White, 2 Metc. 283; Austin *v.* Dorwin, 21 Vt. 39; Spann *v.* Blatzell, 2 Fla. 302; Milliken et al. *v.* Brown, 1 Rawle 391; Williams *v.* Phelps, 16 Wis. 80; Pepper *v.* Aiken, 2 Bush. (Ky.) 251; and an arrest of a debtor is regarded as payment and satisfaction of the debt: Magniac *v.* Thompson, 2 Am. L. Reg. 697.

So upon the principle of an accord and satisfaction, where an agreement is made between the parties, whereby some advantage accrues to the creditor, or detriment to the debtor, other than what springs out of the original contract, a less sum may be received in satisfaction of a greater: Milliken et al. *v.* Brown, 1 Rawle 391; Molyneaux et al. *v.* Collier, 13 Ga. 407; Henderson *v.* Moore, 5 Cranch 11; Rose *v.* Hall, 26 Conn. 392; Jones *v.* Perkins, 29 Miss. 129; Fenwick *v.* Phillips, 3 Metc. (Ky.) 87; or, a note for a less sum, extinguish a debt of greater amount: Brooks et al. *v.* White, 2 Metc. 283; Boyd et al. *v* Hitchcock, 20 Johns. 76; Le Page *v.* McCrea, 1 Wend. 164; Kellogg et al. *v.* Dumont et al., 14 Id. 116; Sanders *v.* The Branch Bank, 13 Ala. 353; Webb *v.* Goldsmith, 2 Duer 416; and hence it follows, that an agreement for the payment of a sum certain, instead of a larger and unliquidated claim, will cancel the indebtedness: McDaniels *v.* Lapham et al., 21 Vt. 223; Lamb *v.* Goodwin, 10 Ired. 320; and the acceptance of the note of one of the partners of a firm, for the debt of a firm, is valid as an accord and satisfaction: Sheeby *v.* Mandeville et al., 6 Cranch 253; Estate of Davis *v.* Desauque, 5 Whart. 531; Muldon *v.* Whitlock, 1 Cowen 290; Parker *v.* Cousins, 2 Gratt. 373; Mason *v.* Wickersham, 4 W. & S. 100; Arnold *v.* Camp, 12 Johns. 409; James *v.* Hackley, 16 Id. 273; Harris et al. *v.* Lindsay, 4 Wash. C. C. 271; Wildes et al. *v.* Fessenden et al., 4 Metc. 12; Livingston *v.* Radcliff, 6 Barb. S. C. 202; Van Epps *v.* Dilleye, Id. 245; Kinster et al. *v.* Pope, 5 Strobh. 126; Benneson *v.* Thayer, 23 Ill. 374; Pierce *v.* Pierce, 25 Barb. 243; Stephens *v.* Thompson, 28 Vt. 77; Powell *v.* Charless, 34 Misso. 485; Hoskinson *v.* Eliot, 62 Penn. St. 393. But in all cases of accord and satisfaction, the consideration therefor, must be either good or valuable: Keeler *v.* Neal, 4 Watts 424; Davis *v.* Noaks, 3 J. J. Marsh. 494; Commonwealth for the use, &c., *v.* Miller, 5 Mon. 205; Nave *v.* Fletcher, 4 Litt. 242; Buddicum *v.* Kirk, 3 Cranch 293.

An accord, however, without a satisfaction, is of no efficacy, and hence an agreement for an accord, will not be binding, unless executed: Williams *v.* Stanton, 1 Root 426; Pope *v.* Tunstale et al., 3 Ark. 209; Linnard *v.* Patterson, 3 Blackf. 354; Maze *v.* Miller, 1 Wash. C. C. 328; Morris Canal *v.* Van Vorst, 1 Zabr. 101; Russell *v.* Lytle, 6 Wend. 390; Hawley *v.* Foot, 19 Id. 516; Brooklyn Bank *v.* De Grann et al., 23 Id. 342; Anderson *v.* The Highland Turnpike Company, 16 Johns. 86; Evans *v.* Wells, 22 Wend. 325; Eaton *v.* Lincoln, 13 Mass. 424; Seamen *v.* Haskins, 2 Johns. Cas. 195; Phillips *v.* Berger, 2 Barb. S. C. 609; Spruneberger *v.* Dentler, 4 Watts 126; Rising *v.* Patterson. 5 Whart. 316; Daniels *v.* Hatch et al., 1 Zabr. 391; Hart *v.* Bailie, 16 S. & R. 162; Weakley *v.* Bell, 9 Watts 280; Phelps *v.* Johnson, 8 Johns. 58; Gregory *v.* Thomas, 2 Wend. 47; Gallagher's Exrs. *v.* Roberts, 2 Wash. C. C. 191; Hearn *v.* Kiehl, 38 Penn. St. 147; Hall *v.* Smith, 15 Iowa 584; Mayfield *v.* Cotton, 21 Texas 1; Kerr *v.* O'Connor, 63 Penn. St. 341; but if, by agreement, an executory obligation be entered into, in lieu of payment, it will be good if the obligation is carried out: Kinsler et al. *v.* Pope, 5 Strobh. 126; Spann *v.* Blatzell,

tion for an unliquidated demand for large pecuniary damages, on account of the uncertainty of such a claim.(a) When a less sum is paid to the

(a) Wilkinson v. Byers, 1 Ad. & E. 106 (E. C. L. R. vol. 28).

2 Fla. 302; Morris Canal v. Van Vorst, 1 Zabr. 391; Keen v. Vaughan, 48 Penn. St. 477; Cushing v. Wyman, 44 Maine 121; Clark v. Bowen, 22 How. U. S. 270.

Upon the question whether the debtor's own negotiable note can be taken as an accord and satisfaction of his debt, the authorities seem to be conflicting; in New York, it has been held, that it cannot be regarded as a satisfaction of the debt, even upon an express agreement of the parties: Putman v. Lewis, 8 Johns. 389; Frisbie v. Larned, 21 Wend. 450; Myers v. Wells, 5 Hill 463; Cole v. Sackett, 1 Hill (N. Y.) 517; but, in Pennsylvania, Connecticut, and New Hampshire, the law is to the contrary: Dougal v. Cowles et al., 5 Day 511; Darlington v. Gray, 5 Whart. 487; Weakley v. Bell et al., 9 Watts 273; Hays v. Clurg, 4 Id. 452; Jeffrey v. Cornish, 10 N. H. 505; Seltzer v. Coleman, 32 Penn. St. 493; and the law is the same in Alabama: Fickling v. Brewer, 38 Ala. 685. With a like clashing of authorities, some of the cases hold, that the debtor's own negotiable note cannot be regarded as payment: Herring v. Sanger, 3 Johns. Cas. 71; Johnson v. Weed, 9 Johns. 310; Olcott v. Rathbone, 5 Wend. 490; Hays v. Stone, 7 Hill 128; Jeffrey v. Cornish, 10 N. H. 505; Elliott v. Sleeper, 2 Id. 525; Maze v. Miller, 1 Wash. C. C. 328; Gallagher's Exrs. v. Roberts, 2 Id. 191; Harris v. Lindsay, 4 Id. 271; Peter v. Beverly, 10 Peters 532; Schemerhorn v. Loines, 7 Johns. 311; Gilead v. Smith, 2 Gill & Johns. 494; Bito v. Porter, 9 Conn. 23; Perit v. Pitfield, 5 Rawle 166; Tyson v. Pollock, 1 Penna. R. 375; McGinn v. Holmes, 2 Watts 121; Risley v. Buchanan, 5 Id. 118; McLughan v. Bovard, 4 Id. 308; Costello v. Cave, 2 Hill (S. C.) 528; Chesturn v. Johnson, 2 Bailey 574; Prescott v. Hubbell, 1 McCord 94; Spear v. Atkinson, 1 Ired. 262; Watson v. Owens, 1 Richard. 111; Weed v. Snow, 3 McL. 262; Gardiner v. Gorham, 1 Doug. 507; Steamboat Charlotte v. Hammond, 9 Misso. 59; McCrary v. Carrington, 35 Ala. 698; Blunt v. Walker, 11 Wis. 334; Sutliff v. Atwood, 15 Ohio 186; Crabtree v. Rowand, 33 Ill. 421; Smith v. Owens, 21 Cal. 11; while others support the principle, that, the legal presumption, if uncontradicted, is, that the note was intended as a payment for the debt, for otherwise the debtor might be compelled to pay his debt twice: Johnson v. Johnson, 11 Mass. 359; Thatcher et al. v. Dinsmore, 5 Id. 299; Varner v. The Inhabitants of Nobleborough, 2 Greenl. 121; Butts v. Dean, 2 Metc. 76; Wallace v. Agry et al., 5 Mason 327; Descandilla et al. v. Harris, 8 Greenl. 298; Ilsley v. Jewett, 2 Metc. 168; Holmes v. De Camp, 1 Johns. 34; Pintard v. Tackington, 10 Id. 104; Maneely v. McGee, 6 Mass. 143; Reed v. Upton, 10 Pick. 522; Jones v. Kennedy, 11 Id. 125; Watkins v. Hill, 8 Id. 522; Cummings v. Hackley, 8 Johns. 202; Comstock v. Smith, 10 Shep. 202; Dogan v. Ashbey, 1 Richard. 36; Fowler v. Bush, 21 Pick. 230; French v. Price, 24 Id. 13; Hutchins v. Olcott, 4 Vt. 549; Torrey v. Baxter, 13 Id. 452; Homes v. Smith, 16 Maine 177; Wise v. Hilton, 4 Id. 435; Curtis v. Hubbard, 9 Metc. 322; Gilmore v. Bussy, 12 Id. 418; Follett v. Smith, 16 Vt. 30; Thornton v. Williams, 14 Ind. 418; Smalley v. Edey, 19 Ill. 207; Wait v. Brewster, 31 Vt. 516; Robertson v. Branch, 3 Sneed 506; Paine v. Dwinel, 53 Maine 52; but where the note has been negotiated by the creditor, no action can be brought on the original debt, unless the note is produced, or accounted for: Small v. Jones, 8 Watts 265; Hughes v. Wheeler, 8 Cowen 77; Dayton v. Trull, 23 Wend. 345; Hays v. McClung, 4 Watts 452; Harris v. Johnston, 3 Cranch 311; McConnell et al. v. Stettinius et al., 2 Gilm. 707; Cocke v. Chancy, Admr., 14 Ala. 65; Spear v.

creditor than the whole amount of his demands, it is competent to the debtor to make the payment in satisfaction of any demand he may

Atkinson, 1 Ired. 262; Shaw *v.* Gorkin, 7 N. H. 16; Holmes *v.* DeCamp, 1 Johns. 34; Burdick *v.* Given, 15 Id. 247; Humphreys *v.* Wheeler, 8 Cowen 77; Bite *v.* Porter, 9 Conn. 23; Street *v.* Hall, 29 Vt. 165; Matthews *v.* Dare, 20 Md. 248.

The New York cases of Cumming *v.* Hackley, 8 Johns. 202, Tobey *v.* Barber, 5 Id. 68, and Hour *v.* Clute, 15 Id. 224, which seem to lead to the conclusion that a creditor may, by agreement, receive the debtor's own security, not negotiable, in satisfaction of the debt, cannot easily be reconciled with the decisions in Putnam *v.* Lewis, 8 Johns. 389, Frisbie *v.* Larned, 21 Wend. 450, Myers *v.* Welles, 5 Hill 463, and Cole *v.* Socket, 1 Hill (N. Y.) 517, before referred to.

But the mere taking of securities for a pre-existing debt, does not thereby release the original obligation, unless there be an agreement to accept the new securities in satisfaction of the prior indebtedness: Pittsburgh & Connellsville R. R. Co. *v.* Clarke, 29 Penn. St. 146; Torry *v.* Hadley, 27 Barb. 192; it is a question of fact, whether such securities are to be regarded as payment, or collateral security: Sellers *v.* Jones, 22 Penn. St. 425; Dickinson *v.* King, 28 Vt. 378.

A check, which has been taken as payment, will cancel the debt: Barnard *v.* Graves, 16 Pick. 41; Dennie *v.* Hart, 2 Id. 204; Franklin *v.* Vanderpool, 1 Hall (N. Y.) 78; but the presumption of law is, that a check is only payment when realized: Cromwell *v.* Lovett, 1 Hall (N. Y.) 56; The People *v.* Howell, 4 Johns. 296; Olcott *v.* Rathbone, 5 Wend. 490; Downey, Exr., *v.* Hicks, Exrx., 14 How. 240; Okie *v.* Spencer, 2 Whart. 253; McIntyre *v.* Kennedy, 31 Penn. St. 448; Strong *v.* King, 35 Ill. 9; and, of course, a note or check is but a conditional payment, when it is expressed to be in full, if, or when paid: Herring *v.* Sanger, 3 Johns. Cas. 71; Tyson et al. *v.* Pollock, 1 Penna. R. 375; Chapman *v.* Steinmetz, 1 Dall. 261; Okie *v.* Spencer, 2 Whart. 253; Proctor *v.* Mather, 3 B. Mon. 353.

The acceptance of a higher security for the same debt, will, as a general thing, extinguish an inferior security: Green *v.* Sarmiento, 1 Peters C. C. 74; Butler *v.* Miller, 1 Denio 407; Carson *v.* Monteiro, 2 Johns. 308; Pleasants *v.* Meng et al., 1 Dall. 380; United States *v.* Price, 9 How. 83; Willings et al. *v.* Consequa, 1 Peters C. C. 393; Ward *v.* Johnson, 13 Mass. 140; Robertson *v.* Smith et al., 18 Johns. 459; Peters *v.* Sandford, 1 Denio 224; Penny *v.* Martin et al., 4 Johns. Ch. 566; Averill *v.* Locks, 6 Barb. S. C. 20; Sloo *v.* Lea, 18 Ohio 279; Ferrall et al. *v.* Bradford, 2 Fla. 508; Smith et al. *v.* Black, 9 S. & R. 142; Lewis *v.* Williams, 6 Whart. 264; Anderson *v.* Levan, 1 W. & S. 334; but, both the securities must be between the same parties: Day et al. *v.* Seal et al., 14 Johns. 404; Axers, Exrx., *v.* Musselman, 2 Browne 11; Beale *v.* The Bank, 5 Watts 529; Wolf *v.* Wyeth, 11 S. & R. 149; Davis *v.* Anable et al., 2 Hill (N. Y.) 339.

And in all cases where the instrument is between the same parties, and for the same sum as the former security, the general course of business, as well as the presumption of fact, would seem to imply that the more recent security extinguishes the older: Slaymaker *v.* Gundacker's Exrs., 10 S. & R. 75; Bank of the United States *v.* Daniels, 12 Peters 14; Castleman *v.* Holmes, 4 J. J. Marsh. 1; Stewart's Appeal, 3 W. & S. 476; Frisbie *v.* Larned, 21 Wend. 450; Butler *v.* Miller, 1 Denio 407; Gardner *v.* Hust, 2 Richard. 601. Thus, the giving of a new note for an old one, is equivalent to a payment of the latter: Cornwall *v.* Gould, 4 Pick. 444; Huse *v.* Alexander, 2 Metc. 157; and so of a bond: Morrison *v.* Berkey, 7 S. & R. 238; Hamilton, Exr., *v.* Collender's Exrs., 1 Dall. 420; Gregory *v.* Thomas, 20 Wend. 17. This, however, is a question to be determined by the intention of the parties: United States *v.* Lyman, 1 Mason 482;

please, and the creditor must appropriate the payment accordingly;(b) [*121] *but if the payment be made generally, without any express appropriation, the creditor may elect, at the time of payment,(c) or within a reasonable time after,(d) to appropriate the money to whichever demand he may please. And if no election as to the appropriation of the payment should be made on either side, the law will, in ordinary cases of current accounts, presume that the first item on the debit side is discharged or reduced by the first payment entered on the credit side, and so on in the order of time.(e)[1] When the debt carries interest, the

(b) Shaw v. Picton, 4 B. & C. 715 (E. C. L. R. vol. 10); Nash v. Hodgson, Ld. C. & Lds. Justices, 1 Jur. N. S. 946; 6 De Gex, M. & G. 474.

(c) Devaynes v. Noble, 1 Meriv. 604.

(d) Simson v. Ingham, 2 B. & C. 65 (E. C. L. R. vol. 9).

(e) 1 Meriv. 608; Williams v. Rawlinson, 10 J. B. Moore 362; Merriman v. Ward, 1 John. & H. 371.

Van Vleet et al. v. Jones et al., Spencer 341; Wallace v. Farman, 4 Watts 378; Sellers v. Jones, 22 Penn. St. 425; Shaw v. The Church, 39 Id. 226; and that intention, in doubtful cases, to be ascertained by the intervention of a jury: Hart v. Boller, 15 S. & R. 162; Jones v. Shawhan, 4 W. & S. 257; Musgrove v. Gibbs, 1 Dall. 216; Hacker et al. v. Perkins, 5 Whart. 95; Porter v. Talcot et al., 1 Cowen 359; Bank of the Commonwealth v. Letcher, 3 J. J. Marsh. 195; Downey v. Hicks, 14 How. 240.

[1] The doctrine stated in the text is the law of this country; for where a debtor, being liable to his creditor on more than one account, makes a voluntary partial payment, he has a right to apply it to what debt he pleases: Speck v. The Commonwealth, 3 W. & S. 328; Berghaus v. Alter, 9 Watts 387; The Mayor and Commonalty of Alexandria v. Patten et al., 4 Cranch 317; Field et al. v. Holland et al., 6 Id. 8; Bosley v. Porter, 4 J. J. Marsh. 621; Hall et al. v. Constant, 2 Hall 185; McDonald v. Pickett, 2 Bail. 617; Black v. Schooler, 2 McC. 293; Bonaffé v. Woodbury, 12 Pick. 456; Hussey v. The Manufacturers' and Mechanics' Bank, 10 Id. 415; Martin v. Draher, 5 Watts 544; Moorhead v. The West Branch Bank, 3 W. & S. 550; Boutwell v. Mason et al., 12 Vt. 608; Randall v. Parramore et al., 1 Fla. 410; Read v. Boardman, 20 Pick. 441; Pindall's Exrx. v. The Bank of Marietta, 10 Leigh 481; Miller v. Trevilian, 2 Rob. (Va.) 2; Jackson v. Bailey, 12 Ill. 159; McTavish et al. v. Carroll, 1 Md. Ch. Dec. 160; Treadwell v. Moore, 34 Maine 112; Caldwell v. Wentworth, 14 N. H. 431; Spring Garden Association v. Tradesmen's Loan Association, 46 Penn. St. 495; Crisler v. McCoy, 33 Miss. 445; Calvert v. Carter, 18 Md. 73; Irwin v. Paulett, 1 Kansas 418; and, if the debtor does not make the application, the creditor may: Speck v. The Commonwealth, 3 W. & S. 328; Berghaus v. Alter, 9 Watts 387; The Mayor and Commonalty of Alexandria v. Patten et al., 4 Cranch 317; Fields et al. v. Holland et al., 6 Id. 8; Mann v. Marsh, 2 Caines 99; Reynolds et al. v. McFarlane, Overton 488; Arnold v. Johnson, 1 Scam. 196; McFarland et al. v. Lewis et al., 2 Id. 345; Hillyer v. Vaughan, 1 J. J. Marsh. 583; Briggs v. Williams et al., 2 Vt. 283; Rossian et al. v. Call et al., 14 Id. 83; Selleck v. The Sugar Hollow Turnpike Co., 13 Conn. 453; Rackley v. Pearce, 1 Kelly 241; Sturges et al. v. Robbins, 7 Mass. 301; Brewer v. Knapp et al., 1 Pick. 332; Logan v. Mason, 6 W. & S. 9; The Stamford Bank v. Benedict, 15 Conn. 438; Mitchell v. Dall, 4 Gill & Johns. 361; Clark et al. v. Burdett, 2 Hall 197; Van Rensselaer's Exrs. v. Roberts, 5 Denio 470; Hamilton v. Benbury, 2 Hayw. 385; Ni-

payment is considered to be applied in the first place in discharge of the interest then due, and the surplus, if any, in discharge *pro tanto* of the

agara Bank *v.* Rosevelt, 9 Cowen 409; Taylor et al. *v.* Jones, 1 Cart. 17; McTavish et al. *v.* Carroll, 1 Md. Ch. Dec. 160; Sawyer, Admr., *v.* Tappan, 14 N. H. 352; Caldwell *v.* Wentworth, Id. 431; Philadelphia Mercantile Loan Association *v.* Moore, 47 Penn. St. 233; Bird *v.* Davis, 1 McCarter (N. J.) 467; Bobe *v.* Stickney, 36 Ala. 482; Fargo *v.* Buell, 21 Iowa 292; Wendt *v.* Ross, 33 Cal. 650; Hargraves *v.* Cooke, 15 Geo. 321; but, where neither debtor nor creditor makes an appropriation, the court will do it for them, in accordance with what is just and equitable: Young *v.* Woodward, 44 N. H. 250; Hempfield Railroad *v.* Thornburg, 1 W. Va. 261; Speck *v.* The Commonwealth, 3 W. & S. 328; Berghaus *v.* Alter, 9 Watts 387; Fields et al. *v.* Holland et al., 6 Cranch 8; Cremer *v.* Higginson, 1 Mass. 338; McTavish et al. *v.* Carroll, 1 Md. Ch. Dec. 160; Caldwell *v.* Wentworth, 14 N. H. 431; Pierce *v.* Knight, 31 Vt. 701.

The intention of the debtor to appropriate a payment, may, however, be indicated by the circumstances of the case, as well as by an express direction: Tayloe *v.* Sandiford, 7 Wheat. 14; Mitchell *v.* Dall, 2 Har. & Gill 160; s. c. 4 Gill & Johns. 361; Fouke *v.* Bowie, 4 Har. & Johns. 566; Robert et al. *v.* Garnie, 3 Caines 14; West Branch Bank *v.* Moorehead, 5 W. & S. 542; Dickinson College *v.* Church, 1 Id. 462; Schnell *v.* Schroeder, Bailey Eq. 335; Scott *v.* Fisher, 4 Mon. 387; Stone *v.* Seymour, 8 Wend. 404; s. c. 15 Id. 19; Terhune *v.* Colton, 1 Beasley 233, 312; and so of the intention of the creditor: Starrett *v.* Barber, 20 Maine 457; Allen *v.* Kimball, 23 Pick. 473; Upham et al. *v.* Lefavour, 11 Metc. 174; Allen *v.* Culver, 3 Denio 285; Lindsey *v.* Steven, 5 Dana 104; and consequently, the discretionary power of the court, to appropriate a payment not expressly applied by either debtor or creditor, is to be controlled by the intention of the parties, as determined by all the circumstances of the case: Emery *v.* Tichout, 13 Vt. 15; Robinson et al. *v.* Doolittle et al., 12 Id. 246; Hillyer *v.* Vaughan, 1 J. J. Marsh. 583; The Stamford Bank *v.* Benedict, 15 Conn. 438; Cheston *v.* Wheelwright, Id. 562; Portland Bank *v.* Brown, 22 Maine 295; Smith *v.* Lloyd, 11 Leigh 512; Caldwell *v.* Wentworth, 14 N. H. 431; Johnson's Ap., 37 Penn. St. 270; Smith *v.* Brooke, 49 Id. 147; Slaughter *v.* Milling, 15 La. Ann. 525; Byrne *v.* Grayson, Id. 457. Thus, in cases of running accounts, payments are to be applied to the debts antecedently incurred, in order of time: Speck *v.* The Commonwealth, 3 W. & S. 328; Berghaus *v.* Alter, 9 Watts 387; United States *v.* Kirkpatrick et al., 9 Wheat. 720; Jones *v.* The United States, 7 How. 681; Boody et al. *v.* The United States, 1 Woodbury & Minot 151; Postmaster-General *v.* Furbur, 4 Mason 333; United States *v.* Wardwell et al., 3 Id. 82; Gass *v.* Stinson, 3 Sumn. 99; McKenzie *v.* Nevins, 22 Maine 138; Miller *v.* Miller, 23 Id. 22; Smith *v.* Lloyd, 11 Leigh 512; Fairchild *v.* Holly, 10 Conn. 176; Allen *v.* Culver, 3 Denio 285; Ross's Exrs. *v.* McLauchlan's Admr. et al., 7 Gratt. 86; McKee's Exrs. *v.* Commonwealth, 2 Grant's Cas. 23; Pierce *v.* Sweet, 35 Penn. St. 151; Antarctic, Sprague's Decs. 206; Price *v.* Cutts, 29 Ga. 142; Berrian *v.* New York, 4 Rob. (N. Y.) 538; Horne *v.* Planters' Bank, 32 Ga. 1; and the appropriation will be made to the first items of such an account, which are secured, although the balance be unsecured: Cushing *v.* Wyman, 44 Maine 121; but see exceptions to this rule, in the case of collectors of taxes: United States *v.* Patterson, 7 Cranch 572; Jones *v.* The United States, 7 How. 681; Seymour *v.* Van Slyck, 8 Wend. 404; Stone *v.* Seymour, 15 Id. 19; Postmaster *v.* Norvell, Gilpin 107; City of St. Joseph *v.* Merlatt, 26 Misso. 233. So, where there are two debts, one bearing interest, and the other not, the payment is to be appropriated to the debt bearing interest: Gwinn *v.* Whittaker, 1 Har. & Johns. 754;

principal. For no creditor would apply any payment to the discharge of part of the principal, which carries interest, instead of to the discharge of interest for which, when due, no further interest is payable.(*f*)

(*f*) Bower *v.* Marris, 1 Cr. & Phi. 351, 355.

Dorsey *v.* Gassaway, 2 Id. 402; Bacon *v.* Brown, 1 Bibb 334; Beauton *v.* Rice, 5 Mon. 253; McTavish et al. *v.* Carroll, 1 Md Ch. Dec. 160; Scott *v.* Cleveland, 33 Miss. 447 ; McFadden *v.* Fortier, 20 Ill. 509; and a payment must be applied to a debt due, rather than to one not due: McDowell *v.* The Blackstone Canal Co., 5 Mason 11; Baker *v.* Stackhoole, 9 Cowen 420; Bacon *v.* Brown, 1 Bibb 334; Stone *v.* Seymour, 15 Wend. 19; Upham et al. *v.* Lefavour, 11 Metc. 174; Lebleu *v.* Rutherford et al., 9 Robins. 95; Follain et al. *v.* Orillion, Id. 506; Treadwell *v.* Moore, 34 Maine 112; Caldwell *v.* Wentworth, 14 N. H. 431; Thomas *v.* Kelsey, 30 Barb. 268; Effinger *v.* Henderson, 33 Miss. 449; Heintz *v.* Cahn, 29 Ill. 308; Cloney *v.* Richardson, 34 Misso. 370; and to a several, in preference to a joint debt: Livermore *v.* Claridge, 33 Maine 428; and, to a legal, rather than to an illegal debt: Hall *v.* Clement, 41 N. H. 166; Rohan *v.* Hanson, 11 Cush. 44; Gill *v.* Rice, 13 Wis. 549; Burrows *v.* Cook, 17 Iowa 436; but to a debt barred by the statute of limitations, rather than to one not so barred: Robinson *v.* Allison, 36 Ala. 525. So, again, the appropriation by the court, in the case of two debts, one of which is secured, and the other not, must be made to the debt not secured; or, if both debts are secured, then to the one of which the security is most precarious: Field et al. *v.* Holland et al., 6 Cranch 8; Merrimack Co. Bank *v.* Brown, 12 N. H. 321; Portland Bank *v.* Brown, 22 Maine 295; Niagara Bank *v.* Rosevelt, 9 Cowen 410; Newman *v.* Meek, 1 Sm. & M. 331; Hammer's Admr. *v.* Rochester, 2 J. J. Marsh. 144; Blanton *v.* Rice, 5 Mon. 253; Smith *v.* Lloyd, 11 Leigh 512; The Stamford Bank *v.* Benedict, 15 Conn. 438; Cheston *v.* Wheelright, Id. 562; Vance *v.* Monroe, 4 Gratt. 53; Upham et al *v.* Lefavour, 11 Metc. 174; The Ordinary *v.* McCollum, 3 Strobh. 494; Blackhouse et al. *v.* Patton et al., 5 Peters 161; Briggs *v.* Williams et al., 2 Vt. 283; Emery *v.* Tichout, 13 Id. 15; Hilton *v.* Burley, 2 N. H. 193; Blackstone Bank *v.* Hill, 10 Pick. 129; Capen *v.* Alden, 5 Metc. 268; Jones *v.* Kilgore, 2 Richard. Eq. 64; McTavish et al. *v.* Carroll, 1 Md. Ch. Dec. 160; N. O. Ins. Co. *v.* Tio, 15 La. Ann. 174; Foster *v.* McGraw, 64 Penn. St. 464; but see, to the contrary: Gwinn *v.* Whitaker, 1 Har. & Johns. 754; Dorsey *v.* Gassaway, 2 Id. 402; Pattison *v.* Hall, 9 Cowen 747; Robinson et al. *v.* Doolittle et al., 12 Vt. 246. In accordance, also, with this doctrine, a partial payment, unappropriated by either party, must be applied to the interest, rather than to the principal of the debt: Spires *v.* Hamot, 8 W. & S. 17; Commonwealth, for the use, &c., *v.* Vanderslice et al., Admrs., 8 S. & R. 425; Smith *v.* Admx. of Shaw, 2 Wash. C. C. 167; Tracy *v.* Wikoff, 1 Dall. 124; Primrose *v.* Hart, Id. 378; Steele *v.* Taylor, 4 Dana 445; Story *v.* Livingston, 13 Peters 360; The United States *v.* McLemore, 4 How. 286; Dean *v.* Williams, 17 Mass. 417; Commonwealth *v.* Miller's Admrs., 8 S. & R. 452; Gwin *v.* Whitaker, 1 Har. & Johns. 754; Frazier *v.* Hyland, Id. 98; Jones *v.* Ward, 10 Yerg. 161; Guthrie et al. *v.* Wickliffe, 1 Marsh. 584; Hart *v.* Derman, 2 Fla. 445; The Union Bank of Louisiana *v.* Kindrick, 10 Rob. 51; Williams *v.* Houghtailing, 3 Cowen 87; Stoughton *v.* Lynch, 2 Johns. Ch. 209; Lewis's Exr. *v.* Bacon's Exrs., 3 Hen. & Munf. 89; Edes *v.* Goodridge, 4 Mass. 103; Fay *v.* Bradley et al., 1 Pick. 194; Meredith *v.* Banks, 1 Halst. 408; Lightfoot *v.* Price, 4 Hen. & Munf. 431; Bunn *v.* Moore's Exrs., 1 Hayw. 272; Anon., 2 Id. 17; North et al. *v.* Mattell, Id. 151; Chap-

When a person becomes so embarrassed as to be unable to pay all his debts in full, he usually endeavors to enter into a composition with his creditors, prevailing on them to accept so much in the pound, and to allow a given time for payment. In this case a *letter of license* is generally given by the creditors, by which they covenant not to take any proceedings for their debts in the meantime; and this license is frequently embodied in a *deed of inspectorship*, by which certain inspectors are appointed to watch the winding-up of the debtor's affairs on behalf of the creditors. The payment of the composition is sometimes guaranteed by some friends of the debtor as his sureties, and when payment is made, a *release of all demands is given by the creditors. If, [*122] however, the composition should not be punctually paid, the

line *v.* Scott, 4 Har. & McHen. 94; Admrs. of Norwood ads. Manning, 2 N. & McC. 395; Johnson *v.* Johnson, 5 Jones Eq. 157; Hampton *v.* Dean, 4 Texas 455; unless the payment is made before the debt is due, in which case it should be applied to the extinguishment of the principal: Starr *v.* Richmond, 30 Ill. 276; and interest upon interest is to be first paid: Anketel *v.* Converse, 17 Ohio St. 11; and, where a creditor is entitled to the payment of two distinct sums, one of which is in his own right, and the other to be paid to him as a trustee, and a partial payment is made, it must be appropriated rateably: Scott *v.* Ray et al., 18 Pick. 361; Barrett *v.* Lewis, 2 Id. 123; Cole *v.* Trull, 9 Id. 325; Harker et al. *v.* Conrad et al., 12 S. & R. 301; and so, when one holds a debt due to himself, and another debt due to himself and another, the appropriations must be rateably: Colby *v.* Copp, 35 N. H. 434.

Where an appropriation or application has been once made, it cannot be altered without the consent of the parties: Hill et al. *v.* Sutherland's Exrs., 1 Wash. C. C. 128; White *v.* Trumbull, 3 Green 314; Hilton *v.* Burley, 2 N. H. 193; Hopkins *v.* Conrad et al., 2 Rawle 316; Martin *v.* Draher, 5 Watts 544; Bank of North America *v.* Meredith, 2 Wash. C. C. 47; Allen *v.* Calver, 3 Denio 285; The Mayor and Commonalty of Alexandria *v.* Patten et al., 4 Cranch 317; Rundlett *v.* Small, 25 Maine 29; Jackson *v.* Bailey, 12 Ill. 159; Hubbell *v.* Flint, 15 Gray 550.

The most embarrassing question in connection with this subject, is, as to when the appropriation is to be made; some of the cases holding, that it may be made at any time: The Mayor and Commonalty of Alexandria *v.* Patten et al., 4 Cranch 317; Brady's Admr. *v.* Hill et al., 1 Mo. 315; Hilton *v.* Barley, 2 N. H. 193; Starrett *v.* Barber, 20 Maine 457; Lindsey *v.* Stevens, 5 Dana 104; Heilborn *v.* Bissel et al., 1 Bail. Eq. 430; Jones *v.* The United States, 7 How. 681; and others, that the application must be made within a reasonable time: Harker et al. *v.* Conrad et al., 12 S. & R. 301; Briggs *v.* Williams et al., 2 Vt. 283; Fairchild *v.* Holly, 10 Conn. 176; Patterson *v.* Hall, 9 Cowen 747; but there is no doubt, that the application cannot be made after a controversy has arisen between the parties: United States *v.* Kirkpatrick, 9 Wheat. 720; Robinson et al. *v.* Doolittle et al., 12 Vt. 246; Fairchild *v.* Holly, 10 Conn. 176.

In the recent case of Marsh *v.* The Oneida Central Bank, 34 Barb. 298, it was held, that a bank which held a note against a depositor, was not bound to make application of deposits when the note became due, but might wait until judgment was obtained against the depositor. For general rules, as to the rights of creditor and debtor in regard to the application of payments, see the modern case of Gaston *v.* Barney, 11 Ohio St. 506.

creditors will no longer be restrained from proceeding to enforce the full payment of their debts.(g) Such creditors as hold security for their debts should openly stipulate that their securities are not to be affected; and such a stipulation will be sufficient to preserve them.(h) But any secret agreement between the debtor and a creditor, by which he is to have any advantage over the others, in order to induce him to agree to the composition, is evidently a fraud on the other creditors, and as such is absolutely void,(i) and prevents the creditor who is party to it from suing for his share in the composition.(k)[1]

The Bankruptcy Act, 1861,(l) provided, that every deed, instrument or agreement whatsoever, by which a debtor, not being a bankrupt, conveyed, or covenanted or agreed to convey his estate and effects, or the principal part thereof, for the benefit of his creditors, or made any arrangement or agreement with his creditors, or any person on their behalf, for the distribution, inspection, conduct, management or winding-up of his affairs or estate, or the release or discharge of such debtor from his debts or liabilities, should, within twenty-eight days from and after the execution thereof by such debtor, or within such further time as the Court [*123] *in London should allow,(m) be registered in the Court of Bankruptcy; and in default thereof should not be received

(g) Cranley v. Hillary, 2 M. & Selw. 120.

(h) Nichols v. Morris, 3 B. & Ad. 41 (E. C. L. R. vol. 23); Ex parte Glendinning, Buck 517; Lee v. Lockhart, 3 Myl. & Cr. 302; Cullingworth v. Lloyd, 3 Beav. 385, and the cases collected, p. 395; Bush v. Shipman, 14 Sim. 239.

(i) Leicester v. Rose, 4 East 372; Knight v. Hunt, 5 Bing. 432 (E. C. L. R. vol. 15); Pendlebury v. Walker, 4 You. & Col. 424; Alsager v. Spalding, 4 N. C. 407; Higgins v. Pitt, 4 Ex. Rep. 312; Pfleger v. Browne, 28 Beav. 391; Mare v. Warner, 3 Giff. 100; Mare v. Earle, Id. 108.

(k) Howden v. Haigh, 11 Ad. & E. 1033 (E. C. L. R. vol. 39); Ex parte Oliver, 4 De Gex & Smale 354. See Atkinson v. Denby, 7 H. & N. 934.

(l) Stat. 24 & 25 Vict. c. 134, s. 194.

(m) Wishart v. Fowler, 4 B. & S. 674 (E. C. L. R. vol. 116).

[1] In the absence of any agreement made between a debtor and his creditors, it seems to be the prevailing rule in this country, that a debtor may give a preference to one creditor, or one set of creditors, by paying his or their debts in full, to the exclusion of all the rest of the creditors, provided it is done in good faith. It is only where this preference is made within six or four months, according to the circumstances of each case as specified in the 35th section of the Bankrupt Act, previous to bankruptcy or insolvency, or in contemplation thereof, or anticipatory and with a view to a subsequent assignment for the benefit of creditors, that any question of its validity can arise. For a full consideration of the subject, see Hilliard's Treatise on the Law of Bankruptcy and Insolvency, chap. x., pp. 322 to 361 inclusive; and Brightly's Bank. L. 66, 72 and 88.

in evidence. And every such deed, on being so registered as aforesaid, should have a memorandum thereof written on the face of such deed, stating the day and the hour of the day at which the same was brought into the office of the Chief Registrar for registration.(n) But this act has now been repealed.(o)

In some cases an assignment of the debtor's estate and effects was made to trustees for sale and conversion into money, to be divided rateably amongst the creditors.[1] As, however, this is the process adopted

(n) Sect. 196; Stanger v. Miller, Ex. 11 Jur. N. S. 1005.
(o) Stat. 32 & 33 Vict. c. 83.

[1] In the State of Pennsylvania, voluntary assignments for the benefit of creditors, are chiefly controlled by the Acts of the Legislature of 1836, 1843, and 1849: Purd. Dig. (1861), pp. 60, 61. A voluntary assignment for the benefit of creditors, has been defined by the Supreme Court of that State, to be an assignment in trust, of the whole, or a part of a debtor's property, for the benefit of all his creditors equally: Wiener v. Davis, 18 Penn. St. 332; hence a preference created in and by such an assignment, is contrary to law, and therefore void: Wiener v. Davis, 18 Penn. St. 333; Blakey's Ap., 7 Id. 450; Worman v. Wolfersberger's Exrs., 19 Id, 59; Lea's Ap., 9 Id. 504, but it is only the preference which is void, and not the assignment, which will operate for the benefit of all the creditors rateably: Wiener v. Davis, *ante;* Law v. Mills, 18 Penn. St. 185; Bittenbender v. Sunbury & Erie R. R. 40 Id. 269; Act of 17 April, 1843, Purd. Dig. 60. But preferences taken alone, and not in connection with an assignment in trust, or any other disposition of the debtor's property, for the benefit of his creditors generally, are not unlawful if *bonâ fide* made: Worman v. Wolfersberger's Exrs., 19 Penn. St. 59; Morgan's Ap., 20 Id. 152; Siegel v. Chidsey, 28 Id. 281; Burd v. Smith, 4 Dall. 85 n.; Mechanics' Bank v. Gorman, 8 W. & S. 308; Dana v. Bank U. S., 5 Id. 223; and hence it has been held, that a creditor who has a lien upon a particular portion of the assigned estate, out of the sale of which he realizes a portion of his claim, is entitled to his *pro rata* dividend on the whole claim, out of the general assets in the hands of the assignee, to an amount sufficient to pay the balance of his demand in full: Keim's Ap., 27 Penn. St. 43; Morris v. Olwine, 22 Id. 441; and the better opinion seems to be, that a *bonâ fide* confession of judgment, anterior to an assignment, will be good: Hutchinson v. McClure, 1 Am. L. Reg. 170; s. c. 20 Penn. St. 63, overruling Sumner's Ap., 16 Id. 174; Blakey's Ap., 7 Id. 450; though the contrary was held in Towar v. Barrington, Brightly 252, and Worman v. Wolfersberger's Exrs., 19 Penn. St. 63; the authority of which latter decision, however, fell with Sumner's Appeal, on which it stood; but, anterior to the Act of the Legislature of 1843, and under the Act of 1836, preferences were allowed, for that act did not forbid preferences in an assignment. See cases above cited, and Hower v. Geeseamen, 17 S. & R. 251; Thomas v. Jenks, 5 Rawle 224; Henessy v. Western Bank, 6 W. & S. 301. It is not, therefore, surprising, that under the Act of 1836, it should have been held, that when a debtor made an assignment for the benefit of creditors, he could stipulate that it should only operate for the benefit of those creditors who should sign a release: Livingston v. Bell, 3 Watts 198; Henessy v. Western Bank, 6 W. & S. 301; though even under that act, and previous thereto, such a stipulation was not allowed in case of a partial assignment in trust for the benefit of creditors; at least, it was held

by the law in cases of bankruptcy, where it is carried on under judicial sanction, the law considered that such an assignment of the whole estate

that such a stipulation in a partial assignment, would result in a reservation of a portion of the debtor's property, which would render the assignment void: McAllister *v.* Marshall, 6 Binn. 338; McClurg *v.* Lecky, 3 Penna. R. 91; Irwin *v* Kean, 3 Whart. 347; Boker *v.* Crookshank, 8 Leg. Int. 82; Johns *v.* Bolton, 12 Penn. St. 339; In re Walton, 4 Id. 430; Weber *v.* Samuel, 7 Id. 499; but it is perhaps a matter of some astonishment, that such stipulations should have been held valid under the Act of 1843: Lea's Ap., 9 Penn. St. 504; for, as such a stipulation would tend to work inequality amongst the creditors, if they did not all join in executing the release, it would necessarily operate antagonistically to the Act of 1843, which by its enactments requires, that the property should be distributed equally. This decision, however, did not long embarrass the courts, for by the Act of 1849, stipulations in assignments in trust for the benefit of creditors, that they should only operate for the benefit of those creditors who should sign a release, were prohibited, and it was enacted, that any such assignment shall be taken as a preference in favor of such creditors, and be void, and the assignment be held and construed to inure to the benefit of all the creditors, in proportion to their respective demands.

Where there is an assignment in trust for the benefit of creditors generally, and there are both partnership and individual creditors, and partnership and individual property, it seems to be pretty conclusively decided, that the partnership property will be applied to the partnership creditors, and the individual or separate property to the separate creditors: Andress *v.* Miller, 15 Penn. St. 316; Singizer's Ap., 28 Id. 525; Walker *v.* Eyth, 25 Id. 217; and if either fund is insufficient, the balance of the fund not exhausted, is to be paid to those separate or partnership creditors, who have not been paid out of their own fund: Honseal's Ap., 45 Penn. St. 487; Black's Ap., 44 Id. 508; Andress *v.* Miller, 15 Id. 316; it has been held, also, that an assignment of partnership property to pay partnership creditors only, and the surplus to the assignors, is valid: Hubler *v.* Waterman, 33 Penn. St. 415. And see Heckman *v.* Messenger, Leg. Int. Jan. 5, 1866, p. 4, 49 Penn. St. 466, a recent decision of the Supreme Court on this point. But see Bell *v.* Newman, 5 S. & R. 78.

A peculiar instance of the application of partnership assets to partnership creditors, under an assignment in trust, occurred in the case of Baker's Ap., 21 Penn. St. 77. The facts of that case were these. A firm consisted of five brothers. Two of them retired from the firm, disposing of their interest in the partnership estate and effects to the other three, the latter agreeing to pay the debts of the firm, and exonerate and defend the assignors from all obligation to pay any part of the same. After some time, one of the remaining three sold his interest in the partnership property to one of the remaining two partners, said to be without the approbation of his copartner. The two remaining partners, after contracting debts, executed an assignment of their partnership property, by the terms of the assignment it being expressly to pay the creditors of the last firm, composed of the two partners: It was held, that the creditors of the first two firms had no right to claim any portion of the fund last assigned, but that the same was distributable among the creditors of the last firm.

In connection with this subject it may be remarked, that it has been held, that a judgment confessed to a trustee for the benefit of some of the creditors of the debtor, is not an assignment in trust for the benefit of creditors: Guy *v.* McIlree, 28 Penn. St. 92; Breading *v.* Boggs, 20 Id. 37. See also Towar *v.* Barrington, Brightly 253.

That assignments in trust for the bene-

of the debtor was an act of bankruptcy, and as such void, if there were any creditor or creditors who had not concurred in it of sufficient amount to sue out a petition for adjudication of bankruptcy.(*p*) And now the Bankruptcy Act, 1869,(*q*) has expressly made the following act, amongst others, an act of bankruptcy, viz., that the debtor has, in England or elsewhere, made a conveyance or assignment of his property to a trustee or trustees for the benefit of his creditors generally.[1] An exception to this rule was formerly made, if a petition for adjudication of bankruptcy did not issue within three calendar months from the execution of such a deed by any trader, provided the deed were executed by every trustee within fifteen days after the execution thereof by the trader, and that the execution by such trader and by every *such trustee were attested by an attorney or solicitor; and provided that notice were given within one month after the execution thereof by such trader in the London Gazette and two London daily newspapers, if he resided in London or within forty miles of it; or in the London Gazette, one London daily newspaper, and one provincial newspaper published near to such trader's residence, if he did not reside within forty miles of London, and such notice was required to contain the date and execution of the deed, and the name and place of abode respectively of every such trustee and of such attorney or solicitor.(*r*) But every such deed was required to be registered, as we have seen, in the Court of Bankruptcy,(*s*) and to be stamped, in addition to the ordinary stamp duty, with a stamp denoting a duty computed at the rate of five shillings upon every hundred pounds, or fraction of a hundred pounds, of the sworn or certified value of the estate or effects comprised in or to be collected or distributed under such deed or instrument; provided, that the maximum of *ad valorem* duty payable in respect of any such deed or instrument should be two hundred pounds.(*t*) But these enactments are now repealed,(*u*) and no exception is admitted to the rule, that every conveyance of a debtor's property to trustees for his creditors generally is an act of bankruptcy.

[*124]

(*p*) Tappenden *v.* Burgess, 4 East 230; Dutton *v.* Morrison, 17 Ves. 193, 199; Powell *v.* Lloyd, 2 You. & Jerv. 372; Ex parte Philpott, Court of Review, 10 Jur. 717. See *post*, the chapter on Bankruptcy of Traders.

(*q*) Stat. 32 & 33 Vict. c. 71, s. 6, par. (1).

(*r*) Stat. 12 & 13 Vict. c. 106, s. 68, repealing stat. 6 Geo. IV. c. 16, s. 4.

(*s*) Stat. 24 & 25 Vict. c. 134, s. 294, *ante*, p. 122.

(*t*) Sect. 195.

(*u*) Stat. 32 & 33 Vict. c. 83.

fit of creditors are not contrary to the spirit of the Bankrupt Act, see Beck *v.* Parker, 65 Penn. St. 272.

By the Act of the 24th of March, 1818, an assignment in trust for the benefit of creditors, must be recorded within thirty days after execution, in the county where the assignor resides: Purd. Dig. (1861), p. 61.

[1] See *post*, page 135, note 1.

The Bankrupt Law Consolidation Act, 1849, contained provisions by which deeds of arrangement between a trader and his creditors, signed by six-sevenths in number and value of those creditors whose debts amounted to ten pounds and upwards, were binding on all the creditors.(*x*) These provisions were repealed [*125] *by the Bankruptcy Act, 1861,(*y*) which substituted for them other enactments, which applied to all debtors, whether traders or not. These enactments have been themselves repealed by the Bankruptcy Repeal and Insolvent Court Act, 1869;(*z*) but as some knowledge of their provisions will for some time be practically necessary, it may be desirable to state them shortly. Every deed between a debtor and his creditors, relating to his debts or liabilities, and his release therefrom, or the distribution, inspection, management and winding-up of his estate, or any of such matters, was rendered binding on all the creditors of such debtor, provided the following conditions were observed, that is to say: (1.) A majority in number, representing three-fourths in value of the creditors of such debtor, whose debts respectively amounted to ten pounds and upwards, should, before or after the execution thereof by the debtor, have in writing assented to or approved of such deed or instrument. (2.) If a trustee or trustees were appointed by such deed or instrument, such trustee or trustees should have executed the same. (3.) The execution of such deed or instrument by the debtor should have been attested by an attorney or solicitor. (4.) Within twenty-eight days from the execution of such deed or instrument by the debtor, the same should have been produced and left (having been first duly stamped) at the office of the Chief Registrar, for the purpose of being registered. (5.) Together with such deed or instrument there should have been delivered to the Chief Registrar an affidavit by the debtor, or some person able to depose thereto, or a certificate by the trustee or trustees, that a majority in number, representing three-fourths in value of the creditors of the debtor whose debts amounted to ten pounds or upwards, had in writing assented to or approved of such deed or instrument; [*126] *and also stating the amount in value of the property and credits of the debtor comprised in such deed. (6.) Such deed or instrument should, before registration, bear such ordinary and *ad valorem* stamp duties as were by the act provided.(*a*) (7.) Immediately on the execution thereof by the debtor, possession of all the property comprised therein, of which the

(*x*) Stat. 12 & 13 Vict. c. 106, s. 224.

(*y*) Stat. 24 & 25 Vict. c. 134, s. 192.

(*z*) Stat. 32 & 33 Vict. c. 83.

(*a*) Stat. 24 & 25 Vict. c. 134, s. 195. See *ante*, p. 124.

debtor could have given or ordered possession, should have been given to the trustees.(b)

The Bankruptcy Amendment Act, 1868,(c) required statements to be added, containing particulars (1) of the debts and liabilities of the debtor, and (2) of the debtor's property and credits. It also contained other provisions, which it is hardly necessary to state, as this act also has been repealed by the Bankruptcy Repeal and Insolvent Court Act, 1869.(d)

The statutory form of conveyance for the benefit of creditors, provided by the Bankruptcy Act, 1861, contained no release of the debtor by his creditors from their debts, and consequently could not be pleaded by the debtor in bar to an action by a creditor for his debt.(e) If, however, a release by the creditors had been inserted in the deed, or were the necessary effect of its provisions, it was pleadable in bar to an action by a non-assenting creditor.(f) All the creditors of the debtor, and not merely those who executed the deed, ought to have been equally benefited by its provisions;(g) *and the deed must not have contained any unreasonable stipulation, by which the non-assenting creditors might have been prejudiced.(h) [*127] It was unreasonable if the executing creditors were paid down a composition, which the non-assenting creditors had only a covenant to pay;(i) or even if the executing creditors had the benefit of a covenant, of which the non-assenting creditors could not avail themselves.(k) But it was held not unreasonable to empower the trustees of the deed to require persons claiming to be creditors

(b) Sect. 192.

(c) Stat. 31 & 32 Vict. c. 104.

(d) Stat. 32 & 33 Vict. c. 83.

(e) Eyre *v.* Archer, 16 C. B. N. S. 638 (E. C. L. R. vol. 111); Jones *v.* Morris, Q. B. 11 Jur. N. S. 812; Clarke *v.* Williams, Ex. Ch. 13 W. R. 923; 34 L. J. Ex. 189.

(f) Chapman *v.* Atkinson, 4 B. & S. 722 (E. C. L. R. vol. 116); Whitehead *v.* Porter, 5 B. & S. 193 (E. C. L. R. vol. 117); Garrod *v.* Simpson, Ex. 11 Jur. N. S. 227; Wills *v.* Hacon, 5 B. & S. 196 (E. C. L. R. vol. 117); Dewhirst *v.* Jones, 3 H. & C. 60.

(g) Walter *v.* Adcock, 7 H. & N. 541; Ex parte Godden, L. J., 32 L. J. Bank. 37; Dewhirst *v.* Kershaw, 1 H. & C. 726; Ilderton *v.* Castrique, 14 C. B. N. S. 99 (E. C. L. R. vol. 108); Ex parte Cockburn, Re Smith, L. C., 12 W. R. 184, 673; 10 Jur. N. S. 573; Benham *v.* Broadhurst, 3 H. & C. 472; Chesterfield and Midland Silkstone Colliery Company, Limited, *v.* Hawkins, 3 H. & C. 677.

(h) Woods *v.* Foote, 1 H. & C. 841; Inglebach *v.* Nicholls, 14 C. B. N. S. 85 (E. C. L. R. vol. 108); Killby *v.* Wright, 18 C. B. N. S. 272 (E. C. L. R. vol. 114); Nicholson *v.* Potts, Ex. Ch. 12 W. R. 440.

(i) Ex parte Cockburn, Re Smith, *ubi sup.*

(k) Benham *v.* Broadhurst; Chesterfield and Midland Silkstone Colliery Company, Limited, *v.* Hawkins, *ubi sup.* And see Gresty *v.* Gibson, 1 Law Rep. Ex. 112; Reeves *v.* Watts, Q. B. 12 Jur. N. S. 565.

to verify their debts or claims by statutory declaration proved before the commissioners of bankruptcy, or otherwise as the trustees might think fit.(*l*) Nor was it unreasonable to give the trustees a discretion as to the sale and management of the estate, or power to sell to the debtor himself,(*m*) or a discretion as to the amount and manner of payment of dividends, or as to the enforcement of payment of debts. And the value of securities held by creditors might reasonably have been ascertained by valuers, or an umpire appointed in the usual way.(*n*) Again, a covenant in a composition deed not to sue the debtor for a limited [*128] time was not *unreasonable ;(*o*) nor was a power to revoke a letter of license given to the debtor.(*p*) In estimating the requisite majority, secured as well as unsecured creditors were required to be taken into account.(*q*)[1] But this was altered by the Bankruptcy Amendment Act, 1868,(*r*) which required that the amount due to each secured creditor, after deducting the value of his securities on the debtor's property, should alone be reckoned. And the deed of composition was not required to provide for the distribution of the whole of the debtor's estate amongst his creditors(*s*) as was required by the corresponding section of the Act of 1849.(*t*)

The Bankruptcy Act, 1869, now contains the following provisions with respect to composition with creditors :(*u*)—" The creditors of a debtor unable to pay his debts may, without any proceedings in bankruptcy, by an extraordinary resolution, resolve that a composition shall be accepted in satisfaction of the debts due to them from the debtor. An extraordinary resolution of creditors shall be a resolution which has

(*l*) Coles *v.* Turner, Ex. Ch. 1 Law Rep. C. P. 373.

(*m*) Greenberg *v.* Ward, C. P. 12 Jur. N. S. 524; 1 Law Rep. C. P. 585.

(*n*) Coles *v.* Turner, *ubi sup.*

(*o*) Hidson *v.* Barclay, 3 H. & C. 361; Walker *v.* Nevill, 3 H. & C. 403.

(*p*) Walker *v.* Nevill, *ubi sup.*

(*q*) King *v.* Rendall, 14 C. B. N. S. 721 (E. C. L. R. vol. 108); Ex parte Godden, 1 De Gex, J. & S. 260; Turquand *v.* Moss, 17 C. B. N. S. 15 (E. C. L. R. vol. 112).

(*r*) Stat 31 & 32 Vict. c. 104, s. 3.

(*s*) Re Rawlings, L. J., 1 De Gex, J. & S. 225; 9 Jur. N. S. 316; Ex parte Morgan, L. C., 9 Jur. N. S. 559; 1 De Gex, J. & S. 283; Clapham *v.* Atkinson, 4 B. & S. 722 (E. C. L. R. vol. 116).

(*t*) Tetley *v.* Taylor, 1 E. & B. 521 (E. C. L. R. vol. 72); Drew *v.* Collins, 6 Ex. Rep. 670; March *v.* Warwick, 1 H. & N. 158; Macnaught *v.* Russell, 1 Id. 611; Irving *v.* Gray, 3 Id. 34; Bloomer *v.* Darkes, C. B. N. S. 165 (E. C. L. R. vol. 89); Cruger *v.* Dunlap, 7 H. & N. 525.

(*u*) Stat. 32 & 33 Vict. c. 71, s. 126.

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[1] See *ante*, p. 123, note 1.

been passed by a majority in number and three-fourths in value of the creditors of the debtor, assembled at a general meeting to be held in the manner prescribed, of which notice has been *given in the prescribed manner, and has been confirmed by a majority in number [*129] and value of the creditors assembled at a subsequent general meeting, of which notice has been given in the prescribed manner, and held at an interval of not less than seven days nor more than fourteen days from the date of the meeting at which such resolution was first passed. In calculating a majority for the purposes of a composition under this section, creditors whose debts amount to sums not exceeding ten pounds shall be reckoned in the majority in value, but not in the majority in number; and the value of the debts of secured creditors shall, as nearly as circumstances admit, be estimated in the same way, and the same description of creditors shall be entitled to vote at such general meetings, as in bankruptcy. The debtor, unless prevented by sickness or other cause satisfactory to such meetings, shall be present at both the meetings at which the extraordinary resolution is passed, and shall answer any inquiries made of him, and he, or if he is so prevented from being at such meetings some one on his behalf, shall produce to the meetings a statement showing the whole of his assets and debts, and the names and addresses of the creditors to whom such debts respectively are due. The extraordinary resolution, together with the statement of the debtor as to his assets and debts, shall be presented to the registrar, and it shall be his duty to inquire whether such resolution has been passed in manner directed by this section, and if satisfied that it has been so passed he shall forthwith register the resolution and statement of assets and debts, but until such registration has taken place such resolution shall be of no validity; and any creditor of the debtor may inspect such statement at prescribed times, and on payment of such fee, if any, as may be prescribed. The creditors may, by an extraordinary resolution, add to or vary the provisions of any compensation previously *accepted by them, without prejudice to any persons taking interests under [*130] such provisions who do not assent to such addition or variation; and any such extraordinary resolution shall be presented to the registrar in the same manner and with the same consequences as the extraordinary resolution by which the composition was accepted in the first instance. The provisions of a composition accepted by an extraordinary resolution in pursuance of this section shall be binding on all the creditors whose names and addresses, and the amount of the debts due to whom, are shown in the statement of the debtor, produced to the meetings at which the resolution has passed, but shall not affect or prejudice the rights of

any other creditors. Where a debt arises on a bill of exchange or promissory note, if the debtor is ignorant of the holder of any such bill of exchange or promissory note, he shall be required to state the amount of such bill or note, the date on which it falls due, the name of the acceptor or person to whom it is payable, and any other particulars within his knowledge respecting the same, and the insertion of such particulars shall be deemed a sufficient description of the creditor of the debtor in respect of such debt, and any mistake made inadvertently by a debtor in the statement of his debts may be corrected after the prescribed notice has been given, with the consent of a general meeting of his creditors. The provisions of any composition made in pursuance of this section may be enforced by the court on a motion made in a summary manner by any person interested, and any disobedience of the order of the court made on such motion shall be deemed to be a contempt of court. Rules of court may be made in relation to proceedings on the occasion of the acceptance of a composition by an extraordinary resolution of creditors, in the same manner and to the same extent and of the same authority as [*131] in respect of proceedings in *bankruptcy. If it appear to the court on satisfactory evidence that a composition under this section cannot, in consequence of legal difficulties, or for any sufficient cause, proceed without injustice or undue delay to the creditors or to the debtor, the court may adjudge the debtor a bankrupt, and proceedings may be had accordingly."

*CHAPTER IV. [*132]

OF BANKRUPTCY OF TRADERS.[1]

UNDER some circumstances a debtor is discharged by law from his

[1] As to the power of Congress to pass bankrupt laws, see Golden *v.* Prince, 3 Wash. C. C. 313; Mitchell *v.* Great Works Co., 2 Story 648; Campbell, 6 Int. R. Rec. 174; Silverman, 4 B. R. 173. As to how the constitutional requirement of uniformity in such acts is complied with, see Appold, 1 B. R. 178.

"Congress passed an act, April 4th, 1800, establishing a uniform system of bankruptcy throughout the United States. The act was limited to five years, and from thence to the end of the next session of Congress; but the act was repealed within that period, by the act of December 19th, 1803, and the system was not renewed until 1841.

"An effort was made in Congress, in the spring of 1840, to re-establish a uniform system of bankruptcy, and the subject received an able and thorough investigation and discussion, but Congress could not agree on the principles of the system, and the effort failed. The bill which was reported and debated, enabled debtors of every description and class, to take advantage of it at their option, and to be thereby completely discharged from their debts, without the co-operation or assent of any creditor. Some of the members of Congress were opposed to any bankrupt system on the part of the United States, as it would enlarge the powers of the Federal courts to a great extent, and lead to the creation of a crowd of officers and agents to administer it, and probably to much abuse and corruption. They preferred that the administration of bankrupt and insolvent laws, should remain with the state governments. The compulsory process of bankruptcy at the instance of the creditor, was urged by others as essential to the system, and that the provisions should even be extended, so as to include corporations, instituted under state authority, for banking, manufacturing, commercial, insurance, and trading purposes. But this last provision was objected to as most inexpedient, if not absolutely beyond the purview of the Constitution. It was apprehended that such a power would lead to infinite abuse, and become expensive and extremely oppressive, and would tend to break up all the moneyed and business institutions created under state laws, or render the power of control of them most formidable and dangerous. The advocates of the bill contended that bankruptcy was a general term, and meant failure, and was equally applicable to all persons of broken fortunes; that the Constitution was not intended to be bound to the English system of bankruptcy, and that Congress had the same power as the British Parliament, to extend the application of it, and that it might and ought to extend it, to all classes of debtors who had become disabled and overwhelmed in the peculiar and severe calamity of the times; that though the assent of at least a majority of the creditors to the debtor's discharge, was deemed by the New York Board of Trade, to be essential to the stability of credit, the rights of creditors, the claims of justice, and the reputation of the country, it was insisted upon, as a compensation for this omission, that the operation of the act would be useful to creditors, though the debtor should be enabled to obtain the benefit of a discharge without their consent or action,

debt without any actual payment, or without payment or more than a part of it. This occurs in the case of bankruptcy.

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for it would put an end to the pernicious practice of giving preference among creditors, and enable the assets of insolvents to be distributed equally among the creditors.

"The bill was strongly opposed by other members of Congress, on constitutional grounds, reaching to the fundamental principles of the bill. It was contended that the power given to Congress, to establish uniform laws on the subject of bankruptcy, was one incidental to the regulation of commerce, and applicable only to merchants and traders, or persons essentially engaged, in various ways and modes, in trade and commerce. That the term bankruptcy was adopted in the Constitution, as it stood defined and settled in the English law, where it had a clear and definite meaning; that it was universally taken and understood in that sense, contemporaneously with the adoption of the Constitution; and it received that practical construction, and none other, in the bankrupt act of 1800; that the English bankrupt laws discharged the bankrupt from his debts and contracts, and were coercive on the debtor, and put in action at the instance of creditors, and at their instance only; that the proceeding was for the equal benefit of all the creditors, and its justice and policy, as applicable to that class of debtors, was founded on the peculiarly hazardous business of trade and commerce, and the necessity of large credits to sustain an extensive foreign and domestic trade; that there was a marked difference between bankrupt and insolvent laws, in the jurisprudence of England and of America, and which had been recognised by the Supreme Court of the United States; that insolvent laws were left to the cognisance of the individual states, each of which had its own system of insolvent laws, and which the bill before the House would entirely supersede, for it was in fact a general and sweeping insolvent law; and it was apprehended, that its operation on credit, and the popular sense of the legal and moral obligation of contracts, would be disastrous.

"The effort to establish a national bankrupt law, was renewed at the next session of Congress, and was successful. An act of Congress 'To establish a uniform system of bankruptcy throughout the United States,' was passed the 19th of August, 1841. It was declared to apply to all persons whatsoever, residing within the United States, who owed debts, not created in consequence of a defalcation as a public officer, or as executor, administrator, guardian, or trustee, or while acting in any other fiduciary character, and who should by petition on oath, setting forth a list of their creditors, and an inventory of their property, apply to the District Court for the benefit of the act, and declare themselves unable to meet their debts and engagements. The act was further declared to apply to all persons being merchants, or using the trade of merchandise, and all retailers of merchandise, and all bankers, factors, brokers, underwriters, or marine insurers, owing debts to the amount of two thousand dollars; who should be liable to become bankrupts, upon petition of one or more of their creditors to the amount of five hundred dollars; provided they had absconded, or fraudulently procured themselves or their property, to be attached or taken in execution, or had fraudulently removed, or concealed, or assigned, or sold their property. The bankrupt when duly discharged, was declared to be free from all his debts. The first provision is a sweeping insolvent law, and applies to all debtors, and upon their own voluntary application; the second is confined to merchants and traders, and the act is put in operation only at the instance of the creditors. The numerous details of the statute, and the many questions which were raised, discussed, and decided, in the District and Circuit Courts of the United

The whole of the law of bankruptcy now depends on the Bankruptcy

States, in the execution of the act, cannot be noticed in the limited space allowed in this note, nor would they be any longer interesting, since the entire statute was repealed by Congress, on the 3d of March, 1843. The provision in the bankrupt act, which rendered it a general insolvent act, and was the one almost exclusively in operation, gave occasion to serious doubts, whether it was within the true construction and purview of the Constitution, and it was that branch of the statute, that brought the system, and I think justly, into general discredit and condemnation, and led to the repeal of the law. In the cases of Kunzler *v.* Cohans, and of Sackett *v.* Andross, 5 Hill (N. Y.) 317, 327, the constitutionality and construction of the bankrupt act of Congress of 1841, was largely discussed, and it was held that the *voluntary*, as well as the other branch of the act, was constitutional, and applied as well to debts created *before*, as after its passage. Mr. Justice Bronson, in a very elaborate opinion, dissented from both of these propositions. And Judge Wells, of the United States District Court of Missouri, in the case of Edward Kleen, 2 N. Y. Legal Obs. 184, after a very full consideration of the subject, also decided that the provision in the act of Congress of 1841, for the discharge of a *voluutary* debtor from his debts and future acquisitions, without payment or assent of his creditors, was unconstitutional."

The foregoing note, taken from Kent's Commentaries, &c., vol. 2, p. 391, n. a, gives a general view of the provisions contained in the repealed bankrupt law, and its scope; but for a full consideration thereof, see "Owen on Bankruptcy;" "The Bankrupt Law of the United States, with a Commentary containing a full explanation of the Law of Bankruptcy," published in 1841, in Philadelphia, and two tracts published in New York, in the year 1842, one by J. B. Staples, and entitled, "The General Bankrupt Law," &c., and the other by Geo. A. Bicknell, Jr., and entitled, "A Commentary on the Bankrupt Law of 1841, showing its operation and effect."

The United States bankrupt act of 1841, was held to be constitutional. See Klein, 1 How. 277.

Prior to the publication of the last American edition of this work, a renewed attempt was made to procure the passage of a general bankrupt act, embodying such provisions, as to create a uniform system of bankruptcy throughout the United States. This effort was made during the session of Congress of 1861–1862.

The proposed act was framed, upon a careful examination and comparison of the provisions of the English Bankrupt Act, which went into operation in October, 1861, the existing insolvent laws of the state of Massachusetts, the bankrupt acts of the United States, of 1800 and 1841, the insolvent laws of the state of New York, and other kindred statutes. It was thought that it combined all the most salutary provisions of these several statutes, so far as they were capable of application, to a uniform system of bankruptcy in the United States. It provided for the full and unconditional discharge of the debtor (except as to certain fiduciary debts), upon the surrender of his entire estate for distribution, without preference, among all his creditors, and upon his compliance with the requirements of the act. It provided for the election of the assignee in bankruptcy by the creditors, and gave them the supervision of the management and winding up of the estate, under the direction of the court. It also permitted, by provisions analogous to the French code of bankruptcy, as well as of the English law, the winding up of bankrupts' estates, at the option of three-fourths in value of the creditors, by trustees, under the inspection of creditors, in lieu of the more formal proceedings in bankruptcy. The various details of the act were designed to give uniformity and efficiency to the system, and to meet the various exigencies of its administration, in the extended territory to which it was to apply.

Act, 1869,(a)[2] to make way for which all the previous bankruptcy acts have been repealed.(b) The former acts were the Bankruptcy Act,

(a) Stat. 32 & 33 Vict. c. 71.

(b) By stat. 32 & 33 Vict. c. 83.

The project, however, failed to meet with the requisite support, and the proposed act did not become a law.

Repeated efforts have been made at subsequent sessions of Congress, to procure the passage of a bankrupt bill, but these also were unsuccessful.

A bill was also reported at the session of Congress (1865–1866), containing the essential features of the bill above referred to, and providing for voluntary bankruptcy upon the petition of the debtor himself, and involuntary bankruptcy, upon the petition of one or more of the creditors of the bankrupt, under the regulations therein prescribed; but limiting the discharge of a debtor to his first bankruptcy, unless under a second bankruptcy, his estate is sufficient to pay seventy per cent. of the debts proved against it, or he obtains the consent of three-fourths in value of his creditors, or can prove payment of all debts owing by him at the time of his previous discharge.

For the law of Bankruptcy, see Hilliard on Bankruptcy and Insolvency, whose Treatise on these subjects, embodies the principles of both English and American decisions.

And as to the act of 1867; The Bankrupt Law of the United States, 1867, with notes and decisions by Edwin James; Brightly's Annotated Bankrupt Law; Bump's Law and Practice of Bankruptcy; Gazzam's Treatise on the Bankrupt Law; American and English Bankruptcy Digest by Gazzam; Rice's Manual of the Bankrupt Law; Avery & Hobbes' Treatise.

[2] The provisions of the bills reported to Congress at the sessions 1861–62, 1865–66, referred to in the previous note, comprise the most prominent features of the existing bankrupt law of the United States, the Act of March 2, 1867 (14 Statutes at Large 517), of which with the amendments thereto, the following is a brief synopsis:

a. Jurisdiction in matters of bankruptcy is conferred thereby principally, upon the several District Courts of the United States, the Supreme Court of the District of Columbia and the Supreme Courts of the several territories; the Circuit Courts being invested with a general superintendence of all cases and questions arising under the act, and with concurrent jurisdiction of suits brought by or against assignees in bankruptcy, and jurisdiction on appeal in equity, and in error at law. For the assistance of the judge of the District Court, he is authorized to appoint in each congressional district, upon the nomination and recommendation of the chief justice of the Supreme Court of the United States, one or more registers in bankruptcy, to whom is confided (with the exception of contested matters, the preliminary stages of the proceedings, and the granting of discharges), the details of the administration of the act. A register is not empowered to commit for contempt, and in all matters where an issue of law is raised and contested by any party to the proceedings, it is his duty to cause the same to be stated in writing by the opposing parties, and to adjourn it into Court, for decision by the judge. (In practice, however, the register provisionally decides questions arising before him, to which exceptions may be taken by parties interested.) The opinion of the judge may be taken upon any point or matter arising in the proceedings, which shall be certified by the register. The justices of the Supreme Court are empowered to frame general orders for regulating the practice and procedure of the District Courts.

The act provides for proceedings in bankruptcy upon the petition of a debtor, viz: voluntary bankruptcy, and upon the petition of creditors, viz: involuntary bankruptcy.

Any person residing within the jurisdiction of the United States, owing debts

1861,(c) under which persons not in trade were for the first time liable to become bankrupt, and the Bankruptcy Act of 1849,(d) by which all

(c) Stat. 24 & 25 Vict. c. 134.

(d) Stat. 12 & 13 Vict. c. 106.

provable under the act, exceeding the amount of three hundred dollars, may apply by petition addressed to the judge of the district, in which he has resided or carried on business for the six months next immediately preceding the time of filing such petition, or for the longest period during such six months, setting forth his residence, his inability to pay all his debts in full, his willingness to surrender all his estate for the benefit of his creditors, and his desire to obtain the benefit of the act, together with schedules of his creditors and assets (and in case he be a citizen of the United States shall take and subscribe an oath of allegiance thereto), shall thereupon be adjudged a bankrupt, the filing of such petition being declared to be an act of bankruptcy.

After such a petition is filed if there be no opposing party, it is generally referred to one of the registers of the Court, by whom a warrant is issued, directed to the marshal of the district as messenger, to publish and serve notice on the creditors of the bankrupt, of a meeting of the creditors to prove their debts, and choose one or more assignees of the bankrupt's estate.

b. This meeting is presided over by the register, the choice of assignee being required to be made by the greater part in value and in number of the creditors, who have proved their debts. If no choice is made by the creditors, the judge, or if there be no opposing interest, the register shall appoint the assignee, all elections or appointments being subject to the approval of the judge. An assignment is then made by the judge, or most generally by the register, to the assignee, of all the bankrupt's estate, the assignment relating back to the commencement of the proceedings, and dissolving any attachment made within four months next preceding the commencement of said proceedings. Certain exemptions (see *post*, page 149, note 1) are allowed to the bankrupt out of his estate, but with such exception, all the property of the bankrupt vests in the assignee, who is required to give notice of his appointment by publication, to collect the estate, convert it into money by sales thereof, to be made on such terms as he may think most for the interest of the creditors, the general orders before referred to, specifying the time of notice, &c., the Court making special orders in regard thereto, as the nature of particular cases requires.

c. All debts due and payable from the bankrupt at the time of the adjudication of bankruptcy (which it has been decided relates to the time of the filing of the petition), and all debts then existing, but not payable until a future day, a rebate of interest being made when no interest is payable by the terms of the contract, may be proved against the bankrupt's estate. This includes claims for goods wrongfully taken and converted, liabilities as endorser, bail, surety, guarantor, contingent liabilities, claims of sureties for the bankrupt and unliquidated damages, &c. In cases of mutual debts or mutual credits, set off is allowed; but not of a claim not provable, or of a claim purchased by or transferred to any debtor of the bankrupt after the filing of the petition.

d. A creditor having a mortgage or pledge of real or personal property, or lien thereon, is admitted as a creditor only for the balance of the debt, after deducting the value of such property, to be ascertained by agreement with the assignee, or by a sale thereof, to be made as the Court shall direct; but the creditor may release or convey his claim upon such property to the assignee, and then be admitted to prove his whole debt. If the value of such property exceeds the sum, for which it is security, the assignee may release to the

the previous acts were repealed. Of these the most important was the statute of 6 Geo. IV. c. 16, "An Act to amend the Laws relating to

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creditor the right of redemption on receiving such excess, or he may sell the property, subject to the claim of the creditor thereon. If the property is not so sold, or released and delivered up, the creditor is not allowed to prove any part of his debt. Probate of a debt is a waiver of action against the bankrupt, and unsatisfied judgments are deemed to be discharged and surrendered thereby, and suits at law by creditors, whose debts are provable, may be stayed.

Probate of debts may be made by deposition taken before a register in bankruptcy, or commissioner of the Circuit Court, setting forth the particulars of the claim, consideration, &c., as specified in the act and general orders. If the creditor is in a foreign country, such deposition may be made before any minister, consul, or vice-consul of the United States. If the proof is satisfactory to the officer before whom it may be made, it is then to be sent to the assignee, whose duty it is to examine it and compare it with the books of the bankrupt.

If before the election of assignee, the judge or register entertain doubts of the validity of any claim, and that it ought to be investigated by the assignee, he may postpone the proof of the claim until the assignee is chosen.

e. Examination of the bankrupt upon matters relating to the estate may be made at any time by the Court, with or without any application; and the attendance of any other person as a witness may also be required. The wife of the bankrupt may be examined as a witness, and if she do not attend as directed, the bankrupt shall not be entitled to a discharge, unless he shall prove to the satisfaction of the Court that he was unable to procure her attendance. A bankrupt is not liable to arrest during the pendency of the bankruptcy proceedings, in any civil action, unless it is founded on some claim, from which the discharge would not release him. (Examination of the bankrupt and witnesses is generally made before the register, to whom the case is referred. As to examination of the bankrupt and witnesses generally, and what questions may be asked them, see Patterson, 6 Int. Rev. Rec. 166; Koch, 1 B. R. 153; Tanner, Id. 59; Judson, Id. 82; Leachman, Id. 91; Rosenfield, Id. 60; Bonesteel, 2 B. R. 106; Van Tuyl, 1 B. R. 193; Levy, 6 Int. Rev. Rec. 134, 163; Lyon, Id. 135; Carson, 2 B. R. 41; Craig, 3 Id. 26; Bellis, Id. 49; O'Donohoe, Id. 59; Holt, Jr., Id. 58; Lord, Id. 58; McBrien, Id. 90; Lewis, Id. 153; Fay, Id. 163; Bromley, Id. 169; Woodward, Id. 177; Solis, 4 B. R. 18; Richards, Id. 25; Craig, Id. 50; Clark, Id. 70; Lathrop, Id. 93; Vetterlein, Id. 194; Frizelle, 5 B. R. 119. As to examination of bankrupt's wife, see Gilbert, 3 B. R. 37; Bellis, Id. 65; Woolford, Id. 113; Vogel, 5 B. R. 393.)

f. At the expiration of three months from the date of the adjudication, or as much earlier as the Court may direct, the Court, upon the request of the assignee, shall call a general meeting of the creditors, at which the assignee shall make a report of his management of his trust, and exhibit an account of all his receipts and expenditures. The majority in value of the creditors present determine whether any and what part of the net proceeds of the estate shall be divided among the creditors; but unless one-half in value of them shall attend, it is the duty of the assignee so to determine. If a dividend is declared, notice thereof is required to be sent to each creditor, who is to be paid by the assignee, as the Court may direct. At the expiration of the next three months, or earlier if practicable, a third meeting of creditors may be called, and another dividend declared. Further meetings may be called upon the order of the Court.

(Besides the adjustment and auditing of the account of the assignee, the allowance or disallowance of exceptions thereto, the definitive allowance of proof of debts, which is perhaps to be considered prior to

Bankrupts," which had been amended and altered by various others,(*e*) the provisions of which, with some alterations, were consolidated in the Act of 1849.

(*e*) 1 & 2 Will. IV. c. 56; 3 & 4 Will. 4, c. 47; 1 & 2 Vict. c. 110; 2 Vict. c. 11; 2 & 3 Vict, c. 29; 5 & 6 Vict. c. 122; 7 & 8 Vict. c. 96; 8 & 9 Vict. c. 48; 10 & 11 Vict. c. 102; 11 & 12 Vict. c. 86.

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this time as only provisionally determined, a variety of other business connected with the settlement of the estate may be appropriately transacted. See Sherwood, 1 B. R. 74.)

Dividends already declared are not disturbed by debts subsequently proved, but creditors proving such debts, are entitled to a dividend equal to those already received by any other creditors, before any further payment is made to the latter. All creditors, whose claims are duly proved, are entitled to share in the bankrupt's estate *pro rata;* but in the order for a dividend, the fees, costs and expenses of bankruptcy proceedings, debts due to the United States, and all taxes and assessments under the laws thereof; debts due to the state in which the proceedings in bankruptcy are pending, and all taxes and assessments under the laws of such state; wages due to any operative, clerk or house servant to an amount not exceeding fifty dollars, for labor performed within six months next preceding the adjudication, and all debts due to any persons, who, by the laws of the United States, are or may be entitled to a priority or preference if the Bankrupt Act had not been passed, are to be entitled to priority or preference, and to be first paid in full in the order stated.

g. At any time after the expiration of six months from the adjudication of bankruptcy, or if no debts have been proved against the bankrupt, or if no assets have come to the hands of the assignee, at any time after the expiration of sixty days, and within one year from the adjudication of bankruptcy, the bankrupt may apply to the Court for a discharge. The following are grounds of refusal of discharge: wilful false swearing by the bankrupt in the affidavit annexed to the petition, schedules, or inventory, or in any examination in the course of the proceedings, in relation to any material fact; concealment of any part of his estate, or any books or writings relating thereto; fraud or negligence in the care, custody, or delivery to the assignee, of property belonging to the bankrupt at the time of the presentation of the petition and inventory (excepting exempted property); causing, permitting, or suffering any loss, waste or destruction thereof; procuring his lands, goods, money or chattels to be attached, sequestered or seized on execution within four months before the commencement of proceedings; destroying, mutilating, altering or falsifying since the passage of the act, any of his books, documents, papers, writings or securities, or being privy to the making of any false or fraudulent entry, in any book of account or other document, with intent to defraud his creditors; removing or causing to be removed, any part of his property from the district, with intent to defraud his creditors; giving any fraudulent preference contrary to the provisions of the act, or making any fraudulent payment, gift, transfer, conveyance, or assignment of any part of his property; or the loss of any part thereof in gaming; or the admitting a false and fictitious debt against his estate, or if having knowledge that any person has proved such false or fictitious debt, the omission to disclose the same to his assignee within one month after such knowledge; or if a merchant, or tradesman, the failure subsequently to the passage of the act to keep proper books of account; procuring directly or indirectly the assent of any creditor to the discharge, or influencing the action of any creditor at any stage of the proceedings, by any pecuniary consideration or obligation; the making, in contemplation of becoming bankrupt,

Traders were defined by the Act of 1849 to be, all alum makers, apothecaries, auctioneers, bankers, bleachers, brokers, brickmakers,

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any pledge, payment, transfer, assignment or conveyance of any part of his property, directly or indirectly, absolutely or conditionally, for the purpose of preferring any creditor or person having a claim against him, or who is or may be under liability for him, or for the purpose of preventing the property from coming into the hands of the assignee, or of being distributed under the act in satisfaction of his debts; conviction of any misdemeanor under the act, or being guilty of any fraud whatever contrary to the true intent of the act.

Before any discharge is granted, the bankrupt is required to take and subscribe an oath, to the effect that he has not done, suffered or been privy to any act, matter or thing specified in the act, as a ground for withholding such discharge, or as invalidating it if granted.

A bankrupt, who has been discharged, becoming a bankrupt a second time on his own application, is not again entitled to a discharge, if his estate is insufficient to pay seventy per centum of the debts proved against it, unless the assent in writing of three-fourths in value of the creditors, whose claims have been proved, is filed at or before the time of application for a discharge; but this provision does not apply to a bankrupt, who has paid all debts owing by him at the time of any previous bankruptcy, or who has been voluntarily released therefrom by his creditors.

Any question of fact raised by specifications in writing of grounds of objection to the bankrupt's discharge, may be ordered by the Court to be tried at a stated session of the District Court.

No debt created by fraud or embezzlement of the bankrupt, or by his defalcation as a public officer, or while acting in any fiduciary capacity, is discharged, but such debt may be proved, and the dividend thereon shall be a payment on account thereof.

The discharge of the bankrupt from any debt, does not discharge or affect any person liable for the same debt, with him as partner, joint contractor, endorser, surety or otherwise.

The original Act of March 2, 1867, as amended by that of July 27, 1868, provided that no discharge should be granted to a debtor, in proceedings commenced subsequently to January 1, 1869, whose assets should not be equal to fifty per centum of the claims proved against his estate, upon which he was liable as principal debtor, unless the assent in writing of a majority in number and value of his creditors, to whom he had become liable as principal debtor, and who had proved their claims, was obtained to such discharge, but by an amendment of July 14, 1870, the second clause (the clause just referred to) of the 33d section of the provisions of the original act and amendment thereof of July 27, 1868, were made inapplicable to all debts contracted prior to January 1st, 1869, the effect of which is to make the latter class of debts dischargeable, whether or not the assets be equal to fifty *per centum* of the claims proved.

A discharge duly granted releases (with the exceptions before stated) the bankrupt from all debts, claims, liabilities and demands, which have been or might have been proved against his estate, and is pleadable as a complete bar to any suit brought on such debts, by a simple averment that on the day of its date such discharge was granted, setting the same forth *verbatim;* and the certificate thereof is conclusive evidence in favor of the bankrupt, of the fact and regularity of the discharge. Any creditor, however, whose debt is proved or provable, may, on the ground that the discharge was fraudulently obtained, at any time within two years after the date thereof, apply to the Court which granted it, to set aside and annul the same. The Court shall thereupon cause reasonable notice to be given to the bankrupt of the application, and order him to appear and answer the same; and if it is found that the fraudulent acts

builders, calenderers, carpenters, curriers, cattle or sheep salesmen, coach proprietors, cow keepers, dyers, fullers, keepers of inns, taverns,

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or any of them so set forth by said creditor are proved, and that the creditor had no knowledge of the same until after the granting of the discharge, the discharge of said bankrupt shall be set aside ; but if the acts alleged are not proved, or are found to have been known to the creditor before the granting of the discharge, judgment shall be rendered in favor of the bankrupt, and the validity of his discharge will not be affected.

h. If a person, being insolvent, or in contemplation of insolvency, within four months before the filing of a petition by or against him, with a view to give a preference to any creditor or person having a claim against him, or who is under any liability for him, procures any part of his property to be attached, sequestered or seized in execution, or makes any payment, pledge, assignment, transfer or conveyance of any part of his property, directly or indirectly, absolutely or conditionally, the person receiving such payment, pledge, assignment, transfer or conveyance, or to be benefited thereby, or by such attachment, having reasonable cause to believe such person is insolvent, and that such attachment, payment, pledge, assignment or conveyance is made in fraud of the provisions of the act, the same shall be void, and the assignee may recover the property or the value of it from the person so receiving it, or so to be benefited; and if any person, being insolvent, or in contemplation of insolvency or bankruptcy, within six months before the filing of the petition by or against him, makes any payment, sale, assignment, transfer, conveyance or other disposition of any part of his property to any person, who then has reasonable cause to believe him to be insolvent, or to be acting in contemplation of insolvency, and that such payment, sale, assignment, transfer or other conveyance is made with the view to prevent his property from coming to his assignee in bankruptcy, or to prevent the same from being distributed under the act, or to defeat the object of, or in any way impair, hinder, impede or delay the operation and effect of, or to evade any of the provisions of the act, the sale, assignment, transfer or conveyance shall be void, and the assignee may recover the property or the value thereof as assets of the bankrupt; and if such sale, transfer or conveyance, is not made in the usual and ordinary course of business of the debtor, the fact shall be *primâ facie* evidence of fraud.

Contracts for withdrawal of opposition to the bankrupt's discharge are rendered void, and the penalty for entering into such a contract by any creditor, is a forfeiture of all share in the estate, and double the value of the money, goods, chattels or securities so obtained, to be recovered by the assignee for the benefit of the estate.

i. Partnerships may be adjudged bankrupt on the petition of all the partners, or any one of them, as well as upon a creditor's petition, the proceedings being the same as in individual bankruptcies, except that the joint stock or property must be kept separate by the assignee (who is to be chosen by the partnership creditors,) from the separate estate of each partner; the joint estate being first applied to the payment of the partnership debts, and the separate estates, first to the payment of the respective separate creditors; and if there be any surplus of joint estate, it shall be added, according to the respective interest of the partners, to their respective separate estates, and any surplus of separate estate to the joint estate, the discharge to be granted to each partner the same as if the proceedings had been against him alone. If copartners reside in different districts, the Court in which the petition is first filed retains exclusive jurisdiction over the case.

j. The provisions of the act also apply to all moneyed, business or commercial corporations and joint stock companies,

hotels or coffee houses, lime burners, livery stable keepers, market [*133] *gardeners, millers, packers, printers, shipowners, shipwrights, victuallers, warehousemen, wharfingers, scriveners receiving other

upon the petition of any officer of such corporation, duly authorized by vote of the majority of the corporators, at any legal meeting called for the purpose, or upon the petition of a creditor, and the like proceedings may be had as in the bankruptcy of natural persons, but no allowance or discharge shall be granted to such corporations, or any officer or member thereof.

k. The act then proceeds to set forth the following acts of bankruptcy, for the commission of which, any person residing and owing debts as before set forth, (in regard to voluntary applications,) may, upon the petition of one or more of his creditors, the aggregate of whose debts provable under the act amounts to at least two hundred and fifty dollars, provided such petition is brought within six months after the act of bankruptcy shall have been committed, be declared bankrupt, viz:

Departing, after the passage of the act, from the state, district or territory, of which he is an inhabitant with intent to defraud his creditors; or when absent with such intent, remaining absent, and concealing himself to avoid legal process in any action for the recovery of a debt or demand provable under the act; or concealing or removing of any of his property, to avoid its being attached, taken or sequestered on legal process; or making any assignment, gift, sale, conveyance or transfer of his estate, property, rights or credits, either within the United States or elsewhere, with intent to delay, defraud, or hinder his creditors; or the being arrested and held in custody, under or by virtue of mesne process, or execution, issued out of any court of any state, district or territory, within which such debtor resides, or has property, founded upon a demand in its nature provable against a bankrupt's estate under the act, and for a sum exceeding one hundred dollars, and the remaining in force of such process, without being discharged by payment or in any other manner provided by the law of such state, district, or territory applicable thereto for a period of seven days; or the being actually imprisoned for more than seven days in a civil action founded on contract, for the sum of one hundred dollars or upwards; or when being bankrupt or insolvent, or in contemplation of bankruptcy or insolvency, the making of any payment, gift, grant, sale, conveyance or transfer of money or other property, estate, rights, or credits or the giving of any warrant to confess judgment; or the procuring or suffering of his property to be taken on legal process, with intent to give a preference to one or more of his creditors, or to any person or persons, who are or may be liable for him as endorsers, bail, sureties or otherwise, or with the intent by such disposition of his property to defeat or delay the operation of the act; or (by amendment of July 14, 1870) if a banker, broker, merchant, trader, manufacturer or miner, the fraudulent stoppage of payment, or the stoppage or suspension and the nonresumption of payment of his commercial paper within a period of fourteen days.

(As to what is commercial paper in this connection, see Shea, 3 B. R. 46; Lowenstein, 2 Id. 99; Hollis, 3 Id. 82; Innes *v.* Carpenter, 4 Id. 139. As to suspension of payment thereof, see Thompson, 3 B. R. 45; Brown, 4 Id. 188; Massachusetts Brick Co., 5 Id. 408.)

Upon the filing of a petition as aforesaid, the court directs an order to show cause, to be served on the debtor, why the prayer of the petition should not be granted, at a time to be specified in the order, not less than five days from the service thereof. The court may also at this stage of the proceedings by injunction restrain the debtor, or any other person, from making any transfer or disposition of any part of the debtor's property, and if there is probable cause for believing that the

men's moneys or estates into their trust or custody, persons insuring against perils of the sea, and all persons using the trade of merchandise by way of bargaining, exchange, bartering, commission, consignment, or otherwise in gross or by retail, and all persons who either for themselves, or as agents or factors for others, seek their living by buying or selling, or by buying and letting for hire, or by the workmanship of goods or commodities.[1] But no farmer, grazier, common laborer, or workman for hire, receiver-general of the taxes, or member of or subscriber to any incorporated commercial or trading companies established by charter or act of parliament, was to be deemed as such a trader liable to become bankrupt.(*f*) And this enumeration has been repeated in the Bankruptcy Act, 1869, with the addition of sharebrokers, stockbrokers and stockjobbers.(*g*) An attorney or solicitor, as such, is not a trader within the bankrupt law; but if he is in the habit of receiving his clients' money into his own hands and investing it for them, and charging a compensation for so doing, in addition to his charges for other pro-

(*f*) Stat. 12 & 13 Vict. c. 106, s. 66. (*g*) Stat. 32 & 33 Vict. c. 71, Schedule 1.

debtor is about to leave the district, or remove or cause his goods to be removed, may issue a warrant for arrest of the bankrupt, and provisional seizure of his estate. If proper service of the order to show cause has been made, as may have been required thereby, the court shall proceed summarily to hear the allegations of the petitioner and debtor, and if the debtor demand it in writing, may order a trial by jury to ascertain the fact of the alleged bankruptcy. If the facts set forth in the petition are found not to be true, the proceedings will be dismissed; if proved, or in default of appearance by the debtor, the court will adjudge him to be a bankrupt.

(The case is then generally referred to a register in bankruptcy, and the proceedings are the same as in a case of voluntary bankruptcy, the bankrupt being required to furnish schedules in the same manner as if he had proceeded voluntarily).

l. The act also provides for the settlement of the estate by trustees, if three-fourths in value of the creditors, whose claims have been proved, shall so resolve at the first meeting, or at any meeting specially called for that purpose—the creditors nominating the trustees, who are to act under the direction of a committee of the creditors. Such an arrangement is entirely subject to the approval of the court. If approved, the trustees become vested with the rights and powers of assignees, the proceedings being still considered proceedings in bankruptcy, the bankrupt being entitled to apply for his discharge in the same manner as if no such resolution had been passed.

The act then proceeds to set forth certain misdemeanors in relation to bankruptcy (as to which see U. S. *v.* Prescott, 4 B. R. 29; U. S. *v.* Geary, Id. 175), and prescribes the fees and costs in the proceedings.

[1] The bankrupt act of the United States applies, as it will have been seen, to all debtors without regard to the fact of their being traders or not, but the term trader is used therein in certain connections (see *ante* page 132, note 2 *g*, *k*), and has been held to mean any person, who upon the principles of commercial law may be included within that term: Cowles, 1 B. R. 42. See also Rogers, 3 Id. 139.

fessional business, he will be liable to become bankrupt as a scrivener receiving other men's moneys into his trust.(*h*) An alien or denizen is within the bankrupt law;[1] and so is a married woman carrying on trade for her separate use by the custom of London,(*i*)[2] or whilst her husband is undergoing sentence of transportation.(*k*) But an infant under the age of twenty-one years cannot be a bankrupt, because by the law of [*134] England he cannot be *made liable on contracts entered into by him in the course of trade.(*l*)

A person within the bankrupt laws becomes bankrupt by committing an *act of bankruptcy*. The following acts, if done with intent to defeat or delay the creditors of a trader, were acts of bankruptcy within the Act of 1849, namely, if any such trader should depart this realm, or being out of this realm should remain abroad, or depart from his dwelling-house, or otherwise absent himself, or begin to keep his house, or suffer himself to be arrested or taken in execution for any debt not due, or yield himself to prison, or suffer himself to be outlawed, or procure himself to be arrested or taken in execution, or his goods, moneys or chattels to be attached, sequestered or taken in execution,[3] or make or cause

(*h*) Malkin *v.* Adams, 2 Rose 28; Ex parte Bath, Mont. 82, 84, where the cases are collected. See also Wilkinson *v.* Candlish, 5 Ex. Rep. 91, 97; Ex parte Dufaur, 2 De Gex, M. & G. 246.

(*i*) Ex parte Carrington, 1 Atk. 206.

(*k*) Ex parte Franks, 7 Bing. 762 (E. C. L. R. vol. 20); 1 M. & S. 1.

(*l*) Belton *v.* Hodges, 9 Bing. 365, 370 (E. C. L. R. vol. 23).

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1 Goodfellow, 3 B. R. 114.

2 In the United States this would depend on her ability to make contracts, which is determinable only by the laws of the respective states. See Howland, 2 B. R. 114; Russell *v.* Russell, 3 Id. 39; Graham *v.* Stark, 3 Id. 92; Slichter, 2 Id. 107.

3 See *ante*, page 132, note 2 *k*.

When a firm is insolvent, it is an act of bankruptcy for a member thereof to suffer its property to be taken on legal process, with intent to give a preference to a creditor: Black, 1 B. R. 81. See also Kohlsaat *v.* Hoguet, 5 B. R. 159; Haskell *v.* Ingalls, Id. 205; Wilson *v.* City Bank of St. Paul, Id. 270. Confession of judgment by an insolvent, if the intent be to give a preference, is an act of bankruptcy without regard to any question of fraud: Sutherland, 1 B. R. 140; Fitch, 2 Id. 164. But in deciding whether the giving of a warrant to confess judgment is an act of bankruptcy, the character of the debtor's business may be taken into consideration: Leeds, 1 B. R. 138. An insolvent debtor commits an act of bankruptcy, by confessing a judgment and allowing his property to be taken in execution issued thereon, with intent to give a preference: Craft, 1 B. R. 89. See also Vogle *v.* Lathrop, 4 Id. 146; Hood *v.* Karper, 28 Leg. Int. 340; s. c. 5 B. R. 358. But it has been held that, suffering a sale to take place from inability to resist, is not an act of bankruptcy, though the effect be to give a preference: Rankin *v.* F. A. & G. C. Railroad Co., 1 B. R. 196; Wright *v.* Filley, 4 Id. 197. But the weight of authority does not seem to sustain these last mentioned cases, for it has been held that mere sufferance of property to be

to be made, either within this realm or elsewhere, any fraudulent grant or conveyance of any of his lands, tenements, goods or chattels, or make or cause to be made any fraudulent surrender of any of his copyhold lands or tenements, or make or cause to be made any fraudulent gift, delivery or transfer of any of his goods or chattels.(*m*) It was also an act of bankruptcy for a trader to lie in prison for debt for fourteen days, or, having been committed or detained for debt, to escape out of prison or custody.[1] But the Bankruptcy Act, 1861, provided that no debtor should be adjudged bankrupt on the ground of having lain in prison as aforesaid, unless, having been summoned, he should not offer such security for the debt in respect of which he was imprisoned or detained as the commissioner or registrar, whose duty it would otherwise be to *adjudicate, should deem reasonably sufficient.(*n*) The act for the abolition of imprisonment for debt(*o*) has now rendered this provision unnecessary. And the Bankruptcy Act, 1869,(*p*) has summed up the above-mentioned acts of bankruptcy in the following terms :— [*135]

(*m*) Stat. 12 & 13 Vict. c. 106, s. 67 ; Ex parte Bland, 6 De Gex, M. & G. 757 ; Johnson *v.* Fesenmeyer, 25 Beav. 88 ; 3 De Gex & Jones 13 ; Pennell *v.* Reynolds, 11 C. B. N. S. 709 (E. C. L. R. vol. 104) ; Ex parte Wensley, 1 De Gex, J. & S. 273 ; Topping *v.* Keysell, 16 C. B. N. S. 258 (E. C. L. R. vol. 111) ; Young *v.* Fletcher, 3 H. & C. 732.

(*n*) Stat. 24 & 25 Vict. c. 134, s. 71. (*o*) Stat. 32 & 33 Vict. c. 62.

(*p*) Stat. 32 & 33 Vict. c. 71, s. 6.

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taken on legal process by an insolvent debtor, by refraining from going into voluntary bankruptcy, is an act of bankruptcy : Dibblee, 2 B. R. 185 ; Wells, 3 Id. 95 ; Davidson, Id. 106 ; Campbell *v.* Trader's National Bank, Id. 124 ; Smith *v.* Buchanan, 4 Id. 133. The taking of property by a receiver appointed by a state Court, is taking under legal process within the meaning of section 39 of the bankrupt act : Clark & Bininger, 3 B. R. 99 ; s. c. 4 Id. 77.

[1] See *ante*, page 132, note 2 *k*.

Where a debtor was arrested on *mesne* process of a state Court, upon a debt of over one hundred dollars, founded on contract, and was released from close custody on bail, but said process was not discharged within seven days, the said debtor not having been actually imprisoned for more than seven days on said order of arrest, was held not to have committed an act of bankruptcy, the bankrupt act requiring that there should have been actual imprisonment for more than seven days in a civil action founded on contract to constitute an act of bankruptcy; an action founded on any demand in its nature provable against a bankrupt's estate (in which the merely being held in custody for a period of seven days constituted an act of bankruptcy), being held not to include a civil action founded on contract : Davis, 3 B. R. 89. Where it is proved that the bankrupt has been imprisoned but seven days, exclusive of the first day, this of itself is not sufficient to support an adjudication of bankruptcy : Hunt *v.* Pooke, 5 B. R. 161.

(1.) That the debtor has, in England or elsewhere, made a conveyance or assignment of his property to a trustee or trustees for the benefit of his creditors generally:[1]

(2.) That the debtor has, in England or elsewhere, made a fraudulent conveyance, gift, delivery, or transfer of his property or of any part thereof:[2]

(3.) That the debtor has, with intent to defeat or delay his creditors, done any of the following things, namely, departed out of England, or being out of England remained out of England; or being a trader departed from his dwelling-house, or otherwise absented himself; or begun to keep house; or suffered himself to be outlawed.

Most of the above acts of bankruptcy have been such ever since a bankrupt was first defined by the statute of Elizabeth "touching orders for bankrupts."(*q*) Bankruptcy was then considered as a crime, and the bankrupt was called "an offender."(*r*) But in modern times bankruptcy has been looked upon as the proper remedy for a trader in embarrassed circumstances. He gives up all his property to his creditors, to be divided rateably amongst them; and, if his behavior has been free from serious

(*q*) Stat. 13 Eliz. c. 7.
(*r*) Stat. 13 Eliz. c. 7, s. 10; 2 Black Com. 471.

[1] See *ante*, page 132, note 2 *k*.

A general assignment for the benefit of creditors, made since the passage of the Bankrupt Act of 1867, is an act of bankruptcy: Perry *v.* Langley, 1 B. R. 155; Grow *v.* Ballard, 2 Id. 69; Goldschmidt, 3 Id. 41; Pierce & Holbrook, Id. 61; Smith, Id. 98; Spicer *v.* Ward, Id. 127; Stubbs, 4 Id. 124; Barnes *v.* Rettew, 28 Leg. Int. 124; (otherwise as to one made prior to June 1st 1867: Wells, 6 Int. Rev. Rec. 181). *Contrà:* Langley *v.* Perry, 2 B. R. 180; (but it must be entirely clear from taint of fraud: Crawford, 2 Id. 181); Kintzing, 3 Id. 52; Sedgwick *v.* Place, 1 Id. 204. See also Arledge, 1 Id. 195; Broome, 3 Id. 113. But such assignment is voidable only and not void: Pierce & Holbrook, 3 B. R. 61; Barnes *v.* Rettew, 28 Leg. Int. 124; and the assignee thereunder will be entitled to compensation for his services rendered in the premises, and may set off the amount thereof in an action by the assignee in bankruptcy for the balance in his hands: Catlin *v.* Foster, 3 B. R. 134. *Contrà:* Stubbs, 4 Id. 124. See also Burkholder *v.* Stump, 4 B. R. 191. Denial of the bankrupt himself is not sufficient to disprove that a general assignment was made in contemplation of bankruptcy: Brodhead, 2 B. R. 93.

[2] See *ante*, page 132, note 2 *k*.

An assignment with intent to hinder, delay or defraud creditors, is an act of bankruptcy, whether the assignor be solvent or insolvent: Randall, 3 B. R. 4. But an assignment by an instrument void for want of a stamp, will not have such effect: Dunham, 2 B. R. 9. A sale of a stock of goods not made in the usual and ordinary course of the debtor's business is *primâ facie* fraudulent: Deane, 2 B. R. 29. But it is only *primâ facie* so, and the presumption may be rebutted: Babbitt *v.* Walbrun, 4 B. R. 30.

blame, he obtains a discharge from past liabilities. Accordingly by the Bankruptcy Act, 1861, *a person was enabled to commit an act of bankruptcy by making a formal declaration of his inability to meet his engagements.(s) So the seizure and sale of the goods of a trader under an execution upon any judgment in a personal action for the recovery of any debt or money demand exceeding fifty pounds was an act of bankruptcy.(t) The filing of a petition by or against a debtor in any court having jurisdiction for the relief of insolvent debtors in insolvency or bankruptcy in any of Her Majesty's dominions, colonies, or dependencies, and the adjudication of any act of insolvency or bankruptcy on such petition, was also evidence of an act of bankruptcy.(u) An act of bankruptcy might also have been committed by non-payment after what was called a judgment debtor summons. Every judgment creditor who was entitled to sue out a writ of *capias ad satisfaciendum*(x) against the debtor in respect of any debt amounting to 50*l.*, exclusive of costs, might at the end of one week from the signing of judgment have sued out against any trader, whether he were in custody or not, a summons, called a judgment debtor summons, requiring him to appear, and to be examined respecting his ability to pay the debt.(y) In like manner, where any decree or order of a court of equity, or order in bankruptcy, insolvency, or lunacy, directing the payment of money, had been disobeyed by the debtor, after having been duly served on him, and the person entitled to the money, or interested in enforcing payment of it, had obtained a peremptory order fixing a day for payment, and the debtor being a trader, should not within seven days after service on him of the peremptory order, or within seven days after the day fixed by the peremptory order for payment (which *should last have happened), have paid the money, or secured, or tendered, or compounded for it, to the satisfaction of the creditor, the creditor might at the end of those seven days have sued out against the debtor a judgment debtor summons.(z) And if after service of such summons the debtor should not have paid the debt and costs, or secured or compounded for the same to the satisfaction of the creditor, the court might, on the appearance of the debter, or if he should not have appeared having no lawful impediment allowed by the court, have adjudged him bankrupt.(a) The Act of 1849 contained a further provision, that on a proper affidavit of debt being made by any

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[*137]

(s) Stat. 24 & 25 Vict. c. 134, s. 72.

(t) Sect. 73.

(u) Sect. 75.

(x) See *ante*, p. 102.

(y) Sect. 76.

(z) Sect. 77.

(a) Sect. 83.

creditor, stating, amongst other things, the delivery to the trader personally, or to some adult inmate at his usual or last known place of abode or business, of written particulars of his demand, with notice requiring immediate payment, such trader might be summoned to appear before the bankrupt court either to admit the demand, or to swear that he verily believed that he had a good defence to such demand or to some part of it. And in such case the court was empowered to require the trader to enter into a bond with two sureties to pay such sum as should be recovered, together with such costs as should be given in any action which should have been or should be brought for the recovery of such demand or any part thereof.(b) And if he admitted the demand, and did not satisfy the creditor within seven days next after the filing of such admission, he committed an act of bankruptcy on the eighth day after the filing of such admission, provided a petition for adjudication of bankruptcy were filed against him within two calendar months from the filing of the creditor's affidavit.(c) There were other attendant provisions which it is [*138] now unnecessary *to state, as the only other acts of bankruptcy beyond the three above referred to(d) are stated by the Bankruptcy Act, 1869,(e) in the following terms:—

(4.) That the debtor has filed in the prescribed manner in the court a declaration admitting his inability to pay his debts:

(5.) That execution issued against the debtor on any legal process for the purpose of obtaining payment of not less than fifty pounds has in the case of a trader been levied by seizure and sale of his goods:[1]

(6.) That the creditor presenting the petition has served in the prescribed manner on the debtor a debtor's summons requiring the debtor to pay a sum due, of an amount of not less than fifty pounds, and the debtor being a trader has for the space of seven days, or not being a trader has for the space of three weeks, succeeding the service of such summons, neglected to pay such sum, or to secure or compound for the same.

But no person shall be adjudged a bankrupt on any of the above grounds unless the act of bankruptcy on which the adjudication is grounded has occurred within six months before the presentation of the

(b) Stat. 12 & 13 Vict. c. 106, ss. 78, 79.
(c) Sect. 81.
(d) *Ante*, p. 135.
(e) Stat. 32 & 33 Vict. c. 71, s. 6.

[1] See *ante*, p. 132, note 2 *k*, p. 134, note 3.

petition for adjudication; moreover, the debt of the petitioning creditor must be a liquidated sum due at law or in equity,[1] and must not be a secured debt, unless the petitioner state in his petition that he will be ready to give up such security for the benefit of the creditors in the event of the debtor being adjudicated a bankrupt, or unless the petitioner is willing to give an estimate of the value of his security, in which latter case he may be admitted as a petitioning creditor to the extent of the balance of the debt due to him after deducting the *value so estimated, but he shall, on an application being made by the trustee within the prescribed time after the date of adjudication, give up his security to such trustee for the benefit of the creditors upon payment of such estimated value. [*139]

When an act of bankruptcy has been committed, any single creditor, or two or more creditors if the debt due to such single creditor, or the aggregate amount of debts due to such several creditors, from any debtor, amount to a sum of not less than fifty pounds, may present a petition to the court, praying that the debtor be adjudged a bankrupt, and alleging as the ground for such adjudication any one or more of the above-mentioned acts or defaults, included under the expression "acts of bankruptcy."(*f*) The truth of the petition is sworn to by the petitioning creditor;(*g*) and at the hearing the court shall require proof of the debt of the petitioning creditor, and of the trading, if necessary, and of the

(*f*) Stat. 32 & 33 Vict. c. 71, s. 6; *ante*, pp. 135, 138.
(*g*) Stat. 32 & 33 Vict. c. 71, s. 80, par. (1).

[1] See *ante* 132, note 2 *k*.

Whilst the adjudication stands unrevoked, all inquiry into the validity of the petitioning creditor's debt is precluded: Fallon, 2 B. R. 92. See also Clasen, 3 Id. 22. Such a debt need not be due at the time of the alleged bankruptcy: Clasen, 3 B R. 22; Linn *v.* Smith 4 Id. 12; Alexander, Id. 45. A single creditor, whose debt is secured by a lien on lands of greater value than the amount of his debt, will not be permitted to abandon all remedies open to him for the collection of his debt, and use the bankruptcy court for the purpose: Johann, 3 B. R. 36. An adjudication of bankruptcy may be made against one partner only on a joint debt. The partnership creditor has such an interest in the separate property of any one of the partners, that he may proceed against one alone: Melick, 4 B. R. 26; see also Stevens, 5 Id. 112. A creditor who holds a mortgage upon the property of his debtor can proceed against the debtor by petition in bankruptcy, provided the security falls short of a full indemnity by two hundred and fifty dollars or more: Alexander, 4 B. R. 45. The reduction of the indebtedness of the petitioning creditor below two hundred and fifty dollars, will disable him from maintaining proceedings in bankruptcy: Ouimette, 3 B. R. 140; Skelley, 5 Id. 214. The petitioning creditor is entitled to payment of expenses of instituting proceedings in bankruptcy: Williams, 2 B. R. 28; Moses, 3 Id. 1; N. Y. Mail Stamship Co., Id. 185.

act of bankruptcy, and if satisfied with such proof shall adjudge the debtor to be a bankrupt.(*h*)[1]

Formerly a commission of bankruptcy under the great seal issued in every case, whereby certain persons were appointed commissioners for

(*h*) Stat. 32 & 33 Vict. c. 71, s. 8.

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[1] See *ante*, p 132, note 2 *k*.

The petition should state the facts clearly, or the debtor may decline to answer it: Randall, 3 B. R. 4. If defective, it may be amended after argument and before judgment thereon: Waite, 1 B. R. 84. An amendment merely formal will be allowed, but not one going to the whole foundation of the proceedings: Craft, 2 B. R. 44; Crowley, 1 Id. 137. See also Leonard, 4 Id. 182. The burden of proof is on the petitioning creditor; he must establish his debt before giving evidence of acts of bankruptcy: Brock *v.* Hoppock, 2 B. R. 2.

A voluntary petition filed pending involuntary proceedings undetermined, will have no effect, and an adjudication made thereon will be set aside: Stewart, 3 B. R. 28. When in the case of a petition in involuntary bankruptcy, the unlawful intent is the necessary consequence of the act charged, as in the case of the payment of one creditor by an insolvent debtor, a mere denial of such intent is no answer to the petition, but the respondent must also allege and prove with what intent he did the act complained of: Silverman, 4 B. R. 173. Where the debtor cannot be found in the district, in which the petition is filed, service of the order to show cause cannot be made out of such district, either personally or by leaving a copy of the order at his last or usual place of abode; but service by publication must be resorted to: Alabama & Chattanooga R. R. Co. *v.* Jones, 5 B. R. 97. The decease of one partner, prior to any adjudication upon the question of bankruptcy, is not legal cause for dismissing the petition: Hunt *v.* Pooke, 5 B. R. 161. The petition is incurably defective if the affidavit thereto be not subscribed by the petitioning creditor: Harley, 4 B. R. 71. So also if neither the petition, nor the deposition as to the act of bankruptcy, is signed by the petitioner: Hunt *v.* Pooke, 5 B. R. 161. The deposition of a witness to acts of bankruptcy can not be amended, because it is the proof, upon which the order to show cause issues, and without which the whole proceeding is defective: May *v.* Harper, 4 B. R. 156. If the petitioning creditor desires to discontinue proceedings and have his petition dismissed, he may do so before adjudication, without giving notice to other creditors of the alleged bankrupt. Until adjudication, the only parties to the proceedings are the petitioning creditor and the debtor. The other creditors must file a new petition, or petition to be substituted under the last clause of the 42d section of the bankrupt act. Any creditor wishing to be so substituted, must appear on the day to which proceedings have been adjourned, and on that day petition to be substituted. When on such adjourned day the petitioning creditor does not appear and proceed, and the understanding with the debtor is that such failure to appear shall be equivalent to a dismissal, and no other creditor appears to be substituted, the proceedings are at an end: Camden Rolling Mills Co., 3 B. R. 146; Olmsted, 4 Id. 71; see also Karr *v.* Whittaker, 5 Id. 123. The service of an injunction on any person in the bankruptcy proceedings, does not give him the right to contest or vacate the adjudication, that being a matter in which he can have no interest: Karr *v.* Whittaker, 5 B. R. 123. See also Boston, Hartford & Erie R. R. Co., 5 Id. 232.

the purpose of directing that particular bankruptcy.(*i*) Subsequently a Court of Bankruptcy was erected in London, and certain fixed commissioners appointed, by any one of whom the duties of a commissioner were to be performed in all cases of bankruptcies in London.(*k*) The creditor presented a formal petition to the Lord Chancellor, whereupon a fiat in bankruptcy issued, whereby the *creditor was authorized to prosecute his complaint against the trader in the Court [*140] of Bankruptcy, or before one of the commissioners of that court.(*l*) And more recently fixed commissioners were appointed throughout the country, each of whom had a separate district, and formed a court of record.(*m*) But by the Bankruptcy Act, 1861, jurisdiction in bankruptcy was vested in the judges of the County Courts, except those of the metropolis.(*n*) And provision was made for the reduction of the number of the London commissioners to three.(*o*) And her Majesty was empowered, upon any vacancy in the office of country commissioner, to transfer, by order in council, the jurisdiction of such commissioner to any of the judges of the County Courts within the district.(*p*) But the Bankruptcy Act, 1869, has now abolished all the London commissioners and also all the country district courts, and has provided for the appointment of a chief judge in the London Bankruptcy Court, and for the transfer of all the country business to the County Courts ;(*q*) subject to powers reserved to the Lord Chancellor to exclude any of them from jurisdiction in bankruptcy.(*r*)[1]

(*i*) Stat. 13 Eliz. c. 7, s. 2; 6 Geo. IV. c. 16, s. 12.

(*k*) Stat. 1 & 2 Will. IV. c. 56.

(*l*) Stat. 1 & 2 Will. IV. c. 56, s. 12.

(*m*) Stats. 5 & 6 Vict. c. 122, s. 59 *et seq.*; 12 & 13 Vict. c. 106, ss. 6–11.

(*n*) Stat. 24 & 25 Vict. c. 134, s. 3.

(*o*) Sect. 2.

(*p*) Sect. 4.

(*q*) Stat. 32 & 33 Vict. c. 71, ss. 59, 60, 128, 130.

(*r*) Sect. 79.

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[1] See *ante* p. 132, note 2 *a*.

The jurisdiction of the District Courts in bankruptcy is superior and exclusive: Barrow, 1 B. R. 125. See also Bowie, Id. 185. But it has been held by the Superior Court of New York City, that nothing in the bankrupt act declares the United States Courts the only forums, where the distribution of a debtor's property can be consummated, and that the jurisdiction of other tribunals of competent authority, is neither expressly nor impliedly excluded: Clark & Bininger, 3 B. R. 129. The District Court in bankruptcy has no power to grant injunctions against proceedings in another Court: Richardson, 2 B. R. 74; Campbell, 6 Int. Rev. Rec. 174; Burns, Id. 182. *Contra:* Reed, Id. 21; Jacoby, Id. 149; Metcalf, Id. 223; Irving *v.* Hughes, 2 B. R. 20. See also Davidson, 2 Id. 49; Clark & Bininger, 3 Id. 123; Snedaker, Id. 155; Donaldson, 6 Int. Rev. Rec. 199; Fuller, 4 B. R. 29; Wilbur, 3 Id. 71. Where no allegation is made, impeaching the validity under the bankrupt act of the transfer to, and lawful custody by, receivers appointed by a state Court, of property formerly in the possession of a bankrupt, the District Court has

The fiat was abolished by the Act of 1849; and the debt, the trading, and the act of bankruptcy having been proved, the trader is adjudged a

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no jurisdiction upon the application of the assignee of such bankrupt, to interfere with the custody of such receivers: Clark & Bininger, 3 B. R. 130. See also Alden *v.* Boston, Hartford and Erie R. R. Co., 5 Id. 230. A state Court after the institution of proceedings in bankruptcy, may nevertheless entertain such applications and make such orders as are necessary to preserve the existence of a mechanic's lien, which has attached prior to such bankruptcy proceedings: Clifton *v.* Foster, 3 B. R. 162. See also Coulter, 5 Id. 64.

As to when and how far proceedings in other courts against a bankrupt will be stayed, pending the bankruptcy and the determination of the question of discharge: see Hoyt *v.* Freel, 4 B. R. 34; Maxwell *v.* Faxton, Id. 60; Merritt *v.* Glidden, 5 Id. 157. As to applications for leave to commence suits against a bankrupt: see Ghirardelli, 4 B. R. 42.

The District Court, in which the bankruptcy proceedings are pending, or the Circuit Court for *that* district, can, in a case where a suit is brought in a state Court by an alleged mortgage creditor to foreclose his mortgage, after the proceedings in bankruptcy are instituted, enjoin the plaintiff therein from further prosecuting the same, but the Circuit Court or District Court of *another* district, has no bankruptcy jurisdiction to entertain such an application for an injunction: Markson *v.* Heaney, 4 B. R. 165. See also Sherman *v.* Bingham, 5 Id. 34. The Circuit Courts of the United States have no jurisdiction of a case either at law or in equity, in which a state is plaintiff against its own citizens. Such jurisdiction is not conferred upon the Circuit Courts by the Bankrupt Act of 1867: The State of North Carolina *v.* Trustees of University, 5 B. R. 466. The Circuit Court may entertain a bill of an assignee to redeem a mortgage: Dwight *v.* Ames, 2 B. R. 147. As to the jurisdiction of the respective District Courts between themselves, as determined by the residence of the bankrupt, see Belcher, 1 B. R. 202; Bailly, Id. 177; Little, 2 Id. 97; Magie, 1 Id. 138, 153; Wiggin, Id. 90; Prankard, Id. 51; Fogerty & Gerrity, 4 Id. 148; Watson, Id. 197; Leighton, 5 Id. 95. As to jurisdiction when petitions are filed in different districts, see Leland, 5 Id. 222; see also Foster & Pratt, 3 Id. 57; Penn, 5 Id. 30. The District Court has power to release a bankrupt from arrest on state process, in an action upon a debt that may be discharged in bankruptcy: Glaser, I B. R. 73. See also Kimball, 2 Id. 74; Borst, Id. 62. Otherwise if the arrest were prior to the institution of proceedings in bankruptcy: Walker, 1 B. R. 60; Hazleton, 2 Id. 12. See also Minon *v.* Van Nostrand, 4 Id. 28. But the bankrupt Court has no power to discharge a bankrupt from arrest, on mesne process from a state Court in an action of tort in the nature of deceit, and evidence is not admissible to contradict the averments in the declaration: Devoe, 2 B. R. 11; Patterson, 1 Id. 58; Pettis, 2 Id. 17. Nor on final process: Whitehouse, 4 Id. 15. Nor will a bankrupt be discharged from arrest for a debt contracted in a fiduciary capacity as a commission merchant: Kimball, 2 B. R. 114. See also Jacoby, 6 Int. Rev. Rec. 149. The District Court may appoint a receiver to take possession of property, which has been conveyed by a bankrupt for the benefit of creditors: Sedgwick *v.* Place, 3 B. R. 35. The marshal under a warrant issued in accordance with section 40 of the Bankrupt Act, may take possession of the property of the bankrupt, wheresoever and in whose hands soever he may find it: Briggs, 3 B. R. 157. See also Harthill, 4 Id. 131; Marks, 2 Id. 175. But the District Court does not possess the power to order in a summary way the sale of real or personal estate, although the same is claimed by the assignee in bankruptcy, even though the title to the same is in dispute, if it also appears that the estate in question is in the actual posses-

bankrupt by the court to which the petition is presented.(s) And the Bankruptcy Act, 1869, provides that a copy of an order of the court adjudging the debtor to be bankrupt shall be published in the London Gazette, and be advertised locally in such manner (if any) as may be *prescribed, and the date of such order shall be the date of the [*141] adjudication for the purposes of the act, and the production of a copy of the Gazette containing such order as aforesaid shall be conclusive evidence in all legal proceedings of the debtor having been duly adjudged a bankrupt and of the date of the adjudication.(t)

Previously to the Bankruptcy Act, 1869, the estate of the bankrupt vested in his assignees.[1] These were in modern times of two kinds;

(s) Stat. 32 & 33 Vict. c. 71, s. 8. (t) Sect. 10.

sion of a third person, holding the same as owner and claiming absolute title to and dominion over it as his own property, whether derived from the debtor before he was adjudged bankrupt, or from some former owner: Knight *v.* Cheney, 5 B. R. 305. The refusal of the Court to grant a discharge because the bankrupt had not applied therefor within one year from the adjudication, is no bar to new proceedings by the bankrupt: Farrell, 5 B. R. 125.

Registers in bankruptcy have the same powers as the district judges when there is no contest: Gettleson, 1 B. R. 170; Lanier, 2 Id. 59; Brandt, Id. 76; they may allow amendments: Morford, 1 Ben. 264; Perry, 1 B. R. 2; Watts, 2 Id. 145; Orne, 6 Int. Rev. Rec. 116; Heller, 5 B. R. 46; Carson, Id. 290; receive surrender of bankrupt: Hasbrouck, 6 Int. Rev. Rec. 115; as to control of cases before them, see Hyman, 2 B. R. 107; their power as to discharge: Bellamy, 6 Int. Rev. Rec. 127; Puffer, 2 B. R. 17. Certificate of question by register must be of an issue of fact or law actually raised: Pulver, 1 Ben. 381; Watts, 2 B. R. 145; Haskell, 4 Id. 181; Sturgeon, 1 Id. 131; Wright, Id. 91; Levy, 6 Int. Rev. Rec. 163; Fredenburg, 1 B. R. 34; Peck, 3 Id. 186. Revision of questions by the Circuit Court arising in the course of the proceedings in the District Court, must be by petition and not by appeal: Reed, 2 B. R. 2. No appeal lies from the adjudication to the Circuit Court: O'Brien, 6 Int. Rev. Rec. 182. As to appeals from the District Court to the Circuit Court, see Kyler, 3 B. R. 11; Benjamin *v.* Hart, 4 Id. 138; Place *v.* Sparkman, 4 Id. 178. The general revisory jurisdiction of the Circuit Court, extends to all decisions of the District Court or district judge at chambers, which cannot be reviewed upon appeal or writ of error under the provisions of the bankrupt act: Alexander, 3 B. R. 6. See also Mittledorfer, Id. 9; York & Hoover, 4 B. R. 156; Place *v.* Sparkman, Id. 178; Clark & Bininger, 3 Id. 122. No appeal lies from the Circuit Court to the Supreme Court of the United States, from a decree on a petition for review under the revisory jurisdiction of the Circuit Court: Morgan *v.* Thornhill, 5 B. R. 1.

[1] See *ante* p. 132, note 2 *b*.

Creditors holding security cannot vote for assignee: Davis, 6 Int. Rev. Rec. 149; *Contra:* Bolton, 1 B. R. 83, nor can a claimant whose claim is unliquidated: Orne, 1 Ben. 361. Solicitation of votes of creditors for assignee will not be sanctioned by the court: Anon. 2 B. R. 100; see also Bliss 6 Int. Rev. Rec. 116.

The assignee must be a resident of the district: Havens, 1 B. R. 126; must not be related to the bankrupt: Powell, 2 B. R. 17; Bogert, 3 Id. 161; Zinn, 4 Id. 123. But such relationship in a remote degree

official assignees and creditors' assignees. The official assignees were officers of the Bankruptcy Court, one of whom was appointed by the

will not be a disqualification: Zinn, 4 B. R. 145. He may be a creditor's attorney: Clairmont, 1 B. R. 42; Barrett, 2 Id. 165. As to manner of election or appointment of assignee, see Scheiffer, 2 B. R. 179.

Assignees may sell unencumbered assets without the order of the court: White, 1 B. R. 1, and also encumbered property in their possession, but in so doing they sell subject to lawful encumbrances: Mebane, 3 B. R. 91. A sale by the marshal under a special order of the Court, prior to the appointment of an assignee, is of the nature of a sale by a provisional assignee: Hitchings, 4 B. R. 125.

Assignees cannot recover assets from third parties by summary proceedings, but must do so by bill in equity or suit at law: Bonesteel, 3 B. R. 127; Ballou, Id. 177; New York Kerosene Oil Company, Id. 31; see also Barstow *v.* Peckman, 5 B. R. 72. *Contra:* Neal, 2 B. R. 82; Norris, 4 Id. 10. A state Court may entertain jurisdiction of an action by the assignee: Peiper *v.* Harmer, 5 B. R. 252. Assignees may be authorized by the court, to finish the work on chattels in an incomplete and unsaleable condition: Dwight *v.* Ames, 2 B. R. 147. The assignee is not authorized to compromise debts due the estate, with the consent of a committee of creditors appointed at a meeting of creditors: Dibble, 3 B. R. 17. The title to all property in the actual possession of the bankrupt, at the time of the commencement of the proceedings in bankruptcy, passes to the assignee: Vogel, 3 B. R. 49.

Property which has been conveyed by a bankrupt in fraud of creditors, prior to the passage of the bankrupt act, vests in the assignee: Goodwin *v.* Sharkey, 3 B. R. 138. A transfer of a policy of insurance by virtue of an assignment in bankruptcy, does not avoid the policy, although it contains the words "if the title of the property is transferred or changed," or "if the property is assigned this policy shall be void," and in case of loss by fire the assignee will be entitled to recover the insurance money: Starkweather *v.* The Cleveland Ins. Co., 4 B. R. 110, but see as to this Carow, 4 B. R. 178. When the bankrupt under a general contract has rendered partial service, but has not completed the contract prior to the filing of the petition, but subsequently fulfils the the same, unless the contract for payment was contingent upon full performance of the services, compensation will be apportioned between the assignee and the bankrupt, in proportion to the value of the services rendered before and after the bankruptcy: Jones, 4 B. R. 114.

The right of accretion as to real estate, is inseparably connected with the legal title, and passes to the assignee: Kinzie *v.* Winston, 4 B. R. 21. In Pennsylvania the dower of the wife of a bankrupt is not divested by proceedings in bankruptcy: Angier, 4 B. R. 199; see also Kelley *v.* Stranger, 3 Id. 2; Hester, 5 Id. 285. Where husband and wife join in a deed duly acknowledged so as to release the dower of the wife, if the deed be avoided in the hands of a fraudulent grantee, as having been executed by the bankrupt, with intent to hinder, delay and defraud creditors, the assignee in bankruptcy will be entitled to the land divested of the wife's claim to dower, and the husband's right to a homestead: Cox *v.* Wilder, 5 B. R. 443. Property held in trust does not pass to the assignee, but it must be property that can be followed or distinguished: Janeway, 4 B. R. 26. The title of the assignee is not such as to prevent the enforcement of a judgment against the bankrupt, on a portion of his property, attached more than four months before the commencement of proceedings in bankruptcy: Bates *v.* Tappan, 3 B. R. 159; Bowman *v.* Harding 4 Id. 5; see also Leighton *v.* Kelsey, Id. 155. Where a party appellant in a suit becomes bankrupt after appeal taken, his assignee in bankruptcy may on motion be substituted as appellant in the case: Herndon *v.* Howard, 4 B. R.

court to act for every bankruptcy. His duty formerly was to receive all the personal estate and effects, and the rents and profits of the real estate, and the proceeds of the sale of the estate and effects, real and personal, of the bankrupt; and after the appointment of the creditors' assignees, he continued to be an assignee jointly with them. But the Bankruptcy Act, 1861, provided that, at the appointment of the creditors' assignee, all the estate, both real and personal, of the bankrupt should be devested out of the official assignee and vested in the creditors' assignee.(*u*) The management of the estate was then vested in the creditors' assignee; except as to debts due to the estate not exceeding 10*l.*, as to which the official assignee was to be deemed the sole assignee of the estate, notwithstanding the appointment of a creditors' assignee.(*x*) But the Bankruptcy Act, 1869, has abolished the official assignees, and has substituted for the creditors' assignees a trustee to be appointed at a general meeting of the creditors. And the act provides(*y*) that the creditors *assembled at such meeting shall and may do as follows: [*142]

(1.) They shall, by resolution, appoint some fit person, whether a creditor or not, to fill the office of *trustee* of the property of the bankrupt, at such remuneration as they may from time to time determine, if any; or they may resolve to leave his appointment to the committee of inspection thereinafter mentioned:

(2.) They shall, when they appoint a trustee, by resolution declare what security is to be given, and to whom, by the person so appointed before he enters on the office of trustee:

(3.) They shall, by resolution, appoint some other fit persons, not exceeding five in number, and being creditors qualified to vote at such first meeting of creditors as is in the act mentioned, or

(*u*) Stat. 24 & 25 Vict. c. 134, s. 117.

(*x*) Stat. 24 & 25 Vict. c. 134, s. 128.

(*y*) Stat. 32 & 33 Vict. c. 71, s. 14.

61. The assignee is entitled to be subrogated to the lien upon real estate of a judgment creditor, who has proved his debt against the bankrupt's estate: Wallace *v.* Conrad, 3 B. R. 10. As to the application of the rule contained in the bankrupt act, limiting actions by or against assignees to two years, see Sedgwick *v.* Casey, 4 B. R. 161; Krogman, 5 Id. 116; Masterson, 4 Id. 180; Peiper *v.* Harmer, 5 Id. 252.

As to what settlements on a wife by a husband, prior to his bankruptcy, will be good againt the assignee, see Sedgwick *v.* Place, 5 B. R. 168; Case *v.* Phelps, Id. 452. As to what *choses in action*, belonging to the wife of a bankrupt pass to the assignee, see Boyd, 5 B. R. 199. As to compensation of assignees, see Davenport, 3 B. R. 18; Pegues, Id. 19; Tully, Id. 19. As to removal of assignees, see Mallory, 4 B. R. 38; Price, Id. 137; Dewey, 4 Id. 139; Blodget, 5 B. R. 472.

authorized in the prescribed form by creditors so qualified to vote, to form a *committee of inspection* for the purpose of superintending the administration by the trustee of the bankrupt's property:

(4.) They may, by resolution, give directions as to the manner in which the property is to be administered by the trustee, and it shall be the duty of the trustee to conform to such directions, unless the court for some just cause otherwise orders.

Subject to the provisions of the act, the trustee has power to do the following things:—

(1.) To receive and decide upon proof of debts in the prescribed manner, and for such purpose to administer oaths:

[*143] (2) To carry on the business of the bankrupt so far *as may be necessary for the beneficial winding up of the same:

(3.) To bring or defend any action, suit, or other legal proceeding relating to the property of the bankrupt:

(4.) To deal with any property to which the bankrupt is beneficially entitled as tenant in tail in the same manner as the bankrupt might have dealt with the same; and the sections fifty-six to seventy-three (both inclusive) of the act of the session of the third and fourth years of the reign of King William the Fourth (chapter seventy-four), "for the abolition of fines and recoveries, and for the substitution of more simple modes of assurance," shall extend and apply to proceedings in bankruptcy under the act as if those sections were re-enacted and made applicable in terms to such proceedings:

(5.) To exercise any powers the capacity to exercise which is vested in him under the act, and to execute all powers of attorney, deeds, and other instruments expedient or necessary for the purpose of carrying into effect the provisions of the act:

(6.) To sell all the property of the bankrupt (including the goodwill of the business, if any, and the book debts due or growing due to the bankrupt) by public auction or private contract, with power, if he thinks fit, to transfer the whole thereof to any person or company, or to sell the same in parcels:

(7.) To give receipts for any money received by him, which receipt shall effectually discharge the person paying such money from all responsibility in respect of the application thereof:

(8.) To prove, rank, claim, and draw a dividend in *the matter of the bankruptcy or sequestration of any debtor of the bankrupt:(*z*) [*144]

The trustee may appoint the bankrupt himself to superintend the management of the property or of any part thereof, or to carry on the trade of the bankrupt (if any) for the benefit of the creditors, and in any other respect to aid in administering the property in such manner and on such terms as the creditors direct.(*a*)

The trustee may, with the sanction of the committee of inspection, do all or any of the following things:—

(1.) Mortgage or pledge any part of the property of the bankrupt for the purpose of raising money for the payment of his debts:
(2.) Refer any dispute to arbitration, compromise all debts, claims, and liabilities, whether present or future, certain or contingent, liquidated or unliquidated, subsisting or supposed to subsist between the bankrupt and any debtor or person who may have incurred any liability to the bankrupt, upon the receipt of such sums, payable at such times, and generally upon such terms as may be agreed upon:
(3.) Make such compromise or other arrangement as may be thought expedient with creditors, or persons claiming to be creditors, in respect of any debts provable under the bankruptcy:
(4.) Make such compromise or other arrangement as may be thought expedient with respect to any claim arising out of or incidental to the property of the bankrupt, made or capable of being made on the trustee by any person or by the trustee on any person:
(5.) *Divide in its existing form against the creditors, according to its estimated value, any property which from its peculiar nature or other special circumstances cannot advantageously be realized by sale. [*145]

The sanction given for the purposes of this section may be a general permission to do all or any of the above-mentioned things, or a permission to do all or any of them in any specified case or cases.(*b*)

The trustee may, with the sanction of a special resolution of the creditors assembled at any meeting, of which notice has been given specify-

(*z*) Stat. 32 & 33 Vict. c. 71, s. 25. (*a*) Sect. 26.
(*b*) Sect. 27.

ing the object of such meeting, accept any composition offered by the bankrupt, or assent to any general scheme of settlement of the affairs of the bankrupt, upon such terms as may be thought expedient, and with or without a condition that the order of adjudication is to be annulled, subject nevertheless to the approval of the court, to be satisfied by the judge of the court signing the instrument containing the terms of such composition or scheme, or embodying such terms in an order of the court.(*c*)

A trustee shall not, without the consent of the committee of inspection, employ a solicitor or other agent, but where the trustee is himself a solicitor he may contract to be paid a certain sum by way of percentage or otherwise as a remuneration for his services as trustee, including all professional services, and any such contract shall, notwithstanding any law to the contrary, be lawful.(*d*)

Where the goods of any trader have been taken in execution in respect of a judgment for a sum exceeding [*146] *fifty pounds and sold, the sheriff, or in the case of a sale under the direction of the county court, the high bailiff or other officer of the county court, shall retain the proceeds of such sale in his hands for a period of *fourteen* days; and upon notice being served on him within that period of a bankruptcy petition having been presented against such trader, shall hold the proceeds of such sale, after deducting expenses, on trust to pay the same to the trustee; but if no notice of such petition having been presented be served on him within such period of fourteen days, or if, such notice having been served, the trader against whom the petition has been presented is not adjudged a bankrupt on such petition, or on any other petition of which the sheriff, high bailiff or other officer has notice, he may deal with the proceeds of such sale in the same manner as he would have done had no notice of the presentation of a bankruptcy petition been served on him.(*e*)

As the bankrupt was discharged from such claims only as had been or might have been proved under the bankruptcy, elaborate provisions were made by the former acts for the proof of as many demands as possible. As these provisions have now been repealed, it is unnecessary to state them. The present act provides as follows:[1] "Demands in the nature

(*c*) Stat. 32 & 33 Vict. c. 71, s. 28.
(*d*) Sect. 29.
(*e*) Sect. 87.

[1] See *ante*, p. 132, note 2 *c*.
Any debt, which may be proved by complying with the provisions of the bankrupt act, is a provable debt: Rankin *v*. Florida,

of unliquidated damages arising otherwise than by reason of a contract or promise shall not be provable in bankruptcy; and no person having notice

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Atlantic & G. C. R. R. Co., 1 B. R. 196. Debts barred by the statute of limitations of the bankrupt's domicil, may be proved against his estate; to prevent it, the debt must be shown to be barred throughout the United States: Ray, 6 Int. Rev. Rec. 223. *Contra:* Kingsley, 1 B. R. 66; Shepard, Id. 115; Harden, Id. 97. A debt created by fraud is provable: Rundle, 2 B. R. 49; Wright, Id. 14; Robinson, Id. 108; Comstock, 22 Vt. 642. Judgment for a fine imposed by a criminal court cannot be proved: Sutherland, 3 B. R. 83. Debt contracted in Confederate notes is not provable: Baily *v.* Milner, 35 Geo. 330; nor one contracted by a *feme covert*, unless under special statutory regulations: Slichter, 2 B. R. 107. Reservation of usurious interest on discount of a note by a national bank, does not bar probate of the principal debt: Moore *v.* Exchange Bank of Columbus, 1 B. R. 123.

A party holding the bankrupt's notes as collateral security, may prove them to an extent sufficient to secure dividends to the amount of his claim: Baily *v.* Nichols, 2 B. R. 151. The liability of a bankrupt as endorser having become absolute, a creditor holding a mortgage from the maker to secure the payment of the notes endorsed, may, nevertheless, prove their full amount against the estate of the endorser: Cram, 1 B. R. 132. Claims for unliquidated damages cannot be proved, without an application for the assessment thereof, as provided by the bankrupt act: Clough, 2 B. R. 59. Claims of the *bankrupt* for unliquidated damages (while unliquidated), cannot be set off against that of a creditor: Orne, 6 Int. Rev. Rec. 84. Debts created by fraud not being dischargeable, the provisions of the bankrupt act as to waiver of action, and discharge and surrender of judgment by creditor proving a debt, do not apply: Migel, 2 B. R. 153; Rosenberg, Id. 81; Robinson, Id. 108; but an action on a provable debt may be stayed until the determination of the discharge, whether the debt is dischargeable or not: Rosenberg, 2 B. R. 81; Migel, Id. 153. See however, Seymour, 6 Int. Rev. Rec. 60. A judgment obtained on a breach of promise to marry, is provable in bankruptcy and barred by the discharge: Sidle, 2 B. R. 77. So is a judgment in trespass for malicious imprisonment: Simpson, 2 B. R. 17.

Where a creditor, after the filing of the bankrupt's petition, but before the first meeting of creditors, transfers his debt to another, the debt may be proved by the owner of it at the time of proof, the oath being modified to suit the facts of the case: Murdock, 3 B. R. 36. See also Frank, 5 Id. 194.

When an endorser's liability has become fixed, such liability constitutes a debt due and payable from the endorser; and may be made the foundation of involuntary as well as voluntary proceedings in bankruptcy: Nickodemus, 3 B. R. 55. A deposition, by an assignee for value of a *chose in action*, before bankruptcy, is sufficient to entitle him to prove his debt and be considered the creditor in respect to such debt, and he has the right to take any such action or proceedings in the cause, in the name of his assignor, at his own expense, as he may be advised: Fortune, 3 B. R. 83. A creditor holding security, who through inadvertence or ignorance, has proved his debt without reference to his security, will be allowed to withdraw such proof and resort to his security: Brand, 3 B. R. 85; Clark & Binninger, 5 Id. 255. A creditor, who has received a preference, having reasonable cause to believe that the bankrupt was insolvent when it was made, but who afterwards voluntarily surrenders, before judgment or decree against him, to the assignee, all property, &c., received by him, will be allowed to prove his debt: Montgomery, 3 B. R. 97; Scott & McCarty, 4 Id. 139; Kipp, Id. 190. *Contra:* Walton, Id. 154. But payment of a decree obtained against such creditor, is not a surrender within the meaning of

of any act of bankruptcy available for adjudication against the bankrupt shall prove for any debt or liability contracted by the bankrupt subse-

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the bankrupt act, and such creditor will not be allowed to prove his debt: Tonkin & Trewartha, 4 B. R. 13; Richter, Id. 67. But receiving preference as to one debt, will not affect the right to prove another, as to which no preference was received, or to receive dividends thereon: Richter, 4 B. R. 67.

The Court has at all times full power and control over proofs of claims, and may allow amendments and supplemental proofs to be filed: Montgomery, 3 B. R. 108. See also Loweree, 6 Int. Rev. Rec. 115. Where a protested note (in which the bankrupt was principal), held by a bank that had discounted it, was taken up by a new note made by the same parties, and accepted by the bank after adjudication of bankruptcy, it was held that the original debt was thereby extinguished, and the liability ceased to be a claim on the estate: Montgomery, 3 B. R. 108. A creditor may prove a claim based on a debt existing at the time of proceedings commenced in bankruptcy, notwithstanding he may, in a suit to recover the same, have obtained judgment thereafter. The debt is not so merged in the judgment, as to deprive the creditor of his right to prove it: Brown, 3 B. R. 145; Vickery, Id. 171. *Contra:* Williams, 2 Id. 79; Gallison, 5 B. R. 353. See also as to this: Crawford, 3 Id. 171; Stevens, 4 Id. 122; Hunt, 5 Id. 433. If doubts are entertained by the register as to the validity of a claim, its proof may be postponed until after the election of the assignee: Herrmann, 3 B. R. 153; Stevens, 4 Id. 122. And such proof of claim, when afterwards tendered, is to be treated in all respects as if it had not been presented before the election of assignee and postponed: Herrmann, 3 B. R. 161. As to the manner, form, and requisites of proper proof of claims, see Elder, 3 B. R. 165.

Where securities are purchased and held by a banker or broker in a fiduciary manner, and are hypothecated in breach of such trust, the proceeds of other securities given by such banker or broker, who afterwards becomes bankrupt, to redeem the securities so hypothecated, cannot be claimed by the *cestui que trust* from the bankrupt's estate. Such *cestui que trust* can only prove his debt, and participate in dividends with other creditors: Ungewitter *v.* Von Sachs, 3 B. R. 178.

A married woman having loaned money to her husband, to be used by him as his contribution to the capital stock of a copartnership, for which a promissory note was given by said copartnership to him, which he transferred to her, it was held that she had a claim provable against his separate estate, and not against that of the copartnership: Frost & Westfall, 3 B. R. 180. If a contract is valid according to the *lex loci contractus*, a debt arising therefrom is provable in bankruptcy, although by the laws of the state, in which the debtor resides, no recovery could be had on such contract: Murray, 3 B. R. 187.

Where the holder of a note receives part of the amount of the same from the endorser, he is entitled to prove for the whole amount against the estate of the bankrupt maker, and holds any dividends he may receive in excess of the amount of the note in trust for the endorser. If the holder omits to prove his debt, the endorser is entitled to prove the note against the bankrupt's estate, and receive dividends upon its whole amount: Ellerhorst, 5 B. R. 144. The bankrupt's wife may prove as a creditor against his estate, for money realized by him out of her separate estate, if the evidence clearly shows that the transaction was intended to be a loan and not a gift: Blandin, 5 B. R. 39. Where the original debt has been proved and allowed, attachment costs can be proved as a general debt against the estate of the bankrupt, if made in good faith, before the commencement of proceedings in bankruptcy, without a knowledge of the insolvency of the debtor, and with no in-

quently to the date of his so having notice. Save as aforesaid, all debts and liabilities, present or future, certain or contingent, to which the bankrupt is subject at the date of the order of adjudication, or to which he *may become subject during the continuance of the bankruptcy [*147] by reason of any obligation incurred previously to the date of the order of adjudication, shall be deemed to be debts provable in bankruptcy, and may be proved in the prescribed manner before the trustee in the bankruptcy. An estimate shall be made according to the rules of the court for the time being in force, so far as the same may be applicable, and where they are not applicable at the discretion of the trustees, of the value of any debt or liability provable as aforesaid, which by reason of its being subject to any contingency or contingencies, or for any other reason, does not bear a certain value. Any person aggrieved by any estimate made by the trustee as aforesaid may appeal to the court, and the court may, if it think the value of the debt or liability incapable of being fairly estimated, make an order to that effect, and upon such order being made such debt or liability shall, for the purposes of this act, be deemed to be a debt not provable in bankruptcy, but if the court think that the value of the debt or liability is capable of being fairly estimated it may direct such value to be assessed with the consent of all the parties interested before the court itself without the intervention of a jury, or if such parties do not consent, by a jury, either before the court itself or some other competent court, and may give all necessary directions for such purpose, and the amount of such value when assessed shall be provable as a debt under the bankruptcy. "Liability" shall for the purposes of this act include any compensation for work or labor done, any obligation or possibility of an obligation to pay money or money's worth on the breach of any express or implied covenant, contract, agreement, or undertaking, whether such breach does or does not occur, or is or is not likely to occur or capable of occurring before the close of the bankruptcy; and generally it shall include any express *or implied engagement, agreement or undertaking, to pay, or [*148] capable of resulting in the payment of money or money's worth, whether such payment be as respects amount fixed or unliquidated, as respects time present or future, certain or dependent on any one contingency, or two or more contingencies, as to mode of valuation capable of being ascertained by fixed rules, or assessable only by a jury, or as matter of opinion."(*f*)

(*f*) Stat. 32 & 33 Vict. c. 71, s. 31.

tention to defeat the operations of the bankrupt act; but costs incurred after the commencement of bankruptcy proceedings, and costs for attaching and keeping exempt property, will be disallowed: Preston, 5 B. R. 293.

The landlord or other person to whom any rent is due from the bankrupt may at any time, either before or after the commencement of the bankruptcy, distrain upon the goods or effects of the bankrupt for the rent due to him from the bankrupt, with this limitation, that if such distress for rent be levied after the commencement of the bankruptcy it shall be available only for *one year's rent* accrued due prior to the date of the order of adjudication, but the landlord or other person to whom the rent may be due from the bankrupt may prove under the bankruptcy for the overplus due for which the distress may not have been available.(*g*)

When any rent or other payment falls due at stated periods, and the order of adjudication is made at any time other than one of such periods, the person entitled to such rent or payment may prove for a proportionate part thereof up to the day of the adjudication, as if such rent or payment grew due from day to day.(*h*)[1]

Interest on any debt provable in bankruptcy may be allowed by the trustee under the same circumstances in which interest would have been allowable by a jury if an action had been brought for such debt.(*i*)[2]

[*149] *If any bankrupt is at the date of the order of adjudication liable in respect of distinct contracts as member of two or more distinct firms, or as a sole contractor, and also as member of a firm, the circumstance that such firms are in whole or in part composed of the same individuals, or that the sole contractor is also one of the joint contractors, shall not prevent proof, in respect of such contracts, against the properties respectively liable upon such contracts.(*j*)[3]

(*g*) Stat. 32 & 33 Vict. c. 71, s. 34.
(*h*) Sect. 35.
(*i*) Sect. 36.
(*j*) Sect. 37.

[1] See *ante*, page 132, note 2 *c*.

A provision similar to this is contained in the United States Bankrupt Act.

The landlord may be entitled to accruing rent, as storage, for the time that the premises are occupied by the assignee: Appold, 1 B. R. 178; Walton, Id. 154. As to whether rent is payable, otherwise than other debts, would seem to depend upon the fact, whether or not it partakes of the nature of a lien by the laws of the respective states: see Appold, 1 B. R. 178, where rent not exceeding one year was allowed as a preferred claim: Wynne, 4 B. R. 5; Terrell, 2 Id. 190; Merrifield, 3 Id. 25; Walker *v.* Barton, 3 Id. 63; Joslyn, Id. 118; McGrath, 5 Id. 254; Trim, Id. 23. If the assignee elects to accept a lease held by the bankrupt, he renders himself liable on behalf of the estate for rent, from the date of the filing of the petition: Laurie, 4 B. R. 7.

[2] No express provision of this kind is to be found in the United States Bankrupt Act, but it has been held that a creditor in proving his debt may include the interest due thereon: Orne, 1 Ben. 361.

[3] An analogous provision is contained in the United States Bankrupt Act.

The trustee, with the consent of the creditors, testified by a resolution passed in general meeting, may from time to time, during the continuance of the bankruptcy, make such allowance as may be approved by the creditors to the bankrupt out of his property for the support of the bankrupt and his family, or in consideration of his services if he is engaged in winding up his estate.(*k*)[1]

Where there have been mutual credits, mutual debts, or other mutual dealings between the bankrupt and any other person proving or claiming to prove a debt under his bankruptcy, an account shall be taken of what is due from the one party to the other in respect of such mutual dealings, and the sum due from the one party shall be set off against any sum due from the other party, and the balance of such account, and no more, shall be claimed or paid on either side respectively; but a person shall not be entitled under this section to claim the benefit of any set-off against the property of a bankrupt in any case where he had, at the time of giving credit to the bankrupt, notice of an act of bankruptcy committed by such a bankrupt and available against him for adjudication.(*l*)[2]

A creditor holding a specific security on the property *of the bankrupt, or on any part thereof, may, on giving up his security, prove for his whole debt. He shall also be entitled to a dividend in respect of the balance due to him after realizing or giving credit for the [*150]

(*k*) Sect. 38. (*l*) Sect. 39.

[1] By the 14th section of the United States Bankrupt Act of 1867, the bankrupt is allowed his necessary household and kitchen furniture, and such other articles and necessaries as the assignee shall designate and set apart, having reference in the amount, to the family, condition and circumstances of the bankrupt, but altogether not to exceed in value in any case the sum of five hundred dollars; and also the wearing apparel of the bankrupt and that of his wife and children; and his uniform, arms and equipments, if he is or has been a soldier in the militia, or in the service of the United States; and such other property as was, or thereafter should be exempted from attachment or seizure or levy on execution, by the laws of the United States; and such other property not included in the foregoing exceptions, as is exempted from levy and sale upon execution or other process or order of any Court, by the laws of the state in which the bankrupt has his domicil, at the time of the commencement of the proceedings in bankruptcy, to an amount not exceeding that allowed by such state exemption laws in force in the year 1864. As to the foregoing exemptions, see Cobb, 1 B. R. 106; Ruth 6 Int. Rev. Rec. 166; Thornton, 2 B. R. 68; Lawson, Id. 19; Hafer, 1 Id. 147; Edwards, 2 Id. 109; Jackson, Id. 158; Perdue, Id. 67; Feely, 3 Id. 15; Noakes, 1 Id. 164; Bennett, 2 Id. 66; Farish, Id. 62; Griffin, Id. 85; Lambert, Id. 138; McLean, Id. 173; Watson, Id. 174; Whitehead, Id. 180; Summers, 3 Id. 21; Taylor, Id. 38; Brown, Id. 60; Young, Id. 111; Asken, Id. 142; Rupp, 4 Id. 25; Beckerkord, Id. 59; Schwartz, Id. 189; Stevens, 5 Id. 298; Welch, Id. 348; Hunt, Id. 493.

[2] See ante, p. 132, note 2 *c*.

value of his security, in manner and at the time prescribed. A creditor holding such security as aforesaid, and not complying with the foregoing conditions, shall be excluded from all share in any dividend.(*m*)[1]

As the bankruptcy of a person consists in his committing an act of bankruptcy, and not in his being adjudged bankrupt, his assignees, when appointed, became entitled to all the real and personal estate of which

(*m*) Stat. 32 & 33 Vict. c. 71, s. 40.

[1] See ante, p. 132, note 2 *d*.

As to power of assignee to sell mortgaged property, see Dwight *v*. Ames, 2 B. R. 147; Stewart, Id. 42; Salmons, Id. 19; Columbian Metal Works, 3 Id. 18; Kahley, 4 Id. 124; Hanna, Id. 39. As to liquidation of liens: Winn, 1 B. R. 131; Schnepf, 6 Int. Rev. Rec. 214; Hambright, 2 B. R. 157; Armstrong *v*. Rickey, 2 Id. 150; High, 3 Id. 46; restraint of action of lien creditors for collection of his debt: Donaldson, 6 Int. Rev. Rec. 199; but where an execution creditor has been so enjoined, he is entitled to a summary hearing: Hafer, 1 B. R. 163.

The assignee cannot make up out of the general funds, any difference between the net proceeds of the sale of mortgaged property, and the amount due the mortgage creditor: Purcell, 2 B. R. 10. See also, Snedaker, 4 Id. 43. If the property constituting the security is not worth the sum due the secured creditor, the assignee has no duties in regard to it: Lambert, 2 B. R. 138. A lien creditor can only prove for the balance of his debt after deducting the value of the property: Winn, 1 B. R. 131. See also, Bridgman, Id. 59; Bolton, Id. 83. He is not compelled to surrender his securities before proving his claim; he is deemed a general creditor after they are exhausted: Ruehle, 2 B. R. 175. He may also make proof without necessarily ascertaining the value of his securities: Bigelow, 1 B R. 186.

Where encumbered property is sold by the assignee, the lien creditor is entitled to the proceeds, deducting only the cost of proving his claim; there is no prior claim thereon for the general expenses in bankruptcy: Hambright, 2 B. R. 157. A creditor secured by a deed of trust with a power of sale, must prove his debt as one holding security, and obtain permission of the Court to have the security sold. A sale made without such permission will be set aside by the Court: Davis *v*. Carpenter, 2 B. R. 125. See also, Frizelle, 5 Id. 122; Lee *v*. Franklin Avenue German Savings Institution, 3 Id. 53. As to what securities, sales, conveyances, liens, &c., are valid, see York & Hoover, 3 B. R. 163; Griffiths, Id. 179; Scott, Id. 181; Jenkins *v*. Mayer, Id. 189; Wynne, 4 Id. 5; Freeman, Id. 17; Potter *v*. Coggeshall, Id. 19; Fuller, Id. 29; Munger & Champlin, Id. 90; Weeks, Id. 116; Fox *v*. Eckstein, Id. 123; Swope *v*. Arnold, 5 Id. 148; Vogle *v*. Lathrop, 4 Id. 146; Wood, 5 Id. 421; Warren *v*. Tenth National Bank, Id. 479.

A creditor who has a lien upon the property of his debtor by virtue of a judgment, &c., by filing a petition for adjudication of bankruptcy of such debtor without reference to such lien, thereby waives and relinquishes the same, and stands before the Court as an unsecured creditor: Bloss, 4 B. R. 37. Security taken at the time of advances made in good faith to an indebted person to enable him to carry on his business, is not invalidated by either the terms or policy of the bankrupt act, since the debtor gets a present equivalent for the new debts he creates, and the security he gives: Darby's Trustees *v*. Boatmens' Saving Institution, 4 B. R. 195. Where a security by way of mortgage is given more than four months before bankruptcy, a change in the form or even in the substance of the deeds made within four months of the bankruptcy, will be protected if no greater value be put into the creditor's hands at that time than he had before: Sawyer *v*. Turpin, 5 B. R. 339.

he was possessed at the hour when he committed the act;(*n*) though the legal estate in the bankrupt's lands remained vested in him until conveyed to the assignees by their appointment.(*o*) The title of the assignees, it was said, related back to the act of bankruptcy. The consequences of this rule were formerly very serious, as many *bonâ fide* transactions were overturned in consequence of an act of bankruptcy having been committed by one of the parties without the knowledge of the other. But after several partial remedies,(*p*) it was enacted by the Act of 1849, that all payments really and *bonâ fide* made by any bankrupt, or by any person on his behalf, before the filing of a petition for adjudication of bankruptcy, and all payments really and *bonâ fide* made to any bankrupt before the filing of such petition, and all conveyances by any bankrupt *bonâ fide* made and executed before the filing of such petition, and all contracts, dealings and transactions by and with any bankrupt really and *bonâ* **fide* made and entered into before 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 filing of such petition, should 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 on whose account such execution or attachment should have issued, had not at the time of such payment, conveyance, contract, dealing or transaction, or at the time of 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.(*q*) The effect of this enactment was to substitute the filing of the petition for adjudication for the *act* of bankruptcy, so far as respects all persons dealing and acting *bonâ fide* and without notice of the act of bankruptcy. On this subject the Bankruptcy Act, 1869, now contains the following provisions. It enacts that the bankruptcy shall be deemed to have relation back and to commence at the time of the act of bankruptcy,(*r*)[1] and then provides as follows:—

[*151]

(*n*) Thomas *v*. Desanges, 2 B. & Ald. 586; Roach *v*. Great Western Railway Company, 1 Q. B. 51 (E. C. L. R. vol. 41).

(*o*) Doe d. Esdaile *v*. Mitchell, 2 M & Selw. 446.

(*p*) Stat. 46 Geo. III. c. 135, s. 1; 49 Geo. III. c. 121, s. 2; 56 Geo. III. c. 137, s. 1; 6 Geo. IV. c. 16, ss. 81, 82, 84; 2 & 3 Vict. c. 11, s. 12; 2 & 3 Vict. c. 29.

(*q*) Stat. 12 & 13 Vict. c. 106, s. 133. (*r*) Stat. 32 & 33 Vict. c. 71, s. 11.

1 See *ante*, p. 132, note 2 *b*.

Property acquired by the bankrupt between the filing of the petition and the discharge does not vest in the assignee: Patterson 6 Int. Rev. Rec., 157; Levy, Id. 163; Rosenfield, 1 B. R. 60. The pro-

Nothing in this act contained shall render invalid,—

(1.) Any payment made in good faith and for value received to any bankrupt before the date of the order of adjudication by a person not having at the time of such payment notice of any act of bankruptcy committed by the bankrupt, and available against him for adjudication:

(2.) Any payment or delivery of money or goods belonging to a bankrupt, made to such [*152] *bankrupt by a depositary of such money or goods before the date of the order of adjudication, who had not at the time of such payment or delivery notice of any act of bankruptcy committed by the bankrupt, and available against him for adjudication:

(3.) Any contract or dealing with any bankrupt, made in good faith and for valuable consideration, before the date of the order of adjudication, by a person not having, at the time of making such contract or dealing, notice of any act of bankruptcy committed by the bankrupt, and available against him for adjudication.(*s*)

Subject and without prejudice to the provisions of this act relating to the proceeds of the sale and seizure of goods of a trader, and to the provisions of this act avoiding certain settlements, and avoiding, on the ground of their constituting fraudulent preferences, certain conveyances, charges, payments, and judicial proceedings, the following transactions by and in relation to the property of a bankrupt shall be valid, notwithstanding any prior act of bankruptcy,—

(1.) Any disposition or contract with respect to the disposition of property by conveyance, transfer, charge, delivery of goods, payment of money, or otherwise howsoever made by any bankrupt in good faith and for valuable consideration, before the date of the order of adjudication, with any person not having at the time of the making of such disposition of property notice of any act of bankruptcy committed by the bankrupt, and available against him for adjudication:

(*s*) Stat. 32 & 33 Vict. c. 71, s. 94.

perty of a bankrupt vests in his assignee as of the date of the commencement of proceedings, and no payment by or to him subsequent to that date, is valid, even though made or received *bonâ fide* or without notice: Mays *v.* Manufacturers National Bank of Philadelphia, 4 B. R. 147.

(2.) *Any execution or attachment against the land of the bankrupt, executed in good faith by seizure before the [*153] date of the order of adjudication, if the person on whose account such execution or attachment was issued had not at the time of the same being so executed by seizure notice of any act of bankruptcy committed by the bankrupt, and available against him for adjudication:

(3.) Any execution or attachment against the goods of any bankrupt, executed in good faith by seizure and sale before the date of the order of adjudication, if the person on whose account such execution or attachment was issued had not at the time of the same being executed by seizure and sale notice of any act of bankruptcy committed by the bankrupt, and available against him for adjudication.(*t*)

But any settlement of property made by a trader, not being a settlement made before and in consideration of marriage, or made in favor of a purchaser or incumbrancer in good faith and for valuable consideration, or a settlement made on or for the wife or children of the settlor of property which has accrued to the settlor after marriage in right of his wife, shall, if the settlor becomes bankrupt within *two years* after the date of such settlement, be void as against the trustee of the bankrupt appointed under the act, and shall, if the settlor becomes bankrupt at any subsequent time within *ten years* after the date of such settlement, unless the parties claiming under such settlement can prove that the settlor was at the time of making the settlement able to pay all his debts without the aid of the property comprised in such settlement, be void against such trustee.[1] *Any covenant or contract made by a [*154] trader, in consideration of marriage, for the future settlement upon or for his wife or children of any money or property wherein he had not at the date of his marriage any estate or interest, whether vested or contingent, in possession or remainder, and not being money or property of or in right of his wife, shall, upon his becoming bankrupt before such property or money has been actually transferred or paid pursuant to such contract or covenant, be void against his trustee appointed under the act. "Settlement" shall for the purposes of this section include any conveyance or transfer of property.(*u*)

And every conveyance or transfer of property, or charge thereon

(*t*) Stat. 32 & 33 Vict. c. 71, s. 95. (*u*) Sect. 91.

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[1] See Sedgwick *v.* Place, 5 B. R. 168; Antrims *v.* Kelly, 4 Id. 189.

made, every payment made, every obligation incurred, and every judicial proceeding taken or suffered by any person unable to pay his debts as they become due from his own moneys in favor of any creditor, or any person in trust for any creditor, with a view of giving such creditor a preference over the other creditors, shall, if the person making, taking, paying, or suffering the same become bankrupt within *three months* after the date of making, taking, paying, or suffering the same, be deemed fraudulent and void as against the trustee of the bankrupt appointed under this act;[1] but this section shall not affect the rights of a pur-

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[1] See *ante*, p. 132, note 2 *h*.

The assignee may recover property conveyed by bankrupt in fraud of creditors before the passage of the Bankrupt Act: Bradshaw *v.* Klein, 1 B. R. 146. As to recovery of property fraudulently disposed of, see Neal, 2 B. R. 82; Meyer, Id. 137; Wilson *v.* Brinkman, Id. 149; Metzger, Id. 114. The assignee cannot recover the value of property transferred by the bankrupt within four months of adjudication, without showing that a preference was thereby intended: Wadsworth *v.* Tyler, 2 B. R. 101.

It is of no consequence whether a preference given to a creditor is voluntary or the result of threats: Foster *v.* Hackley, 2 Am. L. T. Bank. 8; Wilson *v.* Brinkman, 2 B. R. 149; Rison *v.* Knapp, 4 Id. 114; Batchelder, 3 Id. 37.

Although the term endorser is not specifically used in the 35th section of the Bankrupt Act, in regard to preferences, yet any payment or preference to an endorser or other surety is fraudulent and void, where other elements exist in the transaction to give it that character: Ahl *v.* Thorner, 3 B. R. 29.

To constitute a fraudulent preference, when the alleged bankrupt is claimed to be insolvent, he must so be, and know himself so to be, and actually intend, and actually give, a preference to a creditor: Keys, 3 B. R. 54.

Reasonable cause, which should induce a belief on the part of a creditor, of the insolvency of his debtor, means such a state of facts, as would put a prudent man upon inquiry as to the condition of his debtor: White *v.* Raftery, 3 B. R. 53. See also as to this, Stranahan *v.* Gregory, 4 Id. 142; Campbell *v.* Traders' National Bank, 3 Id. 124. Where a creditor has before him what the statute declares shall be *primâ facie* evidence of fraud, he must in law be deemed to have reasonable cause to believe the existence of such fraud, until the legal presumption is overborne by opposing evidence: Kingsbury, 3 B. R. 84. Where a creditor accepts a security, he is conclusively presumed to know what appears on its face, and to have reasonable cause to believe it was intended to accomplish its ordinary and necessary effect: Graham *v.* Stark, 3 B. R. 93.

As to what are, conveyances to hinder and delay creditors, fraudulent preferences, invalid judgments, executions, &c., see Gillespie *v.* McKnight, 3 B. R. 117; Adams, Id. 139; Briggs *v.* Moore, Id. 149; Doyle, Id. 158; Chamberlain, Id. 174; Samson *v.* Burton, 4 Id. 1; Dumont, Id. 4; Tonkin & Trewartha, Id. 13; Terry & Cleaver, Id. 33; Bloss, Id. 37; Street *v.* Dawson, Id. 60; Allen *v.* Massey, Id. 75; Wilson *v.* Stoddard, Id. 76; Martin *v.* Smith, Id. 83; Butler, Id. 91; Beattie *v.* Gardner, Id. 106; Rison *v.* Knapp, Id. 114; Kahley, Id. 124; Smith *v.* Buchanan, Id. 133; Vogle *v.* Lathrop, Id. 146; Gregg, Id. 150; Beers *v.* Placer, Id. 150; Martin *v.* Toof, Id. 158; Eldridge, Id. 162; Shaffer *v.* Fritchery, Id. 179; Antrims *v.* Kelly, Id. 189; Second Nat. Bank of Leavenworth *v.* Hunt, Id. 198; Keating *v.* Keefer, 5 Id. 133; Hall *v.* Wager, Id. 181; Haskell *v.* Ingalls, Id. 205; Harvey *v.* Crane, Id. 218; Scammon *v.* Cole, Id. 257; Wilson *v.* City Bank of

chaser, payee or incumbrancer in good faith and for valuable consideration.(*v*)

In the payment of dividends no preference is given on account of the nature of the debt, whether judgment debt, bond debt, specialty or simple contract. In this respect the Court of Chancery, to which the jurisdiction in bankruptcy anciently belonged, and which now exercises an appellate jurisdiction,(*x*) followed its rule that *equality is equity.[1] The crown, however, may enforce payment of the entire debt of a bankrupt crown debtor, notwith- [*155]

(*v*) Stat. 32 & 33 Vict. c. 71, s. 92.

(*x*) Sect. 71.

St. Paul, Id. 270; Lawrence *v.* Graves, Id. 279; Hood *v.* Karper, 28 Leg. Int. 340; s. c. 5 B. R. 358; Post *v.* Corbin, Id. 12; Cookinham *v.* Morgan, Id. 16; Sawyer *v.* Turpin, Id. 339; Hunt, Id. 433; Darby's Trustees *v.* Lucas, Id. 437; Sansom *v.* Burton, Id. 459.

Transfers made out of the ordinary course of business of a debtor are *primâ facie* fraudulent, and in an action by an assignee in bankruptcy of such a debtor, to impeach a transaction involving such a transfer, the burden of proof is upon the defendant to show its validity: Collins *v.* Bell, 3 B. R. 146; Wilson *v.* Stoddard, 4 Id. 76. The first subdivision of section 35 of the Bankrupt Act, with its limitation of four months, applies only to cases of payments or conveyances made to a creditor, in consideration of pre-existing debts, by way of preference; while the second subdivision, with its limitation of six months, applies to other transfers and conveyances made contrary to the provisions and policy of the Bankrupt Act, or in fraud of the act; but where a payment or conveyance, or other transaction, is fraudulent by any general rule of law other than that specified in the said 35th section, the assignee may sue within two years. The provisions of section 39 avoiding certain acts, are subject to the limitations of four and six months contained in section 35: Bean *v.* Brookmire, 4 B. R. 57; Maurer *v.* Frantz, Id. 142.

The preference upon a judgment note is not obtained when the warrant of attorney is given, but when the judgment upon it is entered: Golson *v.* Neihoff, 5 B. R. 56; Hood *v.* Karper, 28 Leg. Int. 340; s. c. 5 B. R. 358; see also Lord, Id. 318.

An endorser of a note who receives none of the proceeds of the same, and whose contingent liability never becomes absolute, cannot be compelled to pay to the bankrupt's assignee, the amount of the note paid by the bankrupt to the holder, and while the debtor was still carrying on business: Bean *v.* Laflin, 5 B. R. 333.

[1] See *ante*, p. 132 note 2 *f*.

Judgment creditors have no priority in distribution, but share *pro rata* with other creditors: Erwin & Hardee, 3 B. R. 142. When trust property does not remain in specie, but has been made way with by a bankrupt trustee, the *cestui que trust* has no longer a specific remedy against the estate in bankruptcy, but must come in *pari passu* with the other creditors: Janeway, 4 B. R. 26. See also Ungewitter *v.* Von Sachs, 3 Id. 178.

As to claims for wages, see Brown, 3 B. R. 177; Harthorn, 4 Id. 27.

Where commercial paper is endorsed by a firm in its firm name, and also by the individual names of one or more members of the firm, and the makers thereof become embarrassed, and bankruptcy ensues to the endorsers, and the holders accept, with permission of the Court, forty per cent. from the makers, they are only entitled to

standing the bankrupt laws.(y) And a judgment debt, if entered up one year at least before the bankruptcy, was, by the statute for extending the remedies of creditors, a charge in equity on all the bankrupt's real estate.(z) But this was altered with respect to all judgments entered up after the 29th July, 1864, the date of the act to amend the law relating to future judgments, statutes and recognisances.(a) The landlord of a bankrupt might, notwithstanding an act of bankruptcy, distrain for his rent, not exceeding one year's rent accrued prior to the day of the filing of the petition for adjudication.(b) And the present act contains, as we have seen, a provision to the same effect.(c) The wages or salary of a clerk or servant of the bankrupt, for any time not exceeding three calendar months and not exceeding 30*l.*,(d) and also the wages of any laborer or workman not exceeding 40*s.*, might, by the Act of 1849, be ordered by the court to be paid in full;(e) and the present act extends this exception to *four* months' wages or salary of a clerk or servant, not exceeding *fifty* pounds, and to the wages of any laborer or workman not exceeding two months' wages.(f) It also gives priority to rates and taxes due from the bankrupt for twelve months preceding.(g) The bankrupt is entitled to any surplus remaining after payment of his creditors and the costs of the bankruptcy.(h)[1]

[*156] *If the bankrupt had duly surrendered and conformed to the bankrupt law, he was formally entitled to a certificate of conformity, by which he was discharged from all debts due by him when he became bankrupt, and from all claims and demands made provable under the bankruptcy.(i) Formerly the certificate was required to be signed by

(y) *Anon.*, 1 Atk. 262; stat. 32 & 33 Vict. c. 71, s. 49.

(z) Stat. 1 & 2 Vict. c. 110, s. 13; Ex parte Boyle, 3 De G. M. & G. 515; s. c. 17 Jur. 979.

(a) Stat. 27 & 28 Vict. c. 112, s. 1.

(b) Stat. 12 & 13 Vict. c. 106, s. 129; Paull *v.* Best, 3 B. & S. 537 (E. C. L. R. vol. 113).

(c) Stat. 32 & 33 Vict. c. 71, s. 34, *ante*, p. 148.

(d) Stat. 12 & 13 Vict. c. 106, s. 168.

(e) Sect. 169.

(f) Stat. 32 & 33 Vict. c. 71, s. 32.

(g) Sect. 32.

(h) Sect. 45.

(i) Stat. 12 & 13 Vict. c. 106, ss. 199, 200.

a dividend against the endorsers individually, and as a firm, to an amount equal to their claim, after deducting the forty per cent. received from the makers: Howard Cole & Co., 4 B. R. 185.

[1] Surplus funds in the hands of the assignee, after settlement of the estate, where no debts have been proved, and there is reasonable cause to believe that none will be proved, are to be paid to the bankrupt, upon the filing of a petition by him, setting forth his reasons for believing that no creditors desire to prove their debts, and asking that the funds shall be paid to him: Hoyt, 3 B. R. 13.

a given proportion of the creditors ;(*k*) but, by the Act of 1849, the court was constituted the sole judge of any objections which might be made by any creditors against allowing the certificate; and the court might either allow the same or refuse or suspend the allowance thereof, or annex such conditions thereto as the justice of the case might require.(*l*) The certificates were by this act divided into three classes. If the bankruptcy had arisen from unavoidable losses and misfortunes, the bankrupt was entitled to a certificate of the first class. If the bankruptcy had not *wholly* arisen from unavoidable losses and misfortunes, he was entitled to a certificate of the second class. And if the bankruptcy had not arisen from unavoidable losses or misfortunes, he was only entitled to a certificate of the third class.(*m*) But all classification of certificates was abolished by the Bankruptcy Act, 1861 ;(*n*) and the bankrupt, if he had properly conducted himself, became entitled to an *order of discharge*, which discharged him from all debts, claims or demands, provable under his bankruptcy.(*o*) The Bankruptcy Act, 1869, now contains the following provisions with respect to the order of discharge.[1] When a bank-

(*k*) Stat. 6 Geo. IV. c. 16, s. 122.
(*l*) Stat. 12 & 13 Vict. c. 106, s. 198.
(*m*) Stat. 12 & 13 Vict. c. 106, sched Z.
(*n*) Stat. 24 & 25 Vict. c. 134, s. 157.
(*o*) Sect. 161.

[1] See *ante*, p. 132, note 2 *g*.

If there be no assets, the bankrupt may apply for a discharge at the expiration of sixty days, though debts have been proved: Woolums, 1 B. R. 131. When debts are proved and there are assets, application for a discharge can not be filed before the expiration of six months from the adjudication: Bodenheim, 2 B. R. 133. When at the time of the application for a discharge, the assignee has neither received nor paid any moneys on account of the estate, the case is to be regarded as one in which no assets have come to his hands: Dodge, 1 B. R. 115. See also Solis, 3 Id. 186. It is only where the bankrupt can apply for his discharge within less than six months from the adjudication, that he must apply within a year: Greenfield, 2 B. R. 98, 100. See also Willmott, Id. 76; Schenck, 5 Id. 93. See also Martin, 2 Id. 169,—where it was held (no assets having come to the hands of the assignee), that failure to make application for a discharge within one year after the adjudication, would preclude a discharge, the provisions of the statute in this respect being not merely directory, but an absolute requirement; and Canaday, 3 B. R. 3,—where it was held, that it was discretionary with the Court to grant or withhold a discharge, when the application therefor is not made within a year. But refusal of a discharge because the application is not made in time, is no bar to new proceedings: Farrell, 5 B. R. 125. False swearing by the bankrupt in the affidavit annexed to his petition, must be shown to be intentional in order to bar his discharge: Wyatt, 2 B. R. 94. See also Keefer, 4 Id. 126; Smith & Bickford, 5 Id. 20. Omission of names of certain creditors with their knowledge and consent, will not bar a discharge on the objection of other creditors: Needham, 2 B. R. 124. Where the property of the debtor has been attached by a hostile creditor, without the knowledge of the debtor, his subsequent omission to have himself adjudged a voluntary bankrupt, will not be deemed evi-

ruptcy is closed, or at any time during its continuance, with the assent of the creditors testified by a special resolution, the bankrupt may apply

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dence of his intent to give a preference, so as to bar a discharge: Belden, 2 B. R. 14. One who was not a creditor at the time of an alleged fraudulent removal of property, or whose claim was then barred by the statute of limitations, cannot oppose a discharge on the ground of such fraudulent removal: Burk, 3 B. R. 76. A fraudulent sale before the passage of the Bankrupt Act, is in itself insufficient to bar a discharge: Hussman, 2 B. R. 140; Rosenfield, 1 Id. 161. See also Keefer, 4 Id. 126. But see *contra:* Cretiew, 5 B. R. 423, where it was held that the operation of the provisions of the 29th section of the Bankrupt Act, as to fraudulent preferences, &c., which will bar a discharge, is not confined to transactions occurring after the passage of the act. As to what acts amount to a fraudulent preference so as to bar a discharge, see Rosenfeld, Jr., 2 B. R. 49; Lewis *v.* Rosenham, Id. 145; Warner, 5 Id. 414. Where a debtor knows, or in reason ought to know, that he is insolvent, and makes payment of an independent debt, not in the course of trade, and without the creditor's knowledge of such insolvency, it is a fraudulent preference, and bars a discharge: Gay, 2 B. R. 114. But a discharge will not be withheld, when it appears solely from the bankrupt's examination, that he had paid certain debts in full, a short time before he became bankrupt, no other proof being offered to show that such payments were fraudulent preferences: Burgess, 3 B. R. 47. The fair and reasonable construction of section 29 of the Bankrupt Act of the United States, is, that it refuses a discharge on the ground of preference, only when the act is brought within the definition of section 35, or section 29 itself. Under the latter, it must be proved that bankruptcy was in contemplation, and under the former, that the creditor was a party to the fraud: Lock, 2 B. R. 123.

Any creditor may oppose the discharge, whether he has proved his debt or not: Sheppard, 1 B. R. 115; Boutelle, 2 Id. 51; (but the debt must be provable, Murdock 3 B. R. 36.) *Contra:* Levy, 1 Id. 66; Palmer, 3 Id. 77. Specifications of grounds of opposition to a discharge must be reasonably definite; otherwise they will be disregarded: Rathbone, 1 B. R. 50; Hill, Id. 42; Beardsley, Id. 52. Upon the trial of questions of fact arising in opposition to a discharge, the burden of proof is on the creditor: Hill, 1 B. R. 42. See also Orcutt, 4 B. R. 176; Williams, Id. 187. As the discharge does not bar a debt created by fraud, the existence of such debt is no ground for refusal of the discharge: Rosenfield, 1 B. R. 161. See also Patterson, 1 B. R. 58; Stokes, 2 Id. 76. That the creditor's debt is a fiduciary one, is no ground for withholding the discharge, such debt not being affected thereby: Tracy, 2 B. R. 98. The balance due by a factor to his principal, is a fiduciary debt within the meaning of the act: Seymour, 6 Int. Rev. Rec. 60; Kimball, 2 B. R. 74. See as to this, Chapman *v.* Forsyth, 2 How. 202; Lenke *v.* Booth, 5 B. R. 351. Where a creditor was not named in the bankrupt's schedules, and such creditor after discharge granted in bankruptcy, attached by garnishee process property of the bankrupt shown in evidence to have been concealed from the Bankrupt Court, it was held that the certificate of discharge did not bind the creditor, and was no defence to his action, on the ground that it had been fraudulently obtained: Barnes *v.* Moore, 2 B. R. 174. A creditor may set up a fraudulent concealment by the bankrupt of his property, against the certificate of discharge, in whatever court it may be pleaded: Perkins *v.* Gay, 3 B. R. 189; but see Corey *v.* Ripley, 4 B. R. 163,—where it was held that a discharge duly granted, when pleaded in bar to the further maintenance of an action for prior indebtedness, in a State Court, could not be impeached in such Court, for any cause which would have prevented the granting of it, or have

to the court for an order of discharge; but *such discharge shall not be granted unless it is proved to the court that one of the [*157]

been sufficient for annulling it, under the bankrupt act; and that the power to set aside and annul a discharge thereby conferred upon the Federal Courts, was incompatible with the exercise of the same power by a State Court, and that the former was paramount.

The omission of a merchant or tradesman, since the passage of the act, to keep proper books of account, will bar a discharge, whether such omision was wilful or fraudulent or not: Solomon, 2 B. R. 94. As to the requirement of keeping books, see Nooman, 3 B. R. 63; Gay, 2 Id. 114; White, 2 Id. 179; Keach, 3 Id. 3; Littlefield, Id. 13; Bellis, Id. 124; Murdock, 4 Id. 17; Tyler, Id. 27; Bound, Id. 164; Burgess, 3 Id. 147; Coolidge, Id. 71. See as to concealment of property previously assigned by a bankrupt, or of his interest in a joint estate, as a bar to his discharge, Beal, 2 B. R. 178. A bankrupt is not entitled to a discharge, unless he proves satisfactorily that he could not obtain his wife's attendance, upon an order made for her examination: Van Tuyl, 2 B. R. 177. The discharge itself terminates an injunction staying proceedings in a state court, notice to dissolve being unnecessary: Thomas, 3 B. R. 7. A voluntary assignment for the benefit of creditors is a bar to a discharge: Goldschmidt, 3 B. R. 41. But see Pierce & Holbrook, Id. 61, where it was held that an assignment for the benefit of creditors without any preference, sixteen days before the filing of the debtor's petition, and when a creditor proceeding adversarily was about to obtain a judgment, was not, in the absence of actual fraud, a bar to a discharge.

Creditors, who have ratified such an assignment, by joining in an agreement for the substitution of another assignee, are estopped from objecting to the bankrupt's discharge, on the ground of the making of such assignment: Schuyler, 2 B. R. 169.

If the court, upon examining the record, upon an application for a final discharge, perceive that the bankrupt has done any act, which under the statute would be a bar to the granting of the certificate, it will refuse the discharge, although no creditor appear in opposition: Schoo, 3 B. R. 52; Wilkinson, Id. 74. Until a bankrupt has made full and sufficient disclosures, his creditors or the assignee, cannot be required to specify objections to his discharge, or definitively abide by objections, which may have been specified: Long, 3 B. R. 66.

Where a bankrupt has been arrested on process issuing out of a State Court, the U. S. District Court, upon an application of the bankrupt to be discharged from such arrest pending the bankruptcy proceedings, cannot properly inquire into the fact whether the debt or claim, upon which the order of arrest was founded, was or was not one from which the bankrupt would be discharged by a discharge in bankruptcy, or whether the bankrupt was liable by the state law to arrest; but can only determine whether the State Court in its order of arrest, intended to found it on a claim or debt not dischargeable in bankruptcy: Valk, 3 B. R. 73.

Where a bankrupt omitted to include in his schedule, a statement of an interest in an estate in expectancy under a will, his discharge was refused until an amendment, for which leave was granted: Connell, Jr., 3 B. R. 113.

Section 33d of the U. S. Bankrupt Act (in relation to the requirement of the payment of fifty per cent., or the obtaining consent of creditors as a requisite to discharge), should be construed in relation to the word assets, as if it read; "The proceeds of the bankrupt's property in the hands of the assignee, and subject to be divided among his creditors, must be equal to fifty per cent. of claims," &c.: Freiderick, 3 B. R. 117; Webb, Id. 177; see also Borden, 5 Id. 128; Graham, Id. 155. The section referred to is applicable as well to involuntary as to voluntary pro-

following conditions has been fulfilled, that is to say, either that a dividend or not less than ten shillings in the pound has been paid out of his property, or might have been paid except through the negligence or fraud of the trustee, or that a special resolution of his creditors has been passed to the effect that his bankruptcy or the failure to pay ten shillings in the pound has, in their opinion, arisen from circumstances for which the bankrupt cannot justly be held responsible, and that they desire that an order of discharge should be granted to him. And the court may suspend for such time as it deems to be just, or withhold altogether, the order of discharge in the circumstances following: namely, if it appears to the court on the representation of the creditors made by special resolution, of the truth of which representation the court is satisfied, or by other sufficient evidence, that the bankrupt has made default in giving up to his creditors the property which he is required by this act to give up; or that a prosecution has been commenced against him in pursuance of the provisions relating to the punishment of fraudulent debtors, contained in the "Debtors Act, 1869,"(*p*) in respect of any offence alleged to have been committed by him against the said act.(*q*)

(*p*) Stat. 32 & 33 Vict. c. 62, *ante*, p. 103. (*q*) Stat. 32 & 33 Vict. c. 71, s. 48.

ceedings: Bunster, 5 B. R. 82. It is no ground of objection to the discharge of a bankrupt, that he has caused and permitted the loss, waste and destruction of his estate and effects, and misspent and misused the same, unless such loss, &c., occurred after the filing of the petition. The buying of goods fraudulently, or when the debtor knew that he could not pay for them, is not a fraud, which will prevent his discharge: Rogers, 3 B. R. 139. Want of jurisdiction is a good ground of refusal of a discharge: Penn, 3 B. R. 145. A bankrupt, who has omitted to apply for a stay of proceedings in an action against him, pending the question of his discharge, may nevertheless apply after judgment, to have supplementary proceedings thereon stayed, on the ground that he has been discharged, if the plaintiff's demand be one affected by the discharge: World Company *v.* Brooks, 3 B. R. 146. A discharge will not be refused, simply because the publication of the assignee's notice of appointment was omitted to be made: Strachan, 3 B. R. 148. But see Bushey, Id. 167, where it was held that proper notice must be given by the assignee to creditors, and that the omission of it would render the bankrupt liable to lose his right to a discharge: see also Bellamy, 6 Int. Rev. Rec. 86. As to application for annulling discharge: see Stetson, 3 B. R. 179. Spending property in gaming, which if not so spent might be assets, will bar a discharge: Marshall, 4 B. R. 27. It is not necessary for a bankrupt to obtain consent to his discharge by creditors, to whom he is liable as an endorser. Such liability, although fixed, is a secondary and not a principal one, till judgment has been obtained against him by due process of law: Loder, 4 B. R. 50. The mere omission of the name of a creditor on the schedule of a bankrupt, is not a substantive ground for preventing or avoiding his discharge as to such creditor, unless the omission was wilful or fraudulent: Payne *v.* Able, 4 B. R. 67. A discharge cannot be granted after death of the debtor, unless there shall have been a compliance with the requirements of section 29 of the Bankrupt Act, as to the application for a discharge: O'Farrell, 2 B. R. 154; see also Gunike, 4 Id. 23.

An order of discharge shall not release the bankrupt from any debt or liability incurred by means of any fraud or breach of trust, nor from any debt or liability whereof he has obtained forbearance by any fraud, but it shall release the bankrupt from all other debts provable under the bankruptcy, with the exception of—

(1.) Debts due to the crown:

(2.) Debts with which the bankrupt stands charged at the suit of the crown or of any person for *any offence against a statute relating to any branch of the public revenue, or at the suit of the sheriff or other public officer on a bail bond entered into for the appearance of any person prosecuted for any such offence: [*158]

and he shall not be discharged from such excepted debts unless the Commissioners of the Treasury certify in writing their consent to his being discharged therefrom. An order of discharge shall be sufficient evidence of the bankruptcy, and of the validity of the proceedings thereon; and in any proceedings that may be instituted against a bankrupt who has obtained an order of discharge in respect of any debt from which he is released by such order, the bankrupt may plead that the cause of action occurred before his discharge, and may give the act and the special matter in evidence.(*r*)[1]

The order of discharge shall not release any person who, at the date of the order of adjudication, was a partner with the bankrupt, or was jointly bound or had made any joint contract with him.(*s*)[2]

Until the bankrupt obtained his discharge all the real and personal property which might descend, revert, or be devised or bequeathed or come to him, became vested in his assignees.(*t*)[3] But an uncertificated bankrupt might maintain an action for his personal labor performed after the bankruptcy,(*u*) and he might also sue in respect of contracts made with himself, and also in respect of any after-acquired property, if the assignees or creditors did not interfere.(*v*) The court, however, *was empowered by the Act of 1861 in certain cases of miscon- [*159]

(*r*) Stat. 32 & 33 Vict. c. 71, s. 49.

(*s*) Sect. 50.

(*t*) Stat. 12 & 13 Vict. c. 106, ss. 141, 142.

(*u*) Silk *v.* Osborne, 1 Esp. R. 140.

(*v.*) Webb *v.* Fox, 7 Term Rep. 391; Drayton *v.* Dale, 2 B. & C. 293 (E. C. L. R. vol. 9); Crofton *v.* Poole, 1 B. & Ad. 568 (E. C. L. R. vol. 20).

[1] See *ante*, p. 132, note 2 *g*.

[2] See *ante*, p. 132, note 2 *i*.

[3] See *ante*, p. 151, note 1.

duct, either to refuse or suspend the order of discharge, or to grant the same subject to any conditions touching any salary, pay, emoluments, profits, wages, earnings or income, which might afterwards become due to the bankrupt, and touching his after-acquired property.(*w*) The Act of 1869 has, as we have seen,(*x*) substituted the trustee for the assignees; and it vests in him all the property of the bankrupt at the commencement of the bankruptcy, or which may be acquired by or devolve on him during its continuance.(*y*) The act also contains the following provisions with regard to the status of an undischarged bankrupt. Where a person who has been made bankrupt has not obtained his discharge, then, from and after the close of his bankruptcy, the following consequences shall ensue:

(1.) No portion of a debt provable under the bankruptcy shall be enforced against the property of the person so made bankrupt until the expiration of three years from the close of the bankruptcy; and during that time, if he pay to his creditors such additional sum as will, with the dividend paid out of his property during the bankruptcy, make up ten shillings in the pound, he shall be entitled to an order of discharge in the same manner as if a dividend of ten shillings in the pound had originally been paid out of his property:

(2.) At the expiration of a period of three years from the close of the bankruptcy, if the debtor made bankrupt has not obtained an order of discharge, any balance remaining unpaid in respect of any debt proved in such bankruptcy (but without interest in the meantime) shall be deemed to be a subsisting debt in the nature of [*160] *a judgment debt, and, subject to the rights of any persons who have become creditors of the debtor since the close of his bankruptcy, may be enforced against any property of the debtor with the sanction of the court which adjudicated such debtor a bankrupt, or of the court having jurisdiction in bankruptcy in the place where the property is situated, but to the extent only, and at the time and in manner directed by such court, and after giving such notice and doing such acts as may be prescribed in that behalf.(*z*)

Any petition or copy of a petition in bankruptcy, any order or copy

(*w*) Stat. 24 & 25 Vict. c. 134, s. 159.
(*x*) *Ante*, p. 141.
(*y*) Stat. 32 & 33 Vict. c. 71, s. 15.
(*z*) Sect. 54.

of an order made by any court having jurisdiction in bankruptcy, any certificate or copy of a certificate made by any court having jurisdiction in bankruptcy, any deed or copy of a deed of arrangement in bankruptcy, and any other instrument or copy of an instrument, affidavit or document made or used in the course of any bankruptcy proceedings, or other proceedings had under the Bankruptcy Act, 1869, may, if any such instrument as aforesaid or copy of an instrument appears to be sealed with the seal of any court having jurisdiction, or purports to be signed by any judge having jurisdiction in bankruptcy under this act, be receivable in evidence in all legal proceedings whatever.(*a*)

If a person having privilege of parliament commits an act of bankruptcy he may be dealt with under the Act of 1869 in like manner as if he had not such privilege.(*b*)

If a person, being a member of the Commons House of Parliament, is adjudged bankrupt, he shall be and *remain during one year from the date of the order of adjudication incapable of sitting and voting in that House, unless within that time either the order is annulled or the creditors who prove debts under the bankruptcy are fully paid or satisfied. Provided that such debts (if any) as are disputed by the bankrupt shall be considered, for the purpose of this section, as paid or satisfied, if within the time aforesaid he enters into a bond, in such sum and with such sureties as the court approves, to pay the amount to be recovered in any proceeding for the recovery of or concerning such debts, together with any costs to be given in such proceedings.(*c*)

[*161]

The following regulations are made by the Bankruptcy Act, 1869, with respect to the liquidation by arrangement of the affairs of the debtor:[1]

(*a*) Stat. 32 & 33 Vict. c. 71, s. 107. (*b*) Sect. 120.
(*c*) Sect. 121.

[1] See *ante*, p. 132, note 2 *l*.

The Court has power to supersede a bankruptcy with consent of the creditors: Miller, 1 B. R. 105; But see Sherburne, Id. 155; see also Morris's Estate, Crabbe 70; Lathrop, 5 B. R. 43. After an assignee has been appointed, at a subsequent meeting of creditors, they may make an arrangement by trust deed to have the assignee removed, and a trustee appointed in his stead: Jones, 2 B. R. 20. It is a substantial objection to the approval of the resolution for a trustee arrangement, that the committee was composed of two only, one of whom is the trustee: Sillwell, 2 B. R. 164. The trustees under direction of the committee may, if so ordered by the Court, proceed to settle the estate just as if there had been no adjudication of bankruptcy, and the bankrupt was managing his own affairs, taking care always to secure legal protection to each of the

(1.) A debtor unable to pay his debts may summon a general meeting of his creditors, and such meeting may, by a special resolution as defined by the act, declare that the affairs of the debtor are to be liquidated by arrangement and not in bankruptcy, and may at that or some subsequent meeting, held at an interval of not more than a week, appoint a trustee, with or without a committee of inspection.

(2.) All the provisions of the act relating to a first meeting of creditors, and to subsequent meetings of creditors in the case of a bankruptcy, including the description of creditors entitled to vote at such meetings, and the debts in respect of which they are entitled to vote, shall apply respectively to the first meeting of creditors, and to subsequent meetings of creditors, [*162] *for the purposes of this section, subject to the following modifications:

(a.) That every such meeting shall be presided over by such chairman as the meeting may elect; and

(b.) That no creditor shall be entitled to vote until he has proved by a statutory declaration a debt provable in bankruptcy to be due to him, and the amount of such debt, with any prescribed particulars; and any person wilfully making a false declaration in relation to such debt shall be guilty of a misdemeanor.

(3.) The debtor, unless prevented by sickness or other cause satisfactory to such meeting, shall be present at the meeting at which the special resolution is passed, and shall answer any inquiries made of him, and he, or if he is so prevented from being at such meeting some one on his behalf, shall produce to the meeting a statement showing the whole of his assets and debts, and the names and addresses of the creditors to whom his debts are due.

(4.) The special resolution, together with the statement of the assets and debts of the debtor, and the name of the trustee appointed, and of the members, if any, of the committee of inspection, shall be presented to the registrar, and it shall be his duty to inquire whether such resolution has been passed in manner directed by this section, but if satisfied that it was so passed,

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creditors. Wherever the trustees and committee are satisfied that demands are correct, and require no testimony to be taken, they can allow the same: Darby, 4 B. R. 98; but see Bakewell, 4 Id. 199, where it was held that proofs of debts against the estate of a bankrupt must be made before the register, even though proceedings in bankruptcy have been superseded by trustee arrangement.

and that a trustee has been appointed with or without a committee of inspection, he shall forthwith register the resolution and the statement of the assets and debts of the debtor, and such resolution and statement shall be open for inspection on the prescribed conditions, *and the liquidation by arrangement shall be deemed to have commenced as from the date of the appointment of the trustee. [*163]

(5.) All such property of the debtor as would, if he were made bankrupt, be divisible amongst his creditors shall, from and after the date of the appointment of a trustee, vest in such trustee under a liquidation by arrangement, and be divisible amongst the creditors, and all such settlements, conveyances, transfers, charges, payments, obligations and proceedings as would be void against the trustee in the case of a bankruptcy shall be void against the trustee in the case of liquidation by arrangement.

(6.) The certificate of the registrar in respect of the appointment of any trustee in the case of a liquidation by arrangement shall be of the same effect as a certificate of the court to the like effect in the case of a bankruptcy.

(7.) The trustee under a liquidation shall have the same powers and perform the same duties, as a trustee under a bankruptcy, and the property of the debtor shall be distributed in the same manner as in a bankruptcy; and with the modification hereinafter mentioned all the provisions of the act shall, so far as the same are applicable, apply to the case of a liquidation by arrangement in the same manner as if the word "bankrupt" included a debtor whose affairs are under liquidation, and the word "bankruptcy" included liquidation by arrangement; and in construing such provisions the appointment of a trustee under a liquidation shall, according to circumstances, be deemed to be equivalent to and a substitute for the presentation of a petition in bankruptcy, or the *service of such petition or an order of adjudication in bankruptcy. [*164]

(8.) The creditors at their first or any general meeting may prescribe the bank into which the trustee is to pay any moneys received by him, and the sum which he may retain in his hands.

(9.) The provisions of the act with respect to the close of the bankruptcy, discharge of a bankrupt, to the release of the trustee, and to the audit of accounts by the comptroller, shall not apply in the case of a debtor whose affairs are under liquidation

by arrangement; but the close of the liquidation may be fixed, and the discharge of the debtor and the release of the trustee may be granted by a special resolution of the creditors in general meeting, and the accounts may be audited in pursuance of such resolution, at such time and in such manner and upon such terms and conditions as the creditors think fit.

(10.) The trustee shall report to the registrar the discharge of the debtor, and a certificate of such discharge given by the registrar shall have the same effect as an order of discharge given to a bankrupt under the act.

(11.) Rules of court may be made in relation to proceedings on the occasion of liquidation by arrangement in the same manner and to the same extent and of the same authority as in respect of proceedings in bankruptcy.

(12.) If it appear to the court on satisfactory evidence that the liquidation by arrangement cannot, in consequence of legal difficulties, or of there being no trustee for the time being, or for any sufficient cause, proceed without injustice or undue delay to the creditors or to the debtor, [*165] *the court may adjudge the debtor a bankrupt, and proceedings may be had accordingly.

(13.) Where no committee of inspection is appointed the trustee may act on his own discretion in cases where he would otherwise have been bound to refer to such committee.

(14.) In calculating a majority on a special resolution for the purposes of this section, creditors whose debts amount to sums not exceeding ten pounds shall be reckoned in the majority in value, but not in the majority in number.(*d*)

(*d*) Stat. 32 & 33 Vict. c. 71, s. 125.

*CHAPTER V. [*166]

OF BANKRUPTCY OF NON-TRADERS.

BEFORE the Bankruptcy Act, 1861, a person not in trade could not be made a bankrupt. He might, however, have become insolvent. Insolvency, strictly speaking, means a general inability to meet pecuniary engagements.(*a*)[1] But the term was very commonly and conveniently applied to the means of getting rid of such engagements afforded by certain acts of parliament passed for the relief of insolvent debtors.[2]

(*a*) Biddlecombe *v.* Bond, 4 Ad. & E. 332 (E. C. L. R. vol. 31).

[1] If a man's debts cannot be made in full out of his property by levy and sale on execution, he is insolvent within the meaning of the United States bankrupt law: Randall, 3 B. R. 4. Merchants unable to pay all their debts, in the usual and ordinary course of business, as persons carrying on trade usually do, are insolvent within the meaning of the said act: Lewis *v.* Rosenham, 2 B. R. 145; Wilson *v.* Brinkman, Id. 149; Wright, Id. 155; Morgan *v.* Mastick, Id. 163; Rison *v.* Knapp, 4 Id. 114; Stranahan *v.* Gregory, Id. 142; Martin *v.* Toof, Id. 158; Sawyer *v.* Turpin, 5 Id. 339.

Aliter as to a farmer: Keys, 3 B. R. 54. The strict definition of insolvency, usually given in commercial centres, should not be applied in country places. A party should be held insolvent only when he fails to meet his debts according to the usages and customs of the place of his business; the rule should be in harmony with the general custom of the place: Hall *v.* Wager, 5 B. R. 181.

[2] The laws and regulations on the subject of insolvency, are almost as diverse as there are states in the Union. To give a sketch of all these laws, and the judicial constructions of them, would far exceed the limits of a note. The decisions as to what is a valid preference made by a debtor in favor of a creditor, and what an invalid one,—as to what is a good assignment for the benefit of creditors, and what bad,—preferences having been declared void under the bankrupt law, and general assignments for the benefit of creditors, only operating, if at all, in the discretion of the assignee in bankruptcy—together with the many other questions of a like nature, relating to the peculiar system and practice of each state, may be of interest to the citizens of the respective states; but it can scarcely be expected, and it certainly would not be advantageous, to collect together these diversities, numerous as they are, and depending as they do almost entirely upon an interpretation of the statutes of the several states, for such a collection could result in nothing but confusion. The insolvent law of each state, is regulated by the acts of the legislature and judicial opinions of that state, and will be conclusive upon all its citizens, unless there be a conflict between the laws of a state and those of the General Government: Griswold *v.* Platt, 9 Metc. 16; Betts *v.* Bagley, 12 Pick. 580; Alexander *v.* Gibson, 1 N. & McC. 483; Clark, Assignee, &c., *v.* Rosenda et al., 5 Robins. 27. It is only, therefore, those questions which are of general interest, that will be here considered.

The principal act for the relief of insolvent debtors in England was the statute 1 & 2 Vict. c. 110, the former sections of which were, how-

By the term "insolvent law," as generally received, is understood a law operating upon the remedy of a contract, and not upon the contract itself; discharging, indeed, the debtor from imprisonment, but not releasing his future acquisitions of property from the payment of his debt; while under the words "bankrupt law," is comprehended all those enactments, which discharge the debtor from liability upon his contract. That this distinction between bankrupt and insolvent laws, though ordinarily received as true, cannot be entirely relied on, may be seen from the opinion of Chief Justice Marshall, in the case of Sturges *v.* Crowninshield, 4 Wheat. 194: "It is said . . . . that laws which merely liberate the person are insolvent laws, and those which discharge the contract, are bankrupt laws. But if an act of Congress should discharge the person of a bankrupt, and leave his future acquisitions liable to his creditors, we should feel much hesitation in saying that this was an insolvent, not a bankrupt act; and, therefore, unconstitutional. Another distinction has been stated, and has been uniformly observed. Insolvent laws operate at the instance of an imprisoned debtor; bankrupt laws at the instance of a creditor. But should an act of Congress authorize a commission of bankruptcy to issue on the application of a debtor, a court would scarcely be warranted in saying that the law was unconstitutional, and the commission a nullity." Notwithstanding this decision, the district judge of Missouri, in Nelson *v.* Carland, pronounced the Act of Congress of 1841, authorizing a debtor to be declared a bankrupt upon his own petition, a mere insolvent law; but, upon a certificate of difference of opinion between the judges of the Circuit and District Courts, the Supreme Court declared, that, under the circumstances of that case, the act did not give a power of review, and that the decision of the district judge must be regarded as final: 1 How. 269. This difficulty of distinguishing between bankrupt and insolvent laws, has, perhaps, in part, caused that diversity of opinion which has led to the holding, in some cases, that the states not only have power to pass insolvent laws, but also bankrupt laws: Ogden *v.* Saunders, 12 Wheat. 213; Woodhull et al. *v.* Wagner, 1 Baldw. 296; Shaw *v.* Robins, 12 Wheat. 369; Mason *v.* Haile, Id. 370; Beers et al. *v.* Haughton, 9 Peters 330; Hempstead *v.* Reed, 6 Conn. 480; Norton *v.* Cook, 9 Id. 314; Blair, &c., *v.* Williams, 4 Litt. 35; Bronson *v.* Newberry, 2 Doug. 38; Brown *v.* Dillahunty et al. 4 Sme. & Mar. 725; Gray et al. *v.* Monroe et al., 1 McLean 528; Roosevelt *v.* Cebra, 17 Johns. 108; Post *v.* Riley, 18 Id. 54; Penniman *v.* Meigs, 9 Id. 325; Ex parte Ziegenfuss, 2 Ired. 467; Smith *v.* Parsons, 1 Ohio 236; Alexander *v.* Gibson, 1 Nott & McC. 483; while, on the contrary, other authorities maintain that the state legislature have no power to pass bankrupt laws: McMillan *v.* McNeill, 4 Wheat. 209; Golden *v.* Price, 3 Wash. C C. 313; Farmers' and Mechanics' Bank of Pennsylvania *v.* Smith, 6 Wheat. 131; Glenn *v.* Humphreys, 4 Wash. C. C. 424; Medbury *v.* Hopkins, 3 Conn. 472; Ballentine et al. *v.* Haight, 1 Harring. 197; Olden et al., Exrs., *v.* Hallet, 2 South. 466. All the cases, however, agree, that the state governments have no power to make a law impairing the obligation of a contract, and the only question of dispute between them has been, whether a state bankrupt law impairs the obligation of a contract; some holding that it does, because we understand by a bankrupt law one which absolutely discharges the debt; and others, admitting the definition of a bankrupt law, deny that it impairs the contract, if the bankrupt law was in existence at the time when the contract was made, because the contract was then made in subserviency to existing laws. As to insolvent laws, it has been determined that inasmuch as

ever, occupied in abolishing arrest on mesne process in civil actions, and in extending the remedies of judgment creditors against the property of

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they, according to the ordinary acceptation of the term, operate merely upon the remedy, and not upon the contract itself, they cannot be said to impair the obligation of contracts, and are consequently valid. The effect of a discharge under the insolvent law of a state, may be regarded as at rest, so far as regards the decisions of the Courts of the United States: Boyle *v.* Zacharie et al., 6 Peters 635. That other question, also, in respect to the clashing of the authority of the State and General Government, may be considered determined, for in the words of Chief Justice Marshall, in the case of Sturges *v.* Crowninshield, above referred to: "This difficulty of discriminating with any accuracy between insolvent and bankrupt laws, would lead to the opinion that a bankrupt law may contain those regulations which are generally found in insolvent laws, and that an insolvent law may contain those which are common to a bankrupt law. If this be correct, it is obvious that much inconvenience would result from that construction of the Constitution, which would deny to the State Legislature the power of acting on this subject, in consequence of the grant to Congress. It may be thought more convenient that much of it should be regulated by state legislation, and Congress may purposely omit to provide formany cases to which their power extends. It does not appear to be a violent construction of the Constitution, and is certainly a convenient one, to consider the power of the states as existing over such cases as the law of the Union may not reach. But be this as it may, the power granted to Congress may be exercised or declined, as the wisdom of that body shall decide. If, in the opinion of Congress, uniform laws concerning bankruptcies ought not to be established, it does not follow that partial laws may not exist, or that state legislation on the subject may cease. It is not the mere existence of the power, but its exercise, which is incompatible with the exercise of the same power by the states. It is not the right to establish these uniform laws, but their actual establishment, which is inconsistent with the partial acts of the states." See also, Baldwin *v.* Hale, 1 Wall. U. S. 228.

Although, since the passage of the Bankrupt Law, the consideration of the extent of the jurisdiction of the Insolvent Laws of the states may not be of as much practical importance as formerly, it is nevertheless of interest to notice the diversity of sentiment on the subject.

For general purposes, the people of this country are one. yet, in other respects, the states are necessarily foreign and independent of each other: Buckner *v.* Finley et al., 2 Peters 586; Emory *v.* Greenough, 3 Dall. 369; and consequently it is to be expected that, as in the interpretation of foreign contracts, the *lex loci contractus* will be regarded: Smith *v.* Mead, 3 Conn. 253; Hammett *v.* Anderson, Id. 304; so in the execution of the contract, the *lex fori* will prevail: White *v.* Canfield, 7 Johns. 117; Whittemore *v.* Adams, 2 Cowen 626; Lowden et al. *v.* Moses, 3 McC. 93; Ayres et al. *v.* Audibon, 2 Hill (S. C.) 601. In accordance with this we find, that a contract made in one state, is not affected by the discharge of the debtor under the insolvent law of another state: Cook *v.* Moffat et al., 5 How. 295; Smith *v.* Mead, 3 Conn. 253; Hammett *v.* Anderson, Id. 304; Fisher et al. *v.* Wheeler et al., 5 La. Ann. 271; Judd *v.* Porter, 7 Maine 337; Palmer *v.* Goodwin, 32 Id. 535; Larrabee *v.* Talbott, &c., 5 Gill 426; Glenn *v.* Gill, 2 Md. 18; Owens et al. *v.* Bowie et al., &c., Id. 457; Van Raugh *v.* Van Arsdale, 3 N. Y. 154; Van Hook *v.* Whittock, 26 Wend. 53; Hicks *v.* Hotchkiss et al., 7 Johns. Ch. 297; Wyman *v.* Mitchell, 1 Cowen 316; Bizziel *v.* Bedient, 2 Car. L. Repos. 254; McKim *v.* Willis, 1 Allen 512; Kendall *v.* Badger, 1 McCal. C. C. 263; Beer *v.* Hooper, 32 Miss. 246;

their debtors. So far as the act related to insolvent debtors, it was for the most part a reprint, with some important additions, of a previous

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Dinsmore *v.* Bradley, 5 Gray 487; Anderson *v.* Wheeler, 25 Conn. 603; and that a discharge from imprisonment in one state, cannot be of any avail in an action brought in the courts of the United States, or the courts of any other state than that where the discharge was obtained: Ogden *v.* Saunders, 12 Wheat. 213; Clay *v.* Smith, 3 Peters 411; United States *v.* Wilson, 8 Wheat. 253; Woodhull et al. *v.* Wagner, 1 Baldw. 296; Shaw *v.* Robbins, 12 Wheat. 369; Glenn *v.* Humphreys, 4 Wash. C. C. 424; Babcock *v.* Weston, 1 Gallis. 168; Hinkley *v.* Mareau, 3 Mason 88; Beers *v.* Haughton, 9 Peters 330; Suydam et al. *v.* Broadnax et al., Admrs., 14 Id. 67; King *v.* Riddle, 7 Cranch 168; Woodbridge *v.* Wright et al., 3 Conn. 523; Norton *v.* Cook, 9 Id 314; Watson *v.* Browne, 10 Mass. 337; Frey *v.* Kirk, 4 Gill & Johns. 509; Friske *v.* Foster, 10 Metc. 597; Ilsley *v.* Merriam, 7 Id. 242; Clark *v.* Hatch, Id. 455; Wool et al. *v.* Malin, 5 Halst. 208; Vanuxem et al. *v.* Hazlehursts, 1 South. 202; Smith, Admr., *v.* Smith, 2 Johns. 235; White *v.* Canfield, 7 Id. 117; Sicard *v.* Whale, 11 Id. 194; Mather et al. *v.* Bush, 16 Id. 233; Whittemore *v.* Adams, 2 Cowen 626; Peck *v.* Hozier et al., 11 Johns. 346; James et al. *v.* Allen, 1 Dall. 206; Ayres et al. *v.* Audibon, 2 Hill (S. C.) 601; Baldwin *v.* Hale, 1 Wall. U. S. 223; in which last case it was decided that a discharge obtained under the insolvent laws of one state, is not a bar to an action on a note given in and payable in the same state, the party to whom the note was given having been and being of a different state, and not having proved his debt against the defendant's estate in insolvency, nor in any manner been a party to those proceedings. And see Poe *v.* Duck, 5 Md. 1; Fessenden *v.* Willey, 2 Allen (Mass.) 67; Bank *v.* Butler, 45 N. H. 336; Felch *v.* Bugbee, 48 Maine 9; Gilman *v.* Lockwood, 4 Wall. U. S. 409. Some cases, however, have held that if the discharge has been granted by the state in which the contract was made, it will remain good even against a resident of another state: Blanchard *v.* Russell, 13 Mass. 1; Proctor *v.* Moore, 1 Id. 198; Braynard *v.* Marshall, 8 Pick. 194; Savoye et al. *v.* Marsh et al., 10 Id. 594; Pugh *v.* Bussel, 2 Blackf. 394; Scribner *v.* Fisher, 2 Gray 43; Houghton *v* Maynard, 5 Id. 552. As a general rule, the state laws prohibiting assignments of property by a failing debtor, in anticipation of insolvency, to preferred creditors, will not be regarded in another or sister state, where a creditor of the insolvent resides, and to whom such assignment has been made: Upton *v.* Hubbard, 28 Conn. 274; Mead *v.* Dayton, Id. 33; Hoyt *v.* Shelden, 3 Bosw. 267.

But there is a class of cases which would at first sight seem to be inconsistent with the decisions above quoted; thus, a discharge obtained in Maryland, or Pennsylvania, or New York, has been held good in Delaware: Lewis *v.* Norwood, 4 Harring. 460; Fisher *v.* Stayton, 3 Id. 271; Beeson *v.* Beeson's Admrs., 1 Id. 466; Bailey *v.* Seal's Special Bail, Id. 367; so, also, a discharge obtained in Pennsylvania has been held good in New Jersey: Rowland et al. *v.* Stevenson, 1 Halst. 149; and in the same state, a discharge obtained in New York, upon a contract made in Pennsylvania, has been held good: Hale *v.* Ross, Penning. 590; and a discharge obtained in Massachusetts has been pronounced valid in Pennsylvania: Wheelock *v.* Leonard, 20 Penn. St. 440; and a discharge obtained in Massachusetts, upon a contract made there, with citizens of New York, has been held good in New Hampshire: Brown *v.* Collins, 41 N. H. 405; but a debt contracted in Massachusetts, between citizens of that state, which was evidenced by note, and endorsed to a citizen of New Hampshire, can be collected by the holder by suit in the state of New York, notwithstanding the discharge of the maker by the insolvent laws of Massa-

statute for the same purpose,(*b*) by which the laws then existing on the subject were amended and consolidated. The relief afforded to the debtor was his discharge from prison; and the act accordingly only applied to persons in actual custody within the walls of a prison in England. Any such person in custody upon any process whatsoever, for or by reason of any debt, damages, costs, sum or sums of money, or in consequence of contempt of any court whatsoever for non-payment of money or costs, taxed or untaxed, might at any time within the *space [*167] of fourteen days next after the commencement of his actual custody, or afterwards by permission of the court, apply by petition to the Court for the Relief of Insolvent Debtors for his discharge from such custody, according to the provisions of the act.(*c*) In the country the petition was referred for hearing to the county court of the district within which the insolvent was in custody.(*d*) The insolvent himself was formerly the only person who could put the machinery of the act in motion; but afterwards the creditor at whose suit the prisoner was committed to prison or charged in execution might, if not satisfied within twenty-one days next after such prisoner should have been so committed or charged in execution, himself petition the court for his share of the

(*b*) Stat. 7 Geo. IV. c. 57, continued and amended by stat. 11 Geo. IV. & 1 Will. IV. c. 38.

(*c*) Stat. 1 & 2 Vict. c. 110, s. 35.

(*d*) Stat. 10 & 11 Vict. c. 102, s. 10.

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chusetts: Smith *v.* Gardner, 4 Bosw. 54; and see further for analogous cases: Hempstead *v.* Reed, 6 Conn. 480; Hicks *v.* Brown, 12 Johns. 142; Hare, Exr., *v.* Monetrie, 2 Yeates 435; Donaldson *v.* Chambers, 2 Dall. 100; Miller *v.* Hall, 1 Id. 229; Thompson *v.* Young, Id. 294. This inconsistency, however, proceeds from a comity between the different states, by which the same regard is paid by one state to the insolvent laws of a sister state, as that state would pay to the insolvent laws of the former state, as will be seen by reference to Walsh *v.* Nourse, 5 Binn. 381, where Chief Justice Tilghman says: "If this matter is considered on *principle*, it is not easy to discover by what authority any state can, by its laws, affect a debt contracted in another state, where the creditor is residing. I mean how it can affect a debt so as to prevent the creditor from bringing an action in another state. Every state has power over the persons residing within its territory, and therefore, where a debt is discharged by the law of a state in which both plaintiff and defendant reside, another state ought to pay regard to it. Repeated decisions by my predecessors in this court have placed the law on a footing somewhat different from the principle I have mentioned. Our rule has been to pay the same regard to the insolvent laws of our sister states which their courts pay to ours. If the matter were to be taken up anew, I should be for adhering to what I consider the true principle. But, not without considerable reluctance, I have thought myself bound by former decisions, as I have declared in the case of Boggs & Davidson *v.* Teackle," &c.; and see, also, Mount *v.* Bradford, 1 Miles 17; Fisher *v.* Hyde, 3 Yeates 256; Smith *v.* Brown, 3 Binn. 201; Boggs et al. *v.* Teackle, 5 Id. 332; Hilliard et al. *v.* Greenleaf, Id. 336, and note.

relief,(*e*) which consisted in the real and personal estate and effects of the prisoner being vested in the provisional assignee of the court for the benefit of his creditors.

On the filing of the petition either of the debtor or of the creditor, a vesting order, as it was termed, was made by the court. By this order all the real and personal estate and effects of the prisoner, both within this realm and abroad (except his wearing apparel, bedding and other such necessaries of himself and his family, and his working tools and implements, not exceeding in the whole the value of twenty pounds), and all the future estate to which he might become entitled until his final discharge, were vested in the provisional assignee for the time being of the estates and effects of insolvent debtors in England.(*f*) The court might [*168] subsequently *have appointed any proper person or persons to be assignees of such estate and effects, in whom the same accordingly vested on the acceptance of the appointment being signified by him or them to the court.(*g*) The estate and effects of the prisoner were then sold and converted into money by the assignees in the manner directed by the act.(*h*) And the court had power to order that any property of the prisoner might be mortgaged, instead of being sold, if it should appear to the court that his debts could be discharged by such means.(*i*) If the insolvent were a beneficed clergyman, the assignees might have obtained a sequestration of the profits of the benefice for the payment of his debts.(*k*) And if the insolvent were or had been an officer under government, or in the service of the East India Company, a portion of his pay, half-pay, salary, emoluments or pension might, with the written consent of the chief officer of the department to which he belonged or had belonged, be ordered to be paid to the assignees.(*l*) The produce of the insolvent's estate was then divided by the assignees rateably amongst the creditors.(*m*) And if any prisoner should before or after his imprisonment, being in insolvent circumstances, have voluntarily conveyed, charged or made over any of his estate to or in trust for any creditor or creditors, every such transaction was declared to be fraudulent and void as against the assignees, if made within three months before the commencement of

(*e*) Sect. 36. In this case, however, the Insolvent Court had no adequate means of compelling the prisoner to file a schedule of his property: Hollis *v.* Bryant, 12 Sim. 492, 501.

(*f*) Stat. 1 & 2 Vict. c. 110, s. 37; Ford *v.* Dabbs, 5 M. & G. 309 (E. C. L. R. vol. 44).

(*g*) Stat. 1 & 2 Vict. c. 110, s. 45.

(*h*) Sect. 47. See Wright *v.* Maunder, 4 Beav. 512.

(*i*) Sect. 48.

(*k*) Sect. 55. See Stat. 12 & 13 Vict. c. 67.

(*l*) Stat. 1 & 2 Vict. c. 110, s. 56.

(*m*) Sect. 62.

the party's imprisonment, or with the view or intention on his part of petitioning the court for his discharge under the act.(*n*)

*Within fourteen days next after the making of the vesting order, or within such further time as the court thought reasonable, a schedule was required to be delivered into the court, signed by the prisoner, containing a full description of his name, trade or profession, place of abode, debts and property of every description.(*o*) Immediately after the filing of this schedule, a time and place were appointed by the court for the prisoner to be brought up to be dealt with according to the act,(*p*) of which due notice was given to the creditors.(*q*) His schedule was then examined into on oath by the court; and any creditor might oppose his discharge, and for that purpose might put such questions to the prisoner and examine such witnesses as the court thought fit.(*r*) After such examination the court was then empowered, upon the prisoner swearing to the truth of his schedule, and executing the warrant of attorney to be mentioned afterwards, to adjudge that such prisoner should be discharged from custody, and entitled to the benefit of the act as to the several debts and sums of money mentioned in the schedule, due, or claimed to be due, at the time of making the vesting order, from the prisoner to the persons named in his schedule, or for which such persons should have given him credit before the time of making such vesting order, and which were not then payable, and as to the claims of all other persons, not known to the prisoner at the time of the adjudication, who might have been endorsees or holders of any negotiable security set forth in the schedule.(*s*) The discharge might have been, in the discretion of the court, either immediate, or might have been postponed for six months ;(*t*) and in certain cases of flagrant misconduct, it might have *been postponed for any period not exceeding three years.(*u*)

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The insolvent being thus discharged was free from any future imprisonment, and his property was also free from execution at the suit of his creditors, for the debts mentioned in the schedule.(*x*) And the costs of actions and suits,(*y*) and the claims of annuity creditors,(*z*) might have

(*n*) Sect. 59. See Harris *v.* Lloyd, 6 Beav. 426 ; Jackson *v.* Thompson, 2 Q . B. 887 (E. C. L. R. vol. 42); 3 M. & G. 621 (E. C. L. R. vol. 42).

(*o*) Stat. 1 & 2 Vict. c. 110, s. 69.

(*p*) Sect. 70.

(*q*) Sect. 71.

(*r*) Sect. 72.

(*s*) Sect. 75 ; Leonard *v.* Baker, 15 M. & W. 202.

(*t*) Sect. 76.

(*u*) Sects. 77, 78.

(*x*) Sects. 90, 91.

(*y*) Sect. 79.

(*z*) Sect. 80. See Bennett *v.* Burton, 12 Ad. & E. 657 (E. C. L. R. vol. 40).

been comprised in such discharge. The discharge, however, was not, like that of bankruptcy, final and complete; for before any adjudication was made, the prisoner was required to execute a warrant of attorney, authorizing the entering up of a judgment against him in one of the superior courts at Westminster, in the name of the assignee or assignees, for the amount of the prisoner's unsatisfied debts as stated in the schedule. And if at any time it should have appeared to the satisfaction of the court that the prisoner was of ability to pay such debts, or any part thereof, or that he was dead leaving assets for that purpose, the court might have permitted execution to be taken out upon the judgment for such sum as it might have ordered, such sum to be distributed rateably among the creditors.(*a*)

Under certain circumstances, an insolvent might, by other acts of parliament have obtained as complete a discharge from his debts as if he had become bankrupt.(*b*) The acts, however, only applied to such persons as had become indebted without any fraud, or [*171] *gross or culpable negligence.(*c*) Any person so indebted, not being a trader within the bankrupt laws, or being such trader, but owing debts amounting in the whole to less than 300*l*., might, whether he should have already been in prison or not,(*d*) have applied for the protection of his person from process, on making a full disclosure and surrender of all his estate and effects for the payment of his debts. The application was made to the Court for the Relief of Insolvent Debtors.(*e*) But if the petitioner should not have resided for the last six calendar months within twenty miles of London, but should have resided for that time within the district of a County Court, application must then have been made to such County Court.(*f*) The whole estate and effects of the insolvent were then vested in the provisional assignee of the Insolvent Court, or in the clerk of the County Court, as the case might be, for the benefit of all the creditors rateably.(*g*) But the wearing apparel, &c., of the petitioner and his family, not exceeding the value of 20*l*., might have been excepted, as in the other Insolvent Act, provided such excepted articles, and the values thereof, were fully and truly described.(*h*) With the exception of the warrant of attorney given by the prisoner under the

(*a*) Stat. 1 & 2 Vict. c. 110, s. 87. See also sects. 88 and 89. See Hawkes *v.* Halliwell, 2 Sm. & G. 498.

(*b*) Stat. 5 & 6 Vict. c. 116, s. 87; 7 & 8 Vict. c. 96; 10 & 11 Vict. c. 102.

(*c*) Stats. 5 & 6 Vict. c. 116, s. 4; 7 & 8 Vict. c. 96, s. 24.

(*d*) Stats. 7 & 8 Vict. c. 96, s. 6; 10 & 11 Vict. c. 102, s. 7.

(*e*) Stat. 10 & 11 Vict. c. 103, ss. 6. 8.

(*f*) Ibid. s. 6.

(*g*) Stats. 5 & 6 Vict. c. 116, s. 7; 10 & 11 Vict. c. 102, s. 5.

(*h*) Stat. 7 & 8 Vict. c. 96, s. 9.

other Insolvent Act, the provisions of these acts were generally similar to those of that act. The filing of every petition under these acts was required to be registered in the registry for judgments of the County Courts.(*i*)

In the reign of Geo. III. an act was passed for the discharge of debtors in execution upon any judgment *for any debt or damages not exceeding 20*l.*, exclusive of costs.(*k*) But this act is now repealed.(*l*) An act was also passed in the early part of the present reign for facilitating arrangements between debtors and creditors,(*m*) which applied only to such debtors as were not traders within the bankrupt laws. But this act also has been repealed.(*n*) [*172]

The Bankruptcy Act, 1861,(*o*) made a complete change in the law with respect to the insolvency of persons not in trade. That act repealed all the above-mentioned acts for the relief of insolvent debtors, and abolished the court for their relief.(*p*) All persons whether traders or not became subject to the bankrupt law;(*q*) but no person was to be adjudged a bankrupt, except in respect of some one of the acts of bankruptcy described in the act as applicable to a non-trader.(*r*) The Bankruptcy Act, 1861, also contained provisions for the discharge from prison of pauper and lunatic prisoners for debt. These provisions applied both to traders and non-traders.(*s*) This act also contained provisions for the payment of a portion of the pay, half-pay, salary, emolument or pension of any bankrupt to his assignees if sanctioned by the chief officer of the department to which he might have belonged;(*t*) also for the sequestration of the profits of the benefice of any bankrupt who was a beneficed clergyman.(*u*) But the Bankruptcy Act, 1861, has *now been repealed,(*x*) and its place is supplied by the Bankruptcy Act, 1869.(*y*)[1] Imprisonment for debt has also been [*173]

(*i*) Stat. 17 & 18 Vict. c. 16, s. 2. See *ante*, p. 105.
(*k*) Stat. 48 Geo. III. c. 123. See Tolson *v.* Dykes, 1 Phillips 439.
(*l*) Stat. 32 & 33 Vict. c. 83.
(*m*) Stat 7 & 8 Vict. c. 70.
(*n*) Stat. 32 & 33 Vict. c. 83.
(*o*) Stat. 24 & 25 Vict. c. 134.
(*p*) Sects. 19–27.
(*q*) Sect. 69.
(*r*) Sect. 69.
(*s*) Sects. 98–107; Bramwell *v.* Eglinton, Q. B. 10 Jur. N. S. 583.
(*t*) Stat. 24 & 25 Vict. c. 134, s. 134.
(*u*) Sect. 135; Hopkins *v.* Clarke, 4 B. & S. 836 (E. C. L. R. vol. 116), affirmed, 5 B. & S. 753 (E. C. L. R. vol. 117).
(*x*) Stat. 32 & 33 Vict. c. 83.
(*y*) Stat. 32 & 33 Vict. c. 71.

[1] As soon as the United States Bankrupt Act went into operation, it *ipso facto* suspended all action upon future cases arising under state insolvent laws: Common-

abolished.(z) Under the present act a non-trader is still liable to be made a bankrupt, and the acts of bankruptcy have already been enumerated.(a)

Where a bankrupt is a beneficed clergyman, the trustee(b) may apply for a sequestration of the profits of the benefice, and the certificate of the appointment of the trustee shall be sufficient authority for the granting of sequestration without any writ or other proceeding, and the same shall accordingly be issued as on a writ of *levari facias*(c) founded on a judgment against the bankrupt, and shall have priority over any other sequestration issued after the commencement of the bankruptcy, except a sequestration issued before the date of the order of adjudication by or on behalf of a person who at the time of the issue thereof had not notice of an act of bankruptcy committed by the bankrupt, and available against him for adjudication; but the sequestrator shall allow out of the profits of the benefice to the bankrupt, while he performs the duties of the parish or place, such an annual sum, payable quarterly, as the bishop of the diocese in which the benefice is situate directs; and the bishop may appoint to the bankrupt such or the like stipend as he might by law have appointed to a curate duly licensed to serve the benefice in case the bankrupt had been non-resident.(d)

Where a bankrupt is or has been an officer of the army or navy, or an officer or clerk or otherwise employed or engaged in the civil service of [*174] the crown, or *is in the enjoyment of any pension or compensation granted by the Treasury, the trustee during the bankruptcy, and the registrar after the close of the bankruptcy, shall receive for distribution amongst the creditors so much of the bankrupt's pay, half-pay, salary, emolument, or pension as the court, upon the application of the trustee, thinks just and reasonable, to be paid in such manner and at such times as the court, with the consent in writing of the chief officer of

(z) Stat. 32 & 33 Vict. c. 62, *ante*, p. 103.
(a) *Ante*, pp. 135, 138.
(b) *Ante*, p. 141.
(c) *Ante*, p. 52.
(d) Stat. 32 & 33 Vict. c. 71, s. 88.

wealth *v.* O'Hara, 6 Int. Rev. Rec. 125; Way *v.* Bardwell, 97 Mass. 246; s. c. 3 B. R. 115; Van Nostrand *v.* Barr, 2 Id. 154; Martin *v.* Berry, Id. 188; Bank of Louisiana, 3 Id. 110; Cassard *v.* Kroner, 4 Id. 185. See *contra:* Hawkins, 17 Am. L. R. 205; s. c. 2 B. R. 122; Maltbie *v.* Hotchkiss, 5 Id. 485; and see also, as to this subject: Sedgwick *v.* Place, 1 B. R. 204; Clark *v.* Bininger, 3 Id. 129; Thornhull *v.* Bank of Louisiana, 5 Id. 367. But it does not divest the state courts of the jurisdiction necessary to the final administration of the estate of an insolvent, who had made a surrender previous to its passage: Meekins *v.* Creditors, 19 La. 497; s. c. 3 B. R. 126.

the department under which the pay, half-pay, salary, emolument, pension, or compensation is enjoyed, directs.(*e*)

Where a bankrupt is in the receipt of a salary or income other than as aforesaid, the court upon the application of the trustee shall from time to time make such order as it thinks just for the payment of such salary or income, or of any part thereof, to the trustee during the bankruptcy, and to the registrar if necessary after the close of the bankruptcy, to be applied by him in such manner as the court may direct.(*f*)

After the adjudication of bankruptcy has taken place, the proceedings are the same whether the bankrupt may have been a trader or not.

(*e*) Stat. 32 & 33 Vict. c. 71, s. 89. (*f*) Sect. 90.

[*175]

*CHAPTER VI.

OF INSURANCE.

HAVING now considered, though very briefly, the subject of debts generally, there remain certain debts, payable on contingencies, which deserve a separate notice, namely, debts arising under contracts to insure effected by policies of insurance. A policy of insurance, or assurance, is the name given to an instrument by which a contract to insure is entered into; and a contract to insure is a contract either to indemnify against a loss which may arise on the happening of some event, or to pay, on the happening of some event, a sum of money to the person insured.[1] The most usual kinds of insurance are, insurance of *lives*, insurance against loss by *fire*, and insurance of *ships* and their cargoes against the perils of the seas.

And, first, as to life insurance.[2] The advantages of life insurance are

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[1] Insurance is a contract, whereby for a stipulated consideration, one party undertakes to indemnify the other against certain risks. Marine insurance is a contract, whereby for a consideration stipulated to be paid by one interested in a ship, freight, or cargo, subject to the risks of marine navigation, another undertakes to indemnify him, against some or all of those risks, during a certain period or voyage. The other species of insurance most in use, are those against loss by fire on land, and loss of life: 1 Phill. on Ins. 1.

Mr. Justice Lawrence says: "The contract of insurance is applicable to protect men against uncertain events, which may in anywise be of a disadvantage to them:" 5 B. & P. 301, Lucena *v.* Crawford. See, for sundry definitions of insurance, Mr. Sergt. Coleridge's argument in Patterson *v.* Powell, 9 Bing. 320; 1 Phill. on Ins., p. 1, n. 1.

"Insurance is a contract, by which the one party, in consideration of a price paid to him adequate to the risk, becomes security to the other, that he shall not suffer loss, damage, or prejudice, by the happening of the perils specified, to certain things which may be exposed to them:" 5 Bos. & Pul. 301, Lawrence, J.

Insurance may be defined, a contract, by which, in consideration of a certain sum, one party agrees to indemnify another, against risks incurred in a certain manner, during a stipulated period: 48 Law Mag. 251.

The written instrument in which the contract of marine insurance is embodied, is called a *policy* of insurance. It is a printed or written contract, in which the premium, the risk insured against, the names of the underwriters, and the sum insured, are to be inserted: 1 Arnould on Ins. 16.

Policy is the name given to the instrument by which the contract of indemnity is effected between the insurer and insured; and it is not, like most contracts, signed by both parties, but only by the insurer, who, on that account, it is supposed, is denominated an underwriter: Park on Ins. 1.

[2] Insurance upon life, is a contract, by which the insurers undertake, in con-

now so well known, that there is no occasion to dilate upon them. By payment of a small annual premium during the life insured, a sum of money may be secured at his decease, applicable to the payment of his debts, for a provision for his family, or any other purposes. But as the insurance of lives and other events, in which the person insured has no interest, is often nothing more than a mischievous kind of gaming, it is enacted, by an act of the 14th of George III., that no insurance shall be made on the life of any person, or on any other event whatsoever, wherein the person for whose use and benefit, or on whose account, such policy shall be made, shall have no interest, or by *way of gaming or wagering; and that every such assurance shall be null or void, to all intents and purposes whatsoever;(*a*) and that it shall not be lawful to make any policy on the life of any person, or other event, without inserting in the policy the person's name interested therein, or for whose use or benefit, or on whose account, such policy is made;(*b*) and that in all cases where the insured hath an interest in such life or event, no greater sum shall be recovered or received from the insurer than the amount or value of the interest of the insured in such life or other event.(*c*) But this act does not extend to insurances *bonâ fide* made on ships, goods or merchandises,(*d*) with respect to which provisions have been made by another act of parliament.(*e*) Every person is considered to have a sufficient interest in the duration of his own life to sustain his own insurance of it; but if he should afterwards put an end to his life, or die by the sentence of the law, the insurance will be void in the hands of his executors; and no provision to the contrary contained in the policy of

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(*a*) Stat. 14 Geo. III. c. 48, s. 1; Shilling *v.* Accidental Death Insurance Company, 2 H. & N. 42; Hebdon *v.* West, 3 B. & S. 579 (E. C. L. R. vol. 113).

(*b*) Sect. 2; Hodson *v.* Observer Life Assurance Society, 8 E. & B. 40 (E. C. L. R. vol. 92).

(*c*) Sect. 3.

(*d*) Sect. 4.

(*e*) Stat. 19 Geo. II. c. 37, amended by stat. 27 & 28 Vict. c. 56, s. 1.

sideration of a gross sum paid down, or, as is most usual, of an annual payment, to pay the person for whose benefit the insurance is effected, or the personal representatives of the insured, as the case may be, either a stipulated sum, or an annuity, upon the death of the party insured, whenever it may happen, if the insurance be made for the whole term of life; or, if the insurance be made for a limited period, in case the death of the insured happens within that period: Ellis on Ins. 101.

"An insurance upon life is a contract, by which the underwriter, for a certain sum, proportioned to the age, health, profession, and other circumstances of the person whose life is the object of insurance, engages that the person shall not die within the time limited in the policy; or if he do, that he will pay a sum of money to him in whose favor the policy was granted:" Angell on Fire and Life Insurance, p. 334.

Dalby *v.* The India and London Life Assurance Co., 28 Eng. L. & Eq. 312.

insurance will be of any avail.(*f*) The assignee of a person who has insured his own life is not required by the above-mentioned statute to have any interest in the life of such person, for the statute makes no mention of the assignment of policies.(*g*) A creditor has an insurable interest in the life of his debtor to the extent of his debt; but if the debt should be discharged from any other source, it was formerly held that [*177] the policy would *thenceforth be void for want of interest.(*h*) This strict law was not however usually taken advantage of by the assurance offices, who generally paid the sums insured without any inquiry as to the extent of the interest of the party insured in the life on which the insurance had been effected.(*i*) And by recent decisions,(*k*) the doctrine that a contract for life assurance is a contract for indemnity only has been overruled; so that if the person insuring has an insurable interest at the time of effecting the policy, the subsequent loss of such interest will not render the policy void. An interest as trustee is sufficient to support a life insurance.(*l*) But a father has not such an interest in the life of his son as to warrant an insurance of it for his own benefit.(*m*)[1] By recent statutes,(*n*) policies of

(*f*) Amicable Assurance Society *v.* Bolland, 4 Bligh, N. S. 194, reversing Bolland *v.* Disney, 3 Russ. 351; see Clift *v.* Schwabe, 3 C. B. 437 (E. C. L. R. vol. 54).

(*g*) Ashley *v.* Ashley, 3 Sim. 149.

(*h*) Godsall *v.* Boldero, 9 East 72; s. c. 2 Smith's Leading Cases 157.

(*i*) Lloyd & Goold, Cas. Temp. Sugden 291.

(*k*) Dalby *v.* India & London Life Assurance Company, 15 C. B. 365 (E. C. L. R. vol. 81); s. c. 18 Jur. 1024; Law *v.* London Indisputable Life Policy Company, 1 Kay & John. 223.

(*l*) Tidswell *v.* Angerstein, Peake N. P. Cases 151; Collett *v.* Morrison, 9 Hare 162, 176.

(*m*) Halford *v.* Kymer, 10 B. & C. 724 (E. C. L. R. vol. 21).

(*n*) Stats. 16 & 17 Vict. cc. 59, 63, ss. 10, 11; 23 & 24 Vict. c. 111, s. 10; 28 & 29 Vict. c. 96, s. 15.

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[1] It is pretty well settled, that he who is to reap the benefit of an insurance made upon the life of a person, must have some interest in that life: Valton *v.* National Loan Fund Life Asso. Soc., 22 Barb. 9; Ruse *v.* Mutual Ins. Co., 23 N. Y. 516; but the interest necessary, is slight; Hoyt *v.* N. Y. &c. Ins. Co., 3 Bosw. 440; Muller *v.* Eagle Life and Health Ins. Co., 2 E. D. Smith 268; Bevin *v.* The Com. Mutual Life Ins. Co., 23 Conn. 244. It has been decided on this point, that a creditor has a sufficient interest in the life of his debtor, to insure that life; Morrell *v.* Trenton Mutual Life and F. Ins. Co., 10 Cush. 282; and that he may insure for a larger sum than his debt; Am. Life and Health Ins. Co. *v.* Robertshaw, 26 Penn. St. 189; so also, that a father has a sufficient insurable interest in the life of his son: Loomas *v.* Eagle Life and Health Ins. Co., 6 Gray 396; a divorced wife in that of her former husband: McKee *v.* Phœnix Ins. Co., 28 Mo. 383; and a clerk in the life of a partner who has promised to employ him a certain number of years at a fixed salary, to the amount of the salary for the number of years remaining: Hebdon *v.* West, 3 B. & S. 578.

An assignee of a policy of life insu-

life insurance are subject to stamp duties according to the table in the note.(*o*)[1]

An act has recently been passed to enable assignees of policies of life assurance to sue thereon in their own *names.(*p*) It provides that [*178 any person or corporation entitled, by assignment or other derivable title, to a policy of life assurance, and possessing at the time of action brought the right in equity to receive and the right to give an effectual discharge to the assurance company liable under such policy for moneys thereby assured or secured, shall be at liberty to sue at law in the name of such person or corporation to recover such moneys.(*q*) In any action on a policy of life assurance, a defence on equitable grounds, or a reply to

	s.	*d.*
(*o*) Where the sum insured does not exceed 25*l*.	0	3
Exceeding 25*l*., and not exceeding 500*l*., then for every 50*l*. and any fractional part of 50*l*.	0	6
Exceeding 500*l*. and not exceeding 1000*l*., then for every 100*l*. and any fractional part of 100*l*.	1	0
Exceeding 1000*l*., then for every 1000*l*. and any fractional part of 1000*l*.	10	0

The stamp on policies for accidental death or personal injury is regulated by stat. 28 & 29 Vict. c. 96, ss. 10–15.

(*p*) Stat. 30 & 31 Vict. c. 144.

(*q*) Sect. 1.

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rance, however, is not required to have any interest in the life insured; St. John *v.* Am. Mutual Life Ins. Co., 3 Kernan 31; nor need interest be shown to entitle him to his action: Trenton Mutual Life and F. Ins. Co. *v.* Johnson, 4 Zabr. 576.

In Ruse *v.* Mutual Benefit Life Ins. Co., 26 Barb. 556, it was held, that where the statement of interest has been accepted by the company, it is sufficient proof of interest.

[1] The tax imposed on policies of insurance, by the Internal Revenue Act, is as follows:

Insurance (*Life*).—Policy of insurance or other instrument, by whatever name the same shall be called, whereby any insurance shall be made upon any life or lives.

When the amount insured shall not exceed one thousand dollars, twenty-five cents,	25
Exceeding one thousand dollars and not exceeding five thousand dollars, fifty cents,	50
Exceeding five thousand dollars, one dollar,	$1 00

Insurance (*Marine, Inland and Fire.*)—Each policy of insurance, or other instrument, by whatever name the same shall be called, by which insurance shall be made or renewed upon property of any description; whether against perils by the sea, or by fire, or other peril of any kind, made by any insurance company, or its agents, or by any other company or person, the premium of which does not exceed ten dollars, ten cents, 10

Exceeding ten, and not exceeding fifty dollars, twenty-five cents,	25
Exceeding fifty dollars, fifty cents,	50

Sec. 170. Schedule B. Tit. Ins. 2 Brightly's U. S. Dig., p. 379, sec. 368.

The stamp duty on the assignment of a policy of insurance is the same as required on the policy. Id. 2 Brightly's Dig., p. 380, sec. 371.

such defence on similar grounds, may be respectively pleaded and relied upon in the same manner and to the same extent as in any other personal action.(r) No assignment made after the passing of the act of a policy of life assurance shall confer on the assignee therein named, his executors, administrators or assigns, any right to sue for the amount of such policy, or the moneys assured or secured thereby, until a written notice of the date and purport of such assignment shall have been given to the assurance company liable under such policy at their principal place of business for the time being; and the date on which such notice shall be received shall regulate the priority of all claims under any assignment; and a payment *bonâ fide* made in respect of any policy by any assurance company before the date on which such notice shall have been received, shall be as valid against the assignee giving such notice as if the act had not been passed.(s) Every assurance company is required on every policy issued by them after the 30th of September, 1867, to specify their principal place or places of business at which notices of assignment may be given in pursuance of the act.(t) And [*179] every assurance company to whom notice shall *have been duly given of the assignment of any policy under which they are liable, shall, upon the request in writing of any person by whom any such notice was given or signed, or of his executors or administrators, and upon payment in each case of a fee not exceeding five shillings, deliver an acknowledgment in writing under the hand of their principal officer of their receipt of such notice; and every such written acknowledgment, if signed by a person being *de jure* or *de facto* the principal officer of the company whose acknowledgment the same purports to be, shall be conclusive evidence as against the company of their having duly received the notice to which such acknowledgment relates.(u)

Insurance against fire is a contract to indemnify against loss by fire, and is usually renewed from year to year on payment of a premium.[1]

(r) Stat. 30 & 31 Vict. c. 144, s. 2.
(s) Sect. 3.
(t) Sect. 4.
(u) Sect. 6.

[1] Fire insurance, is a contract in the nature of an indemnity, given by the insurers, against such loss or damages by fire as may happen to the insured, in respect of the houses, buildings, stock, merchandise, or other articles covered by the policy: Ellis on Ins. 1.

An insurance against fire, is a contract by which the insurer, in consideration of the premium which he receives, undertakes to indemnify the insured against all losses which he may sustain in his house, or goods, by means of fire, within the time limited in the policy: 2 Park. on Ins. (Eng. ed. 1842) 950.

Insurance against fire is a contract to indemnify the insured for loss or damage to his property, occasioned by that ele-

The person who effects such an insurance must have an interest in the property insured, and he cannot recover beyond the extent of his interest; neither can he assign his policy without the consent of the insurers.(*x*) When the building insured is situate within the limits of the Metropolitan Building Acts, any person interested may procure the insurance money, in case of fire, to be laid out in repairs or re-building.(*y*) A covenant to insure any building within such limits is therefore tantamount to a covenant to repair to the extent of such insurance, and, if entered into by a lessee in his lease, will *run with the land*, so as to be binding on the assignee of the lease.(*z*) And *it is now decided [*180] that, according to the true construction of the act of Geo. III. relating to this subject, the law is the same even if the building be situate beyond the above-mentioned limits.(*a*) A recent enactment empowers a Court of Equity to relieve against a forfeiture for breach of a covenant or condition to insure against fire, when no loss or damage by fire has happened, and the breach has, in the opinion of the court, been committed through accident or mistake, or otherwise without fraud or gross negligence, and there is an insurance on foot at the time of the application to the court in conformity with the covenant to insure.(*b*) But the same person is not to be relieved more than once, or where a forfeiture has been already waived out of court.(*c*) It is also provided that the

(*x*) Lynch *v.* Dalzell, 4 Bro. Parl. Cas. 431; Saddler's Company *v.* Badcock, 2 Atk. 554.

(*y*) Stat. 14 Geo. III. c. 78, s. 83. This section is not repealed by stat. 18 & 19 Vict. c. 122, s. 109.

(*z*) Vernon *v.* Smith, 5 B. & Ald. 1 (E. C. L. R. vol. 7), see Principles of the Law of Real Property 316, 2d ed.; 326, 3d ed.; 331, 4th ed.; 342, 5th ed.; 359, 6th ed.; 367, 7th ed.; 383, 8th ed.

(*a*) See 4 Jur. N. S., pt. 2, p. 132: Simpson *v.* Scottish Union, &c., V.-C. W., 11 W. R. 459; 1 Hem. & Mill. 618; Re Barker, L. C., 10 Jur. N. S. 1085.

(*b*) Stat. 22 & 23 Vict. c. 35, s. 7; Page *v.* Bennett, 2 Giff. 117.

(*c*) Stat. 22 & 23 Vict. c. 35, s. 6.

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ment, during a specified period; Flanders on Fire Ins. 17.

Perpetual insurances are sometimes effected on buildings against loss by fire. In this case a premium is deposited with the insurer proportionate to the amount of insurance desired, and so long as the deposit remains with the insurer or the peril insured against has not happened, the insurance continues. Should a total loss occur by fire, and the sum insured be paid, or the premises rebuilt, the policy should be surrendered, and the premium is sunk for the benefit of the insurer. In cases of partial loss, it is usually stipulated in the policy, that the insurance shall remain for the difference only between the amount originally insured, and the amount paid or expended for the partial loss; but as to the premium or deposit in this latter case, in some instances the policy prescribes that it shall be sunk for the benefit of the insurer, in others, that only a portion of the premium proportionate to the loss shall be sunk.

person entitled to the benefit of a covenant on the part of the lessee or mortgagor to insure against fire shall, on loss or damage by fire happening, have the same advantage from any then subsisting insurance of the premises, effected by the lessee or mortgagor, or by any person claiming under him, but not effected in conformity with the covenant, as he would have from an insurance effected in conformity with the covenant.(*d*) There is a further enactment, which will be very beneficial to the purchasers of leasehold property, namely, that where, on a *bonâ fide* purchase of such property, the purchaser is furnished with a receipt for the last payment of rent accrued due before the completion of the purchase, and an insurance is subsisting in conformity with the lessee's covenant to insure, the purchaser shall not be liable for any breach of such covenant, [*181] committed at any time *before the completion of the purchase, of which he had not notice before such completion.(*e*)[1]

The insurance of ships and their cargoes from the perils of the sea is a matter belonging rather to mercantile law than to the department of conveyancing.[2] In this kind of insurance, as well as in the others, an

(*d*) Sect. 7.

(*e*) Stat. 22 & 23 Vict. c. 35, s. 8. The *ad valorem* duty on fire insurances is now repealed by stat. 32 Vict. c. 14, s. 12.

[1] A covenant made by a lessee to repair, or keep in repair, the demised premises, or to surrender, or leave them, in good repair, amounts to a contract of insurance, and obliges him to build in case the premises be burned: Payne *v.* Haine, 16 M. & W. 541; Bullock *v.* Dommdt, 6 Term Rep. 650; Abby *v.* Billups, 35 Miss. 618; Nave *v.* Berry, 22 Ala. 382; McIntosh *v.* Lowen, 49 Barb. 550. But where the lease contained a written clause providing that the buildings are to be kept in repair, and maintained in good condition by the lessee, and printed clauses providing that at the end of the term, the lessee will quit and deliver up the premises "in as good order and condition (reasonable use and wearing thereof, fire and other unavoidable casualties excepted) as the same now are or may be put into" by the lessor, and that the lessee shall keep the buildings insured against loss by fire, in a specified sum payable to the lessor, it was held that the lessee was not liable to repair injuries which occurred through ordinary wear, or fire, or other unavoidable casualty: Ball *v.* Wyeth, 8 Allen (Mass.) 275; and see Warner *v.* Hitchins, 5 Barb. 666; Howeth *v.* Anderson, 25 Texas 557.

Where the covenant was to maintain buildings, it was held that the lessee was bound by it at all times, and that an action might be brought against him for the breach of that covenant, before the expiration of the term: Buck *v.* Pike, 27 Vt. 529; but where the covenant is to make certain improvements, the lessee has the whole term to comply therewith: Palethorp *v.* Bergner, 52 Penn. St. 149.

See further on this subject generally: West *v.* West, 7 J. J. Marsh. 258; Jacques *v.* Gould, 4 Cush. 384; Dean *v.* Jones, 1 E. & E. 484; Kling *v.* Dress, 5 Rob. (N. Y.) 521.

[2] Marine insurance is a contract, whereby one party, for a stipulated sum, undertakes to indemnify the other against loss, arising from certain perils or sea risks, to which his ship, merchandise, or other interest, may be exposed during a certain

interest in the property insured must generally belong to the party effecting the insurance, if the ship be a British vessel, or the goods be laden on board any such vessel.(*f*) It is now provided that whenever a policy of insurance on any ship or on any goods in any ship, or on any freight, has been assigned so as to pass the beneficial interest in such policy to any person entitled to the property thereby insured, the assignee of such policy shall be entitled to sue thereon in his own name; and the defendant in any action shall be entitled to make any defence which he would have been entitled to make if the said action had been brought in the name of the person by whom or for whose account the policy sued upon was effected.(*g*) Full information on the subject of marine insurance will be found in Park on Insurance, Arnould on Marine Insurance, Abbott on Shipping, and in the chapter on maritime insurance in the late J. W. Smith's admirable Compendium of Mercantile Law. Connected with maritime insurance are *bottomry* and *respondentia*. Bottomry is an agreement by which a vessel is hypothecated or pledged by the owner for the payment, in the event of her voyage terminating successfully, of money advanced to him for the necessary use of the vessel, together with interest, which interest, in *consideration of the risk incurred, is generally far beyond five per [*182] cent., formerly the legal rate.(*h*) Respondentia is a somewhat similar contract with respect to the cargo, except that the borrower only is responsible in the event of the safe termination of the voyage, the lender having no lien on the goods.(*i*)[1]

(*f*) Stat. 19 Geo. II. c. 37, s. 1. The stamps on sea insurance are now regulated by stat. 30 Vict. c. 23, s. 3 *et seq.*

(*g*) Stat. 31 & 32 Vict. c. 86, s. 1.

(*h*) Simonds *v.* Hodgson, 3 B. & Ad. 50 (E. C. L. R. vol. 23).

(*i*) 2 Black. Com. 457.

voyage, or a certain period of time: 1 Arnould on Ins. 2.

Marine insurance is a contract, whereby, for a consideration stipulated to be paid, by one interested in a ship, freight, or cargo subject to the risks of marine navigation, another undertakes to indemnify him against some or all of those risks, during a certain period or voyage: 1 Phill. on Ins. 1.

By the contract of marine insurance, the insurer for a consideration which is called a premium, undertakes to indemnify the assured against loss on property arising from perils, the property and the perils being both defined by the instrument of agreement aided by the law: 1 Pars. on Marine Ins. &c., p. 17.

[1] Bottomry is a pledge of a vessel and its freight, deriving its name from the bottom or keel of the ship.

Respondentia is a pledge of goods laden on board a vessel. Most modern bottomry bonds, however, contain a pledge of ship, freight, and cargo. The terms bottomry and respondentia are, however, often used synonymously. By the civil law writers, this contract is termed *Contrata la grosse*, or, *a la grosse aventure*, *Nautioum fœnus* and *Contractus trajectitiæ pecuniæ.* Emerigon

gives rather an illustration than a definition of the contract. "The lender," he says, "lends to another a certain sum of money, upon the condition that, in case of the loss of the effects for which that sum has been lent, by any peril of the sea or *vis major*, the lender shall have no recourse except upon what shall remain:" 2 Emer. 385. Again, "Bottomry is neither a sale, nor a partnership, nor a loan properly so called, nor an insurance. It is different from all the other contracts; it constitutes a particular species:" Id. 389–90. According to Valin, "Bottomry is a contract by which the lender, in consideration, that he will lose his money if the thing upon which he makes the loan should perish by accident, has the right to stipulate an extraordinary interest or profit, in case the thing shall arrive safely in port:" Valin, Book 3, tit. V, p. 1. Pothier's definition is more accurate. "The contract of bottomry," he says, "is a contract by which one of the parties, who is the lender, lends to the other, who is the borrower, a certain sum of money, upon the condition, that in case of the loss of the effects for which this sum has been lent, occasioned by some peril of the sea, or accident of *vis major*, the lender will not have any recourse unless it is to the extent of what remains, and that in case of a prosperous arrival, or in case it shall have been prevented by the fault of the master, or of the mariners, the borrower shall be bound to return to the lender the sum lent, with a certain stipulated profit, for the price of the risk of the effects, of which the lender has charged himself:" Pothier Traité du Prêt. à lâ grosse aventure, § 1, p. 1129.

"The condition of the bottomry loan, and of the obligation of the borrower included in it, exists, when during all the time of the risk, the effects upon which the loan has been made, have not been taken nor lost, however damaged they may have been by the accidents of *vis major;* and the borrower, in consequence is bound:" Id. p. 1133.

"If only a part of the said effects have arrived, and the residue have been taken or lost, the obligation in this case, only exists to the extent of the value of that which remains, and it is dissolved for the residue:" Id. p. 1134.

It combines the character of a loan and a maritime insurance—the lender being the insurer against maritime risks, and the borrower the assured of his lender. The double office of lender and insurer gives the latter a right to demand marine interest, or *fœnus nauticum*, that is, interest greatly beyond the ordinary compensation for the use of money, notwithstanding usury laws, as this interest is a mixed compensation for the use of the money lent, and insurance against loss by marine risks, of the property pledged in bottomry to the extent of the loan.

The origin of the contract is lost in a remote antiquity. It existed before the time of Justinian, and it is treated of in his Digest and Code. It was known among the Romans, under the titles of *Nauticum fœnus*, and *Contractus trajectitiæ pecuniæ*. It was doubtless derived by the Romans from the Greeks. A speech of Demosthenes is still preserved to us, in which the facts are stated to be, that two fraudulent debtors endeavored to sink the ship on which they were bound, after having failed to fulfil the promise to embark on board her a cargo, hypothecated to the lender of a very considerable sum; and what is still more surprising, Plutarch remarks of Demosthenes, that for him to accept the bribe of Harpalus, was natural enough, as his father had lent money on maritime interest: 48 Law Mag. 252.

Until quite a recent period, almost all the learning on this subject, was to be found in the civil law books. Now, however, bottomry is not looked upon with the dislike which was exhibited towards it in the time of Demosthenes, but on the contrary, the contract is favored, as it is considered, that it is for the general advantage of the shipping interests of the world, that bottomry transactions should not be rendered too difficult: The Vibelia, 1 Robinson, Jr. 1; The Zodiac, 1 Hagg. Adm. 320; The Reliance, 3 Id. 66; The Rubicon, Id. 8. Indeed, courts of admiralty in the general exercise of their jurisdiction, are not

governed by the strict rules of the common law, but act upon enlarged principles of equity: The Virgin, 8 Peters 538; The Hero, 2 Dod. 142. Thus, bottomry bonds may be sustained in part, though they may be bad in part: Abbott on Shipp. 159; The Nelson, 1 Hagg. Adm. 169; The Bridgewater, Olcott's Adm. 35; and even material mistakes in them may, it seems, be reformed: The Zephyr, 3 Mason 341; for these bonds are not to be construed strictly, but liberally, so as to carry into effect the intention of the parties: Pope *v.* Nickerson, 3 Story 465.

There are two classes of bottomry and respondentia bonds; those of the one, are made by the owner of the property pledged, while those of the other, can only be made by the master of the ship bottomed, or in which the goods are carried. The former are resorted to at the option of the borrower, as a means of procuring money on a ship, or for an adventure; the latter can only be created for the purpose of borrowing money, which cannot be otherwise obtained, and which is necessary to be raised, in order to repair or refit a vessel which has become unseaworthy: The Packet, 3 Mason 255; The Gratitudine, 3 Rob. 272; and see The Panama, Olcott Adm. 343; they are made by the master of the vessel *virtute officii*, under the authority conferred on him by law, under certain circumstances, to pledge his ship, freight, and cargo, or any of them, and as a general rule, such loans can only be effected in foreign ports. A bottomry bond may be given by a substituted master, to the consignee of the vessel who had appointed him: The Rubicon, 3 Hagg. 9. Where the ship and freight have the same owner, and are both hypothecated, there is no equity which forbids the creditor from resorting to either in the first instance for the payment of his bond: Welsh *v.* Cabot, 39 Penn. St. 342.

The essential requisites of a bottomry bond. There is no particular form necessary. Any contract in language setting forth the fundamental properties of bottomry, will be sufficient evidence to sustain the contract. We have not," says Emerigon, "any printed form of the contract of bottomry; the draft of it is made in the form which the parties find appropriate. It is sufficient that they express themselves without equivocation, that they insert the usual clauses, and that they stipulate nothing which is contrary to the nature of the contract:" 2 Emerigon 400. The particular voyage on which the vessel is bound, need not be stated: The Jane, 1 Dod. 461. And like all other contracts as to its form, it must comply with the law of the place where it is entered into: The Nelson, 1 Hagg. Ad. 169. "Sometimes an instrument in the form of a bond, at others in the form of a bill of sale, at others of a different shape, is made use of:" Abbott on Shipp. 158. There must be risk incurred by the lender. "Navigation," says Emerigon, vol. ii. 39, "forms the only object of bottomry. If nothing has been exposed to the perils of the sea, the contract has never been bottomry;" see also Jennings *v.* The Ins. Co. of Penna., 4 Binn. 244. But Ch. J. Tilghman there distinguished the case before him, which was a contract stipulating for more than legal interest, from such an agreement, made to secure a loan with legal interest, and refused to express an opinion as to such an agreement. The fact that a bottomry bond only bears interest at the ordinary rate, is a reason for presuming that sea risk was not contemplated: The Emancipation, 1 Robinson, Jr. 124; The Hero, 2 Dod. 142. But although there can be no valid bottomry contract to secure a loan, unless the lender shall agree to incur sea peril, yet the risk may be assumed for any given voyage, or for any definite time: Valin 4; The Draco, 2 Sumner 157; The Atlantic, 4 Newb. Adm. 514.

As a general proposition of law, it is undoubtedly true, that a deed extorted by actual duress, is invalid; and this principle of law would clearly extend to vitiate a bond of bottomry, compulsorily obtained by duress from the master, even although the advances were made upon the promise of a future bond, and the bond itself was taken as a fulfilment of that promise. But it does not follow that such an instrument,

executed while the master is imprisoned, though at the suit of the bond-holder, was executed under duress, and therefore void: The Heart of Oak, 1 W. Rob. 213.

When the bond is made by a master *virtute officii*, it must *ordinarily* be given in a port of a country foreign to the owners of the vessel. But this may be a port sought by a vessel in distress as an asylum, called a port of necessity; or it may be the port of destination of the vessel: Reade *v.* The Commercial Ins. Co., 3 Johns. 352; Webb *v.* Pierce, Sprague 192. There are, however, some exceptions to this rule, as where the master, though in a domestic port, has no means of communicating with his owners: La Ysabel, 1 Dods. 273, or where the owners have become insolvent: The Trident, 1 Robinson, Jr. 29. In short the place where the vessel is, provided she is on a voyage and is in distress, is of no further importance, than that generally speaking, unless the vessel is in a foreign port, there will be no necessity, and hence, no right on the part of the master, to raise money by a pledge of the ship and cargo, or of either. The general principle, that bottomry bonds can alone be given for the furtherance of the voyage in which the vessel is actually engaged, is not affected by the circumstance, that by the law of the country where she is seized, the vessel may be arrested and sold, for any debt owing by the owner, to a creditor residing in that country: The Osmanli, 3 W. Rob. 198.

Another requisite of the contract when made by a master is, that there must be a necessity for the loan on bottomry. If the repairs and supplies are in a just sense necessary, then it is clear, that if the master has no other means of meeting the expenditure, he may take the money therefor upon bottomry: The Ship Fortitude, 3 Sumner 228; Greely *v.* Smith, 3 W. & M. 236.

1. There must be a necessity for the supplies and repairs, for the safety and security of the vessel, or to enable her to prosecute her voyage: The Aurora, 1 Wheat. 103; Burke *v.* The M. P. Rich, 1 Cliff. C. C. 308.

The necessary repairs for which a vessel may be bottomried, mean such as are reasonably fit and proper for the ship under the circumstances, and not merely such as are absolutely indispensable for the safety of the ship, or accomplishment of the voyage. The money advanced should at the time *appear* to be needed for the supplies or repairs, but all that the law requires is an apparent necessity. A bottomry bond may be given to pay off a former bond; and if such former bond was valid, the latter will be so likewise: The Aurora, 1 Wheat. 26. It would seem not to be incumbent upon a foreign merchant, advancing money upon bottomry for the repairs of a vessel, to calculate the expediency of such repairs: The Vibelia, 1 W. Rob. 10.

A public advertisement for the sale of a bottomry bond, by auction, to the lowest bidder, at a foreign port, will not discharge a *bonâ fide* purchaser, from the necessity of making reasonable inquiry as to the actual existence of "an unprovided necessity." Such "an unprovided necessity" is essential to the validity of a bottomry bond, and therefore the want of it will render a bond void, even against a *bonâ fide* vendor ignorant of all the circumstances: The Prince of Saxe Cobourg, 3 Hagg. 387.

2. There must be an inability on the part of the master to procure funds of the owner, or funds on the personal credit of the owner, at the port of distress. It seems to be an open question, whether the bond would be valid if the master has the requisite funds, or could procure them on his own credit: Abb. on Ship. 156. A bottomry bond by a master is not valid, unless it has been given to enable the vessel to leave a port where she is detained either for necessary repairs, or for claims upon her, the master having there no funds nor credit, nor means of getting money: Gibbs *v.* The Texas, Crabbe 236.

But the necessity of the supplies and repairs being once made out, it is incumbent upon the owners, who assert that they could have been obtained upon their personal credit, to establish that fact by competent proofs, unless it is apparent from the circumstances of the case. It is

no objection that the owner had funds in the hands of his consignees, at the same port, provided the master applied for and could not obtain them. The non-existence of funds, and the inability to get at them, must be deemed precisely equal predicaments of distress. Nor is it an objection, that the supplies and repairs were in the first instance made upon the master's credit. The lender may well trust to the credit of the master, as auxiliary to the lien, which the foreign law would give on the ship, or the general responsibility of the owners. And the fact that the master ordered the supplies and repairs before the bottomry bond was given, can have no legal effect to defeat that security, if they were so ordered by the master, upon the faith, and with the intention, that a bottomry bond should ultimately be given, to secure the payment of them: The Virgin, 8 Peters 538; The Yuba, 4 Blatch. C. C. 352. The bond may pledge both the ship and the personal responsibility of the captain: Kelly *v.* Cushing, 48 Barb. 269. A bottomry bond may be valid, though the money was not advanced in one sum, nor at the same time the bond was given. If advanced before the bond was made, or in separate sums, it is only necessary that it should have been advanced on the faith and understanding that the bottomry security was to be given: La Ysabel, 1 Dod. 273; The Virgin, 8 Peters 538. Such a bond, to be valid, should be given for repairs or outfits of a vessel, and not for a pre-existing debt; and should appear to be risked on the vessel, and not on the personal liability of the owner: Greeley *v.* Smith, 3 Wood. & M. 236. But small advances, originally made without any express stipulation for a bond, but followed by a bond of bottomry, may be included in the bond: The Trident, 1 W. Rob. 34; The Fair Haven, Law Rep. 1 Adm. & Ecc. 67. And though a loan upon personal credit cannot be changed into a loan upon bottomry, it is a totally different thing from this, to take a bottomry bond for a loan, where the money was at first advanced on the security of a lien, or the right of lien on the ship: The Ship Vibelia, 1 Robinson, Jr. 1. And in ascertaining the original character of the loan, where the question is personal credit or not, the law of the place where the advances have been made may be properly invoked, if that law gives a lien for the advances, because it renders the contemplation of bottomry security more probable than it would otherwise be, by furnishing a presumption against the contracting of the loan on mere personal credit: La Ysabel, 1 Dod. 273; The Alexander, Id. 280; The Virgin, 8 Peters 538.

The lender is always expected to prove, by other eveidence than the bond, that the money was lent, and that the repairs were made, and the materials furnished to the amount claimed, and that they were necessary to enable the vessel to perform her voyage, or for her safety: Crawford *v.* The William Penn, 3 Wash. C. C. 354. Necessity for repairs is proved, when such circumstances of exigency are shown, as would induce a prudent owner, if present, to order them; and if the fact of such necessity be left unproved, evidence is required of due inquiry, and of reasonable grounds of belief, that the necessity was real and exigent: The Grapeshot, 9 Wall. U. S. 130; but it is not necessary further to prove, that the money lent was actually employed in repairing or refitting the vessel: Cunard *v.* The Atlantic Ins. Co , 1 Peters 436; The Jane, 1 Dod. 461.

Where once the transaction is shown to have been clearly and indisputably of a bottomry character, that is, where the distress is admitted or established, the want of personal credit is beyond question, and the bond in all essentials is correct; the strong presumption of the law, under such circumstances, is in favor of its validity; and this is not to be impugned without clear and conclusive evidence of fraud, or unless it shall be proved beyond all doubt, that although the contract is in form a bottomry transaction, the money was in fact advanced on different considerations: The Vibelia, 1 Robinson, Jr. 1.

And *primâ facie*, and until the contrary is shown, the master is presumed to have acted with good faith, upright intentions, and reasonable diligence: The Fortitude, 3 Sumner 228.

[*183] *CHAPTER VII.

OF ARBITRATION.[1]

INSTEAD of the ultimate remedy of an action at law or suit in equity, recourse is sometimes had for the settlement of disputes to the more ami-

[1] The laws of all the states contain provisions on the subject of arbitration and reference, and in almost all of them any personal controversy, whether litigated or not, may be referred under a rule of court. This is the case in Alabama, Florida, Georgia, Kentucky, Louisiana, California, Michigan, Mississippi, New Jersey, Ohio, Tennessee, Vermont, Virginia and Pennsylvania; and in New Hampshire the reference is of the same effect as if under a rule of court. In Maine, Massachusetts and New York any personal controversy may be made the subject of arbitration. The statutes of Delaware, Iowa and Texas allow a reference of any matter in litigation; and those of Arkansas authorize a reference, by agreement in writing, in cases where no suit is pending. In general, there is no necessity for the choice of an umpire, as the statutes either direct the arbitrators to be of an uneven number, or else allow them to be so chosen; thus, in Florida, Kentucky, California, Massachusetts, Mississippi, New Hampshire, New Jersey, New York, Ohio and Vermont, the dispute may be referred to one or more persons; if one only should be chosen, he is of course the umpire; but it is customary to choose an uneven number at first, obviating the necessity of an umpire. In Arkansas, any number of referees, not exceeding five, may be chosen; while in Delaware the number is fixed at three. The laws of Texas and Louisiana, regulating arbitrations and awards, prescribe the manner of choosing an umpire; the former requiring, that where one is necessary to be chosen, on account of the difference of opinion of the arbitrators, and they cannot agree in the choice, he shall be appointed by the clerk of the court; and the latter giving power to the arbitrators themselves to appoint an umpire, although it also allows the parties, at discretion, to fix upon their umpire at the time the other arbitrators are appointed.

The Pennsylvania systems of arbitration are peculiar, being in number no less than six, five of which are by agreement of the parties, and the sixth at the pleasure of either, and commonly called the compulsory rule of arbitration. In the case of Williams *v.* Craig, 1 Dall. 313, Chief Justice McKean gives a description of four of these kinds of reference in the following words: "There are four species of awards: *First*, those made by mutual consent, in pursuance of arbitration-bonds entered into out of court; *secondly*, those which are made in a cause depending in a court of law or equity, upon consent of the parties to refer the matter in variance (which are awards at common law); *thirdly*, those which are made under a rule of court, by virtue of the statute of 9 & 10 Will. 3, c. 15, which was calculated to remedy the delay and circuity of action attendant upon awards made merely in pursuance of arbitration-bonds, without the intervention of a controlling power to compel the acquiescence of the parties. These are the only awards in use at this day in England; but the legislature of Pennsylvania, in the year 1705, introduced another species here, which are, *fourthly*, those awards, or reports, that are made in pur-

cable expedient of arbitration. And in some transactions, especially in articles of co-partnership between traders, it is usual to stipulate that,

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suance of the Act of Assembly, setting forth that 'when the plaintiff and defendant consent to a rule of court for referring the adjustment of their accounts to certain persons, mutually chosen by them in open court, the award, or report, of such referees being made according to the submission of the parties, *and approved by the court*, and entered upon the record, or roll, shall have the same effect and be as available in law as a verdict by twelve men:' 1 State Laws 48; 4 Ann. c. 36; Act of 1705, 1 Sm. Laws 50.

"This act differs essentially from the statute of Will. 3, in many respects, but particularly that to render a report, or award, valid and effectual, the former requires that it be *approved by the court;* but no such provision is made by the latter, and, therefore, awards under rules of court are conclusive in England, unless some corruption, or other misbehavior in the arbitrators, is proved. The courts of equity, indeed, have taken a wider ground, and wherever a plain error appears, either in matter of fact or law, it seems, they will make it an object of inquiry: 2 Vern. 705; 1 Vern. 157; 3 Atk. 494. From some expressions in the authority, we might presume that the error must be apparent on the award; but as the chancellor, at the same time, speaks generally, that it must be set forth in the bill for relief, there is, at least, great room to doubt upon the subject.

"In Pennsylvania, however, since the revolution, as the approbation of the court is made a necessary ingredient in the confirmation of reports, we have thought it our duty, from time to time, to inquire into the allegations against them, before we gave them our sanction. But in doing this we have always confined ourselves to two points: *First*, whether there is an evident mistake in matter of *fact;* or, *secondly*, whether the referees have clearly erred in matter of law. If either of these is satisfactorily proved, the argument is surely as strong for setting a report aside, as where injustice has been done by the corruption, or other misconduct, of the referees."

The fifth species of award is that created by the Act of the 21st of March, 1806 (4 Sm. Laws 326), wherein it is provided, "That it shall be lawful for any person or persons, desirous of settling any dispute or controversy, by themselves, their agents or attorneys, to enter into an agreement in writing to refer such dispute or controversy to certain persons to be by them mutually chosen," &c. By the 3d section of the Revised Act of 1836, on the subject of voluntary arbitrations, a new modification of the voluntary system is introduced, it being enacted that "It shall be lawful, also, for the parties to any suit to consent, as aforesaid, to a rule of court for referring all matters of fact in controversy in such suit to referees as aforesaid, reserving all matters of law arising thereupon for the decision of the court, and the report of such referees, setting forth the facts found by them, shall have the same effect as a special verdict, and the court shall and may proceed thereupon in like manner as upon a special verdict," &c. And see Steele *v.* Lineberger, 59 Penn. St. 308.

The last species of award, being the compulsory system, authorizes *either* party to enter a rule of reference and regulate the proceedings on arbitration. The provisions of this system will be found in the Acts of 20th March, 1810, 5 Sm. Laws 131; 25th of February, 1813, 6 Sm. Laws 28; 28th of March, 1820, Pamph. L. 172; and the revised act on compulsory arbitration, of the 16th of June, 1836. This system originated from the violent opposition at one time felt in Pennsylvania to the common law; it is alluded to by Mr. Duponceau in his Treatise on Jurisdiction, p. 102, thus: "In Pennsylvania it was for some time believed that the legislature would abolish the common law altogether.

if any dispute shall arise, it shall be referred to the determination of two indifferent persons as arbitrators, or of their umpire, who is usually and

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Violent pamphlets were published to instigate them to that measure. The whole, however, ended in a law for determining all suits by arbitrators in the first instance at the will of either party." A recent act of the legislature, passed May 1, 1861 (Pamph. L. 521), has repealed the act of 1836 in reference to compulsory arbitration, so far as the same relates to the city and county of Philadelphia, so that this mode of settling disputes and controversies cannot now be there resorted to. The still more recent Acts of April 6, 1869, January 20, 1870, and April 6, 1870, are comparatively local in their character, extending only to a few counties of Pennsylvania: Pamph. L. 1869, p. 725; Pamph. L. 1870, pp. 85, 948.

By the voluntary system of arbitration in Pennsylvania, any person or persons may be chosen as arbitrators by the parties; and by the compulsory system, the number of arbitrators is to be either three or five, and if they cannot agree, the discretion of appointment is left with the prothonotary of the court; but the parties may agree to refer the dispute to one person; and the act of 1836 contains precise directions as to the practice of appointing arbitrators, or an umpire.

The fact that the statutes of a state have provided a method of arbitration and reference, does not abrogate the common law system, which will still remain in existence unless expressly abolished: Martin *v.* Chapman, 1 Ala. 278; Byrd *v.* Odeur, 9 Id. 755; Titus *v.* Scantling, 4 Blackf. 90; Tyler *v.* Dyer, 13 Maine 41; Mooer's Admr. *v.* Allen, 35 Id. 276; Camp et al. *v.* Root, 18 Johns. 22; Waine *v.* Elderkin, 1 Chandler's (Wis.) 219; Wells *v.* Lain, 15 Wend. 99; Valentine *v.* Valentine et al., 2 Barb. Ch. 430; Gray *v.* Wilson, 4 Watts 39; Graham et al. *v.* Hamilton, 1 Binn. 461; Graham *v.* Graham, 9 Penn. St. 254; s. c. 12 Penn. St. 128; Allen *v.* Chase, 3 Wis. 249; and where an arbitration is had under the common law, an umpire may of course be chosen, if a necessity for one should arise, as well as in those cases where the statutes of the state make provision for the election of an umpire, and he will be subject to the regulations of the common law on that subject, unless the laws of the state provide otherwise: Ramsey *v.* Edwards, 17 Conn. 309; Falconer *v.* Montgomery, 4 Dall. 232; Passmore *v.* Pettit et al., Id. 271; Crabtree *v.* Green, 8 Ga. 8; Keans *v.* Rankin, 2 Bibb 88; Tyler *v.* Webb, 10 B. Mon. 123; Knowlton *v.* Horner, 29 Maine 552; Rigden *v.* Martin, 6 Har. & Johns. 403; McKinstry *v.* Solomons, 2 Johns. 57; s. c. 13 Id. 27; Van Courtlandt et al. *v.* Underhill et al., 17 Id. 405; Butler *v.* The Mayor, &c., of New York, 1 Hill (N. Y.) 489; Boyer *v.* Aurand, 2 Watts 74; Graham *v.* Graham, 9 Penn. St. 254; s. c. 12 Id. 128; Sharp *v.* Lipsey, 2 Bail. 113; Pack *v.* Wakeley et al., 2 McCord 279; Shields *v.* Penn, Overt. 313; Richards *v.* Brockenborough's Admr., 1 Rand. 449; Rison *v.* Berry, 4 Id. 275; Bassett's Admr. *v.* Cunningham's Admr., 9 Gratt. 684. This kind of submission may be revoked at any time before the award is made: Martin *v.* Chapman, 1 Ala. 278; Randal *v.* Chesapeake, &c., Canal Co., 1 Harring. 235; Peter's Admr. *v.* Craig, 6 Dana 307; Allen *v.* Watson, 16 Johns. 205; Frets *v.* Frets, 1 Cowen 335; Erie *v.* Tracy, 2 Grant's Cas. 20; Davis *v.* Maxwell, 27 Ga. 368; and it is *ipso facto* revoked by the death of either party Mooer's Admr. *v.* Allen, 35 Maine 276; Ferris *v.* Mann, 2 Zabr. 161; Freeborn *v* Denman, 3 Halst. 116; Frets *v.* Frets, 1 Cowen 335; Tyson *v.* Robinson, 3 Ired. 333; unless there should be an agreement to the contrary: Bailey *v.* Stewart, 3 W. & S. 560; but where the reference is made a rule of court, the death of one of the parties will not revoke it, if the cause of action survives: Bacon *v*, Crandon, 15 Pick. 79; Tyson *v.* Robinson, 3 Ired. 333; but see, contrary to the last, Power *v.* Power, 7 Watts 205, which decides that a

very properly required to be chosen by the arbitrators before they proceed to take the subject in question into consideration.(a) And it is agreed that the award in writing of the arbitrators, or of their umpire in case of their disagreement, shall be binding and conclusive on all parties.

As the courts of law and equity have full jurisdiction on all questions arising out of agreements of any kind, it follows that they retain a jurisdiction over matters which the parties themselves have agreed should be

(a) See Bates *v.* Cooke, 9 B. & C. 407, 408 (E. C. L. R. vol. 17).

submission even by a rule of court, is, like any other naked authority, countermandable. An award, however, which has been accepted or carried into effect, bars all further action: Kendall *v.* Stokes et al., 3 How. (U. S.) 87; United States *v.* Ames, 1 Wood. & Min. 76; Martin *v.* Chapman, 1 Ala. 278; Gerrish et al. *v.* Ayres et al., 3 Scam. 245; Coleman *v.* Wade, 2 Seld. 44; Patton's Admr. *v.* Baird, 7 Ired. Eq. 255.

Awards must conform to the submission or agreement by which they are referred: Daniel *v.* Daniel's Admr., 6 Dana 99; Anderson *v* Farnham et al., 34 Maine 161; Reeves *v.* Goff, Penning. 105; Young *v.* Young, 2 Halst. Ch. 450; Welty *v.* Lentmyer, 4 Watts 75; Coleman et al. *v.* Lukens, 4 Whart. 347; Okinson *v.* Flickinger, 1 W. & S. 257; Sharp *v.* Lipsey, 2 Bail. 113; Speer *v.* Bidwell, 44 Penn. St. 23; Burchell *v.* Marsh, 17 How. (U. S.) 344; and if not required by the submission to be in writing, may be by parol: Jones *v.* Dewey, 17 N. H. 596; but all the arbitrators must concur, unless the submission provides otherwise: Mackey *v.* Neill, 8 Jones L. 214; Bakus's Ap., 58 Penn. St. 186; and, where an award is partly good and partly bad, it will be valid so far as it is good, and void as to the rest, except where the good and bad are so intermingled that the one cannot be separated from the other, in which case the whole award will be bad: Reynolds *v.* Reynolds, 15 Ala. 398; Galway's Heirs *v.* Webb, Hardin 318; Dickey *v.* Sleeper, 13 Mass. 244; Walker *v.* Walker, 28 Ga. 140; Griffin *v.* Hadley, 8 Jones L. 82; and awards must be certain: Etnier *v.* Shope, 43 Penn. St. 110; Stanley *v.* Southwood, 45 Id. 189; Pettibone *v.* Perkins, 6 Wis. 616; and final: Bayne *v.* Morris, 1 Wall. (U. S.) 97; McCracken *v.* Clarke, 31 Penn. St. 498; Owen *v.* Boerum, 23 Barb. 187; Smith *v.* Potter, 27 Vt. 304; Carter *v.* Calvert, 3 Md. Ch. Dec. 199; and a second award is void: Bayne *v.* Morris, 1 Wall. (U. S.) 97; as to what is sufficient to set an award aside, see further: State, to the use of, &c., *v.* Williams, 9 Gill 172; Bean *v.* Farnam et al., 6 Pick. 269; Newman *v.* Labeaume, 9 Miss. 30; Eaton *v.* Eaton, 8 Ired. Eq. 102; Conger *v.* James, 2 Swan 213; Webber *v.* Ives, 1 Tyler 441; Ligon *v.* Ford, 5 Munf. 10; Taber *v.* Jenny, Sprague 315.

In the State of New York, upon a motion to refer a cause then pending, the reference may be opposed on the ground that a material point of law will arise: Lusher *v.* Walton, 1 Caines 149; Low *v.* Hallett, 3 Id. 82; Adams *v.* Bayles, 2 Johns. 374; Salisbury *v.* Scott, 6 Id. 329; De Hart *v.* Covenhoven, 2 Johns. Cas. 402; Shaw *v.* Ayrs, 4 Cowen 52; Anon., 5 Id. 423.

As to the time within which an award is to be made, see Minton *v.* Moore, 4 Blackf. 315; Shaw *v.* Pearce, 4 Binn. 485; Abbot *v.* Pinchin, 1 Dall. 349; White *v.* Puryean, 10 Yerg. 441; Willard *v.* Bickford, 39 N. H. 536; Keller *v.* Sutrick, 22 Cal. 471.

An agreement to arbitrate does not divest courts of their jurisdiction: Allegre *v.* Insurance Co., 6 Har. & Johns. 408; Haggart *v.* Morgan, 1 Seld. 422; but see, to the contrary: Monongahela Navigation Co. *v.* Fenlon, 4 W. & S. 205; Leonard *v.* House, 15 Ga. 473.

referred to arbitration.(b) Notwithstanding, therefore, an agreement to refer disputes to arbitration, either party may bring the matter into court.(c) But the Common Law Procedure Act, 1854, now provides, that, whenever the parties to any deed or instrument in writing to be [*184] thereafter executed shall agree to refer *their differences to arbitration, and one of such parties shall nevertheless commence an action at law or suit in equity against the others in respect of the matters so agreed to be referred, the court may stay the proceedings on such terms as it may think fit, on being satisfied that no sufficient reason exists why such matters cannot be or ought not to be referred to arbitration, and that the defendant was at the time of the bringing of such action or suit and still is ready and willing to concur in all acts necessary for causing such matters to be decided by arbitration.(d) And a contract may be so worded as to amount to merely an agreement to pay so much as an arbitrator may award, in which case there can be no right to sue until the award has been made.(e)

The reference of disputes to arbitration appears to have been early adopted by the courts of law, with the consent of the parties to an action, in cases where the matter in dispute could be more conveniently settled in this mode. A verdict was taken for the plaintiff by consent, subject to the award of an arbitrator agreed upon by the parties, and the reference was made a rule of court. This plan is still continually adopted. The arbitrators and the parties to the reference by this means become subject to the jurisdiction of the court, which has power to set aside any award which may appear to have been given unjustly or through mistake of the law; or if the award be valid, its performance may be enforced under the penalty of imprisonment for contempt [*185] *of court. And by the Common Law Procedure Act, 1854, the court has power, upon the application of either party, to order any matter in dispute, which consists wholly or in part of matters of mere account, to be referred to arbitration, upon such terms as to costs and otherwise as the court may think reasonable.(f) In order to extend

(b) Wellington v. Mackintosh, 2 Atk. 569.

(c) Waters v. Taylor, 15 Ves. 10, 18; Mexborough v. Bower, 7 Beav. 127, 132; Horton v. Sayers, 4 H. & N. 643; Cook v. Cook, V.-C. W., 15 W. R. 981.

(d) Stat. 17 & 18 Vict. c. 125, s. 11; Hirsch v. Im Thurn, 4 C. B. N. S. 569 (E. C. L. R. vol. 93). See Mason v. Haddan, 6 C. B. N. S. 526; Wheatley v. Westminster Brymbo Coal and Coke Company, Limited, 2 Drew. & Sm. 347; Cook v. Catchpole, V.-C. W. 10 Jur. N. S. 1068.

(e) Scott v. Avery, 5 H. of L. Cases 811; Scott v. Corporation of Liverpool, 3 De G. & J. 334; Elliott v. Royal Exchange Assurance Company, Law Rep. 2 Ex. 237.

(f) Stat. 17 & 18 Vict. c. 125, ss. 3, 6, 7.

the benefits of this mode of submission to arbitration to all cases of controversies between merchants and traders or others concerning matters of account or trade or other matters, an act of parliament was passed in the reign of William the Third, intituled "An Act for determining Differences by Arbitration."(*g*) This act empowers all merchants and traders and others desiring to end by arbitration any controversy, for which there is no other remedy but by personal action or suit in equity, to agree that their submission of their suit to the award or umpirage of any person or persons shall be made a rule of any of her majesty's courts of record which the parties shall choose. And it provides, that, in case of disobedience to the arbitration or umpirage to be made pursuant to such submission, the party neglecting or refusing to perform and execute the same, or any part thereof, shall be subject to all the penalties of contemning a rule of court when he is a suitor or defendant in such court. And the process to be issued accordingly shall not be stopped or delayed in its operation by any order, rule, command or process of any other court, either of law or equity, unless it shall be made to appear on oath to such court that the arbitrators or umpire misbehave themselves, and that such award, arbitration or umpirage was procured by corruption or other undue means. It is also further provided,(*h*) that any arbitration or umpirage procured by corruption or undue means shall be *judged void, and be set aside by any court of law or equity, so as complaint of such corruption or undue practice be made in the court where the rule is made for submission to such arbitration or umpirage before the last day of the next term after such arbitration or umpirage is made and published to the parties. The Court of Chancery is a court of record within the meaning of this act.(*i*) And it is now provided, that every agreement or submission to arbitration by consent, whether by deed or instrument in writing not under seal, may be made a rule of any one of the superior courts of law or equity at Westminster, on the application of any party thereto, unless such agreement or submission contain words purporting that the parties intend that it should not be made a rule of court; but where it is provided that it shall be made a rule of one of such courts in particular, it may be made a rule of that court only.(*j*) A parol submission cannot be made a rule of court, even though made in pursuance of an agreement to refer contained in a deed.(*k*)

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(*g*) Stat. 9 & 10 Will. III. c. 15. (*h*) Sect. 2.

(*i*) Heming *v.* Swinnerton, 2 Phil. 79.

(*j*) Stat. 17 & 18 Vict. c. 125, s. 17; Re Newton and Hetherington, 19 C. B. N. S. 342 (E. C. L. R. vol. 115); Parkes *v.* Smith, 15 Q. B. 297 (E. C. L. R. vol. 69).

(*k*) Ex parte Glaysher, 3 H. & C. 442.

Previously to a recent statute either party might have revoked his submission, and thus determined the authority of the arbitrators; and this may still be done, if the submission relate to criminal matters, which are not within the statute.(*l*) But it is now enacted,(*m*) that the power and authority of any arbitrator or umpire, appointed by or in pursuance of any rule of court or judge's order or order of nisi prius in any action, or by or in pursuance of any submission to reference containing an [*187] agreement that such submission shall be made a *rule of any of her majesty's courts of record, shall not be revocable by any party to such reference without the leave of the court by which such rule or order shall be made, or which shall be mentioned in such submission, or by leave of a judge.(*n*) And the arbitrator or umpire is empowered and required to proceed with the reference notwithstanding any such revocation, and to make such award although the person making such revocation shall not afterwards attend the reference. The court, or any judge, is also empowered under any such reference, by rule or order, to command the attendance and examination of witnesses, or the production of any document.(*o*) And by the act to amend the law of evidence it is now provided, that every arbitrator or other person, having by law or by consent of parties authority to hear, receive and examine evidence, may administer an oath to all such witnesses as are legally called before them respectively.(*p*)

The Common Law Procedure Act, 1854, provides, that if reference is authorized to be made to a single arbitrator, and all the parties do not, after differences have arisen, concur in the appointment of an arbitrator; or if any appointed arbitrator refuse or become incapable to act, or die, and the terms of the document authorizing the reference do not show that it was intended that such vacancy should *not* be supplied, and the parties do not concur in appointing a new one; then any party may serve the remaining parties with a written notice to appoint an arbitrator; and if within seven clear days after such notice shall have been served no arbitrator be appointed, it shall be lawful for any judge of any of the superior courts of law or equity at Westminster, upon summons [*188] to be taken out by the party *having served such notice, to appoint an arbitrator, who shall have the same power to act in the

(*l*) 2 Wms. Saund. 133 e, n. (*d*); Rex *v.* Bardell, 5 Ad. & E. 619 (E. C. L. R. vol. 31); s. c. 1 Nev. & P. 74.

(*m*) Stat. 3 & 4 Will. IV. c. 42, s. 39.

(*n*) See Scott *v.* Van Sandau, 1 Q. B. 102 (E. C. L. R. vol. 41).

(*o*) Stat. 3 & 4 Will. IV. c. 42, s. 40.

(*p*) Stat. 14 & 15 Vict. c. 99, s. 16.

reference and to make an award as if he had been appointed by consent of all parties.(*q*)

The authority of arbitrators is liable to be determined not only by a revocation of the submission, but also by the death of either of the parties previously to the making of the award.(*r*) In order to obviate this inconvenience, it is now usual to insert in the order or rule of court, by which reference is made to arbitration, a provision that the death of either of the parties shall not operate as a revocation of the authority of the arbitrators, but that the award shall be delivered to the executors or administrators of the parties, or either of them, in case of their or his decease.(*s*) And the same stipulation may be effectually made in a submission to arbitration by private agreement.(*t*) The bankruptcy of either party is not a determination of a submission to arbitration.(*u*)

When the reference is made to two arbitrators, one appointed by each party, it is now provided,(*v*) that either party may, in case of the death, refusal to act or incapacity of any arbitrator appointed by him, substitute a new arbitrator, unless the document authorizing the reference show that it was intended that a vacancy should *not* be supplied. And if on such a reference one party fail to appoint an arbitrator, either originally or by way of substitution as aforesaid, for seven clear days *after the other party shall have appointed an arbitrator, and shall have served the party so failing to appoint with notice in writing to make the appointment, the party who has appointed an arbitrator may appoint such arbitrator to act as sole arbitrator in the reference; and an award made by him shall be binding on both parties as if the appointment had been by consent; provided, however, that the court or a judge may revoke such appointment on such terms as shall seem just. [*189]

When no time is limited for the making of the award it must be made within a reasonable time;(*x*) but if a given time be limited, the award must be made within that time, unless the time for making it be en-

(*q*) Stat. 17 & 18 Vict. c. 125, s. 12.

(*r*) Cooper *v.* Johnson, 2 B. & Ald. 394; Brooke *v.* Mitchell, 6 M. & W. 473.

(*s*) Tyler *v.* Jones, 3 B. & C. 144 (E. C. L. R. vol. 10); Prior *v.* Hembrow, 8 M. & W. 873; 2 Wms. Saund. 133 d, n. (*d*).

(*t*) Macdougall *v.* Robertson, 2 You. & Jer. 11; s. c. 4 Bing. 435 (E. C. L. R. vol. 13); 1 M. & P. 147.

(*u*) Hemsworth *v.* Bryan, 1 C. B. 131 (E. C. L. R. vol. 50).

(*v*) Stat. 17 & 18 Vict. c. 125, s. 13.

(*x*) Macdougall *v.* Robertson, ubi supra.

larged.(y) And if the award is required to be made and ready to be delivered to the parties by a certain day, it will be considered as ready to be delivered if it be made,(z) unless the arbitrators should fail to deliver it to either of the parties on request made for that purpose on the last day.(a) The submission to arbitration frequently contains a power for the arbitrators or umpire to enlarge the time for making the award; and in this case the time may be enlarged from time to time(b) by such arbitrators or umpire,(c) provided the enlargement be made on or before the expiration of the time originally limited for making the award.(d) And if the submission be made a rule of court, then, whether the arbitrators or umpire have power to enlarge the time or not,(e) the court, or a [*190] judge thereof, has power to *enlarge the time.(f) And should no enlargement be formally made, yet the parties may, by continuing their attendance on the reference, or by recognizing the proceedings under it, virtually empower the arbitrators or umpire to make a valid award subsequently to the time originally limited.(g) And the Common Law Procedure Act, 1854, now provides, that the arbitrator acting under any such document or compulsory order of reference, as mentioned in the act, shall make his award under his hand, and (unless such document or order respectively shall contain a different limit of time) within three months after he shall have been appointed and shall have entered on the reference, or shall have been called upon to act by a notice in writing from any party; but the parties may, by consent in writing, enlarge the term for making the award. And the superior court of which such submission, document or order is or may be made a rule or order, or any judge thereof, may for good cause truly stated in the rule or order for enlargement from time to time enlarge the term for making the award; and if no period be stated for the enlargement in such consent or order for enlargement, it shall be deemed to be an enlargement for one month.(h) The word "month" in an act of parliament now means a calendar month.(i)

(y) 1 Wms. Saund. 327, a n. (3).
(z) Bradsey v. Clyston, Cro. Car. 541.
(a) Brooke v. Mitchell, 6 M. & W. 473.
(b) Payne v. Deakle, 1 Taunt. 509; Barrett v. Parry, 4 Taunt. 658.
(c) See Dimsdale v. Robertson, 2 Jones & Lat. 58.
(d) See Reid v. Fryatt, 1 M. & Selw. 1; Mason v. Wallis, 10 B. & C. 107 (E. C. L. R. vol. 21).
(e) Parbery v. Newnham, 7 M. & W. 378; Leslie v. Richardson, 6 C. B. 378 (E. C. L. R. vol. 60).
(f) Stat. 3 & 4 Will. IV c. 42, s. 39; Re Warner and Powell's Arbitration, V.-C. S., Law Rep. 3 Eq. 261.
(g) Rex v. Hill, 7 Price 636.
(h) Stat. 17 & 18 Vict. c. 125, s. 15.
(i) Stat. 13 & 14 Vict. c. 21, s. 4.

In proceeding in the business of the arbitration, the arbitrators are bound to require the attendance of the parties, for which purpose notice of the meeting of the arbitrators should be given to them.(*j*) But if either party neglect to attend either in person or by attorney, after due notice, the arbitrators may proceed without *him.(*k*) In taking the evidence the arbitrators are at liberty to proceed in any way [*191] they please, if the parties have due notice of their proceedings, and do not object before the award is made.(*l*) But each must use his own judgment;(*m*) and in order to obviate any objection, they ought to proceed in the admission of evidence according to the ordinary rules of law.(*n*) The award should be signed by the arbitrators in each other's presence,(*o*) and when made it must be both certain and final. Thus if the award be that one party enter into a bond with the other for his quiet enjoyment of certain lands; this award is void for uncertainty; for it does not appear in what sum the bond should be.(*p*) With regard to certainty, however, the rule of law is *id certum est quod certum reddi potest*, and therefore an award that one of the parties should pay the costs of an action is good without fixing the amount of the costs, for that may be ascertained by the taxing officer.(*q*) On the question of finality many cases have arisen. If the arbitrators be *empowered* to decide all matters in difference between the parties, the award will not necessarily be wanting in finality for not deciding on all such matters, unless it appear to have been *required* that all such matters should be determined by the award.(*r*) If the award reserve to the arbitrators,(*s*) or to give to any other person,(*t*) or to one of the parties,(*u*) any further *authority or discretion in the matter, it will be bad for want of finality. And if the award be that any stranger to the reference [*192] should do an act, or that money should be paid to, or any other act

(*j*) Anon., 1 Salk. 71.

(*k*) Harcourt *v.* Ramsbottom, 1 Jac. & Walk. 512; Scott *v.* Van Sandau, 6 Q. B. 237 (E. C. L. R. vol. 51).

(*l*) Ridout *v.* Pye, 1 Bos. & P. 91.

(*m*) Whitmore *v.* Smith, 5 H. & N. 824.

(*n*) Attorney-General *v.* Davison, McCle. & Yo. 160.

(*o*) Stalworth *v.* Inns, 13 M. & W. 466; Wade *v.* Dowling, Q. B. 18 Jur. 728; 2 E. & B. 44 (E. C. L. R. vol. 75); Eads *v.* Williams, 4 De G., M. & G. 674, 688.

(*p*) Samon's Case, 5 Rep. 77 b.

(*q*) Cargey *v.* Aitcheson, 2 B. & C. 170 (E. C. L. R. vol. 9); s. c. 3 D. & R. 433; 2 Wms. Saund. 293 b, n. (*a*).

(*r*) Wrightson *v.* Bywater, 3 M. & W. 199; 1 Wms. Saund. 32 a, n. (*a*).

(*s*) Manser *v.* Heaver, 3 B. & Ad. 295 (E. C. L. R. vol. 23).

(*t*) Tomlin *v.* Mayor of Fordwich, 5 Ad. & E. 147 (E. C. L. R. vol. 31).

(*u*) Glover *v.* Barrie, 1 Salk. 71.

done in favor of, a stranger, unless for the benefit of the parties,(*x*) such award will be void.(*y*) An award, however, may be partly good and partly bad, provided the bad part is independent of and can be separated from that which is good.(*z*) But if, by reason of the invalidity of part of the award, one of the parties cannot have the advantage intended for him as a recompense for that which he is to do, according to that part of the award which would otherwise be valid, the whole will be void.(*a*) If it should appear on the face of the award that the arbitrators, intending to decide a point of law, have fallen into an obvious mistake of the law, the award will be invalid.(*b*) But where subjects involving questions both of law and fact are referred to arbitration, the arbitrators may make an award according to what they believe to be the justice of the case, irrespective of the law on any particular point.(*c*) And it is now provided, that it shall be lawful for the arbitrator, upon any compulsory reference under the Common Law Procedure Act, 1854, or upon any reference by consent of parties, where the submission is or may be made a rule or order of any of the superior courts of law or equity at Westminster, if he shall think fit, and if it is not provided to the contrary, to state his award as to the whole or any part thereof in the form [*193] of a special case for the *opinion of the court; and when an action is referred, judgment, if so ordered, may be entered according to the opinion of the court.(*d*)

When the submission to arbitration is not made the rule of any other court,(*e*) the Court of Chancery, according to the ordinary principles of equity, has power to set aside the award for corruption or other misconduct on the part of the arbitrators, or if they should be mistaken in a plain point of law or fact.(*f*) If the submission be made a rule of court under the above-mentioned statute of Will. III.,(*g*) the court of which it is made a rule has power to set aside the award, not only on the grounds of corruption or undue practice mentioned in the act, but also for mis-

(*x*) Wood *v*. Adcock, 7 Ex. Rep. 468.

(*y*) Cooke *v*. Whorwood, 2 Saund. 337; Adam *v*. Statham, 2 Lev. 235; Fisher *v*. Pimbley, 11 East 188.

(*z*) Fox *v*. Smith, 2 Wils. 267; Aitcheson *v*. Cargey, 2 Bing. 199 (E. C. L. R. vol. 9).

(*a*) 2 Wms. Saund. 293 b, n. (1).

(*b*) Ridout *v*. Pain, 3 Atk. 494; Richardson *v*. Nourse, 3 B. & Ald. 237 (E. C. L. R. vol. 5).

(*c*) Re Badger, 2 B. & Ald. 691; Young *v*. Walker, 9 Ves. 364; Hodgkinson *v*. Fernie, 3 C. B. N. S. 189 (E. C. L. R. vol. 91).

(*d*) Stat. 17 & 18 Vict. c. 125, s. 5.

(*e*) Nichols *v*. Roe, 3 Myl. & K. 431.

(*f*) Ridout *v*. Pain, 3 Atk. 494.

(*g*) Stat. 9 & 10 Will. III. c. 15.

takes in point of law;(*h*) and no other court has a right to entertain any application for this purpose.(*i*) The application to set aside the award must, however, be made within the time limited by the act.(*k*) But although the time limited by that statute may have expired, yet if there be any defect apparent on the face of the award, the court will not assist in carrying it into effect by granting an attachment for its non-performance.(*l*) If the submission to arbitration be made by rule or order of the court in any cause independently of the statute, the court still retains its ancient jurisdiction of setting aside the award on account either of the misconduct of the arbitrators, or of their mistake in point of law.(*m*) In analogy, however, *to the practice under the statute of Will. III., the court in ordinary cases requires application for setting aside the award to be made within the time limited by that statute;(*n*) but upon sufficient grounds it will grant such an application, though made after the expiration of that time.(*o*) All applications, however, to set aside any award made on a compulsory reference under the Common Law Procedure Act, 1854, must be within the first seven days of the term next following the publication of the award to the parties, whether made in vacation or term; and if no such application is made, or if no rule is granted thereon, or if any rule granted thereon is afterwards discharged, the award is final.(*p*) The court or a judge has also power to remit the matters referred to arbitration, or any of them, to the reconsideration of the arbitrator, upon such terms as to costs and otherwise as to such court or judge may seem proper.(*q*)

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It is usual to provide for the appointment of an umpire in case the parties should disagree. But the Common Law Procedure Act, 1854, now provides,(*r*) that when the reference is to two arbitrators, and the terms of the document authorizing it do not show that it was intended that there should *not* be an umpire, or provide otherwise for the appointment of an umpire, the two arbitrators may appoint an umpire at any time within the period during which they have power to make an award, unless they be called upon to make the appointment sooner, by notice under the following provisions. And if, where the parties or two

(*h*) Zachary *v.* Shepherd, 2 Term Rep. 781; Lowndes *v.* Lowndes, 1 East 276, overruling Anderson *v.* Coxeter, 1 Stra. 301; see 1 Wms. Saund. 327 d, n. (*s*).

(*i*) Stat. 9 & 10 Will. III. c. 15, s. 2; Nichols *v.* Roe, 3 Myl. & K. 431.

(*k*) Lowndes *v.* Lowndes, 1 East 276; *ante*, p. 185.

(*l*) Pedley *v.* Goddard, 7 Term Rep. 73.

(*m*) Lucas *v.* Wilson, 2 Burr. 701.

(*n*) Macarthur *v.* Campbell, 5 B. & Ad. 518 (E. C. L. R. vol. 27); Smith *v.* Whitmore, 1 Hem. & Mill. 576, affirmed 10 Jur. N. S. 1190.

(*o*) Rawsthorn *v.* Arnold, 6 B. & C. 629 (E. C. L. R. vol. 13); s. c. 9 D. & R. 556.

(*p*) Stat. 17 & 18 Vict. c. 125, s. 9.

(*q*) Ibid. s. 8.

(*r*) Ibid. s. 14.

arbitrators are at liberty to appoint an umpire or third arbitrator, such [*195] *parties or arbitrators do not appoint an umpire or third arbitrator, or if any appointed umpire or third arbitrator refuse to act, or become incapable of acting, or die, and the terms of the document authorizing the reference do not show that it was intended that such a vacancy should *not* be supplied, and the parties or arbitrators respectively do not appoint a new one, then any party may serve the remaining parties, or the arbitrators as the case may be, with a written notice to appoint an umpire or third arbitrator; and, if within seven clear days after such notice shall have been served no umpire or third arbitrator be appointed, it shall be lawful for any judge of any of the superior courts of law or equity at Westminster, upon summons to be taken out by the party having served such notice, to appoint an umpire or third arbitrator, who shall have the same power to act in the reference and make an award as if he had been appointed by consent of all parties.(*s*)

If an umpire be appointed, his authority to make an award commences from the time of the disagreement of the arbitrators,(*t*) unless some other period be expressly fixed; and if, after the disagreement of the arbitrators, he make an award before the expiration of the time given to the arbitrators to make their award, such award will nevertheless be valid.(*u*) And it is now provided that if the arbitrators shall have allowed their time, or their extended time, to expire without making an award, or shall have delivered to any party, or to the umpire, a notice in writing stating that they cannot agree, the umpire may enter on the reference in lieu of the arbitrators.(*x*) [*196] The umpire must be chosen by the *arbitrators in the exercise of their judgment and at the same time,(*y*) and must not be determined by lot,(*z*) unless all the parties to the reference consent to his appointment by such means.(*a*) In order to enable him to form a proper decision, he ought to hear the whole evidence over again,(*b*) unless the partics should be satisfied with his deciding on the statement of the arbitrators.(*c*) And the whole matter in difference must be submitted to his decision, and not some particular points only on which the arbitrators may disagree.(*d*)

(*s*) Stat. 17 & 18 Vict. c. 125, s. 12; see Re Lord, 1 Kay & Johns. 90; Collins *v.* Collins, 26 Beav. 306.

(*t*) Smailes *v.* Wright, 3 M. & Selw. 559; Sprigens *v.* Nash, 5 M. & Selw. 193.

(*u*) Sprigens *v.* Nash, ubi sup.

(*x*) Stat. 17 & 18 Vict. c. 125, s. 15.

(*y*) Re Lord, Q. B. 1 Jur. N. S. 893; 5 E. & B. 404 (E. C. L. R. vol. 85).

(*z*) In Re Cassell, 9 B. & C. 624 (E. C. L. R. vol. 17); Ford *v.* Jones, 3 B. & Ad. 248 (E. C. L. R. vol. 23); European, &c. Shipping Company *v.* Crosskey, 8 C. B. N. S. 397 (E. C. L. R. vol. 98). See, however, Re Hopper, Law Rep. 2 Q. B. 367; 8 B. & S. 100.

(*a*) Re Jamieson, 4 Ad. & E. 945 (E. C. L. R. vol. 31).

(*b*) Re Salkeld, 12 Ad. & E. 767 (E. C. L. R. vol. 40); Re Hawley, 2 De G. & S. 33.

(*c*) Hall *v.* Lawrence, 4 Term Rep. 589.

(*d*) Tollit *v.* Saunders, 9 Price 612.

An award for the payment of money creates a debt from one party to the other, for which an action may be brought in any court of law,(*e*) and which will be sufficient to support a petition for adjudication of bankruptcy.(*f*) But when the award is made a rule of court, its performance may, as we have seen,(*g*) be enforced by attachment. And where the reference is made by order of the Court of Chancery,(*h*) or where the award requires any act to be done which cannot be enforced by an action at law,(*i*) equity will decree a specific performance. And it is now provided that when any award directs possession of any lands or tenements to be delivered to any party, the court, of which the document authorizing the reference is or is *made a rule or order, [*197] may order any party to the reference who shall be in possession of such lands or tenements, or any person in possession of the same, claiming under or put in possession by him since the making of the document authorizing the reference, to deliver possession of the same to the party entitled thereto pursuant to the award; and such rule or order to deliver possession shall have the effect of a judgment in ejectment against every such party or person named in it, and execution may issue, and possession shall be delivered by the sheriff as on a judgment in ejectment.(*k*)

The award of arbitrators or of an umpire, though indented and under hand and seal, is not a deed unless delivered as such.(*l*) It is now subject to stamp duty according to the table in the note.(*m*)

(*e*) 2 Wms. Saund. 62 a, n. (5).
(*f*) Ex parte Lingard, 1 Atk. 241.
(*g*) *Ante*, p. 184.
(*h*) Marquis of Ormond *v.* Kynnersley, 2 Sim. & Stu. 15; Wood *v.* Taunton, 11 Beav. 449.
(*i*) Hall *v.* Hardy, 3 P. Wms. 190.
(*k*) Stat. 17 & 18 Vict. c. 125, s. 16.
(*l*) Brown *v.* Vawser, 4 East 584.
(*m*) Stat. 28 & 29 Vict. c. 96, s. 3, where the amount or value of the matter in dispute shall not exceed £5 . . . . 0 0 3

					£	*s.*	*d.*
Where the amount or value of the matter in dispute shall not exceed £5					0	0	3
And where it shall	exceed	£5	and not exceed	£10	0	0	6
"	"	10	"	20	0	1	0
"	"	20	"	30	0	1	6
"	"	30	"	40	0	2	0
"	"	40	"	50	0	2	6
"	"	50	"	100	0	5	0
"	"	100	"	200	0	10	0
"	"	200	"	500	0	15	0
"	"	500	"	750	1	0	0
"	"	750	"	1000	1	5	0
And where it shall exceed £1000, and also in all other cases not above provided for					1	15	0[1]

[1] Awards are not made liable to stamp duty by the Internal Revenue Law of the United States.

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*PART III.

OF INCORPOREAL PERSONAL PROPERTY.

CHAPTER I.

OF PERSONAL ANNUITIES, STOCKS AND SHARES.

IN addition to goods and chattels in possession, which have always been personal property, and to debts which have long since been considered so, there exists in modern times several species of incorporeal personal property, to which we now propose to direct our attention. These species of property are certainly not *choses in possession*, neither yet are they like debts strictly *choses in action*, though often classed as such. In analogy, therefore, to the well-known division of real estate into corporeal and incorporeal, we have ventured to place these kinds of property together into a class to be denominated *incorporeal personal property*. A debt no doubt is also incorporeal, but it is still well characterized by its ancient name of a *chose in action.*

The first kind of incorporeal personal property which we shall mention is a *personal annuity*.[1] This kind of property is not indeed of so modern an origin as some of those which we shall hereafter mention. It consists of an annual payment, not charged on real estate; but it may nevertheless be limited to the heirs, or the heirs of the body of the grantee. In former times it was doubted whether an annuity was not a

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[1] As a part of the law of this country, this subject has become of far more practical importance than formerly, from the gradual development of the legal principles relating to life insurance, which embrace most, if not all, of those applicable to personal annuities.

mere *chose in action*, and therefore incapable of assignment;(a) but *this objection has long been overruled. When limited to the heirs of the grantee it will, on his intestacy, descend, like real estate, to his heir; but it is still personal property,(b) and will pass by his will under a bequest of all his personal estate.(c) When given to the grantee and the heirs of his body, the grantee does not acquire an estate tail; for this kind of inheritance is not a *tenement* within the meaning of the statute *De Donis Conditionalibus*.(d) The grantee has merely a fee simple *conditional* on his having issue, such as a grantee of lands would have had under a similar grant prior to the statute *De Donis*,(e) or as a copyholder would now take in manors where there is no custom to entail.(f) When the grantee has issue, he may therefore alien the annuity in fee simple by a mere assignment; but should he die without issue the annuity will fail. A personal annuity given to a man *for ever* will devolve on the executor, and not on the heir of the grantee.(g)[1]

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The next kind of incorporeal personal property to be considered is stock in the public funds, or bank annuities. Previously to the Revolution in 1688 there was no funded debt properly so called; although King Charles I. and King Charles II. both found occasion to raise money by the grant of annuities in fee simple chargeable on particular branches of the revenue. These annuities, not being payable out of real estate, appear to have been the first instances of personal annuities limited to the grantees and their heirs, and they *gave occasion to those lawsuits by which the legal nature and incidents of personal annuities have been determined; although some mention of such annuities is certainly to be found in the old books.(h) Soon after the Revolu-

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(a) Co. Litt. 144 b, n. (1).
(b) Earl of Stafford *v.* Buckley, 3 Ves. sen. 171; Radburn *v.* Jervis, 3 Beav. 450, 461.
(c) Aubin *v.* Daly, 4 B. & Ald. 59 (E. C. L. R. vol. 6).
(d) Turner *v.* Turner, 2 Amb. 776, 782; Earl of Stafford *v.* Buckley, ubi sup.
(e) See Principles of the Law of Real Property 30, 36, 2d ed.; 32, 38, 3d & 4th eds.; 35, 41, 5th, 6th, 7th & 8th eds.
(f) Ibid. 286, 2d ed.; 295, 3d ed.; 299, 4th ed.; 310, 5th ed.; 327, 6th ed.; 334, 7th ed.; 349, 8th ed.
(g) Taylor *v.* Martindale, 12 Sim. 158.
(h) Co. Litt. 144 b, Fitz. N. B. 152 a.

[1] Where an annuity is given by will, and there is no direction as to the time when it shall commence, it commences at the testator's death: Craig *v.* Craig, 3 Barb. Ch. 76; Hall *v.* Hall, 2 McCord's Ch. 281; Wiggin *v.* Swett, 6 Metc. 194; Eyre *v.* Golding, 5 Binn. 474; Hilyard's Est., 5 W. & S. 30; Santee *v.* Santee, 64 Penn. St. 474; Cooke *v.* Meeker, 36 N. Y. 15.

tion, however, a portion of the public debt was funded, or transferred into perpetual annuities, payable, by way of interest, on the capital advanced, which capital was to be repaid by the government in the manner agreed on. And from that time to the present, the funded debt of the country has, by several acts of parliament, been greatly increased. Stock in the funds, therefore, is merely a right to receive certain annuities, by half-yearly dividends, as they become due,(*i*) subject to the right of government to redeem such annuities on payment of a stipulated sum, which sum is the nominal value of the stock. Thus, 100*l.* £3 per cent. Consolidated Bank Annuities is a right to receive 3*l.* per annum for ever, subject to the right of government to redeem this annuity on payment of 100*l.* sterling. The actual value of 100*l.* £3 per cent. Consolidated Bank Annuities (or *Consols* as they are shortly termed) of course depends on the state of the stock market, being generally lower, though it has been higher, than the nominal price, which is called *par*.

The public funds are composed of several separate stocks, of which, however, by far the largest and most important are the consols. In this fund alone the Court of Chancery formerly invested all the money committed to its care belonging to the suitors in that court; and, as it is a rule of equity, that whatever the Court would certainly order to be done may be done without applying to the Court, every trustee and executor [*201] was justified *in investing in consols any money which he might have held in trust, without any express direction for that purpose.(*k*) But should he have invested trust money upon any other security, without express authority so to do, he would have been answerable to his cestuis que trust for the amount of the money so invested, should the security have failed; and it seems also, that the cestui que trust had an option either to claim the money, or to have so much stock as the money improperly invested would have purchased at the time when the improper investment was made.(*l*) But when the trustee was authorized by the terms of his trust to invest either in the funds or on real securities, it was decided, after much conflict of opinion, that the cestui que trust had no option to charge the defaulting trustee with any larger

(*i*) Wildman *v.* Wildman, 7 Ves. 174, 177; Rawlings *v.* Jennings, 13 Ves. 38, 45. Dividend warrants may now be sent by post, stat. 32 & 33 Vict. c. 104.

(*k*) Howe *v.* Lord Dartmouth, 7 Ves. 150; Holland *v.* Hughes, 16 Ves. 114; Tebbs *v.* Carpenter, 1 Mad. 306; Norbury *v.* Norbury, 4 Mad. 191.

(*l*) Forrest *v.* Elwes, 4 Ves. 497; Pride *v.* Fooks, 2 Beav. 430; Robinson *v.* Robinson, Lords Justices, 1 De G., M. & G. 247.

sum than the amount of the money lost, with interest at four per cent. For had the trustee chosen, as he might, to invest on real security, the cestui que trust would have gained nothing by the subsequent rise in the funds.(*m*) Recent enactments have, however, now largely extended the investments in which trust funds may be placed.(*n*)[1]

The legal nature and incidents of stock in the public funds have been fixed by the various acts of parliament by which these funds have been created. These statutes are far too numerous to be here mentioned; but their provisions are generally similar. By one of the earliest of these statutes,(*o*) it is provided, that all persons who *shall be entitled [*202] to any of the annuities thereby created, and all persons lawfully claiming under them, shall be possessed thereof *as of a personal estate, and the same shall not be descendible to the heir.* And the same rule holds with respect to all the public funds which now exist.

The transfer of stock in the public funds is effected only by the signature of the books at the Bank of England in the manner prescribed by act of parliament; and this transfer may be effected either in person or by attorney duly appointed for the purpose by writing, under hand and seal, attested by two or more credible witnesses.(*p*) The legal title to stock belongs to the person in whose name it is standing in the Bank books; and the Bank refuses to recognize trusts, or to keep more than one account for the same person; neither will it allow of the transfer of any stock into the names of more than four persons. Formerly the right to stock always carried the right to the current half-year's dividends, and the transfer books were closed for some days prior to the days of payment of the dividends. But a day for closing the books is now fixed in the month preceding that in which the dividends are payable, and the person whose name then appears inscribed in the books as proprietor is, as between him and the transferee, entitled to the current half-year's dividend; and after that day the person to whom any transfer

(*m*) Robinson *v.* Robinson, ubi sup., overruling Watts *v.* Girdlestone, 6 Beav. 188; Ames *v.* Parkinson, 7 Beav. 379, and Ouseley *v.* Anstruther, 10 Beav. 456.

(*n*) See *post*, the chapter on "SETTLEMENTS."

(*o*) Stat. 1 Geo. I. st. 2, c. 19, s. 9.

(*p*) Stat. 1 Geo. I. st. 2, c. 19, s. 11, and subsequent acts.

[1] As a general rule, the courts having jurisdiction, on application made to them for that purpose, would authorize the investment of trust funds, in the debt of the United States, or of some State; in some municipal loan, or on real security.

is made is not entitled to the current dividend.(q) When stock is standing in the name of a trustee, the beneficial owner may transfer his equitable interest in any manner he pleases. As the claim of the beneficial owner is equitable only, there will be no occasion to give to the transferee a power of attorney to sue in the name of the transferor ;(r) and the transferee, on giving notice of [*203] *the transfer to the trustee, will be entitled to a legal transfer of the stock into his own name in the books at the Bank. A recent act of parliament contains provisions for the conversion of stock, transferable only at the Bank, into stock certificates payable to bearer, and transferable accordingly from hand to hand.(s)

As the constant fluctuations of the value of the funds were long since found to present a great temptation to gambling on the chance of their rise or fall, an act was passed in the reign of Geo. II.(t) for the purpose of suppressing such transactions. This act was introduced into parliament by Sir John Barnard, whose name it bears, and it was intituled "An Act to prevent the infamous Practice of Stockjobbing."[1] It con-

(q) Stat. 24 Vict. c. 3, s. 7.
(r) See *ante*, p. 6.
(s) Stat. 26 Vict. c. 28.
(t) Stat. 7 Geo. II. c. 8.

[1] A provision similar to that referred to in the text, was formerly the law of New York, whereby it was declared that all contracts, written or verbal, for the sale or transfer of stocks, are void, unless the party contracting to sell, be at the time in the actual possession of the evidence of the debt or interest, or otherwise entitled in his own right, or has due authority to sell the same.

Under this statute it was held, that where, at the time of the purchase of stock, the persons with whom the contract was made, had no stock standing in their names, upon the books of the corporation that had issued the stock, and there was no other evidence to prove that they were the owners of the stock contracted to be sold, the would-be purchasers could not maintain an action against them, the transaction being void: Ward *v.* Van Duser, 2 Hall 162. And see, also, Gram *v.* Stebbins et al., 6 Paige Ch. 124.

In Massachusetts, upon an interpretation of this statute, it has been decided that, although a person contracting for the sale and transfer of stock, be in possession of the certificate or other evidence of the title to such stock, as required by statute, at the time of the contract, yet if he is nevertheless then already under a liability or obligation for the sale and transfer of an equal or greater number of shares of the same stock, the contract is absolutely void: Stebbins et al. *v.* Leowolf, 3 Cush. 137; but that a contract for the sale of railroad stock, by one who has previously pledged it, and of which the pawnee holds the certificate, but which the pawnor is authorized by the pawnee to sell whenever he has an opportunity, is not within the New York statute concerning stock-jobbing: Thompson *v.* Alger, 12 Metc. 428.

But this law has since been repealed; see N. Y. Rev. Stats. 1859, vol. ii. p. 980; Washburn *v.* Franklin, 28 Barb. 27.

See also *ante*, p. 92, note.

tained several provisions directed against the practice of fictitious sales of stock for a future time, where the seller had not the stock he sold, neither intended to procure it, and the buyer had no intention to purchase the amount he contracted for; but the only object of the parties was that, should the stock rise, the vendor should pay the buyer the difference occasioned by the increase in price, and should it fall, the buyer should pay the vendor the difference occasioned by the decrease.(*u*) But this act, having been found to interfere with legitimate transactions, has lately been repealed.(*x*)

*It seems that stock is not *goods*, *wares* or *merchandise* within the 17th section of the Statute of Frauds,(*y*) so that it does not require a written memorandum for a contract for its sale, if the value exceeds ten pounds and the buyer does not accept and receive any part, nor give something in earnest to bind the bargain or in part payment.(*z*) Contract notes for the sale or purchase of Government or other public stocks or shares, to the amount or value of five pounds or upwards, are now liable to a stamp duty of one penny.(*a*)[1] [*204]

By a modern act of parliament, the Court of Chancery is empowered to order the dividends of stock belonging to infants to be applied for their maintenance.(*b*) By another act the Lord Chancellor is empow-

(*u*) See Child *v.* Morley, 8 Term Rep. 610; Heckscher *v.* Gregory, 4 East 607, 614. The buyer who is interested in the rise of the funds is called, in the language of the Stock Exchange, a *bull*, the seller is a *bear*, but either party, if unable to pay his differences, becomes a *lame duck*. A stockjobber, properly so called, is a person who supplies the public, through the medium of the brokers, with money or stock to the exact amount they may require, making a profit only of 1-8th per cent. on each transaction; a course of business altogether different from the "infamous" practices usually called stockjobbing by the public.

(*x*) Stat. 23 Vict. c. 28.

(*y*) Stat. 29 Car. 2, c. 3. See *ante*, p. 40.

(*z*) See Numes *v.* Scipio, 1 Com. 356; Pickering *v.* Appleby, 1 Com. 354; 2 P. Wms. 308; Pawle *v.* Gunn, 4 Bing. N. C. 445 (E. C. L. R. vol. 33); Humble *v.* Mitchell, 11 Ad. & E. 205 (E. C. L. R. vol. 39); Knight *v.* Barber, 16 M. & W. 66.

(*a*) Stat. 23 & 24 Vict. c. 111.

(*b*) Stat. 11 Geo. IV. & 1 Will. IV. c. 65, s. 32.

[1] By the Internal Revenue Act, a broker's note or memorandum of sale is, liable to a stamp duty of ten cents. And by the same Act, as amended by the Act of July 13, 1866, a stamp duty at the rate of one cent for every one hundred dollars or fractional part thereof, is to be paid on all sales or contracts for the sale of stocks, bonds, &c., made by brokers, banks or bankers. Sects. 99 & 170 of the Act of June 30, 1864, as amended by the Act of July 13, 1866, 2 Brightly's U. S. Dig., pp. 357, 379, sects. 279, 365.

ered to appoint a person to transfer stock and receive and pay over dividends standing in the name of or vested in any lunatic, idiot or person of unsound mind beneficially entitled thereto, or standing in the name of or vested in the committee of a lunatic who may have died intestate, or himself become lunatic, or may be out of the jurisdiction of or not amenable to the process of the Court of Chancery, or if it be uncertain whether such committee be living or dead, or if he should neglect or refuse to transfer such stock and to receive and pay over the dividends thereof.(*c*) And the Lord Chancellor is also empowered to appoint a person to transfer stock standing in the name of or vested in any lunatic residing out of England; and also to receive and pay over the dividends [*205] thereof to the curator of such lunatic or otherwise, *as the Lord Chancellor shall think fit.(*d*) By another recent act it is provided, that when stock shall be standing in the name of any infant or person of unsound mind jointly with any person not under any legal disability, such person may alone give a power of attorney to receive the dividends.(*e*) And generally, the land or stock of any lunatic, in possession, reversion or expectancy, may be sold or mortgaged for the payment of his debts, or for his maintenance and otherwise for his benefit.(*f*)

When any person has an interest in stock standing in the name of another he is enabled to restrain the transfer of such stock, or, as it is said, to *put a stop upon it*, by means of a writ of *distringas*, to be served upon the Bank of England. This writ appears to be in strictness a proceeding in a suit supposed to have been commenced by the party obtaining it against the Bank and the legal owner of the stock; but in practice a suit is not commenced, unless the right to stop the stock be disputed.(*g*) This writ formerly issued only out of the equity side of the Court of Exchequer; but when the equitable jurisdiction of that court was transferred to the Court of Chancery, it was provided that a writ of *distringas*, in a prescribed form, should issue out of the latter court, the force and effect of which, and the practice relating to the same, should be such as was previously in force in the Court of Exchequer.(*h*) The writ commands the sheriff to *distrain* the Bank by their lands and chattels, so that they appear in court to answer a bill of complaint lately exhibited against them and other defendants by the person obtaining the

(*c*) Stat. 16 & 17 Vict. c. 70, s. 140.

(*d*) Sect. 141.

(*e*) Stat. 8 & 9 Vict. c. 97, s. 3.

(*f*) Stat. 16 & 17 Vict. c. 70, s. 116; 25 & 26 Vict. c. 86, ss. 12–14.

(*g*) See Wilkinson on the Funds 235–252; Re Cross, 1 Drew. & Sm. 580.

(*h*) Stat. 5 Vict. c. 5, s. 5.

writ. The object of the *writ is stated in a notice, which is served along with it, to be for the purpose of restraining any [*206] transfer of the stock in question until the order of the court be obtained. An appearance is accordingly entered by the Bank, and the transfer of the stock is thus delayed. When the *distringas* is required to be removed, an order of the court may be readily obtained for the dismissal of the supposed suit. It is surprising that a course by which a cestui que trust of stock may be so effectually protected from any fraudulent transfer by his trustee should not be more frequently adopted.

Stock, being a kind of *chose in action*, could not formerly have been sold under a *fieri facias* issued in execution of a judgment against the owner.(*i*)[1] And in fact, in the acts by which stocks were created, it was declared that they should not be taken in execution.(*k*) But by the act for extending the remedies of creditors against the property of debtors,(*l*) it is provided that any judge of one of the superior courts of common law,(*m*) on the application of any judgment creditor, may order that any government stock of the debtor standing in his own name, or in the name of any person in trust for him, shall stand charged with the payment of the judgment debt and interest, and such order shall entitle the judgment creditor to all such remedies as he would have been entitled to if such charge had been made in his favor by the debtor; but no proceedings are to be taken to have the benefit of such charge until after the expiration of six calendar months from the date of such order.(*n*) And by a subsequent act of *parliament,(*o*) this provision is declared to extend to the interest of any judgment debtor, whether in pos- [*207]

(*i*) Dundas *v.* Dutens, 1 Ves. jun. 198.

(*k*) Bank of England *v.* Lunn, 15 Ves. 577.

(*l*) Stat. 1 & 2 Vict. c. 110, s. 14. (*m*) Miles *v.* Presland, 4 Myl. & Cr. 431.

(*n*) See Watts *v.* Jefferyes, 3 Macn. & G. 372; Watts *v.* Porter, Q. B. 1 Jur. N. S. 133; 3 E. & B. 743 (E. C. L. R. vol. 77). *Contra*, Beavan *v.* Earl of Oxford, 6 De G., M. & G. 524, 525, 532; Scott *v.* Lord Hastings, 4 Kay & J. 633, 638; Crow *v.* Robinson, Law Rep. 4 C. P. 264, 267; Pickering *v.* Ilfracombe Railway Co., Law Rep. 3 C. P. 235, 251.

(*o*) Stat. 3 & 4 Vict. c. 82, s. 1. See Hulkes *v.* Day, 10 Sim. 41.

[1] In Maryland, New Jersey, Wisconsin, and Pennsylvania, stock may be taken in execution for the payment of debts: Md. Code, p. 49, art. 10, § 19; Suppl. (1868), p. 92, art. 26, secs. 198, &c.; Nixon's Dig. Laws of N. J. (1868), p. 294, § 7, Rev. Stats. of Wis. (1858), p. 787, § 33; Purd. Dig. (1861), p. 432, § 12. In Georgia no transfer of bank stock can be made by a debtor, after a judgment obtained against him: New Dig. Laws of Ga., vol. i. p. 512. In Ohio the statutes give certain regulations respecting the manner in which a creditor may proceed in chancery, against his debtor's equities, stock, &c., see 2 Rev. Stats. of Ohio (1861), p. 1086, § 458, &c.

session, remainder or reversion, and whether vested or contingent, as well in such stock as in the dividends or annual produce thereof, and also to stock in which the debtor may be interested standing in the name of the accountant-general of the Court of Chancery.(*p*) And in order to prevent any judgment debtor from disposing of the stock authorized to be charged, an order may be procured by the creditor, in the first instance *ex parte*, restraining the Bank of England from permitting a transfer of the stock until the order shall either be made absolute (that is, confirmed and continued) or discharged; and no disposition of the judgment debtor in the meantime is to be valid or effectual as against the creditor. And the order will be made absolute if the debtor do not, within a time mentioned in the order, show cause to the contrary.(*q*) When the debtor is entitled to the dividends of stock standing in the names of trustees, the order obtained by the creditor charging such dividends will be binding on the trustees; but the Bank must still pay the dividends to the trustees as legal owners.(*r*)

The history of the law respecting the transmission of stock by will affords a curious instance of the enactments of the legislature having been virtually overruled by the decisions of the Court of Chancery. The acts by which the funds were created provided, that any person possessed of [*208] stock might devise the same by will *in writing *attested by two or more credible witnesses*, but that such devisee should receive no payment till so much of the will as related to the stock had been entered in the office at the Bank; and in default of such devise the stock should go to the executors or administrators.(*s*) The Court of Chancery however held, that as stock had been declared by parliament to be personal estate, it must, like all other personal estate, devolve, in the first instance, on the executor for payment of debts, even though it should have been specially bequeathed;(*t*) and that the executor, having it in his hands by virtue of his office of executor, was bound after payment of debts to dispose of it according to the will of his testator, even although such will were unattested.(*u*) For, previously to the act for the amend-

(*p*) See Warburton *v.* Hill, 1 Kay 470; Haly *v.* Barry, Law Rep. 3 Ch. Ap. 452, 456, 457.

(*q*) Stat. 1 & 2 Vict. c. 110, s. 15.

(*r*) Churchill *v.* Bank of England, 11 M. & W. 323; Bristead *v.* Wilkins, 3 Hare 235; and see Taylor *v.* Turnbull, 4 H. & N. 495.

(*s*) Stat. 1 Geo. I. stat. 2, c. 19, s. 12, and subsequent acts.

(*t*) Bank of England *v.* Moffatt, 3 Bro. C. C. 260; Bank of England *v.* Parsons, 5 Ves. 665; Bank of England *v.* Lunn, 15 Ves. 569.

(*u*) Ripley *v.* Waterworth, 7 Ves. 440; Franklin *v.* Bank of England, Id. 575, 589.

ment of the laws with respect to wills,(x) a will of personal estate required no attestation. In effect, therefore, a person was enabled to bequeath his stock by a will unattested. All wills, however, are not required to be attested by two witnesses. And by a recent act of parliament the provisions of the old acts, which had virtually been disregarded, have been formally repealed; and it is declared that the stock of a deceased person may be transferred by his executors or administrators, notwithstanding any specific bequest or disposition thereof contained in the will; but the Bank are not to be required to allow of such transfer, or of the receipt of any dividend on the stock, until the probate of the will or the letters of administration shall have been first left at the Bank for registration.[1] And the Bank may require all the executors who

(x) Stat. 7 Will. IV. & 1 Vict. c. 26.

[1] The assent of the executor must be obtained, before a legatee can take possession of his legacy: McClanahan's Admr. *v.* Davis et. al., 8 How. 170; Rea *v.* Rhodes, 5 Ired. Eq. 148; Nunn *v.* Owens, 2 Strobh. 101; Hudson, Exr. *v.* Reeve, 1 Barb. S. C. 89; in which last case it was held, that where the executrix and legatee are the same person, the executrix, as such, might assent to the legacy to herself, and that assent would vest the title in her; and this is true also of specific legacies: West *v.* Smith et al., 8 How. 411; Lark et al. *v.* Linstead et al., 2 Md. Ch. Dec. 162; Christ *v.* Christ, Admr., 1 Cart. (Ind.) 570; Finch *v.* Rogers, 11 Humph. 559. And, if an executor refuses to assent to a legacy without adequate cause, the legatee may come into equity to compel an assent: Vaughan *v.* Vaughan, 30 Ala. 329; Lewis *v.* Darling, 16 How. (U. S.) 1. But the consent of the executor may be implied from the nature of the circumstances: Squires et ux. *v.* Old, 7 Humph. 454; Hall *v.* Hall, 27 Miss. 458; and the assent of an executor to the bequest of a life estate, operates as to the bequest of the remainder over, so that no new assent is necessary: Thrasher *v.* Ingram, 32 Ala. 645; Hotchkiss *v.* Thomas, 6 Jones L. 537; Gay *v.* Gay, 29 Ga. 549; and when once given cannot be retracted: Ross *v.* Davis, 17 Ark. 113; Dunham *v.* Elford, 13 Rich. Eq. 190; but the assent is no waiver of his right to a refunding bond: Nelson *v.* Cornwell, 11 Gratt. 724; and see, also, Rea *v.* Rhodes, 5 Ired Eq. 148; White *v.* White, 4 Dev. 257; Gums *v.* Capehart, 5 Jones Eq. 242; Suggs *v.* Sapp, 20 Ga. 100. A transfer agent of a corporation, before permitting the transfer of a portion of its stock, appearing on the face of the certificate to be held in trust, has a right, especially if the *cestui que trust* is named, to require the exhibition of the authority to transfer, beyond the certificate: Bayard *v.* F. & M. Bank, 52 Penn. St. 232.

In the case of Norman et ux. *v.* Storer et al., 1 Blatch. C. C. 593, where $1000 was given to a legatee by will, the money to be raised out of the testator's estate, and paid over to the legatee, and the executor and trustee under the will, having raised the money, instead of paying it as required, purchased bank stock with it, in his own name, in trust for the legatee; and afterwards, when called upon to account, sold the bank stock, and paid over the proceeds, $1460 34, to the duly authorized agent of the beneficiary, which he received as and for the $1000 legacy, the stock having been sold with his knowledge and assent; it was held, that as there was no evidence that the legatee was advised of the purchase of the bank stock, or ever assented to it, the executor had a right to sell the stock and pay over the proceeds, for the stock did not belong to the legatee, and the executor was guilty of no conversion or wrong in selling it.

shall have proved the will to concur in the transfer.(y) And the registry [*209] of specific bequests of *stock is no longer required, but merely the registry of the names of the deceased party, and of his executor and administrators.(z)

The next kind of incorporeal personal property which we shall mention are shares in joint stock companies. Joint stock companies were formerly of two kinds, those which were incorporate, or made into *corporations* and those which were not so.

Corporations are legal personages, always known by the same name, and preserving their identity through a perpetual succession of natural persons. They are either corporations *sole*, composed only of one person, such as a bishop, a parson, or the chamberlain of London; or corporations *aggregate*, composed of many persons acting on all solemn occasions by the medium of their *common seal*;(a) and it is of such corporations that we are now about to speak. Such corporations may be created either by charter conferred by the queen's letters-patent, or by act of parliament.[1] And, till a few years ago, all joint stock companies which had not obtained this expensive sanction were in fact private partnerships on an extended scale. In the present reign however, as we shall hereafter see, provision has been made for the incorporation of all public joint stock companies;(b) but such companies as are incorporated by letters-patent or special act of parliament still enjoy peculiar privileges. These companies therefore first require notice.

The nature and incidents of shares in the joint stock of companies [*210] incorporated by letters-patent or act of *parliament have generally been determined by their respective charters or acts of incorporation. And in the great majority of cases, and in all the

(y) Stat 8 & 9 Vict. c. 97, s. 1.
(z) Sect. 2.
(a) See Bac. Abr., tit. Corporations, 1 Black. Com. ch. 18.
(b) Stat. 7 & 8 Vict. c. 110; partly repealed by stat. 20 & 21 Vict. c. 14, s. 23; 7 & 8 Vict. c. 113, partly repealed by stat. 20 & 21 Vict. c. 49, all now repealed by the Companies Act, 1862, stat. 25 & 26 Vict. c. 89.

[1] In the United States, corporations are created in all cases, under the authority of Acts of Congress, or of Acts of Assembly. These may be general or special acts. The former confer authority on courts to grant charters in designated cases, or allow individuals when associated together, to incorporate themselves by pursuing certain formalities. Special acts of incorporation, whether of Congress or of Assembly, either themselves create the corporations, or authorize the executive, on compliance with certain stipulated conditions, by the persons who desire to be incorporated, to issue to such persons letters-patent of incorporation.

modern charters and acts of incorporation, the shares are declared to be personal estate, and transmissible as such. In a few of the older companies, of which the New River Company is an instance,(*c*) the shares are real estate in the nature of incorporeal hereditaments. For the future, however, all the provisions contained in special acts for the incorporation of joint stock companies will, as far possible, be the same. For an act of parliament has been passed "for consolidating in one act certain provisions usually inserted in acts with respect to the constitution of companies incorporated for carrying on undertakings of a public nature."(*d*)[1] Other acts have also been passed for consolidating certain provisions usually inserted in acts authorizing the taking of lands for undertakings of a public nature;(*e*) in acts authorizing the making of railways;(*f*) in acts for constructing or regulating markets and fairs;(*g*) in acts authorizing the making of gasworks for supplying towns with gas;(*h*) or of waterworks for supplying towns with water;(*i*) in acts for the making and improving of harbors, docks and piers;(*k*) in acts for paving, draining, cleansing, lighting and improving towns;(*l*) and in acts authorizing the making of cemeteries.(*m*) In each of these acts enactments are made with respect to various matters *usually contained in acts of incorporation for the above purposes; and it is provided that the clauses and provisions of these [*211]

(*c*) Drybutter *v.* Bartholomew, 2 P. Wms. 127.

(*d*) Stat. 8 & 9 Vict. c. 16, extended by stat. 26 & 27 Vict. c. 118, amended by stat. 32 & 33 Vict. c. 48.

(*e*) Stat. 8 & 9 Vict. c. 18, extended by stat. 23 & 24 Vict. c. 106.

(*f*) Stat. 8 & 9 Vict. c. 20, extended by stat. 26 & 27 Vict. c. 92. See also stat. 27 & 28 Vict. c. 120, 27 & 28 Vict. c. 121, 30 & 31 Vict. c. 127, 32 & 33 Vict. c. 114.

(*g*) Stat. 10 & 11 Vict. c. 14.

(*h*) Stat. 10 & 11 Vict. c. 15.

(*i*) Stat. 10 & 11 Vict. c. 17, extended by stat. 26 & 27 Vict. c. 93.

(*k*) Stat. 10 & 11 Vict. c. 27.

(*l*) Stat. 10 & 11 Vict. c. 34.

(*m*) Stat. 10 & 11 Vict. c. 65.

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[1] General provisions relative to all corporations have been enacted by the legislatures of several of the states, Thomps. Dig. of the Laws of Florida 268 to 284; Revis. Stats. Mass. (1860), pp. 384 to 389; 2 Compiled Laws, Michigan (1857), pp. 699 to 706; N. H. Compiled Stats. (1867), p. 275, &c.; Nixon's Dig. Laws of N. J. (1868), pp. 167 to 173; 2 Revis. Stats. of N. Y. (1859), pp. 476 to 825; Revis. Stats. of Vt. (1839), 378 to 394; 1 Matthews' Dig. of Laws of Va. (1856), pp. 421 to 433; Purd. Dig. (1861), pp. 194 to 202. And statutes analogous to the 8 & 9 Vict. c. 16, s. 4, &c., have not been without precedent in this country: New Dig. Laws of Georgia (1851), by T. R. R. Cobb, vol. I., 431 to 434; Stats. of S. C., vol. VI., 302 to 306. The Manufacturing Companies' Act, Purd. Dig. (1861), pp. 689 to 696; and Purd. Dig. Suppl. (1871), pp. 1347 to 1351; The Turnpike Bridge and Plank Road Companies' Act, Purd. Dig. (1861), pp. 979 to 988; The Railroad Companies' Act, Id. 835 to 850, and their respective supplements.

general acts, save so far as they shall be expressly varied or excepted by any special act, shall apply to every undertaking which shall thereafter be authorized by act of parliament for any of the purposes above referred to. A uniformity is thus given to the constitution of such companies, and the length of the acts of parliament required to establish them has been greatly diminished. A short title, for the convenience of reference, is given to each act. The act first mentioned is called "The Companies Clauses Consolidation Act, 1845;"(n) the acts amending it are called "The Companies Clauses Act, 1863,"(o) and "The Companies Clauses Act, 1869;"(p) and all the others have similar titles.

The Companies Clauses Consolidation Act[1] contains provisions with respect to the distribution of the capital of the company into shares, which are to be personal estate, and transmissible as such;(q) with respect to the transfer of shares, which must be by deed duly stamped, in which the consideration shall be truly stated,(r) and which cannot take place until the transferor shall have paid all calls for the time being due on every share held by him;(s) with respect to the transmission of shares by will, intestacy, marriage of a female, &c.;(t) with respect to the payment of calls,(u) which [*212] *may be made payable by instalments,(v) and the forfeiture of shares for nonpayment of calls;(w) with respect to the remedies of creditors of the company against the shareholders,(x) which are confined to the extent of their shares in the capital

(n) Stat. 8 & 9 Vict. c. 16, s. 4.
(o) Stat. 26 & 27 Vict. c. 118.
(p) Stat. 32 & 33 Vict. c. 48.
(q) Stat. 8 & 9 Vict. c. 16, s. 7.
(r) Sect. 14.
(s) Sect. 16; Hall v. Norfolk Estuary Company, Q. B. 16 Jur. 149; Regina v. Londonderry and Coleraine Railway Company, 13 Q. B. 998 (E. C. L. R. vol. 66); Hubbersty v. Manchester, Sheffield and Lincolnshire Railway Company, 36 L. J. N. S. Q. B. 198.
(t) Sects. 18, 19.
(u) Sects. 21–28; see Wolverhampton New Waterworks Company v. Hawkesford, 6 C. B. N. S. 336 (E. C. L. R. vol. 95).
(v) Ambergate, &c. Railway Company v. Norcliffe, 6 Ex. Rep. 629.
(w) Sects. 29–35.
(x) Sect. 36.

[1] In the preceding page, a reference has been made to several acts, analogous to the "Companies' Clauses Consolidation Act," and "the act for the registration, incorporation, and regulation of joint stock companies," and among others, to the Pennsylvania Turnpike Act, and the Manufacturing Companies' Act, of the same State. Some of these acts are not entirely general, but relate to certain kinds of corporations, as for manufacturing purposes, and the like. The advantage of these enactments is found in the fact, that they form a general law, applicable to all corporations falling under the class to which they relate, and as such are drafted with more care, and more thoroughly considered than private bills of incorporation, whereby many of the dangers resulting from hasty legislation are avoided.

of the company not then paid up, and may be exercised only in case there cannot be found sufficient property or effects of the company whereon to levy execution;(y) with respect to the borrowing of money by the company,(z) the conversion of the borrowed money into capital,(a) the consolidation of the shares into stock,(b) general meetings,(c) the appointment and rotation of directors,(d) the powers,(e) proceedings and and liabilities of the directors,(f) the appointment and duties of auditors,(g) the accountability of the officers of the company,(h) the keeping of accounts,(i) the making of dividends(k) and of by-laws,(l) the settement of disputes by arbitration,(m) the giving of notices,(n) the recovery of damages and penalties,(o) and appeals with respect to such damages or penalties to the quarter sessions;(p) and, lastly, with respect to affording access to the special act by all parties interested.(q) The provisions of the other acts are not of a nature to require enumeration. By a recent act of *parliament provision has been made for the exoneration from stamp duty of transfers of bonds and mortgages [*213] given by public companies for money which by their acts of parliament they may be authorized to borrow on the original bond or mortgage being stamped in the first instance with three times the amount of the *ad valorem* duty over and above such duty.(r)[1]

Joint stock companies which had not obtained letters-patent or special acts of incorporation were formerly subjected to very great inconvenience whenever they had occasion to take legal proceedings against any person who happened to be a shareholder. And every shareholder in such companies was subjected to the like inconvenience whenever he had

(y) Devereux *v.* Kilkenny, &c. Railway Company, 5 Ex. Rep. 834; Hitchins *v.* Kilkenny, &c. Railway Company, 10 C. B. 160 (E. C. L. R. vol. 70); Nixon *v.* Brownlow, 3 H. & N. 686.

(z) Stat. 8 & 9 Vict. c. 16, ss. 38–55.

(a) Sects. 56–60.

(b) Sects. 61–64.

(c) Sects. 66–80.

(d) Sects. 81–89.

(e) Sects. 90, 91.

(f) Sects. 92–100; Wilson *v.* West Hartlepool Harbor and Railway Company, Lds. Js., 11 Jur. N. S. 124.

(g) Sects. 101–108.

(h) Sects. 109–114.

(i) Sects. 115–119.

(k) Sects. 120–123.

(l) Sects. 124–127.

(m) Sects. 128–134.

(n) Sects. 135–139.

(o) Sects. 142–158.

(p) Sects. 159, 160.

(q) Sects. 161, 162.

(r) Stat. 16 & 17 Vict. c. 59, s. 14.

[1] By the 170th sec. of the Act of Congress of June 30, 1864, as amended by the 4th sec. of the Act of July 13, 1870, no stamp is required upon the transfer or assignment of a mortgage, where it, or the instrument it secures, has been once duly stamped: Stats. at Large (1869–1870), p. 257.

occasion to proceed against the company. For such a company, however extensive, was in law merely a partnership; and a partner who owes money to the partnership of which he is a member, evidently owes a portion of it to himself according to his interest in the joint stock; and in like manner a partner who is a creditor claims part of his demand against himself. In each case, therefore, an account must be settled before the exact debt or credit of the partner can be ascertained.(*s*) In order to obviate the difficulties which thus arose, many joint stock companies obtained special acts of parliament, enabling them to sue and be sued in the name of some officer. And an act of parliament(*t*) was passed empowering the crown to grant, by letters-patent, charters to companies for any trading or other purposes whatsoever, which, without incorporating such companies, would empower them to sue and be sued in the name of some officer appointed and registered for the purpose. This [*214] *act is still in force, and it contains a valuable provision, empowering the crown to limit, by the letters-patent, the liability of the individual members of the company for its engagements to a given extent per share.(*u*) Banking companies, whose shareholders are generally their customers, were peculiarly subject to the inconvenience above referred to in suing and being sued. Accordingly by modern statutes,(*x*) all such banking companies as consisted of more that six members were allowed to appoint some public officer who must sue and be sued on behalf of the company.(*y*) More recently, however, two acts of parliament were passed, the one incorporating public joint stock companies, the other for providing for the incorporation of joint stock banks. Each of these acts require some notice.

The first act was intituled "An Act for the Registration, Incorporation and Regulation of Joint Stock Companies."(*z*) This act applied to every joint stock company established for any commercial purpose, or for any purpose of profit,(*a*) or for the purpose of insurance (except banking companies, schools and scientific and literary institutions, and

(*s*) See Richardson *v.* Bank of England, 4 Myl. & Cr. 165.

(*t*) Stat. 7 Will. IV. & 1 Vict. c. 73, repealing a former statute for a similar purpose, 4 & 5 Will. IV. c. 94.

(*u*) Stat. 7 Will. IV. & 1 Vict. c. 73, s. 4.

(*x*) Stats. 7 Geo. IV. c. 46, s. 9 *et seq.;* 1 & 2 Vict c. 96; extended, 3 & 4 Vict. c. 111; made perpetual, 5 & 6 Vict. c. 85; 27 & 28 Vict. c. 32.

(*y*) Chapman *v.* Milvain, 5 Ex. Rep. 61; Steward *v.* Greaves, 10 M. & W. 711.

(*z*) Stat. 7 & 8 Vict. c. 110, amended by stat. 10 & 11 Vict. c. 78.

(*a*) See The Queen *v.* Whitemarsh, 15 Q. B. 600 (E. C. L. R. vol. 69); Bear *v.* Bromley, 21 L. J. Q. B. 354; 18 Q. B. 271 (E. C. L. R. vol. 83).

friendly, loan and benefit building societies duly certified and enrolled under the statutes in force respecting such societies;(*b*) and the term "joint stock company" comprehended every partnership whereof the capital was divided or agreed to be divided into shares, and so as to be transferable without the express consent of all the copartners; and also every insurance *company; whether of lives, ships, or against fire or storm; and every company for granting or purchasing annuities on lives; and every friendly society insuring to an amount exceeding 200*l.* upon one life or for any one person; and also every partnership which at its formation, or by subsequent admission (except any admission consequent on devolution or other act of law), should consist of more than twenty-five members. But the act did not apply to companies incorporated by statute or charter, nor to companies authorized to sue and be sued in the name of some officer or person.(*c*) This act, however, has since been repealed.(*d*) It provided for the establishment of a registry office, in which the name and business of every projected company, together with the names, occupations and places of business and residence of the promoters of the company, were required to be registered before they could proceed to make public, whether by way of prospectus, handbill or advertisement, any intention or proposal to form the company.(*e*) Further particulars were also to be registered as they should be decided on from time to time.(*f*) This registration, however, only enabled the company to act provisionally, and it was therefore termed *provisional registration.* And before the company could act otherwise than provisionally, it was required to obtain a certificate of *complete registration.* This certificate could only be obtained on production of a deed of settlement of the company, according to the form set forth in the act, signed by at least one-fourth in number of the persons who at the date of the deed had become subscribers, and who should hold at least one-fourth of the maximum number of shares in the capital of the company.(*g*) *This deed was required to be certified by two directors of the company in a given form, and along with it was to be produced a complete abstract or index of the deed, together with a copy of it for registration. Provision was also made for the registration, half-yearly or oftener, of all transfers of shares, and of changes in the names of the shareholders,(*h*) and for an annual return

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(*b*) See *post*, p. 230. (*c*) Sect. 2.
(*d*) Stat. 25 & 26 Vict. c. 89.
(*e*) Stat. 7 & 8 Vict. c. 110, s. 4. See also stat. 10 & 11 Vict. c. 78, s. 7; Abbott *v.* Rogers, C. P. 1 Jur. N. S. 804; 16 C. B. 277 (E. C. L. R. vol. 81).
(*f*) Stat. 7 & 8 Vict. c. 110, s. 4; 10 & 11 Vict. c. 78, ss. 4, 5, 6.
(*g*) Stat. 7 & 8 Vict. c. 110, s. 7. (*h*) Stat. 7 & 8 Vict. c. 110, ss. 11–13.

of the name and business of every company.(*i*) On complete registration being certified the company became *incorporated*(*k*) as from the date of the certificate, by the name of the company as set forth in the deed of settlement, with power to have a common seal, but on which was to be inscribed the name of the company, and with other powers necessary to the conduct of their affairs,(*l*) including a power to hold lands on obtaining a license for that purpose from the Board of Trade.(*m*) Provision was also made for the registry of joint stock companies then existing, and for the alteration of their deeds of settlement in order to comply with the provisions of the act.(*n*) The transfer of shares was required to be effected by deed in a given form, to be duly stamped, and in which the full amount of the pecuniary consideration for the sale was to be truly expressed.(*o*) But no sale or mortgage of any share was valid until the company had obtained a certificate of complete registration and the subscriber had been duly registered as a shareholder in the Registry Office;(*p*) and no transfer could be made if the transferor should not then have paid up the full amount due to the company on every share held by him, unless there were a provision to the contrary in the deed of settlement.(*q*)[1] [*217] *Shareholders in these companies were liable to the creditors of the company, if such creditors had used due diligence to obtain satisfaction by execution against the property of the company; but after the expiration of three years next after any person should have ceased to be a shareholder, his liability ceased.(*r*)

The act which provides for the incorporation of banking companies was intituled "An Act to regulate Joint Stock Banks in England."(*s*) This act has now been repealed.(*t*) The incorporation effected under the provisions of this act was by letters-patent, obtained, on petition, from the crown. The petition was referred to the Board of Trade,

(*i*) Stat. 7 & 8 Vict. c. 110, s. 14.
(*k*) Banwen Iron Company *v.* Barnett, 8 C. B. 406 (E. C. L. R. vol. 65).
(*l*) Stat. 7 & 8 Vict. c. 110, s. 25.
(*m*) Stat. 10 & 11 Vict. c. 78, ss. 1, 2, 3.
(*n*) Sects. 58, 59.
(*o*) Sect. 54.
(*p*) Sect. 26; Ex parte Neilson, 3 De G., M. & G. 556.
(*q*) Sect. 54.
(*r*) Sects. 66-68; Greenwood's case, 3 De G., M. & G. 459, 478; s. c. 18 Jur. 387.
(*s*) Stat. 7 & 8 Vict. c. 113.
(*t*) Stat. 25 & 26 Vict. c. 89.

[1] Most of the charters of incorporation in the United States, contain a clause enacting, that the shares thereof shall only be transferred on the books of the institution. This is, in general, effected by a brief letter of attorney, signed by the owner of the stock, in the presence of a witness, and directed to an officer of the bank, or in blank, authorizing him to transfer to the vendee.

on whose report a charter was granted to the company(*u*) for a term not exceeding twenty years.(*x*) Other provisions were also made for the registration of the company, the transfer of shares, the liability of shareholders, and other matters which it is now unnecessary to state.[1]

The main object of the two statutes above referred to was evidently to give publicity to the names of the real promoters and shareholders of joint stock companies, so that the public might know with whom they were dealing, and that those who reaped the benefit of such undertakings might also bear their proper share of the risk. Another object was to recognize, as legal personages, bodies which before had a legal existence, but had no convenient means of acting or of being acted on. In the same spirit another act of parliament was passed in the same session, "for facilitating the winding-up the affairs of joint stock companies unable to meet *their pecuniary engagements."(*y*) By this act all incorporated or privileged companies for any commercial or trading purposes, including banking companies,(*z*) and also all joint stock companies within the definition contained in the act for their incorporation,(*a*) were made liable to bankruptcy in the same manner as private individuals; but the bankruptcy of the company was not to be construed to be the bankruptcy of any member of the company in his individual capacity.(*b*)[2] This act, however, was almost entirely superseded by the

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(*u*) Stat. 7 & 8 Vict. c. 113, s. 3. (*x*) Sect. 6.

(*y*) Stat. 7 & 8 Vict. c. 111, amended by stat. 20 & 21 Vict. c. 78.

(*z*) Stat. 7 & 8 Vict. c. 113, s. 48.

(*a*) Stat. 7 & 8 Vict. c. 110, s. 2; *ante*, p. 214.

(*b*) Stat. 7 & 8 Vict. c. 111, s. 2.

[1] By the laws of Pennsylvania, any number of persons not less than five, associating together under the rules and regulations, prescribed by the act of the legislature of that state, passed May 1, 1861, and known as the Banking Companies Act, may become a body corporate, for the period of twenty years: Purd. Dig. (1861), p. 78, &c., and Supplements.

[2] See *ante*, p. 132, note 2 *j*.

A corporation created for the purpose of carrying on any lawful business, defined by its charter, and clothed with power to do so, is such as is contemplated by the U. S. Bankrupt Act: Rankin *v.* Florida, Atlantic & Gulf Central R. R. Co., 1 B. R. 196. The board of trustees of a corporation, cannot authorize the secretary to file a petition for the purpose of having the corporation adjudicated a bankrupt. Such action can only be taken by the majority of the corporators;—that is, by the corporators holding a majority of the shares of stock: Lady Bryan Mining Co., 4 B. R. 36, 131.

Railroad corporations are within the operation of the U. S. Bankrupt Act: Adams *v.* Boston, Hartford & Erie R. R. Co., 4 B. R. 99; 5 Id. 234; Alabama & Chattanooga R. R. Co. *v.* Jones, 5 Id. 97. When the charter of a corporation does not authorize it to carry on the business of a banker, broker, manufacturer, miner or trader, it cannot come within the pro-

"Joint Stock Companies Winding-up Act, 1848,"(c) as amended by the "Joint Stock Companies Winding-up Amendment Act, 1849,"(d) under which an official manager was appointed, and a list of contributories made out, on whom calls were made from time to time for payment of the debts and liabilities of the company. These acts again did not apply to companies registered under the "Joint Stock Companies Act, 1856,"(e) by which act, as several times amended,(f) joint stock companies were regulated, until the passing of the "Companies Act, 1862."(g) This act has repealed and consolidated all the former acts relating to joint stock companies.

An act of parliament was passed in 1855 for limiting the liability of members of certain joint stock companies.(h) Under this act any joint [*219] stock company to *be formed under the act 7 & 8 Vict. c. 110, other than an assurance company, with a capital to be divided into shares of a nominal value of not less than 10*l.* each, might obtain a certificate of complete registration with limited liability, upon complying with certain conditions. With reference to this act it was remarked in the third edition of the present work,(i) that it seems that all that can now be expected of an act of parliament is to introduce a principle to be worked out by subsequent amendments; and that it was to be hoped that the principle of limited liability then introduced might by some future act be both more widely extended and more accurately applied. This was afterwards done by the Joint Stock Companies Acts, 1856,(k) and 1857,(l) and the Joint Stock Banking Companies Act, 1857,(m) as

(c) Stat. 11 & 12 Vict. c. 45.

(d) Stat. 12 & 13 Vict. c. 108, amended by stat. 20 & 21 Vict. c. 78; and see, as to railways, stat. 13 & 14 Vict. c. 83.

(e) Stat. 19 & 20 Vict. c. 47, s. 108.

(f) Stat. 20 & 21 Vict. c. 14; 20 & 21 Vict. c. 49; 21 & 22 Vict. c. 60; 21 & 22 Vict. c. 91.

(g) Stat. 25 & 26 Vict. c. 89; amended by stat. 30 & 31 Vict. c. 131.

(h) Stat. 18 & 19 Vict. c. 133.

(i) Pp. 182, 183.

(k) Stat. 19 & 20 Vict. c. 47.

(l) Stat. 20 & 21 Vict. c. 14.

(m) Stat. 20 & 21 Vict. c. 40.

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visions of the Bankrupt Act, as to suspension of commercial paper: Alabama & Chattanooga R. R. Co. *v.* Jones, 5 B. R. 97.

Where the effect of granting a stay upon a judgment against a corporation bankrupt before execution returned, or setting aside an execution issued thereon, the stockholders being personally responsible, would be to discharge a person, or officer, or member thereof, where such liability must be predicated of such judgment and execution returned unsatisfied, a motion on the part of such corporation defendant to stay proceedings after judgment must be denied, the corporation not being dischargeable under the Bankrupt Act: Allen *v.* Soldiers' Business Messenger and Dispatch Co., 4 B. R. 176.

amended by subsequent acts,(*n*) all of which are now repealed and consolidated by the Companies Act, 1862,(*o*) as amended by the Companies Act, 1867.(*p*)

Under these acts seven or more persons associated for any lawful purpose, may by subscribing their names to a memorandum of association, and otherwise complying with the requsitions of the acts in respect of registration, form an incorporated company, with or without limited liability.(*q*)[1] But no banking company claiming to issue notes in the United Kingdom shall be entitled to limited liability in respect of such issue.(*r*) Not more than ten persons may carry on the business of banking as partners, unless they are registered under this act, or are formed in pursuance of some other act of *parliament or of letters-patent; and no partnership consisting of more than twenty [*220] persons can now be formed for the purpose of carrying on any other business that has for its object the acquisition of gain by the partnership or by the individual members thereof, unless it be registered as a company under this act, or be formed in pursuance of some other act of parliament, or of letters-patent, or be a company engaged in working mines within and subject to the jurisdiction of the Stannaries.(*s*) The liability of the members of a company formed under this act may, according to the memorandum of association, be limited either to the amount, if any, unpaid on the shares respectively held by them, or to such amount as the members may respectively undertake by the memorandum of association to contribute to the assets of the company in the event of its being wound up.(*t*) In the former case, the company is said to be limited by shares; and in the latter to be limited by guarantee. And the Companies Act, 1867, now provides, that the liability of the directors or managers, or managing director of a limited company, may, if so provided by the memorandum of association or fixed by special resolution, be unlimited.(*u*)

(*n*) Stat. 20 & 21 Vict. c. 80; 21 & 22 Vict. c. 60; 21 & 22 Vict. c. 91.
(*o*) Stat. 25 & 26 Vict. c. 89.
(*p*) Stat. 30 & 31 Vict. c. 131.
(*q*) Stat. 25 & 26 Vict. c. 89, s. 6.
(*r*) Sect. 182.
(*s*) Sect. 4.
(*t*) Sect. 7.
(*u*) Stat. 30 & 31 Vict. c. 131, ss. 4–8.

[1] The liability of the stockholders of incorporations, is in general regulated by the charter, or the general laws under which the incorporation has come into existence; this liability is sometimes absolute; but most generally limited, either upon the amount the stockholder has subscribed, or the amount he has actually paid up towards the capital stock of the corporation, or is bound to contribute.

The memorandum of association of a company limited by shares must contain the following things:—

1. The name of the company with the addition of the word "limited," as the last word of such name.
2. The part of the United Kingdom in which the registered office of the company is proposed to be situate.
3. The object for which the company is to be established.

[*221] *4. A declaration, that the liability of the members is limited.

5. The amount of capital with which the company proposes to be registered, divided into shares of a certain fixed amount; subject to the following regulations:
   1. That no subscriber shall take less than one share.
   2. That each subscriber of the memorandum of association shall write opposite to his name the number of shares he takes.(x)

When the company is limited by guarantee, its memorandum of association must contain the first three of the above-mentioned requisites; and, (4), a declaration, that each member undertakes to contribute to the assets of the company, in the event of the same being wound up during the time that he is a member, or within one year afterwards, for payment of the debts and liabilities of the company contracted before the time at which he ceases to be a member, and of the costs, charges and expenses of winding up the company, and for the adjustment of the rights of the contributories amongst themselves, such amount as may be required, not exceeding a specified amount.(y)

If no limit be placed on the liability of the members the company is called an unlimited company, and its memorandum of association must contain only the following things:—

1. The name of the company.
2. The part of the United Kingdom in which the registered office of the company is proposed to be situate.

[*222] *3. The objects for which the company is to be established.(z)

The memorandum of association must bear the same stamp as if it were a deed, and must be signed by each subscriber in the presence of and be attested by one witness at the least. When registered, it binds the company and the members thereof to the same extent as if each

(x) Stat. 25 & 26 Vict. c. 89, s. 8.

(y) Sect. 9.

(z) Sect. 10.

member had subscribed his name and affixed his seal thereto, and there were contained in the memorandum a covenant on the part of himself, his heirs, executors and administrators, to observe all the conditions of such memorandum, subject to the provisions of the act.(*a*) No alteration can be made by any company in the conditions contained in its memorandum of association; except that a company limited by shares may increase its capital by the issue of new shares of such amount as it thinks expedient, or may consolidate and divide its capital into shares of larger amount than its existing shares, or convert its paid-up shares into stock;(*b*) and except that any company may, with the sanction of a special resolution of the company as after mentioned, and with the approval of the Board of Trade, change its name; but such change will not affect any of the rights or obligations of the company.(*c*) And the Companies Act, 1867, now empowers any company limited by shares to modify by special resolution the conditions of its memorandum of association so as to reduce its capital, provided the sanction of the court be obtained.(*d*) The same act also empowers any company limited by shares to divide its capital or any part thereof into shares of a smaller amount than originally fixed by its memorandum of association; provided that *the proportion [*223] between the amount which is paid, and the amount (if any) which is unpaid, on each share of reduced amount, shall be the same as it was in the case of the existing share or shares from which the share of reduced amount is derived.(*e*)

The memorandum of association may in the case of a company limited by shares, and must in the case of a company limited by guarantee or unlimited, be accompanied, when registered, by articles of association signed by the subscribers to the memorandum of association, and prescribing such regulations for the company as the subscribers shall deem expedient. These articles must be expressed in separate paragraphs numbered arithmetically. The act contains a Table marked A, in the first schedule thereto, of provisions, all or any of which may be adopted in the articles of association.(*f*) The regulations contained in this Table will, if not excluded or modified by the articles, be deemed, so far as they are applicable, to be the regulations of every company limited by shares.(*g*) The articles of association must be printed and stamped as if they were contained in a deed, and must be signed and attested in the

(*a*) Stat. 25 & 26 Vict. c. 89, s. 11.
(*b*) Sect. 12.
(*c*) Sect. 13.
(*d*) Stat. 30 & 31 Vict. c. 131, s. 9–20.
(*e*) Stat. 30 & 31 Vict. c. 131, s. 121.
(*f*) Stat. 25 & 26 Vict. c. 89, s. 14.
(*g*) Sect. 15.

same manner as the memorandum of association; and when registered, they bind the company and the members thereof to the same extent.(*h*) The memorandum and articles, if any, are to be registered by the registrar of joint-stock companies;(*i*) and thereupon the company is incorporated, with power to hold lands; and a certificate of the incorporation of any company given by the registrar shall be conclusive evidence that all the requisitions of the act in respect of registration have been complied [*224] with.(*k*) No company formed for the *purpose of promoting art, science, religion, charity or any other like object, not involving the acquisition of gain by the company, or by the individual members thereof, shall, without the sanction of the Board of Trade, hold more than two acres of land: but the Board of Trade may, by license under the hand of one of their principal or assistant secretaries, empower any such company to hold lands in such quantity and subject to such conditions as they think fit.(*l*) All shares are to be personal estate.(*m*) Every company is required to keep a register of its members;(*n*) and every company having a capital divided into shares is required to make out an annual list of its members, with other particulars, and to forward a copy thereof to the registrar of joint-stock companies.(*o*) No notice of any trust, expressed, implied or constructive, is to be entered on the register.(*p*) And a certificate under the common seal of the company, specifying any shares or stock held by any member, is *primâ facie* evidence of his title to the shares or stock therein specified.(*q*) And the register of members is *primâ facie* evidence of any matters by the act directed or authorized to be inserted therein.(*r*)

Every company is bound by the act to have a registered office, to which all communications and notices may be addressed.(*s*) And every limited company must keep its name painted or affixed on the outside of every office or place of business of the company, in a conspicuous position, in letters easily legible, and must have its name engraven in legible characters on its seal, and must have its name mentioned in legible [*225] characters *in all notices, advertisements, bills, notes, endorsements, checks, orders for money or goods on behalf of the company, and in all bills of parcels, invoices, receipts and letters of credit of the company.(*t*) But associations not for profit may, by license of the

(*h*) Stat. 25 & 26 Vict. c. 89, s. 10.
(*i*) Sect. 17.
(*k*) Sect. 18.
(*l*) Stat. 25 & 26 Vict. c. 89, s. 21.
(*m*) Sect. 22.
(*n*) Sect. 25.
(*o*) Sect. 26.
(*p*) Sect. 30.
(*q*) Sect. 31.
(*r*) Sect. 37.
(*s*) Sect. 39.
(*t*) Sect. 41.

Board of Trade, be registered with limited liability, without the addition of the word limited to their names.(*u*) Every limited company is required to keep a register of all mortgages and charges specifically affecting the property of the company.(*x*) And every limited banking company, and every insurance company, and deposit, provident or benefit society under the act, is required before it commences business, and afterwards on the the first Monday in February and the first Monday in August in every year, to make a statement of its capital, liabilities and assets in a given form, to be put up in a conspicuous place in the office of the company.(*y*)

Subject to the provisions of the act, and to the conditions contained in the memorandum of association, any company formed under the act may, in general meeting, from time to time, by passing a special resolution in manner after mentioned, alter all or any of the regulations of the company contained in the articles of association, or in the table marked A. in the first schedule, where such table is applicable to the company; or make new regulations to the exclusion of or in addition to all or any of the regulations of the company; and any regulations so made by special resolution shall be deemed to be regulations of the company of the same validity as if they had been originally contained in the articles of association, and shall be subject in like manner to be altered or modified by any subsequent *special resolution.(*z*) A resolution passed by a company under the act is deemed to be special whenever a resolution has been passed by a majority of not less than three-fourths of such members of the company for the time being entitled, according to the regulations of the company, to vote as may be present, in person or by proxy (in cases where by the regulation of the companies proxies are allowed), at any general meeting of which notice specifying the intention to propose such resolution has been duly given; and such resolution has been confirmed by a majority of such members for the time being entitled, according to the regulations of the company, to vote as may be present, in person or by proxy, at a subsequent general meeting, of which notice has been duly given, and held at an interval of not less than fourteen days, nor more than one month from the date of the meeting at which such resolution was first passed: At any such meeting, unless a poll is demanded by at least five members, a declaration of the chairman that the resolution has been carried shall be deemed conclusive evidence of the fact, without proof of the number or proportion of the

[*226]

(*u*) Stat. 30 & 31 Vict. c. 131, s. 23.
(*x*) Stat. 25 & 26 Vict. c. 89, s. 43.
(*y*) Sect. 44.
(*z*) Sect. 50.

votes recorded in favor or against the same. Notice of any such meeting shall be deemed to be duly given, and the meeting to be duly held, whenever such notice is given and meeting held in manner prescribed by the regulations of the company. In computing the majority when a poll is demanded, reference shall be had to the number of votes to which each member is entitled by the regulations of the company.(*a*) A copy of every special resolution must be printed and registered,(*b*) and must be annexed to or embodied in every copy of the articles of association that may be issued after the passing of such resolution.(*c*)

[*227] *Contracts on behalf of any company may be made as follows:—

(1.) Any contract which, if made between private persons would be by law required to be in writing, and if made according to English law to be under seal, may be made on behalf of the company in writing under the common seal of the company, and such contract may be in the same manner varied or discharged.

(2.) Any contract which, if made between private persons would be by law required to be in writing and signed by the parties to be charged therewith, may be made on behalf of the company in writing signed by any person acting under the express or implied authority of the company, and such contract may in the same manner be varied or discharged.

(3.) Any contract, which, if made between private persons would by law be valid, although made by parol only and not reduced into writing, may be made by parol on behalf of the company by any person acting under the express or implied authority of the company, and such contract may in the same way be varied or discharged.(*d*)

Shares in joint stock companies are transferred by deed registered at the office of the company. But the Companies Act, 1867, provides, in the case of a company limited by shares, for the issue of share warrants with respect to shares fully paid up, or with respect to stock;(*e*) and these warrants entitle the bearer to the shares or stock specified in them, and such shares or stock may be transferred by delivery of the share warrant.(*f*)

(*a*) Stat. 25 & 26 Vict. c. 89, s. 51.
(*b*) Sect. 53.
(*c*) Sect. 54.
(*d*) Stat. 30 & 31 Vict. c. 131 s. 37.
(*e*) Sects. 27–33.
(*f*) Sect. 28.

[*228] *Provision is made for the winding-up of Joint Stock Companies either by the court(*g*) or voluntarily;(*h*) and if voluntarily, the winding-up may by the order of the court be subject to its supervision.(*i*) The court to which this jurisdiction is given is the Court of Chancery, except in the case of mines subject to the jurisdiction of the Stannaries; but where the Court of Chancery makes an order for winding up a company under the act, it may, if it think fit, direct all subsequent proceedings for winding up the same to be had in the County Court.(*k*) The winding-up is effected by liquidators appointed for that purpose, and who if appointed by the court are styled official liquidators.(*l*) All persons liable to contribute to the assets of a company under the act, in the event of its being wound up, are called contributories.(*m*) The liability of contributories is regulated by the following rules:(*n*)—

1. No past member shall be liable to contribute to the assets of the company, if he has ceased to be a member for a period of one year or upwards prior to the commencement of the winding-up:
2. No past member shall be liable to contribute in respect of any debt or liability of the company contracted after the time at which he ceased to be a member:
3. No past member shall be liable to contribute to the assets of the company unless it appears to the court that the existing members are unable to satisfy the contributions required to be made by them in pursuance of the act:
4. In the case of a company limited by shares, no *contribution shall be required from any member exceeding the amount, if any, unpaid on the shares in respect of which he is liable as a present or past member: [*229]
5. In the case of a company limited by guarantee, no contribution shall be required from any member exceeding the amount of the undertaking entered into on his behalf by the memorandum of association:
6. Nothing in the act contained shall invalidate any provision contained in any policy of insurance or other contract, whereby the liability of individual members upon any such policy or

(*g*) Stat. 25 & 26 Vict. c. 89, ss. 79–128. See also stat. 30 & 31 Vict. c. 131, s. 40.
(*h*) Stat. 25 & 26 Vict. c. 89, ss. 129–146.
(*i*) Sects. 147–152.
(*k*) Stats. 25 & 26 Vict. c. 89, s. 81; 30 & 31 Vict. c. 131, ss. 41, 42.
(*l*) Stat. 25 & 26 Vict. c. 89, ss. 92–97, 133–144.
(*m*) Sect. 74.
(*n*) Sect. 38.

contract is restricted, or whereby the funds of the company are alone made liable in respect of such policy or contract:

7. No sum due to any member of a company, in his character of a member, by way of dividends, profits or otherwise, shall be deemed to be a debt of the company payable to such member in a case of competition between himself and any other creditor not being a member of the company; but any such sum may be taken into account for the purposes of the final adjustment of the rights of the contributories amongst themselves.

Acts have since been passed to enable joint-stock companies carrying on business in foreign countries to have official seals to be used in such countries,(*o*) and to enable certain companies to issue mortgage debentures founded on securities upon or affecting land, and to make provision for the registration of such mortgage debenture and securities.(*p*)

[*230] *Shares in joint stock companies are not *goods*, *wares* or *merchandise* within the 17th section of the Statute of Frauds; so that they do not require a written memorandum for a contract for their sale, when the value exceeds 10*l*., and the buyer does not accept and receive any part, nor give something in earnest to bind the bargain or in part-payment.(*q*) And such shares were not considered to be stock within the meaning of the Stock Jobbing Act above mentioned and now repealed.(*r*) But the sale of shares in joint stock banks is now void unless the contract shall set forth in writing the numbers of the shares in the registry of the company, or, where there is no register by distinguishing numbers, then the names of the registered proprietors of the shares at the time of making the contract.(*s*)

Several acts of parliament have been passed for the encouragement of friendly societies, for the mutual relief of their members and their families in case of sickness, old age, death, or other contingencies;(*t*) all of which are now consolidated into one act.(*u*) The rules of these

(*o*) Stat. 27 Vict. c. 19.

(*p*) Stat. 28 & 29 Vict. c. 78.

(*q*) Humble *v*. Mitchell, 11 Ad. & E. 205 (E. C. L. R. vol. 39); Knight *v*. Barber, 16 M. & W. 66; Bowlby *v*. Bell, 3 C. B. 284 (E. C. L. R. vol. 54). See *ante*, p. 40.

(*r*) Hewitt *v*. Price, 4 M. & G. 355 (E. C. L. R. vol. 43); Williams *v*. Tyre, 18 Beav. 366; *ante*, p. 203.

(*s*) Stat. 30 Vict. c. 29.

(*t*) Stat. 10 Geo. IV. c. 56, amended by 4 & 5 Will. IV. c. 40; 3 & 4 Vict. c. 73; 9 & 10 Vict. c. 27; 13 & 14 Vict. c. 115; 15 & 16 Vict. c. 65; 16 & 17 Vict. c. 123; 17 & 18 Vict. c. 101.

(*u*) Stat. 18 & 19 Vict. c. 63, amended by stats. 21 & 22 Vict. c. 101; 23 & 24 Vict. c. 58; 30 & 31 Vict. c. 117, and 32 & 33 Vict. c. 61.

societies are required to be certified by the registrar of friendly societies, and in whose custody a transcript of the rules of every friendly society is now required to be kept.(x) And it is now provided that *the [*231] registrar of friendly societies shall not grant any certificate to any society assuring to any member thereof a certain annuity or superannuation, deferred or immediate, unless the table of contributions payable for such kind of assurance shall have been certified under the hand of the actuary to the commissioners for the reduction of the national debt, or by an actuary to some life assurance company in London, Edinburgh, or Dublin who shall have exercised the profession of actuary for at least five years.(y) On the death or removal of any trustee of one of these societies, the whole property of the society vests in the succeeding trustee for the same estate and interest as the former trustee had therein, and subject to the same trusts, without any assignment or conveyance whatever, except the transfer of stock and securities in the public funds.(z) And on the death, bankruptcy or insolvency of any officer of any such society, or on any execution issuing against him, or on his making any assignment or conveyance for the benefit of his creditors, the money or effects in his hands belonging to the society are to be paid over and delivered to the society before any other of his debts are paid.(a) Acts of parliament have also been passed to legalize the formation of industrial and provident societies for carrying on trades or handicrafts in common,(b) and many of the provisions which relate to friendly societies apply also to these institutions.(c) Loan societies are regulated by another act of parliament, which, after having been long periodically continued, is now made perpetual.(d) Other acts of *parliament [*232] have recently been passed for the regulation of savings banks;(e)[1] and particularly for the establishment of savings banks in connection with the post-office,(f)—banks which, having the security of a government guarantee, are a great boon to the poorer classes.

(x) Stat. 18 & 19 Vict. c. 63, s. 26. A transcript of the rules was formerly required to be enrolled with the clerk of the peace. Stat. 4 & 5 Will. IV. c. 40, s. 4.

(y) Stat. 18 & 19 Vict. c. 63, s. 26.

(z) Sect. 18.

(a) Sect. 23.

(b) Stat. 15 & 16 Vict. c. 31, amended by stats. 17 & 18 Vict. c. 25, and 19 & 20 Vict. c. 40; repealed and consolidated by stat. 25 & 26 Vict. c. 87, amended by stat. 30 & 31 Vict. c. 117.

(c) Stats. 25 & 26 Vict. c. 87, s. 15; 30 & 31 Vict. c. 117, s. 3.

(d) Stat. 3 & 4 Vict. c. 110, made perpetual by stat. 26 & 27 Vict. c. 56.

(e) Stat. 26 & 27 Vict. c. 87.

(f) Stats. 24 Vict. c. 14; 26 Vict. c. 14, and 32 & 33 Vict. c. 59.

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[1] For statutory regulations resembling those spoken of in the text, see the acts respecting Savings Institutions and Loan Companies, Purd. Dig. (1861), p. 106.

An act of parliament also exists for the regulation of benefit building societies.(*g*)[1] The funds of these societies are raised by monthly contributions of the members, which must not exceed 20*s*. per share, and by fines for non-payment. These shares must not exceed the value of 150*l*. each; but any member may hold more than one share.(*h*) When the amount of the shares has been realized, the money is divided amongst the members, and the society is dissolved. Such members, however, as may wish to buy land or to build, may receive the amount of their shares in advance on payment of an additional subscription by way of interest, and also on payment of a bonus for the advance, which of course is deducted from the amount of the share advanced. This bonus is usually determined by competition amongst the members, the shares to be paid in advance being put up by auction by the society; and the subscriptions and fines to become due in respect of the advanced shares are then secured to the society by the purchasers, by mortgage of land or houses of sufficient value.(*i*) These mortgages are not [*233] *liable to stamp duty,(*k*) provided they be made by a member for securing the repayment to the society of money not exceeding five hundred pounds; but in other cases the stamp duty now attaches.(*l*) These mortgages were also exempt from any of the forfeitures or penalties formerly in force against usury.(*m*)[2] And a receipt for the moneys secured, endorsed

(*g*) Stat. 6 & 7 Will. IV. c. 32.

(*h*) Morrison *v.* Glover, 4 Ex. Rep. 430.

(*i*) See Moseley *v.* Baker, 6 Hare 87; 3 De G., M. & G. 1032; Doe d. Morrison v. Glover, 15 Q. B. 103 (E. C. L. R. vol. 69); Seagrave *v.* Pope, 1 De G., M. & G. 783; Fleming *v.* Self, Kay 518; 3 De G., M. & G. 997; Farmer *v.* Smith, 4 H. & N. 196; Sparrow *v.* Farmer, 26 Beav. 511; Smith *v.* Pilkington, 1 De G., F. & J. 120.

(*k*) Walker *v.* Giles, 6 C. B. 662 (E. C. L. R. vol. 60); Williams *v.* Hayward, 22 Beav. 220.

(*l*) Stat. 31 & 32 Vict. c. 124, s. 11.

(*m*) Stat. 6 & 7 Will. IV. c. 32, s. 2.

[1] An act of the legislature of Pennsylvania, passed the 22d day of April, 1850, empowers, "any number of persons, citizens of the city and county of Philadelphia, and the counties of Schuylkill and Berks," "who are associated, or who mean to associate" "for the purpose of forming mutual savings fund, land and building associations," to make application for incorporation "to the Court of Common Pleas of the proper county, in which said corporation or body politic in law, is intended to be situated;" and the said courts are thereby authorized to incorporate the said associations, under the stipulations and provisos therein mentioned. By an act of the 3d of April, 1851, the above provisions are extended to Montgomery county. By the Act of the 21st of April, 1852, they are extended to Delaware county; and by the Act of the 14th of April, 1853, they are extended to Allegheny county; and by subsequent statutes, the act is still further extended: Purd. Dig. (1861), p. 129.

[2] But such a provision, will not exonerate all contracts made by such associations with their members, from the operation of the statute relating to usury: Savings Bk. *v.* Wilcox, 24 Conn. 147; Martin *v.* Nash-

by the trustees of the society upon any such mortgage, vests the estate comprised in the security in the person entitled to the equity of redemption, without any reconveyance.(n) Under cover of the Building Societies Act, many societies called freehold land societies have been established for the purpose of buying freehold land and selling it again in lots to the different members; but these societies are not within the scope of the building and friendly societies acts, and can only be certified as such by the concealment of their real object.(o)

An act has also been passed for facilitating the erection of dwelling-houses for the laboring classes,(p) under which any number of persons, not less than six, may by subscribing articles of association form themselves into a company for the purposes of the act. The articles are to be in a given form, and to be registered by the registrar of joint stock companies. And the Companies Clauses Consolidation Act, 1845, is incorporated into the act, the articles of association being deemed the special act.

The provisions above referred to for charging the *stock of any debtor with the payment of any judgment debt,(q) extend to stock and shares in any *public* company in England, whether incorporated or not.(r) [*234]

(n) Stat. 6 & 7 Will. IV. c. 32, s. 5; Prosser *v.* Price, 28 Beav. 68; Pearce *v.* Jackson, Law Rep. 3 Ch. Ap. 576.

(o) See Grimes *v.* Harrison, 26 Beav. 435; Hughes *v.* Layton, Q. B., 10 Jur. N. S. 513.

(p) Stat. 18 & 19 Vict. c. 132. See also stat. 29 Vict. c. 28; 30 Vict. c. 28, and 31 & 32 Vict. c. 130.

(q) *Ante*, p. 206.

(r) Stat. 1 & 2 Vict. c. 110, s. 14. See Nicholls *v.* Rosewarne, 6 C. B. N. S. 480 (E. C. L. R. vol. 95).

ville Building Association, 2 Cold. 418. In Pennsylvania it has been held, that building associations cannot recover on their mortgage loans, more than the sum loaned, with the actual interest thereon: Houser *v.* Hermann Building Association, 41 Penn. St. 478; Denny *v.* West Philadelphia Association, 39 Id. 154; Reiser *v.* Saving Fund, Id. 137; and this judgment has been reiterated in McGrath *v.* Hamilton Savings and Loan Association, 44 Penn. St. 385, decided subsequently to the Act of 1859, in the eighth section of which it is declared, that the true intent and meaning of the acts of the legislature, in relation to building associations is, that premiums taken by the said associations should not be deemed usurious.

See also further on the subject of building associations, the following decisions supporting the doctrine stated in the text: Pomeroy *v.* Ainsworth, 22 Barb. 118; Citizens' Mutual Loan Association *v.* Webster, 25 Id. 263; West Winstead Saving Bank *v.* Ford, 27 Conn. 282.

The prerogative of the crown in the grant of letters-patent is frequently exercised not only for the incorporation of joint stock companies, but also for conferring on private individuals certain exclusive rights and privileges. These rights, called *patents* from the letters-patent which confer them, will be considered in the next chapter.

*CHAPTER II. [*235]

OF PATENTS AND COPYRIGHTS.

A PATENT is the name usually given to a grant from the crown, by letters-patent, of the exclusive privilege of making, using, exercising and vending some new invention. The granting of such letters-patent is an ancient prerogative of the crown, a prerogative which remains unaffected by the Patent Law Amendment Act, 1852.(a) In the reign of Queen Elizabeth this prerogative was stretched far beyond its due limits, and the monopolies thus created formed one of the grievances which King James, her successor, was at last obliged to remedy. Accordingly by a statute passed in the twenty-first year of his reign, and commonly called the Statute of Monopolies,(b) it was declared and enacted that all such monopolies were altogether contrary to the laws of this realm, and so were and should be utterly void and of none effect, and in no wise put in use or execution. In this statute, however, there are certain exceptions, and particularly one on which the modern law with respect to patents may be said to be founded. This exception is as follows: "Provided also and be it declared and enacted, that any declaration before mentioned shall not extend to any letters-patent and grants of privilege for the term of *fourteen years* or under, hereafter to be made, of the sole working or making of any manner of new manufactures within this realm, to the true and first inventor and inventors of such manufactures, which others at the time of making such letters-patent and *grants [*236] shall not use, so also they be not contrary to the law or mischievous to the state, by raising prices of commodities at home, or hurt of trade, or generally inconvenient; the said fourteen years to be accounted from the date of the first letters-patent or grant of such privilege hereafter to be made; but that the same shall be of such force as they should be if this act had never been made, and of none other."(c)

It will be seen that the granting of letters-patents is not expressly warranted by this statute; but that it merely reserves to such letters-patent as fall within the terms of the exception, such force as they should

(a) Stat. 15 & 16 Vict. c. 93; see sect. 16. (b) Stat. 21 Jac. I. c. 3.
(c) Stat. 21 Jac. I. c. 3, s. 6.

have had if the act had never been made, and none other force. As, however, all grants of exclusive privilege by letters-patent, which do not fall within this exception, and some others of little importance, are now rendered void by the statute, the construction of this exception has become a matter of great practical importance. And, first, the term must be *fourteen years* from the date of the letters-patent, or under; and the full term of fourteen years is usually granted. But it is now provided, that all letters-patent for inventions, granted under the provisions of the Patent Law Amendment Act, 1852, shall be made subject to the condition that the same shall be void, and that the powers and privileges thereby granted shall cease, at the expiration of three and seven years respectively from the date thereof, unless there be paid before the expiration of the said three and seven years respectively, certain stamp duties mentioned in the act, namely, 50*l.* stamp duty before the expiration of the third year, and 100*l.* stamp duty before the expiration of the seventh year.(*d*) These payments appear high, but they are a great improvement on the old law, under which heavy fees and duty were payable [*237] *on taking out every patent; whereas now, if a patent prove useless, it may be discontinued, and the payment saved. By a modern act of parliament,(*e*) a prolongation of the term granted by the original letters-patent may be granted, either to the original grantor or to his assignee,(*f*) for a term not exceeding *seven* years after the expiration of the first term in case the Judicial Committee of the Privy Council shall, upon proper application, report to her Majesty, that such further extension of the term should be granted. And if such further period of seven years can be shown to be insufficient for the reimbursement and remuneration of the expense and labor incurred in perfecting the invention, then, by a subsequent statute,(*g*) the crown may grant to the inventor, or his assignee, an extension of the patent for any time not exceeding *fourteen* years.[1]

(*d*) Stat. 16 & 17 Vict. c. 5, s. 2; Williams *v.* Frost, 28 Beav. 93.

(*e*) Stat. 5 & 6 Will. IV. c. 83, s. 4, amended 2 & 3 Vict. c. 67; and extended by stats. 15 & 16 Vict. c. 83, s. 40, and 16 & 17 Vict c. 115, s. 7.

(*f*) Russell *v.* Ledsam, 14 M. & W. 574; affirmed, 16 M. & W. 633; 1 H. of L. Cases 687.

(*g*) Stat. 7 & 8 Vict. c. 69, ss. 2, 4, continued by stats. 15 & 16 Vict. c. 83, s. 40, and 16 & 17 Vict. c. 115, s. 7; In Re Norton's Patent, P. C., 9 Jur. N. S. 419; 11 W. R. 720; Re Hill's Patent, P. C., 9 Jur. N. S. 1209; 12 W. R. 25.

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[1] The acts of Congress in relation to patents, which had been enacted prior to the 4th of July, 1836, were repealed by the last section of the act approved on that day. And by the last section of an act entitled "An Act to revise, consolidate and amend the statutes relating to patents and copyrights, approved on the eighth of

Secondly, the patent must be for "new manufactures within this realm, which others at the time of making such letters-patent and grants

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July, 1870, Statutes at Large (1869–1870), p. 198, the said act of the fourth of July 1836, and all other acts relating to patents and copyrights, as enumerated in the last section of the said act of 1870, were repealed. This last act, was the result of an effort to condense or codify under one single title, all the laws of the United States on the subject of patents and copyrights, and the general features of those laws as existing before the passage of the latter act, have been therein re-enacted, so that its provisions may be regarded as substantially the same as those contained in the former laws of the United States on these subjects.

By the twenty-fourth section of this act, it is enacted "that any person who has invented or discovered any new and useful art, machine, manufacture, or composition of matter, or any new or useful improvement thereof, not known or used by others in this country, and not patented, or described in any printed publication in this or any foreign country, before his invention or discovery thereof, and not in public use or on sale for more than two years prior to his application, unless the same is proved to have been abandoned, may upon payment of the duty required by law, and other due proceedings had, obtain a patent."

The twenty-fifth section of this act provides, that an inventor shall not be debarred of his right to a patent by reason of a prior patent for the discovery or invention in a foreign country, provided that the same has not been introduced into the United States for more than two years previous to his application for a patent, and that the patent shall expire at the same time with the foreign patent, or in case of there being more than one foreign patent, with the expiration of that one having the shortest time to run, but in no case to exceed the limitation of seventeen years, which by the twenty-second section of said act is fixed upon as the period during which a patent shall run. The "due proceedings" for the obtaining of a patent prescribed by said act, are contained in sections twenty-six to thirty-four inclusive, wherein the mode of making claim therefor is regulated, and the rules in relation to the certainty of specification necessary to the perfecting of a claim for a patent presented; and a schedule of the official charges is contained in the sixty-eighth section of said act; but no patent is to be held void on account of previous use in a foreign country, if the patentee believed himself to be the original and first inventor and discoverer, if it had not been patented or described in a printed publication: sec. 62; and patents granted prior to the second of March, 1861, may be extended for the period of seven years and to have the same effect as if originally granted for twenty-one years, upon terms therein prescribed: sec. 67.

In case of the death of the inventor entitled to a patent, it is to be issued to his administrator or executor, in trust for his heirs, provided the decedent has made no other provision by his will: sec. 35. But unless the word "patented," together with the day and year the patent was granted, is marked upon the thing patented, or when this cannot be done, on account of the character of the article, a label containing the same, attached to a package of the said articles, no damages can be recovered for the use thereof, unless upon proof of use after prior actual notice.

By the seventy-first section of the same act, "any person who by his own industry, genius, efforts and expense has invented or produced any new and original design for a manufacture, bust, statue, alto-relievo, or bas-relief; any new and original design for the printing of woollen, silk, cotton or other fabrics; any new and original impression, ornament, pattern, print or picture to be printed, painted, cast, or otherwise placed on or worked

shall not use." The *use* here mentioned has been held to mean a use in public; if therefore the invention, for which the patent is sought to be obtained, has been previously used in public within the realm, the patent will be void.(*h*) And the *realm* in this statute has been determined to [*238] mean the united *kingdom of Great Britain and Ireland; so that when separate letters-patent were granted for England and Scotland, if any invention had been publicly known or practiced in England, a patent for Scotland was void.(*i*)

By an act of parliament to which we have before referred, it is, however, provided, that letters-patent may be confirmed, or new ones granted, for any invention or supposed invention, which shall have been found by the verdict of a jury, or discovered by the patentee or his assigns, to have been either wholly or in part invented or used before, if the Judicial Committee of the Privy Council, upon examining the matter, shall be satisfied that the patentee believed himself to be the first and original inventor, and that such invention, or part thereof, *had not been publicly and generally used* before the date of the first letters-patent.(*k*) It is also now provided by the Patent Law Amendment Act, 1852, that any invention may be used and published for six months from the date of the application for letters-patent for the invention, without prejudice to the letters-patent, provided the *provisional specification*, which describes the nature of the invention, and is to accompany the petition for the letters-

(*h*) Lewis *v.* Marling, 10 B. & C. 22 (E. C. L. R. vol. 21); Carpenter *v.* Smith, 9 M. & W. 300; Re Newell, 4 C. B. N. S. 269 (E. C. L. R. vol. 93); Betts *v.* Menzies, 10 H. of L. Cases 117; 9 Jur. N. S. 29; Hills *v.* Liverpool United Gaslight Company, 9 Jur. N. S. 140; Harwood *v.* Great Northern Railway Company, 35 L. J. Q. B. 27; Young *v.* Fernie, Giff. 577; 10 Jur. N. S. 526.

(*i*) Brown *v.* Annondale, 8 Cl. & Fin. 214.

(*h*) Stat. 5 & 6 Will. IV. c. 83, s. 2.

into any article of manufacture, the same not having been known or used by others, before his invention or production thereof, or patented or described in any printed publication, may upon payment of the duty required by law, and other due proceedings had, the same as in cases of inventions or discoveries, obtain a patent therefor "for three years and six months, or for seven years, or for fourteen years as the applicant may in his application elect," and patentees of designs issued prior to the second of March, 1861, shall be entitled to extensions of their respective patents for seven years, the proceedings to be the same as provided in the case of patents for inventions and discoveries, and the fees as provided in section seventy-five: secs. 71, 73, 74 and 75.

Under the act of the eighth of July, 1870, the invidious distinction formerly existing between citizens and foreigners as regards the fees to be paid in patent cases is removed, and in fact no distinction whatever against aliens now appears to exist, except that to be entitled to the privilege of filing a caveat, they must have resided for one year previous, in the United States, and declared their intention of becoming citizens.

patent, be allowed by the proper law officer.(*l*) It is also provided that the applicant, instead of having a provisional specification, may, if he think fit, file a complete specification under his hand and seal, particularly describing and ascertaining the nature of his invention, and in what manner the same is to be performed, in which case the invention will be protected for six months from the date of the application, and may be used and published without prejudice *to any letters-patent to [*239] be granted for the same.(*m*)[1] It is also provided, that if any application for letters-patent be made in fraud of the true and first inventor, any letters-patent granted to the true and first inventor, shall not be invalidated by reason of any use or publication of the invention subsequent to such application, and before the expiration of the term of protection.(*n*)

Thirdly, a patent must be granted "to the true and first inventor and inventors." If therefore the original inventor should sell his secret to another person, such person cannot obtain letters-patent for the invention in his own name; but the original inventor must obtain the letters-patent, and then assign them to the other. If two persons should both make the same discovery, he who first publishes it by obtaining a patent for it, will be the true and first inventor within the meaning of the statute, although he may not actually have been the first to make the discovery.(*o*) But a person cannot obtain a patent for an invention which has been communicated to him by another within the realm.(*p*) If, however, a person

(*l*) Stat. 15 & 15 Vict. c. 83, s. 8; Re Newall, 4 C. B. N. S. 269 (E. C. L. R. vol. 93); Re Bates and Redgate, Law Rep. 4 Ch. Ap. 577; 38 L. J. Chan. 501.

(*m*) Sect. 9. See also stat. 16 & 17 Vict. c. 115, s. 6.

(*n*) Stat. 15 & 16 Vict. c. 83, s. 10.

(*o*) Boulton *v.* Bull, 2 H. Black. 487.

(*p*) Hill *v.* Thompson, 8 Taunt. 395 (E. C. L. R. vol. 4); s. c. 2 J. B. Moore 452.

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[1] By the 40th section of the Act of the 8th of July, 1870, Stats. at Large (1869–70), p. 203, wherever further time may be desired to mature an invention, it may be lawful to file in the Patent Office, a caveat, praying protection of the right until the invention is matured; whereupon, on application for a patent made within one year after filing the caveat, by any other person, for a patent for an invention which may in any way interfere, notice will be given to the person who has filed the caveat, of such application; and an alien shall have this privilege who has resided in the United States one year, next preceding the filing of his caveat, and made oath of his intention to become a citizen.

The filing of a caveat is not however necessary for the preservation of the right, but merely enables the inventor to receive notice of any interfering application: Hildreth *v.* Heath, Cranch's Patent Decs. 101; so as to offer him some protection from the rule of law, which gives to the inventor who first adapts his invention to practical use, the right to the grant of the patent: Phelps *v.* Brown, 4 Blatch. C. C. 362.

should be in possession of an invention communicated to him from abroad, such person, if he be the first introducer of the invention into this country, is regarded by the law as the true and first inventor thereof within the meaning of the statute of James ;(q) and it is no objection that the patent is taken out in trust merely for the foreign inventor.(r) But it is now provided that where letters-patent are granted in the United Kingdom for any invention first invented in any foreign country, [*240] or by the subject of any foreign state, *and a like privilege for the exclusive use or exercise of such invention in any foreign country is there obtained before the grant of such letters-patent in the United Kingdom, all rights and privileges under such letters-patent shall (notwithstanding any term in such letters-patent limited) cease and be void immediately upon the expiration or other determination of the term of the like privilege obtained in such foreign country; or where more than one such like privilege is obtained abroad, immediately upon the expiration or determination of the term of such privileges which shall first expire or be determined. And no letters-patent granted for any invention, for which any patent or like privilege shall have been obtained in any foreign country, shall be of any validity, if granted after the expiration of the term for which the foreign patent or privilege was in force.(s) The remaining restrictions imposed by the act of James I. require no comment.

The granting of letters-patent is, as has been observed, a prerogative of the crown; and although a patent may now be always obtained for any new invention, yet the grant is still a matter of favor and not of right, and all grants of letters-patent for inventions are at the present day clogged with certain conditions. Of these conditions, the most important is that which requires the inventor particularly to describe and ascertain the nature of his invention, and in what manner the same is to be performed, by an instrument in writing under his hand and seal, called the specification, and to cause the same to be filed in the High Court of Chancery within a given period, generally six calendar months from the [*241] date.(t) This instrument *was formerly required to be enrolled, instead of being merely filed as at present. And it is provided by the act of 1852 that, if a complete specification be filed along with

(q) Edgeberry v. Stephens, 2 Salk. 447.

(r) Beard v. Edgerton, 3 C. B. 97, 129 (E. C. L. R. vol. 54).

(s) Stat. 15 & 16 Vict. c. 83, s. 25; Daw v. Eley, V.-C. W., 36 L. J. N. S. 482; Law Rep. 3 Eq. 496.

(t) Ibid. s. 27. See stat. 16 & 17 Vict. c. 115, s. 6. As to munitions of war, see stat. 22 Vict. c. 13.

the petition for the letters-patent, then, in lieu of a condition for making void the letters-patent in case the invention be not described and ascertained by a subsequent specification, the letters-patent shall be conditioned to become void, if such complete specification filed as aforesaid does not particularly describe and ascertain the nature of the invention, and in what manner the same is to be performed.(*u*)[1] The object of requiring a specification is to secure to the public the benefit of the knowledge of the invention after the term granted by the patent shall have expired. The framing of the specification is a matter of great nicety; for the description contained in it must correspond with the title of the invention contained in the letters-patent,(*v*) and must clearly describe the invention,(*w*) neither covering more than the proper subject of the patent,(*x*) nor omitting anything necessary to make the description intelligible.(*y*) Provision however has been made by an act of parliament before referred to,(*z*) for enabling the grantee or assignee of any letters-patent to enter a *disclaimer* of any part either of the title of the invention, or of the specification, stating the reason of such disclaimer, or to enter a memorandum of any alteration in the title or specification, not being such disclaimer or such alteration as shall extend the exclusive right granted by the patent.[2] Under these provisions, letters-patent

(*u*) Stat. 15 & 16 Vict. c. 83, s. 9.

(*v*) Rex *v.* Wheeler, 2 B. & Ald. 345, 350. See Nickels *v.* Haslam, 7 M. & G. 378; (E. C. L. R. vol. 49); Beard *v.* Egerton, 3 C. B. 97 (E. C. L. R. vol. 54).

(*w*) Bloxham *v.* Elsee, 6 B. & C. 169 (E. C. L. R. vol. 13).

(*x*) Hill *v.* Thompson, 3 Meriv. 629.

(*y*) Rex *v.* Wheeler, ubi supra; Neilson *v.* Harford, 8 M. & W. 805.

(*z*) Stat. 5 & 6 Will. IV. c. 83, s. 1. See also stat. 7 & 8 Vict. c. 69, ss. 5, 6.

[1] Whenever a patent is inoperative or invalid by reason of a defective or insufficient specification, or by reason of claiming more than the patentee had a right to, without any fraudulent intent in so doing, he may surrender, and obtain a new patent upon a corrected specification; said reissued patent with corrected specification to have the same effect as if the same had been filed in such corrected form: Stats. at Large (1869–1870), 205, sec. 53. And by the thirty-third section of the said act, the benefit of this section is extended to the assignee of a patent: Id. 202.

[2] A provision of the same character is contained in the fifty-fourth section of the act of the 8th of July, 1870, which in substance provides that whenever any patentee shall have, through inadvertence, accident, or mistake, made his specification of claim too broad, claiming more than that of which he was the original or first inventor, some material and substantial part of the thing patented being truly and justly his own, any such patentee may make disclaimer of such parts of the thing patented, as the disclaimant shall not claim to hold by virtue of the patent or assignment, stating therein the extent of his interest in such patent. And such disclaimer shall thereafter be taken and considered as part of the original specification, to the extent of the interest which shall be possessed in the patent, or right secured thereby to the disclaimant: Stats. at Large (1869–70), p. 206. On the sub-

[*242] originally void may in many *cases be rendered valid, the disclaimer being read as part of the original title or specification.(a) But the object of the act is merely to allow of the removal from the specification of that which is superfluous; and a disclaimer will not be allowed which converts a description, in itself unintelligible or impracticable, into a practicable description of a useful invention.(b) The above-mentioned provisions have been extended to letters-patent granted and specifications filed under the Patent Law Amendment Act, 1852.(c) This act also provides for the printing, publishing and sale, under the direction of the commissioners of patents, of all specifications, disclaimers, and memoranda of alterations deposited or filed under the act.(d) A "register of patents" is also directed to be kept, where shall be entered and recorded, in chronological order, all letters-patent granted under the act, the deposit or filing of specifications, disclaimers and memoranda of alterations filed in respect of such letters-patent, all amendments in such letters-patent and specifications, all confirmations and extensions of such letters-patent, the expiry, vacating or cancelling of such letters-patent, with the dates thereof respectively, and all other matters and things affecting the validity of such letters-patent as the commissioners may direct; and such register, or a copy thereof, is to be open at all convenient times to the inspection of the public, subject to such regulations as the commissioners may make.(e)

Another condition formerly inserted in letters-patent rendered them void, in case the letters-patent, or the liberty and privileges thereby [*243] granted, should become *vested in or in trust for more than the number of twelve persons, or their representatives, at any one time, as partners, dividing or entitled to divide the benefit or profit obtained by reason thereof; but it is now enacted that, notwithstanding any proviso that may exist in former letters-patent, it shall be lawful for a larger number than twelve persons hereafter to have a legal and beneficial interest in such letters-patent.(f)

(a) The Queen v. Mill, 10 C. B. 379 (E. C. L. R. vol. 70); Seed v. Higgins, 8 H. of L. Cases 550.

(b) Ralston v. Smith, 11 H. of L. Cases 223.

(c) Stat. 15 & 16 Vict. c. 83, s. 39.

(d) Sect. 29.

(e) Sect. 34.

(f) Sect. 36. See post, the chapter on joint ownership and joint liability.

ject of disclaimer, see the following decisions made prior to the law of 1870: O'Reilly et al. v. Morse et al., 15 How. 63; Whitney et al. v. Emmett et al., 1 Baldw. 303; Wyeth et al. v. Stone et al., 1 Story 273; Reed v. Cutter et al., Id. 590; Hall v. Wiles, 2 Blatch. C. C. 194; Silsby v. Foot, 20 How. U. S. 378; McCormick v. Seymour, 3 Blatch. C. C. 209.

In letters-patent a clause is usually contained forbidding all persons from using the invention without the consent, license or agreement of the inventor, his executors, administrators or assigns, in writing, under his or their hands and seals, first had and obtained in that behalf.(*g*) The granting of licenses to use a patent is one of the most profitable ways of turning it to account. All licenses are now required to be registered in the registry to be presently mentioned.

Letters-patent obtained in England formerly conferred an exclusive privilege only within England, Wales, and the town of Berwick upon Tweed; and also within the islands of Guernsey, Jersey, Alderney, Sark and Man, and her Majesty's colonies and plantations abroad, if so expressed in the patent. In order to obtain the like exclusive privilege for Scotland, it was necessary to obtain separate letters-patent under the seal appointed by the treaty of union to be used instead of the great seal of Scotland; and in the same manner the like privilege for Ireland was required to be obtained by letters-patent under the great seal for Ireland. But it is now provided that letters-patent shall extend to the whole of the United Kingdom of Great Britain and Ireland, the channel islands, and the Isle *of Man; and in case the warrant for granting [*244] the patent shall so direct, such letters-patent shall be made applicable to her Majesty's colonies and plantations abroad, or such of them as may be mentioned in such warrant.(*h*) But where separate letters for England, Scotland or Ireland have been already granted, separate letters-patent may still be granted for the other countries, on payment for such country of one-third the stamp duties payable for a patent for the whole kingdom.(*i*)

Letters-patent and the privileges thereby granted are freely assignable from one person to another, and the assignee by such assignment is placed in the same position as his assignor previously stood.[1] The as-

(*g*) See the form of letters-patent in Appendix (A).

(*h*) Stat. 15 & 16 Vict. c. 83, s. 18.

(*i*) Stat. 16 & 17 Vict. c. 5, s. 4.

[1] See Act of Congress of eighth of July, 1870, sec. 36; Stats. at Large (1869–1870), 203. Under the law as it existed prior to this act, it has been held that an assignment of a patent right may be made before the issuing of a patent: Gayler *v.* Wilder, 10 How. 477; so also, of the assignment of the extension of a patent: Railroad Co. *v.* Trumble, 10 Wall. 367; and the assignee, in all cases taking subject to the legal consequences of the previous acts of the assignor (McClurg *v.* Kingsland et al., 1 How. 202), may maintain an action in his own name: Brooks et al. *v.* Bicknell et al., 3 McLean 250; but the assignment must be in writing Gibson *v.* Cook, 2 Blatch. C. C. 144. An extension of a patent, procured by the executor or ad-

signee may consequently bring in his own name the same actions and suits both at law and in equity against those who have infringed upon the patent as the patentee himself might have done.(k) The privileges granted by letters-patent are therefore plainly an instance of an incorporeal kind of personal property, different in its nature from a mere *chose in action*, which never has been assignable at law. A deed is said to be necessary for the valid legal assignment of letters-patent; but the author is not aware of any authority for this position; and the general

(k) Godson on Patents 237; Walton *v.* Lavater, 8 C. B. N. S. 162 (E. C. L. R. vol. 98).

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ministrator of the inventor, did not enure to the benefit of the assignees: Wilson *v.* Rousseau et al., 4 How. 646; for under the statute law prior to 1870, an assignment of a patent, or a license to use the privilege during the term for which letters were granted, although including a reissue, did not include an extension: Hodge *v.* Railroad, 3 Fish. Pat. Cas. 410; Wood *v.* Railroad, Id. 464; but, by the sixty-seventh section of the act above referred to, "the benefit of the extension of a patent, shall extend to the assignees and grantees of the right to use the thing patented, to the extent of their interest therein;" and an assignee who was in the use of the thing patented, at the time of the renewal, has still a right to use it: Wilson *v.* Rousseau et al., 4 How. 646; Wilson *v.* Simpson et al., 9 Id. 109; Bloomer *v.* McQuewan, 14 Id. 539; Bloomer *v.* Millenger, 1 Wall. 340; Chaffee *v.* Boston Belting Co., 22 How. U. S. 217.

A covenant by a patentee, made prior to the law authorizing extensions, that the covenantee should have the benefit of any improvement, or alteration, or renewal of the patent, does not include the extension obtained by an administrator under the act of 1836, but only the renewal obtained upon a surrender of the patent, on account of a defective specification: Wilson *v.* Rousseau et al., 4 How. 646; but see act of July 8, 1870, sec. 67; and a covenant, by which a licensee will become entitled to an extension under the act of 1836, will not entitle him to an extension under a special act: Bloomer *v.* Stolley, 6 McLean 158.

An assignee of a patent, is one who has had transferred to him in writing, the whole interest of the original patent, or any undivided part of such whole interest, for every portion of the United States. A grantee, is one who has had transferred to him in writing, the exclusive right under the patent, to make and use, and to grant to others to make and use, the thing patented, within some specified part of the United States. A licensee, is one who has had transferred to him, in writing or orally, a less or different interest, than either the interest in the whole patent, or an undivided part of such whole interest, or an exclusive sectional interest: Potter *v.* Holland, 4 Blatch. C. C. 206.

When an assignment is made under the act of 1836, of the exclusive right within a specified part of the country, the assignee may sue in his own name, provided the assignment be of the entire and unqualified monopoly; but any assignment short of this, is a mere license, and will not carry with it a right to the assignee to sue in his own name: Gayler et al. *v.* Wilder, 10 How. 477; but one cannot divide his right into parts, and grant to one man the right to use it in connection with, or application to, one class of subjects, and to another, in its connection with, or application to, another class of subjects, to such an extent that purchasers from any of these persons, may not use the thing purchased exactly as they please: Washing Machine Co. *v.* Earle, 3 Wall. Jr. 320.

rule appears to be, that the assignment of incorporeal personal property may be made without deed. Perhaps, however, the necessity of an assignment by deed may be implied from the clause in the letters-patent, which forbids the use of the invention "without the consent, license or agreement of the inventor, his executors, administrators or assigns, in writing, under his or their hands *and seals, first had and obtained in that behalf." All assignments of letters-patent are now required to be registered under the Patent Law Amendment Act, 1852.[1] [*245]

The act provides that there shall be kept at the office appointed for filing specifications in chancery under this act, a book or books entitled "The Register of Proprietors," wherein shall be entered, in such manner as the commissioners shall direct, the assignment of any letters-patent, or of any share or interest therein, any license under letters-patent, and the district to which such license relates, with the name or names of any person having any share or interest in such letters-patent or license, the date of his or their acquiring such letters-patent, share and interest, and any other matter or thing relating to or affecting the proprietorship in such letters-patent or license; and a copy of any entry in such book certified under such seal as may have been appointed, or as may be directed by the Lord Chancellor, to be used in the said office, shall be given to any person requiring the same, on payment of the fees therein provided; and such copies so certified shall be received in evidence, in all courts and in all proceedings, and shall be primâ facie proof of the assignment of such letters-patent, or share or interests therein, or of the license or proprietorship as therein expressed; provided always, that until such entry shall have been made, the grantee or grantees of the letters-patent shall be deemed and taken to be the sole and exclusive proprietor or proprietors of such letters-patent, and of all the licenses and privileges thereby given and granted.(*l*)[2]

(*l*) Stat. 15 & 16 Vict. c. 83, s. 35. See Green's Patent, 24 Beav. 145; Chollett *v.* Hoffman, 7 E. & B. 686 (E. C. L. R. vol. 90).

[1] Act of Congress of eighth of July, 1870, sec. 33; Stats. at Large (1869–1870), p. 202: Gayler et al. *v.* Wilder, 10 How. 477; Wyeth et al. *v.* Stone et al., 1 Story 273; Gibson *v.* Cook, 2 Blatch. C. C. 144; but the registration of an assignment of a patent right, is not necessary as between the parties: Black *v.* Stone, 33 Ala. 327.

[2] The cases referred to in the following note, as interpreting the law of patents in the United States prior to the act of 1870, may still be found useful in construing that statute.

The improvements in mechanics, consist of new adaptations or combinations of the six primary mechanical powers; but any combination of mere theory, existing only in the brain of the inventor, and not rendered effective practically and materially, although its advantages, and its use-

Closely connected with the subject of patents is that of copyright.

fulness to the public, may be demonstrated with mathematical certainty, cannot be the subject of a patent, being merely an abstract principle: Odwine *v.* Winkley, 2 Gall. 51; Blanchard *v.* Sprague, 3 Sumn. 535; Stone *v.* Sprague et al., 1 Story 270; Smith *v.* Ely, 5 McLean 76. In the case of Le Roy et al. *v.* Tatham et al., 14 How. 156, Justice McLean says: "A principle is not patentable. A principle in the abstract is a fundamental truth; an original cause; a motive; these cannot be patented, as no one can claim in either of them an exclusive right . . . the elements of power existing, the invention is not in discovering them, but in applying them to useful objects." But the original inventor of an abstract principle, who has reduced it to a practical and useful form, is entitled to a patent; Woodcock *v.* Parker et al., 1 Gall. 438; Bedford *v.* Hunt et al., 1 Mass. 302; Le Roy et al. *v.* Tatham et al., 14 How. 156; Washburn et al. *v.* Gould, 3 Story 122; Lowell *v.* Lewis, 1 Mass. 182; Whitely *v.* Swayne, 7 Wall. U. S. 685; if, however, the thing patented had been previously known and used, the patent is void: Bedford *v.* Hunt et al., 1 Mass. 302; Shaw *v.* Cooper, 7 Peters 292; Whitney et al. *v.* Emmet et al., 1 Baldw. 303; Morris *v.* Huntington, 1 Paine C. C. 348; Pennock et al. *v.* Dialogue, 2 Peters 1; Reed *v.* Cutter et al., 1 Story 590; for the applicant must be the sole inventor: Thomas *v.* Weeks, 2 Paine C. C. 92; and this is the case, even where the inventor was entirely ignorant of such previous use: Evans *v.* Eaton, 3 Wheat. 454; s. c. 1 Peters C. C. 322; Dawson *v.* Follen, 2 Wash. C. C. 311; Delano *v.* Scott, Gilp. 489; so where an original inventor allows his invention to be used by the public, this is considered as an abandonment of his right, and of course will furnish a good objection to his obtaining a patent: Gayler et al. *v.* Wilder, 10 How. 477; Shaw *v.* Cooper, 7 Peters 292; Whittemore et al. *v.* Cutter, 1 Gall. 478; Mellus *v.* Silsbee, 4 Mass. 108; Pennock et al. *v.* Dialogue, 2 Peters 1; but it should be clearly established by proof, that such public use was with the knowledge and consent of the inventor: neither acts alone, nor declarations alone, being sufficient to prove an abandonment: McCormick *v.* Seymour, 2 Blatch. C. C. 194; and the mere user by the inventor of his discovery, in trying experiments, or by his neighbors, with his consent, as an act of kindness, for temporary and occasional purposes only, will not destroy the right of the discoverer to a patent: Wyeth et al. *v.* Stone et al., 1 Story, 273; Winans *v.* Schenectady and Troy Railroad Company; 2 Blatch. C. C. 229; Agawam Co. *v.* Jordan, 7 Wall. U. S. 583; nor experiments made by another, although those experiments led to the invention subsequently patented: Allen *v.* Hunter, 6 McLean 303; Cahon *v.* King, 1 Clif. C. C. 592; but the use of several machines in public, for more than two years prior to applying for a patent, slightly varying in form and arrangement, yet substantially the same as afterwards patented, cannot be alleged as experimental, so as to avoid the consequences of such prior use; Sanders *v.* Logan et al., 9 Am. L. Reg. 476; Tappan *v.* National Bank Co., 4 Blatch. C. C. 509; so, too, the inventor will not be deprived of his patent, where the knowledge of the discovery is surreptitiously obtained and communicated to the public: Shaw *v.* Cooper, 7 Peters 292; Whitney et al. *v.* Emmett et al., 1 Baldw. 303; Ryan et al. *v.* Goodwin et al., 3 Sumn. 514; and in like manner, any intermediate knowledge or use, between the time of discovery and the application for a patent, by a subsequent inventor, will not deprive the original discoverer of his right to a patent, who is during that time perfecting his invention, or using due diligence to secure his patent: Whitney et al. *v.* Emmett et. al., 1 Baldw. 303; Morris *v.* Huntington, 1 Paine C. C. 348; Reed *v.* Cutter et al., 1 Story 590; nor, on the other hand, will the idea of the discovery, though it has occurred to others, deprive the invention of its originality, unless the idea had been embodied in a practical form: Teese *v.*

Copyright may be defined to be the *exclusive right of multiply- [*246]

Phelps, 1 McAll. C. C. 48; Ellithorp v. Robertson, 4 Blatch. C. C. 307; and the time of the description in a printed publication, must be when the invention by the patentee was made, and not when he presented his application: Bartholomew v. Sawyer, 4 Blatch. C. C. 347.

A previous discovery in a foreign country, will not render a patent obtained here void, unless such discovery had been patented, or described in a printed publication: O'Reilly et al. v. Morse et al., 15 How. 63; Brooks et al. v. Bicknell et al., 3 McLean 250; Bartholomew v. Sawyer, 4 Blatch. C. C. 347.

If a machine produce several different effects by a particular combination of machinery, and these effects are produced in the same way in another machine, and a new effect added, the inventor of the latter is not entitled to a patent for the whole of the machine, but merely for the improvement: Whittemore et al. v. Cutter, 1 Gall. 478; Odwine v. Winkley, 2 Id. 51; Barrett et al. v. Hall et. al., 1 Mass. 447; Seymour v. Osborne, 11 Wall. U. S. 518; Goodyear v. Matthews, 1 Paine C. C. 300; and for each improvement of a machine, there must be a separate patent: Barrett et al. v. Hall et al., 1 Mass. 447; McCormick v. Talcott, 20 How. U. S. 402; and a claim for a combination of several devices, so as to produce a particular result, is not good for a claim for any mode of combining those devices: Case v. Brown, 2 Wall. 320; Burr v. Duryee, 1 Id. 531.

The description contained in the specification, must be so clear, that any one skilled in the art to which it appertains, may compound or use the thing patented, without making experiments: Wood v. Underhill, 5 How. 1; Gray et al. v. James et al., 1 Peters C. C. 394; Burr v. Cowperthwait, 4 Blatch. C. C. 163; Seymour v. Osborne, 11 Id. 516. In the case of Lowell v. Lewis, 1 Mass. 182, however, it was decided, that if the invention be definitely described in the patent, so as to distinguish it from what is before known, the patent will be good, though the specification does not describe the invention, in such full, exact, and clear terms, that a person skilled in the art or science of which it is a branch, could construct or make the thing invented; but the invention must be so clearly described, as to enable the public to appropriate it, after the expiration of the patent right: Sullivan v. Redfield et al., 1 Paine C. C. 441; Evans v. Chambers, 2 Wash. C. C. 125; Ames v. Howard et al., 1 Sumn. 482; and not leave the person attempting to use the discovery to find it out by experiment: Tyler v. Boston, 7 Wall. U. S. 327.

If a patent has been granted upon a specification defective by reason of its obscurity, the proper course is to surrender the patent and take out a new one: Stimpson v. The West Chester Railroad Company, 4 How. 380; Wilson v. Rousseau et al. Id. 646; Odwine v. The Amesbury Nail Factory, 2 Mass. 28; and the second patent will be considered as emanating, at the time the first was granted: Shaw v. Cooper, 7 Peters 292; Morris v. Huntington, 1 Paine C. C. 348; Grant et al. v. Raymond, 6 Peters 218; The Philadelphia and Trenton Railroad Company v. Stimpson, 14 Id. 448; Godfrey v. Eames, 1 Wall. 317.

If a patent includes more than the actual invention, it is void: Wood v. Underhill et al., 5 How. 1, O'Reilly et al. v. Morse, et al., 15 Id. 63; Whitney et al. v. Emmit et al., 1 Baldw. 303; Batten v. Taggart, 2 Wall. Jr. 101; and the proper course under these circumstances, is for the inventor to enter a disclaimer for the excess. See *ante*, p. 241, note 2.

Nothing useless or frivolous, or injurious to the moral health or comfort of society, can be the subject of a patent: Bedford v. Hunt et al., 1 Mass. 302; Whitney et al. v. Emmett et al. 1 Baldw. 303; Lowell v. Lewis, 1 Mass. 182; Langdon v. De Groot, 1 Paine C. C. 203; consequently, where the principle of two machines is entirely similar, and the only difference consists, in the latter being constructed of materials better adapted to the purposes

ing copies of an original work or composition.(*m*)[1] From the nature

(*m*) 14 M. & W. 316.

for which it was made than the former, it was not considered as entitled to a patent, not being sufficiently useful: Hotchkiss et al. *v.* Greenwood et al., 11 How. 266; Stimpson *v.* The Baltimore and Susquehanna Railroad Company, 10 Id. 343.

On the subject of infringements of patents, see McClurg et al. *v.* Kingsland et al., 1 How. 202; Gayler et al. *v.* Wilder, 10 Id. 477; Wilson *v.* Barnum, 8 Id. 258; Silsbee *v.* Foote, 14 Id. 219; Gray et al. *v.* James et al., 1 Peters C. C. 394; Dixon *v.* Moyer, 4 Wash. C. C. 69; Sawin et al. *v.* Guild, 1 Gall. 485; Evans *v.* Jordan et al., 1 Brockenb. 248; Livingston & Co. *v.* Jones & Co., 3 Wall. Jr. 330; Batten *v.* Silliman, Id.; Jones *v.* Morehead, 1 Wall. 155; Kendall *v.* Winsor, 21 How. U. S. 322.

[1] By the eighty-sixth section of the act already referred to on the subject of patents and copyrights, it is provided, "That any citizen of the United States, or resident therein, who shall be the author, inventor or designer, or proprietor of any book, map, chart, dramatic or musical composition, engraving, cut, print, or photograph, or negative thereof, or of a painting, drawing, chromo, statue, statuary, and of models or designs intended to be perfected as works of the fine arts, and his executors, administrators or assigns, shall upon complying with the provisions of this act, have the sole liberty of printing, reprinting, publishing, completing, copying, executing, finishing, and vending the same; and in the case of a dramatic composition, of publicly performing or representing it, or causing it to be performed or represented by others; and authors may reserve the right to dramatize or translate their own works." And by the eighty-seventh section thereof, the period during which this privilege may be enjoyed, is limited to twenty-eight years, to be continued, however, for a further term of fourteen years, or in case of the death of the author or inventor, to his widow and children upon conforming to the regulations contained in the eighty-eighth section of said act.

No person shall be entitled to a copyright unless he shall before publication, deposit in the mail a printed copy of the title of the book or other article, or a description of the painting, drawing, chromo, statue, statuary, or model or design for a work of the fine arts, for which he desires a copyright, addressed to the Librarian of Congress, and, within ten days from the publication thereof, deposit in the mail two copies of such copyright book or other article, or in case of a painting, drawing, statue, statuary, model or design for a work of the fine arts, a photograph of the same, to be addressed to said Librarian of Congress, as thereafter in said act provided.

The ninety-first section provides, "That the Librarian of Congress shall record the name of such copyright book or other article, forthwith, in a book to be kept for that purpose, in the words following: "Library of Congress, to wit, Be it reremembered that on the day of Anno Domini A. B. of hath deposited in this office, the title of a book, (map, chart, or otherwise, as the case may be, or description of the article), the title or description of which is in the following words, to wit: (here insert the title or description), the right whereof he claims as author, originator, (or proprietor, as the case may be), in conformity with the laws of the United States respecting copyrights. C. D., Librarian of Congress." And he shall give a copy of the title or description, under the seal of the Librarian of Congress, to said proprietor, whenever he shall require it."

But by the ninety-seventh section thereof, no person shall maintain an action for the infringement of his copyright, unless he shall give notice thereof by inserting in the several copies of every edition published, on the title page, or the page immediately following, if it be a book; or if a map, chart, musical composition, print, cut, engraving, photograph, painting, draw-

of this right it must almost necessarily have had its origin at a period subsequent to the invention of the art of printing. It is, however, the better opinion that such a right existed prior to the Statute of Anne,(*n*) by which the term of an author's copyright was first limited by the legislature.(*o*) But this statute, together with others by which the copyright of authors was further secured,(*p*) has been repealed by the act of the present reign to amend the law of copyright, on which the law of copyright now depends.(*q*) By this act the copyright of every book (which term includes for the purposes of the act every pamphlet, sheet of letterpress, sheet of music, map, chart or plan) published after the passing of the act in the lifetime of the author shall endure for his natural life, and for the further term of seven years from his death, and shall be the property of such author and his assigns; but if the term of seven years shall expire before the end of forty-two years from the first publication of the book, the copyright shall in that case endure for such period of forty-two years; and the copyright in every book published after the death of its author shall endure for forty-two years from the first publication thereof.(*r*) By the same act the existing copyright in books then published is extended for the full term provided by the act in the case of books thereafter published. But if the copyright belong wholly or partly to a publisher or other person, who has acquired it for any other consideration than that of natural love and affection, the copyright is not to be extended by the act, *unless the author, if living, or his personal representative if he be dead, and the proprietor of such copyright, shall, before the expiration of the subsisting term of copyright, consent and agree to accept the benefits of the act, and shall register a minute of such consent in the prescribed form; in which case the copyright shall endure for the full term provided by the act, and shall be the property of the person or persons expressed in the minute.(*s*) And in order to provide against

[*247]

(*n*) 8 Anne, c. 19.

(*o*) Miller *v.* Taylor, 4 Burr. 2303; Donaldson *v.* Beckett, 4 Burr. 2408; 2 Bro. P. C. 129; Boosey *v.* Jefferys, 6 Exch. Rep. 592.

(*p*) Stats. 41 Geo. III. c. 107; 54 Geo. III. c. 156.

(*q*) Stat. 5 & 6 Vict. c. 45.

(*r*) Sect. 3.

(*s*) Stat. 5 & 6 Vict. c. 45, s. 4.

ing, chromo, statue, statuary, or model or design intended to be perfected and completed as a work of the fine arts, by inscribing upon some portion of the face or front thereof, or on the face of the substance on which the same shall be mounted, the following words, viz., "Entered according to the Act of Congress, in the year by A. B., in the office of the Librarian of Congress at Washington." Stats. at Large (1869–1870), p. 212, &c.

the suppression of books of importance to the public, the Judicial Committee of the Privy Council are authorized, on complaint made to them, that the proprietor of the copyright in any book, after the death of its author, has refused to allow its republication, to grant a license to the complainant to publish the book in such manner and subject to such conditions as they may think fit.(*t*) And with regard to encyclopædias, reviews and other periodical works, it is provided, that the copyright in every article shall belong to the proprietor of the work for the same term as is given by the act to authors of books, whenever any such article shall have been or shall be composed on the terms that the copyright therein shall belong to such proprietor and be paid for by him;(*u*) but payment must be actually made by the proprietor before the copyright can vest in him;(*x*) and after the term of twenty-eight years from the first publication of any such article, the right of publishing the same in a separate form shall revert to the author for the remainder of the term given by the act; and during such term of twenty-eight years the proprietor shall not publish any such article separately without previously obtaining the consent of the author or his assigns. But any [*248] author may reserve to himself the *right to publish any such composition in a separate form, and he will then be entitled to the copyright in such composition when published separately, without prejudice to the right of the proprietor of the encyclopædia, review or other periodical in which it may have first appeared.(*y*) By the same act the sole liberty of representing any dramatic piece at any place of dramatic entertainment, and of performing any musical composition in any public place,(*z*) is secured to the author and his assigns for the same term as is provided for the duration of copyright in books.(*a*) The property in dramatic works had previously been secured to the authors for a shorter period by an act of the reign of King William the Fourth, which is still in operation.(*b*) It is now decided that a foreigner residing abroad is not entitled to the copyright of any work composed by him and first published in this country; but a foreigner residing in England or in

(*t*) Stat. 5 & 6 Vict. c. 45, s. 5.

(*u*) See Bishop of Hereford *v.* Griffin, 16 Sim. 190; Sweet *v.* Benning, 16 C. B. 459 (E. C. L. R. vol. 81).

(*x*) Richardson *v.* Gilbert, 1 Sim. N. S. 336.

(*y*) Stat. 5 & 6 Vict. c. 45, s. 18.

(*z*) Russell *v.* Smith, 15 Sim. 181; 12 Q. B. 217 (E. C. L. R. vol. 64).

(*a*) Stat. 5 & 6 Vict. c. 45, s. 20.

(*b*) Stat. 3 & 4 Will. IV. c. 15. See Morton *v.* Copeland, 16 C. B. 517 (E. C. L. R. vol. 81); Marsh *v.* Conquest, 17 C. B. N. S. 418 (E. C. L. R. vol. 112); 12 W. R. 1006; Lacy *v.* Rhys, 4 B. & S. 873 (E. C. L. R. vol. 116).

a British colony at the time of the first publication of his work is entitled to the copyright.(*c*)[1]

By the same act a book of registry is required to be kept at Stationers' Hall, open to public inspection on payment of a small fee, in which may be registered the proprietorship and assignment of copyrights.(*d*) And no proprietor of copyright in any book which shall be first published after the passing of the act can maintain any action or suit at law or in equity, or any summary *proceeding, in any respect of any [*249] infringement of such copyright, unless he shall, before commencing such action, suit or proceeding, have caused such book to be registered pursuant to the act; but the omission to register will not affect the copyright in the book, but only the right to sue or proceed in respect of the infringement thereof. And the remedies of the proprietors of the sole liberty of representing any dramatic piece under the above-mentioned act of Will. IV. are not to be prejudiced, although no entry shall be made in the register book.(*e*) And every registered proprietor is empowered to assign his interest by making entry in the book of registry of such assignment and of the name and place of abode of the

(*c*) Jefferys *v.* Boosey, H. of Lords, 1 Jur. N. S. 615; 4 H. of L. Cases 815; Low *v.* Routledge, V.-C. K., 10 Jur. N. S. 922, affirmed 11 Jur. N. S. 939; Law Rep. 3 H. of L. 100.

(*d*) Stat. 5 & 6 Vict. c. 45, ss. 11, 19, 20. See Ex parte Davidson, 18 C. B. 297; (E. C. L. R. vol. 86); Ex parte Davidson, 2 E. & B. 577 (E. C. L. R. vol. 75), *qu?*

(*e*) Stat. 5 & 6 Vict. c. 45, s. 24.

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[1] In the recent case of Low *v.* Routledge, Law Rep. 1 Ch. 42, referred to by the author, it was decided that an alien friend, coming into a British colony, and residing there for the purpose of acquiring copyright, during and at the time of the publication in England, of a work composed by him, and first published in that country, is entitled to copyright in England in the work so published, though he may not, under the laws in force in the colony where he is residing, be entitled to copyright there.

The facts of this case were these: Maria S. Cummins, author of the story called "Haunted Hearts," was a native of this country, but in April and May of 1864, resided in Montreal, Canada. In the month of April, 1864, Sampson, Low, Son & Co., of London, the plaintiffs, paid the said M. S. Cummins, the purchase-money for the manuscript and copyright of the said production; and thereupon she signed at Montreal, and from thence transmitted to the plaintiffs, due authority for enabling them to procure entries of her proprietorship in the copyright, and of an assignment thereof by her to the plaintiffs, pursuant to statute. It was alleged also, that the book was printed and published on the 23d day of May, 1864.

The principle, however, above alluded to, did not control the case, which went off on a demurrer, on the ground that in the entry of the proprietorship of the copyright, the name of the plaintiff's firm was different from the name stated in the bill; and that the date of publication was untruly stated.

See *post*, p. 253, note.

assignee, in the form given in a schedule to the act; and such assignment so entered is declared to be effectual in law to all intents and purposes whatsoever, without being subject to any stamp or duty, and to be of the same force and effect as if such assignment had been made by deed.(*f*)[1] But if the right of representing any dramatic piece or performing any musical composition is intended to pass to the assignee of the copyright, an entry must be expressly made of such intention.(*g*)

The act also expressly provides, that all copyrights protected by the act shall be deemed personal property, and shall be transmissible by bequest; or in case of intestacy, shall be subject to the same laws of distribution as other personal property.(*h*)

In order to give more effectual protection to persons entitled to the [*250] copyright of books, it is also provided *that no person, not being the proprietor of the copyright, or some person authorized by

(*f*) Stat. 5 & 6 Vict. c. 45, s. 13. (*g*) Sect. 22. (*h*) Sect. 25.

[1] The 89th section of the Act of Congress of the 8th of July, 1870, prescribes "that copyrights shall be assignable by law, by any instrument of writing, and such assignment shall be recorded in the office of the librarian of Congress, within sixty days after its execution, in default of which it shall be void as against any subsequent purchaser or mortgagee for a valuable consideration without notice."

But under the laws of the United States existing previous to this act, it has been decided, that the assignment, if not recorded, is nevertheless valid as between the parties, and also, as to all persons not claiming under the assignors: Webb et al. *v.* Powel et al., 2 Wood & M. 497.

An assignment made by one entitled to a copyright, will only convey the present right of the author, and will not cover any future right to which he may be entitled, by reason of the renewal of his right, unless it is clearly indicated that such future right shall also have been assigned; this is based upon the principle, that the laws were intended for the benefit of the authors themselves: Pierpont *v.* Fowle, 2 Wood & M. 23.

Where a non-resident alien, author of an unprinted comedy, had for a valuable consideration transferred his proprietorship of it for the United States, to a resident of New York, who adopted measures for procuring a copyright, and in the meantime represented the comedy, somewhat modified, upon the public stage, it was held, that the assignee could not sustain a suit under the statutes of the United States, against one, who, having obtained his knowledge from the English copy, and from witnessing the performance in New York, was representing the comedy on the stage in another city. But it was also held, that notwithstanding the foreign author's assignment, was at law nothing more than a mere license, it was still, in equity, valuable as an assignment for the United States, of such literary property as could exist in his composition, and that consequently the suit could be maintained before an equitable tribunal: Keene *v.* Wheatley et al., 9 Am. L. Reg. 33.

An author does not abandon any of his rights in a play, by consenting to its public representation while in manuscript, and before it is copyrighted: Boucicault *v.* Fox, 5 Blatch. C. C. 87.

him, may import into any part of the United Kingdom, or into any other part of the British dominions, for sale or hire any printed book first composed or written or printed and published in any part of the United Kingdom, wherein there shall be copyright, and reprinted in any country or place whatsoever out of the British dominions.(*i*) And by subsequent acts,(*j*) books, wherein the copyright is subsisting, first composed or written or printed in the United Kingdom, and printed or reprinted in any other country, are absolutely prohibited to be imported either into the United Kingdom or into the British possessions abroad, provided the proprietor of such copyright, or his agent, shall have given notice in writing to the commissioners of customs that such copyright subsists, and in such notice shall have stated when the copyright will expire. But by another act(*k*) it is provided, that in case the proper legislative authorities in any British possession shall make any act or ordinance to make due provision for securing the rights of British authors in such possession, her Majesty, on the same being transmitted to the Secretary of State, may, if she think fit so to do, express her royal approval of such act or ordinance, and thereupon may issue an order in council declaring that, so long as the provisions of such act or ordinance continue in force within such colony, the prohibitions contained in the above-mentioned acts, or in any other acts, with respect to foreign reprints of books first composed, written, printed or published in the United Kingdom, and entitled to copyright therein, shall be suspended so far as regards such colony; and thereupon such act or ordinance shall come into operation, except so far as *may be otherwise provided therein, or as may be otherwise directed by such order in council.(*l*) [*251]

By acts of parliament of an older date, copyright has also been created in prints, engravings, maps, charts and plans for the term of twenty-eight years, to commence from the day of first publishing thereof; which day, together with the proprietor's name, is to be truly engraved on each plate, and printed on every print.(*m*)[1] But these acts do not apply to illustrative wood engravings printed on the same sheet as the letter-press

(*i*) Stat. 5 & 6 Vict. c. 45, s. 17.

(*j*) Stat. 8 & 9 Vict. c. 93, s. 9, and 16 & 17 Vict. c. 107, ss. 44, 160.

(*k*) Stat. 10 & 11 Vict. c. 95.

(*l*) Several British colonies have obtained Orders in Council under this act. See 6 Jur. N. S. pt. 2, p. 45.

(*m*) Stat. 8 Geo. II. c. 13, amended by 7 Geo. III. c. 38, and rendered more effectual by 17 Geo. III. c. 57; Gambart *v.* Sumner, 5 H. & N. 5; Gambart *v.* Ball, 14 C. B. N. S. 306 (E. C. L. R. vol. 108).

[1] See *ante*, p. 246, note 1.

of a book, as such engravings form part of the book and are comprised within its copyright.(*n*) Under these acts the assignee of the copyright may bring an action in his own name against any person who may pirate it.(*o*) And by a modern statute(*p*) all the provisions contained in these acts are extended to the United Kingdom of Great Britain and Ireland. And it is provided,(*q*) that if any person shall, during the existence of the copyright, engrave, etch or publish any engraving or print of any description whatever, either in whole or in part, already published in any part of Great Britain or Ireland, without the express consent of the proprietor or proprietors thereof first obtained in writing signed by him, her or them respectively, with his, her or their own hand or hands, in the presence of and attested by two or more credible witnesses, then every such proprietor may, by a separate action upon the case, to be brought [*252] against the person so offending, *in any court of law in Great Britain or Ireland, recover such damages as the jury shall assess, together with double costs of suit. By a more recent act it is declared that the provisions of the above-mentioned statutes are intended to include prints taken by lithography, or any other mechanical process by which prints or impressions of drawings or designs are capable of being multiplied indefinitely.(*r*)

By other acts of parliament copyright has been granted to the makers of new and original sculptures, models, copies and casts for the term of fourteen years from their first putting forth or publishing the same,(*s*) with a further term of fourteen years to the original maker, if he shall be then living;(*t*) provided that in every case the proprietor cause his name, with the date, to be put on every such sculpture, model, copy or cast before the same shall be put forth or published.(*u*)[1] And it is also provided that no person who shall purchase the right or property of any such sculpture, model, copy or cast of the proprietor, expressed in a deed in writing signed by him with his own hand, in the presence of and attested by two or more credible witnesses, shall be subject to any action for copying, casting or vending the same.(*x*) By the Designs Act, 1850,(*y*) provision has been made for the registration of sculptures,

(*n*) Bogue *v.* Houlston, 5 De G. & Sm. 267; s. c. 16 Jur. 272.
(*o*) Thompson *v.* Symonds, 5 Term Rep. 41.
(*p*) Stat. 6 & 7 Will. IV. c. 59, s. 1. (*q*) Sect. 2.
(*r*) Stat. 15 & 16 Vict. c. 12, s. 14.
(*s*) Stat. 38 Geo. III. c. 71, amended by 54 Geo. III. c. 56.
(*t*) Stat. 54 Geo. III. c. 56, s. 6. (*u*) Sect. 1.
(*x*) Sect. 4. (*y*) Stat. 13 & 14 Vict. c. 104, s. 6.

[1] See *ante*, p. 246, note 1.

models, copies and casts within the protection of the Sculpture Copyright Acts, which registration entitles the proprietor of the copyright to certain penalties in case of piracy.(*z*) And with regard to paintings, drawings and photographs, it is now provided that the exclusive right of copying, engraving, *reproducing and multiplying them by any means and of any size shall belong to the author, being a British subject [*253] or resident within the dominions of the Crown, for the term of his life and seven years after his death.(*a*) And a register of proprietors of copyright in paintings, drawings and lithographs is established at Stationers' Hall, subject to similar regulations to that established for the registry of copyright in books.(*b*)

By an act of parliament recently passed to amend the law of international copyright,(*c*) her Majesty is empowered by any order in council to grant the privilege of copyright for such period as shall be defined in such order (not exceeding the term allowed in this country), to the authors, inventors and makers of books, prints, articles of sculpture and other works of art, or any particular class of them, to be defined in such order, which shall, after a future time to be specified in such order, be first published in any foreign country, to be named in such order.[1] And her Majesty is also empowered(*d*) by any order in council to direct that the authors of dramatic pieces and musical compositions, which shall after a future time to be specified in such order, be first publicly represented or performed in any foreign country to be named in such order, shall have the sole liberty of representing or performing in any part of the British dominions such dramatic pieces or musical compositions during such period as shall be defined in such order, not exceeding the period allowed in this country. Provision however is made for the entry of proper particulars of the subjects for which copyrights shall be granted in the register book of the Stationers' Company in London, within a

(*z*) Stat. 13 & 14 Vict. c. 104, s. 7. (*a*) Stat. 25 & 26 Vict. c. 68, s. 1.

(*b*) Sects. 4, 5, *ante*, p. 247.

(*c*) Stat. 7 & 8 Vict. c. 12, ss. 2, 3, 4, extended to paintings, drawings and photographs by stat. 25 & 26 Vict. c. 68, s. 12.

(*d*) Stat. 7 & 8 Vict. c. 12, s. 5.

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1 An international copyright has never been a part of our system, and it was virtually so declared by the eighth section of the Act of Congress of the 3d of February, 1841; and now by the Act of the 8th of July, 1870, it is provided, that nothing therein contained "shall be construed to prohibit the printing, publishing, importation, or sale of any book, map, chart, dramatic or musical composition, print, cut, engraving, or photograph, written, composed, or made by any person not a citizen of the United States, nor resident therein," sec. 103.

[*254] time to be prescribed in each such *order in council.(e) And all copies of books wherein there shall be any subsisting copyright by virtue of this act, or of any order in council made in pursuance thereof, printed or reprinted in any foreign country, except that in which such books were first published, are absolutely prohibited to be imported into any part of the British dominions, except with the consent of the registered proprietor of the copyright thereof, or his agent authorized in writing.(f) But no such order in council shall have any effect unless it shall be therein stated, as the ground for issuing the same, that due protection has been secured by the foreign power named in such order in council for the benefit of parties interested in works first published in the dominions of her Majesty, similar to those comprised in such order.(g) And every such order in council is to be published in the London Gazette as soon as may be after the making thereof, and from the time of such publication shall have the same effect as if every part thereof were included in the act.(h) And no copyright is allowed to any book, dramatic piece, musical composition, print, article of sculpture or other work of art, first published out of her Majesty's dominions, otherwise than under this act. A convention under this act has already been effected with France, the stipulations of which have been confirmed by act of parliament.(i) And the provisions of the International Copyright Act have been extended to authorized translations of foreign books for a term not exceeding five years from the first publication of such translations;(k) also to authorized translations of foreign dramatic pieces for a term not exceeding five years from the time at which the authorized translations are first published or publicly represented,(l) but so as [*255] *not to prevent fair imitations or adaptations to the English stage of any dramatic piece or musical composition published in any foreign country.(m)

No person can print or publish any newspaper before delivering at the Stamp Office a declaration containing, amongst other things, the true name, addition, place of abode of the printer and publisher, and of every proprietor resident out of the United Kingdom, and also of every proprietor resident in the United Kingdom, if their number shall not exceed two, exclusive of the printer and publisher; and if their number should exceed two, then the names of two of the proprietors must be given, the

(e) Stat. 7 & 8 Vict. c. 12, ss. 6, 7, 8, 9; Cassell v. Stiff, 2 Kay & J. 279.

(f) Sect. 10.

(g) Sect. 14.

(h) Sect. 15.

(i) Stat. 15 & 16 Vict. c. 12.

(k) Sects. 1, 2, 3, 4.

(l) Sects. 4, 5.

(m) Sect. 6.

amount of whose shares shall not be less than the share of any other proprietor resident in the United Kingdom, exclusive of the printer and publisher; and the amount of their shares must be specified.(*n*) Under this act if one person holds in trust for another, both names must be mentioned;(*o*) and a mortgagee must be mentioned also, otherwise the right to publish the newspaper would formerly have been considered as goods of the mortgagee, in the order and disposition of the mortgagor, and would accordingly, in the event of his bankruptcy, have passed to his assignees.(*p*) But this appears to be no longer the case under the Bankruptcy Act, 1869.(*q*)[1]

By recent statutes a copyright has been granted to designs for articles of manufacture for the term of three years, one year, or nine calendar months, according to the nature of the manufacture;(*r*) and, in pursuance of *these acts, a registrar of designs for articles of manufacture has been appointed, by whom all designs to be protected [*256] by the acts are required to be registered;(*s*) and provision is also made for the transfer of the copyright in such designs by any writing purporting to be a transfer, and signed by the proprietor, and also for the registration of transfers in a prescribed form.(*t*) These acts have been extended and amended by the Designs Act, 1850,(*u*) which provides for the "provisional registration" of designs for the term of one year, and empowers the Board of Trade to extend the copyright in ornamental designs for such term, not exceeding the additional term of three years, as the board may think fit.(*v*) A more recent statute extends the copyright to certain ornamental designs,(*x*) and provides for the registration of any pattern or portion of any article of manufacture instead of a drawing or

(*n*) Stat. 6 & 7 Will. IV. c. 76, s. 6.

(*o*) Harmer *v*. Westmacott, 6 Sim. 284.

(*p*) Longman *v*. Tripp, 2 Bos. & Pull. N. R. 67; Ex parte Foss, Re Baldwyn, 2 De G. & J. 230.

(*q*) Stat. 32 & 33 Vict. c. 71, *ante*, p. 54.

(*r*) Stat. 5 & 6 Vict. c. 100, by which all the previous statutes were consolidated, and 6 & 7 Vict. c. 65; 21 & 22 Vict. c. 70; 24 & 25 Vict. c. 73.

(*s*) Stat. 6 & 7 Vict. c. 65, ss. 7, 8, 9.

(*t*) Stats. 5 & 6 Vict. c. 100, s. 6; 6 & 7 Vict. c. 65, s. 6.

(*u*) Stat. 13 & 14 Vict. c. 104. See also stats. 14 & 15 Vict. c. 8, extended by stat. 15 & 16 Vict. c. 6.

(*v*) Stat. 13 & 14 Vict. c. 104, s. 9.

(*x*) Stat. 21 & 22 Vict. c. 70, s. 3.

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[1] By the fourteenth section of the Bankrupt Law of the United States, the adjudication of bankruptcy and the appointment of his assignee, at once vests in said assignee all the bankrupt's rights in patents and patent-rights, and copyrights: 2 Brightly's U. S. Dig., p. 81, sec. 26.

description.(*y*) It also enables proceedings for piracy to be brought in the county court.(*z*)

The marks often used by manufacturers to designate goods made by them resemble copyright as a subject of property ;(*a*) and the Court of Chancery will restrain a third person from passing off his own goods as those made by another, by the use of that other person's trade mark. [*257] And when a business, with the machinery *and trade marks, is assigned from one person to another, the assignee has the same right as the assignor had before to prevent others from using the marks.(*b*) A trade mark may belong to particular works as well as to particular persons.(*c*) But those who themselves deceive the public cannot prevent others from using their marks.(*d*) A recent act of parliament has amended the law relating to the fraudulent marking of merchandise,(*e*) and has made the forging of trade marks or their wrongful application to articles of merchandise a misdemeanor.(*f*)[1] And every

(*y*) Stat. 21 & 22 Vict. c. 70, s. 5. (*z*) Sects. 8, 9.

(*a*) Hall *v.* Burrows, L. C., 10 Jur. N. S. 55; Leather-Cloth Company, Limited, *v.* American Leather-Cloth Company, Limited, H. of L., 13 W. R. 373; 11 Jur. N. S. 513. See, however, Collins' Company *v.* Brown, 3 Kay & J. 423.

(*b*) Edelston *v.* Vick, 11 Hare 78. (*c*) Motley *v.* Downman, 3 Myl. & Cr. 1.

(*d*) Pidding *v.* How. 8 Sim. 477; Perry *v.* Truefitt, 6 Beav. 66; Leather-Cloth Company, Limited, *v.* American Leather-Cloth Company, Limited, 13 W. R. 873; 11 Jur. N. S. 513.

(*e*) Stat. 25 & 26 Vict. c. 88. (*f*) Sects. 2, 3.

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[1] By the statute law of the United States on the subject of trade marks, "any person or firm domiciled in the United States, and any corporation created by the authority of the United States, or of any state or territory thereof, and any person, firm or corporation resident of, or located in any foreign country, which by treaty or convention affords similar privileges to citizens of the United States, and who are entitled to the exclusive use of any lawful trade mark, or who intend to adopt and within the United States, may obtain use any trade mark for exclusive use protection for such lawful trade mark, by complying with" certain specified requirements, such as recording in the Patent Office the name, residence, and place of business of the applicant; the merchandise to which it is to apply; the description of the trade mark, with a fac simile thereof; and the mode in which it is to be used; the time it has been used, and such other regulations as are prescribed in the manner therein provided; such exclusive use to continue for the period of thirty years, except where claimed for, or applied to, articles not manufactured in this country, and in which it receives protection under the laws of any foreign country for a shorter period, in which case it will cease here when it ceases to have any effect elsewhere; and the privilege of be renewed for a like period of thirty the exclusive use of such trade mark may years: Act of July 8, 1870, sec. 77, 78, Stats. at Large (1869–1870), p. 210, &c.

Independently of statutory regulation there is a property in trade-marks: Derringer *v.* Plate, 29 Cal. 292; Bradley *v.* Norton, 33 Conn. 157.

Equity will enjoin against the pirating

person who now contracts to sell any article with any trade mark thereon is deemed to warrant that such mark is genuine, unless the contrary be expressed in some writing signed by or on behalf of the vendor, and delivered to and accepted by the purchaser.(*g*) And the same provision has been made with respect to any description, statement or other indication of or respecting the number, quantity, measure or weight of any article, or the place or country in which it shall have been made or produced.(*h*)[1]

(*g*) Stat. 25 & 26 Vict. c. 88, s. 19. (*h*) Sect. 20.

of a trade-mark, where there is between the original and the imitation marks, such resemblance as would mislead purchasers using ordinary prudence and caution: Colladay *v.* Baird, Common Pleas of Philadelphia, 17 Leg. Intel. 365; Barnet *v.* Phalon, 9 Bosw. 192; but chancery will not interfere in such questions, so as to restrain a manufacturer from putting his name upon goods because it is the same as another manufacturer: Faber *v.* Faber, 49 Barb. 357; or an owner of goods from putting his trade-mark thereon, though it may contain the name of the manufacturer: Walton *v.* Crowley, 3 Blatch. C. C. 440; these being cases where, from the circumstances of each, the injury sustained must be without a remedy; or between the vendors of patent medicines, being quack medicines, the questions in these cases having too little merit to commend them on either side: Heath *v.* Wright, 3 Wall. Jr. 141.

[1] For some decisions on the law of copyright anterior to the Act of the eighth of July, 1870, see the following cases: There can be no copyright of an abstract idea; a thing invented, but not visible to others; the invention must, in addition, have been designed or represented in some visible form: Binns *v.* Woodruff, 4 Wash. C. C. 48; and it must be of something new and original, and not merely a copy from something already produced, with only such alterations as a person of skill and experience could readily make: Jollin *v.* Jacques et al., 1 Blatchf. 618; Webb et al. *v.* Powers et al., 2 Wood. & M. 497; but it matters not whether the materials of the compilation be new or old: Emerson *v.* Davies et al., 3 Story 768; for every one may have the right to use the materials, and yet the compilation be the subject of copyright: Gray et al. *v.* Russell et al., 1 Story 11; Atwill *v.* Ferrett, 2 Blatch. C. C. 39; Greene *v.* Bishop, 1 Cliff. C. C. 186. But a distinction is to be noticed between a compilation and an abridgment, for if a compilation be made of materials which are not open to all, but of the work of another, for which a copyright has been obtained, it is an infringement of that right: Webb et al. *v.* Powers et al., 2 Wood. & M. 497; but an abridgment, being not a mere compilation of the work of another, but a substantial condensation of the materials of the original work, requiring intellectual ability, and judgment and labor, is not an infringement of a copyright, but is itself a subject of copyright, notwithstanding a copyright has been obtained by the author of the previous work, of which it is an abridgment: Folsom et al. *v.* Marsh et al., 2 Story 100; Story's Exrs. *v.* Holcombe et al., 4 McLean 306.

By the common law, an author has a property in his manuscript, so long as he does not abandon it to the public: Bartlette *v.* Crittenden et al., 4 McLean 300; Wheaton et al *v.* Peters et al., 8 Peters 591; Bauker *v.* Caldwell, 3 Min. 94; and if he publishes his work, he dedicates it to the public: Bartlette *v.* Crittenden, 5 McLean 32; or the representation of a play in a public place of amusement, is a surrender of it to the public, so far as it can be retained in the memory without the use of notes: Keene *v.* Clarke, 5 Rob. 38; but

Connected with the subject of trade marks is that of goodwill. The goodwill of a trade or business is often of great value. It comprises every advantage which has been acquired by carrying on the business, whether connected with the premises in which the business has been carried on, or with the name of the firm by whom it has been conducted.(*i*) [*258] On the dissolution of *a partnership, each partner has a right, in the absence of any stipulation to the contrary, to use the name of the old firm;(*k*) and if there be a stipulation that, in case of the decease of one partner, the surviving partner shall take the stock or capital at a valuation, the goodwill must be included in such valuation.(*l*) The sale of the goodwill of a business will not prevent the vendor from setting up the same business on his own account, even in immediate proximity to the premises on which the old business has been carried on;(*m*) so that

(*i*) Churton *v*. Douglas, Johnson 174.

(*k*) Banks *v*. Gibson, M. R. 11 Jur. N. S. 680; 34 L. J. Chan. 179; 13 W. R. 1012.

(*l*) Hall *v*. Barrows, M. R. 9 Jur. N. S. 483, affirmed by L. C. 10 Jur. N. S. 55.

(*m*) Cruttwell *v*. Lye, 17 Ves. 335; Hall *v*. Barrows, Churton *v*. Douglas, *ubi supra*.

this last proposition has been denied in Boucicault *v*. Fox, 5 Blatch. C. C. 87, which holds that an author does not abandon any of his rights in a play, by consenting to its public representation while in manuscript and before it is copyrighted. The sending of a letter by post, is not considered as an abandonment of it, and the sole right of publishing still remains in the author: Denis *v*. Leclere, 1 Mart. (La.) 297; Folsom et al. *v*. Marsh et al., 2 Story 100; Wetmore *v*. Scovell et al., 3 Edw. Ch. 515; Grigsby *v*. Breckinridge, 2 Bush 480; and in accordance with the same principle it has been held, that where a manuscript had been used for the purposes of instruction, the author had not thereby abandoned it, even though the pupils had taken copies of it: Bartlette *v*. Crittenden et al., 4 McLean 300.

The case of Stephens *v*. Cady, 14 How. 529, decides that a copyright is not the subject of an execution at common law. A copper-plate engraving was taken in execution, and Justice Nelson, in his opinion, remarks, "The copper-plate engraving, like any other tangible personal property, is the subject of seizure and sale, on execution. And the title passes to the purchaser, the same as if made at a private sale. But the incorporeal right, secured by the statute to the author, to multiply copies of his map, by the use of the plate, being intangible, and resting altogether in grant, is not the subject of seizure and sale by means of this process—certainly not at common law. No doubt the property may be reached by a creditor's bill, and be applied to the payment of the debts of the author, the same as stock of the debtor is reached and applied, the court compelling a transfer and sale of the stock for the benefit of the creditors."

And see also Stevens *v*. Gladding, 17 How. 447.

On the subject of infringement of copyright, see Backus *v*. Gould et al., 7 How. 798; Story's Exrs. *v*. Holcombe et al., 4 McLean 306; Jollin *v*. Jacques et al., 1 Blatchf. 618; Webb et al. *v*. Powers et al., 2 Wood. & M. 497; Blunt *v*. Patten, 2 Paine C. C. 393; Little *v*. Gould, 2 Blatchf. C. C. 165, 362; Stowe *v*. Thomas, 2 Wall. Jr. 547; in this last case, which is one of the more recent on the subject of copyright, it was decided that the translation into another language, of a book for which a copyright was granted, was not an infringement of that right.

the purchaser should, in such cases, always insist on a covenant being entered into by a vendor not to carry on the business within so many miles of the old premises, which covenant as we have seen,(*n*) is valid. And in a recent case, where the goodwill of a partnership business was ordered to be sold by the Court, a notice was directed to be inserted in the advertisements and particulars of sale, that the sale would not prevent any person theretofore interested in the business from carrying on the like business in the same town.(*o*)[1]

(*n*) *Ante*, p. 91.

(*o*) Johnson *v.* Helleley, 2 De G. J. & S. 446.

[1] But good faith requires that the vendor of a goodwill should do nothing which directly tends to deprive his vendee of its benefits and advantages, and hence he cannot hold himself out to the public by advertisement or otherwise, as continuing his former business, or as carrying it on at another place: Hall's Ap., 60 Penn. St. 458. As to what constitutes good will, see Musselman's Ap., 62 Id. 81.

[*259]

*PART IV.

OF PERSONAL ESTATE GENERALLY.

CHAPTER I.

OF SETTLEMENTS OF PERSONAL PROPERTY.

PERSONAL property is capable of being settled, but not in the same manner as land. Land, being held by estates, is settled by means of life estates being given to some persons, with estates in remainder in tail and in fee simple to others. But personal property, as we have already observed,(*a*) is essentially the subject of absolute ownership. The settlement of such property, by the creation of estates in it, cannot therefore be accomplished. And there is a striking difference in many cases between the effect of the same limitation, according as it may be applied to real or to personal property.

As there can be no estate in personal property, it follows that there can be no such thing as an estate for life in such property in the strict meaning of the phrase. Thus, if any chattel, whether real or personal, be assigned to A. for his life, A. will at once become entitled in law to the whole. By the assignment, the property in the chattel passes to him, and the law knows nothing of a reversion in such chattel remaining in the assignor. And this is the case even though the chattel be a term of years of such length (for instance 1000 years) that A. could not possibly live so long.(*b*)[1] The term is [*260] *considered in law as an indivisible chattel, and consequently incapable of any such modification of ownership as is contained in a life estate.

(*a*) *Ante*, p. 7.

(*b*) 2 Prest. Abs. 5.

[1] A term of years, whether for one year, or for one thousand, is personal property: Petition of Timothy Gray, 5 Mass. 419; Brewster *v.* Hill, 1 N. H. 350; Dillingham *v.* Jenkins, 7 Sm. & Mars. 487; The Widow and Heirs of Reynolds *v.* The Commissioners of Stark Co., 5 Ohio 204; Field *v.* Howell, 6 Geo. 423; Williams's Exrs. *v.* The Mayor, &c., of Annapolis, 6 Har. & Johns. 529; although the legislatures of

An apparent exception to the above rule has long been established in the case of a bequest by will of a term of years to a person for his life:

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some of the States have enacted, that under certain circumstances, they shall be considered real property, and in other States, they have been made subject to the rules and regulations, prescribed with respect to real estate. thus, by the Revised Statutes of Mass., 1860, ch. 90, § 20, p. 471, "When land is demised for the term of one hundred years or more, the term shall, so long as fifty years of the same remain unexpired, be regarded as an estate in fee simple, as to everything concerning the descent and devise thereof, upon the decease of the owner, the right of dower therein, and the sale thereof by executors, administrators, or guardians, by license from any court; and also concerning the levy of executions thereon, and the redemption thereof, when taken in execution or when mortgaged;" and by Revis. Stats. of N. Y. 3d Vol. (5th ed.), p. 12, § 24, "A freehold estate, as well as a chattel real, may be created to commence at a future day; an estate for life may be created in a term of years, and a remainder limited thereon; a remainder of a freehold or chattel real, either contingent or vested, may be created expectant on the determination of a term of years." In Ohio, "Permanent leasehold estates, renewable forever, shall be subject to the same law of descent and distribution, as estates in fee are or may be subject to;" Ohio Revis. Stats. (1860), ch, 36, § 20, p. 505, and ch. 87, § 1, p. 1142. The laws of Pennsylvania, enjoin the recording of leases for a longer term than twenty-one years, as deeds of lands are recorded: Purd. Dig., by Brightly (1861), p. 321, §§ 2 and 3. The General Stats. of N. H. (1867), p. 252, § 4, contain a similar provision with respect to leases of a longer duration than seven years: and the Stats. of Vt. (1839), p. 312, § 6, fix the term of years which must be acknowledged by the grantor, and recorded, at any period greater than one year. In Maryland a leasehold estate under a lease for ninety-nine years, renewable forever, so far partakes of the realty that the title can only pass by deed executed with all the solemnities which are prescribed for the sale of real estate, and a vendor's lien for the purchase money of such an estate may be enforced in equity: Beatt *v.* Beatt, 21 Md. 578. See *ante*, p. 2, note 1.

Notwithstanding the statute of Ohio making permanent leaseholds subject to all the laws and rules applicable to land, with regard to descent and distribution, it is still to be doubted whether they are to be regarded as realty in that State: the early case of The Lessee of Bisbee *v.* Hall, 3 Ohio 465, which occurred before the enactment of the statute above referred to, decided that leases were subject to the laws of personal property; the subsequent case of Murdock et al. *v.* Ratcliffe, 7 Ohio 123, in interpreting a statute then in force, which declared that the tenants or lessees, should enjoy all the rights and privileges which they would be entitled to enjoy, did they hold their lands in fee simple, says, this provision was "designed, in our opinion, to secure to tenants, civil and political privileges, not to change the quality of their estates."

It having been enacted, that permanent leasehold estates, should be subject to the laws of real estate, as to descent and distribution, it was ruled in Loring *v.* McClendy et al., 11 Ohio 335, that a permanent leasehold estate is not a chattel, but realty; which is shaken, if not overruled, in The Lessee of Boyd et al. *v.* Talbert, 12 Ohio 213, where Chief Justice Lane remarks: "The question whether a lease be realty or personalty, need not be here determined; but I take the opportunity to express my apprehension, that the case reported last year" (Loring *v.* McClendy et al., 11 Ohio 355) "does not conclude this point, and I shall be ready to consider it when it becomes necessary." This is followed by The Northern Bank of Kentucky *v.* Roosa, 13 Ohio 334, explaining

in this case the intention of the testator is carried into effect by the application of a doctrine similar to that of executory devises of real

Loring *v.* McClendy, and deciding that judgments are liens, without levy, for one year, on permanent leaseholds as upon other real estate.

And this doubt is perhaps increased, by the opinion of Spalding, J., in the case of Buckingham *v.* Reeve et al., 19 Ohio 399, wherein he says, that if he was called upon to decide the question directly, he should hesitate to say that a judgment at law would have a lien upon any leasehold estate whatever; and adds further, that the law then in force in Ohio regulating permanent leaseholds, had "respect only to the treatment, after an order of sale, or the levy of an execution." But in Phillips et al. *v.* Knox County Mutual Insurance Company, 20 Ohio 181, it was said, that where a lease had been made for ninety-nine years, it was equivalent to the fee. And see also McAlpin *v.* Woodruff, 11 Ohio 120.

Strictly speaking, there cannot be a limitation of personal property after an estate for life in it; nevertheless, this may be attained by means of an executory devise, or deed of trust: Cooper *v.* Cooper, 2 Brevard 355; and the only question to be determined, in order to decide upon the validity of the limitation, is, whether it tends to create a perpetuity: that is, whether it is impossible for it to take effect, and be executed, within a life or lives in being, and twenty-one years added to the period of gestation, afterwards; if it will, it is a valid limitation: Griggs *v.* Dodge, 2 Day 28; Taber *v.* Packwood, Id. 52; Nevison et al. *v.* Taylor, Admr., 3 Halst. 43; Horne et al. *v.* Lyeth, 4 Har. & Johns. 431; Keating *v.* Reynolds, Bay 80; Cordle's Admr. *v.* Cordle's Exr., 6 Munf. 455; Timberlake *v.* Graves, Id. 174; Drury et al. *v.* Grace, 2 Har. & Johns. 356; Jackson *v.* Blanshaw, 3 Johns. 292; Paterson *v.* Ellis's Exrs., 11 Wend. 259; Scott, Exr., *v.* Price, Exr., 2 S. & R. 59; Miffin *v.* Neal, Admr., 6 Id. 460; Cassilly et al. *v.* Meyer et al., 4 Md. 1; Hubley *v.* Long, 2 Grant's Cas. 268; Ingram *v.* Smith, 1 Head (Tenn.) 411; Thornton *v.* Burch, 20 Ga. 791; Condict *v.* King, 2 Beasley (N. J.) 375.

In Horne et al. *v.* Lyeth, 4 Har. & Johns. 431, Chief Justice Dorsey uses the following words: "Having thus briefly examined what would have been the operation of this bequest, if the subject-matter had been a frank-tenant (and in doing this, we were necessarily led upon an inquiry concerning the meaning and legal effect, of the word 'heirs' and 'heirs of the body,' when limited upon a preceding estate of freehold), we shall now consider the bequest as applicable to chattel interest, or leasehold property.

"At one period of our law, if a term for years or chattel was bequeathed to one for life, and after his death to a third person, the ulterior limitation was considered void, and the whole interest of the term or thing, became vested in the first devisee; but in process of time, this doctrine was abandoned, and courts of justice, on grounds of general utility and public convenience, sustained the superadded limitation as an executory devise. . . . . If a leasehold estate is limited to one for life, remainder to the 'heirs of his body,' the whole interest vests in the first taker, and the words 'for life,' will not be sufficient to restrain his interest to a life estate. But if words of limitation are superadded to the words 'heirs of the body,' such additional limitation is considered as indicative of an intention, to give only a life estate. . . . . If the words 'heirs of the body' (which naturally point to children and their descendants), are considered as words of limitation, and enlarge the estate of the first devisee to an absolute interest, why should not the word 'heirs,' so comprehensive in its signification, give as great an interest?"

In accordance with the doctrine, that if personal property be given to one for life, remainder to his heirs, or to the heirs of

estates.(c) The whole term of years is considered as vesting in the legatee for life, in the same manner as under an assignment by deed; but on his decease the term is held to shift away from him, and to vest, by way of *executory bequest*, in the person to be next entitled.(d) Accordingly, if a term of years be bequeathed to A. for his life, and after his decease to B., A. will have, during his life, the whole term vested in him, and B. will have no vested estate, but a mere *possibility*, as it is termed,(e) until after the decease of A.; and this possibility, like the possibility of obtaining a real estate, was formerly inalienable at law unless by will,(f) though capable of assignment in equity.(g) But by the act to amend the law of real property,(h) which repeals an act of the previous session passed for the same purpose,(i) it is provided that an

(c) See Principles of the Law of Real Property 249, 2d ed.; 256, 3d ed.; 259, 4th ed.; 270, 5th ed.; 284, 6th ed.; 292, 7th ed.; 301, 8th ed.

(d) Matthew Manning's Case, 8 Rep. 95; Lampert's Case, 10 Rep. 47.

(e) See Princeples of Law of the Real Property 223, 2d ed.; 230, 3d ed.; 231, 4th ed.; 240, 5th ed.; 250, 6th ed.; 256, 7th ed.; 267, 8th ed.

(f) Shep. Touch. 230.

(g) Fearne, Cont. Rem. 548.

(h) Stat. 8 & 9 Vict. c. 106, s. 6.

(i) Stat. 7 & 8 Vict. c. 76, s. 5.

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his body, he will take absolutely, unless there be words to show that only an estate for life was intended, see the following cases: Keating *v.* Reynolds, 1 Bay 80; Exrs. of Moffat *v.* Strong, 10 Johns. 12; Guery *v.* Vernon, 1 Nott & McC. 69; Dott et al. *v.* Cunnington, 1 Bay 453; Powell *v.* Glenn et al., 21 Ala. 458; Durden's Admr. *v.* Burns's Admr. et al., 6 Id. 363; Cruger et al. *v.* Heyward, Exr., et al., 2 Dessaus. 94; McGran *v.* Davenport, 6 Port. 319; Williams *v.* Graves, Exr., 17 Ala. 62; Ewing *v.* Standifer et al., 18 Id. 400; Woodley *v.* Findlay et al., 9 Id. 716; Machen *v.* Machen, 15 Id. 373; Powell *v.* Brandon, 24 Miss. 344; Barker *v.* Crosby, 32 Barb. 184; Rewalt *v.* Ulrich, 23 Penn. St. 388; Amelia Smith's Ap., Id. 9; Moore *v.* Brooks, 12 Gratt. 135; but very slight circumstances will be regarded as sufficient to indicate such intention: Hagerty *v.* Albright, 52 Penn. St. 274. But see to the contrary: Paterson *v.* Ellis's Admr., 11 Wend. 259.

A bequest of a life estate in personal property, gives the donee a right to consume or wear out such articles as cannot otherwise be enjoyed; and the donee's liability to the remainderman, is to be governed by the intent of the donor, collected from the whole will: German *v.* German, 27 Penn. St. 116; Holman's Ap., 24 Id. 174; and if the bequest is not specific, the personalty should be converted into money, of which the interest only would go to the tenant for life: Akerman *v.* Vreeland, 1 McCarter's (N. J.) 23; but where a bequest for life is made of personalty, which can be enjoyed without being consumed or decreased, though waste or destruction is practicable, and it is the intention of the testator that the legacy should be in the possession of the first taker, but also that it should be preserved for the subsequent enjoyment of the remainderman; the executor, under the act of the legislature of Pennsylvania of 24th of February, 1834, may require security from the first legatee for the proper return of the gift, before placing it in his possession: Clevenstine's Ap., 15 Penn. St. 496; Rodgers *v.* Rodgers, 7 Watts 15. See also, Act of 17th May, 1871, § 1; Purd. Dig. Suppl. p. 1652. And see also, Clarke *v.* Terry, 34 Conn. 176.

executory and future interest, and a possibility coupled with an interest, in any tenements or hereditaments of any tenure may be disposed of by deed. B. may, therefore, during the life of A., assign his expectancy by [*261] deed; and such *assignment will entitle the assignee to the whole term on A.'s decease. If, however, no such assignment should have been made, B. will become, on the decease of A., possessed of the whole term, which will then shift to B. by virtue of the executory bequest in his favor. The mere circumstance, indeed, of the term being bequeathed to A. for his life only, will operate to shift away the term on his decease,(*j*) independently of the bequest to B.; so that, if there had been no bequest over to B., the interest of A. would continue only during his life, and the residue of the term would then remain part of the undisposed of property of the testator. It may, however, be doubted whether the doctrine of executory bequests is applicable in law to any other chattels than chattels real.(*k*)[1]

The strict and ancient doctrine of the indivisibility of a chattel, though still retained by the courts of law, has no place in the modern Court of Chancery, which, in administering equity, carries out to the utmost the intentions of the parties. In equity, therefore, under a gift of personal property of any kind to A. for his life, and after his decease to B., A. is merely entitled to a life interest, and B. has, during the life of A., a vested interest in the remainder, of which he may dispose at his pleasure, and the Court of Chancery will compel the person to whom the courts of law may have awarded the legal interest to make good the disposition.[2] Accordingly, if the personal property so given should consist of movable goods, equity will compel A., the owner for life, to furnish and sign an inventory of the goods, and an undertaking to take proper care of

(*j*) Eyres *v.* Faulkland, 1 Salk. 231; Ker *v.* Lord Dungannon, 1 Dru. War. 509, 528.

(*k*) Fearne, Cont. Rem. 413. See, however, 1 Jarm. Wills, 793; 747, 2d ed.; Hoare *v.* Harker, 2 Term Rep. 376.

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[1] But see Cooper *v.* Cooper, 2 Brevard 355; Griggs *v.* Dodge, 2 Day 28; Taber *v.* Packwood, Id. 52; Nevison et al. *v.* Taylor, Admr., 3 Halst. 43; Cordle's Admr. *v.* Corde's Exr., 6 Munf. 455; Timberlake *v.* Graves, Id. 174; Guery *v.* Vernon, 1 Nott & McC. 69; Biscoe *v.* Biscoe, 6 Gill & Johns. 232; Raborg *v.* Hammond, 2 Har. & G. 42; Royal *v.* Eppes, Admr., 2 Munf. 479; Dashiel *v.* Dashiel, 2 Har. & Gill 127; Powell *v.* Glenn et al., 21 Ala. 458; Patterson *v.* Ellis's Exr., 11 Wend. 259; Bell *v.* Hogan, 1 Stew. 536; Scott, Exr. *v.* Price, Exr., 2 S. & R. 59; Williams *v.* Graves, Exr., 17 Ala. 62; Mifflin *v.* Neal, Admr., 6 S. & R. 460; Usilton *v.* Usilton et al., 3 Md. Ch Decs. 36; Woodley *v.* Findley et al., 9 Ala. 716; Machen *v.* Machen, 15 Id. 373; Rowe *v.* White, 1 Green 411. And see also *ante*, p. 259, note.

[2] See *ante*, p. 259, note.

*them.(*l*) This doctrine, however, is comparatively of modern date; for formerly the Court of Chancery followed the rules of law in the construction of such gifts; and if a gift of movable goods had been made to A. for his life, and after his decease to B., they would not have afforded to B. any assistance after A.'s decease.(*m*) But if the gift had been of the *use or enjoyment* of the goods only to A. for his life, and after his decease to B., the court would then have assisted B. by declaring A.'s representatives after his decease to be trustees only for the benefit of B.(*n*) But this distinction is now exploded; and the only case in which the tenant for life is now entitled absolutely to things given to him for life is, that of articles *quæ ipso usu consumuntur*, as wines, &c., a gift of which to a person for his life vests in him the absolute ownership.(*o*) In all other cases, as we have said, modern equity will assist the donee in remainder, to whom any gift of personal estate may be made after the decease of another who is to have them only for his life.(*p*) When, therefore, it is wished to make a settlement of any kind of personal property, the doctrine of the Court of Chancery is at once resorted to. The property is assigned to trustees, *in trust* for A. for his life, and after his decease *in trust* for B., &c. This assignment to the trustees vests in them the whole legal interest in the property; and in a court of law they are held to be absolutely entitled to it; for the Statute of Uses(*q*) has no application to any kind of personal estate. But in equity the trustees are compellable to pay the entire income to A. for his life, and after his decease to B., and so on according to the *trusts of the settlement; and if B. should alien his interest during the life of A., the trustees will be bound, on having notice of the disposition, to stand possessed of the property, after A.'s decease, in trust for the alienee.(*r*)

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When shares in joint stock companies are settled in the manner above mentioned, it sometimes becomes a question whether any extraordinary profit which may be divided amongst the shareholders by way of bonus should be considered as capital or as interest. The equitable tenant for life is too frequently inclined to consider himself entitled to any bonus in the

(*l*) Fearne, Cont. Rem. 407; Conduitt *v.* Soane, 1 Coll. 285.

(*m*) Fearne, Cont. Rem. 402. (*n*) Ibid. 404.

(*o*) Randall *v.* Russell, 3 Meriv. 190; Andrew *v.* Andrew, 1 Coll. 690.

(*p*) Fearne, Cont. Rem. 406.

(*q*) 27 Hen. VIII. c. 10; Principles of the Law of Real Property 126, 2d ed.; 131, 3d and 4th eds.; 136, 5th ed.; 142, 6th ed.; 146, 7th ed.; 152, 8th ed.

(*r*) A form of marriage settlement of stock and other personal estate upon the usual trusts will be found in Appendix (B).

same manner as to ordinary dividends. The Court of Chancery, however, usually considers every bonus, whether consisting of additional joint stock or shares,(*s*) or simply of money,(*t*) as part of the capital, unless it appear to be nothing more than an increased dividend arising from the increased profits of the year.(*u*) In the absence, therefore, of any special provision to the contrary, every bonus ought to be invested upon the trusts of the settlement, and the income only paid to the tenant for life.[1]

By a modern act of parliament,(*v*) on the decease of a person entitled to a life interest in any income, made payable or coming due at fixed periods, of any property, whether real or personal, his executors or [*264] administrators *are entitled to recover from the remainderman an apportioned part of the next payment of the income, according to the time which shall have elapsed since the last period of payment, up to and including the day of the decease of such person.[2]

(*s*) Brander *v.* Brander, 4 Ves. 800; Hooper *v.* Rossiter, 13 Price 774; s. c. M'Cleland 527.

(*t*) Paris *v.* Paris, 10 Ves. 185; Ward *v.* Combe, 7 Sim. 634. See also Gilly *v.* Burley, 22 Beav. 619, 624, and the cases there collected.

(*u*) Barclay *v.* Wainewright, 14 Ves. 66; Price *v.* Anderson, 15 Sim. 473; Preston *v.* Melvill, 16 Sim. 163; Maclaren *v.* Stanton, 3 De G. F. & J. 203.

(*v*) Stat. 4 & 5 Will. IV. c. 22, s. 2; Re Maxwell's Trusts, V.-C. W., 9 Jur. N. S. 350; 1 Hem. & Mill. 610.

[1] In Earp's Ap., 28 Penn. St. 368, where a testator devised and bequeathed the residue of his estate to his executors, in trust, to collect the rents, income, and interest, and to pay one equal fourth part to and for the use of each of his four children, respectively; and among his residuary estate, was stock held by the testator in a manufacturing company, upon which large surplus profits, over and above the current dividends declared, had accumulated, and continued to accumulate for several years after his death: It was held that the surplus fund accumulated by the company, over and above the current dividends at the time of the death of the testator, was a part of the principal of the fund, and was subject to the trusts declared in the will; and that the accumulations on the stock after the death of the testator, were as much a part of the income of the principal as the current dividends. And in Wiltbank's Ap., 64 Id. 256, approving Earp's Ap., it was held that the earnings and profits of stock of a decedent made after his death, are income, though in the form of capital, by the issue of new stock.

[2] At common law there can be no apportionment of rent: Zule *v.* Zule, 24 Wend. 76; Stillwell *v.* Doughty, 3 Bradf. 359; Marys *v.* Anderson, 24 Penn. St. 272; Wegtly *v.* R. R., 2 Grant Cas. 243; Bank of Penna. *v.* Wise, 3 Watts 397, in which last case it was decided that "the idea of apportioning the rent that becomes payable, after the purchaser of a reversionary interest in fee, at a sheriff's sale, has paid the purchase money, and received his deed of conveyance for it, between him and the defendant in the execution, as whose estate it was sold, is unknown to the law, and cannot be reconciled with any of its analogous and fixed principles." See also, Martin *v.* Martin, 7 Md. 368. And where a lease continued beyond the termination

And when any other limited interest determines, a similar right to an apportionment is also given. But the act makes no apportionment of rent between the heir or devisee and the executor of a tenant in fee

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of a life estate, it was held that there could be no apportionment thereof, and that the rent belonged to whosoever had the estate on the rent day; Marshall *v.* Moosley, 21 N. Y. 280. By a statute of Pennsylvania, where a tenant fraudulently removes from the premises the goods and chattels liable to distress, in order to deprive the landlord of his remedy, the rent may be apportioned up to the time of such fraudulent removal, and a distress forthwith made: Brightly's Purd. Dig. 611, sect. 6; so too where a levy under an execution is made on the tenant's goods in the demised premises liable to distress, the rent for the current year or quarter, apportioned to the time of the levy, is by statute payable out of the proceeds of the sale of the goods: Wickey *v.* Eyster, 58 Penn. St. 501; and where a reversioner disposes of a portion of the reversion, the rent may be apportioned between himself and his vendee: Linton *v.* Hart, 25 Penn. St. 193.

It is in accordance with the doctrine that rent cannot be apportioned as to time, that it has been decided, that where a tenant has been evicted of any portion of the demised premises by his landlord, the eviction is a bar to any claim by the landlord for rent: Shumway *v.* Collins, 6 Gray 227; Linton *v.* Hart, 25 Penn. St. 193; Wright *v.* Lattin, 38 Ill. 293.

If one is entitled for life, to the interest of a certain sum charged on real estate, and dies, the income may be apportioned, so that the interest which may accrue, between the day on which the interest was regularly payable, and the day of the death, will be paid to the executor or administrator: Sweigart *v.* Frey, Admr., 8 S. & R. 299; see also Green, Exr., *v.* Osborn, 17 Id. 171; Cole *v.* Patterson, 25 Wend. 456.

The rule of law which refuses apportionment of rent in respect of time, is applicable to all periodical payments becoming due at fixed intervals; not to sums accruing *de die ad diem.* Annuities, therefore, and dividends on money in the funds, are not apportionable, as a general rule. But dower, and sums for the maintenance of a wife and child are exceptions, and an annuity in lieu of dower will last as long as the dower would have lasted: Blight *v.* Blight, 51 Penn. St. 420. And interest, whether the principal is secured by mortgage or by bond, notwithstanding that it is expressly made payable half yearly, may be apportioned, for although reserved at fixed periods, it becomes due *de die ad diem* for forbearance of the principal, which the creditor is entitled to recall at pleasure: McKeen's Ap., 42 Penn. St. 484; Wertz's Ap., 65 Id. 306.

In accordance with the principle that the contract is terminated by the act of God, it has been held, that where one enters into a contract of hire for a year, and dies before the expiration of the year, his wages should be apportioned: Bacot *v.* Parnell, 2 Bail. 424; George *v.* Elliott, 2 Hen. & Munf. 5; Wolf *v.* Howes, 20 N. Y. 197; Babbitt *v.* Riddell, 2 Grant Cases 161.

In the state of South Carolina, an overseer hired for a year, who is turned away for misconduct, may nevertheless recover for the services actually performed while he conducted himself properly: Eakin *v.* Harrison, 4 McCord 249; but if he has been negligent in his duties, or loss has occurred by his leaving the service, he can recover nothing: Byrd *v.* Boyd, Id. 246, and of these matters a jury will judge, as well as of the amount to which he may be entitled: McClure *v.* Pyatt, Id. 26. It seems, also, in the same state, that "if one rents a house for a year, and during the term it is rendered untenable by a storm, the rent ought to be apportioned according to the time it was occupied;" Ripley *v.* Wightman, 4 McCord 447.

simple.(*w*) And where the property ceases with the interest, and does not go over to another, as in the case of a life annuity, the act appears inapplicable; and the right to an apportioned part should therefore, if desired, be expressly conferred.(*x*) The act extends only to instruments executed, and wills coming into operation after the passing of the act, which took place on the 16th June, 1834;(*y*) and its provisions do not apply to any case in which it is expressly stipulated that no apportionment shall take place, or to annual sums made payable in policies of assurance of any description.(*z*) Previously to this act no apportionment was made of annuities, or of the dividends of stock settled in trust for one person for life, with remainder to another; but the remainderman was entitled to the whole of the annuity or dividend which fell due next after the decease of the person entitled for life.(*a*) But in a case where the tenant for life of stock died on the day on which a half-year's dividend became due, it was held that it belonged to his personal estate.(*b*) If an [*265] annuity were *given for the maintenance of an infant,(*c*) or of a married woman living separate from her husband,(*d*) the necessity of the case was considered a ground for presuming that an apportionment was intended. The interest of money lent was also always apportioned; for though the payment of such interest be made half-yearly, yet it becomes due *de die in diem*, so long as the principal remains unpaid.(*e*)

An estate tail, such as that created by a gift of lands to a man and the heirs of his body,(*f*) has nothing analogous to it in personal property. An estate tail cannot be held in such property at law, neither does equity admit of any similar interest. A gift of personal property

(*w*) Brown *v.* Amyot, 3 Hare 173, 183; Beer *v.* Beer, C. P. 16 Jur. 223, 225; 12 C. B. 60 (E. C. L. R. vol. 74); Re Clulow, 3 Kay & J. 689.

(*x*) But see Carter *v.* Taggart, 16 Sim. 447; Trimmer *v.* Danby, V.-C. K. 23 L. J., Chan. 979.

(*y*) Mitchell *v.* Mitchell, 4 Beav. 549; Knight *v.* Boughton, 12 Beav. 312; Wardroper *v.* Cutfield, V.-C. K., 10 Jur. N. S. 194.

(*z*) Stat. 4 & 5 Will. IV. c. 22, s. 3.

(*a*) Pearly *v.* Smith, 3 Atk. 260; Sherrard *v.* Sherrard, 3 Atk. 502; Warden *v.* Ashburner, 2 De G. & S. 366; The Queen *v.* The Lords of the Treasury, 16 Q. B. 357 (E. C. L. R. vol. 71).

(*b*) Paton *v.* Sheppard, 10 Sim. 186.

(*c*) Hay *v.* Palmer, 2 P. Wms. 501; 1 Swanst. 349 note.

(*d*) Howell *v.* Hanforth, 2 W. Black. 1016

(*e*) Edwards *v.* Countess of Warwick, 2 P. Wms. 176; Banner *v.* Lowe, 13 Ves. 135; Re Roger's Trusts, 1 D. & S. 339.

(*f*) See Principles of the Law of Real Property 28, 2d ed.; 30, 3d and 4th eds.; 33, 5th, 6th, 7th and 8th eds.

of any kind to A. and the heirs of his body will simply vest in him the property given.(*g*) And in the construction of wills, where many informal expressions are allowed to vest an estate tail in lands, the general rule is, that expressions, which if applied to real estate would confer an estate tail, shall, when applied to personal property, simply give the absolute interest.(*h*) The same effect will be produced by a gift of such property to a man and his heirs. The words "heirs," and "heirs of his body," are quite inapplicable to personal estate; the heir, as heir, has nothing to do with the personal property of his ancestor.[1] Such property has nothing hereditary in its nature, but simply belongs to its owner for the time being. Hence, a gift of personal property to A. simply, without more, is sufficient to *vest in him the absolute interest.(*i*) [*266] Whilst, under the very same words, he would acquire a life interest only in real estate,(*j*) he will become absolutely entitled to personal property. Thus a gift of lands to A. for life, and after his decease to B., gives to B. a mere life interest in remainder expectant on the

(*g*) Fearne, Cont. Rem. 461, 463; Doncaster *v.* Doncaster, 3 Kay & J. 26.
(*h*) 2 Jarm. Wills, ch. 44, p. 534, 3d ed.
(*i*) Byng *v.* Lord Stafford, 5 Beav. 558.
(*j*) Principles of the Law of Real Property 17, 114, 2d ed.; 18, 119, 3d and 4th eds.; 18, 125, 5th ed.; 18, 131, 6th ed.; 18, 134, 7th ed,; 19, 140, 8th ed.

[1] Comfort *v.* Mather, 2 W. & S. 450, was the case of a bequest "to S. E., wife of J. E.," of the sum of $1000, "to have and to hold to her the said S. E., her heirs and assigns, forever;" and S. E. having died before the testator, it was held, that the bequest lapsed, Sergeant, J., remarking, that it had been "repeatedly and uniformly decided, in conformity to a principle of law, which is said to have been borrowed from the civil law, that every legacy implies a condition that the legatee shall survive the testator, and that where the legatee dies in the lifetime of the testator, the legacy lapses. The legislature of this State (Pennsylvania) has, by the act of 8th of April, 1833, corrected the rule, where a legacy is in favor of a child, or other lineal descendant of the testator, declaring that in such case it shall survive to the issue; but they have not thought fit to go further." See act of 8th of April, 1833, Purd. Dig. (1861), p. 1017. See also to the same point, Sword *v.* Adams, 3 Yeates 34; Dickinson *v.* Parvis et al., Exrs. 8 S. & R. 71; Bendall *v.* Bendall, 24 Ala. 295; Coffin *v.* Elliott, 9 Rich. Eq. 244; Hutchinson's Ap., 34 Conn. 300. By a subsequent enactment of the same State (Act of 6th May, 1844; Purd. Dig. 1017), it was provided, that "no devise or legacy, hereafter made in favor of a brother or sister, or the children of a deceased brother or sister, of any testator, such testator not leaving any lineal descendants, shall be deemed or held to lapse, or become void by reason of the decease of such devisee or legatee, in the lifetime of the testator, if such devisee or legatee shall leave issue surviving the testator; but such devise or legacy shall be good or available in favor of such surviving issue, with like effect as if such devisee had survived the testator, saving always to every testator the right to direct otherwise." Under this last act it has been decided, that a bequest by a testator to his sister, who was dead at the time the will was written, but who left children who survived the testator, was not void: Minter's Ap., 40 Penn. St. 111.

decease of A.;(*k*) unless indeed the gift be by will under the act for the amendment of the laws with respect to wills.(*l*) But a gift of personal property to A. for life, and after his decease to B., gives to B. a vested equitable interest in the corpus or body of the fund, to which he becomes absolutely entitled, subject only to A.'s life interest; and the circumstance of B.'s dying in the lifetime of A. would be immaterial.(*m*)

It is true that in deeds and other legal instruments it is usual to transfer personal estate absolutely, by the use of the words "executors, administrators and assigns." As real estate is conveyed to a man, his heirs and assigns,(*n*) so personal property is assigned to him, his executors, administrators and assigns. The executor or administrator is, as we shall see, the person who becomes legally entitled to a man's personal estate after his decease; in the same manner that a man's heir or assign becomes entitled to his real property. But the analogy extends no further. [*267] There is no necessity for the use of these terms(*o*) as there is for the employment of the *word "heirs." These terms, however, are constantly employed in conveyancing as words of limitation of an absolute interest; and a rule has sprung up with respect to their construction similar to the rule in Shelley's Case, by which the word "heirs," when following a life estate given to the ancestor, is merely a word of limitation, giving to such ancestor an estate in fee.(*p*) Thus, if money or stock be settled in trust for A. for life, and after his decease in trust for his executors, administrators and assigns, A. will be simply entitled absolutely;(*q*) in the same manner as a gift of lands to A. for his life, with remainder to his heirs and assigns, gives him an estate in fee simple. But as the rule, so far as it applies to personal property, is not founded on the same strict principle as the rule in Shelley's Case, a gift of such property to the executors or administrators (not adding assigns) of a person who has taken a previous life interest is sometimes

(*k*) Goodtitle d. Richards *v*. Edmonds, 7 Term Rep. 635.

(*l*) Stat. 7 Will. IV. & 1 Vict. c. 26, s. 28.

(*m*) Benyon *v*. Madison, 2 Bro. C. C. 75.

(*n*) Principles of the Law of Real Property 115, 2d ed.; 120, 3d and 4th eds.; 126, 5th ed.; 132, 6th ed.; 135, 7th ed.; 141, 8th ed.

(*o*) Elliott *v*. Davenport, 1 P. Wms. 84. See Earl of Lonsdale *v*. Countess of Berchtoldt, 1 Kay 646.

(*p*) See the Principles of the Law of Real Property 207, 2d ed.; 214, 3d ed.; 215, 4th ed.; 224, 5th ed.; 234, 6th ed.; 240, 7th ed.; 250, 8th ed.

(*q*) Co. Litt. 54 b; Hames *v*. Hames, 2 Keen 646; Grafftey *v*. Humpage, 1 Beav. 46; Howell *v*. Gayler, 5 Beav. 157; Meryon *v*. Collett, 8 Beav. 386; Morris *v*. Howes, 4 Hare 599.

construed as giving him no further interest in such property;(r) whilst, under the same circumstances, the word "heirs" in a gift of real estate would have given him the fee simple.

As no estates can subsist in personal property, it follows that the rules, on which contingent remainders in freehold lands depend for their existence, have never had any application to contingent dispositions of personal property. Such dispositions partake rather of the indestructible nature of executory devises and shifting *uses. Thus a gift of lands to [*268] A. for his life, and after his decease to such son of A. as shall first attain the age of twenty-one years, creates a contingent remainder, which will fail in the event of no son of A. having attained the prescribed age at the time of his decease.(s) The reason of this failure depends on the ancient rule, that there must always be some defined owner of the feudal possession; and, consequently, between the time of the death of A. and the time of his son's attaining the age of twenty-one years, some owner of the freehold ought to have been appointed, in whom the feudal possession might continue.(t) Personal property, however, has evidently nothing to do with these feudal rules relating to possession. If, therefore, a gift be made of personal property to trustees, in trust for A. for his life, and after his decease, in trust for such son of A. as shall first attain the age of twenty-one years; or if a term of years be bequeathed to A. for his life, and after his decease to such son of A. as shall first attain the age of twenty-one years; it will be immaterial whether or not the son attain the age of twenty-one years in the lifetime of his father. On his attaining that age, he will become entitled quite independently of his father's interest. His ownership will spring up, as it were, on the given event of his attaining the age. But as the indestructible nature of these future dispositions of personal estate might lead to trusts of indefinite duration, the rule of perpetuities, which confines executory interests within a live or lives in being, and twenty-one years afterwards, with a further allowance for the time of gestation, should it exist,(u) applies equally to personal as to real estate. And the

(r) Wallis *v.* Taylor, 8 Sim. 241; see 1 Beav. 52; Daniel *v.* Dudley, 1 Phi. 1; Attorney-General *v.* Malkin, 2 Phi. 64; Mackenzie *v.* Makenzie, 3 Macn. & G. 559. See also Alger *v.* Parrott, V.-C. W., Law Rep. 3 Eq. 328.

(s) Festing *v.* Allen, 12 M. & W. 279; 5 Hare 573; Holmes *v.* Prescott, V.-C. W. 10 Jur. N. S. 507; 12 W. R. 636.

(t) Principles of the Law of Real Property 209, 1st ed.; 217, 2d ed.; 224, 3d and 4th eds.; 233, 5th ed.; 246, 6th ed.; 250, 7th ed.; 259, 8th ed.

(u) Principles of the Law of Real Property 242, 1st ed.; 251, 2d ed.; 259, 3d ed.; 262, 4th ed.; 272, 5th ed.; 286, 6th ed.; 294, 7th ed.; 305, 8th ed.

[*269] *further restriction on the accumulation of income imposed by the Thellusson Act,(*v*) applies to trusts for the accumulation of of the income of personal estate as well as real.[1]

Equitable interests in personal property of a future kind may be created through the instrumentality of powers, in a similar manner, and to the same extent, as future estates in land.(*x*) Thus stock in the funds may be vested in the trustees upon such trusts as B. shall by any deed or by his will appoint, and in default of and until any such appointment, in trust for C., or upon any other trusts. Here C. will have a vested interest in the stock, subject to be divested or destroyed by B.'s exercising his power of appointment; and B., though not owner of the stock, has power to dispose of it by deed or will, and may if he please appoint to himself; in which case the trustees will be found to transfer it to him. If the power should not be exercised by B., C. will then be entitled absolutely; and will not, as was formerly the case with respect to landed property, be subject to judgment debts incurred by B.,(*y*) or to any other of his debts. But if B. should exercise his power by deed without valuable consideration, or by will, in favor of a third person, the stock so appointed would be considered in equity as part of the assets of B. the appointer, and would be subject to the demands of his creditors in preference to the claim of the appointee.(*z*) [*270] *In case of bankruptcy, it was provided by the former acts(*a*) that all powers vested in the bankrupt, which he might legally execute for his own benefit (except the right of nomination to any vacant ecclesiastical benefice), might be executed by the assignees for the benefit of the creditors in the same manner as the bankrupt might have executed the same.

(*v*) Stat. 39 & 40 Geo. III. c. 98; Principles of the Law of Real Property 243, 1st ed.; 253, 2d ed.; 260, 3d ed.; 263, 4th ed.; 274, 5th ed.; 288, 6th ed.; 295, 7th ed.; 307, 8th ed.

(*x*) See Principles of the Law of Real Property 231, *et seq.* 1st ed.; 236, 2d ed.; 243, 3d ed.; 245, 4th ed.; 255, 5th ed.; 266, 6th ed.; 272, 7th ed.; 283, 8th ed.

(*y*) Ibid.

(*z*) Lassells *v.* Cornwallis, 2 Vern. 465; Bainton *v.* Ward, 2 Atk. 172. The doctrine applies also to appointments of real estate. See Fleming *v.* Buchanan, 3 De G., M. & G. 976.

(*a*) Stat. 12 & 13 Vict. c. 106, s. 147, repealing stat. 6 Geo. IV. c. 16, s. 77, to the same effect, and now repealed by stat. 32 & 33 Vict. c. 83.

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[1] For American statutes against accumulation, following the "Thellusson Act," and closely resembling it, see 1 Rev. Stats. N. Y. 726, sects. 37 & 38; Purd. Dig. 853, sec. 9. Under these acts it has been held, that no accumulation of money will be valid, except during the minority of one, who, if then of full age, would be entitled to the accumulated fund: Hawley *v.* James, 5 Paige Ch. 481; Washington's Est., 28 Leg. Intel. 204.

And by the Bankruptcy Act, 1869, such powers may now be exercised by the trustees for the creditors.(*b*)[1]

The rules respecting the necessity of a compliance with the terms and formalities of the power, whenever it is exercised otherwise than by will,(*c*) and the relief afforded by the Court of Chancery on the defective exercise of a power,(*d*) apply as well to personal as to real property. Powers over personal estate may also be exercised by women, without their husband's consent, and also in favor of their husbands, in the same manner as powers over land ;(*e*) and the provision of the recent Wills Act, which requires wills made in exercise of powers to be executed and attested like all other wills,(*f*) applies equally to powers over personal estate. A general bequest of personal estate will also now include any personal estate which the testator may have only a *power* to appoint as he may think fit, in the same *manner as a general devise of [*271] real estate will comprise real estate subject to any such power.(*g*)

A frequent instance of the employment of a power over personalty occurs in the case of children's portions, which are usually settled on all the children equally, subject to a power given to the parents to appoint the shares in a different manner.[2] When such a power is exer-

(*b*) Stat. 32 & 32 Vict. c. 71, ss. 15, par. (4); 25, par. (5).

(*c*) See Principles of the Law of Real Property 238, 2d ed.; 245, 3d ed.; 247, 4th ed.; 257, 5th ed.; 268, 6th ed.; 274, 7th ed.; 285, 8th ed. See now as to deeds, stat. 22 & 23 Vict. c. 35, s. 12.

(*d*) Ibid. 239, 2d ed.; 246, 3d ed.; 248, 4th ed.; 258, 5th ed.; 269, 6th ed.; 276, 7th ed.; 287, 8th ed.

(*e*) Ibid. 241, 2d ed.; 248, 3d ed.; 250, 4th ed.; 260, 5th ed.; 271, 6th ed.; 278, 7th ed.; 289, 8th ed.

(*f*) Ibid. 240, 2d ed.; 247, 3d ed.; 249, 4th ed.; 259, 5th ed.; 271, 6th ed.; 277, 7th ed.; 288, 8th ed.

(*g*) Ibid. 242, 2d ed.; 249, 3d ed.; 251, 4th ed.; 261, 5th ed.; 273, 6th ed.; 279, 7th ed.; 291, 8th ed.

[1] By the fourteenth section of the Bankrupt Law of the United States, it is provided that all the right, title, power and authority to sell, manage, dispose of, sue for, recover or defend the property or estate of the bankrupt, as he himself might or could have had if no assignment had been made, shall, in virtue of the adjudication of bankruptcy and the appointment of his assignee, be at once vested in such assignee: 2 Brightly's U. S. Dig., p. 81, sec. 26.

[2] Whenever a person gives property, and points out with certainty the objects who are to take, the property itself, and the way in which it shall go, that creates a trust, unless he shows clearly, that his desire expressed, may be controlled by some person to whom he has given a discretion to defeat it: Gilbert *v.* Chapin, 19 Conn. 342; Hunter *v.* Stembredge, 12 Geo. 194; Gibbs *v.* Marsh, 3 Metc. 243; Lucas *v.* Lockhart, 10 Sm. & Mar. 470; Erickson *v.* Willard, 1 N. H. 232; Jackson *v.*

cised, the shares previously vested in the children are divested from them, and new shares are vested in them by the operation of the power.

Jackson, 2 Penn. St. 212; Mitchells *v.* Johnsons, &c., 6 Leigh 461; Still *v.* Spear, 45 Penn. St. 171.

This doctrine is particularly applicable to those cases where, a testator has bequeathed, or devised property to one, with a "desire," "hope," or "recommendation," that he will appoint it among a certain class, or to such of a designated class, as he shall choose; the words "desire," "hope," "recommend," &c., being considered sufficiently certain, if the objects, and the subject-matter of the trust, are clearly indicated; and the discretion reposed by the testator in the donee of the power, being limited to certain individuals of a class, and on no account to be exercised without that limit, is regarded as sufficiently clear to raise a trust: Gibbs *v.* Marsh, 2 Metc. 243; Lucas *v.* Lockhart, 10 Sm. & Mar. 470; Erickson *v.* Willard, 1 N. H. 232; Bull *v.* Bull, 8 Conn. 47; The New Parish in Exeter *v.* Odwine et al., 7 N. H. 142; Dominick *v.* Sayre, 3 Sandf. S. C. 555; Green *v.* Collins, 6 Ired. 139; Withers et al. *v.* Yeadon, Admr., 1 Rich. Eq. 324; Jarnagin *v.* Conway et al., 2 Humph. 50; Mitchells *v.* Johnsons, &c., 6 Leigh 461; Negroes *v.* Plummer, 17 Md. 165; Freeland *v.* Pearson, Law Rep. 3 Eq. 658; Wickersham *v.* Savage, 58 Penn St. 365. But if the discretion or confidence reposed in the appointor, is such as to allow him to defeat the ultimate desire of the testator, there can be no trust, for one of the certainties incident to every trust is then deficient, by reason of the extreme license vested in the donee of the power: Harper *v.* Phelps, 21 Conn. 270; Lillard *v.* Robinson, 3 Litt. 415; Burbank *v.* Whitney, 24 Pick. 146; Ellis et al. *v.* Ellis's Admr., 15 Ala. 296; Eaton *v.* Watts, Law Rep. 4 Eq. 151. In the language of the English cases, the power of appointment must be one, "which it is the duty of the party to execute, made his duty by the requisition of the will, put upon him as such by the testator, who has given him an interest extensive enough to enable him to discharge it, he is a trustee for the exercise of the power, and not as having a discretion, whether he will exercise it, or not; and the court adopts the principle as to trusts; and will not permit his negligence, accident, or other circumstances, to disappoint the interest of those, for whose benefit he is called upon to execute it:" Brown *v.* Higgs, 8 Ves. 574; Pierson *v.* Garnet, 2 Brown Ch. 38; Prevost *v.* Clarke, 2 Madd. Ch. 458. It is often a matter of considerable difficulty, to determine whether a discretion thus granted, is sufficient to defeat a trust or not, as will be seen by a comparison of the cases of Coates's Appeal, 2 Penn. St. 129; McKonkey's Appeal, 13 Id. 253; and Pennock's Estate, 20 Id. 268, which, although under different names, are the same case, decided differently three several times; the facts as reported disclose, that a testator bequeathed to his wife the use of his real estate during her life, and his personal property absolutely, "having full confidenee, that she would leave the surplus, to be divided at her decease, justly among my children." By the first of the three cases last cited, it was decided, that this bequest was a trust for the children; by the second, that it was a trust as to the surplus, after the death of the wife; and by the third, that it was no trust at all. This last is, without doubt, the correct decision, being in accordance with the principles above alluded to; for, to quote from the opinion of Chief Justice Gibson, in McKonkey's Appeal, 13 Penn. St. 258: "It is plain, that she" (the wife of the testator) "was to use not only the income of the personal estate, but the estate itself, as if she were the untrammelled owner of it; that is, the discretion reposed by the testator in his wife, was so great, as to give her an option to defeat his desire, if she saw fit, and consequently there could be no trust, as was very properly concluded on a third hearing of the case. And see

Formerly, if such a power were so worded as not to authorize an exclusive appointment to some or one of the children, it was held by the Court

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Beck's Appeal, 46 Id. 527; Church *v.* Disbrow, 52 Id. 219; Burt *v.* Herron, 66 Id. 400. In the case of Harrisons *v.* Harrison's Admrx., 2 Gratt. 1, however, upon construction of the following words of a will, it was held, that there was an absolute trust for the children, subject to the wife's use: "In the utmost confidence in my wife, I leave to her all my wordly goods, to sell, or keep for distribution among our dear children, as she may think proper. My whole estate, real and personal, are left in fee simple to her; only requesting her to make an equal distribution among our heirs; and desiring her to do for some of our faithful servants, whatever she may think will most conduce to their welfare, without regard to the interest of my heirs." Again, the term used by the testator to designate the class intended to take—among whom the appointor may exercise his discretion—must not be too general; that is, so general as to give rise to an uncertainty, otherwise there will be no trust, and in default of appointment, the property will go to the heir at law, if real estate, or if personal property, to the next of kin, according to the statute of distributions: Hill's Exrs. *v.* Bowman et al., 7 Leigh 650; Shermer *v.* Shermer's Exrs., 1 Wash. (Va.) 266; Ralston *v.* Waler, 44 Penn. St. 279; in other words, the persons who are to take, must be a restricted and clearly ascertainable class, and can never be beyond those of children or relations, of the donor or donee of the power: Mahon *v.* Savage, 1 Sch. & Lef. 111; Harding *v.* Glyn, 1 Atk. 469; Morris *v.* Owen et al., 2 Call 520; Cole *v.* Wade, 16 Ves. 27; Ray *v.* Adams, 3 Myl. & K. 237; Doyley *v.* Attorney-General, 4 Vin. Ab. 485; Witts *v.* Boddington, 3 Bro. C. 95; Cathey *v.* Cathey, 9 Humph. 470; Hudson *v.* Hudson's Admr., 6 Munf. 352; Dominick *v.* Sayre, 3 Sandf. S. C. 555; Frazier *v.* Frazier's Exrs. et al., 2 Leigh 642; Grant *v.* Lyman, 4 Russ. 292; thus, the word "family," has been held too general: Tolson *v.* Tolson, 10 Gill & Johns. 159; Cruwys *v.* Coleman, 9 Ves. 319; Wright *v.* Atkins, 1 Turn. & Russ. 157; Stubbs *v.* Sargon, 2 Keen 255; and so of the word "relatives:" Gilbert *v.* Chapin, 19 Conn. 342; Dominick *v.* Sayre, 3 Sandf. S. C. 555; or "relations:" Varrel *v.* Wendell, 20 N. H. 431; but, on the other hand, "male descendants of the name of Dominick," have been held to designate a class, who would all take equally in default of appointment: Dominick *v.* Sayre, 3 Sandf. S. C. 555; and the words "members of my family," have been regarded as sufficiently certain to create a trust: Frazier, &c., *v.* Frazier's Exrs., &c., 2 Leigh 642.

Where the power is to appoint *among* a certain class, all must have something: McKonkey's Appeal, 13 Penn. St. 253; Grimke *v.* Exrs. of Grimke, 1 Dessauss. 377; Haynesworth *v.* Cox, Harp. Eq. 119, n.; Fronty *v.* Fronty, Bail. Eq., Ap. 517; Withers et al. *v.* Yeadon, Admr., 1 Rich. Eq. 324; Cathey *v.* Cathey et al., 9 Humph. 470; Knight *v.* Yarborough, Gilm. 27; Hudsons *v.* Hudsons' Admr., 6 Munf. 352; Mitchells *v.* Johnsons, &c., 6 Leigh 461; the word *among*, indicates that the discretion is limited to all, and to be exercised only as regards the proportion in which each is to take, which, of course, need not be equally: Withers et al. *v.* Yeadon, Admr., 1 Rich. Eq. 324; Knight *v.* Yarborough, Gilm. 27; Mitchells *v.* Johnsons, &c., 6 Leigh 461; Lippincott *v.* Ridgway, 3 Stockt. 526; though see to the contrary: Bolton *v.* De Peyster, 25 Barb. 539; Ingraham *v.* Meade, 3 Wall. Jr. 32; Budington *v.* Munson, 33 Conn. 481; but no illusory appointment will be valid: Grimke *v.* Exrs. of Grimke, 1 Dessauss. 377; for that would not be fulfilling the intention of the testator, though the English practice of setting aside certain appointments as illusory, it seems, is not known as part of the Pennsylvania jurisprudence: Ingraham *v.* Meade, *ante;* Graeff *v.* De Turk, 44

of Chancery, as a rule of equity, that each child ought to have a substantial share; and an appointment to any child of a very small share was called an *illusory appointment*, and was held void.(*h*) But this doctrine having given rise to difficulties and family disputes, from the uncertainty of the question what was too small or what was a sufficient share, the meddlesome doctrine of equity on this point was a few years

(*h*) 1 Sugd. Pow. 568 *et seq.*; 449, 8th ed.; Chance on Powers, 396 *et seq.*

Penn. St. 532. If, however, the donee of the power has the power of appointing *to such* of the class as he may see fit, he may appoint to one only, for that is in accordance with the discretion reposed in him: Curr *v.* Crain et al., 2 Eng. 241; Ball *v.* Ball, 8 Conn. 47; Lasley *v.* Blakeman, 4 B. Mon. 540; Rhett *v.* Mason, 18 Gratt. 491; where, however, one left an estate to trustees, to pay to *such* brothers and sisters of my daughter and their children, and in such proportions, as she shall, &c., direct and appoint, my will being, that she shall have power to dispose of the same *among* her said brothers and sisters and their children, as she may think fit, it was held, that each brother and sister was entitled to some portion of the fund: Lippincott *v.* Ridgway, 2 Stockt. 164. But in either case, if the appointor does not exercise the power, all of the class will take, for in both instances the testator has indicated the class, as the recipients of his bounty; in the one case, granting to a third person the power to divide it among them as he will, in the other, allowing him to give it to one of the class mentioned, if he chooses: Carr *v.* Crain et al., 2 Eng. 241; Bull *v.* Bull, 8 Conn. 47; Collins *v.* Carlisle, 7 B. Mon. 14; Emory et al. *v.* The Judge of Probate, 7 N. H. 142; Dominick *v.* Sayre, 3 Sandf. S. C. 555; Green *v.* Collins, 6 Ired. 139; McKonkey's Appeal, 13 Penn. St. 253; Thomas *v.* Thomas, 1 Rawle 118; Withers et al. *v.* Yeadon, Admr., 1 Rich. Eq. 324; Cathey *v.* Cathey et al., 9 Humph. 470; Morris *v.* Owen et al., 2 Call. 520; McGaughey's Admr. *v.* Henry, 15 B. Mon. 383; Cruse *v.* McKee, 2 Head 1; Rogers *v.* Rogers, 2 Id. 660; and this is in accordance with that principle of law which prescribes, that where there is a general and a particular intention manifested by the testator, the general intention shall prevail, though the particular intention be defeated: Heirs of Capel *v.* McMillan, Admr., 8 Port. (Ala.) 205; Statesworth *v.* Statesworth, 5 Ala. 145.

It has been held, however, in the case of Baker et al. *v.* Lorillard, 4 Comst. 257, that where there was a devise to one of property, to dispose of the same among children and grandchildren, it might have been appointed to some in exclusion of the others.

So restricted is this power of appointment to the class specified, that it has been held, that a power to appoint to children, will not authorize an appointment to grandchildren: Rankin et al. *v.* Hoyle et al., 6 Ired. Eq. 161; Jarnagin *v.* Conway et al., 2 Humph. 50; Morris *v.* Owen et al., 2 Call. 520; Hudsons *v.* Hudsons' Admr., 6 Munf. 352; Lasley *v.* Blakeman, 4 B. Mon. 540; Little *v.* Bennett, 5 Jones Eq. 156; Horwitz *v.* Norris, 49 Penn. St. 213; Carson *v.* Carson, Phill. (N. C.) Eq. 57.

But where there are no children, or there are strong and conclusive circumstances, to show that such was the intention of the testator, grandchildren will take under such a bequest to children: Cutter *v.* Doughty, 23 Wend. 522; Ruff *v.* Rutherford et al., 1 Bail. Eq. 7; Hallowell et al. *v.* Phipps et al., 2 Whart. 376; Dickinson *v.* Lee, 4 Watts 82; Mowatt *v.* Carson et al., 7 Paige 328; Phillip's Devisees *v.* Beale, 9 Dana 1; Ingraham *v.* Meade, 3 Wall. Jr. 32.

ago abolished by act of parliament ;(*i*) and now the appointment of any share, however small, cannot be set aside on the ground of its being illusory. The act extends, as did the doctrine, to real estate as well as personal; but landed property is, from its nature, seldom cut up into little portions.

Although no appointment is now void for being illusory, yet where an exclusive appointment is not authorized, any appointment, by which any object of the power would be entirely excluded, is still void. Thus, if *1,000*l.* be given to A., B. and C. in such shares as their father [*272] shall appoint, and in default of appointment to them equally, an appointment of 900*l.* to A., would now be good, as 100*l.* would remain to be equally divided between the three,(*k*) of which B. and C. would get each one-third.(*l*) But a subsequent appointment of the remaining 100*l.* to B. would be void, as altogether excluding C., who is equally an object of the power.(*m*) It is customary, however, in modern settlements to give to parents a power of appointment in favor of any one or more of the children exclusively of the others. And in order that those to whom appointments have been made should not obtain more than may have been intended for them, it is generally provided that no child taking any share of the fund under any appointment shall be entitled to any share in the part unappointed without bringing his or her share into *hotchpot*,[1] and accounting for the same accordingly. Under such a provision, A., in the instance above given, would not be entitled to any share in the 100*l.* unappointed, without also agreeing to a like division of his 900*l.* amongst himself and the others. The clause of hotchpot operates favorably to the representatives of those children who may happen to die before any appointment shall have been made to them. For when a power is given to appoint amongst children, no appointment can be made to the executors or administrators of those who may have died ;(*n*) so that such executors or administrators cannot possibly take more than the aliquot part given to the deceased child in default of any appointment; whilst they may be partially or totally excluded even *from that by a [*273] partial or complete exercise of the power of appointment in

(*i*) Stat. 11 Geo. IV. & 1 Will. IV. c. 46, 16th July, 1830.

(*k*) Young *v.* Waterpark, 13 Sim. 202.

(*l*) Wilson *v.* Piggott, 2 Ves. jun. 351; Wombwell *v.* Hanrott, 14 Beav. 143. See Foster *v.* Cautley, 6 De G. M. & G. 55.

(*m*) 2 Ves. jun. 355.

(*n*) Boyle *v.* The Bishop of Peterborough, 1 Ves. jun. 299; Ricketts *v.* Loftus, 4 You. & Col. 519.

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1 Termed in the civil law, "*collation*:" Reed *v.* Crocker, 12 La. Ann. 436.

favor of the surviving children, or even of a single survivor. When the appointment is partial only, the executors or administrators of a deceased child will, under the hotchpot clause, divide the fund unappointed with the other children to whom no appointment may have been made; whereas, without such a clause, the children to whom appointments may have been made would be equally entitled to participate in the part unappointed.(*o*)

When a power is given to appoint property amongst a particular class, no portion of the fund can be appointed in favor of any person who is not a member of that class; and any appointment to such person will accordingly be void.[1] Thus, if the power be to appoint the property to all or any of the *children* of the appointor in such manner as he may think fit, no interest in the property can be appointed to any *grandchild* of the appointor; for a grandchild is not an object of the power.(*p*) So if the power be to appoint amongst nephews or grand-nephews, those only can take any shares who answer that description.(*q*) Again, if the power be to appoint portions amongst younger children, nothing can be taken by a younger son who afterwards becomes the eldest by the decease of his elder brother;(*r*) although if he should have actually received any share in the money whilst a younger son, he will [*274] not be obliged to refund it on becoming the eldest.(*s*) The word *"younger," however, is not, in parental provisions,(*t*) taken literally, but as meaning any child who may not be entitled to the family estate. Therefore a daughter, who may be the eldest child, would be considered as a proper object of a power to appoint amongst the younger children, whilst her younger brother, being the eldest son entitled to the family estate, would not be allowed to participate.(*u*) And in the same manner a second son becoming the eldest, but not ob-

(*o*) Wilson *v.* Piggott, 2 Ves. jun. 351; Wombwell *v.* Hanrott, 14 Beav. 143; Walmsley *v.* Vaughan, 1 De G. & J. 114.

(*p*) Alexander *v.* Alexander, 2 Ves. sen. 640; Bristow *v.* Warde, 2 Ves. jun. 336.

(*q*) Falkner *v.* Butler, Amb. 514; Waring *v.* Lee, 8 Beav. 247.

(*r*) Chadwick *v.* Doleman, Vern. 528; Lord Teynham *v.* Webb, 2 Ves. sen. 198; Gray *v.* Earl of Limerick, 2 De G. & Sm. 370. See Sandeman *v.* Mackenzie, 1 John. & H. 613.

(*s*) 2 Sugd. Pow. 293; 680, 8th ed.

(*t*) Hall *v.* Hewer, Amb. 203; Lyddon *v.* Ellison, 19 Beav. 565.

(*u*) Pierson *v.* Garnet, 2 Bro. C. C. 38; Heneage *v.* Hunloke, 2 Atk. 456; Beale *v.* Beale, 1 P. Wms. 244.

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[1] See *ante*, p. 271, note.

taining the family estate, would be allowed a share.(v) A power to appoint amongst children living at their father's decease includes a child *en ventre sa mère*.(w)

In some cases where the power only authorizes an appointment amongst children, an appointment in favor of the issue of a child may be sustained as being, in effect, first an appointment to the child, and then an assignment by such child in favor of his issue.(x) But this of course can only be done when the child is of age, and is a party to and executes the deed by which the appointment is made. And the more regular plan in such cases is, for the father first to make the appointment in favor of the child, and then for the child to make an assignment of the fund appointed to trustees in trust for his children in the manner intended.

An appointment by a father in favor of his child, in exercise of a power for that purpose, ought to be made for the benefit of the child who is the object of the *provision, and not indirectly for the benefit of the father who makes the appointment or of any other person.[1] Accordingly, any exercise of the power under a bargain for, or even with a view to the benefit of the appointor, or of any other person than one of the objects of the power, will be considered as, in technical phrase, a fraud on the power and will be void.(y) But when there is no evidence that the appointment is made under a bargain for the benefit of the father, although there may be strong suspicion that such is the case, the appointment cannot be set aside.(z) Powers of appointment amongst children usually enable the parent to fix the age or time at which the fund appointed shall vest in any child. But, on the prin-

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(v) Spencer *v.* Spencer, 8 Sim. 87; Macoubrey *v.* Jones, 2 Kay & J. 684; Sing *v.* Leslie, 2 Hem. & Mil. 68.

(w) Beale *v.* Beale, 1 P. Wms. 244.

(x) Routledge *v.* Dorril, 2 Ves. jun. 357; West *v.* Berney, 1 Russ. & My. 431, 439; Goldsmid *v.* Goldsmid, 2 Hare 187; Limbard *v.* Grote, 1 Myl. & K. 1,

(y) Daubeney *v.* Cockburn, 1 Meriv. 626; Palmer *v.* Wheeler, 2 Ball & B. 18; Jackson *v.* Jackson, 1 Dru. 91; Thompson *v.* Simpson, 2 Jones & Lat. 110; Topham *v.* Duke of Portland, 1 De G., J. & S. 517; Pryor *v.* Pryor, 2 De G., J. & S. 205.

(z) M'Queen *v.* Farquhar, 11 Ves. 467; Hamilton *v.* Kirwan, 2 Jones & Lat. 393; Campbell *v.* Home, 1 You. & Col. N. C. 664.

1 Bostick *v.* Winton, 1 Sneed 524, may be referred to in illustration of the doctrine stated in the text; in which case it was decided, that a conveyance made to a child, in order that he might have sufficient property to become bail for the father, the appointor, and to become security for the father's debts, with the understanding that the land was to be reconveyed, was not such an appointment in good faith, as would defeat the remainders.

ciple just stated, a father will not be allowed to make an immediate appointment to an infant child, for the sake of becoming himself entitled to the fund appointed, as the child's personal representative in the event of its decease.(*a*) An appointment to an infant is not, however, necessarily void on account of the circumstance that the father, who has made the appointment, will become entitled to the property appointed in the event of the child's decease.(*b*)

In the exercise of powers of appointment amongst children, care [*276] should be taken not to postpone the vesting of their shares to a period which may exceed the *limits allowed by the law of perpetuity.(*c*) When the powers of appointment is a general power, enabling the appointor to make a disposition in favor of any object he may please, the property is evidently not tied up so long as such a power exists over it; and neither the reason nor the rule which forbids a perpetuity has any application till some settlement is made in exercise of such a power. In such a case, therefore, the limits of perpetuity commence from the time of the appointment.(*d*) But where the power of appointment is to be exercised only in favor of a particular class of objects, the property subject to the power is evidently already tied up in favor of that class. The limits of perpetuity are therefore in this case to be reckoned, not from the time of the exercise of the power, but from the date of its creation. The interest given by the power must, for this purpose, be regarded as if they had been inserted in the settlement by which the power was created; and if such interests would have been too remote, if inserted in the original settlement, they will be too remote when given in exercise of the power.(*e*) Thus a person having a general power of appointment by will over a fund, may by his will appoint a share of it in favor of any unborn child of his own, to be vested in such child on his attaining the age of twenty-three years. The limit of perpetuities is reckoned from the time of the appointment, which in this case is the death of the appointor, when his will begins to take effect. The child must necessarily then be born, or in *ventre sa mère*, and the child's life is accordingly the life then in being within which the share [*277] must necessarily vest. But if by a marriage settlement a fund be settled in trust for the father for his life, and *after his de-

(*a*) Cunynghame *v.* Thurlow, 1 Russ. & My. 436; Lord Sandwich's Case, cited 11 Ves. 479; Gee *v.* Gurney, 2 Coll. 486.

(*b*) Butcher *v.* Jackson, 14 Sim. 444; Fearon *v.* Desbrisay, 14 Beav. 635.

(*c*) See *ante*, p. 268.

(*d*) 1 Sugd. Pow. 249, 495; 395, 8th ed.

(*e*) Co Litt. 271 b, n. (1), vii. 2; 1 Sugd. Pow. 498; 396, 8th ed.; Routledge *v.* Dorril, 2 Ves. jun. 357.

cease in trust for the children, in such shares as he shall appoint by his will, he cannot make an appointment in favor of any unborn child, to be vested on his attaining the age of twenty-three years. For in this case the limit of perpetuities counts from the date of the settlement, when the property was first tied up for the benefit of the children; and this limit would be exceeded if the child should not attain the given age within twenty-one years after the decease of the father, who was the life in being at the date of the settlement. And the rule is, that every limitation which *may* exceed in duration a life or lives in being, and twenty-one years afterwards (allowing for the period of actual gestation), is void as tending to a perpetuity.(*f*)

When personal property is directed to be paid to any persons at a future time, the leaning of the courts is always in favor of vested interests; that is to say, the courts lean to that construction which will give to the parties a present assignable and transmissible right to that which is not payable till a future time.[1] Thus if a legacy be given to a person

(*f*) See Principles of the Law of Real Property 242, 1st ed.; 251, 2d ed.; 259, 3d ed.; 273, 5th ed.; 287, 6th ed.; 294, 7th ed.; 305, 8th ed.

[1] The fundamental rule, that the intention of the testator is to govern the construction of a will, is the primary test to discover whether a legacy is vested or contingent: Chighizola *v.* Le Baron, Exr., 21 Ala. 406; Marr, Exr., *v.* McCulloch, Admr., 6 Port. (Ala.) 507; Stone et al., Admrs., *v.* Massy, 2 Yeates 363; Scott, Exr., *v.* Price, Exr., 2 S. & R. 59; Lemonier *v.* Godfroid, 6 Har. & Johns. 474. It is often, however, a matter of great difficulty, to decide whether, from the intention of the testator, it was designed that a legacy should be vested or contingent: Shattuck, Admr., *v.* Stedman et al., Exrs., 2 Pick. 468.

The legal construction of wills favors the vesting of legacies: Johnson *v.* Valentine, 4 Sandf. S. C. 36; Reed *v.* Buckley, 5 W. & S. 517; Roberts's Exrs. *v.* Brinker, 4 Dana 572; Cowdin *v.* Perry et al., Exrs., 11 Pick. 503; The State *v.* Mann, 3 Har. & Johns. 338; Eldridge *v.* Eldridge, 9 Cush. 516; Manderson *v.* Lukens, 23 Penn. St. 31; Chew's Ap., 37 Id. 23; Young *v.* Stoner, Id. 105; Devane *v.* Larkins, 3 Jones Eq. 377. Thus, words of survivorship are always to be referred to the period of the testator's death, unless there is a plain intent to the contrary: Moore *v.* Lyons, 25 Wend. 119; Hulburt *v.* Ericson et al., 16 Mass. 241; Drayton *v.* Drayton et al., 1 Dessaus. 325; Elliott *v.* Exrs. of Smith, Id.; Sealy *v.* Laurens, Id.; Fulton *v.* Fulton, 2 Grant's Cas. 28; Dominick *v.* Moore, 2 Bradf. 201.

Where time is annexed to the payment only, and not to the gift itself, the legacy is vested; Chighizola *v.* Le Baron, Exr., 21 Ala. 406; Seibert's Appeal, 13 Penn. St. 501; Moore *v.* Smith, 9 Watts 403; Lamb *v.* Lamb, 8 Id. 184; Bayard *v.* Atkins, 10 Penn. St. 17; Schriver *v.* Cobeau, 4 Watts 130; Patterson, surviving Exr., *v.* Hawthorne, Admr., 12 S. & R. 112; Magoffin, Admr., *v.* Patton et al., Exrs., 4 Rawle 113; Jackson's Admr. *v.* Subett, 10 B. Mon. 572; Furness, Exr., *v.* Fox, 1 Cush. 134; Ware *v.* Cook, 1 Halst. Ch. 193; Marr, Exr., *v.* McCullough, Admr., 6 Port. 507; Patterson *v.* Ellis, 11 Wend. 269; Donner's Appeal, 2 W. & S. 372; Roberts's Exrs. *v.* Brinker, 4 Dana 572; Gregg et al. *v.* Bethea, 6 Port. (Ala.) 9; Goddard *v.*

to be payable when he attains the age of twenty-one years, the legacy is considered to be immediately vested, and will accordingly be payable to the administrator of the legatee in case he should die under age.(*g*) So if personal estate be settled in trust for A. for life, and after his decease for all his children in equal shares, each of his children will be entitled to a share, whether such child survive his parent or not, and although such child should die in infancy.(*h*) If, however, the property should [*278] consist of money charged on *land or other real estate, such as the portions of younger children when the family estate is entailed on the eldest son, the rule is different; and if any of the children should die before the time when his or her portion becomes payable, it will, in the absence of special provision to the contrary, sink into the land for the benefit of the estate.(*i*)

In the settlement of personal property upon children there are two plans, either of which may be adopted with respect to the vesting of the interests given. The one plan is, to vest the interests of the children in

(*g*) 2 Black. Comm. 513; Co. Litt. 237 a, note (1).

(*h*) Skey *v.* Barnes, 3 Mer. 335; Templeton *v.* Warrington, 13 Sim. 267. See Swallow *v.* Binns, 1 Kay & John. 417.

(*i*) Co. Litt. 237 a, n. (1). See Evans *v.* Scott, 1 H. of L. C., 43, 57.

Johnson, Exr., 14 Pick. 352; Lemonier *v.* Godfroid, 6 Har. & Johns. 474; Boone *v.* Sinkler, 1 Bay 369; Carpenter *v.* Heard, 14 Pick. 449; Gifford *v.* Thorn, 1 Stockt. 702; Bowman's Ap., 34 Penn. St. 19; Burd's Exr. *v.* Burd's Admr., 40 Id. 182; Roome *v.* Phillips, 24 N. Y. 463; Snow *v.* Snow. 49 Maine 159; Colt *v.* Hubbard, 33 Conn. 281; and in like manner, when the division, merely, of the property, is postponed to a future time, and not its distribution, the legacy is considered vested: Spruill *v.* Moore, 5 Ired. Eq. 287; Womack *v.* Greenwood, 6 Geo. 299; Smith *v.* Wiseman, 6 Ired. Eq. 540; McLemore *v.* McLemore, 8 Ala. 687; Christian *v.* Christian, 3 Port. (Ala.) 351; Etheridge, Admr., *v.* Bell, 5 Ired. 87; Candler *v.* Dinkle, 4 Watts 143; Fanty *v.* Kline, Penning. 551.

If something out of the principal is to be immediately paid to the legatee, or appropriated in his favor, the legacy will be vested; as the giving of interest on the principal sum until the time of payment arrives: Schriver *v.* Cobeau, 4 Watts 130; Heleman *v.* Heleman et al., 4 Rawle 440 King *v.* King, 1 W. & S. 205; Marr, Exr., *v.* McCullough, Admr., 6 Port. 507; Patterson *v.* Ellis, 11 Wend. 269; Hopkins *v.* Jones, 2 Penn. St. 69; Kelso *v.* Dickey, 7 W. & S. 279; Lemonier *v.* Godfroid, 6 Har. & Johns. 474; Boone *v.* Sinkler, Exr., 1 Bay 369; Cassilly et al. *v.* Meyer et al., 4 Md. 1.

When there is a gift to a class of persons, to take effect in enjoyment at a future period, the property vests in the persons as they come *in esse*, subject to be opened and let in others, as they may be born afterwards: Johnson *v.* Valentine, 4 Sandf. S. C. 36; Barnes et al. *v.* Prevost et al., 4 Johns. 61; and see, also, Hall *v.* Eddy, 2 Green 169; Ward *v.* Saunders, 3 Sneed 387; Yeaton *v.* Roberts, 8 Foster 459; Cooper *v.* Hepburn, 15 Gratt. 551; Nichols *v.* Denny, 37 Miss. 59; Tucker *v.* Bishop, 16 N. Y. 402; Hocker *v.* Gentry, 3 Metc. (Ky.) 463; Chambers *v.* Payne, 6 Jones Eq. 276.

them immediately as they come into being, divesting from each of them proportionate shares as others are born, and also divesting the shares altogether in favor of the others, in the event of the decease of any son under age, or of any daughter under age and without having been married. The other plan is, to vest the interests given only in those who, being sons, attain the age of twenty-one years, or, being daughters, attain that age or marry under it. So far as the corpus of the fund is concerned, the result of each of these plans is the same, the property being ultimately divided only amongst those children who, being sons, live to come of age, or, being daughters, come of age or previously marry. But with regard to the income of the fund the plans are different. In the first case, the income belongs to the children whilst under age; but in the second no interest either in the income or in the principal is given during minority, or, in the case of daughters, until marriage under age. In the first case, therefore, if the father be dead, the income will be payable to the guardian of the children toward their maintenance and education; but in the second case there will be no provision for these purposes in the *absence of express directions. Such directions therefore should [*279] in such case be always inserted, with a provision for the accumulation of the surplus income by way of increase of the principal. If, however, the whole property is ultimately to go amongst the children,(*k*) or if the persons entitled, in the event of the children not living to attain vested interests, should agree,(*l*) the Court of Chancery will direct the income to be applied for the children's maintenance in the absence of sufficient provision for that purpose, and even in the face of an express direction to accumulate the income.(*m*) And a recent act of parliament now provides that, in all cases where any property is held by trustees in trust for an infant, either absolutely or contingently on his attaining the age of twenty-one years, or on the occurrence of any event previously to his attaining that age, it shall be lawful for such trustees, at their sole discretion, to pay to the guardians (if any) of such infant, or otherwise to apply for or towards the maintenance or education of such infant, the whole or any part of the income to which such infant *may be entitled* in respect of such property, whether there be any other fund applicable to the same purpose, or any other person bound by law to provide for such maintenance or education, or not; and such trustees shall accumulate all the residue of such income by way of compound interest, by investing the same and the resulting income thereof from time to time in pro-

(*k*) Haley *v.* Bannister, 4 Mad. 275; Errat *v.* Barlow, 14 Ves. 202.
(*l*) Turner *v.* Turner, 4 Sim. 430; Cannings *v.* Flower, 7 Sim. 523.
(*m*) Greenwell *v.* Greenwell, 5 Ves. 194.

per securities, for the benefit of the person who shall ultimately become entitled to the property from which such accumulations shall have arisen: provided always, that it shall be lawful for such trustees at any time, if it shall appear to them expedient, to apply the whole or any part of such [*280] *accumulations as if the same were part of the income arising in the then current year.(*n*) This enactment applies only to deeds executed, and wills executed or confirmed or revived by codicil executed after the passing of the act, which took place on the 28th of August, 1860.(*o*) The act, it will be observed, applies only to income to which the infant may be entitled; so that if the infant should not be entitled to the income irrespectively of the act, it would scarcely be safe for the trustees to apply it for the infant's maintenance without express authority.

In marriage settlements a life interest is usually and properly given to the father and mother, so that no provision is required for the maintenance of the children until after the decease of the survivor. And where life interests are not given to the parents, but provision is made for the maintenance of the children during the father's lifetime out of the settled fund, such provision is considered as primarily applicable for the maintenance of the children accordingly.(*p*) But the general rule is, that every father is bound to maintain his children, if of ability so to do;(*q*) and a provision contained in a gift to an infant child, for his maintenance and education, will not be applied for that purpose during his father's lifetime, if the father is able to maintain him in a manner suitable to his condition and prospects.(*r*)[1] When, therefore, it is in-

(*n*) Stat. 23 & 24 Vict. c. 145, s. 26.

(*o*) Sect. 34.

(*p*) Stocken *v.* Stocken, 4 Sim. 152; Meacher *v.* Younge, 2 Myl. & K. 490; Ransome *v.* Burgess, V.-C. K., Law Rep. 3 Eq. 773. See Thompson *v.* Griffin, 1 Craig & Phillips 317,

(*q*) Andrews *v.* Partington, 3 Bro. C. C. 60.

(*r*) Maberley *v.* Turton, 14 Ves. 499; Jervoise *v.* Silk, G. Cooper 52; Ex parte Williams, 2 Collyer 740.

[1] A father will not be allowed for the maintenance and education of his children, out of their fortunes, if he is of ability to support them: In the matter of Kane et al., 2 Barb. Ch. 375; Walker et al. *v.* Prowder et al., 2 Ired. Eq. 478; Whilden et al. *v.* Whilden Exr., et al., Riley Ch. Cas. 205; Addison *v.* Bowie, 2 Bland Ch. 606; In the matter of Bostwick, 4 Johns. Ch. 100; Jones *v.* Stockett, 2 Bland Ch. 431; Crugar *v.* Haywood, 2 Dessauss. 94; In the matter of Harland's Accounts, 5 Rawle 323; Dawes *v.* Howard et al., 4 Mass. 97; Guion *v.* Guion's Admr., 16 Mo. 52; Sparhawk et al. *v.* Admr. of Buell et al., 9 Vt. 70; Presley *v.* Davis, 7 Rich. Eq. 105; Harring *v.* Coles, 2 Bradf. 349; Hines *v.* Mullins, 25 Geo. 696; Phelan *v.* Phelan, 12 Fla. 449; and this is true also, where the child, by the father's consent, is in the custody of the mother, who has been guilty of miscon-

tended that the income of property given to children should be applied to their maintenance during their father's lifetime, without *reference to his ability to maintain them, the application of the income, without reference to his ability, should be expressly directed; and, if such application be so directed, the income must of course be applied accordingly.(s) When two funds are provided for the maintenance of an infant, it is frequently difficult to decide to which fund recourse should be first had.[1] The general rule is, that the interest of the infant determines the order of application;(t) but, in order to avoid questions, it is very desirable, when two funds are provided for an infant's maintenance, to direct that one of them shall be in aid only of the provision afforded by the other. But the act to which we have just referred gives, [*281]

(s) See Wetherell v. Wilson 1 Keen 80; White v. Grane, 18 Beav. 571.

(t) Foljambe v. Willoughby, 2 Sim. & Stu. 165; Lygon v. Lord Coventry, 14 Sim 41.

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duct: Gill v. Read, 5 R. I. 343; but the father's situation in life, the future prospects of the children, the extent of their fortune, and all other circumstances, must be taken into consideration in determining the ability of the father: In the matter of Kane et al., 2 Barb. Ch. 375; Walker et al. v. Crowder et al., 2 Ired. Eq. 478; Ellerbe v. The Heirs, &c., of Ellerbe, 1 Speer Eq. 328; Brown v. Deloach, 28 Geo. 486; Alston v. Alston, 34 Ala. 15.

The case is, of course, different where the father is not of ability: Myers v. Myers, 2 McCord Ch. 255; Dawes v. Howard et al., 4 Mass. 97; Newport et al. v. Cook et al., 2 Ash. 332; Tompkins v. Tompkins, 3 Green 303; and where, on that account, sums from the child's income have been paid over to the father, by the trustee of the child, in the due exercise of his discretion, for the support of the child, it has been held, that no promise of repayment can be implied, on account of a subsequent change for the better, in the circumstances of the father: Pearce v. Olney, 5 R. I. 269; and it seems that a mother will be allowed for the support of her children, out of their estates, notwithstanding she may be of ability to maintain them: Wilkes v. Rogers et al., 6 Johns. 566; Whipple v. Dow, 2 Mass. 415; Dawes v. Howard et al., 4 Id. 97; Guion v. Guion's Admr., 16 Mo. 52; Osborne v. Van Horn et al., 2 Florida 360. But where a mother has maintained a child, she will not be allowed to recover what she has expended, upon an implied promise of the child to refund, for the law will presume that she has furnished her means gratuitously: Cummings v. Cummings, 8 Watts 366; and the same is true of a stepfather: Brown v. Sockwell, 26 Geo. 380; Gillett v. Camp, 27 Mo. 541; Brush v. Blanchard, 18 Ill. 46.

In all cases, however, the court will consult the permanent interests of the children: In the matter of Burke, 4 Sand. Ch. 617; and will make exceptions to ordinary rules of law in their favor, as has been done by allowing interest upon legacies left to children, from the time of the death of the testator, where there was no other means of support: Sullivan v. Winthrop et al., 1 Sumn. 1; Miles v. Wister, 5 Binn. 479; Lupton et al. v. Lupton et al., 2 Johns. Ch. 614; Leiby's Ap., 49 Penn. St. 182.

[1] Where a fund has been appropriated to the maintenance and education of children, it must be completely exhausted before a further allowance will be made by the court: In the matter of Davison et al, 5 Paige Ch. 136.

as we have seen,(*u*) a discretion to the trustees to apply the income of of the infant's property for his maintenance, whether there be any other fund applicable to the same purpose, or any other person bound by law to provide for such maintenance or education, or not.

In settlements of personal property, it has long been usual to provide for the investment of the fund settled in the parliamentary stocks or public funds of Great Britain, or at interest upon government or real securities in England or Wales, but not in Ireland; and at the present day investments in railway debentures, preference shares and other securities yielding a larger income, are often authorized. Government securities, as distinguished from stocks or funds, seem to be nothing else than Exchequer bills, in which trustees appear to be justified, even without express authority, in investing the property for any temporary [*282] purpose, as during the necessary delay in completing a *contemplated mortgage security.(*v*) But where a permanent investment is intended, a trust to lay out money in government securities will not authorize the purchase of Exchequer bills.(*w*) Real security means the mortgage of real estate, namely, freehold or copyhold hereditaments of sufficient value.(*x*) And if it be desired that the trustees should have power to invest the trust money on mortgage of leasehold estates, or in railway debentures,(*y*) or shares, or any other securities, or to lend it to any person on his bond, express authority ought to be given to the trustees for the purpose. But the Improvement of Land Act, 1864, now provides, that all trustees, directors and other persons who may be directed or authorized to invest any money on real security shall (unless the contrary be provided by the instrument directing or authorizing such investments) have power at their discretion to invest money in the charges authorized by that act, or on mortgages thereof.(*z*) And it is further provided, that no charge on land made by any absolute order of the Inclosure Commissioners by virtue of that act shall be deemed such an incumbrance as shall preclude a trustee of money, with power to invest

(*u*) *Ante*, pp. 279, 280.

(*v*) Matthews *v.* Brise, 6 Beav. 239, 244.

(*w*) Ex parte Chaplin, 8 You. & Col. 397; as to the issue of Exchequer Bills, see stat. 24 Vict. c. 5.

(*x*) See Stickney *v.* Sewell, 1 Myl. & Cr. 8; Phillipson *v.* Gatty, 7 Hare 516; Mant *v.* Leith, 15 Beav. 524; Drosier *v.* Brereton, 15 Beav. 221. Turnpike bonds are real securities for some purposes: Robinson *v.* Robinson, Lords Justices, 1 De G., M. & G. 247, 272.

(*y*) Mortimore *v.* Mortimore, 4 De G. & J. 472.

(*z*) Stat. 27 & 28 Vict. c. 114, s. 60.

the same in the purchase of land or on mortgage, from investing it in a purchase or upon a mortgage of the land so charged, unless the terms of his trust or power expressly provide that the land to be so purchased or taken in mortgage be not subject to any prior charge.(*a*) Investments in *Ireland were often expressly prohibited, on account of an [*283] act of parliament, which empowered trustees, who were authorized by their trust to lend money at interest on real securities in England, Wales or Great Britain, to lend the same at interest on real securities in Ireland.(*b*) But all loans of money on real securities in Ireland under the act, in which any minor or unborn child, or person of unsound mind, might be interested, were required to be made by the direction and under the authority of the Court of Chancery in England, to be obtained in any cause or upon petition in a summary way;(*c*) and every such loan was to be made with the consent of the person or persons, if any, whose consent might be required as to the investment of such money upon real securities in England, Wales or Great Britain, testified in the manner required by the trust.(*d*) And it was also provided that the act should not apply to cases where there was an express restriction against the investment of the trust money on securities in Ireland.(*e*) A recent statute now provides, that when a trustee, executor or administrator shall not, by some instruments creating his trust, be expressly forbidden to invest any trust fund on real securities in any part of the United Kingdom, or on the stock of the Bank of England or Ireland, or on East India Stock, it shall be lawful for such trustee, executor or administrator to invest such trust fund on such securities or stock; and he shall not be liable on that account as for a breach of trust, provided that such investments shall in other respects be reasonable and proper.(*f*) This provision *has been made retrospective by act of parliament.(*g*) [*284] And by a subsequent act of parliament the term "East India Stock," as above used, has been explained to mean as well East India Stock then existing as East India Stock charged on the revenues of India and created under any act or acts of parliament which subsequently received the royal assent.(*h*) A further enactment empowers the making

(*a*) Stat. 27 & 28 Vict. c. 114, s. 61.

(*b*) Stat. 4 & 5 Will. IV. c. 29. Leaseholds for lives perpetually renewable at a head rent form real securities in Ireland: Macleod *v.* Annesley, 16 Beav. 600.

(*c*) Stat. 4 & 5 Will. IV. c. 29, s. 2; Ex parte French, 7 Sim. 510; Ex parte Lord William Pawlett, 1 Phill. 570; Norris *v.* Wright, 14 Beav. 291.

(*d*) Sect. 4.

(*e*) Sect. 5.

(*f*) Stat. 22 & 23 Vict. c. 35, s. 32.

(*g*) Stat. 23 & 24 Vict. c. 38, s. 12; Cockburn *v.* Peel, 3 De G., F. & J. 170; Hume *v.* Richardson, 4 De G., F. & J. 29.

(*h*) Stat. 30 & 31 Vict. c. 132.

of general orders from time to time as to the investment of cash under the control of the Court of Chancery, and for the conversion of any 3*l.* per Cent. Bank Annuities, standing in the name of the accountant-general of the Court of Chancery, in trust in any cause or matter, into any stocks, funds, or securities, upon which by any such general order cash under the control of the court may be invested.(*i*) And when any such general order shall have been made, trustees, executors or administrators, having power to invest their trust funds upon government securities, or upon parliamentary stocks, funds or securities, or any of them, may invest such trust funds or any part thereof in any of the stocks, funds or securities, in or upon which, by such general order, cash under the control of the court may from time to time be invested.(*j*) In pursuance of this enactment a general order has been made dated the 1st of February, 1861, authorizing the investment of cash under the control of the court in Bank Stock, East India Stock, Exchequer Bills, and 2*l.* 10*s.* per Cent. Annuities, and upon mortgage of freehold and copyhold estates respectively in England and Wales, as well as in Consolidated 3*l.* per Cent. Annuities, Reduced 3*l.* per Cent. Annuities, and New 3*l.* per Cent. Annuities.(*k*)

[*285] *A still later enactment of the same session authorizes trustees, having trust money in their hands which it is their duty to invest at interest, at their discretion to invest the same in any of the parliamentary stocks or public funds, or in government securities, and at their discretion to call in any trust funds invested in any other securities, and to invest the same on any such securities as aforesaid, and also from time to time at their discretion to vary any such investments as aforesaid for others of the same nature; provided that no such original investment as aforesaid (except in 3*l.* per Cent. Consolidated Bank Annuities), and no such change of investment as aforesaid, shall be made where there is a person under no disability entitled in possession to receive the income of the trusts fund for his life or for a term of years determinable with his life, or for any greater estate, without the consent in writing of such person.(*l*) This last enactment, however, like the other provisions in the same act, extends only to persons acting under a deed executed, or a will executed or confirmed or revived by a codicil executed afterthe 28th of August, 1860, the date of the act.(*m*)

(*i*) Stat. 23 & 24 Vict. c. 38, s. 10. (*j*) Sect. 11.

(*k*) See Equitable Reversionary Interest Society *v.* Fuller, 1 John. & Hem. 379; Re Langford, 2 John. & Hem. 458; Re Warde, 2 John. & Hem. 191.

(*l*) Stat. 23 & 24 Vict. c. 145, s. 25. (*m*) Sect. 34.

The consent of the persons for the time being entitled to the income of the property is generally required, in settlements, to any change of investment which the trustees may be authorized to make; and this consent is sometimes required to be in writing, and occasionally to be testified by deed. Where consent is required, it must be given previously to or at the time of the change of investment;(n) for as the consent is required as a *check upon the trustees, a subsequent consent, when the mischief may be done, is evidently unavailing. [*286] The person whose consent is required is not, however, the sole judge of the propriety of any change of investment: the trustee, by virtue of his office, has also a discretion; and if he should consider the investment ineligible, he may refuse to make it, although requested so to do by the person whose consent ought to be obtained.(o) But the terms of the instrument may require the trustees to change the investments at the request of any given person; and in this case they will generally be bound to act accordingly, unless the circumstances of the case should be such as were evidently not contemplated when the settlement was made.(p)

In settlements of personal property authority is sometimes given to the trustees to make investments in the purchase of landed estates. As land devolves in a different manner from personal property, it is obvious that a simple change of property from personalty to land would in many cases materially disarrange the destination of the property. Thus if a person entitled under the settlement to a revisionary interest in the settled fund should have died intestate, his administrator would be entitled to such interest, so long as the property continued personal, but, on its being changed into real estate, it would shift to his heir-at-law. In order to obviate this inconvenience, it is so contrived that the lands to be purchased should, from the moment the purchase is made, be considered as personal property.[1] To effect this object, the lands when purchased

(n) Bateman *v.* Davis, 3 Madd. 98; Greenham *v.* Gibbson, 10 Bing. 363 (E. C. L. R. vol. 25); Wiles *v.* Gresham, 2 Drewry 258.

(o) Lee *v.* Young, 2 You. & Col. N. C. 532.

(p) Boss *v.* Godsall, 1 You. & Col. N. C. 617; Cadogan *v.* Earl of Essex, 2 Drewry 227.

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[1] It is a well-established rule of equity, that where land is directed to be sold, and thereby converted into money, it shall be considered as money; and that money, which is to be employed in the purchase of land, shall be regarded as real property: Craig *v.* Leslie, 3 Wheat. 377; Peter, Exr., et al., *v.* Beverly et al., 10 Peters 534; Hawley et al. *v.* James et al., 5 Paige Ch. 318; Smith et al. *v.* McCrary et al., 3 Ired. Eq. 204; Golt et al., Exrs. *v.* Cook et al., 7 Paige Ch. 521; Kane *v.* Golt et al., Id.; s. c., 24 Wend. 641; The Commonwealth *v.* Martin's Exrs.

are directed to be held by the trustees upon trust to sell them, with the [*287] consent of the equitable tenant for life, during their *lives, and after their decease at the discretion of the trustees.(q) This trust

(q) See Appendix B.

&c., 5 Munf. 121; Pratt v. Talliaferro, 3 Leigh 419; Siter et al. v. McClanchan et al., 2 Gratt. 280; Reading v. Blackwell, 1 Baldw. 166; Fairly v. Kline, Penning. 551; Hurlt v. Fisher, 1 Har. & Gill. 88; Leadenham's Exr. v. Nicholson et al., Id. 267; Morrow v. Brenizer, 2 Rawle 185; Burr v. Sim et al., 1 Whart. 252; Allison Exr. v. Wilson's Exrs., 13 S. & R. 332; Price v. Watkins, 1 Dall. 8; Rice v. Bixler, 1 W. & S. 445; Willing v. Peters, 7 Penn. St. 287; Lorillard et al. v. Coster et al., 5 Paige Ch. 172; Drake v. Pell, 3 Edwd. Ch. 267; Rinehart v. Harrison's Exrs. 1 Baldw. 177; Marsh v. Wheeler, 2 Edwd. Ch. 160; Tazewell et al. v. Smith, Admr., 1 Rand. 313; Parkinson's Est., 32 Penn. St. 457; Holland v. Craft, 3 Gray 162; Loughborough v. Loughborough, 14 B. Mon. 549; High v. Worley, 33 Ala. 196; Forsyth v. Rathbone, 34 Barb. 388; Dundas's Ap., 64 Penn. St. 325, and the conversion is so effectual, that where real estate was directed to be sold by will, it was considered as so converted at the death of the decedent, that a purchaser at an execution, of an heir's interest, acquired no title therein: Brolasky v. Gally, 51 Id. 509; and the conversion will operate, through the gift to which the proceeds were to be applied is void under the statute: Evan's Ap., 63 Id. 1830. This rule will apply, even though the sale or purchase is not to be made until a future time, provided there is no contingency, upon the happening or not happening of which, the intended conversion will be defeated: Reading v. Blackwell, 1 Baldw. 166; Fairly v. Kline, Penning. 551; Price v. Watkins, 1 Dall. 8; Rinehart v. Harrison's Exrs., 1 Baldw. 177; Brothers v. Cartwright, 2 Jones Eq. 113; Harcum v. Hudnall, 14 Gratt. 369; Hocker v. Gentry, 3 Metc. (Ky.) 363. But where the intended transformation is to be effected upon a contingency, there will be no conversion until that contingency has happened: Evans v. Kingsberry, 2 Rand. 120; Storer v. Zimmerman, 21 Penn. St. 324; Clay et al. v. Hart, 7 Dana 11; Nagle's Appeal, 13 Penn. St. 260; Bleight v. Manufac. & Mechan. Bank, 10 Id. 132; Wright v. The Trustees of the M. E. Church, 1 Hoff. 213; Henry v. McCloskey, 9 Watts 142; Anewalt's Ap., 42 Penn. St. 414; Ross v. Drake, 37 Id. 373; Millers & Bowman's Ap., 60 Id. 404, and a mere authority to sell at discretion, and not a positive direction does not work a convesion: Drayton's Ap., 61 Id. 172. Where land is directed to be sold for a particular purpose, and is sold accordingly, and there is a balance of money after the accomplishment of the purpose for which the sale was made, that money will be considered as land, unless the testator, donor, or other person by whose direction the conversion was made, has clearly shown that it was his wish that the character of personalty should be stamped upon the whole property; and this rule applies equally, where a part of the fund is sufficient to accomplish a purpose to be attained through the purchase of land: Craig v. Leslie, 3 Wheat. 577; Hawley et al. v. James et al., 5 Paige Ch. 318; Smith et al. v. McCrary et al., 3 Ired. Eq. 204; The Commonwealth v. Martin's Exrs., 5 Munf. 121; by this last case it seems that the conversion will not be enforced, if it should operate injuriously upon the beneficiary, so as to thwart or turn aside the bounty of the grantor, for, to quote the words of Judge Coulter, "Money directed to be employed in the purchase of land, and land directed to be sold and turned into money, are to be considered as that species of property into which they are directed to be converted. . . . It is also an established principle, that, if a party having such fund

for sale converts the land into money in the contemplation of equity; for it is a rule of equity, that whatever is agreed to done shall be considered as done already. In the words of Sir Thomas Sewell,(r) "Nothing is better established than this principle, that money directed to be employed in the purchase of land, and land directed to be sold and turned into money, are to be considered as that species of property into which they are directed to be converted; and this in whatever manner the direction is given, whether by will, by way of contract, marriage articles, settlement or otherwise, and whether the money is actually deposited or only covenanted to be paid, whether the land is actually conveyed or only agreed to be conveyed. The owner of the fund or the contracting parties may make land money, or money land." And if land is clearly directed to be sold, the circumstance that the consent of some person or persons is required to the sale will not prevent the immediate conversion of the land into money in the contemplation of equity, although such a circumstance may often cause a long postponement of the period of its actual conversion.(s) Notwithstanding a trust for the sale of land, if all the parties interested should be of full age,(t) and if females unmarried,(u) they may elect that the land shall not be sold; and after such election the land will be considered as real estate in equity as well as at law.(x) And the election of the parties need not be expressed in so many *words, but may be inferred from any acts by which their intention is clearly shown.[1](y) [*288]

(r) In Fletcher v. Ashburner, 1 Bro. C. C. 499, approved by Lord Alvanley in Wheldale v. Partridge, 5 Ves. 396, 397. See also Griffith v. Ricketts, 7 Hare 299.

(s) See Lechmere v. Earl of Carlisle, 3 P. Wms. 218, 219.

(t) Van v. Barnett, 19 Ves. 102.

(u) Oldham v. Hughes, 2 Atk. 452.

(x) Davies v. Ashford, 15 Sim. 42.

(y) Lingen v. Sowray, 1 P. Wms. 172; Cookson v. Reay, 5 Beav. 22; 12 Cl. & Fin. 121.

dies, it will go to his real or personal representatives, as money or land, according as he himself would have taken it; but this rule of considering money as land, or land as money, will not apply if the special purpose for which the conversion is to be made fail; *neither does it apply, if the effect would operate an escheat.*"

Real estate belonging to an infant, sold under a direction of the Court for the purpose of distribution, is not thereby converted into personalty: Jones v. Edwards, 8 Jones L. 336; Oberley v. Lerch, 3 Green 346; Nelson v. Hagerstown, 27 Md. 51. See State v. Hirons, 1 Houst. 252. And so of personalty invested in real estate, under an order of court: Davis's Ap., 60 Penn. St. 118.

Conversion in short, is a question of intention; and to effect it by will, the direction to convert must be positive and explicit: Chew v. Nicklin, 45 Penn. St. 84; Edward's Ap., 48 Id. 144. Where by equitable conversion money is considered as land, it cannot in any case retain its inheritable quality as real estate, further than the first descent: Dyer v. Cornell, 4 Id. 361, and the converse of this is also the law.

[1] In all cases where there would be an equitable conversion of land into money, or money into land, the person for whose

All properly drawn settlements of personal estate formerly contained a power for the trustees or trustee for the time being, acting in the execution of the trusts, to give receipts for any money payable to them or him under the trusts, which receipts, it was declared, should effectually discharge the persons paying the money from all responsibility as to its application. The necessity of this provision arose from a rule of equity, by which any person who paid money to another, whom he knew to be merely a trustee, was bound to see the money applied according to the trusts.(z) If, however, the trusts were of such a kind as to require time and discretion to carry them into effect, the receipt of the trustees would, from the nature of the case, have been an effectual discharge, without an express clause for this purpose.(a)[1] But by a recent act of parliament it is provided, that the bonâ fide payment to and receipt of any person

(z) Spalding *v.* Shalmer, 1 Vern. 301; Lloyd *v.* Baldwin, 1 Ves. sen. 173.
(a) Doran *v.* Wiltshire, 3 Swanst 699; Balfour *v.* Welland, 16 Ves. 151.

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use the property is given, may elect to receive it as money or land according to his option: The Commonwealth *v.* Martin's Exrs., 5 Munf. 121; Burr *v.* Sim et al., 1 Wheat. 252; Smith *v.* Starr, 3 Id. 65; Rice *v.* Bixler, 1 W. & S. 445; Willing *v.* Peters, 7 Penn. St. 287; Tazewell et al. *v*, Smith, Admr., 1 Rand. 313; but in order to make this election, he must be entitled to the whole estate, or fund: Craig *v.* Leslie, 3 Wheat. 577; Rinehart *v.* Harrison's Exrs., 1 Baldw. 177; and where there is more than one distributee, they must all agree in determining the character of the property, for the election of one alone is not sufficient: Willing *v.* Peters, 7 Penn. St. 286; Shallenberger *v.* Ashworth, 25 Id. 152; Evan's Ap., 63 Id. 183; Rhinehart *v.* Harrison's Exrs., 1 Baldw. 167, in which last case, it was also decided, that election can only be made by the person or persons first entitled.

[1] Where trust property has been sold, and the purchase-money is to be reinvested upon trusts which require time and discretion, or the acts of sale and reinvestment are contemplated to be at a distance from each other, the purchaser is not bound to look to the application of the purchase money: Wormley et al. *v.* Wormley et al., 8 Wheat. 421; Lining *v.* Peters et al., 2 Dessaus. 375; Hauser et al. *v.* Shore et al., 5 Ired. Eq. 357; nor is he so bound, where, in accordance with a power for that purpose, lands are sold for the payment of debts generally: Hannum et al. *v.* Spear, 2 Dall. 291; s c. 1 Yeates 553; Hauser et al. *v.* Shore et al., 5 Ired. Eq. 357; Davis *v.* Christian, 15 Gratt. 11; Goodrich *v.* Proctor, 1 Gray 567; Stall *v.* Cincinnati, 16 Ohio St. 169; though it is otherwise, of debts scheduled or specified: Grant *v.* Hook, 13 S. & R. 262; and so where trust property has been sold for the purpose of distribution among the owners, the purchaser has been held not liable for the misapplication of the proceeds: Hunt et al. *v.* The State Bank et al., 2 Dev. Eq. 60.

The proper mode of discovering whether the purchaser of property held in trust, is to look to the application of the purchase-money, is, to ascertain whether the trust is for general, or specific purposes; if the former, the purchaser is not bound; thus, in Grant *v.* Hook, 13 S. & R. 262, Judge Duncan says, "Where the trust is for the payment of debts generally, the purchaser is not bound to see to the application of the purchase-money, although he has notice of the debts. For a purchaser cannot be expected to see to the observance of a trust so unlimited and undefined.

to whom any *purchase or mortgage money* shall be payable upon any express or implied trust shall effectually discharge the person paying the same from seeing to the application or being answerable for the misapplication thereof, unless the contrary shall be expressly declared by the instrument creating the trust or security.(*b*) It is the better opinion that this enactment is not retrospective; for it can scarcely be supposed that the legislature contemplated the existence of a prescience of this act in the authors of old settlements, inducing them to insert therein an express declaration that the act should not apply. And with respect to instruments executed and wills or codicils confirmed or *revived [*289] by codicil executed after the 28th August, 1860, it is now provided that the receipts in writing of any trustees or trustee for any money payable to them or him, by reason or in the exercise of any trusts or powers reposed or vested in them or him, shall be sufficient discharges for the money therein expressed to be received, and shall effectually exonerate the person paying such money from seeing to the application thereof, or from being answerable for any loss or misapplication thereof.(*c*)

Every settlement, the trusts of which were likely to be of long duration, formerly contained a power of appointing new trustees in the event of any trustee dying, going to reside beyond the seas, desiring to be discharged, refusing, or becoming incapable to act in the execution of the trusts.(*d*)[1] And as the mere appointment of a trustee was not sufficient

(*b*) Stat. 22 & 23 Vict. c. 35, s. 23.
(*c*) Stat. 23 & 24 Vict. c. 145, s. 29.
(*d*) See Appendix B.

But, if the trust be of such a nature, that the purchaser can reasonably be expected to see to the application of the purchase-money, as if it be for the payment of legacies, which are scheduled or specified, he is bound to see that the money is applied accordingly." See also, Dalzell *v.* Crawford, 2 Pa. L. Jour. 23; s. c., 1 Pars. Eq. Cas. 37; Cadbury *v.* Duval, 10 Penn. St. 267; St. Mary's Ch. *v.* Stockton, 4 Halst. Ch. 520. "In all cases . . . where the objects are not so defined as to be brought at once to the view of the purchaser, it is settled that he is not affected by them, and has only to pay the purchase-money:" Garrett *v.* Macon et al., 2 Brockenb. 234.

In North Carolina, however, it seems to be an open question, whether a purchaser from a trustee with a power to sell, must see to the application of the purchase-money: Rutledge *v.* Smith, 1 Busbee Eq. 283.

See also, Nicholls *v.* Peak, 1 Beasley 69; Cardwell *v.* Cheatham, 2 Head 14; Penn Life Ins. Co. *v.* Austin, 42 Penn. St. 267; and Hill on Trustees, 4th Am. ed., p. 342, note 2.

[1] For the American Statute Law on the subject of the appointment of trustees, by the courts, in the place of others dying, resigning, &c., see N. H. Compiled Stats. (1867), p. 380, sec. 5; 3 Rev. Stats. of N. Y. (5th ed.), p. 22, § 90; Matthew's Dig. of the Laws of Va. (1857), vol. 1, pp. 263–4; Rev. Stats. of Vt. (1839), 300; Vol. ii. Compiled Laws of Michigan (1857), p. 828,

to vest the trust property in him, it was usual and proper to direct that, on every such appointment, the trust property should be so conveyed, assigned, transferred or paid as effectually to vest the same in the new trustee jointly with the surviving or continuing trustees, or solely, as the case might require. Every new trustee was also invested with the same powers as the original trustees. But the act to which we have already referred,(*e*) now provides that whenever any trustee, either original or substituted, and whether appointed by the Court of Chancery or otherwise, shall die, or desire to be discharged from or refuse or become unfit or incapable to act in the trusts or powers in him reposed, before the same shall have been fully discharged and performed, it shall be lawful [*290] *for the person or persons nominated for that purpose by the deed, will, or other instrument creating the trust (if any), or if there be no such person, or no such person able and willing to act, then for the surviving or continuing trustees or trustee for the time being, or the acting executors or executor, or administrators or administrator of the last surviving and continuing trustee, or for the last retiring trustee, by writing, to appoint any other person or persons to be a trustee or trustees in the place of the trustee or trustees so dying or desiring to be discharged, or refusing, or becoming unfit and incapable to act as aforesaid; and so often as any new trustee or trustees shall be so appointed as aforesaid, all the trust property (if any) which for the time being shall be vested in the surviving or continuing trustees or trustee, or in the heirs, executors or administrators of any trustee, shall, with all convenient speed, be conveyed, assigned and transferred so that the same may be legally and effectually vested in such new trustee or trustees, either solely or jointly with the surviving or continuing trustees or trustee as the case may require, and every new trustee or trustees to be appointed as aforesaid, as well before as after such conveyance or assignment as aforesaid, and also every trustee appointed by the Court of

(*e*) Stat. 23 & 24 Vict. c. 145, s. 27, *ante*, pp. 279, 280, 285. This act applies also to trustees appointed by the Court of Chancery of the County Palantine of Lancaster. Stat. 28 Vict. c. 40.

sec. 27; Maryland Code (1860), p. 579, sec. 118; Suppl., 1870, p. 33, sub. sec. 2; Code of Ala. (1852), p. 535, § 3000; Howard *v.* Gilbert, 39 Ala. 726; Gen. Stats of Mass. (1860), p. 501, sec. 7; Shaw *v.* Paine, 2 Allen 293; Rev. Stats. of Maine (1857), p. 435, sec. 5; Nix. Dig. Laws of N. J. (1868), p. 642, sec. 13; Rev. Stats. of Wisconsin (1858), p. 532, sec. 27; Stats. of S. C. (1786 to 1814), vol. v., pp. 277, 278; Caruther's and Nicholson's State Laws of Tenn. 693; Maxwell *v.* Finnie, 6 Cold. (Tenn.) 434; Vol. ii. Rev. Stats. of Ohio (1861), p 1630, sec. 67; Stats. of Minnesota (1849–1858), p. 384, sec. 27; Purd. Dig. (1861), p. 970, § 23, and p. 972, § § 38–41; p. 975, § 57; and Suppl. 1679, sec. 1.

Chancery, either before or after the passing of the act, shall have the same powers, authorities and discretions, and shall in all respects act, as if he had been originally nominated a trustee by the deed, will, or other instrument creating the trust. This act, as we have before observed, extends only to instruments executed, or wills confirmed or revived by codicil executed after the 28th of August, 1860. A mere power to appoint a new trustee does not render such appointment imperative; and in case of the death of any trustee, the survivors or survivor may still carry on the ordinary business of the trust.(*f*) When a trustee *has once accepted the office, he has no right to retire, unless the person having the power to appoint another trustee in the event of his retiring should consent to do so;(*g*) or unless, from unforeseen circumstances, the duties of the trust should have become more onerous than was contemplated by the trustee when he accepted the office.(*h*) When several deeds are required for the appointment of a new trustee, it is now sufficient if one of the deeds be stamped with a duty of 1*l.* 15*s.* and the others with the same duty as would be payable on a duplicate thereof.(*i*) [*291]

The Trustee Act, 1850,(*k*) the provisions of which have been extended by a more recent act,(*l*) empowers the Court of Chancery to appoint a new trustee in all cases where it is inexpedient, difficult or impracticable so to do without the assistance of that court, and either in substitution for, or in addition to, any existing trustee,(*m*) and whether there be any existing trustee or not.(*n*) Provision is also made for the appointment of a new trustee in lieu of any trustee who may have been convicted of felony,(*o*) and for the infancy,(*p*) lunacy or idiotcy of any trustee or executor,(*q*) and for his being out of the jurisdiction of the court, or not being found, and for its being uncertain whether he is living or dead,(*r*) and for his neglecting or refusing *to transfer any [*292]

(*f*) Warburton *v.* Sandys, 14 Sim. 622.

(*g*) Adams *v.* Paynter, 1 Coll. 532.

(*h*) Coventry *v.* Coventry, 1 Keen 758.

(*i*) Stat. 24 & 25 Vict. c. 91, s. 30. See Principles of the Law of Real Property 136, 6th ed.; 139, 7th ed.; 145, 8th ed.

(*k*) Stat. 13 & 14 Vict. c. 60. See Principles of the Law of Real Property 136, 3d. and 4th eds.; 148, 5th ed.; 155, 6th ed.; 158, 7th ed.; 166, 8th ed.

(*l*) Stat. 15 & 16 Vict. c. 55.

(*m*) Stat. 13 & 14 Vict. c. 60, ss. 32, 35.

(*n*) Stat. 15 & 16 Vict. c. 55, s. 9.

(*o*) Sect. 8.

(*p*) Sect. 3.

(*q*) Stat. 13 & 14 Vict. c. 60, ss. 5, 6; 15 & 16 Vict. c. 55, ss. 10, 11.

(*r*) Stat. 13 & 14 Vict. c. 60, ss. 22, 25.

stock, or to receive the dividends or income thereof, or to sue for or recover any chose in action.(s)[1]

The office of trustee of a settlement is one involving great responsibility, and frequently much trouble, without any renumeration; for a trustee is not allowed to make a profit of his trust. And if he be a solicitor, he cannot receive payment for his professional trouble incurred in the business of the trust,(t) unless he expressly stipulate before accepting the office, that he shall be permitted to do so,(u) or unless his charges be voluntarily paid by the cestui que trust with full knowledge that they might have been resisted.(x) But a trustee may charge against the trust property all costs and expenses properly incurred in the conduct of the trust. And, it has been held, that in the event of a suit being brought against the trustees, one of the trustees, being a solicitor, may be employed by his co-trustees, and may make the usual charges against them, provided the amount of the costs be not thereby increased.(y)[2] And every trustee is allowed in a suit his full costs, as between solicitor and client.(z) But his right to costs may be forfeited by his negligence and misconduct;(a) or he may even be made to pay the costs of the other [*293] *parties.(b) As the trustee has the legal title to the property, he is often enabled, if fraudulently inclined, to sell it or spend it for his own benefit. It is therefore highly proper that his conduct should be narrowly scrutinized, and that he should be invariably punished for any breach of faith. But the Court of Chancery goes further than this, and punishes, with almost equal severity, his neglect of duties, which in many cases he scarcely knows that he has undertaken. Thus, if a trustee, by his negligence or misplaced confidence in his co-trustee,

(s) Stat. 13 & 14 Vict. c. 60, ss. 23, 24, 25; stat. 15 & 16 Vict. c. 55. ss. 4, 5.

(t) Moore v. Frowd, 3 Myl. & Cr. 45; Fraser v. Palmer, 4 You. & Col. 515; Collins v. Carey, 2 Beav. 128; Bainbrigge v. Blair, 8 Beav. 588; Todd v. Wilson, 9 Beav. 486. See Ex parte Newton, 3 De G. & Sm. 584.

(u) Re Sherwood, 3 Beav. 388.

(x) Stanes v. Parker, 9 Beav. 385. See Gomley v. Wood, 3 Jones & Lat. 678.

(y) Cradock v. Piper, 1 Macn. & G. 664; Clack v. Carlon, V.-C. W., 7 Jur. N. S. 441. See, however, Lincoln v. Windsor, 9 Hare 158; Lyon v. Baker, 5 De G. & Sm. 622; Broughton, L. C., 1 Jur. N. S. 965; 5 De G., M. & G. 160.

(z) 2 Fonb. Eq. 176.

(a) Campbell v. Campbell, 2 Myl. & Cr. 25; Howard v. Rhodes, 1 Keen 581.

(b) Wilson v. Wilson, 2 Keen 249; Willis v. Hiscok, 4 Myl. & Cr. 197; Firmin v. Pulham, 2 De G. & Sm. 99.

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1 See *ante*, p. 289, note.

2 See the case of Robinson v. Pett, 2 Leading Cases in Equity 206, where in an able note, the whole subject of the compensation of trustees is considered.

gives him an opportunity to commit a breach of trust, of which opportunity the co-trustee avails himself, the innocent trustee will be made to replace the whole of the fund abstracted by the other.(c) So if the trustee should depart from the letter of his trust, as by investing the trust fund on an unauthorized security, although at the importunity of some of the parties interested, and with a bonâ fide desire to benefit them all, he will be answerable for any loss which such departure may have occasioned.(d) And if, being ignorant of law, he should give himself up entirely to his professional adviser, he may still suffer from the mistake of his solicitor or conveyancer;(e) and in such a case he will scarcely perhaps see the justice of the remark that he might (had he known how) have chosen a wiser *solicitor, or a more learned counsel.(f)[1] [*294] In all ordinary settlements, clauses used to be inserted for the

(c) Lord Shipbrook v. Lord Hinchinbrook, 11 Ves. 252; Brice v. Stokes, 11 Ves. 319; Hanbury v. Kirkland, 3 Sim. 265; Booth v. Booth, 1 Beav. 125; Broadhurst v. Balguy, 1 You. & Col. N. C. 16; Styles v. Guy, 1 Macn. & G. 422; Dix v. Burford, 19 Beav. 409.

(d) Driver v. Scott, 4 Russ. 195; Pride v. Fooks, 2 Beav. 430; Forrest v. Elwes, 4 Ves. 497; Watts v. Girdlestone, 6 Beav. 188.

(e) Willis v. Hiscox, 4 Myl. & Cr. 197; Angier v. Stannard, 3 Myl. & K. 566; Hampshire v. Bradley, 2 Coll. 34; Boulton v. Beard, 3 De G., M. & G. 608; see, however, Poole v. Pass, 1 Beav. 600; Holford v. Phipps, 3 Beav. 434, 4 Beav. 475.

(f) 3 Myl. & K. 572.

[1] Where trustees act *bonâ fide*, and with due diligence, they have always received the favor and protection of courts of equity, and their acts are regarded with the most indulgent consideration; but, where they have betrayed their trust, grossly violated their duty, or been guilty of unreasonable negligence, their acts are inspected with the severest scrutiny, and they are dealt with according to the rules of strict justice: Diffenderffer v. Winder, 3 Gill & Johns. 312; Gilbert v. Sutliff, 3 Ohio 129; Ellig v. Naglee, 9 Cal. 683; Smith v. Vertrees, 2 Bush (Ky.) 63. A trustee may, in the discharge of his duty, consult the opinion of counsel, and if it has been reasonably and properly done, he will be entitled to an allowance for the expense incurred, out of the trust estate: Jones v. Stockett, 2 Bland. Ch. 409; Green v. Mumford, 4 R. I. 313; but the advice so given, will not protect the trustee from the consequences of a failure to discharge his duty properly, for if he has doubts, or there was room for them, he should apply to a court of equity, which will always give him directions upon which he may rely with entire confidence: Freeman et al. v. Cook et al., 6 Ired. Eq. 373; Weber v. Samuel, 7 Barr 510; Hayden's Exrs. v. Marmaduke, 19 Mo. 403; Ihmsen's Ap., 43 Penn. St. 431. But see Neff's Ap., 57 Id. 91.

In the case of Rogers et al., Exrs., v. Benson et al., 5 Johns. Ch. 540, where a trustee, in his character of counsel, gave an opinion in writing concerning the title to certain lands not included in the trust, but the opinion was so loosely drawn as to apply to the trust estate, and the person to whom the opinion was given made sale of the trust property, it was held that the trustee should not be liable for the act of the person to whom he had given the opinion, there having been no fraud on his part.

But a trustee, who, after accepting the trust, voluntarily permits his co-trustee

indemnity and reimbursement of trustees, to the effect that they should not be answerable the one for the other of them, or for signing receipts for the sake of conformity, or for involuntary loss; and that they might reimburse themselves out of the trust funds all costs and expenses incurred in relation to the trust. But these clauses, though often very highly valued by trustees, really afforded them little, if any, further protection than they would have been entitled to, if left to the ordinary rules of equity.(*g*) It has, however, been recently enacted that every deed, will or other instrument creating a trust, either expressly or by implication, shall be deemed to contain these clauses.(*h*) It would have been more direct, and therefore more philosophical, to alter the rules of equity with respect to trustees, if alteration were required, rather than to enact that a deed shall be deemed to contain clauses which in fact are not there.

In order to provide means for securing trust funds, and for relieving trustees from the responsibility of administering them, an act of parliament has been passed,(*i*) whereby all trustees, executors, administrators or other persons having in their hands(*k*) any moneys belonging to any trust whatsoever, or the major part of them,(*l*) may pay the same, with the privity of the accountant-general of the Court of Chancery, into the Bank of England, to the account of such accountant-general in the matter of the trust, in trust to attend the [*295] *orders of the court. Bank annuities, East India and South Sea stock, and government and parliamentary securities, held upon trust, may also be transferred or deposited in like manner. The trust is then administered by the court upon petition in a summary way, without a bill, unless the court direct any suit to be instituted.(*m*)[1] Where the fund does not ex-

(*g*) Fenwick *v.* Greewell, 10 Beav. 412; Brumridge *v.* Brumridge, 27 Beav. 5.
(*h*) Stat. 22 & 23 Vict. c. 35, s. 31.
(*i*) Stat. 10 & 11 Vict. c. 96, s. 1.
(*k*) Buckley's Trust, 17 Beav. 110.
(*l*) See stat. 12 & 13 Vict. c. 74.
(*m*) Stat. 10 & 11 Vict. c. 96, s. 2.

to take the entire management of it, and the possession and control of the trust property, is, equally, with him, liable to account: Royall *v.* McKenzie, 25 Ala. 363; Wayman *v.* Jones, 4 Md. Ch. Decs. 500; McMurray *v.* Montgomery, 2 Swan 374; Schenck *v.* Schenck, 1 Green 174.

[1] Proceedings in courts of equity are originated by bill or by petition. But where new parties are to be brought in, not necessary to the original bill, or where the investigation may involve inquiries, calculated by protracting the cause, to delay parties not interested in such new inquiries, the proceeding must be by bill. A petition is the proper course, when no other persons are to be made parties to litigate the questions presented by it, than such as are, or ought to have been, parties to the original bill: Hayes *v.* Miles et al., 9 Gill & Johns. 193; Dyckman et al. *v.* Kernochan et al., 2

ceed in amount or value the sum of five hundred pounds, jurisdiction is now given to the county courts; the fund, if money, being paid into a post-office savings bank established in the town in which the county court is held, in the name of the registrar of the court, in trust to attend the orders of the court. And stocks or securities may be transferred into or deposited in the names of the treasurer and registrars of the court upon the like trust.(*n*) Where there is not a treasurer, a person shall be nominated, by rule of practice, to whom the transfer or deposit, in conjunction with the registrar, may be made.(*o*)

A salutary act has recently been passed for the punishment of fraudulent trustees, bankers, directors, and public officers.(*p*) More recent acts empower any trustee, executor or administrator, by petition or statement to be signed by counsel, to apply to any judge of the Court of Chancery, for his opinion, advice or direction on any question respecting the management or administration of the trust property.(*q*)

In some marriage settlements, in addition to the settlement actually

(*n*) Stat. 30 & 31 Vict. c. 142, ss. 24, 25. (*o*) Sect. 24.
(*p*) Stat. 20 & 21 Vict. c. 54.
(*q*) Stat. 22 & 23 Vict. c. 35, s. 30; 23 & 24 Vict. c. 38, s. 9.

Paige Ch. 26; Duval *v.* The Farmers' Bank of Maryland, 4 Gill & Johns. 292; Maccubbin *v.* Cromwell, 2 Har. & G. 443; Griggs *v.* Detroit, &c., Co., 10 Mich. 117. Thus, it is the proper course to pursue, for joining a party who ought to have been joined in the original proceedings: Williams *v.* Hall, &c., 7 B. Mon. 295; but where a person is a necessary party, in consequence of an act performed by himself after the commencement of the suit, the proper proceeding to bring him into court is an original bill in the nature of a supplemental bill: Winter *v.* Ludlow (Ct. Court U. S. for the East. Dist. of Pa.), 3 Phila. 464. A lunatic who wishes to traverse his inquisition of lunacy, may apply by petition: In the matter of Christie, 5 Paige Ch. 242; and it is the proper course also for a lunatic to take who wishes to compel his guardian to account: Tally *v.* Tally, 2 Dev. & Bat. Eq. 385; and so of an application for a rehearing, whether it be by supplemental bill, or bill of review: Hunt *v.* Smith et al., 3 Rich. Eq. 466; Huison, Admr., *v.* Pickett, 2 Hill Ch. 353; Wiser *v.* Blackly et al., 2 Johns. Ch. 488; Livingston *v.* Hubbs et al., 3 Id. 124; Haskell et al. *v.* Raval, 1 McCord's Ch. 28 Colomb et al. *v.* The Br. Bank at Mobile, 18 Ala. 454; Emerson *v.* Davies et al., 1 Wood. & M. 21; Jenkins *v.* Eldredge, 3 Story 299; Baker *v.* Whiting et al., 1 Id. 218; Green's Ap., 59 Penn. St. 235; Elliott *v.* Balcom, 11 Gray 286. Application for maintenance may also be made by petition: In the matter of Bostwick, 4 Johns. Ch. 102.

In South Carolina, by statute, any equitable claim, under the value of 100*l.*, may be brought to the notice of the court by petition: Skilling *v.* Jackson, 1 Hill Ch. 185.

In Pennsylvania, the proceedings in the matter of the accounts of trustees, and others acting in a fiduciary capacity, are usually commenced by filing the accounts, or by petition,—a bill to account, is assumed as having been filed.

made, a covenant is inserted for the settlement of all such property as the intended wife shall become entitled to during the coverture or marriage. [*296] It *sometimes happens that at the time when such covenant is entered into, the wife is, without being aware of it, entitled to other property besides that actually settled. In such a case, the general rule is that the property to which she is then entitled, is subject to the covenant, and ought to be settled, as well as that which she may subsequently acquire.(*r*) But as the question is entirely one of intention, if the property to which the wife is entitled appear to have been purposely omitted, it will not be bound by such a covenant.(*s*) If the covenant to settle the wife's future property be entered into by the intended husband alone, the wife will not be bound to settle any future property to which she may become entitled for her separate use.(*t*) Occasionally covenants are unadvisedly entered into by the intended husband to settle on his children, or to leave to them by his will, all the property that he may acquire during the coverture, or all his property generally.(*u*) So a father may covenant, on the marriage of his daughter, to leave her as great a share in his property as to any of his other children.(*v*) These covenants will be enforced in equity; but from their vague and uncertain character, they are [*297] *likely to lead to much litigation. A covenant to settle property of a given value, when no time is limited for its performance, creates no lien on any of the property of the covenantor.(*w*) And it appears to be now settled, contrary to what was before supposed to be the law, that no lien is created whether a time for the performance of the covenant be specified or not.(*x*)

(*r*) Grafftey *v.* Humpage, 1 Beav. 46; James *v.* Durant, 21 Beav. 177; Blythe *v.* Granville, 13 Sim. 190; Ex parte Blake, 16 Beav. 463; Re Mackenzie's Settlement, Law Rep. 2 Ch. Ap. 345.

(*s*) Hoare *v.* Hornby, 2 You. & Col. N. C. 121; Otter *v.* Melvill, 2 De G. & Sm. 257; Wilton *v.* Colvin, 3 Drew. 617; Archer *v.* Kelly, 1 Drew. & S. 300.

(*t*) Douglas *v.* Congreve, 1 Keen 410, 423; Travers *v.* Travers, 2 Beav. 179; Drury *v.* Scott, 4 You. & Col. 264; Ramsden *v.* Smith, 2 Drew. 298; Hammond *v.* Hammond, 19 Beav. 29. See also Butcher *v.* Butcher, 14 Beav. 222; Cramer *v.* Moore, 3 Sm. & G. 141; Grey *v.* Stuart, 2 Giff. 398; Brooks *v.* Keith, 1 Drew. & S. 462; Coventry *v.* Coventry, 32 Beav, 612; Re Mainwaring's Settlement, Law Rep. 2 Eq. 487.

(*u*) Lewis *v.* Madocks, 17 Ves. 48; Needham *v.* Smith, 4 Russ. 318; Needham *v.* Kirkman, 4 B. & Ald. 531 (E. C. C. L. R. vol. 6); Hardey *v.* Green, 12 Beav. 182.

(*v*) Willis *v.* Black, 4 Russ. 170; Clegg *v.* Clegg, 2 Russ. & My. 570; Eardley *v.* Owen, 10 Beav. 572; Jones *v.* How, 7 Hare 267; 9 C. B. 1 (E. C. L. R. vol. 67). See Phelp *v.* Amcotts, V.-C. J., 17 W. R. 703.

(*w*) Freemoult *v.* Dedire, 1 P. Wms. 429; Berrington *v.* Evans, 3 You. & Col. 384.

(*x*) Mornington *v.* Keane, 2 De G. & J. 292, explaining Roundell *v.* Brearey, 2 Vern. 482, and questioning Wellesley *v.* Wellesley, 4 Myl. & Cr. 561, 581.

Marriage as we have seen,(*y*) is a valuable consideration.[1] Every settlement, therefore, made by parties of full age, previously to and in

(*y*) *Ante*, p. 74.

[1] Not only is marriage regarded as a valuable consideration: Magniac *v.* Thompson, 1 Baldw. 344, affirmed 7 Peters 348; Carroll *v.* Lee, Admr. 3 Gill & Johns. 504; Bray *v.* Dugeon, 6 Munf. 132; Smith *v.* Smith's Admr., Id. 581; Hutcher *v.* Robertson, Exr., 4 Strobh. Eq. 179; De Barante *v.* Gott et al., 6 Barb. 492; Dunn *v.* Thorp, Admr. &c., 4 Ired. Eq. 7; Freeman et al. *v.* Hill, Exr. et al., 1 Dev. & Bat. 389; Trenton Banking Co. *v.* Woodruff et al, 1 Green Ch. 117; Armfield *v.* Armfield, 1 Freeman Ch. 311; Cummings *v.* Boston, 25 Geo. 277; Cloud *v.* Dupree, 28 Id. 170; Albert *v.* Winn, 5 Md. 66; Frank's Ap., 59 Penn. St. 190; but it is looked upon as the highest of considerations: Tunno et al. *v.* Trezevant et al., 2 Desauss. 267; and equity will uphold an agreement made in consideration of marriage, in cases where by law, no remedy could be sought; as, where one in contemplation of marriage, gave a bond to his intended wife, that he would allow her to hold all her personal property to her sole and separate use; though, by the marriage, such bond was, as a legal instrument, extinguished, yet the agreement was upheld, in accordance with the intention of the parties: Baldwin *v.* Carter, 17 Conn. 201; Smith *v.* Chapell, 31 Id. 589; but a verbal agreement, though founded upon marriage, will not be valid: Andrews & Bro. *v.* Jones et al., 10 Ala. 400; Montgomery *v.* Henderson, 3 Jones Eq. 113; unless falling within the principle of the statute of frauds: Neale *v.* Neales, 9 Wall. U. S. 1; nor will an agreement in consideration of marriage be supported, unless the circumstances of the parties are such as to warrant the making of a marriage settlement; thus in the case of Keith *v.* Woombwell, 8 Pick. 213, which was an agreement made between two very poor persons in anticipation of marriage, C. J. Parker says, "That two very poor people, depending upon their labor for their living, should, upon a contemplated marriage enter into an agreement, the effect of which would be that the labor of one should go to the support of both, and that the labor of the other should be to the profit of that one only, would be a very unequal bargain, and hardly sustainable in a court of equity. It would be without consideration, and as respects *future* creditors even, would be fraudulent, for the visible means of the husband in such case, upon which he would gain his daily credit, would be continually diminished, by a secret, invisible consumption, which would keep him down, and render him wholly unable to pay his debts." And see, Quidort *v.* Pergeaux, 3 Green 472.

Where, however, the contract of marriage is valid, it is interpreted like an ordinary contract of sale; if the contract is executed, the wife is regarded as a purchaser, and if executory, as a creditor: Magniac *v.* Thompson, 1 Bald. 344, affirmed, 7 Peters 348; Armfield *v.* Armfield, 1 Freem. Ch. 311; but courts of law will not estimate the value of the marriage, in comparison with the settlement, though equity may do it: Magniac *v.* Thompson, 1 Baldw. 344, affirmed, 7 Peters 348; so, a contract based upon the consideration of marriage, will be valid, even though the husband was indebted at the time: Magniac *v.* Thompson, 1 Baldw. 344; Fones *v.* Rice, et al., 9 Gratt. 568; Rivers *v.* Thayer, 7 Rich. Eq. 136; Tisdale *v.* Jones, 38 Barb. 523; Jones's Ap., 62 Penn. St. 324; just as one may sell his property for a good consideration, even though indebted: Wheaton *v.* Sexton's Lessee, 4 Wheat. 503; but, of course, existing liens will not be defeated by such sale or settlement: Armfield *v.* Armfield, 1 Freem. Ch. 311; Byrod's Ap., 31 Penn. St. 241; and to make the contract void for fraud against creditors, both parties must concur in the fraud: Magniac *v.* Thompson, 1 Baldw. 344; Andrews & Bros. *v.* Jones et al., 10

consideration of marriage, or made subsequently to marriage in pursuance of written articles,(z) stands on the footing of a purchase, and has

(z) Stat. 29 Car. II. c. 3, s. 4. See *ante*, p. 78.

Ala. 400; Marshall *v.* Morris, 16 Geo. 368; and generally, almost any agreement which is reasonable, and made *bonâ fide* before marriage, to secure property to the wife, will be enforced in equity: Stilley *v.* Folger et al., 14 Ohio 649; Brooks et al. *v.* Dent, Admr., et al., 1 Md. Ch. Decs. 523; Wood *v.* Savage, Walk. Ch. 471; Miller *v.* Goodwin, 8 Gray 542; Robson *v.* Jones, 27 Geo. 266; Snyder *v.* Webb, 3 Cal. 83; Page *v.* Kendrick, 10 Mich. 300; but a post-nuptial settlement, made in pursuance of a parol agreement made before marriage, is void as to antecedent creditors: Reade *v.* Livingston, 3 Johns. Ch. 481; Izard *v.* Izard, 1 Bailey Ch. 288; Davidson *v.* Graves, Riley Ch. 219; Borst *v.* Covey et al., 16 Barb. 136; it is otherwise, however, in regard to a post-nuptial settlement, made in accordance with a written ante-nuptial agreement; Reade, Admr., *v.* Livingston et al., 3 Johns. Ch. 481; Woodward *v.* Woodward, 5 Sneed 49; Kinnard *v.* Daniel, 13 B. Mon. 496. Where post-nuptial settlements are made without consideration, they will be governed by the same rules as voluntary settlements; thus they are regarded as valid, if made by one not indebted at the time: Sexton *v.* Wheaton, 8 Wheat. 229; Picquet *v.* Swan, 4 Mass. 443; Simpson *v.* Graves, Riley Ch. 232; United States Bank *v.* Ennis, Wright 605; Beach *v.* White, Walker Ch. 495; Barker *v.* Coneman, 13 Cal. 9; Reynolds *v.* Lansford, 16 Texas 286; Townsend *v.* Maynard, 45 Penn. St. 198; Larkin *v.* McMullen, 49 Id. 29; Dygert *v.* Remerschneider, 39 Barb. 417; and even though he be indebted, provided he has sufficient property in addition to that settled, to pay his debts, or those debts are amply secured by the covenants of the settlement: Reade, Admr., *v.* Livingston et al., 3 Johns. Ch. 481; Picquet *v.* Swan, 4 Mass. 443; Thompson *v.* Dougherty, 12 S. & R. 448; Ridgway *v.* Underwood, 4 Wash. C. C. 137; Hopkirk *v.* Randolph, Admr., &c., 2 Brockenb. 130; Pinney et al. *v.* Fellows, 15 Vt. 536; Rundle *v.* Murgatroyd, 4 Dall. 304; Moritz *v.* Hoffman, 35 Ill. 553; Levitt *v.* Levitt, 47 N. H. 329; or he conveys nothing more than what the equity of the wife would entitle her to: Poindexter *v.* Jeffries, 15 Gratt 363; Coates *v.* Gerlach, 44 Penn. St. 43; Butler *v.* Rickets, 11 Iowa 107; Shaffner *v.* Renter, 37 Barb. 44; or where the settlement merely returns to the wife, property equivalent to that of hers, which had been appropriated by the husband: Wiley *v.* Gray, 36 Miss. 510; Harris *v.* Brown, 30 Ala. 401; Stockett *v.* Holliday, 9 Md. 480; William & Mary College *v.* Powell, 12 Gratt. 372; Tripner *v.* Abrahams, 47 Penn. St. 227; Latimer *v.* Glenn, 2 Bush 535; such a deed, however, will be only void as to antecedent, and not as to subsequent creditors: Hinds, Lessee, *v.* Longworthy, 11 Wheat. 199; Reade, Admr. *v.* Livingston et al., 3 Johns. Ch. 481; Bennett *v.* The Beford Bank, 11 Mass. 421; Ridgway *v.* Underwood, 4 Wash. C. C. 137; Davis *v.* Herrick, 37 Maine 397; Niller *v.* Johnson, 27 Md. 6; but it has been held that a subsequent creditor, would participate in the benefit of a decree instituted by a prior creditor: Ammon's Ap., 63 Penn. St. 284; where such a conveyance was made at the commencement of a new and hazardous business, it was held void as against debts contracted in that business: Mullen *v.* Wilson et al., 44 Penn. St. 413. And see Snyder *v.* Christ, 39 Id. 499; Case *v.* Phelps, 39 N. Y. 164; Clayton *v.* Brown, 30 Geo. 490.

In the case of Salmon *v.* Bennett, I Conn. 525, C. J. Swift remarks, "Where there is no actual fraudulent intent, and a voluntary conveyance is made to a child in consideration of love and affection, if the grantor is in prosperous circumstances, unembarrassed, and not considerably indebted, and the gift is a reasonable provision for the child, according to his state and condition in life, comprehending but

equal validity. But a voluntary settlement is liable to be defeated by the creditors of the settlor, if he was so much indebted at the time as

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a small portion of his estate, leaving ample funds unencumbered for the payment of the grantor's debt; then such a conveyance will be valid against creditors existing at the time."

A voluntary settlement is also void, as to a subsequent purchaser, with notice: Sterry *v.* Arden et al., 1 Johns. Ch. 261, affirmed, 12 Johns. 536; Cathcart et al. *v.* Robinson, 5 Peters 264; in which last case, C. J. Marshall uses the following language: "There is some contrariety and some ambiguity in the old cases on this subject; but this court conceives that the modern decisions, establish the absolute conclusiveness of a subsequent sale, to fix fraud upon a family settlement, fraud not to be repelled by any circumstances whatever." And it does not matter whether the sale be from the grantor or grantee under the voluntary deed, save that if from the latter, it must be previous to a sale by the grantor, or before it is taken in execution by his creditors: Anderson et al. *v.* Roberts et al., 18 Johns. 516; other cases, however, hold that a voluntary settlement, though void as to creditors, is good as to the grantor and all claiming under him: Thompson *v.* Dougherty, 12 S. & R. 448; Church *v.* Church, 4 Yeates 280; Shunk *v.* Endress, 3 W. & S. 253; Worrall's Accounts, 5 Id. 113; Huey's Ap., 29 Penn. St. 219; but there is no question, that a voluntary settlement will be good as to existing creditors, or subsequent purchasers, by matter *ex post facto;* as if one gains credit by such settlement, so as to found a consideration for a marriage presently had: Sterry *v.* Arden et al., 1 Johns. Ch. 261, affirmed, 12 Johns. 536; Huston's Admr. *v.* Cantril et al., 11 Leigh 137; Hopkirk *v.* Randolph, Admr., 2 Brockenb. 130. And a post-nuptial settlement for a valuable consideration is good, as an ordinary transfer of property: Barron *v.* Barron et al., 24 Vt. 376; Pinney et al. *v.* Fellows, 15 Id. 536; Brooks et al. *v.* Dent, Admr., et al., 1 Md. Ch. Decs. 523; Livingston *v.* Livingston, 2 Johns. Ch. 537; Ryan, Admr., *v.* Bull et al., 3 Strobh. Eq. 86; U. S. Bank et al. *v.* Brown et al., 2 Hill Ch. 562; Keith *v.* Wombwell, 8 Pick. 213.

It is not absolutely indispensable that there should be a trustee to a marriage settlement: Carroll *v.* Lee, Admr., 3 Gill & Johns. 504; Exr. of Allen *v.* Rumph et al., 2 Hill Ch. 4; Crostwaight, &c., *v.* Hutchinson, &c., 2 Bibb 407; Barron *v.* Barron et al., 24 Vt. 376; Fox *v.* Jones, 1 W. Va. 205; for, if no trustee is named, the husband will take that office: Hamilton *v.* Bishop et al., 8 Yerg. 33; Picquet *v.* Swan, 4 Mass. 443; Griffith's Admr. *v.* Griffith, 5 B. Mon. 118; Baldwin *v.* Carter, 17 Conn. 201; Kenley *v.* Kenley, 2 How. (Miss.) 751; Parks *v.* Noble, 9 Rich. Eq. 85; Resor *v.* Resor, 9 Ind. 347; Riley *v.* Riley, 25 Conn. 154; but, agreements entered into between husband and wife during coverture are void at law: Wallingsford *v.* Allen, 10 Peters 583; Sheppard *v.* Sheppard, 7 Johns. Ch. 57; Harkins et al. *v.* Coulter et al., 2 Port. 463; Duffy *v.* The Insurance Co., 8 W. & S. 413; Wood *v.* Warden, Admr., &c., 20 Ohio 521; Hutton *v.* Hutton's Admr., 3 Penn. St. 100; Johnston *v.* Johnston, 1 Grant Cas. 468; Bear *v.* Bear, 33 Penn. St. 525; Fowler *v.* Trebein, 16 Ohio St. 493; though they are good in equity, if upon a valuable consideration: Wallingsford *v.* Allen, 10 Peters 583; Sheppard *v.* Sheppard, 7 Johns. Ch. 57; Harkins et al. *v.* Coulter et al., 2 Port. 463; McKennan *v.* Phillips, 6 Whart. 571; Trenton Banking Co. *v.* Woodruff et al., 1 Green Ch. 117; Shirley *v.* Shirley et al., 9 Paige Ch. 363; Griffith's Admr. *v.* Griffith, 5 B. Mon. 118; Bridges *v.* Wood, 4 Dana 610; Smith *v.* Smith's Admr., 6 Munf. 581; Duffy *v.* The Insurance Co., 8 W. & S. 413; Wood *v.* Warden, Admr., 20 Ohio 521; Stiles *v.* Fleming, Exr., et al., 1 Dev. Eq. 185; Ex parte Wells, 3 Desauss. 158; Hutton *v.* Hutton's Admr., 3 Penn. St. 100; Wells *v.* Wells, 35 Miss. 638; Deming

to bring the settlement within the provisions of the statute of the 13th of Elizabeth(*a*) already noticed,(*b*) by which the alienation of goods and chattels made for the purpose of delaying, hindering or defrauding creditors, is rendered void as against them. For although by the phrase "goods and chattels" was intended only such personal property as could be taken by the sheriff under an execution on a judgment,(*c*) but as almost all kinds of personal property may now be taken in execution,(*d*) or charged with the payment of judgment debts,(*e*) all such property is now within the compass of the statute.(*f*)[1] [*298] *The voluntary assignment of goods or chattels, or delivery or making over of bills, bonds, notes or other securities, or the voluntary transfer of any debts made by a person being at the time insolvent,(*g*) was by the former bankruptcy acts void in the event of his bankruptcy.(*h*) This provision embraced all personal estate capable of assignment or transfer:(*i*) but it did not extend to a gift of money.(*j*) The provisions of the Bank-

(*a*) Stat. 13 Eliz. c. 5; Sharf *v.* Soulby, 1 Macn. & G. 364.

(*b*) *Ante*, p. 48.

(*c*) Sims *v.* Thomas, 2 Ad. & E. 536 (E. C. L. R. vol. 29). See *ante*, p. 51.

(*d*) Stat. 1 & 2 Vict. c. 110, s. 12. See *ante*, p. 119.

(*e*) Stats. 1 & 2 Vict. c. 110, s. 14; 3 & 4 Vict. c. 82, s. 1; *ante*, p. 119.

(*f*) See Edwards *v.* Cooper, 11 Q. B. 33 (E. C. L. R. vol. 63); Barrack *v.* M'Culloch, 3 Kay & John. 110; Jenkyn *v.* Vaughan, 3 Drew. 419.

(*g*) See Cutten *v.* Sanger, 2 You. & Jer. 459.

(*h*) Stat. 12 & 13 Vict. c. 106, s. 126, repealing stat. 6 Geo. IV. c. 16, s. 73, to the same effect.

(*i*) Brown *v.* Bellaris, 5 Mad. 53.

(*j*) Ex parte Shortland, 7 Ves. 88; Kensington *v.* Chandler, 2 M. & Selw. 36; Ex parte Skerett, 2 Rose 384.

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v. Williams, 26 Conn. 226; Simons *v.* McElwain, 26 Barb. 420; but an agreement between husband and wife to live separate and apart from each other, is good neither at law nor in equity, unless through the intervention of a trustee: McKennan *v.* Phillips, 6 Vt. 571; Simpson *v.* Simpson, 4 Dana 141; Carson *v.* Murray et al., 3 Paige 483; Reed *v.* Beazley, 1 Blackf. 97; Rogers *v.* Rogers, 4 Paige 516; Champlin *v.* Champlin et al., 1 Hoff. Ch. 55; the contrary has, however, been held, where the agreement was consummated; see Hutton *v.* Hutton's Admr., 3 Penn. St. 100.

A contract by a husband during marriage, while living in amity, or before marriage, to pay an allowance for the support of his wife in case of a future separation, is void as against public policy; but when made in contemplation of the continuance of a previous separation, or of disagreements which have already taken place, is good: Gaines *v.* Poor, 3 Metc. (Ky.) 503.

[1] But in Pennsylvania, lands are considered as chattels for the payment of debts; creditors have a legal right to take the property of their debtors in execution, and any conveyance made to defeat them is void: Reichart *v.* Castator, 5 Binn. 112; and in case of insolvency, the assignees have power to recover and dispose of all such real or personal estate, as the insolvent shall have (prior to the assignment) conveyed or transferred with intent to defraud his creditors: Purd. Dig. (1861), pp. 542, 543.

ruptcy Act, 1869, on this subject are very stringent, and have been already mentioned. And the word "property," which is employed by the act, is expressly defined by it to include money as well as every other description of property.(*k*)[1]

Although a voluntary settlement may thus be defeated by creditors, yet when once completed, it is binding on the settlor, who cannot by any means undo it.(*l*) Thus, in one case,(*m*) a maiden lady not immediately contemplating marriage, but thinking such an event possible, transferred a sum of stock into the names of trustees in trust for herself until she should marry, and, after her marriage, in trust for her separate use for her life, free from the control of any person or persons with whom *she might intermarry, and after her decease, upon trusts for the benefit of any such husband, and her child or children by any husband or husbands. She afterwards being still unmarried, filed a bill in Chancery, praying that the settlement might be delivered up to her to be cancelled, and that the stock might be ordered to be re-transferred by the trustees. But the court held that she was bound by the settlement she had made, and was not entitled to any assistance to release her from it.[2]

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If however the object of the settlor is merely his own benefit or convenience, the settlement will be revocable by him at his pleasure. Thus where a man, without any communication with his creditors, puts property into the hands of trustees for the purpose of paying his debts, his object is said to be, not to benefit his creditors, but to benefit himself by the payment of his debts.(*n*) He may accordingly revoke the trust thus created(*o*), so long as the creditors remain in ignorance of

(*k*) *Ante*, pp. 153, 154. Stat. 32 & 33 Vict. c. 71, s. 4.

(*l*) Ellison *v.* Ellison, 6 Ves. 656; Edwards *v.* Jones, 1 Myl. & Cr. 226; Newton *v.* Askew, 11 Beav. 145; Kekwich *v.* Manning, 1 De G., M. & G. 176; Bentley *v.* Mackay, 15 Beav. 12; Bridge *v.* Bridge, 16 Beav. 315; Re Way's Settlement, Lds. Jus. 13 W. R. 149; 2 De G., J. & S. 365.

(*m*) Bill *v.* Cureton, 2 Myl. & K. 503. See also Petre *v.* Espinasse, 2 Myl. & K. 496; M'Donnell *v.* Hesilridge, 16 Beav. 346; Donaldson *v.* Donaldson, 1 Kay 711.

(*n*) Per Sir C. Pepys, M. R., 2 Myl. & K. 511; cited by Wigram, V.-C., in Hughes *v.* Stubbs, 1 Hare 479.

(*o*) Garrard *v.* Lord Lauderdale, 3 Sim. 1; Acton *v.* Woodgate, 2 Myl. & K. 492; Ravenshaw *v.* Hollier, 7 Sim. 3; Law *v.* Bagwell, 4 Dru. & Warren 398; Smith *v.* Keating, 6 C. B. 136 (E. C. L. R. vol. 60); Driver *v.* Mawdesley, 16 Sim. 511.

[1] See *ante*, p. 135, note, and 154, note. [2] See *ante*, p. 297, note.

it.(*p*) This rule, however, though well established, seems to attribute to debtors a somewhat light estimation of the claims of their creditors; and there appears to be no disposition in the courts to extend it.(*q*)

[*300] The statute of Elizabeth,(*r*) by which voluntary *settlements of lands and other hereditaments are void as against subsequent purchasers for valuable consideration, though it extends to chattels real,(*s*) does not apply to purely personal estate.(*t*)[1] A voluntary settlement of personal estate cannot therefore be defeated by a subsequent sale of the property by the settlor.

Settlements of any definite and certain principal sum of money, of any denomination or currency, whether British, foreign or colonial, or of any definite and certain share in the funds, or Bank, East India, or South Sea stock, or in the stock or funds of any other company or corporation, or in the stocks or funds of any foreign or colonial government, state, corporation or company whatsoever, are now liable to an ad valorem duty of one-fourth per cent., or five shillings per hundred pounds, on the amount of the money or the value of the stock or share settled, according to the table contained in the Stamp Act,(*u*) with a progressive duty of ten shillings for every *entire* quantity of 1080 words beyond the first 1080. The duty on the settlement of money secured

(*p*) Browne *v.* Cavendish, 1 Jones & Lat. 606, 635; Griffith *v.* Ricketts, 7 Hare 299, 307; Mackinnon *v.* Stewart, 1 Sim. N. C. 76, 89, 90; Harland *v.* Binks, 15 Q. B. 713 (E. C. L. R. vol. 69); Smith *v.* Hurst, 10 Hare 30. But see Cornthwaite *v.* Frith, 4 De G. & Sm. 552.

(*q*) See Wilding *v.* Richards, 1 Coll. 661; Simmonds *v.* Palles, 2 Jones & Lat. 489; Kirman *v.* Daniel, 5 Hare 493, 499–501.

(*r*) Stat. 27 Eliz. c. 4; Principles of the Law of Real Property 56, 1st ed.; 59, 2d ed.; 62, 3d and 4th eds.; 67, 5th ed.; 71, 6th ed.; 73, 7th ed.; 74, 8th ed.

(*s*) Co. Litt. 3 b; 6 Rep. 72.

(*t*) 2 Myl. & K. 512.

(*u*) Stat. 13 & 14 Vict. c. 97; 27 Vict. c. 18, ss. 11–13.

[1] On the subject of voluntary settlements of personal estates, and that their validity or invalidity is, in this country, as a general thing, determined by the same rules which regulate such settlements of land, see Bayard et al. *v.* Hoffman et al., 4 Johns. Ch. 450; Bank U. S. et al. *v.* Huth, 4 B. Mon. 444; Bohn *v.* Headley, 7 Har. & Johns. 257; Toumin *v.* Buchanan's Exr., 1 Stew. 67; Backhouse's Admr. *v.* Jett's Admr., 1 Brockenb. 500; Thayer *v.* Thayer et al., 14 Vt. 107; Davis *v.* Payne's Admr., 4 Rand. 332; Huston, Admr., *v.* Cantrill et al., 11 Leigh 157; Bentley et al. *v.* Harris, Admr., 2 Gratt. 357; Beckham *v.* Secrest, 2 Rich. Eq. 54; Worthington et al. *v.* Shipley, 5 Gill 445; Fleming *v.* Townsend, 6 Geo. 103; Wilson *v.* Buchanan, 7 Gratt. 334; Smith *v.* Stern, 18 Penn. St. 360; McVicker *v.* May, 3 Id. 227; Penrod *v.* Morrison, Admr., 2 Penna. R. 126; Clemens *v.* Davis, 7 Penn. St. 264; Streeper *v.* Eckert, 2 Whart. 302; Stark *v.* Ward, 3 Penn. St. 328; Forsyth *v.* Matthews, 12 Id. 100.

by a policy of assurance is now charged on the sum secured; but if there be not any certain covenant, contract or provision made for keeping up such policy or for paying the premiums which may become payable in that behalf, then the ad valorem duty is chargeable only on the value of the policy at the date of the settlement.(x)

By the Succession Duty Act, 1853,(y) provision has been made for charging certain duties on the succession *to property upon the death of any person dying after the 19th of May, 1853. These [*301] duties are at the same rates as the lagacy duty, of which an account will be given in the chapter on wills, increasing in proportion to the distance in consanguinity between the predecessor, from whom the interest succeeded to is derived, and the successor.[1]

(x) Stat. 27 Vict. c. 18, s. 12.

(y) Stat. 16 & 17 Vict. c. 51.

[1] A provision similar to that referred to in the text was enacted by the Act of Congress, approved June, 30, 1864, and known as the "Internal Revenue Law." The 124th and 125th secs. of said act, relate to the tax upon legacies and distributive shares of personal property. Sec. 126, and some subsequent secs. of the same act, refer to the succession of real estate, and the amount and manner of levying tax thereon. But the third section of the Act of Congress, of the 14th of July, 1870, repealed the taxes imposed by the Internal Revenue Law on legacies and successions. Stats. at Large (1869–70), p. 256, sec. 3.

[*302] *CHAPTER II.

OF JOINT OWNERSHIP AND JOINT LIABILITY.

THERE may be a joint ownership of any kind of personal property, in the same manner as there may be a joint tenancy of real estate;(a) and the four unities of *possession*, *interest*, *title* and *time*, which characterize a joint tenancy of real estate, apply also to a joint ownership of chattels. But as no estates can exist in personal property, the distinctions which hold with respect to joint estates for life, in tail, or in fee, do not occur in a joint ownership of personalty. If personal property, whether in possession or in action, be given to A. and B. simply, they will be joint owners, having equal rights as between themselves, during the joint ownership, and being, with respect to all other persons than themselves, in the position of one single owner. Hence it follows, that if a bond or covenant be given or made to two or more jointly, they must all join in suing upon it;(b) and a release by one of them to the obligor is sufficient to bar them all.(c)[1] As a further consequence of the unity of a joint

(a) See Principles of the Law of Real Property 99, 1st ed.; 104, 2d ed.; 109, 3d and 4th eds.; 114, 5th ed.; 120, 6th ed.; 123, 7th ed.; 128, 8th ed.

(b) Slingsby's Case, 5 Rep. 18 b; Petrie *v.* Bury, 3 B. & C. 353 (E. C. L. R. vol. 10); 1 Wms. Saund. 291 i.

(c) 2 Rol. Abr. 410 (D.), pl. 1, 5.

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[1] In general all the obligees or covenantees should join in suing upon a joint contract: Eisenhart et al. *v.* Slaymaker, 14 S. & R. 153; Halliday *v.* Doggett et al., 6 Pick. 359; Williams et al. *v.* Ehringhaus et al., 2 Dev. 511; Blanchard *v.* Dyer, 21 Maine 111; Moody et al. *v.* Sewall, 14 Id. 295; Darling *v.* Simpson, 15 Id. 175; Jellison *v.* Lafonta, 19 Pick. 245; Archer *v.* Dunn, 2 W. & S. 360; Sims *v.* Tyre, 3 Brev. 249; Hays et al. *v.* Lasater et al., 3 Pike 565; Archer *v.* Boyne, 3 Scam. 526; Richardson *v.* Jones, 1 Ired. 296; Bailey *v.* Powell et al., 11 Misso. 416; Sims et al. *v.* Harris, 8 B. Mon. 55; Strange *v.* Floyd, 9 Gratt. 474; Quisenberry *v.* Artis, 1 Duvall (Ky.) 30; Deshler *v.* Beers, 32 Ill. 368; and the joint owners of personal property, are properly joined in an action of replevin to recover possession: McArthur *v* Lane, 15 Maine 245; Hart *v.* Fitzgerald, 2 Mass. 509; provided their interests in the property are not separate and distinct: Chambers *v.* Hunt, 15 Penn. St. 343; and they may also join, in an action of trespass for an injury thereto: Glover et al. *v.* Austin, 6 Pick. 209; Pickering *v.* Pickering et al., 11 N. H. 141; Smoot *v.* Wathen, Admr., 8 Misso. 525; Douty *v.* Bird, 60 Penn. St. 48. But all the parties plaintiffs need not be joined, provided there is a legal cause for omitting some, such as their death, coverture, or refusing to be joined: Sneed *v.* Wiester, &c., 2 Marsh. 283; Hays et al.

ownership, the important right of survivorship, which distinguishes a joint tenancy of real estate, belongs also to a joint ownership of personal property. Whether the subject of the joint ownership be a chattel real as a lease, or a chose in possession as a horse, or a chose in action as a debt or legacy, the surviving joint owner will be entitled to the whole, *unaffected by any disposition which the deceased joint owner may have made by his will, unless the joint tenancy should have [*303]

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v. Lasater, 3 Pike 565; Strange *v.* Floyd, 9 Gratt. 474. So, where the moving cause of action, of two or more joint covenantees, is several, and not joint, each may maintain his several action on the covenant: Blakey, &c., *v.* Blakey et al., 2 Dana 462; Bailey *v.* Powell et al., 11 Misso. 419; Sims et al. *v.* Harris, 8 B. Mon. 55; Catawissa R. R. Co. *v.* Titus, 49 Penn. St. 277; Power *v.* Hathaway, 43 Barb. 214; Little *v.* Hobbs, 8 Jones L. 179; thus, where several were interested in a fund, and one was paid his share, it was held that the others were entitled to sue separately, the payment of the one being considered an acknowledgment on the part of the debtor, that they had several interests: Parker *v.* Elder, 11 Humph. 547; and, where there are joint owners of a vessel, one may sue for his share, of the surplus proceeds of a sale on execution against himself and the other owners: Hopkins *v.* Forsyth, 12 Penn. St. 34. And see State *v.* Hesselmeyer, 34 Misso. 76; Steadman *v.* Guthrie, 4 Metc. (Ky.) 147; Rhoads *v.* Booth, 14 Iowa 572; Masters *v.* Freeman, 17 Ohio St. 323.

In the case of Mytinger *v.* Springer, 3 W. & S. 405, where money was contributed by several individuals, and deposited in the hands of a stakeholder, as a wager upon the result of an election, it was held by Rogers, J., that, "If there were originally a partnership, it being illegal, it would go for nothing, and each of the parties would recover only on his original right of action, and consequently for himself. The law will not recognize a partnership for an illegal purpose, and *for that reason* the court is bound to treat the transaction of partnership as if it had never been;" and in the case of App *v.* Coryell, 3 Penna. R. 494, where a similar principle was involved, the court said, "The contract being void, the money could be recovered only on the promise implied from the receipt of it to the plaintiff's use, which in this respect, is determined by the nature of the consideration, ... no money, however, is received to a man's use, but his own; consequently the law implies no promise to any one but the owner." But see to the contrary of these cases: Gray *v.* Wilson, 1 Meigs 394, decided in Tennessee, where betting is not forbidden by statute, and which also holds, "that though one of several interested in a joint fund, be paid, he cannot, without the consent of all, withdraw his name, or dismiss the suit, even as to himself."

Even though the interests of those making the contract are unequal, if the contract is made by them all jointly, they should all join in suing upon it: Gayle *v.* Martin, 3 Ala. 593; Haughton et al. *v.* Bayley et al., 9 Ired. 337.

A release by one partner of a partnership debt, will extinguish the claim of all the partners; a principle equally true in all cases of joint contracts: Pierson et al. *v.* Hooker, 3 Johns. 68; Southworth *v.* Packard, 7 Mass. 95; Kimball et al. *v.* Wilson, 3 N. H. 96; Fitch et al. *v.* Forman, 14 Johns. 172; Salmon et al. *v.* Davis, 4 Binn. 375; Hall *v.* Gray, 54 Maine 230.

In case of the death of one or more of the parties to a joint contract, the survivors or survivor must sue upon the claim: Beebe et al., Exrs., *v.* Miller, Minor 364; Vandenheuvel *v.* Storrs, 3 Conn. 203; Collison *v.* Little, 2 Port. 89; Penn *v.* Butler, 4 Dall. 354; and when all are dead, the action should be brought by the representatives of the last survivor: Stowell's Admr. *v.* Drake, 3 Zabr. 310.

been previously severed in the lifetime of both the parties.(*d*) And for this reason trustees of settlements of personal estate are always made joint owners, in order that the surviving trustees may take the entire fund, rather than that the executors or administrators of any trustee who may happen to die should have any right to intermeddle with the share of the deceased. Where any *beneficial* interest accrues to any joint owner by survivorship, it is deemed a succession within the Succession Duty Act, 1853, and as such liable to the succession duty.(*e*)[1]

If the joint ownership be created by a will, it is not necessary that the share of all the joint owners should vest at the same time. Thus under a bequest to A. for life, and after his decease to the issue(*f*) or children(*g*) of B., without words of severance, all the issue or children, born in A.'s lifetime, will become entitled jointly, though some may not be living when the shares of the others become vested interests.[2] On the decease of any of them therefore before payment, the survivors will become entitled to their shares. A similar exception to the unity of *time* occurs also in the case of a devise of real estate by will.(*h*)

In analogy to the rule by which a joint estate in fee-simple in lands is [*304] created by a limitation to two or *more, *their heirs and assigns*, it is customary with conveyancers to made a gift of personal estate to two or more jointly, by limiting it to them, *their executors, administrators and assigns*. This, however, though usual is not strictly necessary. In ill-framed instruments, limitations of personalty are sometimes made to two persons, "and the survivor of them, and the executors and administrators of such survivor." If, however, the persons are simply made joint owners, the law will be sufficient of itself to carry the property to the survivor. Bonds and covenants, when intended to be given or made to two or more jointly, are in like manner usually given or made to the obligees or covenantees, *their executors and administrators*; or if the subject-matter be assignable, to them, *their executors, administrators and assigns*. But when entered into with two or more persons, bonds or covenants cannot, as respects the obligees or covenan-

(*d*) Litt. sects. 281, 282; Lady Shore *v.* Billingsley, 1 Vern. 482; Willing *v.* Baine, 3 P. Wms. 115; Morley *v.* Bird, 3 Ves. 629; Williams *v.* Henshaw, 1 John. & H. 546.

(*e*) Stat. 16 & 17 Vict. c. 51, s. 3; *ante*, p. 300.

(*f*) Bridge *v.* Yates, 12 Sim. 645.

(*g*) Amies *v.* Skillern, 14 Sim. 428.

(*h*) See Principles of the Law of Real Property 102, 1st ed.; 107, 2d ed.; 112, 3d and 4th eds.; 117, 5th ed; 123, 6th ed.; 126, 7th ed.; 131, 8th ed.

[1] See *ante* p. 301, note 1.

[2] See *ante*, p. 277, note 1.

tees, be joint or several, at their election, for one and the same cause; for otherwise the court would be in doubt for which of them to give judgment.(*i*) And whether a covenant be joint or several depends much more upon the subject-matter than upon the words employed. If each of the covenantees has a separate interest, each may have a separate cause of action, and the covenant will accordingly in such a case be several, though expressed to be made with the covenantees jointly and severally.(*j*) But if each of the covenantees has not a separate cause of action, all of them must concur in suing upon the covenant, even although it be expressed to be made with some of them, "and as a separate covenant" with the other;(*k*) for if all may sue, all must.(*l*)

*An exception to the right of survivorship between joint owners occurs in the case of partners in trade.[1] In this case the [*305]

(*i*) 5 Rep. 19 a; 1 East 501.

(*j*) 5 Rep. 19 a; 1 Wms. Saund. 155 a, n. (1).

(*k*) Slingby's Case, 5 Rep. 18 b; Anderson *v.* Martindale, 1 East 497; Foley *v.* Addenbrooke, 4 Q. B. 197 (E. C. L. R. vol. 45); Hopkinson *v.* Lee, 6 Q. B. 964 (E. C. L. R. vol. 51); Bradburne *v.* Botfield, 14 M. & W. 559; Wakefield *v.* Brown, 9 Q. B. 209 (E. C. L. R. vol. 58); Keightly *v.* Watson, 3 Exch. Rep. 716.

(*l*) 4 Q. B. 208 (E. C. L. R. vol. 45); Wetherell *v.* Langston, 1 Exch. Rep. 634; Pugh *v.* Stringfield, 3 C. B. N. S. 2 (E. C. L. R. vol. 91).

[1] In cases of solvency, the surviving partner is the owner at law, of all the partnership effects: Knox *v.* Schepler, 2 Hill 595; Slatter *v.* Carrol, 2 Sandf. Ch. 580; Territory of Florida, for the use, &c., *v.* Redding et al., 1 Fla. 444; Roys *v.* Vilas, 18 Wis. 169; Stearns *v.* Houghton, 38 Vt. 583; and as such is the party to sue and be sued, for all partnership claims or liabilities: Alsop *v.* Mather, 8 Conn. 587; Pendleton et al. *v.* Phelps et al., 4 Day 476; Sturgess *v.* Beach, 1 Conn. 509; Yale *v.* Yale, 13 Id. 185; Egberts et al. *v.* Wood et al., 3 Paige Ch. 517; Sale *v.* Dishman's Exrs., 3 Leigh 548; Linney's Admr. *v.* Dare's Admr. et al., 2 Id. 595; Boyce *v.* Coster, 4 Strob. Eq. 30; McCandless & Co. *v.* Hadden, 9 B. Mon. 186; Bernard *v.* Wilcox, 2 Johns. Cas. 374; Marshall et al. *v.* De Groot, 1 Caine Cas. 122; Roosevelt et al. *v.* McDowell, Exr., 1 Kelly 489; Clarke, Admr., *v.* Howe, 23 Maine 560; Philson *v.* Admr. of Bampfield, 1 Brev. 202; Davis *v.* Church, 1 W. & S. 240; Caldwell, Admr., &c., *v.* Stileman, 1 Rawle 215; Gardiner, Admr., *v.* Cummings et al., 1 Geo. Decs. 1; Harwood et al. *v.* Jones, 10 Gill & Johns. 405; Robinson *v.* Thompson et al., 1 Sm. & M. Ch. 454; Hammon *v.* St. John et al., 4 Yerg. 107; Southard *v.* Lewis, 4 Dana 148; Andrew's Heirs, &c., *v.* Brown's Admr. et al., 21 Ala. 437; Walker, Admr. et al. *v.* House, 4 Md. Ch. Decs. 44; Burgwin *v.* Admr. of Hostler, 1 Tayl. 124; Ward *v.* Barber, 1 E. D. Smith 423; Wilson *v.* Soper, 13 B. Mon. 411; Hoskinson *v.* Eliot, 62 Penn. St. 393. This *jus accrescendi*, only holds to enable the survivor to get in the debts, and settle the affairs of the firm: Jarvis *v.* Hyer et al., 4 Dev. 367; Holland *v.* Fuller, 13 Ind. 195; and his interest, therefore, is merely a legal one, which he must use for the purpose of bringing the partnership accounts to a settlement: Lang's Heirs *v.* Warning, 17 Ala. 154; White *v.* The Union Insurance Company, 1 N. & McCord 557; McCormick's

law, in order to the encouragement of commerce, vests in the executors or administrators of a deceased partner, the share of the deceased in all

Ap., 55 Penn. St. 252; Tillotson *v.* Tillotson, 34 Conn. 335; but in Louisiana this is not an absolute right, being dependent on the consent of the heirs present or represented in the State: McKowen *v.* McGuire, 15 La. Ann. 671; and for discharging this duty, he will not be entitled to compensation: Beatty *v.* Wray, 19 Penn. St. 516; Brown *v.* McFarland's Exr., 41 Id. 129. And see, Griggs *v.* Clark, 23 Cal. 427.

But where the surviving partner is insolvent, and there is no partnership fund, equity will give a remedy against the representatives of the deceased partner: Sale *v.* Dishman's Exr., 5 Leigh 548; Linney's Admr. *v.* Dare's Admr. et al., 2 Id. 595; Emanuel *v.* Bird, Admr., et al., 19 Ala. 596; Wilder et al. *v.* Keeler et al., 3 Paige Ch. 167; Marshall et al. *v.* De Groot, 1 Caine Cas. 122; Philson *v.* Admr. of Bamfield, 1 Brev. 202; Caldwell, Admr., *v.* Stileman, 1 Rawle 215; Southard *v* Lewis, 4 Dana 148; Hammersley *v.* Lambert et al., 2 Johns. Ch. 508; Horsey, &c., *v.* Heath, &c., 5 Ham. 355; and this has also been held, where one was unable to obtain satisfaction from the surviving partner: Voorhis *v.* Child, 17 N. Y. 354; Shaw *v.* Knowles, 3 R. I. 112. In some of the States, however, by statute, the representatives of a deceased partner may be sued, even when the surviving partner is solvent, and for that purpose may be joined with him as defendants: McLain et al. *v.* Carson, Exr., 4 Pike 164; Maxey *v.* Averill's Exrs., 2 B. Mon. 108; Ransom *v.* Pomeroy, Admr., 8 Blackf. 383; Brewster's Admr. *v.* Sterrett, 32 Penn. St. 115; Moore's Ap., 34 Id. 411; Gunter *v.* Jarvis, 25 Texas 581; or they may be sued alone; and this has been held, even though there is an action for the same cause pending against the surviving partners: Creswell et al., Exrs., *v.* Blank, 3 Grant Cas. 320; and by a statute of Tennessee, the doctrine of survivorship does not apply to the case of land held by a firm: Gaines *v.* Catron, 1 Humph. 514.

Where the executor of a partner, continues the business of his testator, he thereby becomes a partner, and liable as such, not in his representative, but in his individual capacity: Alsop *v.* Mather et al., 8 Conn. 584; Egberts et al. *v.* Wood et al., 3 Paige Ch. 517; but the personal representatives of a deceased partner may carry on the business, where a covenant to that effect existed in the co-partnership articles, or he directed by will that it should be done: Laughlin *v* Lorentz's Admr., 48 Penn. St. 275.

There is no such analogy between death and insolvency, in cases of partnership, as to give by law a solvent partner, the sole administration of the assets, where the remaining partners are insolvent: Hubbard et al. *v.* Guild, 1 Duer 662. See also Barcroft *v.* Snodgrass, 1 Cold. (Tenn.) 430.

Real estate, when purchased with partnership funds, and for partnership purposes, is regarded as partnership property: Brooke *v.* Washington, 8 Gratt. 248; Wheatley's Heirs *v.* Colhoun, 12 Leigh 272; Pierce's Admr. *v.* Triggs's Heirs, 10 Id. 424; Whislow *v.* Chiffelle, S. C. Eq. (Harper's) 25; Edgar *v.* Donnaly et al., 2 Munf. 387; Deloney *v.* Hutcheson, 2 Rand. 183; Buchan *v.* Sumner, 2 Barb. Ch. 166; Donaldson *v.* The Bank of Cape Fear, 1 Dev. Ch. 106; Divine, &c., *v.* Mitchum, 4 B. Mon. 489; Hauff *v.* Howard, 3 Jones Eq. 440; Tillinghurst *v.* Champlin, 4 R. I. 173; Matlock *v.* Matlock, 5 Ind. 403; Willis *v.* Freeman, 35 Vt. 44; Meason *v.* Kaine, 63 Penn. St. 335; and even when purchased in the name of the partners as tenants in common, it will, if for partnership purposes, be deemed, in equity, as partnership estate: Hoxie *v.* Carr et al., 1 Sumn. 171; Sigourney *v.* Mann et al., 7 Conn. 11; Smith *v.* Tarlton et al., 2 Barb. Ch. 336; Cilley *v.* Huse, 40 N. H. 358; Matlack *v.* James, 2 Beasley 126; Buffum *v.* Buffum, 49 Maine 108; Robertson *v.* Baker, 11 Fla. 192; so, likewise, where the name of one of the partners only is used: Boyers *v.* Elliott, 7 Humph. 204; Hunt et al. *v.* Benson, 2 Id. 459; Lacy *v.*

personal chattels in possession, such as merchandise or ships, which were the joint property of the partnership.(m) But this rule does not extend

(m) Co. Litt. 182 a; Kempe v. Andrews, 3 Lev. 290; Rex v. Collector of Customs, 2 M. & Selw. 223; Buckley v. Barber, 6 Exch. Rep. 164.

Hall, 37 Penn. St. 360; Moreau v. Saffarans, 3 Sneed 595; Jarvis v. Brooks, 7 Foster 37; Coder v. Huling, 27 Penn. St. 84; and, under these circumstances, the realty is considered in equity, as personal property: Hoxie v. Carr et al., 1 Sumn. 171; Buck, &c., v. Winn, &c., 11 B. Mon. 332; Boyce v. Coster, 4 Strobh. Eq. 30; Rice v. Bernard et al., 20 Vt. 479; Delmonico v. Guillaume, 2 Sandf. Ch. 366; Platt v. Oliver et al., 3 McL. 27; Andrew's Heirs, &c., v. Brown's Admr. et al., 21 Ala. 437; Davis v. Christian, 15 Gratt. 11; Ludlow v. Cooper, 4 Ohio St. 1; Moderwell v. Mullison, 21 Penn. St. 257; Black v. Black, 15 Geo. 445; Collumb v. Read, 24 N. Y. 505; Bird v. Morrison, 12 Wis. 138; Nicoll v. Ogden, 29 Ill. 323; Arnold v. Wainwright, 6 Minn. 358; though the contrary has been held in North Carolina: Ferguson v. Hass, Phill. Eq. 113; and may be taken in execution, and sold, under a writ of *fi fa.*: Hunter v. Martin, 2 Richard. 541; but, at law, real estate so purchased, is considered as the several property of the partners: Burnside et al. v. Marick et al., 4 Metc. 537; Dyer v. Clark, Admr. et al., 5 Id. 562; Howard et al. v. Priest et al., Id. 582; Ensign v. Briggs, 6 Gray 329; Galbraith v. Gedge, 16 B. Mon. 631; Lang v. Waring, 25 Ala. 625; Blake v. Mutter, 19 Maine 16; in which last case it was doubted, whether a different rule would hold, even in equity, in that State, against the express provisions of statute c. 35, § 1, which provides, "that all lands conveyed to two or more persons, shall be held by them as tenants in common, and not as joint tenants, unless the conveyance contain express words clearly showing a different intention;" in case, too, of the death of one of the partners, the legal title descends and vests in his heirs at law: Yeatman v. Woods, 6 Yerg. 20; Andrew's Heirs, &c., v. Brown's Admrs., &c., 21 Ala. 437; Piper v. Smith, 1 Head 93; but the surviving partner has an equitable lien thereon, for his indemnity against the debts of the firm, and the balance that may be due him: Gray v. Palmer, 9 Cal. 616; and as the several property of each of the partners, such property may be taken in execution at the suit of a creditor of one of the partners, as to his share, but equity will compel him to hold it in trust, to be applied, if necessary to the payment of the partnership claims: Peck et al. v. Fisher, 7 Cush. 386; Clagett v. Kilbourne, 1 Black (U. S.) 346.

In the absence of proof that real estate had been bought with partnership funds, for partnership purposes; no one of the joint owners can bind the rest by any contract respecting it: Thompson v. Bowman, 6 Wall. (U. S.) 316.

In Buck, &c., v. Winn, &c., 11 B. Mon. 322, it was intimated, that if partnership funds were invested in real estate, not necessary or intended to be used in the business of the firm, either bought for speculation or as an investment, it would be regarded as partnership assets; in New York, however, it has been decided, that in order to have that effect, the real estate so purchased must be for partnership purposes: Cox v. McBurney et al., 2 Sanford S. C. 561; and this has also been decided in the Circuit Court of the United States for the Eastern District of Pennsylvania, in the able opinion delivered by Judge Washington in the case of Phillips v. Crammond, 2 Wash. C. C. 442, in which he says, "Crammond purchased a piece of ground on the Schuylkill, containing about twenty-eight acres, upon which he built a house for a country seat, and in other respects improved the same at considerable expense, to which he gave the name of Sedgely. The purchase-money for this property, and what was expended in improving it, was drawn from the partnership funds, and the con-

at law to *choses in action*, which must accordingly be sued for in the name of the survivor.(*n*) In equity, however, the share of the deceased

(*n*) Martin *v.* Crompe, 1 Ld. Raym. 340; s. c. 2 Salk. 444; 2 Wms. Saund. 117 b, n. (2).

veyance was made to Cammond alone . . . The general principle is, that if a receiver, executor, factor, or trustee, lays out the money which he holds in his fiduciary character, in the purchase of real property, and take the conveyance to himself, he who is entitled to the money, which has been thus invested, may follow the same, and consider the purchase as made for his use, and the purchaser a trustee for him. Upon the same principle, I conceive that a resulting trust would arise to a partnership concern, in lands purchased by one of the partners, and paid for out of the joint funds. . . . But this species of resulting trust is open to certain qualifications, amongst which it is proper to notice the following, viz., that the person whose money was invested in the purchase, is not obliged to take the land, and to consider the purchaser as his trustee, but may elect to treat him as his debtor, and to claim the money instead of the property. As a consequence of this, and because the claim to a resulting trust is merely that of an equity, founded upon the presumptive interest of the parties, that equity may be rebutted, even by parol evidence and circumstances to defeat it. . . . This qualification of the doctrine seems to be decisive of the present case. . . . Nothing can be more clear, than that the property in question, was purchased and improved for the sole and separate use of Wm. Crammond, and that his partners so understood and assented to it. The circumstances to establish these facts are conclusive. The nature of the property,—a country-seat, improved at an immense expense, in the vicinity of the place at which the purchaser alone resided, capable of affording to him an elegant luxury, but totally useless and unproductive to the concern, and out of the view and scope of the business in which they were engaged." But in Pennsylvania, in the case of Erwin's Ap., 39 Penn. St. 535, it was decided that land purchased in the name of one of the members of a partnership, but paid for with the money of the firm, and used by the firm, though not necessary for the partnership purposes, and not used as intended, was partnership property.

In the same State it has been held, that where partners wish to make real estate partnership property, as to subsequent purchasers without notice, or judgment creditors, they must do it by some deed, or instrument of writing, recorded: Ridgway's Appeal, 15 Penn. St. 177; Lancaster Bank *v.* Myley, 1 Id. 544; Hale *v.* Henrie, 2 Watts 143; Lefevre's Ap., 28 Leg. Intel. 412. In Patterson *v.* Brewster, 4 Edw. Ch. 352, it was ruled, that there cannot be a partnership in buying and selling real estate; but the contrary has been decided in Kramer *v.* Arthurs et al., 7 Penn. St. 171; Brady et al., Exrs., *v.* Colhoun et al., Admrs., 1 Penna. R. 140; Dudley *v.* Littlefield, 21 Maine 422; River Whaling Co. *v.* Borden, 10 Cush. 458.

Where real estate is considered partnership assets, judgments for partnership debts will be payable out of the proceeds, in preference to judgments obtained against the partners individually: Overholtz's Appeal, 12 Penn. St. 222; Divine, &c., *v.* Mitchum, 4 B. Mon. 488; North Penna. Coal Co.'s Ap., 45 Penn. St. 181; a purchaser, however, at sheriff's sale, without notice of the partnership claim, will hold against the creditors of the firm: Buck, &c., *v.* Winn, &c., 11 B. Mon. 322; and the same principle seems to have ruled the case of McDermot *v.* Laurence, 7 S. & R. 438, which decided, that where real estate was taken by partners on ground-rent, and buildings erected thereon, for the purpose of carrying on glass-works,

partner, both in the choses in possession and in action belonging to the partnership, devolves on his executors or administrators. The consequence is that, though the choses in action must be sued for by the surviving partner, he will be a trustee of the share of the deceased partner for his executors or administrators.(*o*) The same rule is applied in equity even to real estate purchased for the purposes of a trading partnership,(*p*) and conveyed to the partners as joint tenants in fee. On the decease of any of them, equity holds the survivors to be trustees of the share of the deceased for his executors or administrators as part of his personal estate.(*q*)

Indeed, as a general rule, joint ownership is not *favored in equity, on account of the right of survivorship which attaches to it.(*r*) If therefore two persons advance money by way of mortgage or otherwise, and take the security to themselves jointly, and one of them die, the survivor will be a trustee in equity for the representatives of the deceased, of the share advanced by him.(*s*) And when the intention is that the survivor should receive the whole, a declaration should be inserted that his receipt alone shall be a sufficient discharge for the money secured.(*t*) [*306]

An ownership in common (or, as it is usually styled in analogy to real estate, a tenancy in common) of chattels may arise either from the severance of a joint ownership, or from a gift to two or more to hold in common.(*u*) As, however, a chose in action is inalienable at law, a joint ownership of a chose in action cannot be severed at law by either, or

(*o*) Jeffreys *v.* Small, 1 Vern. 217; Lake *v.* Craddock, 3 P. Wms. 158.

(*p*) Randall *v.* Randall, 7 Sim. 271.

(*q*) Phillips *v.* Phillips, 1 Myl. & K. 649, 663; Broom *v.* Broom, 3 Myl. & K. 443; Morris *v.* Kearsley, 2 You. & Col. 139; Bligh *v.* Brent, 2 You. & Col. 258; Houghton *v.* Houghton, 11 Sim. 491; Custance *v.* Bradshaw, 4 Hare 315, 322; Darby *v* Darby, 3 Drew. 495; see Cookson *v.* Cookson, 8 Sim. 529.

(*r*) 2 Atk. 55; 2 Ves. sen. 258.

(*s*) Petty *v.* Styward, 1 Ch. Rep. 57; 1 Eq. Ca. Ab. 290.

(*t*) See Principles of the Law of Real Property 342, 1st ed.; 343, 2d ed.; 355, 3d ed.; 361, 4th ed.; 372, 5th ed.; 394, 6th ed.; 401, 7th ed.; 420, 8th ed.

(*u*) Litt. sect. 321.

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which was subsequently mortgaged by one partner, without notice to the mortgagee of partnership debts then existing, the property was to be considered as between the mortgagee and partnership creditors, as real estate, and liable in the first instance to the mortgage. The real estate owned by the partners after the payment of all the debts of the firm, and the adjustment of all the partnership equities, will be treated as real estate: Buckley *v.* Buckley, 11 Barb. 44; Buchan *v.* Sumner, 2 Barb. Ch. 166; Wilcox *v.* Wilcox, 13 Allen 252.

even by both, of the joint owners. Thus in case of the bankruptcy of a joint creditor, by which all his estate becomes vested in his assignees, an action against the debtor must be brought in the joint names, formerly of the assignees, and now of the creditors' trustees and the other joint creditors.(v) And if two joint creditors should become bankrupt, the action must be brought in the joint names, formerly of the assignees, and now of the creditors' trustees of both of them.(w) A tenancy in common cannot in fact exist at law of a chose in action. A. may owe 20*l.* to B. and C. jointly, or he may owe 10*l.* to B. and 10*l.* to C.; but he cannot owe 20*l.* to B. and C. in common. If each has a several cause of action, each must sue [*307] *separately. In equity, however, the case is different. Though B. and C. are joint owners at law, in equity they may be owners in common; and on the decease of either of them, his share may in equity belong to his representative, instead of accruing beneficially to his companion. And with regard to letters-patent, it appears that even at law, they may be the subject of an ownership in common, and that the assignee of an undivided share may alone sue for an infringement of that part of the patent, without joining the persons interested in the remaining shares.(x) And one owner in common of letters-patent can work the patent on his own account, without the concurrence of the others.(y)[1] In deciding whether a tenancy in common has been created by deed, there is very seldom any difficulty. But in wills, where greater indulgence is given to informal words, the rule is, that any words which denote an intention to give to each of the legatees a distinct interest in the subject of gift, will be sufficient to make them tenants in common. Thus a gift by will to two or more persons "equally to be divided between them,"(z) or simply "between them,"(a) or "in joint and equal proportions,"(b) or "equally,"(c) or "respectively,"(d) or "to be en-

(v) Thomason *v.* Frere, 10 East 418. See stat. 32 & 33 Vict. c. 71, s. 105, and the repealed stat. 12 & 13 Vict. c. 106, s. 152, repealing stat. 5 & 6 Vict. c. 122, s. 31.

(w) See Hancock *v.* Heywood, 3 Term Rep. 433.

(x) Dunnicliff *v.* Mallet, 7 C. B. N. S. 209 (E. C. L. R. vol. 97); Walton *v.* Lavater, 8 C. B. N. S. 162 (E. C. L. R. vol. 98).

(y) Mathers *v.* Green, L. C. 11 Jur. N. S. 845.

(z) Blisset *v.* Cranwell, 1 Salk. 226; Phillips *v.* Phillips, 2 Vern. 430; 1 Eq. Ca. Abr. 292, pl. 6; 1 P. Wms. 34.

(a) Lashbrook *v.* Cock, 2 Mer. 70.

(b) Ettricke *v.* Ettricke, 2 Ambl. 656.

(c) Lewen *v.* Dodd, Cro. Eliz. 443.

(d) 1 Atk. 580; 1 Ves. sen. 104.

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[1] Where there has been an assignment of an undivided part of the whole original patent, the assignee of such part, and the patentee, become joint owners of the patent: Potter *v.* Holland, 4 Blatch. C. C. 206. And see *ante*, p. 244, note.

joyed alike,"(*e*) will make such persons tenants in common, and not joint tenants, as they would have been without the insertion of such words. In this respect the rule is the same *whether the subject of the devise or bequest be real or personal estate.(*f*) [*308]

Owners in common or personal estate, like tenants in common of lands, have merely a unity of possession: the interest of one may be larger or smaller than that of the other, one having, for instance, one-third, and the other, two-thirds of the property. So the title need not be the same, as one may have been originally a joint tenant with a third person, who may have severed the joint tenancy by assigning his moiety to the other. The right of survivorship, which springs from a unity of interest and title, has accordingly no place between owners in common.(*g*)

Connected with the subject of joint ownership is that of joint liability. Two or more persons may be jointly liable to the same debt or demand. In a joint bond, the obligors, according to the usual form, bind themselves, their heirs, executors and administrators jointly; and in a joint covenant, they in like manner, covenant for themselves, their heirs, executors and administrators jointly. In every case of joint liability, each is liable for the whole debt,(*h*) yet they are all, like joint owners, considered as one person.[1] They must accordingly all be sued together

(*e*) Loveacres d. Mudge *v.* Blight, Cowp 352.
(*f*) See 2 Jarm. Wills, 161 *et seq.* 1st ed.; 211, 2d ed.; 231, 3d ed.
(*g*) Litt. sect. 321. (*h*) 1 B. & Ald. 35.

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[1] Whether a contract be joint, or joint and several, each of the contractors is liable for the whole debt: Ward *v.* Johnson et al., 13 Mass. 148; McMahan *v.* Murphy, 1 Bailey 535; though it has been held in a joint covenant, to secure the payment of rent, that the sureties could not be sued without joining the principal: City of Phila. *v.* Reeves et al., 48 Penn. St. 472; for persons jointly liable must all be made defendants in an action to enforce the liability: Keller *v.* Blasdel, 1 Nev. 491; Beale *v.* Trudeau, 18 La. Ann. 129; though the contrary has been holden under a statute of Iowa: Ryerson *v.* Hendrie, 22 Iowa 480; and where an obligation is joint and several, proceedings may be instituted against either one, or all, of those bound: Ward *v.* Johnson, 13 Mass. 148; Crane, Admr., *v.* Alling, 3 Green 423; Dudley (Geo.) 423; Merrick *v.* The Bank of the Metropolis, 8 Gill 61; Morris *v.* McAnally, 3 Cold. (Tenn.) 304; Kent *v.* Wells, 21 Ark. 411; and the rule is the same as to joint tort feasors: Buckler *v.* Lambert, 4 Metc. (Ky) 330; Laverty *v.* Vanarsdale, 65 Penn. St. 507; but the suit must be against one, or all, and cannot be against any intermediate number: Minor et al. *v.* The Mechanics' Bank of Alexandria, 1 Peters 73; and the personal representatives of one deceased, are equally liable with their testator or intestate: Bulkley *v.* Wright et al., Exrs., 2 Root 70; Miller *v.* Reed, 3 Grant Cas. 52. So, the fact of one of several joint and several

during their joint lives;(*i*) and a release to one of them will discharge them all.(*j*) It is, however, provided by the Bankruptcy Act, 1869, that the order of discharge of a bankrupt shall not release any person who at the date of the order of adjudication was a partner with the bankrupt, or was jointly bound, or [*309] *had made any joint contract with him.(*k*)[1] And if any person jointly liable upon any simple contract shall be discharged by the Statute of Limitations, but his co-contractor or co-contractors shall be liable by virtue of a new acknowledgment or promise, judgment may be given and costs allowed against the latter person or persons only.(*l*)[2] And if such person or persons shall plead in abatement that the other ought to be jointly sued, and it shall appear that he was discharged by the statute, the issue joined on such plea shall be found against such person or persons pleading the same.(*m*) The fact of

(*i*) 1 Wms. Saund. 291 b, n. (4).

(*j*) 2 Rol. Abr. 412 (G), pl. 4; Clayton *v.* Kynaston, 2 Salk. 574; 2 Wms. Saund. 47 gg, n. (1); Warwick *v.* Richardson, 14 Sim. 281.

(*k*) Stat. 31 & 32 Vict. c. 71, s. 50; *ante*, p. 158. The former enactment was stat. 24 & 25 Vict. c. 134, s. 163, repealing stat. 12 & 13 Vict. c. 106, s. 200, repealing stats. 6 Geo. IV. c. 16, s. 121, and 5 & 6 Vict. c. 122, s. 37, to the same effect.

(*l*) Stat. 9 Geo. IV. c. 14, s. 1. (*m*) Sect. 2.

covenantors having been sued, will not prevent a subsequent action as to another, or all jointly, provided, of course, the previous action has not resulted in a satisfaction of the demand: Ward *v.* Johnson et al., 13 Mass. 148; Sheeby *v.* Mandeville, 5 Cranch 254; Townsend *v.* Riddle, 2 N. H. 448; Anderson *v.* Neef et al., 32 Penn. St. 379; White *v.* Smith et al., 33 Id. 186.

In the case of Willings et al. *v.* Consequa, Peters C. C. 301; it was held, that "where two or more persons are liable for a simple contract debt, a judgment obtained against one of them, is an extinguishment of the claim on the other debtors, in the same manner, as a bond, given by one of two persons liable on a simple contract, is an extinguishment of the original debt." By a statute of Pennsylvania, however, it is now enacted, that "where a judgment shall be hereafter recovered against, one or more of several copartners, or joint and several obligors, promisers, or contractors, without any plea in abatement, that all the parties to the instrument or contract on which the suit is founded, are not made parties thereto, such judgment shall not be a bar to a recovery in any subsequent suit or suits, against any person or persons, who might have been joined in the action in which such judgment was obtained, whether the same shall be obtained amicably or by adversary process." Purd. Dig. (1861), p. 578, sec. 38.

[1] See *ante*, p. 132, note 2 *g*.

[2] One of several joint contractors, cannot by his admissions revive the liability of the other obligors, extinguished by the statute of limitations, though he may his own: Mott *v.* Petrie, &c., 15 Wend. 317; Bowdre *v.* Hampton, 6 Richard. 208. But the acknowledgment of a debt, by one partner, after a dissolution of the firm, is sufficient to take a case out of the statute as regards the others: Smith, Admr., *v.* Ludlow et al., 6 Johns. 267; but see to the contrary, Kauffman *v.* Fisher, 3 Grant Cas. 302; and the mere acknowledgment by one, is not considered a sufficient proof of an existing debt, to bind the other: Hackley *v.* Patrick, 3 Johns. 536; Burns *v.* McKenzie, 23 Cal. 101; Thompson *v.* Bowman, 6 Wall. U. S. 316; Conery *v.* Hays, 19 La. Ann. 325.

one joint debtor being beyond the seas at the time when the cause of action accrues, will not deprive the others of the benefit of the Statutes of Limitation; and the recovery of judgment against any who were not beyond seas, will be no bar to an action against the absent debtors on their return. And for this purpose no part of the United Kingdom, nor the Isle of Man, nor the Channel Islands, are to be considered as beyond seas.(*n*) After the decease of any one joint debtor the survivors or survivor of them may still be sued for the whole debt, as though the deceased had no share in it,(*o*) and the estate of the deceased will be discharged from all liability both at law and in equity.(*p*)[1] So if a judgment be obtained against two or more jointly, and one of them die, the estate of the survivor or survivors, whether real or personal, will be exclusively liable to be taken in execution; although *the real estate of the deceased, having formerly been bound from the date of the judgment, was until recently liable to contribute equally with the real estate of the survivors.(*q*) [*310]

(*n*) Stat. 19 & 20 Vict. c. 97, ss. 11, 12.
(*o*) Richards *v.* Heather, 1 B. & Ald. 29.
(*p*) Richardson *v.* Horton, 6 Beav. 185; Wilmer *v.* Currey, 2 De G. & Sm. 347; Crossley *v.* Dobson, 2 De G. & Sm. 486; Other *v.* Iveson, 3 Drew. 177.
(*q*) 3 Rep. 14 b; Smarte *v.* Edsun, 1 Lev. 30; 2 Wms. Saund. 51. See now stat. 27 & 28 Vict. c. 112; Principles of the Law of Real Property, p. 82, 7th ed.; 83, 8th ed.

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[1] In all cases of joint obligation, the surviving debtor is the party liable, who must be sued alone, without being joined with the representatives of the decedent: Hott *v.* Petrie, &c., 15 Wend. 317; Water's Representatives *v.* Riley's Admr., 2 Har. & G. 305; Preston *v.* Preston, 1 Har. & Johns. 366; Murphy's Admrs. *v.* The Branch Bank of Alabama, 5 Ala. 421; Boykin *v.* Watson's Admrs., 3 Brev. 260; Poole *v.* McLeod, 1 Smed. & Mar. 391; The State Treasurer *v.* Friott et al., Admrs., 24 Vt. 134; Bradley *v.* Burwell, 3 Denio 61; Teller *v.* Wetherell, 9 Mich. 464; Black *v.* Struthers, 11 Iowa 459; Rothwell *v.* Dewees, 2 Black (U. S.) 613; Hoskinson *v.* Eliot, 62 Penn. St. 393. But by statutes of Tennessee, Massachusetts, Mississippi, Ohio, and North Carolina, the representatives of a deceased obligor may be joined in an action against the survivor: Perkins *v.* Hadley, 4 Hayw. 152; Claribon *v.* Goodloe, Cook 391; Simpson et al. *v.* Young et al. 2 Humph. 514; Foster et al. *v.* Hooper, Admr., 2 Mass. 572; Henderson et al. *v.* Talbert, 5 Smed. & Mar. 109; Smith *v.* Fagan et al., 2 Dev. 298; Taylor *v.* Taylor, 5 Hump. 110; Burgoyne *v.* O. Life Ins. and Trust Co., 5 Ohio St. 586; and in Pennsylvania an action may be brought against the executors of a deceased partner: Moore's Ap., 34 Penn. St. 411; though they cannot be joined with the surviving partners: Hoskinson *v.* Eliot, 62 Id. 393. See also *ante*, p. 305, note.

In Georgia, in an action against joint contractors, the plaintiff has his election in case of the death of one of them, to suggest the death of record, and to pursue the survivors, or to join the representatives of the decedent; but having elected to take the former course, he cannot afterwards be allowed to join the legal representatives of the decedent with the survivors: Harrell *v.* Park, 32 Ga. 555; but see, Pearce *v.* Bruce, 38 Id. 444.

Some few cases also hold, that in equity, a bond will be treated as several, so as to make the representatives of a deceased obligor, proportionably liable: Smith et al., Exrs., *v.* Martin et al., Exrs., 4 Desauss. 148; Haggins *v.* Peck, Admr., 10 B. Mon. 217.

A liability, however, may be both joint and several at the same time; and as such a liability is more beneficial to the creditor, it is more usual than a liability which is simply joint. A joint and several bond has hitherto run in this form:—"for which payment to be well and truly made, we bind ourselves, and each of us, and the heirs, executors and administrators of us and of each of us, jointly and severally;" or if there were a larger number of obligors, say five, the better form was:—"for which payment to be well and truly made, we bind ourselves, and each of us, and any two, three, or four of us, and the heirs, executors and administrators of us, and of each of us, and of any two, three, or four of us, jointly and severally." But now, as we have seen,(r) all mention of heirs, executors and administrators may be omitted. In the case of a joint and several bond, an action may be brought against all the obligors, or against any one, two, three or four of them whom the obligee may select; otherwise he must have sued either all of them jointly, or any one of them singly.(s) A joint and several covenant was usually in this form:—"And the said A. B. and C. D. do hereby, for themselves, their heirs, executors and administrators jointly, and each of them doth hereby for himself respectively, and for his respective heirs, executors and administrators, covenant," &c.; or if there were more than two covenantors, the better form was, for the reason [*311] *above given, "And the said A. B., C. D., E. F. and G. H., do hereby, for themselves, their heirs, executors and administrators jointly, and any two or three of them, do hereby, for themselves, their heirs, executors and administrators jointly, and each of them doth hereby for himself respectively, and for his respective heirs, executors and administrators, covenant," &c. In all cases of joint and several liability, each party is individually liable, and may be sued alone for the whole debt, or if the creditor please, he may sue them all jointly. In consequence of the joint liability, a release of one of the debtors will discharge them all; and, as they are all discharged, the creditor will thenceforth be unable even to sue any of them severally.(t)[1] As, however,

(r) *Ante*, pp. 106, 107.

(s) Per Buller, J., in Streatfield *v.* Halliday, 3 Term Rep. 782.

(t) 2 Rol. Abr. 412 (G), pl. 5; Clayton *v.* Kynaston, 2 Salk. 574; Nicholson *v.* Revill, 4 Ad. & E. 683 (E. C. L. R. vol. 31); s. c. N. & M. 192; Evans *v.* Bremridge, 2 Kay & John. 174; affirmed, 8 De G., M. & G. 100.

[1] That the release of one of several joint, or joint and several debtors, will operate as a release of all, is doubtless too firmly established as a legal doctrine to be easily overthrown: The American Bank *v.* Doolittle, 14 Pick. 123; Ward *v.* Johnson et al., 13 Mass. 148; Brown *v.* Marsh, 7 Vt. 320; Bank of Catskill *v.* Messenger

the several liability is distinct from the joint, it is competent to the creditor, in releasing one of the debtors, expressly to reserve his remedy

et al., 9 Cowen 37; Harrison *v.* Close et al., 2 Johns. 448; Rowley *v.* Stoddard, 7 Id. 207; Barrington et al. *v.* The Bank of Washington, 14 S. & R. 405; United States *v.* Thompson, Gilp. 614; Willings et al. *v.* Consequa, Peters C. C. 301; Walker *v.* McCulloch, 4 Greenl. 421; Abel *v.* Forgue, 1 Root 502; Crane, Admr., *v.* Alling, 3 Green 423; Averill *v.* Lyman, 18 Pick. 352; Goodnow *v.* Smith et al., Id. 414; Bronson et al. *v.* Fitzhugh et al., 1 Hill 185; Clagett et al. *v.* Salmon, 5 Gill & Johns. 315; McAllester et al. *v.* Sprague et al., 34 Maine 296; Kirby *v.* Taylor et al., 6 Johns. Ch. 242; Frink *v.* Green, 5 Barb. 455; Bozeman *v.* The State Bank, 2 Eng. 328; Hoffman *v.* Dunlop et al., 1 Barb. 185; Benjamin et al. *v.* McConnell, et al., 4 Gilm. 536; Gray's Exrs. *v.* Brown, 22 Ala. 262; Taylor *v.* Galland, 3 Iowa 17; Booth *v.* Campbell, 15 Md. 569; Elliott *v.* Holbrook, 33 Ala. 659; Cornell *v.* Masten, 35 Barb. 157; Evans *v.* Pigg, 3 Cold. (Tenn.) 395; and it seems to have been determined upon the principle, that whether the obligation be joint, or joint and several, the debt is entire, "and when once satisfied or released, can no longer be enforced against any party to it:" Wiggin *v.* Tudor et al., 23 Pick. 444; but it may well be doubted whether the case of Burson *v.* Kincaid, 3 Penna. R. 57, which decides that the release of one joint co-obligor is a release of all, but a release of an obligor in a joint and several obligation is not a release of all, is not more in accordance with general principles of law. The reasoning of Judge Kennedy in that case, is certainly entitled to very great respect. "In the abstract," he says, "it is certainly true, and the principle of law well settled, that if a creditor release one of two joint debtors, whether they be indebted upon a simple contract, bond, or judgment, it will also be a discharge of the other from the debt. Why is it so? Because otherwise the whole burden of the debt would be thrown upon one of them, instead of both, which would be directly contrary to their undertaking and contract. Upon the same principle, it has been held, that if the obligee in a bond, given to him by two or more jointly, tear off the seal of one of the joint obligors, or in any manner cancel the bond as to one of them, it discharges all the rest. It was in its concoction the joint bond of the whole; but the moment it is cancelled by the obligee as to one of the obligors, it ceases to be the bond or deed of all; in short, it ceases to be the same bond, if bond at all it can be called. By the original contract under which it was given, it was agreed, and made to be, the joint obligation of all; and without a new agreement between the same parties, it cannot be changed, and made a bond singly of any one or more of them, short of the whole number, without their consent. But the obligee or covenantee may release one of two several obligors named in a bond, or one of two several covenantors in a deed, or cancel the bond or deed as to one, by tearing off his seal, without the consent of the other, and for this reason too, that it does not increase the responsibility of the other obligor or covenantor, or change in any manner the nature of his obligation or covenant. It was the bond or deed of each singly before, and the obligee or covenantee had a right to look to either singly for the fulfilment of it, and the one, therefore, can in nowise be injured, by cancelling the bond or deed as to the other."

Since the above decision was made, it has been enacted by the legislature of the same state, that when a compromise or composition is made with an individual joint debtor, it shall not be so construed as to discharge the other joint debtors, nor shall it impair the right of the creditor to proceed against such of the joint debtors as have not been discharged: Purd. Dig. Suppl. (1871), p. 1283, secs. 3 and 5; and in Burke et al. *v.* Noble, 48 Penn. St. 168, it has been decided, that a

against the others; and in this case, each of the remaining debtors will continue severally liable.(u) So he may covenant with one of the debtors

(u) Ex parte Gifford, 6 Ves. 807; Thompson v. Lack, 3 C. B. 540 (E. C. L. R. vol. 54); Kearsley v. Cole, 16 M. & W. 136; Price v. Barker, Q. B. 1 Jur. N. S. 775; 4 E. & B. 760 (E. C. L. R. vol. 82); Willis v. De Castro, 4 C. B. N. S. 216 (E. C. L. R. vol. 93).

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release of one of several joint debtors, on payment of his proportion of the debt, does not discharge the others, if it was not the intention of the parties: and the same is true as to joint-tort-feasers: Matthews v. Chichopee Manuf. Co., 3 Rob. (N. Y.) 711; see also, Hope v. Johnston, 11 Rich. 135; Seymour v. Butler, 8 Clarke 304. Where all parties agree to the release of one of the obligors, or covenantors, of a joint bond or deed, the contract will still be binding as to the remaining parties; for, as the learned judge continues to observe, in the case last cited: "It is well settled, that if the name of one of two, or more joint obligors be stricken out or erased, or his seal torn from a bond by the consent of the obligee and the other obligors, it shall cease to be the bond of him whose name is so stricken out or erased from it, but shall from that time be the bond of the others. And for what reason? Because it was their agreement that it should be so. Their agreement alone, in this respect, without more, is equivalent to a new, and re-execution and redelivery of the bond, as their act and deed." And see Barrington et al. v. The Bank of Washington, 14 S. & R. 405; Bronson et al. v. Fitshugh et al., 1 Hill 185; Rogers v. Hosack's Exrs., 18 Wend. 319; Campbell v. Booth, 8 Md. 107; Irwin v. Scribner, 15 La. Ann. 583.

A release, however, of one joint contractor, to be binding, must be a technical release, that is, under seal, thereby importing a good consideration: Bank of Catskill v. Messenger et al., 9 Cowen 37; Harrison v. Close et al., 2 Johns. 448; Rowley v. Stoddard, 7 Id. 207; Walker v. McCulloch, 4 Greenl. 421; Shaw v. Pratt, 22 Pick. 305; De Zeng v. Bailey et al., 9 Wend. 336; McAllester et al. v. Sprague et al., 34 Maine 296; Frink v. Green, 5 Barb. 455; Shock v. Miller, 10 Penn. St. 401; Armstrong v. Hayward, 6 Cal. 183; McAllister v. Denin, 27 Miss. 40; Drinkwater v. Jordan, 46 Maine 432; Ayer v. Ashmead, 31 Conn. 447; but a release which is made a part of the decree of a court, is a technical release, though not under seal: Benjamin et al. v. McConnell et al., 4 Gilm. 536. Some of the cases hold, that equity will not relieve against releases of this description: Willings et al. v. Consequa, Peters C. C. 301; Joy v. Wurtz, 2 Wash. C. C. 266; while others determine that equity will interpret the release according to the intentions of the parties, and the justice of the case: Claggett et al. v. Salmon, 5 Gill. & Johns. 315; Norris's Admr. v. Hammett et al., Charlt. 267; Kirby v. Taylor et al., 6 Johns. Ch. 242; but fraud, of course, avoids the release: Carter v. Connell et al., 1 Whart. 392. Any thing, however, which operates as a complete voluntary discharge of one joint debtor, will discharge the others also; thus, where the obligee in a joint and several bond, appointed one of the administrators of one obligor, having assets, to be one of his own executors, the debt will be thereby paid, and the surviving obligor discharged: Griffith v. Chew, Exr., 8 S. & R. 17; and where there was a joint execution against two persons, and one of them was taken in execution, and then voluntarily discharged by the creditor, it was held, that this was a release of both: Gould v. Gould et al., 4 N. H. 173; so, where one injured by several jointly, gave a receipt to one of them "in full" of said L.'s trespass, when he and Wilson P. Hunter (another defendant) were in company together with others, it was held to operate as a discharge of the other joint trespassers: Gilpatrick v. Hunter et al., 24 Maine 18; but the taking of a new

never to sue him; and in such a case he will retain his remedy against the others severally.(v) On account of the several liability, the estate

(v) Lacy *v.* Kynaston, 2 Salk. 575; 2 Wms. Saund. 48, n. (1).

security from one of two joint debtors, will not operate as a release, unless it is intended to have that effect: Parker *v.* Cousins, 2 Gratt. 372; Anderson *v.* Neef et al., 32 Penn. St. 379; Bowers *v.* Stile, 49 Id. 65; Schollenberger *v.* Seldonridge, Id. 83; though at common law, a judgment obtained against one of several joint-contractors, extinguishes the joint liability of those not sued, as well as of him who was sued: Mason *v.* Eldrod, 6 Wallace (U. S.) 231; nor will an assignment by a joint debtor to a creditor, of all his interest, in consideration of his indebtedness, have the effect of a release, so far as to discharge other joint debtors: McLarren *v.* Robinson, 20 Penn. St. 127.

Where F., one of two common carriers, jointly charged by the plaintiffs with negligence, agreed with the plaintiffs by a simple contract in writing, that if the latter would release T., the other carrier, it should not impair or affect any liability which he, F., might have incurred, or was subject to; and thereupon T. was released accordingly; it was held that F.'s agreement not being under seal, did not qualify the release, so as to prevent its operating the discharge of both F. and T. from the original cause of action: Bronson et al. *v.* Fitzhugh et al., 1 Hill 185.

But a covenant not to sue one of several joint, or joint and several debtors, will not operate as a release, but will only discharge the one with whom the covenant was made; who may have his remedy, if it should be broken by joining him as defendant: Tuckerman et al. *v.* Newhall, 17 Mass. 581; Brown *v.* Marsh, 7 Vt. 320; Bank of Catskill *v.* Messenger et al., 9 Cowen 37; Harrison *v.* Close et al., 2 Johns. 448; Rowley *v.* Stoddard, 7 Id. 207; Walker *v.* McCulloch, 4 Greenl. 421; Mason et al. *v.* Jonett's Admr., 2 Dana 107; Reed *v.* Shaw, 1 Blackf. 245; Shed *v.* Pierce, 17 Mass. 623; Sewall *v.* Sparrow, 16 Id. 24; Ruggles *v.* Patten, 8 Id. 480; Crane, Admr., *v.* Alling, 3 Green 423; Durell *v.* Wendell et al., 8 N. H. 369; Goodnow *v.* Smith et al., 18 Pick. 414; McAllester et al. *v.* Sprague et al., 34 Maine 296; Fink *v.* Green, 5 Barb. 455; Bozman *v.* The State Bank, 2 Eng. 328; Miller *v.* Fenton, 11 Paige Ch. 19; Couch *v.* Mills et al., 21 Wend. 424; Browning & Co. *v.* Grady, Admr., 10 Ala. 999; Matthey *v.* Gally, 4 Cal. 62; City of Carondelet *v.* Desnoyer, 27 Mo. 36; and the like is true of a bond of indemnity given to one of two joint promissors: Berry *v.* Gillis, 17 N. H. 9; though the principle of this doctrine has been doubted: Jonas *v.* Bank, 29 Conn. 25; and note a distinction between a covenant not to sue for a limited time, and a covenant never to sue: Thurston *v.* James, 6 R. I. 103; nor will a receipt in full to one joint debtor, for his share of the liability, effect the discharge of all; Rowley *v.* Stoddard, 7 Johns. 207; Andrews *v.* Andrews et al., 1 Root 72; Shotwell *v.* Miller, Coxe 81; Rogers *v.* Hemstead, Kirby 44; Shock *v.* Miller, 10 Penn. St. 401; and it has been doubted, whether it will effect the discharge of the one to whom it is given: Buckingham *v.* Oliver, 3 E. D. Smith 129; Griffith *v.* Grogan, 12 Cal. 317; nor can a discharge of one of several joint obligors by operation of law, relieve the other obligors: Ward *v.* Johnson et al., 13 Mass. 148; nor a judgment obtained against one, without satisfaction: McLaurine *v.* Monroe, 30 Mo. 462; Kauffman *v.* Fisher, 3 Grant's Cas. 302; but an actual satisfaction of the debt, by one joint debtor, will release all: Walker *v.* McCulloch, 4 Greenl. 421; and so of payment in full, by one of two or more joint trespassers, in satisfaction of the damage committed: Gee *v.* Overby, 7 Eng. 164.

The law as regards joint trespassers or wrongdoers, seems to be the same with that of joint obligors, as respects the effect produced by a release of one, or a cove-

of a person who has become jointly and severally bound is not discharged by his decease in the lifetime of his co-debtors, but still remains liable to the entire debt as respects the creditor, and to a portion of it as respects the surviving co-debtors. It has been recently enacted, that no co-contractor or co-debtor, whether liable jointly only or jointly and severally, shall lose the benefit of the Statutes of Limitation by reason [*312] only of payment of any *principal, interest or other money by any other co-contractor or co-debtor.(*w*)

One of the most usual means of incurring a joint and several liability is the entering into a partnership. At law the liability of partners is joint only, as to debts incurred by the partnership; so that they ought all to be joined as defendants to an action at law for recovering any such debt.(*x*) But a dormant partner, whose name may or may not be known, may either be joined or not at the pleasure of the creditor ;(*y*)[1] unless

(*w*) Stat. 19 & 20 Vict. c. 97, s. 14, not retrospective ; Jackson *v.* Woolley, 8 E. & B. 784 (E. C. L. R. vol. 35).

(*x*) See Rice *v.* Shute, 5 Burr. 2611 ; 1 Wms. Saund. 291 b, n. (4).

(*y*) De Mautort *v.* Saunders, 1 B. & Ad. 398 (E. C. L. R. vol. 20); Beckham *v.* Drake, 9 M. & W. 79; 11 M. & W. 315.

nant entered into with one to indemnify him from all legal proceedings: Snow *v.* Chandler, 10 N. H. 92; Bronson et al. *v.* Fitzhugh et al., 1 Hill 185; Smithwick *v.* Ward, 7 Jones L. 64; Lovejoy *v.* Murray, Leg. Intel. July 6, 1866; but they may be sued separately: Gee *v.* Overby, 7 Eng. 164.

Where all the joint obligors or covenantors are dead, the proper parties to proceed against, are the representatives of the last survivor: Beebe et al., Exrs., *v.* Miller, Minor 364.

[1] A secret partner is as much governed by the transactions of the acting partner, as if his name was used: Shead *v.* Barrington et al., 1 Stew. 134; Richardson *v.* Farmer, 36 Mo. 35; but this law is confined to trade and commerce, and does not extend to speculation in the purchase of lands: Pitts *v.* Waugh et al., 4 Mass. 425.

An action may be sustained by the ostensible partners, without joining those that are dormant: Lord *v.* Baldwin, 6 Pick. 350; Wilkes *v.* Clark, 1 Dev. 178; Shropshire *v.* Shepherd, 3 Ala. 733; Monroe *v.* Ezzell, 11 Ala. 603; Clarkson *v.* Carter, 3 Cowen 84; or the dormant partner may be joined as co-plaintiff: Rogers *v.* Kichline, 36 Penn. St. 293; in Secor *v.* Keler, 4 Duer 416, which was an action for work and labor done by the firm, it was held that he must be joined; but the contrary has been held: Artisan's Bank *v.* Treadwell, 34 Barb. 553; Boardman *v.* Keeler et al., 2 Vt. 65; Clark et al. *v.* Miller et al., 4 Wend. 628; but where the ostensible partners are dead, the surviving dormant partner may sue alone: Beach *v.* Hayward, 10 Ohio 455. On the other hand, dormant partners, when discovered, may be joined as parties defendant: Griffith & Co. *v.* Buffum et al., 22 Vt. 181; Everett et al. *v.* Chapman et al., 6 Conn. 347; Lea *v.* Guice, 13 Sm. & M. 657; Reynolds *v.* Cleveland et al., 4 Cowen 282; but they need not be so joined: Sylvester et al. *v.* Smith, 9 Mass. 119; Carey *v.* Bright, 58 Penn. St. 70; for a dormant partner is an allowable, not an essential party: Desha et al. *v.* Holland, 12 Ala. 513; Clark et al. *v.* Miller et al., 4 Wend.

the contract be under seal, in which case, as the deed is itself the contract, and not merely evidence of it,(z) those only can be sued on it who have sealed and delivered it. In equity, however, in favor of creditors, all partnership debts are considered to be both joint and several. On the decease of a partner, therefore, his estate will be liable in equity to all the partnership debts incurred previous to his decease;(a) and the creditors may, if they please, resort in the first instance to the estate of the deceased, leaving it to his representatives to recover from the surviving partners their share of the debts.(b) It seems, however, that in analogy to the rule in bankruptcy, next stated, the separate creditors of the deceased partner would first be paid in full out of the estate, before its application to the payment of any of the debts of the partnership.(c)

*In the case of the bankruptcy of a trading partnership, the rule which is always followed in the payment of the debts is, [*313] that the joint assets of the firm are in the first place liable to the partnership debts; and that the separate estate of each partner is in the first place liable to his separate debts, which must be paid in full out of such separate estate, before any of it can be applied towards payment of

(z) *Ante*, p. 88.

(a) Devaynes *v.* Noble, 1 Meriv. 529, 563; 2 Russ. & My. 495.

(b) Wilkinson *v.* Henderson, 1 Myl. & K. 582; Braithwaite *v.* Britain, 1 Keen 206; Thorpe *v.* Jackson, 2 You. & Col. 553; Way *v.* Bassett, 5 Hare 55.

(c) Gray *v.* Chiswell, 9 Ves. 118; Brown *v.* Weatherby, 12 Sim. 6, 10; Ridgway *v.* Clare, 19 Beav. 111; Whittingstall *v.* Grover, M. R., 10 W. R. 53; Lodge *v.* Pritchard, 4 Giff. 294.

628; Brown *v.* Birdsall, 29 Barb. 549; hence, where in the case of a secret partnership, an execution was levied on the goods in the name of the ostensible partner, it was held that it should not be postponed for a subsequent one, in the names of both the partners: Brown's Appeal, 17 Penn. St. 480.

Where one takes a note from an ostensible partner, upon which a judgment is obtained, an execution issued, and returned, "*nulla bona*," it has been held, that the holder of the note will not be thereby barred from a suit against all the partners: Watson et al. *v.* Owens et al., 1 Richard. 111; Sheey *v.* Mandeville et al., 6 Cranch 254; but this has been denied in Pennsylvania, in Smith et al. *v.* Black, 9 S. & R. 142, which particularly noticing the case of Sheey *v.* Mandeville, nevertheless decided in accordance with what would seem to be the fixed legal principle, that a judgment recovered against one partner, is a bar to a subsequent suit against both (where there are two), though the new defendant was a dormant partner at the time of the contract, and not discovered until after suit. But Sheey *v.* Mandeville has been overruled in Mason *v.* Elrded, 6 Wall. U. S. 231; and see *ante*, p. 308, and p. 311, notes.

The admission of a dormant partner, who is proved to be so, may be given in evideuce to bind the firm: Kaskaskia Bridge Co. *v.* Shannon et al., 1 Gilm. 15; Shepherd *v.* Ward, 8 Wend. 542.

the debts of the partnership.(*d*)[1] Any creditor of a partnership may however be a petitioning creditor in respect of his debt, on the bank-

(*d*) Ex parte Elton, 3 Ves. 238, 241; Ex parte Kensington, 14 Ves. 447; Ex parte Peake, 2 Rose 54; Ex parte Harris, 1 Madd. 583; Ex parte Janson, 3 Madd. 229; Re Plummer, 1 Phil. 56; Ex parte Kennedy, 2 De G., M. & G. 228; Ex parte Topping, L. C., 11 Jur. N. S. 210.

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[1] See *ante*, p. 132, note 2 *i*.

An adjudication of bankruptcy may be made against one partner only on a joint debt. The partnership creditor has such an interest in the separate property of any one of the partners, that he may proceed against one alone: Melick, 4 B. R. 26. See also Stevens, 5 Id. 112.

As to the adjudication of bankruptcy of partnerships upon the petition of a member or members thereof, see Willis, 3 B. R. 51; Prankard, 1 Id. 51; Boylan, 6 Int. Rev. Rec. 28; Foster, 3 B. R. 57; Mitchell, Id. 111. The decease of one partner prior to an adjudication upon the question of bankruptcy, is not legal cause for dismissing the petition: Hunt *v.* Pooke, 5 B. R. 161. So long as joint debts of a firm remain outstanding and unsettled, proceedings in bankruptcy, whether voluntary or involuntary, may be joint: Williams, 3 B. R. 74; Hunt *v.* Pooke, 5 Id. 161. An assignee in bankruptcy, of an individual partner, is not entitled to the possession of partnership property. In order to reach partnership property through the bankruptcy court, all the co-partners must be adjudged bankrupt: Shepard, 3 B. R. 42. But the assignee of a bankrupt firm, takes by his assignment all the property of the firm and of the individual members thereof, even though part of the property may be out of the district in which the bankrupts reside, and owned in part by partners, who have not been joined in the bankruptcy proceedings: Leland, 5 B. R. 222.

Where the members of a firm, which is insolvent, make a conveyance of all their joint personal property to creditors, who have reasonable cause to believe the firm to be insolvent, and within four months thereafter one of the firm is adjudged a bankrupt on his own petition, the conveyance to such creditors by all the partners does not constitute a preference, which the assignee of the bankrupt partner can avoid: Forsaith *v.* Merritt, 3 B. R. 11. *Bonâ fide* transfers of partnership effects by one member of the firm to another, vests the title in the transferee as his separate estate: Byrne, 1 B. R. 122. Where a member of a late firm files his individual petition in bankruptcy, and inserts in his schedules debts contracted by the firm, and there are no partnership assets to be administered, he will be entitled to be discharged from all his debts, individual and copartnership: Abbe, 2 B. R. 26; Bidwell, Id. 78. But where there are both firm debts and firm assets, and the copartnership is actually existing, and has not been determined theretofore by bankruptcy, insolvency, assignment or otherwise, the firm must be declared bankrupt, by either voluntary or involuntary proceedings, before a member of it can be discharged: Winkens, 2 B. R. 113. See also Frear, 1 B. R. 201; Little, Id. 74; Shepard, 3 Id. 42. But see Melick, 4 B. R. 26; Stevens, 5 Id. 112. A firm may be declared bankrupt although one of its members may have been already adjudged such on a creditor's petition. Hunt *v.* Pooke, 5 B. R. 161. An assignee of an individual partner may petition to have the firm declared bankrupt, in order to a proper administration of separate and partnership assets, and if there is no denial of the insolvency of such firm, it will be adjudged bankrupt: Shumate *v.* Hawthorn, 3 B. R. 54. A separate creditor, who has proved his debt against one of the partners, has no right to participate in the choice of an assignee, where the partnership is in bankruptcy: Phelps, 1 B. R. 139.

At law, partners have a right to dispose of their property as they please: McDonald et al. *v.* Beach et al., 2 Blackf. 55; Sigler

ruptcy of any individual member of the firm; and in that case he will be entitled to a dividend on his debt out of the estate of such bankrupt

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v. Knox Co. Bank 8 Ohio St. 511; and separate or joint creditors may attach either separate or joint property: Bardwell *v.* Perry et al., 19 Vt. 292; Jarvis et al., Admrs., *v.* Brookes et al., Admrs., 3 Fost. 131; but equity will not allow a partner to dispose of his stock in trade, for the purpose of paying his own creditors, to the exclusion of those of the partnership: Ferson *v.* Monroe, 1 Fost. 462; French *v.* Lovejoy, 12 N. H. 458; Hill *v.* Beach, 1 Beasley 31; Sage *v.* Chollar, 21 Barb. 596; nor to sell, or mortgage, his undivided interest, in a specific part of the property belonging to the partnership: Lovejoy *v.* Bowers, 11 N. H. 404; and any such attempt to appropriate the partnership property to his individual benefit, will be regarded as a fraud upon his copartners: Filley et al. *v.* Phelps et al., 18 Conn. 294; Rogers & Son *v.* Batchelor et al., Admrs., 12 Peters 221; Yale *v.* Yale, 13 Conn. 185; Saloy *v.* Albrecht, 17 La. Ann. 75. This is in accordance with that equitable principle, that partnership property is to be applied to the payment of partnership debts, before a separate creditor can be allowed to resort to it: Lord *v.* Baldwin, 6 Pick. 350; Morrison *v.* Blodgett et al., 8 N. H. 248; Murray *v.* Murray et al., 5 Johns. Ch. 60; Conkling et al. *v.* The Washington University et al., 2 Md. Ch. Decs. 497; Pierce, Admr. et al. *v.* Tiernan et al., 10 Gill. & Johns. 253; McDonald et al. *v.* Beach et al., 2 Blackf. 55; White *v.* The Union Ins. Co., 1 N. & McCord 557; Wilson et al. *v.* Conine, 2 Johns. 282; McCulloch *v.* Dashiell, 1 Har. & Gill. 96; Tucker *v.* Oxley, 5 Cranch 35; White *v.* Dougherty et al., Mart. & Yerg. 309; Doner et al. *v.* Stauffer et al., 1 Penna. R. 178; Woodrop *v.* Ward, 3 Desauss. 203; Gardiner et al. *v.* Smith, 12 La. 370; Emanuel *v.* Bird, Admr., 19 Ala. 596; Grosvenor & Co. *v.* Austin, 6 Ohio 103; Muir *v.* Leitch et al., 7 Barb. 341; Buchan *v.* Sumner, 2 Barb. Ch. 166; Christian *v.* Ellis, 1 Gratt. 396; Nicoll et al. *v.* Mumford, 4 Johns. Ch. 522; Deveau *v.* Fowler, 2 Paige Ch. 400; Jackson *v.* Cornell et al., 1 Sandf. Ch. 348; Murril et al. *v.* Neill et al., 8 How. 414; Washburn et al. *v.* The Bank of Bellows Falls et al., 19 Vt. 278; Wilder et al. *v.* Keeler et al., 2 Paige Ch. 167; Smith *v.* Barker et al., 10 Maine 158; Lucas et al. *v.* Atwood et al., 2 Stew. 378; Glum *v.* Gill, 2 Md. 15; Burtus *v.* Tisdale et al., 4 Barb. 571; Linford v. Linford, 4 Dutch. 113; Wintersmith *v.* Pointer, 2 Metc. (Ky.) 457.

But this, like every other general rule, admits of exceptions; and it is hardly, indeed, susceptible of strict application, in any cases but those of bankruptcy, insolvency, and execution. The consequences of its application to partnerships would be highly injurious to trade, and embarrassing to justice. . . . It has been repeatedly settled here, as well as in England, that the partner may be sued for separate debts, that the partnership effects may be taken in execution and sold by moieties; and that the purchaser of the moiety, under the execution, shall be considered as tenant in common with the partner:" McCarty *v.* Emlen, 2 Dall. 278. "Each partner is entitled to the possession of the partnership property; if one excludes the other, no action at law lies—the remedy is in equity. So, if the sheriff, by virtue of an execution against one of several partners, takes possession of the property, an action at law, I apprehend, does not lie against him. The court from which the execution issued would stay proceedings upon it, to give time to have an account taken in equity; but if no such stay is obtained, the officer can sell the right of the partner who is defendant in the execution. According to the rule in equity, the partnership accounts should all be liquidated before a sale on execution, . . . but if the sale should be made, and the purchaser should take the property, would he be a trespasser? or would he not be tenant in com-

rateably with his separate creditors,(e) And the other partnership creditors may prove their debts on such separate bankruptcy in order to have

(e) Ex parte Ackerman, 14 Ves. 604; Ex parte Detastet, 17 Ves. 247; stat. 32 & 33 Vict. c. 71, s. 100.

mon with the other partner, of the partnership property, subject to the claims of the creditors of the partnership? The sheriff or other officer, in making a levy, and taking the property to a place of safe deposit, is surely not a trespasser:" Scrugham *v.* Carter, 12 Wend. 133; Hughes *v.* Boring, 16 Cal. 81.

That the partnership goods may be attached, or levied upon under an execution, for the separate debt of one of the partners, is not doubted: Bradbury *v.* Smith, 21 Maine 122; Douglass *v.* Winslow, 20 Id. 89; Reed *v.* Johnson, 24 Id. 322; Reed *v.* Shepardson, 2 Vt. 120; Schatzell & Co. *v.* Bolton, 2 McCord 478; Knox *v.* Schepler, 2 Hill 595; Morgan *v.* Watmough, 5 Whart. 525; Dow, Admr. *v.* Sayward, 14 N. H. 9; Clark *v.* Lyman, Admr., 8 Vt. 290; Whitney *v.* Ladd, 10 Id. 165; Burrall *v.* Acker, 23 Wend. 606; Place *v.* Sweetzer et al., 16 Ohio 142; Clark *v.* Allee, 3 Harring. 80; Knox et al. *v.* Summers, 4 Yeates 477; Andrews *v.* Keith, 34 Ala. 722; Wiles *v.* Maddox, 26 Mo. 77; James *v.* Stratton, 32 Ill. 202; but the preponderance of authority would seem to determine, that the sheriff cannot take the goods out of the possession of the other partners: Silter et al. *v.* Walker, 1 Freem. Ch. (Miss.) 77; Deal *v.* Bogue, 20 Penna. St. 233; Newman et al. *v.* Bean, 1 Fost. 93; Thomas *v.* Lusk, 13 La. Ann. 277; and cases above cited; though the contrary has been decided: White *v.* Jones, 38 Ill. 159; and he can only sell the interest of the partner who is defendant in the execution: Doner et al. *v.* Stauffer et al., 1 Penna. R. 198; Haskins *v.* Everett, 4 Sneed 531; which has been held in a case where the sheriff's sale was by sample: Treadwell *v.* Roscoe, 3 Dev. 50; but the sheriff should levy upon "*all the partnership effects*, ... because the moieties are undivided; for if he seize but a moiety, and sell that, the other partner will have a right to a moiety of that moiety; but he must seize the whole, and sell a moiety thereof undivided, and the vendee will be tenant in common with the other partner: Slaver *v.* White et al., 6 Munf. 111; Phillips *v.* Cook, 24 Wend. 393; Scrugham *v.* Carter, 12 Id. 133. Where a sale has been made under such an execution, the proceeds must be paid over to the execution creditor, and the recourse of the partners, or of the creditors of the firm, is against the partnership property, for the purchaser has only acquired an interest in the assets, after the payment of the partnership debts and liabilities: Phillips *v.* Cook, 24 Wend. 393; Wilson et al. *v.* Conine, 2 Johns. 282; Doner et al. *v.* Stauffer et al., 1 Penna. R. 198; Lothrop *v.* Wightman, 41 Penn. St. 297. But an attachment by a creditor of one of the partners, will not prevail against a subsequent attachment of a joint creditor: Pierce *v.* Jackson, 6 Mass. 242; Allen et al. *v.* Wells et al., 22 Pick. 455; nor will it be good against partnership property in the hands of a creditor of the firm, who may retain for his debt: Morgan *v.* Watmough, 5 Whart. 525; and see Clark *v.* Allee, 3 Harring. 80.

That the sheriff in an execution against the partnership property, for a debt due by an individual partner, "can sell only the actual interest which such partner has in the partnership property, after the accounts are settled, or subject to the partnership debts, which are first to be paid," has been repeatedly decided: Jarvis *v.* Hyer et al., 4 Dev. 364; Barber *v.* The Hartford Bank, 9 Conn. 407; Lynden *v.* Gorham et al., 1 Gallis. 367; Fisk *v.* Herrick, 6 Mass. 271; Church et al. *v.* Knox et al., 2 Conn. 514; Brewster et al. *v.* Hammett et al., 4 Id. 240; In the matter of Smith, 16 Johns. 102; Nicoll et al. *v.* Mumford, 4 Johns. Ch. 325; Goodwin *v.* Richardson, Admr., 11 Mass. 472; Gibson *v.* Stevens, 7 N. H. 352; Moody *v.* Payne, 2 Johns. Ch. 548; Knox *v.* Schepler, 3 Hill

a vote at any meeting of creditors; but they can receive no dividends till the separate creditors have been paid in full.(*f*) But if any creditor

(*f*) Stat. 32 & 33 Vict. c. 71, s. 103. A similar provision was contained in stat. 12 & 13 Vict. c. 106, s. 140, repealing stats. 6 Geo. IV. c. 16, s. 62, and 5 & 6 Vict. c. 122, s. 39, to the same effect.

595; Doner et al. *v.* Stauffer et al., 1 Penna. R. 198; Wilter *v.* Richards, 10 Conn. 37; Filley et al. *v.* Phelps et al., 18 Id. 294; Rogers & Son *v.* Batchelor et al., Admrs., 12 Id. 221; Yale *v.* Yale, 13 Id. 185; Burtus *v.* Tisdale et al., 4 Barb. 571; Clark *v.* Allee, 3 Harring. 80: Treadwell *v.* Roscoe, 3 Dev. 50; Merrill et al. *v.* Rinker, 1 Baldw. 534; Sitler et al. *v.* Walker, 1 Freem. Ch. (Miss.) 77; Deal *v.* Bogue, 20 Penn. St. 233; Lucas *v.* Laws, 27 Id. 211; Nixon *v.* Nash, 12 Ohio St. 647; this interest of the individual partner, is his share of the surplus after the payment of the partnership debts, and settlement of the partnership equities: Newman et al. *v.* Bean, 1 Fost. 93; Morrison *v.* Blodgett et al., 8 N. H. 248; Nicoll et al. *v.* Mumford, 4 Johns. Ch. 525; White *v.* Dougherty et al., Mart. & Yerg. 309; Doner et al. *v.* Stauffer et al., 1 Penna. R. 198; Witter *v.* Richards, 10 Conn. 37; Filley et al. *v.* Phelps et al., 18 Id. 294; United States *v.* Huck et al., 8 Peters 271; Rogers & Son *v.* Batchelor et al., Admr., 12 Id. 221; Yale *v.* Yale, 13 Conn. 185; Buchan *v.* Sumner, 2 Barb. Ch. 166; Sutcliffe *v.* Dohrmann, 16 Ohio 181; Place *v.* Sweetzer et al., Id. 142; Clark *v.* Allee, 3 Harring. 80; Setler et al. *v.* Walker, 1 Freem. Ch. 77; Atwood *v.* Meredith, 37 Miss. 635; Pitman *v.* Robicheau, 14 La. Ann. 108; Arnold *v.* Wainwright, 6 Minn. 358; Crooker *v.* Crooker, 52 Maine 267; this is all that a partner can pass by assignment: Rodriguez *v.* Hefferman, 5 Johns. Ch. 417; Nicoll et al. *v.* Mumford, 4 Id. 525; Doner et al. *v.* Stauffer et al., 1 Penna. R. 198; Burtus *v.* Tisdale et al., 4 Barb. 571; Fellows *v.* Greenleaf, 43 N. H. 421; and the purchaser becomes a tenant in common with the remaining partners: Gilmore *v.* The N. A. Land Co. et al., Peters C. C. 460; Phillips *v.* Cook 24 Wend. 393; McCarty *v.* Emlen, 2 Dall. 278; Slaver *v.* White et al., 6 Munf. 111; Sitler et al. *v.* Walker, 1 Freem. Ch. 77; Remheimer *v.* Hemingway, 35 Penn. St. 432.

The rule that partnership assets are to be applied to the payment of the partnership debts, before the creditor of one of the partners can derive any benefit therefrom, arises from the equities subsisting between the partners, and not from any preference given to the joint creditors: Hoxie *v.* Carr et al., 1 Sumn. 171; Doner et al. *v.* Stauffer et al., 1 Penna. R. 198; Allen et al. *v.* The Centre Valley Co. et al., 21 Conn. 130; Washburn et al. *v.* The Bank of Bellows Falls et al., 19 Vt. 278; Reese et al. *v.* Bradford et al., 13 Ala. 837; Bardwell *v.* Perry et al., 19 Vt. 292; Glenn *v.* Gill, 2 Md. 15; Yearsley's Est., 1 Am. L. Reg. 636; Backus *v.* Murphy, 38 Penn. St. 397; Potts *v.* Blackwell, 4 Jones Eq. 58; Huskill *v.* Johnson, 24 Geo. 625; Miller *v.* Estill, 5 Ohio St. 508; or, to use the words of Judge Lane, in Grosvenor & Co. *v.* Austin's Admr., 6 Id. 112, a copartnership "creditor, is permitted a specific preference, to subject that joint fund to the payment of his joint claim, or debt, and this, not because the creditors' rights are enlarged by the existence of the joint fund, but because the interests of the partners are so connected with its distribution, that it is necessary to adopt this rule, to secure the rights of the debtors between themselves. Hence the doctrine has been introduced, that the partnership property should be first applied in satisfaction of the partnership debts; not for the creditors' sake, but because there is a fund, which both parties have a right reciprocally, to apply for the benefit of a third party;" and, with similar reasoning the case of Rice *v.* Barnard et al., 20 Vt. 479, decided, that "the right of partnership creditors, to claim a preference over the creditors of the individual members of the

has a joint and several security, which would enable him, at law, to sue any partner severally, he may, at his option, prove his debt against

firm, in the distribution of the partnership property, is wholly dependent upon the right of the individual partners, to enforce a lien upon the partnership funds for the payment of the partnership liabilities, before the individual debts; and if the contract of partnership be of such a nature, that the partners can enforce no such right as between themselves, the partnership creditors can claim no such preference." But in Cammack *v.* Johnson et al., 1 Green Ch. 167, the chancellor seemed to be of a different opinion, ruling, that "in an open firm, the credit is given to the firm, and to the goods they are possessed of, and a partnership creditor shall be first paid out of them; but, if the partner be unknown, the credit is given to the visible partner only, and the goods in his possession are supposed to be his own, and in such case, the discovery of such latent partner, cannot give any preference to a partnership creditor. As between the partners themselves, I see no reason to make any distinction in their rights, whether they are dormant or not; but as to the public, it is not only highly proper, but necessary, to prevent injustice towards creditors, that this difference should be observed." The weight of authority, however, is against the case last cited; and hence it would seem to follow, that if the partnership equity, as between the individual partners, was, from any cause, to cease, the preferred lien of the joint creditors, would also expire; and this we find to be the fact, for, where one partner, there being two, sells his interest to the other, the lien of the joint creditors is gone: Glenn *v.* Gill, 2 Md. 15; Dunham *v.* Hanna, 18 Ind. 270; Doner *v.* Stauffer, 1 Penna. R. 198; Cooper's Ap., 26 Penn. St. 262; Vandike's Ap., 57 Id. 9; but this has been doubted: see Conroy *v.* Woods, 13 Cal. 626. Where partnership property was sold on separate executions against the individual partners, at the same time, by a joint sale, it leaves the interests standing in the proceeds, as it existed in the property, at the time of the levy: Cooper's Ap., 26 Penn. St. 262; Vandike's Ap., 57 Id. 9; Doner *v.* Stauffer, 1 Penna. R. 198.

Joint creditors may, however, resort to the separate property of the individual partners, before the payment of the separate creditors, for there is no subsisting equity to interfere with their claim, as was held in the case of Allen et al. *v.* Wells et al., 22 Pick. 455. "It is urged, however, on the part of the defendants, that as this court, as a court of law, have long since recognised the principle, that an attachment of the goods of a partnership, by a creditor of one of the partners, is not valid as against an after attachment by a partnership creditor, it should also adopt the converse of the proposition, giving a like preference to separate creditors in respect of the separate property. But we think that there is a manifest distinction in the two cases. The restriction upon separate creditors as to the partnership property, arises not merely from the nature of the debt attempted to be secured, but also from the situation of the property proposed to be attached. In such a case a distinct moiety or other proportion, cannot be taken and sold, as one partner has no distinct separate property in the partnership effects. His interest embraces only what remains upon the final adjustment of the partnership concerns. But on the other hand, a debt due from the copartnership, is the debt of each member of the firm, and every individual member, is liable to pay the whole amount of the same, to the creditor of the firm. In the case of the copartnership, the interest of the debtor is not the right to any specific property, but to a residuum, which is uncertain and contingent, while the interest of one partner in his undivided property, is that of a present absolute interest in the specific property. Each separate member of the copartnership, being thus

the separate estate of any such partner, instead of against the firm jointly;(g) but he cannot prove against both together.(h) The Bank-

(g) Ex parte Hay, 15 Ves. 4.

(h) Ex parte Bevan, 10 Ves. 107; Ex parte Husbands, 2 Glyn & Jam. 4.

liable for all debts due from the copartnership, and no objection arising from any interference with the rights of others—as joint owners, it seems necessarily to follow, that his separate property may be well adjudged to be liable to be attached, and held to secure a debt due from the copartnership;" and see also, Bardwell *v.* Perry et al., 19 Vt. 292; Kuhne *v.* Law, 14 Rich. 18, and the cases subsequently cited; but see to the contrary, Jarvis et al., Admrs., *v.* Brooks et al., Admrs., 1 Fost. 141. Where, however, a firm is bankrupt, or insolvent, or a voluntary assignment for the benefit of creditors has been made, or there are other circumstances necessarily causing an application of the principles of equity, the separate property is to be first applied to the payment of the individual creditors, before the partnership creditors can resort to it, and under such circumstances the rule is, that in cases of distribution, partnership funds are first applicable to partnership debts, and private funds to private debts: Woodrob *v.* Ward, Exrs., 3 Desauss. 203; Hall *v.* Hall, 2 McC. Ch. 302; Tunno *v.* Trezevant, 2 Desauss. 270; Egbert et al. *v.* Wood et al., 3 Paige Ch. 517; Murril et al. *v.* Neill et al., 8 How. 414; Emanuel *v.* Bird, Admr., 19 Ala. 596; McCulloch *v.* Dashiell, 1 Har. & G. 96; Cleghorn *v.* The Insurance Bank of Columbus, 9 Geo. 319; Payne *v.* Matthews, 6 Paige Ch. 20; Jackson *v.* Cornell et al., 1 Sandf. Ch. 348; Wilder et al. *v.* Keeler et al., 3 Paige Ch. 167; Bell et al., Exrs., *v.* Newman, Admr., 5 S. & R. 78; Black's Ap., 44 Penn. St. 509; Walker *v.* Eyth, 25 Id. 216; Tingizer's Ap., 28 Id. 524; Crooker *v.* Crooker, 46 Maine 250; Treadwell *v.* Brown, 41 N. H. 12; Toombs *v.* Hill, 28 Geo. 371; Tillinghast *v.* Champlin, 4 R. I. 173; Van Wagner *v.* Chapman, 29 Ala. 172; Pahlman *v.* Graves, 26 Ill. 405; Dean *v.* Phillips, 17 Ind. 406; Barcroft *v.* Snodgrass, 1 Cold. 430; Mittnight *v.* Smith, 2 Green (N. J.) 259; McCormick's Ap., 55 Penn. St. 252; and in Emanuel *v.* Bird, Admr., *supra*, it was held, that when surviving partners are insolvent, and there is no joint fund to which the partnership creditors may resort, they are entitled to share in the assets of the deceased partner *pari passu* with his separate creditors; and see McCulloch *v.* Dashiell, 1 Har. & G. 96; Ex parte Jewett, 16 Am. L. Reg. 291; s. c., 1 B. R. 130; in which last case there were both individual and firm creditors, but individual assets only, which mainly consisted of goods which had been purchased by the bankrupt from the firm on its dissolution, prior to his bankruptcy, and were principally the same goods in the purchase of which the partnership debts had been incurred, the same principle of distribution was applied; but in general, in bankruptcy, where there are both joint and separate debts proved, on a separate petition, the joint creditors are not entitled to participate in the distribution of the assets, until the separate creditors are paid: Ex parte Byrne, 16 Am. L. Reg. 499; s. c. 1 B. R. 122; where, however, a firm creditor, held the notes both of the firm and of the individual partners, for a firm debt, it was held, that he was entitled to prove his claim on the firm notes, against the joint estate, and on the individual notes, against the separate estates: Mead *v.* Bk. of Fayetteville, 16 Am. L. Reg. 818; s. c. 2 B. R. 65. An obligee in a joint and several bond, given by the members of a firm, is entitled to dividends out of the individual assets, the firm and its several members having been adjudged bankrupt: Bigelow 2 B. R. 121.

Where a partnership was dissolved by mutual consent, one partner retaining the stock of goods, and purchasing other goods from time to time, and continuing the business, and both partners were at different

ruptcy Act, 1869, provides that where joint and separate properties are [*314] being administered, dividends of the joint *and separate properties shall, subject to any order to the contrary that may be made by the court on the application of any person interested, be declared together, and the expenses of and incident to such dividends shall be fairly apportioned by the trustee between the joint and separate properties, regard being had to the work done for and the benefit re-

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times subsequently adjudged bankrupts, such stock of goods must be regarded as belonging to the individual estate of the partner, who continued the business, and primarily liable to pay his individual debts, before any portion can be applied to pay the debts of the partnership: Montgomery, 3 B. R. 109; but see Downing, Id. 182, where it was held in a similar case, where there was no solvent partner, and no firm property, that the creditors of the firm, as well as the individual creditors of one of the partners, who had assumed the payment of the firm debts, were entitled to share *pari passu* in the estate of such partner, and that assets were to be marshalled between the firm creditors and the separate creditors of the partners, only where there are firm and separate assets, and proceedings are instituted against the firm, and the individual members, as provided in section 36 of the Bankrupt Act.

A joint creditor having security on the separate estate, may prove against the joint estate, without relinquishing his security—may prove his whole claim against both estates, and receive a dividend from each, but so as not to receive more than the full amount of his debt from both sources: Howard, 4 B. R. 185.

Where one of the partners sells his interest in the concern to his copartner, taking his note therefor, and the latter becomes a bankrupt, leaving some of the notes unpaid, the former cannot receive a dividend until all the firm debts have been paid: Jewett, 1 B. R. 131. Where the original consideration of a claim passed to a partnership, but the obligations given for the same were executed by the individual members of a firm as such, the creditors holding such obligations are entitled to dividends out of the separate estates: Bucyrus Machine Co., 5 B. R. 303. A joint request made by the individual members of a firm, soliciting B. to become a surety of one of them, in an administration bond, does not create a liability of the firm, and is not provable against the partnership in bankruptcy: Forsyth *v.* Woods, 5 B. R. 78. The United States has not a preferred claim against the partnership estate of sureties in a revenue bond, signed by said sureties individually, but the debts created by the breach of the condition of such a bond are individual debts, and such preference may be allowed against the respective separate estates of such sureties: Webb, 2 B. R. 183.

The mere insolvency of a firm is sufficient to defeat an attachment made by a creditor of one of the firm, although the joint creditors have commenced no action for the recovery of their debts: Commercial Bank *v.* Wilkins, 9 Maine 28; but in New York, by statute, even in cases of insolvency, &c., a joint creditor may proceed against the separate property of an absconding debtor: In the matter of Chipman, 14 Johns. 217; In the matter of Smith, 16 Id. 102; Robbins et al. *v.* Cooper et al., 6 Johns. Ch. 186; and see also, Dahlgreen, Admr. *v.* Duncan et al., 7 Sm. & M. 280.

In the case of Brinkerhoff *v.* Marvin, 5 Johns. Ch. 320, it was held, that "where a crediter has separate judgments against each of two partners, the partnership property will be bound, to the same extent as if the amount of both judgments had been included in a joint judgment for the whole, against both parties."

ceived by each property.(i)[1] The rule that the joint assets of the firm are in the first place liable to the partnership debts applies equally where there has been a change in the partnership previous to the bankruptcy. The stock handed over to the new firm is primarily liable to all the debts incurred by them; and the creditors of the old firm must first have recourse to such assets, if any, as may still belong to the old firm, and cannot touch the property of the new partnership till all its creditors have been fully paid.(k) The addition or withdrawal of a partner to or from a firm in difficulties may thus occasion serious detriment to its creditors.

It has recently been decided that the share of a dormant partner in the assets of the partnership is not goods in the order or disposition of the acting partner with the consent of the true owner thereof, so as to pass to his assignees, or now to the trustee for his creditors, in the event of his bankruptcy.(l)

The liability to the debts of a partnership may be incurred by being an ostensible partner, although no share of the profits be received. Thus, if a person allow his name to be used as one of the firm,(m) or to be painted *over the door of a shop,(n) he will be liable to the debts of the firm; for credit may thus be given to the firm on the strength of his character as a solvent person. On the same principle, if a person have once been known to be a partner in the firm,(o) his liability to its debts will continue after his withdrawment, unless he takes proper means to inform the creditors that he has ceased to be a partner.(p) But the circumstance of the name of a deceased partner remaining in the firm will not render his estate liable to the debts of the survivors.(q) And if

[*315]

(i) Stat. 32 & 33 Vict. c. 71, s. 104. See the repealed stat. 24 & 25 Vict. c. 134, s. 177.

(k) Ex parte Freeman, Buck 471; Ex parte Fry, 1 Glyn & Jam. 96; Ex parte Janson, 3 Madd. 229; Ex parte Sprague, 4 De G., M. & G. 866.

(l) Reynolds *v.* Bowley, L. R. 2 Q. B. 474; 8 B. & S. 406; see *ante*, p. 54.

(m) Parkin *v.* Carruthers, 3 Esp. 248; Young *v.* Aztell, cited 2 H. Black. 242.

(n) See M'Iver *v.* Humble, 16 East 169, 174.

(o) Evans *v.* Drummond, 4 Esp. 89; Brooke *v.* Enderby, 2 B. & B. 70 (E. C. L. R. vol. 6); 4 Moore 501; Carter *v.* Whalley, 1 B. & Ad. 11 (E. C. L. R. vol. 20).

(p) Godfrey *v.* Turnbull, 1 Esp. 371; M'Iver *v.* Humble, 16 East 169.

(q) Vulliamy *v.* Noble, 3 Mer. 614; Webster *v.* Webster, 3 Swanst. 490, n.

[1] By the thirty-sixth section of the Act of Congress of the second of March, 1867, it is provided, that the assignee "after deducting out of the whole amount received . . . . the whole of the expenses and disbursements, the net proceeds of the joint stock shall be appropriated to pay the creditors of the co-partnership, and the net proceeds of the separate estate of each partner, shall be appropriated to pay his separate creditors," &c.: 2 Brightly's Dig., p. 92, § 81. See also *ante*, p. 132, note 2 *i*.

a trader direct by his will that his trade shall be carried on by his executor, the executor, who ostensibly carried on the trade, will be liable for the debts he may thereby incur as fully as if he were carrying on the trade for his own benefit;(r) but so much only of the estate of the testator will be liable to such debts as he may have directed to be employed in the business.(s) The rest of the testator's estate is held to be exempt, on the ground of the great inconvenience which would arise from holding it liable after its distribution amongst the legatees. But in strict principle, this exemption is at variance with the rule next stated, that a liability is incurred by any participation in the profits, which rule, however, has now, as we shall presently see, been abolished by act of parliament.

[*316] *A liability to the debts of a partnership was until recently incurred by a participation in the profits, although the circumstance of such participation might be unknown to the creditors.(t) It was enough that the business was carried on *on behalf of* the participator.(u) Thus, if a person placed money in a partnership,(x) or left it there on retiring,(y) with a stipulation to have a compensation for it, under whatever name, subject to abatement or enlargement as the profits might fluctuate, he was liable as a partner. If, however, he left no money in the concern, but was to receive a compensation for his services, or otherwise, a nice distinction was then drawn between taking a share of the profits as such and taking a per-centage upon, or a salary varying with, the profits. He who took a share of the profits as such was liable as a partner;(z) but he who took an equivalent in the shape of percentage or salary, though varying with the profits, escaped the liability.(a)[1] And if a trading concern were carried on for the benefit of

(r) 10 Ves. 119. And at law he will be liable, though his name do not appear: Wightman v. Townroe, 1 M. & Selw. 412.

(s) Ex parte Garland, 10 Ves. 110; Ex parte Richardson, Buck 202; Cutbush v. Cutbush, 1 Beav. 184; Re Butterfield, 11 Jurist 955; Kirkman v. Booth, 11 Beav. 273; M'Neillie v. Acton, 4 De G., M. & G. 744.

(t) Beckham v. Drake, 9 M. & W. 79; 11 M. & W. 315.

(u) Kilshaw v. Jukes, 3 B. & S. 847 (E. C. L. R. vol. 113).

(x) Grace v. Smith, 2 Wm. Black. 998, 1001; Waugh v. Carver, 2 H. Black. 235.

(y) Re Colbeck, Buck 48.

(z) Ex parte Rowlandson, 1 Rose 89, 91; Barry v. Nesham, 3 C. B. 641 (E. C. L. R. vol. 54); Heyhoe v. Burge, 9 C. B. 431 (E. C. L. R. vol. 67); see, however, Rawlinson v. Clarke, 15 M. & W. 292.

(a) Ex parte Hamper, 17 Ves. 403; Pott v. Eyton, 3 C. B. 32 (E. C. L. R. vol. 54); Stocker v. Brockelbank, 3 Macn. & G. 250.

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[1] Individuals who have neither a mutual interest in the capital invested in business, nor are mutually to share the losses that may happen, cannot be partners: Lowry v.

creditors, the creditors were not, from the mere circumstance of their debts being paid out of the profits, liable as partners for the debts incurred.(b)

(b) Wheatcroft v. Hickman, H. of L., 9 C. B. N. S. 47 (E. C. L. R. vol. 99).

Brooks, 2 McCord 421; but, where the right of a person to receive profits, proceeds from his having an interest in the capital, it will constitute him a partner: Ogden, Admr., v. Astor et al., 4 Sandf. S. C. 311; Vassar et al. v. Camp et al., 14 Barb. 341; it is not essential, however, that one should have a property in the capital, to make him such: Hodges v. Daves & Co., 6 Ala. 217; Doh et al. v. Halsey, 16 Johns. 34; for a partnership may be formed by capital furnished by one, and skill and labor by another, provided the profits be divided between them, not as a compensation to the one who has bestowed his skill and labor, but as profits: Everett v. Coe, 5 Denio 180; Simpson et al. v. Feltz, 1 McCord 218; Ward v. Thompson, 22 How. U. S. 330; Gill v. Geyer, 15 Ohio St. 399; neither is it necessary, in order to be partners, that all should have an equal interest: Hodgman v. Smith, 13 Barb. 302; Motly v. Jones et al., 3 Ired. Ch. 144; but, the law will presume their interests are equal unless the contrary is shown: Roach v. Perry, 16 Ill. 37; Stein v. Robertson, 30 Ala. 286; Moore v. Bare, 11 Iowa 198; Griggs v. Clark, 23 Cal. 427.

And one who contracts for a share of the profits of a concern, as profits, will be a partner: Chase, Admr., v. Barrett et al., 4 Paige Ch. 148; Price & Co. v. Alexander & Co., 2 Greene 127; Denny et al. v. Cabot et al., 6 Metcf. 89; Judson et al. v. Adams, &c., 8 Cush. 562; Griffith & Co. v. Buffam et al., 22 Vt. 181; Heimstreet v. Howland, 5 Denio 68; Wadsworth v. Manning et al., 4 Md. 59; Barrett v. Swann et al., 17 Maine 180; Doak v. Swann et al., 8 Id. 170; Cox et al. v. Delano, 3 Dev. 89; Holt & Co. v. Kernodle, 1 Ired. 202; Brockaway v. Burnap, 16 Barb. 309; Catskill Bank v. Gray, 14 Id. 472; Belknap et al. v. Wendell, 1 Fost. 175; Pattison et al. v. Blanchard, 1 Seld. 186; Hodgman v. Smith, 13 Barb. 302; Emanuel v. Draugher et al., 14 Ala. 306; Hodges v. Dawes & Co., 6 Id. 217; Simpson et al. v. Feltz, 1 McCord Ch. 218; Solomon v. Solomon, Exrx., 2 Kelly 18; Bowman et al. v. Bailey, 10 Vt. 170; Boardman v. Keeler et al., 2 Id. 65; Kellogg v. Griswold, 12 Vt. 291; Gregory et al. v. Dodge et al. 14 Wend. 593; Noyes v. Cushman et al., 25 Vt. 396; a community of profits, therefore, as a compensation, or commission, and not joined with a participation in the losses, will not make a partnership: Fitch v. Hail, 25 Barb. 13; Polk v. Buchanan, 5 Sneed 721; Williams v. Soulter, 7 Clarke 435; but it seems that, as regards third persons, the mere perception of profits is sufficient to make a partnership: Bromley v. Elliott, 38 N. H. 287; Fitch v. Harrington, 13 Gray 468; Wait v. Brewster, 31 Vt. 516; Chapman v. Devereaux, 32 Vt. 616; Edwards v. Tracy, 62 Penn. St. 374; Berthold v. Goldsmith, 24 How. U. S. 536; in other words, there will be a copartnership, when each has such an interest in the profits as will entitle him to an account, and give him a specific lien on the fund for the payment of the balance of his account: Champion v. Bostwick, 18 Wend. 580; s. c. 11 Id. 571; Conkling et al. v. The Washington University et al., 2 Md. Ch. Decs. 497; Pierce, Admr. et al. v. Tiernan et al., 10 Gill & Johns. 253; Hodges v. Dawes & Co., 6 Ala. 217; Hodges v. Hollman, 1 Denio 50; Bowman et al. v. Bailey, 10 Vt. 170; McCauley v. Cleveland, 21 Mo. 438; Brigham v. Dana, 29 Vt. 1.

Hence, where a person is to receive, as wages, a compensation graduated according to a percentage of the profits, it will not make him a partner: Nutting v. Colt, 3 Halst. Ch. 539; Perrine v. Hankinson, 6 Halst. 181; Ogden, Admr. v. Astor et al., 4 Sandf. S. C. 311; Burkle v. Eckart, 1 Denio 337; Price & Co. v. Alexander & Co., 2

A beneficial change has now been made by the act to amend the law of partnership.(c) This act provides,(d) that the advance of money by

(c) Stat. 28 & 29 Vict. c. 86, 5th July, 1865. (d) Sect. 1.

Greene 427; Ambler *v.* Beverly, 6 Vt. 119; Baxter et al. *v.* Rodman, 3 Pick. 435; Denny et al. *v.* Cabot et al., 6 Metc. 89; Dunham *v.* Clayton, 1 Penn. St. 255; Potter *v.* Moses et al., 1 R. I. 430; Bartlett *v.* Jones, 2 Strobh. 471; Coffin *v.* Jenkins, 3 Story 108; Clement *v.* Hadock, 13 N. H. 190; Bowman et al. *v.* Bailey, 10 Vt. 170; Boardman *v.* Keeler et al., 2 Id. 65; Wilkinson *v.* Jett, 7 Leigh 115; Norment *v.* Hall, 1 Humph. 324; Kellogg *v.* Griswold, 12 Vt. 291; Shropshire *v.* Shepherd, 3 Ala. 733; Newman et al. *v.* Bean, 1 Fost. 93; Rice *v.* Austin, 17 Mass. 205; Vanderburgh *v.* Hall et al., 20 Wend. 70; Emanuel *v.* Draugher et al., 14 Ala. 306; Hodges *v.* Dawes & Co., 6 Id. 217; Loomis *v.* Marshall, 12 Conn. 77; Ross *v.* Drinker, 2 Hall 415; Thompson *v.* Snow et al., 4 Greenlf. 264; Turner *v.* Bissell et al., 14 Pick. 194; Moore *v.* Smith, 19 Ala. 774; Reed *v.* Murphy et al., 2 Greene 574; Champion et al. *v.* Bostwick, 18 Wend. 580; s. c. 11 Id. 571; Bull *v.* Schuberth, 2 Md. 38; Hallett *v.* Desbau, 14 La. Ann. 529; Smith *v.* Perry, 5 Dutch. 74; and it has been held, that an agreement between two houses, to share commissions on sales of goods, forwarded by one to the other, will not constitute a partnership: Pomeroy *v.* Sigerson, 22 Mo. 177; and so of two carriers to share freight: Merrick *v.* Gordon, 20 N. Y. 93.

That there is a distinction between a sharing of the profits indefinitely, and the taking of a percentage of the profits, is undoubtedly the law of this country, as it is also that of England, but it is a matter of great difficulty to determine where the profits as wages end, and the profits as profits begin: thus Wilde J., in Blanchard *v.* Coolidge, 22 Pick. 154, says: "But there is a distinction between an agreement to share the profits of a trade indefinitely, as profits, and an agreement with an agent to allow him a certain share of the profits, as a compensation for his services." So, too, this delicate difference is commented upon by Chief Justice Gibson, in Miller *v.* Bartlet et al., 15 S. & R. 137, in the following words: "How a commission on profits can be distinguished from an interest in the profits, as such, I am at loss to comprehend. The profits cannot be ascertained before the partnership account is settled, and then a party, under claim to commissions, is entitled to what? To a compensation equal in amount to so many hundredths of the sum of the profits. He is said not to have a specified interest in the profits as such. He has, indeed, no lien or specific demand on the particular fund as a *corpus;* but neither has a partner who is admitted to be so; profits being an incorporeal essence, and without specific existence before they are received and enjoyed. It is impossible to discover any difference, but what is found in the terms, between a dividend and a commission; yet this difference, flimsy as it is, seems to be firmly established." And again, in Dunham *v.* Rogers, 1 Penn. St. 262, the same judge remarks: "It has been so often and so invariably ruled in England and America that a commission on profits is not such an interest in the concern as constitutes partnership, that the point is at rest. What staggers the mind, in this instance, is the apparent shallowness of the distinction, when it is considered, that a commission of fifty per cent. is no more nor less than an equal division of the profits; but it must not be forgotten that the distinction is an arbitrary one, resting on authority, not principle, and that whatever be the proportion, the relation produced by a compensation, in the form of a commission, is in every instance the same." And see the case of Pierson *v.* Steinmyer et al., 4 Richard. 309, where Judge Wardlow says:

way of loan to a person *engaged or about to engage in any trade or undertaking, upon a contract in writing with such per- [*317]

"An agent might stipulate, that he might receive for his services, a sum equal to a certain share of the profits of a house owned by neighbors of his employer. . . . As profits usually arise in dollars, there is, of course, frequent confusion between a share of the profits as profits, and a sum measured by a share of the profits; and the distinction becomes shadowy, difficult of application, and liable to be perverted to purposes of fraud and unfair dealing."

An agreement that each party shall pay his own losses, will not constitute a partnership, for they must mutually share each other's losses; but, under such a state of circumstances, they may be liable to third persons, as partners: Heckert *v.* Fegely, 6 W. & S. 139; and so he will be a partner as to third persons, who having advanced money to assist a certain enterprise, has agreed to share in the losses, but not in the profits, though not a partner as between himself and the others engaged in the enterprise: Moss *v.* Jerome, 10 Bosw. 220; but a partnership *inter sese* may exist, where a certain specified class of losses are to be severally and not mutually borne: Meaher *v.* Cox, 37 Ala. 201. Where upon agreement, one was to furnish a circular saw-mill and hands, and stock to saw, and another was to furnish logs and feed for the hands and stock, and the lumber was to be divided equally between them, it was held that they were not partners: Stoallings *v.* Baker et al., 16 Mo. 481; but, "where two persons agree to burn lime on shares, one to fill the kiln with stones, and the other to burn the kiln, and furnish the necessary wood for the purpose, the lime to be eqally divided between them, it was held that a technical partnership existed between the parties." See, also, Jones *v.* McMichael, 12 Rich. 176; Fail *v.* McKee, 36 Ala. 61.

What constitutes a partnership is a question of law, whether one exists, is a question of fact: Gilpin *v.* Temple et al., 4 Harring. 192. But a partnership may exist as to third persons, where it does not exist between the parties themselves: thus, in Hazzard *v.* Hazzard, 1 Story 273, Judge Story uses the following language: "It is necessary to take notice of a well-known distinction between cases, where, as to third persons, there is held to be a partnership, and cases, where there is a partnership between the parties themselves. The former may arise between the parties, by mere operation of law, against the intention of the parties; whereas, the latter exists only when such is the actual intention of the parties. Thus, if A. and B. should agree to carry on any business for their joint profit, and to divide the profits equally between them, but B. should bear all the losses, and should agree that there should be no partnership between them; as to third persons dealing with the firm, they would be held partners, though *inter se*, they would be held not to be partners." In speaking of the same subject, Chief Justice Ruffin, in Holt and Co. *v.* Kernodle, 1 Ired. 202, remarks: "As to third persons, who may deal with the firm, a partnership may arise; upon a principle of public policy, so as to bind a person for all the liabilities of a firm, and, indeed, make him a party to all its contracts, although that person bring into the business neither effects nor services, but merely lend his name as a partner, or otherwise hold himself out to the world as such. . . . . The ordinary test, however, of a person being a partner, is his participating in the profits of the business; and we believe, there can be no instance imagined, where there is to be a participation in them, as profits, in which every person having a right to share in them, is not thereby rendered a partner, to all intents and purposes. It is so between the parties themselves; because the one of them does not look to the other, personally, for restoring to him his capital, or remunerating him for his labor; but each looks to

son that the lender shall receive a rate of interest varying with the profits, or shall receive a share of the profits arising from carrying on such trade or undertaking, shall not of itself constitute the lender a partner with the person or persons carrying on such trade or undertaking, or render him responsible as such. And no contract for the remuneration of a servant or agent of any person engaged in any trade or undertaking, by a share of the profits of such trade or undertaking, shall of itself render such servant or agent responsible as a partner therein, nor give him the

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the assets, or joint fund, for those purposes, and ascertains his interest by taking an account of the concern. Much more does sharing in the profits constitute a partnership as to the rest of the world, because. . . . . the party takes from the creditors a portion of that fund, which is the proper security for the payment of their debts." Again in the case of Gill et al. *v.* Kuhn, 6 S. & R. 337, which was a suit between partners, it was said by Chief Justice Gibson: "That there is a distinction between partnership as it respects the public, and partnership as it respects the parties, is an elementary principle of this branch of the law, so plain, that its only difficulty is its application to particular cases. Where the agreement is silent, there is often room to doubt as to the precise relation in which the parties stand to each other; and then a joint interest in the stock is considered a discriminative circumstance; but where they explicitly declare there is to be no partnership, it is unnecessary to inquire further; for among themselves, the law permits them to determine their respective interests by their own stipulations; it is a matter with which third persons have no concern. . . . . Hence, the invoices, bills of sale, circular letter, and receipt-book, given in evidence to prove that a joint business had been carried on, which would have a decisive influence on a question of liability to third persons, must be laid out of the case here." And see, Kerr *v.* Potter, 6 Gill 404; Sylvester et al. *v.* Smith, 9 Mass. 119; Coterill *v.* Vandusen et al., 22 Vt. 511; Stearns *v.* Haven et al., 12 Id. 540; Markham's Exr. *v.* Jones, 7 B. Mon. 486; Buckingham *v.* Burgess et al., 3 McL. 364; Blanchard *v.* Coolidge, 22 Pick. 154; Heckert *v.* Fegely, 6 W. & S. 139; Kellogg *v.* Griswold, 12 Vt. 291; Osborne *v.* Brennan, 2 N. & McCord 427; Motley *v.* Jones et al., 3 Ired. Ch. 144; Bull *v.* Schuberth, 2 Md. 38; Pierson *v.* Steinmyer et al., 4 Richard. 309; Cutter *v.* The Estate of Thomas, 25 Vt. 78; Mathews *v.* Felch et al., Id. 538; Dremem et al. *v.* House & Co., 41 Penn. St. 30; Grady *v.* Robinson, 28 Ala. 289; Shackleford *v.* Smith, 25 Mo. 348; Robinson *v.* Green, 5 Harring. 115; Scranton *v.* Rentfrow, 29 Geo. 341; Atherton *v.* Tilton, 44 N. H. 452; Bigelow *v.* Elliott, 1 Cliff. C. C. 28; Sherrod *v.* Langden, 21 Iowa 518; Kirk *v.* Hartman, 53 Penn. St. 97. Limited partnerships, however, may be formed, in almost all the states, in the manner directed by statute; and the special partner, in such a partnership, will not be liable to the creditors of the firm, to a greater extent than the amount contributed by him to the company. A limited partnership may be defined as a contract by which one person or partnership, agrees to furnish another person or partnership, a certain amount either in property or money, to be employed by the person or partnership, to whom it is furnished, in his or their own name or firm, on condition of receiving a share in the profits, in the proportion determined by the contact, and of being liable to losses and expenses to the amount furnished, and no more.

On the subject of limited partnership, see the statutes of the respective states; authority for the formation of this species of partnership being thereby given in almost every state.

rights of a partner.(*e*) And no person, being the widow or child of the deceased partner of a trader, and receiving by way of annuity a portion of the profits made by such trader in his business, shall by reason only of such receipt be deemed to be a partner of or to be subject to any liabilities incurred by such trader.(*f*) And no person receiving by way of annuity or otherwise a portion of the profits of any business, in consideration of the sale by him of the goodwill of such business, shall, by reason only of such receipt, be deemed to be a partner of or be subject to the liabilities of the person carrying on such business.(*g*) But in the event of any such trader as aforesaid being adjudged a bankrupt, or taking the benefit of any act for the relief of insolvent debtors, or entering into an arrangement to pay his creditors less than twenty shillings in the pound, or dying in insolvent circumstances, the lender of any such loan as aforesaid, shall not be entitled to recover any portion of his principal, or of the profits or interest payable in respect of such loan; nor shall any such vendor of a goodwill as aforesaid be entitled to recover any such profits as aforesaid until the claims of the *other creditors of the said trader for valuable consideration in money or money's worth have been satisfied.(*h*) [*318]

When the relation of partners has been established between two or more persons, either ostensibly or by participation in profit, each incurs liability from the acts and dealings of the other in the ordinary course of business. For any one partner may buy, sell(*i*) or pledge goods;(*k*) draw,(*l*) accept(*m*) or endorse(*n*) bills of exchange and promissory notes; give guarantees,(*o*) receive moneys(*p*) and release or compound for debts(*q*) in the name(*r*) and on the account of the firm, in the ordinary course of business.[1] Each partner is also answerable for the fraud of his

(*e*) Sect. 2. (*f*) Sect. 3.
(*g*) Sect. 4. (*h*) Sect. 5.
(*i*) Hyat *v.* Hare, Comb. 383; Lambert's Case, Godbolt 244.
(*k*) Reid *v.* Hollinshead, 4 B. & C. 867 (E. C. L. R. vol. 10).
(*l*) Smith *v.* Jarvis, 2 Ld. Raymond 1484; Re Clarke, Ex parte Buckley, 14 M. & W. 469; 1 Phil. 562.
(*m*) Pinkney *v.* Hall, 1 Salk. 126; 1 Ld. Raym. 175; Lloyd *v.* Ashby, 2 B. & Ad. 23 (E. C. L. R. vol. 22).
(*n*) Swan *v.* Steele, 7 East 210; Vere *v.* Ashby, 10 B. & C. 288 (E. C. L. R. vol. 21).
(*o*) Ex parte Gurdom, 15 Ves. 286; see Halesham *v.* Young, 5 Q. B. 833 (E. C. L. R. vol. 48).
(*p*) Duff *v.* East India Company, 15 Ves. 198, 213.
(*q*) Per Lord Kenyon, 4 Term Rep. 519; per Best, C. J., 10 Moore 393.
(*r*) Kirk *v.* Blurton, 9 M. & W. 284.

[1] One partner may bind the firm by a parol contract, in business relating to the partnership: Weaver *v.* Tapscott, 9 Leigh 432; Sale *v.* Dishman's Exrs., 3 Id. 548;

co-partner in any matter relating to the business of the partnership.(s) And in like manner notice of any matter relating to the partnership, if

(s) Willett v. Chambers, Cowp. 814; Stone v. Marsh, 6 B. & C. 551 (E. C. L. R. vol. 13); Lavell v. Hicks, 2 You. & Col. 481; Blair v. Bromley, 5 Hare 542; 2 Phil. 354.

McCullough v. Sommerville, 8 Id. 415; Doak v. Swann et al., 8 Maine 170; The Man. & Mech. Bank v. Gore et al., 15 Mass. 81; Boardman v. Gore et al., Id. 339; Galloway v. Hughes et al., 1 Bail. 561; Nichols v. Hughes et al., 2 Id. 109; Livingston v. Roosevelt, 4 Johns. 265; Winship v. The Bank of the United States, 5 Peters 529; Miller v. Consolidation Bank, 48 Penn. St. 514; Ihmsen v. Negley et al., 25 Id. 297; Fant v. West, 10 Rich. 149; Kennebec Co. v. Augusta Ins. and Banking Co., 6 Gray 204; Babcock v. Stewart, 58 Penn. St. 179; Hoskinson v. Eliot, 62 Id. 393; Storer v. Hinkley et al., Exrs., Kirby 147; but "the purposes for which the partnership was created, and the extent of the authority of the individual members, is not to be limited by the articles under which their connection was formed, but is to be ascertained, rather from the character of their dealings, and manner in which they hold themselves out to the world;" hence, in the case of Catlin et al., v. Gilder's Exrs., 3 Ala. 544, it having been testified that the firm of Catlin, Peoples & Co., dealt in dry goods and groceries, and were in the habit of trading in anything on which they could make money, it was held, that "taking this statement as literally true, and it cannot be questioned, that Catlin might, during the continuanee of the partnership, have purchased hogs, or other stock, on account of the firm." See also Cadwallader v. Kraesen, 22 Md. 200; Edwards v. Tracy, 62 Penn. St. 374; Michigan Bank v. Eldred, 9 Wall. U. S. 544.

But in doubtful cases, it is for a jury to decide, whether the partner was conducting the usual business of the firm, in the usual manner, so as to bind the firm: The London Savings Fund Society v. Hagerstown Savings Bank, 36 Penn. St. 498. A partnership is bound by the fraud of one of its members, in all matters relating to the business of the firm: Beach v. The State Bank, 2 Cart. (Ind.) 488; Boardman v. Gore et al., 15 Mass. 331; Reynolds v. Waher's Heir and Admr., 1 Wash. (Va.) 164; Venable v. Levick, 2 Head 351; Nesbit et al. v. Patton et al., 4 Rawle 120; Stockwell v. Dillingham, 50 Maine 442; for, "by forming the connection, the partners publish to the world their confidence in each other's integrity and good faith, and impliedly agree to be responsible for what they shall respectively do, within the scope of their partnership business:" Hawkins et al. v. Appelby et al., 2 Sandf. S. C. 428; but it is otherwise if it was known that the partnership funds were being misappropriated, or that the fraudulent partner had no authority to act: Yeager v. Wallace, 57 Penn. St. 365; Fielden v. Lakens, 9 Bosw. 436; Mechanics' Bank v. Foster, 44 Barb. 87; Graham v. Meger, 4 Blatch. C. C. 129; and this holds true in the case of a fraudulent release by one partner: Canal Co. v. Gordon, 6 Wall. U. S. 561. But if money is borrowed, or goods bought, or any other contract is made by one partner, upon his own exclusive credit, he alone is liable therefor, although the money, property, or other contract is for the proper use and benefit of the partnership, and is applied thereto: No. Pa. Coal Co.'s Ap., 45 Penn. St. 185; Clay v. Cottrell, 18 Id. 408; Broaddus v. Evans, 63 N. C. 633. But see to the contrary, Tucker v. Peaslee, 36 N. H. 167.

But one partner cannot bind the firm by deed, or instrument under seal: Donaldson v. Kendall et al., 2 Geo. Decs. 227; Clement v. Brush, 3 Johns. Cas. 181; Green et al. v. W. & T. Beals, 2 Caines 254; Napier v. Catron et al., 2 Humph. 534; Anderson et al. v. Tompkins et al., 1 Brockenb. 463; Andrew's Heirs, &c., v. Brown's Admr. et al., 21 Ala. 437; Davidson et al. v. Kelly, 1 Md. 501; Snyder v. May et al., 19 Penn. St. 235; Pierce v. Cameron et al., 7

given to one partner, is constructively notice to them all.(*t*) And any agreement between the partners, by which any one of them may be restrained from doing any act to pledge the credit of the firm, though binding as between themselves, will not be binding on *any creditor(*u*) who may not have notice of it.(*x*) If, however, the transaction be not [*319]

(*t*) Per Lord Ellenborough, 1 M. & Selw. 259.

(*u*) Waugh *v.* Carver, 2 H. Black. 235; South Carolina Bank *v.* Case, 8 B. & C. 427 (E. C. L. R. vol. 15); Hawken *v.* Bourne, 8 M. & W. 703, 710.

(*x*) Minnitt *v.* Whinery, 5 Bro. Parl. Cas. 489; Ex parte Darlington District Joint Stock Banking Company, In re Riches, L. C. 11 Jur. N. S. 122. See also Hogg *v.* Skeen, 18 C. B. N. S. 426 (E. C. L. R. vol. 114).

Richard. 114; Chamberlain et al. *v.* Madden, Id. 395; Dillon *v.* Brown, 11 Gray 179; except by way of release: Crutwell *v.* De Rossett, 5 Jones 263; Fluck *v.* Bond, 3 Phila. 207; Ormsbee *v.* Davis, 5 R. I. 442; and hence, one partner cannot dispose of the partnership real estate: Arnold *v.* Stevenson, 2 Nev. 234; Piatt *v.* Oliver et al., 3 McL. 27; Ely *v.* Hair, 16 B. Mon. 230; though his deed will convey to the grantee the legal title to an undivided moiety, subject to the equities of the partnership: Jones *v.* Nagle, 2 P. & H. (Va.) 339; but where a partner has a right to dispose of the assets of the firm as surviving partner, though his deed to a purchaser of real estate will not convey a legal title, yet it will transfer an equitable title, through which he may compel the heir to convey the estate: Andrew's Heirs, &c., *v.* Brown's Admr. et al., 21 Ala. 437; Rothwell *v.* Dewees, 2 Black U. S. 616; Dubois Ap., 38 Penn. St. 231; and it has been held, that in cases of urgency, all the partners need not join in an assignment of the partnership property: Robinson *v.* Gregory, 29 Barb. 560; Kemp *v.* Carnley, 3 Duer 1; Stein *v.* La Dow, 13 Minn. 412. So, one partner cannot by a confession of judgment bind his copartner: Shedd *v.* Bank of Brattleboro, 32 Vt. 709; Edwards *v.* Pitzer, 12 Iowa 607; unless actually brought into court by service of process on himself and copartner: Crane et al. *v.* French et al., 1 Wend. 311; Morgan et al. *v.* Richardson, 16 Mo. 409; and a service of process on one of several partners, is not equivalent to service on all: Rice *v.* Doniphan et al., 4 B. Mon. 123. But a judgment for a partnership debt recovered against one of the partners, the others being out of the jurisdiction, is payable out of partnership property, in preference to the individual debts of the partner sued: Inbusch *v.* Farwell, 1 Black U. S. 566; and a judgment confessed by one partner, is good as between him and the creditor, though void as to the copartners: York Bank's Ap., 36 Penn. St. 458; Grier *v.* Hood, 25 Id. 430; and by the Act of April 6, 1830, of Pennsylvania, will not discharge the other partners from liability for the same debt: Kauffmann *v.* Fisher, 3 Grant Cas. 302.

An absolute transfer of the whole property of the firm to break up the firm, is not within the power of a single partner: Kimball *v.* Hamilton, &c., Ins. Co., 8 Bosw. 495; Hook *v.* Stone, 34 Mo. 329; Coope *v.* Bowles, 42 Barb. 87; and amounts to a dissolution of the partnership: Welles *v.* March, 30 N. Y. 344.

After the dissolution of a firm, the admissions of one of the partners cannot be received in evidence against his copartners: Hamilton *v.* Summers, 12 B. Mon. 14; Daniel *v.* Nelson, 10 Id. 316; Draper *v.* Bissell et al., 3 McL. 275; Bispham *v.* Patterson et al., 2 Id. 87; Robinson et al. *v.* Taylor et al., 4 Penn. St. 242; Berryhill *v.* McKee, 1 Humph. 31; Conery *v.* Hayes, 19 La. Ann. 325; unless the one making such admissions, has an express, or an implied authority, to settle the business of the firm: Draper *v.* Bissell et al., 3 McL. 275; Robinson et al. *v.* Taylor et al., 4 Penn. St. 242; Repport *v.* Colvin, 48 Id. 248.

in the ordinary course of the business of the partnership, the other partners will not be liable as such in respect of it. Thus one partner cannot bind the firm by a submission to arbitration,(*y*) or by confessing a judgment ;(*z*) and one partner has ordinarily no authority to execute a deed in the names of the others so as to bind the partnership.(*a*) So a farmer carrying on his business in partnership with another would not be liable on a bill of exchange drawn by his partner in the name of the partnership ;(*b*) neither would a solicitor be liable on a bill drawn by his partner in the name of his firm, though given to secure a partnership debt ;(*c*) for bill transactions form no part of the ordinary business of either farmers or solicitors. Again, there is no right or power implied by law in any of the directors of a joint-stock company to bind the company by drawing or accepting bills or notes ;(*d*) and in like manner notice of any matter relating to the business of a joint-stock company given to any member, even a director, is not constructive notice to the company itself.(*e*) For joint-stock companies are essentially different from ordinary partnerships. It is not necessary that the directors should have any other power to [*320] bind the company by *bills or notes than such as may be conferred on them by the charter or articles of association.(*f*) And the business of such companies is always carried on at an office for the purpose, and is not, like that of ordinary partnerships, confided to any one individual member. The Companies Act, 1862, now provides, that a promissory note or bill of exchange shall be deemed to have been made, accepted or endorsed on behalf of any company under that act, if made, accepted or endorsed in the name of the company, by any person acting under the authority of the company, or if made, accepted or endorsed by or on behalf, or on account of the company by any person acting under the authority of the company.(*g*)

The liability of a shareholder in a joint-stock company to the debts of the company has been already noticed. It varies, as we have seen,(*h*)

(*y*) Stead *v*. Salt, 3 Bing. 101 (E. C. L. R. vol. 11) ; s. c., 10 J. B. Moore 389.

(*z*) Hambidge *v*. De la Crouée, 3 B. C. 742 (E. C. L. R. vol. 54.)

(*a*) Harrison *v*. Jackson, 7 Term Rep. 207 ; see Burn *v*. Burn, 3 Ves. 573, 578.

(*b*) Per Littledale, J., 10 B. & C. 138 (E. C. L. R. vol. 21).

(*c*) Hedley *v*. Bainbridge, 3 Q. B. 316 (E. C. L. R. vol. 43).

(*d*) Dickinson *v*. Valpy, 10 B. & C. 128 (E. C. L. R. vol. 21) ; Bramah *v*. Roberts, 3 N. C. 963.

(*e*) Powles *v*. Page, 3 C. B. 16 (E. C. L. R. vol. 54) ; Martin *v*. Sedgwick, 9 Beav. 333.

(*f*) Balfour *v*. Ernest, 5 C. B. N. S. 601 (E. C. L. R. vol. 94).

(*g*) Stat. 25 & 26 Vict. c. 89, s. 47 ; and see as to other contracts, stat. 30 & 31 Vict. c. 131, s. 37, *ante*, p. 227.

(*h*) *Ante*, p. 228.

according as the company is incorporated with unlimited liability or with liability limited by shares or by guarantee. The mere circumstance, however, of a person allowing his name to be published as a provisional committee-man of a projected joint-stock company does not confer on the solicitor or secretary of the intended company, or any one else, implied authority to pledge the credit of such person for goods supplied to the company, or work done on its account.(*i*) For to agree to become a member of a committee is merely to agree to become one of a body, to whom others have committed a particular duty, and does not constitute an agreement to share with the other members of that body in profit or loss, which is the characteristic of a partnership.(*k*)

(*i*) Reynell *v.* Lewis, 15 M. & W. 517; Barker *v.* Stead, 3 C. B. 946 (E. C. L. R. vol. 54); Bailey *v.* Macauley, 13 Q. B. 815 (E. C. L. R. vol. 66).
(*k*) 15 M. & W. 529.

[*321] *CHAPTER III.

OF A WILL.

ALL kinds of personal property may be bequeathed by will. This right, in its present extent, has been of very gradual and almost imperceptible growth; for anciently, by the general common law, a man who left a wife and children could not deprive them by his will of more than one equal third part of his personal property. If, however, he left a wife and no children, or children and no wife, he was then enabled to dispose of half, leaving the other half for the wife or for the children.(*a*) This ancient rule, however, gradually became subject to many exceptions, by the customs of particular places, until the rule itself took the place of an exception and became confined to such places as had a custom in its favor. These places, in later times, were the province of York, the principality of Wales, and the city of London; as to all which places, a general power of testamentary disposition was conferred by acts of parliament of William and Mary, Anne and George I.(*b*) And now, by the act for the amendment of the laws with respect to wills,(*c*) every person of full age is expressly empowered to bequeath by his will, to be executed as required by the act, all personal estate to which he shall be entitled, either at law or in equity, at the time of his decease.[1]

[*322] *The ecclesiastical courts, as we shall hereafter see, very early acquired the right of determining as to the validity of wills of personal estate; and, in the exercise of this right, they generally followed

(*a*) 2 Black. Com. 492; Williams on Executors, pt. 1, bk. 1, ch. 1. See also 1 C. P. Cooper's Reports, p. 539.

(*b*) Stat. 4 & 5 Will. & Mary, c. 2, explained by stat. 2 & 3 Anne, c. 5, for the province of York; stat. 7 & 8 Will. III. c. 38, for Wales; and stat. 11 Geo. 1, c. 18, for London. See 2 Bl. Com. 493.

(*c*) Stat. 7 Will. IV. & 1 Vict. c. 26, s. 3.

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[1] By the eleventh section of an act of the Legislature of Pennsylvania, of the 11th of April, 1848, the widow of a decedent, who has made a will, shall not be deprived of her share of his personalty under the intestate laws of that State, in case she elects not to take under the will: Purd. Dig. (1861), p. 1017, sec. 13; and by a recent statute, the power of a married woman to make a will, has been restricted as to her depriving her husband of his rights, in like manner: Id. 1018, sec. 21. See, also, 2 Revis. Statutes of Ohio (1861), p. 1623, secs. 43, 44, 45 and 46.

the rules of the civil law. By this law males at the age of fourteen, and females at the age of twelve, were allowed, if of sufficient discretion, to make a testament;(*d*) and the same rule, accordingly, prevailed in this country with respect to wills of personal property,(*e*) although, by some authorities, seventeen and even eighteen was said to be the proper age.(*f*) The act for the amendment of the laws with respect to wills, has, however, now made the law uniform with respect to all wills, whether of real or of personal estate, and has enacted that no will made by any person under the age of twenty-one years shall be valid.(*g*)[1]

(*d*) Inst. lib. 2, tit. 12, s. 1; Dig. lib. 28, tit. 1, s. 5.
(*e*) 2 Bl. Com. 497. (*f*) Co. Litt. 89 b, n. (6).
(*g*) Stat. 7 Will. IV. & 1 Vict. c. 26, s. 7.

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[1] The questions, who may make a will? and, how is it to be made? are best answered by a reference to the statutory provisions of each particular state.

In Pennsylvania, "Every person of sound mind (married women excepted), may dispose by will of his or her real estate, whether such estate be held in fee simple, or for the life or lives of any other person or persons, and whether in severalty, joint tenancy or common, and also of his or her personal estate. Any married woman may dispose, by her last will and testament, of her separate property, real, personal, or mixed, whether the same shall accrue to her before or during coverture: provided, that the said last will and testament be executed in the presence of two or more witnesses, neither of whom shall be her husband. And provided, also, that no will shall be effectual unless the testator were, at the time of making the same, of the age of twenty-one years or upwards, at which age the testator may dispose of real as well as personal or mixed property, if in other respects competent to make a will. Every will shall be in writing, and, unless the person making the same shall be prevented by the extremity of his last sickness, shall be signed by him at the end thereof, or by some person in his presence, and by his express direction, and in all cases shall be proved by the oaths or affirmations of two or more competent witnesses, otherwise such will shall be of no effect. Provided, that personal estate may be bequeathed by a nuncupative will, under the following restrictions: 1. Such will shall in all cases be made during the last sickness of the testator, and in the house of his habitation or dwelling, or where he has resided, for the space of ten days or more next before the making of such will; except where such person shall be surprised by sickness, being from his own house, and shall die before returning thereto. 2. Where the sum or value bequeathed shall exceed one hundred dollars, it shall be proved that the testator, at the time of pronouncing the bequest, did bid the persons present, or some of them, to bear witness that such was his will, or to that effect; and in all cases the foregoing requisites shall be proved by two or more witnesses, who were present at the making of such will. Provided, that notwithstanding this act, any mariner being at sea, or any soldier being in actual military service, may dispose of his movables, wages, and personal estate, as he might have done before the making of this act. No will in writing concerning any real estate shall be repealed, nor shall any devise or direction therein be altered, otherwise than by some other will or codicil in writing, or other writing declaring the same, executed and proved in the same manner as is hereinbefore provided, or by burning, cancelling, or obliterating or destroying the same by the testator himself, or by some one in his presence, and by his express direction. When any person shall

Personal property was anciently of so little account that a will of it might be made by word of mouth, if proved by a sufficient number of

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make his last will and testament, and afterwards shall marry, or have a child or children not provided for in such will, and die leaving a widow and child, or either a widow, or child, or children, although such child or children be born after the death of their father, every such person, so far as shall regard the widow, or child or children after born, shall be deemed and construed to die intestate, and such widow, child or children, shall be entitled to such purparts, shares, and dividends of the estate, real and personal, of the deceased, as if he had actually died without any will. A will executed by a single woman shall be deemed revoked by her subsequent marriage, and shall not be revived by the death of her husband:" Purd. Dig. (1861), pp. 1016, 1017, 1018.

In New York, "All persons, except idiots, persons of unsound mind, married women and infants, may devise their real estate, by a last will and testament, duly executed, according to the provisions of this title. Every male person of the age of eighteen years or upwards, and every female not being a married woman, of the age of sixteen years or upwards, of sound mind and memory, and no others, may give and bequeath his or her personal estate, by will in writing. No nuncupative or unwritten will, bequeathing personal estate, shall be valid, unless made by a soldier, while in actual military service, or by a mariner, while at sea. Every last will and testament of real or personal property, or both, shall be executed and attested in the following manner: 1. It shall be subscribed by the testator at the end of the will. 2. Such subscription shall be made by the testator, in the presence of each of the attesting witnesses, or shall be acknowledged by him to have been so made, to each of the attesting witnesses. 3. The testator, at the time of making such subscription, or at the time of acknowledging the same, shall declare the instrument so subscribed, to be his last will and testament. 4. There shall be at least two attesting witnesses, each of whom shall sign his name as a witness at the end of the will, at the request of the testator. The witnesses to any will, shall write opposite to their names their respective places of residence; and every person who shall sign the testator's name to any will by his direction, shall write his own name as a witness to the will. No will in writing, except in the cases hereinafter mentioned, nor any part thereof, shall be revoked or altered, otherwise than by some other will in writing, or some other writing of the testator declaring such revocation or alteration, and executed with the same formalities with which the will itself was required by law to be executed; or unless such will be burnt, torn, cancelled, obliterated, or destroyed, with the intent, and for the purpose of revoking the same, by the testator himself, or by another person in his presence, by his direction and consent; and when so done by another person, the direction and consent of the testator, and the fact of such injury, or destruction, shall be proved by at least two witnesses. If, after the making of any will, disposing of the whole estate of the testator, such testator shall marry, and have issue of such marriage, born, either in his lifetime, or after his death, and the wife, or the issue of such marriage, shall be living at the death of the testator, such will shall be deemed revoked, unless provision shall have been made for such issue, by some settlement, or unless such issue shall be provided for in the will, or in such way mentioned therein, as to show intention not to make such provision; and no other evidence to rebut the presumption of such revocation shall be received. A will executed by an unmarried woman shall be deemed revoked by her subsequent marriage. Whenever a testator shall have a child, born after the making of his will, either in his lifetime, or after his death, and shall die, leaving

witnesses, as well as by writing; and a will made by word of mouth was termed a nuncupative testament.(*h*) By the Statute of Frauds, however, a nuncupative testament, where the estate bequeathed exceeded the value of thirty pounds, was surrounded by so many requirements as to cause its complete disuse.(*i*) But no provision was made for guarding the execution of a written will of personal estate; although by the same statute(*k*) a will of real estate was required to be attested by three or

(*h*) Wentworth's Executors, 11 *et seq.;* Williams on Executors, pt. 1, bk. 2, ch. 2, s. 6.

(*i*) Stat. 29 Car. II. c. 3, ss. 19–21, explained by stat. 4 Anne, c. 16, s. 14.

(*k*) Sect. 5.

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such child, so after born, unprovided for by any settlement, and neither provided for, nor in any way mentioned in his will, every such child shall succeed to the same portion of the father's real and personal estate, as would have been descended or distributed to such child, if the father had died intestate;" N. Y. Revis. Stats. 5th ed., vol. iii., pp. 138, 141, 144, 145. As to power of a married woman over her separate estate, see Id. 240.

Nearly all the statutes on this subject, require that a person should be of the age of twenty-one years, to make a will, either of real or personal estate; but in New York, as has been seen, a male of the age of eighteen, and a female who has reached sixteen, may make a will of their personalty; in Virginia, North Carolina, Kentucky, Alabama, California and Arkansas, any person who has attained the age of eighteen years, may bequeath their personal property by will; and in Maryland and Mississippi, a female of eighteen may make a will of her real estate.

The number of witnesses required, is different in the different States. In most of them, three is required; but in Pennsylvania, New York, California, Arkansas, Ohio, Delaware, Tennessee, Kentucky, North Carolina, Alabama, Texas, Michigan, Iowa and Virginia, two only are necessary. The statute of Mississippi requires three witnesses to a will of real estate, but one is sufficient to a will of personalty; and three witnesses are also necessary in Virginia to a will of real estate. In some of the States it is requisite that these should be subscribing witnesses, as in New Hampshire, Iowa, Georgia and New Jersey, but it does not follow that they must all join in proving the will: Meckle *v.* Matlack, 2 Harrison 86.

There is a diversity, too, as respects the making of nuncupative wills. In almost all the States they are allowed, but the statutes enjoin, that if the personal property thereby bequeathed should be beyond a certain value they must be strictly proved in the manner pointed out in the respective acts. In Texas, this sum is fixed at $30; and in South Carolina at $10; in New Jersey, at $80; in Pennsylvania, New Hampshire, Alabama, Maine, and Mississippi, at $100; in Georgia, at 30*l.*; in Vermont, North Carolina and Delaware, at $200; in Tennessee, at $250; and in Michigan, Iowa and Maryland, at $300. But in New York, Florida, Massachusetts and Ohio, no nuncupative will can be deemed valid, unless proved as required by the statutes of those States; and in California, Alabama and Arkansas, no such will can be valid unless under the value of $500, nor unless proved as the legislative acts of those respective States demand. It is, however, expressly enacted by the statutes of the different States, that nothing therein contained shall be construed to deprive a mariner at sea, or a soldier in actual military service, from making such will as he might have done before those acts became laws.

Whether a seal is necessary to the validity of a testament is determined by the statutes of the several States.

four witnesses. No attestation, therefore, was required to a will of personal estate, nor was it even necessary that *such a will should be signed by the testator. Thus, instructions for a will committed to writing, given by a person who died before the instrument could be formally executed, though such instructions were neither reduced into writing in the presence of the testator, nor ever read over to him, have been held to operate as fully as a will itself.(*l*) It was, however, provided by the Statute of Frauds, that no will in writing of personal estate should be repealed or altered by word of mouth only, except the same were, in the life of the testator, committed to writing, and after the writing thereof, read unto the testator, and allowed by him, and proved to be so done by three witnesses at the least.(*m*)[1]

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By the recent act for the amendment of the laws with respect to wills, every will of personal estate must now be in writing, and signed at the foot or end thereof by the testator or by some other person in his presence and by his direction; and such signature shall be made or acknowledged by the testator, in the presence of two or more witnesses present at the same time; and such witnesses shall attest and shall subscribe the will in the presence of the testator.(*n*) The act, in fact, requires the same mode of execution and attestation to every will, whether the property be real or personal. But an exception is made in favor of soldiers being in actual military service, that is, on an expedition,(*o*) and of mariners and seamen, being at sea, who may dispose of their personal estate as they might have done before the making of the act;(*p*) a similar exception was contained *in the Statute of Frauds.(*q*) The wills of soldiers on an expedition may accordingly be made by an unattested writing, or by a mere nuncupative testament or declaration of their will by word of mouth, made before a sufficient number of witnesses. But the wills of petty officers and seamen in the royal navy, and of marines and non-commissioned officers of marines, so far as relates to any wages, pay, prize money or other moneys payable by the admiralty, are required

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(*l*) Carey *v.* Askew, 3 Bro. C. C. 58; s. c. 1 Cox 241.

(*m*) Stat. 29 Car. II. c. 3, s. 22.

(*n*) Stat. 7 Will. IV. & 1 Vict. c. 26, s. 9, explained by stat. 15 & 16 Vict. c. 24. See Principles of the Law of Real Property 168, 169, 4th ed.; 175, 176, 5th ed.; 183, 184, 6th ed.; 187, 7th ed.; 196, 197, 8th ed.

(*o*) Drummond *v.* Parish, 3 Curt. 522.

(*p*) Stat. 7 Will. IV. & 1 Vict. c. 26, s. 11.

(*q*) Stat. 29 Car. II. c. 3, s. 23.

[1] See *ante*, p. 322, note 1.

by act of parliament(*r*) to be executed in the presence of and to be attested by a commissioned officer, or certain other officers or persons mentioned in the act; and the wills of such persons are also guarded by other requisitions in order to prevent their being imposed upon.[1] And by the Merchant Shipping Act, 1854, it is now provided that the Board of Trade may, in its discretion, refuse to pay or deliver the wages or effects of any deceased merchant seaman to any person claiming to be entitled thereto under any will made on board ship, unless such will is in writing, and is signed or acknowledged by the testator in the presence of the master or first or only mate of the ship, and is attested by such master or mate. And the Board may, in its discretion, refuse to pay or deliver any such wages or effects to any person, not being related to the testator by blood or marriage, who claims to be entitled thereto under a will made elsewhere than on board ship, unless such will is in writing and is signed or acknowledged by the testator in the presence of two witnesses, one of whom is some shipping master appointed under the act, or some minister or officiating minister or curate of the place in which the same is made, or, in a place where there are no such persons, some justice of the peace, or some British consular officer, or some officer of customs, and *is attested by such witnesses.(*s*) By the act to amend the laws with respect to wills it is provided, that no will [*325] or codicil, or any part thereof, shall be revoked, otherwise than by the marriage of the testator or testatrix (which will of itself effect a revocation),(*t*) or by another will or codicil executed in the manner thereby required, or by some writing declaring an intention to revoke the same, and executed in the manner in which a will is thereby required to be executed, or by the burning, tearing or otherwise destroying the same by the testator, or by some person in his presence, and by his direction, with the intention of revoking the same.(*u*)[2]

A will of personal estate was formerly required to be made according to the law of the domicile of the testator at the time of his decease.(*x*) A person's domicile is the place which he makes his home. But with

(*r*) Stat. 28 & 29 Vict. c. 72, superseding stats. 11 Geo. IV. & 1 Will. IV. c. 20, ss. 48–51; 7 Will. IV. & 1 Vict. c. 26, s. 12.

(*s*) Stat. 17 & 18 Vict. c. 104, s. 200.

(*t*) Stat. 7 Will. IV. & 1 Vict. c. 26, s. 18. See Principles of the Law of Real Property 153, 1st ed.; 163, 2d ed.; 170, 3d ed.; 171, 4th ed.; 179, 5th ed.; 187, 6th ed.; 191, 7th ed.; 200, 8th ed.

(*u*) Stat. 7 Will. IV. & 1 Vict. c. 26, s. 20.

(*x*) Stanley *v.* Bernes, 3 Hagg. 373.

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[1] See *ante*, p. 322, note 1.

[2] See *ante*, p. 322, note 1.

regard to many persons the circumstances connected with their change of residence are such as to render it an exceedingly difficult question of fact,—what country is their domicile at any given time. In order to remedy the inconveniences thus occasioned, it is provided by a recent act,(*y*) that with regard to persons who may die after the 6th of August, 1861, the date of the act, every testamentary instrument made out of the United Kingdom by a British subject, whatever may be his domicile at the time of making it, or at his death, shall, as regards personal estate, be held to be well executed for the purpose of being admitted to probate, if the same be made according to the forms required either by the law of [*326] the place where the same was made, or by the *law of the place where such person was domiciled when the same was made, or by the laws then in force in that part of her Majesty's dominions where he had his domicile of origin.(*z*)[1] It is further provided,(*a*) that every testamentary instrument made within the United Kingdom by any British subject, whatever may be his domicile at the time of making the same, or at his death, shall, as regards personal estate, be held to be well executed, and shall be admitted to probate, if the same be executed according to the forms required by the laws of that part of the United Kingdom where the same is made. And no testamentary instrument is to be revoked or to become invalid, nor is the construction thereof to be altered by reason of any subsequent change of domicile of the person making the same.(*b*) Another act of parliament, passed on the same day,(*c*) provides that whenever her Majesty shall, by convention with any foreign state, agree that provisions to the effect of the enactments therein contained shall be applicable to the subjects of her Majesty and of such foreign state respectively, her Majesty may by order in council direct that, after the publication of such order in the "London Gazette," no British subject resident at the time of his death in the foreign country named in such order shall be deemed, under any circumstances, to have acquired a domicile in such country, unless he shall have been resident in such country for one year immediately preceding his decease, and shall also have made and deposited in a public office of such foreign country (such office to be named in the order in council) a declaration in writing of his intention to become domiciled in such foreign country. And any British subject dying resident in such foreign country, but without hav-

(*y*) Stat. 24 & 25 Vict. c. 114.
(*z*) Stat. 24 & 25 Vict. c. 114, s. 1.
(*a*) Sect. 2.
(*b*) Sect. 3.
(*c*) Stat. 24 & 25 Vict. c. 121.

[1] For a provision somewhat similar to that referred to in the text, see 2 Revised Statutes of Kentucky (1860), p. 459, sec. 8.

ing so resided, and made such declaration *as aforesaid, shall be deemed, for all purposes of testate or intestate succession as to [*327] movables, to retain the domicile he possessed at the time of his going to reside there.(*d*) Similar provisions may be made, after any such convention, with regard to the subjects of such foreign country dying in Great Britain.(*e*) But this act is not to apply to any foreigners who may have obtained letters of naturalization in any part of her Majesty's dominions.(*f*)

Connected with the subject of wills is that of donations mortis causâ, which may here be noticed. A donation mortis causâ is a gift made in contemplation of death, to be absolute only in case of the death of the giver.(*g*) Being a gift, it can be made only of chattels, the property in which passes by delivery;(*h*) although a bond debt has, contrary to this principle,(*i*) been allowed to pass by way of donation mortis causâ by delivery of the bond.(*k*) And a policy of life assurance has also recently been held a proper subject for such a gift,(*l*) also bills or notes though payable to order and unendorsed.(*m*) An actual or constructive delivery of the subject of gift to the donee is essential to a donation mortis causâ;(*n*) it must also be made in expectation *of the donor's decease,(*o*) and must be on condition that the gift be absolute [*328] only on that event.(*p*) It is no objection, however, that the donation is clogged with a trust to be performed by the donee.(*q*) A donation mortis causâ is revocable by the donor during his life,(*r*) and after his decease it is subject to his debts,(*s*) and also to legacy duty.(*t*)[1]

(*d*) Stat. 24 & 25 Vict. c. 121, s. 1. (*e*) Sect. 2. (*f*) Sect. 3.

(*g*) Inst. tit. 7, De Donationibus, cited by Lord Loughborough, in Tate *v.* Hilbert, 2 Ves. jun. 119; Walter *v.* Hodge, 2 Swanst. 99.

(*h*) See *ante*, p. 34; Miller *v.* Miller, 3 P. Wms. 356.

(*i*) Duffield *v.* Elwes, 1 Sim. & Stu. 244.

(*k*) Snellgrove *v.* Baily, 3 Atk. 214; and see Boutts *v.* Ellis, 4 De G., M. & G. 249; Moore *v.* Darton, 4 De G. & Sm. 517.

(*l*) Witt *v.* Amis, 1 B. & Sm. 109 (E. C. L. R. vol. 101).

(*m*) Veal *v.* Veal, 27 Beav. 303; Rankin *v.* Weguelin, 27 Beav. 309. As to checks, see Hewitt *v.* Kaye, L. R. 6 Eq. 198, M. R.; Bromley *v.* Brunton, L. R. 6 Eq. 275, V.-C. S.

(*n*) Wood *v.* Turner, 2 Ves. sen. 431; Bryson *v.* Brownrigg, 9 Ves. 1; Bunn *v.* Markham, 7 Taunt. 224 (E. C. L. R. vol. 2); Ruddell *v.* Dobree, 10 Sim. 244; Farquharson *v.* Cave, 2 Coll. 356; Powell *v.* Hellicar, 26 Beav. 261.

(*o*) Tate *v.* Hilbert, 2 Ves. jun. 111; 4 Bro. C. C. 286.

(*p*) Edwards *v.* Jones, 1 Myl. & Cr. 226; Staniland *v.* Willott, 3 Mac. & Gord. 664.

(*q*) Blount *v.* Burrow, 4 Bro. C. C. 72; Hills *v.* Hills, 8 M. & W. 401.

(*r*) 7 Taunt. 232 (E. C. L. R. vol. 2). (*s*) 1 P. Wms. 406; 2 Ves. sen. 434.

(*t*) Stat. 36 Geo. III. c. 52, s. 7; 8 & 9 Vict. c. 76, s. 4.

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[1] An endeavor to determine the nature and requisites of donations *causa mortis*, by comparing the English and American decisions with the doctrines and princi-

ples of the civil law, must produce great embarrassment, and perhaps end in confusion, as will be seen by a review of the two cases of Wells *v.* Tucker, 3 Binn. 370, and Nicholas *v.* Adams, 2 Whart. 17. In contrasting these cases, it appears that in Pennsylvania this subject has undergone considerable modification, as regards the sentiments entertained of its qualities and attributes; in the former, Chief Justice Tilghman says, "*A donatio causa mortis*, is a gift of a personal chattel, made by a person in his last illness, subject to an implied condition, that if the donor recovers, the gift shall be void. So also it shall be void if the donee dies before the donor. In this, and some other circumstances (being subject to the debts of the donor, &c.), it is in the nature of a legacy. . . . It is a wise principle of our law, that the delivery is essential, because delivery strengthens the evidence of the gift. Too much care cannot be taken in insisting on the most convincing evidence, in cases of this kind, for these donations do, in effect, amount to a revocation *pro tanto*, of written wills; and not being subject to the forms prescribed for nuncupative wills, they are certainly of a dangerous nature. Now let us consider the delivery which was made in this case. In the first place it was not to the donee, but to the donor's wife, to be delivered over. There is no objection to this mode of delivery. Whether made to the donee immediately, or to another for his use, is immaterial. . . Without absolutely committing myself, I incline to the opinion, that in this, as in several other particulars, it partakes of the nature of a legacy, and is revocable. . . . Upon the whole, then, the donation was perfect; it was made in the testator's last illness, and accompanied with the delivery of the bonds, which is all that the nature of the case admits of." Subsequently, in the case of Nicholas *v.* Adams, Chief Justice Gibson, after quoting from the civil law, and saying that there is not one word of sickness from first to last, proceeds: "I would, therefore, briefly define a *donatio causa mortis* to be a conditional gift, dependent on the contingency of expected death. . . . In the *donatio causa mortis*, both are implied from the occasion. But it is certainly not necessary to be in such extremity as is requisite to give effect to a nuncupation, which is sustained from necessity merely, where the donor was prevented by the urgency of dissolution, from making a formal bequest. *Donatio causa mortis* is sometimes spoken of as being distinct from a gift *inter vivos;* the former having sometimes been supposed to be made in reference to the donor's death, and not to vest before it, but inaccurately, as it seems to me; as this gift, like every other, is not executory, but executed in the first instance, by delivery of the thing, though defeasible by reclamation, the contingency of survivorship, or deliverance from peril. The gift is consequently *inter vivos.* All agree that it has no property in common with a legacy, except that it is revocable in the donor's lifetime, and subject to his debts in the event of deficiency. I, therefore, cannot subscribe to the doctrine, that the making of a subsequent will, is conclusive evidence of the gift having not been made during such a last illness, as the law requires; and that if the degree of sickness was such as to induce an expectation of immediate death, the subsequent making of a formal will is conclusive that the donor had escaped from the peril of death, which he supposed to impend at the time of the gift; and that under these circumstances, it cannot take effect as a *donatio causa mortis*. . . . To say nothing of the fallacy, that the making of a will indicates even a respite from sickness, or the apprehension of death, a disposition by *donatio causa mortis*, is not to be disturbed by the alternation of hope and despair, dependent on the doubtful spinning of the die, but only by the turn-up of life."

By the still more recent decision of Headley *v.* Kirby, 18 Penn. St. 326, Judge

from the operation of a will of lands in this respect, that in strictness

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Lowrie utterly repudiates the idea, that the civil law can be of any practical assistance in determining the attributes of donations of this description, saying, "Though we derive the law as to *donationes mortis causa*, from the Roman lawyers, yet their rules on that subject are no guide to us in the administration of our law, for the stringent severity of their law of wills, occasioned and excused larger equitable exceptions, by way of gifts in prospect of death, than can at all be sanctioned under our much more reasonable statute of wills."

What then is a *donatio causa mortis*, considered with regard to the American cases, only? Many of them define it as a gift made by a person in his last illness, subject to the implied condition, that if the donor recovers the gift shall be void: Wells *v.* Tucker, 3 Binn. 370; Weston *v.* Hight, 17 Maine 287; Grattan, Admr., *v.* Appleton et al., 3 Story 755; Harris *v.* Clark et al., Exrs., 2 Barb. 94; Hebb et al., Exrs., *v.* Hebb, Exrx., 5 Gill 506; Lee *v.* Luther, 3 Wood. & M. 524; Michener *v.* Dale, 23 Penn. St. 59; Merchant *v.* Merchant, 2 Bradf. 432; while others say, that it must be made in expectation of death; Nicholas *v.* Adams, 2 Whart. 17; Raymond *v.* Sellick et al., Admrs., 10 Conn. 480; Holly *v.* Adams, 16 Vt. 206; Smith, Admr., *v.* Downey, Admr., 3 Ired. Eq. 268; Dole, Admr., *v.* Lincoln, 31 Maine 422; Huntington, Exr., *v.* Gilmore, 14 Barb. 243; Michener *v.* Dale, 23 Penn. St. 59; Merchant *v.* Merchant, 2 Bradf. 432; but in all of the latter cases, the donor was actually ill of the sickness of which he died; and in Rhodes *v.* Childs, 64 Penn. St. 18; confirming Gourley *v.* Linsenbigler, 51 Id. 345, it was held that in order that the validity of such a gift should be established, the donee must show that it was made in the donor's last illness, in apprehension of death, and upon condition that it was to take effect only on the donor's death by his existing disorder, or in his illness; if, however, the donor is neither out of health, nor in apprehension of death, he cannot make a valid *donatio mortis causa;* Smith et al. *v.* Kittridge, Admr., 21 Vt. 238; Sessions *v.* Moseley, 4 Cush. 87.

A gift by a volunteer soldier, in daily expectation of being ordered to the seat of war, made to a friend in the presence of witnesses, to keep until his return, and if he did not return, the property to belong to the donee, has been held not to be a gift by reason of death, although the donor died ten months afterwards in service: Irish *v.* Nutting, 47 Barb. 370; Gourley *v.* Lesenbigler, 51 Penn. St. 345. But see Gass *v.* Simpson, 4 Cold. 288.

In all cases of gifts in expectation of death, delivery is absolutely essential: Bowers *v.* Hurd, Admr., 10 Mass. 427; Windows *v.* Mitchell, 1 Murph. 127; Shirley *v.* Whitehead, 1 Ired. Eq. 130; Craig *v.* Craig, 2 Barb. Ch. 78; Lewis *v.* Walker, 8 Humph. 503; Jones, Admr., *v.* Deyer, 16 Ala. 221; McCraw *v.* Edwards et al., 6 Ired. Eq. 202; Chevallier, Admr., *v.* Wilson, 1 Texas 161; Hitch *v.* Davis et al., 3 Md. Ch. Decs. 266; Michener *v.* Dale, 23 Penn. St. 59; Singleton *v.* Cotton, 23 Geo. 261. If possible, the gift should be put into the hands of the donee: Harris *v.* Clark, 3 Comst. 93; McDowell *v.* Murdock, 1 N. & McCord 239; Pennington, Admr., *v.* Gettings, Exr., 2 G. & Johns. 208; Windows *v.* Mitchell, 1 Murph. 127; Smith, Admr., *v.* Downey, Admr., 3 Ired. Eq. 268; Miller *v.* Jeffres et al., 4 Gratt. 479; Cutting *v.* Gilman, 41 N. H. 147; but, if not capable of actual delivery, to the donee, the means of obtaining it should be delivered: Harris *v.* Clark, 3 Comst. 93, and other cases just cited. That an after-acquired possession of the thing given, or a previous and continuing possession of it, will not dispense with the necessity of a delivery, see Miller *v.* Jeffres et al., 4 Gratt. 479, where Judge Baldwin says: "A delivery is indispensable to the validity of a *donatio mortis causa.* It must be an actual delivery of the thing itself, as of a watch or a ring; or of the means of getting the possession and enjoyment of the thing, as

the appointment of an executor was formerly essential to a will of per-

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of the key of a trunk or a warehouse, in which the subject of the gift is deposited; or if the thing be in action, of the instrument by using which, the *chose* is to be reduced into possession, as a bond, or a receipt, or the like. . . . . It is not the possession of the donee, but the delivery to him by the donor, which is material in a *donatio mortis causa;* the delivery stands in the place of nuncupation, and must accompany and form a part of the gift; an after-acquired possession of the donee is nothing; and a previous and continuing possession, though by the authority of the donor, is no better. The donee, by being the debtor, or bailee, or trustee of the donor, in regard to the subject of the gift, stands upon no better footing than if the debt or duty were owing from a third person. A debt or duty cannot be released by mere parol, without consideration; and where there is nothing to surrender by delivery, the only result is, that in such a case, there cannot be a *donatio mortis causa;* and the release, without valuable consideration therefor, must be by testament, or by some instrument of writing which would be effectual for the purpose *inter vivos:*" French *v.* Raymond, 39 Vt. 623. See, however, Champney *v.* Blanchard, 39 N. Y. 111.

But a delivery to a third person to be by him delivered over to the donee, has been held a good delivery: Wells *v.* Tucker, 3 Binn. 370; Bonneman, Admr., *v.* Sidlinger et al., 15 Maine 429, and 21 Id. 185; Coutant *v.* Schuyler et al., 1 Paige 316; Jones, Admr., *v.* Deyer, 16 Ala. 221; Dale, Admr., *v.* Lincoln, 31 Maine 422; Sessions *v.* Moseley, 4 Cush. 87; Michener *v.* Dale, 23 Penn. St. 59; Dresser *v.* Dresser, 46 Maine 48; Kemper *v.* Kemper, 1 Duvall 401; and in the case of Richardson *v.* Adams, 10 Yerg. 273, where the testator gave express directions to a residuary legatee, to deliver an article of property to an individual as a gift, and such legatee promised the testator that he would deliver it, the Court of Chancery declared the legatee a trustee, and enforced a delivery of the article. But the court refused to extend this rule, and in the following case declared no trust was created, because the promise was not made to the testatrix by the residuary legatee, but by an executor, who subsequently declined acting: Sims *v.* Walker, 8 Humph. 503; and the delivery of any such gift, in trust for benevolent purposes, has been held void: Dole, Admr., *v.* Lincoln, 31 Maine 422.

Gifts *causa mortis* differ from those *inter vivos*, in that they may be made to a wife, or husband, are subject to the debts of the donor, and revocable by him during his life, besides being subject to the contingency of the donee surviving the donor: Harris *v.* Clark et al., Exrs., 2 Barb. 94; Wells *v.* Tucker, 3 Binn. 370; Meach *v.* Meach et al., 24 Vt. 591; Marshall *v.* Berry, 13 Allen 43; though Chief Justice Gibson, in Nicholas *v.* Adams, as we have seen, denies that there is any difference between them, at the time of the gift, where he says, "This gift, like every other, is not executory, but executed, in the first instance, by delivery of the thing, though defeasible by reclamation, the contingency of survivorship, or deliverance from peril. The gift is consequently *inter vivos*. And see Bedell *v.* Carll, 33 N. Y. 581. In those respects in which these gifts differ from those *inter vivos*, they resemble legacies; thus, they are subject to the debts of the donor: Wells *v.* Tucker, 3 Binn. 370; Bonnerman, Admr., *v.* Sidlinger et al., 15 Maine 429; Harris *v.* Clark et al., Exrs., 2 Barb. 94; Gaunt *v.* Tucker, 18 Ala. 27; Huntington, Exr., *v.* Gilmore, 14 Barb. 243; Michener *v.* Dale, 23 Penn. St. 59; Bloomer *v.* Bloomer, 2 Bradf. 339; and they are revocable by the donor during his life, as well as given upon the implied condition, that if the donee dies before the donor, the gift shall fail: Wells *v.* Tucker, 3 Binn. 370; Huntington, Exr., *v.* Gilmore, 14 Barb. 243; Parker *v.* Marston, 27 Maine 196; Jones *v.* Brown, 34 N. H. 439; Rhodes *v.* Childs, 64 Penn. St. 18; but they differ

sonalty;(u) and, at the present day, the usual and proper method is to

(u) Wentworth's Executors 3, 4, 14th ed.; 2 Black. Com. 503.

from legacies, in that they do not require the assent of the legal representative of the decedent, to make a good title in the donee: Doyle, Admr., *v.* Lincoln, 31 Maine 422; Gourley *v* Linsenbigler, 51 Penn. St. 345.

Negotiable securities, which pass by delivery, may be the subject of a gift in view of death: Grover *v* Grover, 24 Pick. 261; Bradley *v.* Hunt, Admr., 5 Gill & Johns. 58; in which last case, Chief Justice Buchanan remarks: "To constitute a *donatio causa mortis*, the gift should be full and complete at the time, passing from the donor the legal power and dominion over the thing intended to be given, and leaving nothing to be done by him, or his executor, to perfect it. Hence, bank notes are the subject of such gifts, they being considered as money, and the property in them passing by delivery; and so, as to promissory notes payable to bearer, which pass by delivery, and the property, and legal dominion over the thing intended to be given, passing with the possession from the donor to the donee, they do not require to be sued in the name of the executor, and nothing is necessary to be done by him to perfect the gift of the money. But not so with the delivery of a promissory note payable to order, which has been held to be insufficient to pass to the donee the money, the thing intended to be given; upon the ground, that no property in it passes by delivery; and being a mere *chose in action*, it must, notwithstanding the delivery, be sued in the name of the executor. So that the gift of money is not complete at the time, the legal dominion over it remaining in the donor, and on his death, passing to his executor, without the use of whose name it cannot be perfected. This may seem to be technical; but if the rule is admitted, that a delivery of the thing intended to be given, is essential to the perfection of the gift, it must follow, that a promissory note, payable to order, is not capable of being the subject of a *donatio mortis causa.* And if we were at liberty to do so, we should not be disposed to relax the rule, which would be to open still wider the door, already sufficiently wide, to frauds, and perjuries, and the exercise of undue influence, by the artful and designing, upon the weak and unwary."

By more recent decisions, however, "It seems now to be well settled, that any *chose in action*, whether negotiable or not, whether simple contract or specialty, if it be the contract, or promise, of some other than the donor, and do not constitute any obligation upon the donor, may, by mere delivery, constitute a good gift by reason of anticipated death:" Meach *v.* Meach et al., 24 Vt. 291; Brunson *v.* Brunson, 1 Meigs 630; Bonneman, Admr., *v.* Sidlinger et al., 21 Maine 185; hence, a bond is the subject of such a gift: Wells *v.* Tucker, 3 Binn. 370; Braitley *v.* Hunt, Admr., 5 G. & Johns. 58; Harris *v.* Clark et al., Exrs., 2 Barb. 94; Miller *v.* Jeffress et al., 4 Gratt. 479; Waring *v.* Edmonds, 11 Md. 424; Caldwell *v.* Renfrew, 33 Vt. 213; and a certificate of deposit: Westerlo *v.* De Witt, 36 N. Y. 340; and a policy of life assurance: Gourley *v.* Linsenbigler, 51 Penn. St. 345; or a check on a banker, Id.; and so, of the note of a third person: Bonneman *v.* Sidlinger et al., 15 Maine 429; Holly *v.* Adams, Admr., 16 Vt. 206; Parker *v.* Marston, 27 Maine 196; Harris *v.* Clark et al., Exrs., 2 Barb. 94; Smith et al. *v.* Kittridge, Admr., 21 Vt. 238; Sessions *v.* Moseley, 4 Cush. 78; Bates *v.* Kempton, 7 Gray 382; Chase *v.* Redding, 13 Id. 418; Turpin *v.* Thompson, 2 Metc. (Ky.) 420; for, as was said in the case of Coutant *v.* Schuyler et al., 1 Paige 316, "Notwithstanding the attempts which have been made in England, to distinguish between a promissory note and a bond, in relation to the validity of a gift of a *chose in action*, there cannot, in reason, by any difference. A gift of either is valid, as a symbolical delivery of

appoint an executor as to the personal estate; whereas under a devise of

the debt due on the note, or bond, and all the delivery of which the subject is capable." And the fact, that the note is payable to order, and unendorsed, will not alter the case: Harris *v.* Clark et al., Exrs., 2 Barb. 94; Brown, Exr., *v.* Brown et al., 18 Conn. 410; Gourley *v.* Linsenbigler, 51 Penn. St. 345. But that a valid gift, in prospect of death, cannot be made of a certificate of stock, see Pennington Admr. *v.* Gitting's Exr., 2 G. & Johns. 208, and Westerlo *v.* De Witt, 35 Barb. 215; nor will money deposited in a bank, pass by the delivery of the pass book: Ashbrook *v.* Ryan, 2 Bush 228. It has been held, that a sealed note, will not pass by delivery only, and without endorsement: Overton *v.* Sawyer, 7 Jones L. 6. And see Phipps *v.* Hope, 16 Ohio St. 586.

It was at one time held that the decedent's own note, could be made to operate as a gift by reason of death: Wright *v.* Wright et al., 1 Cowen 598; Bowers *v.* Hurd, Admr., 10 Mass. 427; McConnell *v.* McConnell, 11 Vt. 290; Jones, Admr., *v.* Deyer, 16 Ala. 221; but these cases were overruled, and the opinion at present prevailing, is against the validity of such a gift: Parish *v.* Stone, 14 Conn. 198; Raymond *v.* Sellick et al., Admr., 10 Id. 480; Craig *v.* Craig, 2 Barb. Ch. 78; Smith et al. *v.* Kittridge, Admr., 21 Vt. 238; Brown *v.* Moore, 3 Head 671. "A mere promise," said Judge Hibard in the case of Holly *v.* Adams, Admr., 16 Vt. 206, "to pay a sum of money is not a *donatio causa mortis*, within the meaning of the law. . . . This was not a gift; it was merely a *promise to give*, and required the same interpositions of law to make it available, that are required in any case. . . . I am unable to see any distinction in principle, or indeed any reason, why a note of a third person may not as well pass by a gift *causa mortis*, as a horse, or a piece of furniture, or any other species of personal property. . . . The doctrine of the case from 10th Mass., before alluded to, upon which the plaintiff has relied, is, that where the maker of a note has acknowledged that it was given for value, he is not at liberty to deny it. . . . But although that doctrine once obtained in Massachusetts, it is not law *there* now, and I am not aware that it was ever adopted in this State. We think, therefore clearly, that this note was but the evidence, which the daughter held, that the deceased, in his lifetime, had promised to give her the sum of money therein expressed, and to be treated like any other note which is void for want of a consideration." So in the case of the donor's own draft, or order, upon some third person, Judge Gridley, in Harris *v.* Clark et al., Exrs., 2 Barb. 94, delivered an opinion somewhat analogous to the one just preceding, as follows: "The question is, whether the executory promise of the donor, made without consideration, can be made the subject of a gift *causa mortis.* Such a gift *inter vivos*, has been held void for the want of a legal consideration to support the promise, in several adjudged cases, in this court. . . . The gift was merely a *void promise*, which though subsisting in the form of a written security, was as valueles as waste paper, and therefore incapable of being made the subject of a delivery or donation. . . . So far as it represents a valid claim against a third person, we can see no force in the direction that it was not delivered. But inasmuch as it is sought to be enforced against the executors of the donor, as representing and creating a legal obligation upon him, and available against them, as the representatives of the estate, it appears to us to be open to the objections: 1st, That being without consideration, it was a void promise, incapable of being made the subject of a delivery, or a gift; and 2d, That the draft being intended as a voluntary gift, rebuts the implication, which might otherwise arise, of a guarantee on the part of the drawer, that the draft should be accepted and paid." And see also, 3 Comst. 93, and Craig *v.* Craig, 3 Barb. Ch. 78; Mich-

landed property, the lands pass at once to the devisee, and the intervention of an executor is quite unnecessary and inapplicable.(*v*)[2] The

(*v*) In the goods of Barden, Law Rep. 1 P. & D. 325.

ener *v.* Dale, 23 Penn. St. 59; Candor & Henderson's Ap., 27 Id. 119; Flint *v.* Pattee, 33 N. H. 520; Second Nat. Bank *v.* Williams, 13 Mich. 282.

The title to real estate will not pass by a *donatio causa mortis:* Meach *v.* Leach et al., 24 Vt. 591; and in the case of Headley *v.* Kirby, 18 Penn. St. 226, it was decided, that a decedent cannot thus dispose of all his property, Judge Lowrie using the following language: "It is not pretended that any gift like this has ever been held good, and it may be safely declared that no mere gift made in prospect of death, and professing to pass all one's property to another, to take effect after death, can be valid under our statute of wills, no matter what delivery may have accompanied it. If this is not true, then it is plain that the statute of wills, so far as it is intended to exclude all modes of disposing of personal property at death, which it does not provide for, is repealed by the decisions of the courts." But subsequently, in the case of Meach *v.* Meach et al., 24 Vt. 591, in which the Pennsylvania case appears to have been fully examined, it was held, that a gift of all one's personal property in view of death was valid, and in a note to that case, the question as to the amount or value of property which may pass by a *donatio mortis causa*, is thus considered: "I find no case, except the late case in Pennsylvania, where any attempt has been made to limit its operation, on account of the comparative or absolute extent of the property disposed of. And the more I have reflected on the subject, and compared the cases, with a view to evolve some rational and practicable principle of limitation to the extent of its operation, the more I have felt constrained to declare, that it cannot be done by any powers of abstraction or generalization, which my short sight is able to command." See also, Michener *v.* Dale, 23 Penn. St. 59.

A delivery of a deed of a gift, without a delivery of the thing given, is not sufficient to pass the title by way of a *donatio causa mortis:* Smith, Admr., *v.* Doaney, Admr., 3 Ired. Eq. 268; and any such deed of gift must be proved as a will: Grattan, Admr., *v.* Appleton et al., 3 Story 755; Miller *v.* Jeffress et al., 4 Gratt. 479. But see Exrs. of Blake *v.* Low, 3 Desaus. 266; Brinkerhoff *v.* Lawrence, Admr., &c., 2 Sandf. Ch. 400; Meach *v.* Meach et al., 24 Vt. 291.

A *donatio causa mortis* may be upon a condition, other than those which are implied from the very natnre of such a gift: Currie *v.* Steele et al., 2 Sandf. 542.

[2] The testamentary disposition of property, without the appointment of an executor, is, in technical language, denominated a codicil; for, "a codicil is a just sentence of our will, touching that which any would have done after their death, without the appointing of an executor. Which definition doth agree, almost word for word, with the definition of a testament; saving that some words are here expressed, which are there omitted, *absque executoris constitutione*, without the appointment of an executor. By force of which words, the codicil is made to differ from a testament; for a testament can no more consist or be without an executor, than a codicil can admit an executor. . . . Whereupon, the writers, conferring a testament and a codicil together, and perceiving the odds betwixt the one and the other, they call a testament a great will, and a codicil a little will. And do compare the testament to a ship, and the codicil to a boat, tied most commonly to the ship. And not unjustly, as well because the codicil is not able to sustain the heavy burden of an executor, who, representing the person of the testator doth, as it were (like Atlas, who is feigned to carry the world on his shoulders), bear upon his back the whole mass and

executor of a will of personal estate becomes entitled, from the moment of the death of the testator, to all his personal property,(x) which after payment of the debts of the deceased he is bound to apply according to the directions of the will. Thus if the testator should specifically bequeath any part of his personal property, the property so bequeathed will not belong absolutely to the legatee until the executor has assented to the bequest;[3] and this assent must not be given until the executor is

(x) Co. Litt. 388 a; Com. Dig. tit. Biens (C); Williams on Executors, pt. 2, bk. 2.

weight of all the goods and chattels, which did belong to the deceased, and on whose neck are laid all the actions, which either might be intended against the testator, by others, or against others, by the testator," &c.: Swineburne on Wills, vol. 1, part 1, sec. 5, pp. 28, 29.

[3] A legatee's title is not perfect, until the executor has assented to his legacy: Moore v. Barry, 1 Bail. 504; Lenor v. Sylvester, Id. 504; Upchurch v. Norsworthy, 12 Ala. 532; Kelly's Admr. v. Kelly's Distributees, 9 Id. 908; Rea v. Rhodes, 5 Ired. Eq. 148; Johnson v. The Connecticut Bank, 21 Conn. 156; Saggs v. Sapp, 20 Geo. 100; and this is true of every kind of bequest; as well of specific: Moore v. Barry, 1 Bail. 504; Lenoir v. Sylvester, Id. 504; Smith v. Towne's Admr. 4 Munf. 191; Lillard v. Reynolds, 3 Ired. 370; Everitt v. Lane, 2 Ired. Eq. 550; Frouty v. Frouty, 1 Bail. Ch. 517; Lark et al. v. Linstead et al., 2 Md. Ch. Decs. 162; Crist v. Crist, Admr., 1 Cart. 570; as of general: Wilson v. Rine, 1 Har. & Johns. 138; Lark et al. v. Linstead et al., 2 Md. Ch. Decs. 162; Crist v. Crist, Admr., 1 Cart. 570. And the assent of the legatee is equally necessary: Johnson v. The Connecticut Bank, 21 Conn. 156.

But "a very slight assent," on the part of the executor, "is held sufficient; and it may be either express or implied, absolute or conditional. He may not only, in direct terms, authorize the legatee to take possession, but his assent may be inferred, either from direct expressions, or particular acts, and such constructive permission will be equally available. His assent may be implied; as, if the executor congratulate the legatee," &c.: Lynch v. Thomas, 3 Leigh 686; Lillard v. Reynolds, 3 Ired. 370; Hearne v. Kevan et al., 2 Ired. Eq. 34; Chester et al. v. Greer et al., 5 Humph. 26; Hudson, Exr., &c., v. Reeve, 1 Barb. 89; Rea v. Rhodes, 5 Ired. Eq. 148; Cox v. McKinney, 32 Ala. 461; Edney v. Bryson, 2 Jones L. 365; and he may by implication assent to a legacy to himself: Hearne v. Kevan et al., 2 Ired. Eq. 34; Hudson, Exr., &c., v. Reeve, 1 Barb. 89; Walker v. Walker, 26 Ala. 262. In accordance with these principles, it has been held, that the mere acquiescence of the executor, without any formal consent, is sufficient, where the subject-matter of the legacy, is in the hands of the legatee, at the death of the testator: Andrews, Exrx., v. Hunneman et al., 6 Pick. 126; Lowry v. Mountjoy, 6 Call 55; Finch et al. v. Rogers, 11 Humph. 583; in which it was said, that, "In such case, the legatee being actually in possession, and that, too, by the act of the testator, in his lifetime, the reason of the rule, which requires the executor's assent, does not seem to apply. The executor, in the case stated, would not be chargeable with such chattel; it would not be assets in his hands; nor could he maintain any action against the legatee for its recovery, except in the event of a deficiency of assets, to discharge the debts of the estate, after having fully administered the residue of his personal estate." So, too, the assent of the executor to a specific legacy, will be presumed, after possession by the legatee, for a considerable time: Alexander v. Williams, 2 Hill (S. C.) 522; White v. White, 4 Dev. 257; Merritt v. Windley, 3 Id. 399; White v. White, 4 Dev. & Bat. 401; Birney v.

satisfied that there is sufficient to pay the debts of the deceased [*329] *without having recourse to the property so specifically given.(*y*)

If the testator should appoint as his sole executor an infant under the age of twenty-one years, such infant will not be allowed to exercise his

(*y*) Toller's Executors, bk. 3, s. 2; Williams on Executors, pt. 3, bk. 3, ch. 4, s. 3.

Richardson, 5 Dana 424; Squires *v.* Old, 7 Humph. 454; Rea *v.* Rhodes, 5 Ired. Eq. 148; Jordan *v.* Thoruton et al., 7 Geo. 517; Lott *v.* Meacham, 4 Fla. 144; Finch et al. *v.* Rogers, 11 Humph. 563; Gums *v.* Capehart, 5 Jones Eq. 242; and an assent to a legacy for life, is effectual as to the subsequent interest bequeathed by the will: Conner *v.* Satchwell, Admr., 4 Dev. & Bat. 76; Ingram *v.* Terry et al., 2 Hawk. 122; Hearne *v.* Kevan et al., 2 Ired. Eq. 34; Acheson et al., *v.* McCombs et al., 3 Id. 554; Rea *v.* Rhodes, 5 Ired. Eq. 148; Jordan *v.* Thornton et al., 7 Geo. 517; Lott *v.* Meacham, 4 Fla. 144; Finch et al. *v.* Rogers, 11 Humph. 563; Judge of Probate *v.* Alexander, 31 Miss. 297; Parker *v.* Chambers, 24 Geo. 518; Thrasher *v.* Ingraham, 32 Ala. 645; Gay *v.* Gay, 29 Geo. 549.

The executor may give his consent, within the time allowed by law for the payment of debts: Thomson *v.* Schmidt, 3 Hill (S. C.) 156; and after that assent, a creditor of the testator, can no longer pursue the property in the hands of the legatee, through a judgment and execution against the executor; but he may still follow the specific legacies, by making all the legatees parties to a bill in equity: Burnley *v.* Lambert, 1 Wash. 399; Alexander *v.* Williams, 2 Hill (S. C.) 522; Lyon *v.* Vick et al., 6 Yerg. 42; Nunn *v.* Owens, 2 Strob. 101; Buchanan *v.* Pue, Jr., Exr., 6 Gill 112; and where an assent has once been given, an executor cannot, in general, follow the property in the hands of the legatee, even though there should be a deficiency of assets to pay debts, unless he has taken a refunding bond, and even then, in the case of a specific legacy, he cannot recover the thing, but merely the value: Ross *v.* Davis, 17 Ark. 113; but it has been held, that where the assent was given upon condition that a refunding bond should be delivered, and that condition was not complied with, the administrator might recover from the distributee: Howell *v.* Johnston, 4 Jones L. 502.

Where an executor is refractory, and refuses to confirm the title of a legatee, a court of equity will compel him: Lark et al. *v.* Linstead et al., 2 Md. Ch. Decs. 162; Huckabee, Admr., *v.* Swoope, 20 Ala. 491; Crist *v.* Crist, Admr., 1 Cart. 570; Vaughan *v.* Vaughan, 30 Ala. 329.

The opinion of Judge Nelson in the case of McClanahan, Admr., *v.* Davis et al., 8 How. 178, may be here quoted, as containing a summary of the law on this subject: "The legatee, whether general or specific, or whether of chattels real or personal, must first obtain the executor's assent to the legacy, before his title can become perfect. He has no authority to take possession of the legacy without such assent, although the testator by the will expressly direct that he shall do so. . . . But the law has prescribed no particular form by which the assent of the executor shall be given, and it may be, therefore, either express or implied. It may be inferred from indirect expressions, or particular acts; and such constructive permission shall be equally available. An assent to the interest of tenant for life of a chattel, will inure to vest the interest of the remainder, and *e converso*, as both constitute but one estate. So an assent to a bequest of a lease for years, carries with it an assent to a condition or contingency annexed to it; and it may be implied, from the possession of the subject bequeathed, by the legatee, for any considerable length of time."

office during his minority; but during this time the administration of the goods of the deceased will be granted to the guardian of the infant, or to such other person as the Court of Probate may think fit.(*z*) Such person is called an administrator *durante minore ætate.*(*a*)[1] If a married woman should appoint an executrix, she cannot accept the office without the consent of her husband,(*b*) and having accepted it with his consent, she is unable, without his concurrence, to perform any act of administration which may be to his prejudice; whilst he, on the other hand, may release debts due to the deceased or make an assignment of the deceased's personal estate, without his wife's concurrence;(*c*) for as the general rule of law is that a husband and wife are but one person, the power, and with it the responsibility, are vested in the husband. Nevertheless, a married woman, being an executrix, may make a will without the consent of her husband, confined to the personal estate of which she is executrix;(*d*) and the executor of her will so made will be the executor of the original testator. For it is a general rule,

(*z*) Stat. 38 Geo. III. c. 87, s. 6.
(*a*) Williams on Executors, pt. 1, bk. 5, ch. 3, s. 3.
(*b*) Ibid. pt. 1, bk. 3, ch. 1.
(*c*) Ibid. pt. 3, bk. 1, ch. 4; 5 Rep. 27 b.
(*d*) Ibid. pt. 1, bk. 2, ch. 1, s. 2.

[1] By the 23d section of an act of the legislature of Pennsylvania, of the 15th of March, 1832, it is enacted, that "Whenever all the executors named in any last will and testament, or all the persons entitled, as kindred, to the administration of any decedent's estate, shall happen to be under the age of twenty-one years, it shall be lawful for the register to grant administration . . . . to any other fit person or persons, subject nevertheless to be terminated, at the instance of any of the said minors, who shall have arrived at the full age of twenty-one years." Purd. Dig. (1861), p. 277, sec. 29.

A similar provision is in force in Massachusetts: "When a person appointed executor is under the age of twenty-one years, at the time of proving the will, administration may be granted with the will annexed, during his minority, unless there be another executor who shall accept the trust, in which case, the estate shall be administered by such other executor, until the minor shall arrive at full age, when he may be admitted as joint executor with the former, upon giving bond as before provided." Gen. Stats. of Mass. (1860), p. 482, sec. 7.

In the State of New York it is provided, that "If any person, who would otherwise be entitled to letters of administration, as next of kin, or to letters of administration with the will annexed, as residuary or specific legatee, shall be a minor, such letters shall be granted to his guardian, being in all respects competent, in preference to creditors or other persons." Rev. Stats. of N. Y. (5th ed.), vol. iii. p. 160, sec. 33.

And see also, Gen. Stats. N. H. (1867), p. 361, sec. 3; Thomps. Dig. of the Laws of Fla., p. 195, sec. 2; Rev. Stats. of Vt. (1839), pp. 260, 261, sec. 6; Rev. Stats. of Me. (1857), pp. 411, 412, sec. 15; Laws of Del., Rev. Code of 1852, p. 297, sec. 7; 1 Rev. Stats. of Ohio (1860), p. 568, sec. 8; Stats. of Min., p. 432, sec. 6; Gen. Stats. of Kansas, p. 431, sec. 8. And see Watson *v.* Warnock, 3 Geo. 694.

that if an executor should die before having completely administered the estate of his testator, the executor appointed by the will of such executor will be entitled to complete the distribution of the estate of the former testator.(e)[1]

*The testator however may, and usually does, appoint more than one person his executors. In this case the law regards all the co-executors as one individual person; and consequently any one of the executors of full age may, during the life of his companions, perform, without their concurrence all the ordinary acts of administration, such as giving receipts, making payments, and selling and assigning the property.(f) But all the executors, infants included, must join in bringing [*330]

(e) Bla. Com. 506. And it seems that he is bound to do so: Brooks v. Haynes, Law Rep. 6 Eq. 25, M. R.

(f) Shep. Touch. 484.

[1] The statute law in the United States, generally, is, that an executor of an executor, cannot be the executor of the first testator. Thus, in New York, "No executor of an executor, shall, as such, be authorized to administer on the estate of the first testator; but, on the death of the sole or surviving executor of any last will, letters of administration, with the will annexed, of the assets of the first testator left unadministered, shall be issued," &c. Rev. Stats. of N. Y. (5th ed.), vol. iii., p. 156, sec. 17. In Massachusetts, "The executor of an executor shall not, as such, administer the estate of the first testator," Rev. Stats. of Mass. (1860), p. 482, sec. 9. In Pennsylvania, "Whenever a sole executor, or the survivor of several executors shall die, leaving goods or estate of his testator unadministered, the register having jurisdiction, shall notwithstanding such executor may have made his last will and testament, and appointed an executor or executors thereof, grant letters of administration of all such goods and estate, in the same manner as if such executor had died without having made any testament or last will; and the executor of such deceased executor shall in no case be deemed executor of the first testator." Purd. Dig. (1861), p. 275, sec. 16. And see 2 Matthews's Dig. (1857), p. 558, sec. 8; Rev. Stats. of Vt. (1839), p. 262, sec. 12; Laws of Del., Rev. Code of 1852, p. 297, sec 10; 2 Compil. Laws of Michigan p. 874, sec. 12; Rev. Stats. of Maine (1857), p. 412, sec. 18; 1 Rev. Stats. of Ohio (1860), p. 568, sec. 10; 2 Rev. Stats. of Ky. (1860), p. 499, sec. 11; Nix. Dig. N. J. (1868), p. 309, sec. 38; Gen. Stats. N. H. (1867), p. 361, sec. 8; Gen. Stats. of Kansas, p. 432, sec. 10.

But in South Carolina it has been enacted that "executors of executors shall have actions of debt, account, and of goods carried away, of the first testator, and execution of judgments obtained by, or recognisances made to the first testator, in any court of record, in the same manner as the first testator should have had if he were in life, as well of actions of the time past, as of the time to come; and the same executors of executors, shall answer to others, of as much as they have recovered of the goods of the first testator, as the first executors should do if they were in life:" Rev. Stats. of S. C., vol. ii., p. 439. And similar provisions are in force in North Carolina: Code of N. C. (1855), p. 290, secs. 42 and 43.

actions respecting the estate.(*g*) If, therefore, the testator appoint a person indebted to him as his executor, or one of his executors, this appointment will operate at law as a release of the debt.(*h*)[1] For the debt is a chose in action, and a man cannot either solely or conjointly with others bring an action against himself. In equity, however, an executor who was indebted to the testator is bound to account for his debt to the estate of the testator.(*i*) On the decease of any co-executor, the office survives to those who remain; and until recently, if one of them should have renounced the executorship in the lifetime of his companions, he

(*g*) Williams on Executors, pt. 2, bk. 1. ch. 2. An ejectment was an exception, as any one executor might demise the entirety of the testator's leasehold land. Doe d. Stace *v.* Wheeler, 15 M. & W. 623. But see now stat. 15 & 16 Vict. c. 76, ss. 168 *et seq.*

(*h*) Wentworth's Executors 73, 14th ed.; Freakley *v.* Fox, 9 B. & C. 130 (E. C. L. R. vol. 17).

(*i*) Bac. Ab. tit. Executors and Administrators (A), 10; Simmons *v.* Gutteridge, 13 Ves. 264.

[1] The statutes of many of the States of the Union, establish a rule contrary to that stated in the text. Thus, by the laws of Florida, "If any person shall appoint his or her debtor to be the executor of his or her last will and testament, such appointment shall not, either in law or equity, be construed to operate as a release or extinguishment, of any debt due to the testator, unless the same be so expressly declared in said last will and testament." Thomps. Dig. of the Laws of Fla., p. 196, sec. 1, ch. 7. And so, also, in Texas, "The naming an executor, shall not operate to extinguish any just claim which the deceased had against him; and in all cases, when an executor or administrator may be indebted to his testator or intestate, he shall account for the debt in the same manner as if it were so much money in his hands: provided, however, that if said debt was not due at the time of receiving letters, he shall only be required to account for it, from the date when it shall become due." Paschal's Dig. Laws of Texas, p. 325, Art. 1336. See also New Dig. of the Laws of Geo., by T. B. R. Cobb (1851), vol. i., pp. 302, 303, sec. 51; Rev. Code of N. C. (1855), p. 288, sec. 31; 2 Rev. Stats. of Ky. (1860), p. 499, sec. 10; 2 Matthews's Dig. Va. (1857), p. 561, sec. 13; Nixon's Dig. N. J. (1868), p. 307, sec. 24; Gen. Stats. of Kansas, p, 444, sec. 65; Gross's Stats. Ill. (1869), p. 800, sec. 15; Stats. of S. C., vol. v., p. 111, sec. 25; Laws of Del., Rev. Code of 1852, p. 301, sec. 18; Dig. of Stats. of Ark., p. 125, sec. 82; 1 Rev. Stats. of Ohio (1860), p. 578, sec. 65; How. & Hutch. Stats. Laws of Miss., p. 404, sec. 67.

By the 2d section of an act of the legislature of Pennsylvania, of the 3d of April, 1829, it is provided, that "In all cases where a creditor hath appointed, or shall appoint, his judgment debtor his executor, and the said judgment is a lien on the real estate of such executor, and the same is bequeathed specifically to a legatee, or generally in the residuary clause of such testator's will, or where any testator having a judgment situated as aforesaid, shall have creditors interested in preserving the lien of such judgment, such legatee or creditor so interested in such judgment, may suggest their interest in the same upon the record thereof, and issue a writ of *scire facias* against the defendant, to revive the same, and continue the lien thereof at any time when such proceedings shall be necessary under the laws of this commonwealth, which judgment so revived, shall remain for the use of all persons interested therein." Purd. Dig. (1861), p. 285, sec. 84.

might at any time have changed his mind and undertaken the office. But if having survived all his companions, he should then have renounced,(*j*) or if, without renunciation, administration should have been granted to another person,(*k*) he could not afterwards have interfered. It *is [*331] however now provided by the Court of Probate Act, 1857, that where any person after the commencement of that act,(*l*) (which was fixed by Order in Council for the 11th of January, 1858), renounces probate of the will of which he is appointed executor or one of the executors, the rights of such person in respect of the executorship shall wholly cease; and the representation to the testator and the administration of his effects shall, without any further renunciation, go, devolve and be committed in like manner, as if such person had not been appointed executor.(*m*) And by a subsequent act the same effect is produced whenever an executor named in a will survives the testator, but dies without having taken probate, and whenever an executor named in a will is cited to take probate and does not appear to such citation.(*n*) When two or more executors prove, the executor of the will of the survivor of them will, after the decease of all of them, be entitled to act as executor of their testator.[1]

If any person not duly authorized should intermeddle with the goods of the testator, or do any other act relating to the office of executor, he thereby becomes an executor of his own wrong, or, as it is called in law French, an executor *de son tort*. Such an executor is liable to the same demands from the creditors of the deceased as if he had been regularly appointed; but like a regular executor he is not liable beyond the amount of the assets of the testator which have come to his hands. The chief difference between such an executor and one who has been duly appointed is this, that an executor *de son tort* is not allowed to derive any benefit from his own wrongful intermeddling; whereas a regularly appointed executor, if a creditor of the deceased, may *lawfully retain his [*332] own debt out of the assets in preference to all other debts of the same degree.(*o*)

(*j*) Hensloe's Case, 9 Rep. 36; Cresswick *v.* Woodhead, 4 M. & G. 811 (E. C. L. R. vol. 43).

(*k*) Venables *v.* East India Company, 2 Ex. Rep. 633.

(*l*) In the goods of Witham, Law Rep., 1 P. & D. 303.

(*m*) Stat. 20 & 21 Vict. c. 77, s. 79.

(*n*) Court of Probate Act, 1858, 21 & 22 Vict. c. 95, s. 16.

(*o*) Williams on Executors, pt. 1, bk. 3, ch. 5; pt. 3, bk. 2, ch. 2, s. 6.

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[1] See *ante*, p. 329, note.

The most striking difference between a will of personal estate and a will of lands yet remains to be noticed. A will of lands has always operated and still operates as a mode of conveyance requiring no extrinsic sanction to render it available as a document of title. But a will of personal estate has always required to be proved. This probate of the will was until recently required to be made in some ecclesiastical court. But by the Court of Probate Act, 1857,(*p*) the jurisdiction of all the ecclesiastical courts over wills was entirely abolished, and a Court was established called the Court of Probate, with a principal registry in London and district registries throughout the kingdom, in which all wills of personal estate are now required to be proved. In this court the will itself is deposited, and a copy of the will, which is given by the court to the executor on proving, denominated the probate copy, is the only proper evidence of the right of the executor to intermeddle with the personal estate of his testator;(*q*)[1] Before probate,

(*p*) Stat. 20 & 21 Vict. c. 77, amended by stat. 21 & 22 Vict. c. 95.

(*q*) Rex *v.* Netherseal, 4 Term Rep. 260; Wms. Ex. pt. 1, bk. 4, ch. 1.

[1] For the regulations adopted by the several States of the Union, on the subject of the probate of wills, see the statutes of the respective States.

As to the operation and effect of the probate of a will, a distinction is to be made between personal and real property. The probate of a will of personalty, is conclusive evidence, while it remains unrevoked, throughout the Union, as will be seen by the following cases. But as regards realty, the decisions are not uniform; some holding, that the probate is of equal effect with that of personal property, while others support the English, or common law doctrine; the former is acknowledged as the law of Rhode Island, Alabama, Maine, Massachusetts, New Hampshire, Connecticut, Ohio, California and Kentucky: Potter *v.* Webb et al., 2 Greenlf. 257; Small et al. *v.* Small, 4 Id. 224; Osgood *v.* Breed, 12 Mass. 533; Inhabitants of Dublin *v.* Chadbourne, 16 Id. 433; Laughton *v.* Atkins, 1 Pick. 549; Tompkins *v.* Tompkins, 1 Story 547; Poplin *v.* Hawke, 8 N. H. 124; Judson *v.* Lake, 3 Day 318; Bush *v.* Sheldon, 1 Id. 170; Bailey *v.* Bailey et al., 8 Ohio 246; Tarver *v.* Tarver et al., 1 Peters 180; Patton *v.* Tallman, 27 Maine 17; Singleton *v.* Singleton et al., 8 B. Mon. 348; Adams *v.* DeCook, 1 McAll. C. C. 253; and the latter principle, is received in New York, Maryland and South Carolina: Jackson *v.* Thompson, 6 Cowen 178; Rogers *v.* Rogers, 3 Wend. 514; Smith's Lessee *v.* Steele, 1 Har. & McHen. 419; Darby *v.* Mayer et al., 10 Wheat. 465; Exrs. of Crossland *v.* Murdock, 4 McCord 217; Warford *v.* Colvin, 14 Md. 532; Tygart *v.* Peoples, 9 Rich. Eq. 46.

In Pennsylvania, by the seventh section of the act of 22d of April, 1856, Purd. Dig. (1861), p. 275, sec. 13, "The probate, by the register of the proper county, of any will devising real estate, shall be conclusive, as to such realty, unless within five years from the date of such probate, those interested to controvert it, shall, by caveat and action at law duly pursued, contest the validity of such will as to such realty;" and until concluded by lapse of time, as above specified, the probate is only *primâ facie* evidence in regard to real estate: Shinn *v.* Holmes, 25 Penn. St. 142; Baker *v.* McFerran, 26 Id. 211; Coates *v.* Hughes, 3 Binn. 498; Smith *v.* Bonsall, 5 Rawle 83; Walmsley

however, the executor may perform all the ordinary acts of administration, such as receiving and giving receipts for debts due to the testator, paying the debts owing by the testator, and selling and assigning any part of the personal estate. But when evidence is required of his right to intermeddle, the probate is the only valid proof; without it, therefore, no action or suit can be maintained; although proceedings may be commenced before, and carried up to the point where the evidence is required.(r)[1]

*The jurisdiction of the ecclesiastical courts over wills of personal estate is of a very ancient origin. The probate of wills [*333]

(r) Williams on Executors, pt. 1, bk. 4, ch. 1, s. 2; Stuart v. Burrowes, 1 Drury 265, 274.

v. Read et al., 1 Yeates 87; Spangle v. Rambler, 4 S. & R. 192; Logan v. Watt et al., 5 Id. 212; Rowland v. Evans, 6 Penn. St. 435; Thompson v. Thompson, 9 Id. 234; Dormink et al. v. Reichenback, 10 S. & R. 89. In North Carolina, and Tennessee also, the probate is regarded as *primâ facie* proof as to real estate: Stanley v. Kean, 1 Tayl. 93; Weatherhead v. Sewell et al., 9 Humph. 282; and in Louisiana it has been held, that it is at least *primâ facie* evidence, if not conclusive: Donaldson v. Winter, 1 La. 144.

In the State of Virginia, Judge Green, in the case of Bagwell et al. v. Elliott, 2 Rand. 200, decided, that it was not "necessary that a will should be proved in a court of probate, in order to give it validity, as a will of lands. The only effect of such probate is, to afford one mode of proof that the will is genuine and authentic; but the mode of proof allowable, before the passing of those statutes, is not abolished or prohibited by them; that is, by evidence on the trial. If a will offered for probate, were contested, and rejected, this might be used thereafter, as the decision of a competent judicial tribunal, and would condemn it forever." And see, Parker's Exrs. v. Brown's Exrs. et al., 6 Gratt. 554.

[1] In some of the States this power has been controlled by statute; thus, in Ohio, "No executor named in a will, shall, before letters testamentary are granted, have any power to dispose of any part of the estate of the testator, except to pay funeral charges, nor to interfere in any manner, with such estate, further than is necessary for its preservation." Rev. Stats. of Ohio (1860), p. 568, sec. 11. And so also, in Virginia and New York: 2 Matthews's Dig. Va. (1857), p. 552, § 1; 3 Rev. Stats. of N. Y. (5th ed.), p. 156, § 16; and see also Md. Code (1860), p. 627, sec. 48; 1 Rev. Stats. of Ky. (1860), p. 497, sec. 1; Gen. Stats. of Kansas (1868), ch. 37, p. 432, sec. 11.

In Alabama, it has been decided, that executors are not entitled to exercise any powers, as such, other than collecting and taking care of the estate, until they have given bond, and taken the oath prescribed: Cleveland et al., Exrs., v. Chandler, 3 Stew. 489; nor will their assent to a legacy, before probate, give any title to the legatee: Gardner et al. v. Gault et al., 19 Ala. 666. In Vermont, an executor has no authority under a will, until the same is approved or allowed by the judge of probate: Tucker, Exr., v. Starkes et al., Brayton 99. And see Trasks v. Donoghue, 1 Aik. 370; Thomas et al., Exrs., v. Cameron, 16 Wend. 579. But in New Hampshire, it has been held, that an executor derives his authority from the testator, and may commence an action, as such, before probate of the will: Strong, Exrx., v. Perkins, 3 N. H. 517; and see Bowman's Ap., 62 Penn. St. 166.

of personalty, as a means of their authentication, appears to have been in use from the very earliest times. The first persons by whom probate was granted were said to be the lords of manors; and some vestiges of this ancient right long remained in the case of one or two manors, the lords of which retained such a jurisdiction(*s*) until abolished by the Court of Probate Act, 1857.(*t*) But so early as the time of Glanville, who wrote in the reign of Henry II., the ecclesiastical courts had acquired an exclusive right to determine on the validity of a will or the bequest of a legacy.(*u*) And from this period the right of the church to interfere in testamentary matters became gradually settled, though not without much opposition on the part of the temporal lords.

A will was required to be proved in the court of the bishop or ordinary in whose diocese the testator dwelt, and within whose jurisdiction the personal effects of the testator consequently lay. But if there were effects to the value of 5*l.*, called *bona notabilia*, in two distinct dioceses or jurisdictions within the same province, either of Canterbury or York, the will was required to be proved in the Prerogative Court of the archbishop of that province.(*x*) If there were personal effects within two provinces, the will must have been proved in each province, either in the Prerogative Court, or in some court of inferior jurisdiction; observing, as to each province, the same rule as would have applied had the testator [*334] *had no property elsewhere.(*y*) If probate were granted by a bishop, or other inferior judge, in a case where the deceased had goods to the value of 5*l.* in any other diocese in the same province, such probate was absolutely void; but probate granted by an archbishop, in a case where the deceased had not *bona notabilia* in divers dioceses, was voidable only, and not absolutely void.(*z*) But the Court of Probate Act, 1857, now renders valid all grants of probates which were void or voidable by reason only that the courts from which they were obtained had not jurisdiction to make such grants, except where the same had been already litigated.(*a*) And any will may now be proved in the prin-

(*s*) Wentworth's Ex., 14th ed. 99, 100; Toller's Executors 50.

(*t*) Stat. 20 & 21 Vict. c. 77, s. 3.

(*u*) Glanville, lib. 7, cc. 6, 7; 1 Reeves's Hist. Eng. Law 72.

(*x*) Williams on Executors, pt. 1, bk. 4, ch. 2. For an account of the rise of the archbishop's jurisdiction, see Gent. Mag. new series, vol. 12, p. 582.

(*y*) Second Report of Real Property Commissioners 67.

(*z*) Wentworth's Executors 110, 14th ed.; Lysons *v.* Barrow, 2 Bing. N. C. 486 (E. C. L. R. vol. 29).

(*a*) Stat. 20 & 21 Vict. c. 77, s. 86; In the goods of Tucker, 2 Sw. & Trist. 123; 9 W. R. 420.

cipal registry of the Court of Probate without regard to the abode of the testator.(*b*) But if the testator had, at the time of his death, a fixed place of abode within any district, his will may be proved in the registry of that district;(*c*) and the grant so made will be effectual even if the testator should not have had any fixed place of abode within that district.(*d*)

The evidence required for the proof of a will varies according to the form of the attestation, and also according to the circumstance of the validity of the will being or not being disputed. The usual and proper form of attestation to a will expresses that the formalities required by the Wills Act(*e*) have been complied with; thus, "Signed and declared by the above-named A. B., the testator, as and for his last will and testament, in the presence of us, both present at the same time, who, at his request, in his presence, and in the *presence of each other, [*335] have hereunto subscribed our names as witnesses." When the attestation is in this form, and the validity of the will is not disputed, it is *proved* by the simple oath of the executor, that he believes the will to be the true last will and testament of the deceased. But as such a form of the attestation clause is not essential to the validity of the will,(*f*) wills are sometimes informally made without any clause of attestation, or with a clause which does not express that the required formalities have been complied with. When this occurs, an affidavit, in addition to the executor's oath, is required from one of the subscribing witnesses, that the will was executed in compliance with the statute.(*g*) Probate in either of the above modes is termed probate in *common form*. But if the validity of the will should be disputed, or any dispute should be anticipated by the executor, the will is proved *in solemn form per testes*. In this case both the witnesses are sworn and examined, and such other evidence taken as the circumstances require, in the presence of the widow and next of kin of the testator, and all others pretending to have any interest, who are cited to be present to see the proceedings. When a will has once been proved in this form it is finally established, and the executor cannot be compelled to prove it any more; but when a will has been proved merely in common form, the executor may, at any time

(*b*) Stat. 20 & 21 Vict, c. 77, s. 59.

(*c*) Sect. 46.

(*d*) Sect. 47.

(*e*) Stat. 7 Will. IV. & 1 Vict. c. 26, s. 9, *ante*, p. 323.

(*f*) Stat. 7 Will. IV. & 1 Vict. c. 26, s. 9.

(*g*) Williams on Executors, pt. 1, bk. 4, ch. 3, s. 3. The practice of the Court of Probate is generally the same as the old practice of the Prerogative Court of the Archbishop of Canterbury; stat. 20 & 21 Vict. c. 77, s. 29.

within thirty years, be compelled by any party interested to prove it *per testes* in solemn form.(*h*) The contentious jurisdiction with respect to the grant and revocation of probates of wills, has been transferred to the [*336] county courts in cases where *the personalty is under the value of 200*l*., and the deceased was not at the time of his death beneficially entitled to any real estate of the value of 300*l*.(*i*)

Probate of wills are required by act of parliament to be stamped with an ad valorem duty according to the value of the personal estate of the testator(*j*) whenever it exceeds 100*l*.(*k*)[1] The effects of the testator within the jurisdiction of the spiritual judge granting probate were formerly alone valued for this purpose.(*l*) But it is now provided that probate shall be granted in respect of the whole of the personal and movable estate and effects of the deceased in the United Kingdom.(*m*) And provisions have been made for extending to England, Scotland and Ireland respectively probates granted by the courts of probate which have now been established in England and Ireland, and confirmations, as they are called, of executors in Scotland.(*n*) A recent act of parliament provides that all Indian government promissory notes and certificates issued or stock created in lieu thereof, being assets of a deceased person, the interest whereon shall be payable in London by drafts payable in India, and which at the decease of the owner thereof shall have been registered in the books of the secretary of state in council in London, or in the books of the governor and company of the Bank of England, or shall have been enfaced in India for the purpose of being so registered before the decease of the owner thereof, and all India government promissory

(*h*) Williams on Executors, pt. 1, bk. 4, ch. 3, s. 4.

(*i*) Stat. 21 & 22 Vict. c. 95, s. 10.

(*j*) Stats. 55 Geo. III. c. 184; 5 & 6 Vict. c. 79, s. 23; 22 & 23 Vict. c. 36, s. 1.

(*k*) Stat. 27 & 28 Vict. c. 56, s. 5.

(*l*) Attorney-General *v.* Hope, 2 Cl. & Fin. 84; Attorney-General *v.* Bouwens, 4 M. & W. 171.

(*m*) Stat. 21 & 22 Vict. c. 56, s. 15. As to ships at sea, see stat. 27 & 28 Vict. c. 56, s. 4.

(*n*) Stat. 20 & 21 Vict. c. 79, ss. 94, 95; 21 & 22 Vict. c. 56, ss. 12, 13, 14; 21 & 22 Vict. c. 95, s. 29.

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[1] By the Internal Revenue Act, being Act of Congress of June 30, 1864, it is provided, that upon the proof of wills, or granting letters of administration, a tax of one dollar shall be paid whenever the value of the estate exceeds two thousand dollars, and an additional tax of fifty cents, for every one thousand dollars value of the estate or fractional part of one thousand dollars, exceeding two thousand dollars. See sec. 170, Schedule B., tit. "Probate of Will," 2 Brightly's U. S. Dig., p. 380, sec. 374.

*notes issued with coupons attached, which, under such regulations and conditions as may be determined from time to time by [*337] the secretary of state in council, shall be so registered, and all certificates issued or stock created in lieu thereof, shall be deemed and taken to be personal estate and bona notabilia of such deceased person in England; and probate or letters of administration in England, or confirmation granted in Scotland and sealed with the seal of the principal court of probate in England, shall be sufficient to constitute the persons therein named the legal personal representatives of the deceased with respect to such notes and money as aforesaid.(*o*) Probates of wills operating merely in exercise of powers of appointment over property of which the deceased had no ownership, were formerly held to be exempt from probate duty in respect of the value of the property appointed.(*p*) But it is now provided, that probate duty shall be paid in respect of all the personal or movable estate and effects which any person dying after the 3d of April, 1860, shall have disposed of by will under any authority enabling such person to dispose of the same as he or she shall think fit.(*q*) The distribution of the effects of officers and soldiers dying on service is provided for by the Regimental Debts Act, 1863.(*r*) Exemptions from probate duty have been made by parliament in favor of the effects of common seamen, marines and soldiers, who may be slain or die in the queen's service.(*s*) And pay, wages, prize money or pensions due to deceased naval officers, marines, seamen and others employed in *the [*338] navy, whose whole assets shall not exceed thirty-two pounds, are allowed to be paid out without probate of their wills.(*t*) And the exemptions thus made have recently been extended to all persons to whom any sum of money, not exceeding one hundred pounds, may be payable by a public department in respect of civil pay or allowances, or annuities granted under authority of parliament.(*u*) And in the case of any civil or military allowances chargeable to the army votes, and of army prize money, the existing exemptions are extended to the sum of one hundred pounds.(*v*) Probates of the wills of petty officers and seamen in the royal navy and of marines and non-commissioned officers of marines are placed by act of parliament under the care of an officer called the in-

(*o*) Stat. 23 Vict. c. 5, s. 1. As to bonds and specialties, see stat. 25 Vict. c. 22, s. 39.

(*p*) Platt *v*. Routh, 6 M. & W. 756; 3 Beav. 257; affirmed in the House of Lords; Drake *v*. Attorney-General, 10 Cl. & Fin. 257.

(*q*) Stat. 23 Vict. c. 15, s. 4.

(*r*) Stat. 26 & 27 Vict. c. 57; and see the Army Prize (shares of deceased) Act, 1864, stat. 27 & 28 Vict. c. 26.

(*s*) Stat. 55 Geo. III. c. 184.

(*t*) Stat. 4 & 5 Will. IV. c. 25, s. 8.

(*u*) Stat. 31 & 32 Vict. c. 90, s. 1.

(*v*) Sect. 2.

spector of seamen's wills, and are subject to special regulations made to prevent frauds on persons proverbially careless and liable to imposition.(x) And with respect to merchant seamen, the Merchant Shipping Act, 1854, now provides, that if the money and effects of any such seamen do not exceed in value the sum of 50*l.*, probate may be dispensed with at the discretion of the Board of Trade.(y) The probate duty is in the first place paid on the whole value of the personal estate of the testator without allowing for his debts; and after the debts are paid, a return of part of the probate duty is made according to the value to which the estate may be reduced by the payment of the debts. But where leasehold estates are the sole security, by way of mortgage, for any debts due from the deceased, the amount of such mortgage debts may be [*339] deducted from the *value of the said leasehold estates.(z) As some persons attempted to evade probate duty by means of voluntary bonds to take effect at their decease, in lieu of legacies, it is now provided that no return of probate duty shall be made in respect of any voluntary debt due from any person dying after the 28th of June, 1861, which shall be expressed to be payable on the death of such person, or payable under any instrument which shall not have been bonâ fide delivered to the donee thereof three months before the death of such person.(a)

When the will has been proved, it is the duty of the executor to pay the testator's debts out of the personal estate, to which such executor becomes entitled by virtue of his office. For this purpose the executor has reposed in him by the law the fullest powers of disposition over the personal estate of the deceased, whatever may be the manner in which it has been bequeathed by the will.(b) And in the event of a sale of any such property by the executor, the purchaser is not bound to inquire whether there are any debts remaining unpaid; for, in the absence of evidence to the contrary, the executor is presumed to be acting in the proper discharge of his office.(c) Nor is the purchaser at all concerned with the application which the executor may make of the purchase-money; but the executor's receipt will be a sufficient discharge, and he

(x) Stat. 11 Geo. IV. & 1 Will, IV. c. 20, ss. 55–58, amended by stat. 2 & 3 Will. IV. c. 40, ss. 12, 13; 4 & 5 Will. IV. c. 25, s. 8; Williams on Executors, pt. 1, bk. 4, ch. 4; bk. 5, ch. 2, s. 4.

(y) Stat. 17 & 18 Vict. c. 104, s. 199. (z) Stat. 31 & 32 Vict. c. 127, s. 7.

(a) Stat. 24 & 25 Vict. c. 92, s. 3.

(b) Ewer *v.* Corbet, 2 P. Wms. 148; Russell *v.* Plaice, 18 Beav. 21.

(c) Nugent *v.* Gifford, 1 Atk. 463; Elliot *v.* Merriman, 2 Id. 42.

alone will be responsible to the creditors and legatees for its due application.(*d*) The order in which debts ought to be paid out of the personal estate of a deceased debtor has been *already noticed in the chapter on debts;(*e*) and it has also been stated that the executor, if a creditor, is entitled to retain his own debt in preference to all others of the same degree.(*f*) [*340]

When the will has been executed after the 28th of August, 1860, or has been confirmed or revived by a codicil executed after that date, the executors are empowered to pay any debts or claims upon any evidence that they may think sufficient, and to accept any composition, or any security, real or personal, for any debts due to the deceased, and to allow any time for payment of any such debts as they shall think fit, and also to compromise, compound or submit to arbitration all debts, accounts, claims and things whatsoever relating to the estate of the deceased, and for any of the purposes aforesaid to enter into, give and execute such agreements, instruments of composition, releases and other things as they shall think expedient, without being responsible for any loss to be occasioned thereby.(*g*) And the executors are now empowered immediately, or at any time after probate, to apply to the Court of Chancery for an order to be made upon motion or petition of course, or by the judge at chambers, referring it to the chief clerk of the judge to take an account of the debts and liabilities affecting the personal estate of the deceased and to report thereon; and after any such order shall have been made, proceedings at law by the creditors against the executors may be restrained or suspended by the court until the account directed by such order shall have been taken.(*h*)[1]

(*d*) Whale *v*. Booth, 4 Term Rep. 625, n.; M'Leod *v*. Drummond, 17 Ves. 154.
(*e*) *Ante*, pp. 97, 102, 105, 106. (*f*) *Ante*, pp. 331, 332.
(*g*) Stat. 23 & 24 Vict. c. 145, s. 30.
(*h*) Stats. 13 & 14 Vict. c. 35, s. 19; 23 & 24 Vict. c. 38, s. 14.

[1] The personal representative of a testator or intestate, is bound to proceed in the settlement of the estate, in such manner as will promote the interests of those entitled thereto, and to that end may compromise claims: Chouteau *v*. Suydam, 21 N. Y. 179; or waive formal proof thereof: Anderson's Admr. *v*. Washabaugh, 43 Penn. St. 115; or arbitrate them: Peter's Ap., 38 Id. 239; Chadbourn *v*. Chadbourn, 9 Allen 173; so, also, he may rescind an unfinished contract of his testator or intestate: Dougherty *v*. Stephenson, 20 Penn. St. 210; Gray *v*. Hawkins, 8 Ohio St. 449; or assign and transfer the securities belonging to the estate: Speelman *v*. Culbertson, 15 Ind. 441; Ladd *v*. Wiggin, 35 N. H. 421; Thomas *v*. Reister, 3 Ind. 369; Walker *v*. Craig, 18 Ill. 116; Hough *v*. Bailey, 32 Conn. 288. As to the obligation of an executor or administrator, to plead the statute of limitations, there

When the debts have been paid, the legacies left by the testator are [*341] then to be discharged. In order to give *the executor sufficient time to inform himself of the state of the assets and to pay the debts of the deceased, he is allowed a twelvemonth from the date of the death of the testator before he is bound to pay any legacies.(*i*) From this time all such general legacies as remain unpaid carry interest, at the rate of four per cent. per annum.(*j*) Notwithstanding the lapse of a year from the testator's death, the executor, however, is still liable to any creditor of the deceased to the amount of the assets which have come to the executor's hands;(*k*) and if he should have paid any legacies in ignorance of the claims of the creditor, his only remedy is to apply to the legatees to refund their legacies, which they will be bound to do, in order to satisfy the debt.(*l*) From this liability to creditors, an executor could not until recently have been discharged, unless he threw the property into chancery, in which case the court undertakes the administration, and the executor is consequently exonerated from all risk.(*m*) But a recent act exonerates executors from all liability to the rents and covenants of any leasehold or other property liable to rents or covenants after an assignment made by him to a purchaser, provided he shall have set apart a sufficient fund to answer any future claim in respect of any fixed and ascertained sum agreed by the lessee or grantee to be laid out on the property.(*n*)[1] And it is further provided, that where an executor shall have given the like notices as would have been given by the Court of [*342] Chancery in an administration suit, for creditors and *others to send in their claims against the estate of the testator, the exe-

(*i*) Ward *v.* Penoyre, 13 Ves. 333; Benson *v.* Maude, 6 Madd. 15.

(*j*) Ward *v.* Penoyre, ubi sup.

(*k*) Norman *v.* Baldyry, 6 Sim. 621: Knatchbull *v.* Fearnhead, 3 Myl. & Cr. 122; Hill *v.* Gomme, 1 Beav. 540.

(*l*) March *v.* Russell, 3 Myl. & Cr. 31. (*m*) 3 Myl. & Cr. 126.

(*n*) Stat. 22 & 23 Vict. c. 35, ss. 27, 28. This act extends to leases made before it passed: Smith *v.* Smith, 1 Drew. & Smale, 684; Re Green, 2 De G., F. & J. 121.

seems to be a diversity of sentiment; and although the better opinion is that he has a discretion on the subject: Barnawell *v.* Smith, 5 Jones Eq. 168; Semmes *v.* Magruder, 10 Md. 242; Pollard *v.* Sears, 28 Ala. 484; Ritter's Ap., 23 Penn. St. 95; Conway *v.* Rayburn, 22 Ark. 290; yet, there is not wanting authority, that the personal representative of a decedent is without discretion, and must plead the statute: Rector *v.* Conway, 20 Ark. 79.

[1] Though the covenant in a ground-rent deed, is personal on the part of the covenantor, yet as to arrears of rent accruing after his decease, the landlord is restricted to the realty out of which it issues, and is not entitled to payment out of money in the hands of the executors. But the personal representatives of the covenantor, may be sued for the breaches of the covenant in the ground-rent deed, occurring after his death, though the judgment will be restricted to the land bound by the covenant: William's Ap., 47 Penn. St. 283.

cutor may distribute the assets amongst the parties entitled, without liability to any person of whose claim he shall not have had notice at the time of distribution.(*o*) The executor is of course not answerable to the testator's creditors beyond the amount of assets which have come to his hands,(*p*) unless he should for sufficient consideration give a written promise to pay personally,(*q*) or should do any act amounting to an admission that he has assets of the testator sufficient for the payment of the debts.(*r*)[1]

(*o*) Stat. 22 & 23 Vict. c. 35, s. 29; Clegg *v*. Rowland, V.-C. M., Law Rep. 3 Eq. 368; 36 L. J., N. S. Chan. 137.

(*p*) Bac. Abr. tit. Executors; (P), 1.

(*q*) Stat. 29 Car. II. c. 3, s. 4; *ante*, p. 78; 1 Wms. Saund. 210, n. (1); 211, n. (2).

(*r*) Horsley *v*. Chaloner, 2 Ves. sen. 83.

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[1] An executor or administrator can only be made answerable for the assets which come to his hands: Douglass *v*. Satterlee et al., Admr., 11 Johns. 16; Williams *v*. Holden, 4 Wend. 229; Call et al., Exrs., *v*. Ewing, 1 Blackf. 301; Moore's Admrs. *v*. Tandy et al., 3 Bibb 97; Byrd *v*. Holloway, 6 Sm. & M. 199; Loundes, &c., *v*. Pinckney et al., 2 Strobh. Eq. 44; Robinson *v*. Lane, 14 Sm. & M. 161; Clayton *v*. Wardell, 2 Bradf. 1; but where he has been in possession of assets and has handed them over to his co-executor or administrator, or other person, or has in any way connived at the possession of the assets by his co-executor or administrator, he will be responsible for their administration: Douglass *v*. Satterlee et al., Admrs., 11 Johns. 16; Stewart *v*. Conner, 9 Ala. 803; Edmonds et al. *v*. Crenshaw, 14 Peters 166; Mesick, Exr., *v*. Mesick et al., 7 Barb. 120; Clarke *v*. Jenkins et al., 3 Rich. Eq. 319; Tilton *v*. Tilton, 41 N. H. 479; Fisher *v*. Skillman, 3 Green 229; and so where he postpones the collection of a debt due the estate, until it is lost: Shaffer's Ap., 10 Penn. St. 131; Cason *v*. Cason, 31 Miss. 578; Cooley *v*. Vansyckle, 1 McCart. (N. J.) 496.

A promise, however, made by an executor or administrator, in writing, to pay the debt of his testator or intestate, will make him individually liable: Ciples *v*. Alexander, 2 Constitutional R. 768; Robinson *v*. Lane, 14 Sm. & M. 161; Carter *v*. Thomas, 3 Cart. 213; provided, it be made upon a sufficient consideration: Byrd *v*. Holloway, 6 Sm. & M. 199; Mosely et al. *v*. Taylor, 4 Dana 542; Robinson *v*. Lane, 14 Sm. & M. 161; and, forbearance is a sufficient consideration: Taliaferro *v*. Robb et al., Admrs., 2 Call 217; Mosely et al. *v*. Taylor, 4 Dana 542; but a verbal promise, even if upon a good consideration, will not be binding, in those states, where the statute of frauds requires the promise of an executor to pay the debt of his testator, to be in writing, as falling within the provisions of that statute: Harrington *v*. Rich, 6 Vt. 666; Okeson's Ap., 59 Penn. St. 99.

But where an executor admits that he has assets, or does any act amounting to such an admission, he will make himself individually responsible for the debts of the decedent: Taliaferro *v*. Robb et al., Exrs., 2 Call 217; Ten Eyck *v*. Vanderpoel, 8 Johns. 120; Sleighter *v*. Harrington, Exrx., 2 Tayl. 249; Sims *v*. Stillwell, 3 How. (Miss.) 181; Loundes, &c., *v*. Pickney et al., 2 Strobh. Eq. 44; Irwin's Ap., 35 Penn. St. 294; Colwell *v*. Alger, 5 Gray 67; Sample *v*. Lipscomb, 18 Geo. 687; Ciples *v*. Alexander, 2 Constitutional R. 768; in which last case, it was said by Judge Bay: "As there is no privity of contract between the executor or administrator, and a testator or intestate's creditor, it is not presumed in law, that they can know whether a demand is just or unjust. And therefore, a bare admission alone on the

On the payment or delivery of any legacy of the amount or value of 20*l.* or upwards, whether payable out of the estate of the testator, real or personal, or out of any real or personal estate over which he had a power of appointment,(*s*) a receipt must be given by the legatee, which is chargeable with a duty, called the legacy duty, on the amount or value of the legacy.(*t*) But no sum of money, which by any marriage settlement is subjected to any limited power of appointment to or for the benefit of any person or persons therein specially named or described as the object or objects of such power, or to or for the benefit of the issue of any such person or persons, is liable to legacy duty under the will in which such sum is appointed or apportioned in exercise of such limited power.(*u*) The amount of legacy duty varies according to the degree of relationship [*343] *which the legatee bore to the deceased.[1] Where the legacy is to a child or lineal descendant, or to the father or

(*s*) Stat. 8 & 9 Vict. c. 76, s. 4; Attorney-General *v.* Marquis of Hertford, 3 Ex. Rep. 670.

(*t*) Stat. 36 Geo. III. c. 52, s. 27.

(*u*) Stat. 8 & 9 Vict. c. 76, s. 4.

part of an executor or administrator, is not sufficient to charge the estate with the debt, although they may admit they have assets for that purpose, and that will charge them in case of a deficiency, provided that there is a legal recovery against them."

"A promissory note imports a consideration, and it is unnecessary to state any in pleading, or to prove any upon the trial, in the first instance. When such note is given by an executor or administrator, it is *primâ facie* evidence of assets, because they are the legal consideration, upon which the promise ought to be, and is presumed to be, founded; it is, however but *primâ facie* evidence between the original parties, and the defendant may show that in fact there was a deficiency of assets, and of course no consideration to support the note:" Bank of Troy *v.* Topping et al., 13 Wend. 557; s. c., 9 Id. 273.

[1] By the 124th section of the Act of Congress of the 30th of June, 1864, as amended by the acts of the 3d of March 1865, and 13th of July, 1866, legacies and distributive shares of the estates of decedents, which exceed in amount the sum of one thousand dollars, were made liable to a duty, or tax, to be paid to the United States, after the following rate, to wit: To a lineal ancestor or descendant, or brother or sister of decedent, one per centum; to a descendant of a brother or sister of the decedent, two per centum; to a brother or sister of the father or mother of a decedent, or a descendant of such brother or sister, four per centum; to a brother or sister of the grandfather or grandmother of a decedent, or a descendant of such brother or sister, five per centum; to any other degree of collateral relationship, or to a stranger, six per centum. The succession of real estate, was by the 133d section of the same act, subjected to the same tax, with the exception, that the brother or sister of decedent was taxed two per centum, and there was no limitation of the tax as regards the amount of the estate. But no duty was to be paid, for any legacy or distributive share of personal property, to the husband or wife of the decedent, nor for any succession of real estate, where the successor was the wife of the predecessor. But by the 3d section of the Act of the 13th of July, 1870, the above taxes on legacies and successions have been repealed.

mother or any lineal ancestor of the deceased the duty is one per cent. If to a brother or sister, or any descendant of a brother or sister, the duty is three per cent. If to a brother or sister of the father or mother of the deceased, or any descendant of such brother or sister, five per cent. If to a brother or sister of a grandfather or grandmother of the deceased, or any descendant of such brother or sister, six per cent. And if the legacy be to any person in any other degree of collateral consanguinity to the deceased, or to any stranger in blood, the duty is ten per cent.(*x*) But the husband or wife of the deceased are exempt from all legacy duty, and so also are the royal family. By the Succession Duty Act, 1853, leasehold property although personal estate, is exempted from legacy duty, and is charged in lieu thereof with a succession duty, calculated upon the same principles as the duty on real property.(*y*)

If a legacy be given to an infant, or to a person absent beyond the seas, the only way in which the executor can obtain a proper discharge for such legacy is by payment of it, after deducting the legacy duty, into the Bank of England, with the privity of the accountant-general of the Court of Chancery, to be placed to the account of the person for whose benefit the same shall be so paid. The money is then laid out by the accountant-general in the purchase of consols, which, with the dividends thereon, are afterwards transferred and paid to the person entitled, or otherwise applied for his benefit, on application to the Court of Chancery by *petition or motion in a summary way.(*z*) The legacy duty [*344] on annuities for lives is fixed by tables given in the Succession Duty Act, and is payable by four equal payments, to be made successively on completing each of the first four years' payments of the annuity.(*a*)

(*x*) Stat. 55 Geo. c. 184.

(*y*) Stat. 16 & 17 Vict. 51, ss. 1, 19, 21. See Principles of the Law of Real Property 240, 4th ed ; 249, 5th ed.; 259, 6th ed.; 265, 7th ed.; 276, 8th ed.

(*z*) Stat. 36 Geo. III. c. 52, s. 32 ; Ex parte Bennett, V.-C. K. B. 15 Jur. 213.

(*a*) Stat. 16 & 17 Vict. c. 51, s. 31; 36 Geo. III. c. 52, s. 8.

The statutes of Pennsylvania contain provisions, by which collateral inheritances are subjected to a certain tax; this tax does not vary according to the degree of relationship, as in the English laws, and the Internal Revenue Act above referred to, but is fixed at five per cent. upon the estate, real, personal, or mixed, of every decedent, coming to, or about to be enjoyed by, any other person than the "father, mother, husband, wife, children, and lineal descendants of such decedent," provided, the estate of the decedent exceeds in amount two hundred and fifty dollars. Purd. Dig. (1861), p. 148, &c.

A legacy may be either specific, demonstrative, or general.[1] A specific legacy is a bequest of a specific part of the testator's personal estate.

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[1] "A specific legacy is a disposition of a certain thing, which may be known and distinguished from any other thing of the same kind;" hence a bequest of "my East Haddam bank stock" is a specific legacy: Brainerd *v.* Cowdry, 16 Conn. 1; or, of "all my stock which I hold in the Union Bank of Pennsylvania:" Blackstone *v.* Blackstone, 3 Watts 335; and so, a bequest of a horse, or other individual thing, or money in a bag, or drawer, is a specific legacy: Mathis *v.* Mathis, 3 Harrison 59. "But if a sum of money is bequeathed, to be laid out in the purchase of lands, or to be vested in particular securities, it is a mere pecuniary legacy; for the legatee cannot, in that case, sever that from the general fund, so as to establish a right to the identical sum in specie. And this he must be able to do, in order to make his legacy specific. Thus, in a bequest of stock, if the testator owned it at the time, it is specific; more especially, if it can be collected, from the will, that the testator intended to confine the bequest to the stock he had on hand at the time of his death. As if the legacy be of *my* stock, or part of *my* stock, or in *my* stock. But if the testator did not *own* the stock when he made the will, or died, but directed it to be purchased out of his personal estate, for particular persons: on the question whether these legacies were specific, or pecuniary, it was held by the court, that they were pecuniary:" White et al. *v.* Beattie, Exr., 1 Dev. Eq. 87; s. c. Id. 320. And see, also, Smith *v.* Smith, 23 Geo. 21.

"So a bequest by a testator to his wife, in the following words: 'I wish her to take Stanford in her third of the property, if she chooses,' is not a specific legacy to the wife, but only gives her the right to take the legacy at a fair valuation; and if that valuation is more than her share, she must account for the surplus:" Young et al. *v.* Carson, Admr., et al., 1 Dev. & Bat. 360. And, where a testator bequeaths bank stock generally, without saying it is the bank stock he owns, the bequest will be general, and not specific. But when, after giving several legacies of bank stock, in giving another legacy of bank stock, he used this expression, "In case there should be any deficiency in the bank stock, which I hold at my death, as compared with the amount bequeathed in my will and testament," it was held, that he meant the stock which he should then have, and therefore the legacies were specific: McGuire et al. *v.* Evans et al., 5 Ired. Eq. 269. See, also, Hoff's Ap., 24 Penn. St. 200.

For other instances of specific legacies, see Cuthbert et al. *v.* Cuthbert et al., 3 Yeates 486; Stickney *v.* Davis, 16 Pick. 21; White *v.* Winchester, 6 Id. 56; Stout *v.* Hart et al., Exrs., 2 Halst. 414; Walton *v.* Walton, 7 Johns. Ch. 262; Lillard *v.* Reynolds, 3 Ired. 370; Chase *v.* Lockerman, 11 Gill & Johns. 186; Hammond *v.* Hammond, 2 Bland 314; Perry, Exr., *v.* Maxwell, Exr., 2 Dev. Eq. 488; Everitt *v.* Lane, 2 Ired. Eq. 550; Warren, Exr., *v.* Wigfall et al., 3 Desauss. 47; Wharley *v.* Wharley, 1 Bail. Eq. 397; Gilbreath *v.* Alban et al., 10 Ohio 64; Howell et al. *v.* Hook's Admr., 4 Ired. Eq. 188; Christler's Exr. *v.* Meddis, Admr., 6 B. Mon. 37; Alsop's Appeal, 9 Penn. St. 374; Scholl *v.* Scholl, 5 Barb. 312; McGuire et al. *v.* Evans et al., 5 Ired. Eq. 269; Bailey et al. Exrs., *v.* Wagner et al., 2 Strobh. Eq. 1; Ludlam's Estate, 13 Penn. St. 188; Buchanan *v.* Pue, Jr., Exr., 6 Gill 112; Van Wagener, Exr., *v.* Baldwin et al., 3 Halst. Ch. 211; Woods *v.* Sullivan, 1 Swan 507; Hoke *v.* Herman, 21 Penn. St. 301; Wallace *v.* Wallace, 3 Fost. 149; McGlaughlin's Exr. *v.* McGlaughlin's Admr., 24 Penn. St. 20. "If a thing bequeathed in a will, by such a description as to distinguish it from all other things, be disposed of, so that it does not remain at the death of the testator, or if it be so changed that it cannot be called the same thing, the bequest is gone. If

Thus a bequest of "the service of plate, which was presented to me on such an occasion," is specific, and so also is a bequest of "100*l.* consols,

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such a legacy be of a debt, payment necessarily makes an end of it. The legatee is entitled to the very thing bequeathed, if it be possible for the executor to give it to him; but if not, he cannot have money in place of it. This results from an inflexible rule of law, applied to the mere fact, that the thing bequeathed does not exist, and it is not founded on any presumed intention of the testator:" Hoke *v.* Herman, 21 Penn. St. 301; Blackstone *v.* Blackstone, 3 Watts 335; Gilbreath *v.* Alban et al., Exrs., 10 Ohio 64; Newcomb, Admr., *v* St. Peter's Church et al., 2 Sandf. Ch. 637; Alsop's Appeal, 9 Penn. St. 374; McGuire et al. *v.* Evans et al., 5 Ired. Eq. 269; Bailey et al., Exrs., *v.* Wagner et al., 2 Strobh. Eq. 1; Ludlam's Estate, 13 Penn. St. 188; Beck *v.* McGillis, 9 Barb. 35; but "a legacy is not extinguished or destroyed by a variation of the testator's interest, produced by operation of law; as where the bequest is of certain bank shares, and the charter of the bank expires, and the funds are conveyed to trustees, who divided the moneys received among the stockholders; if the testator receives part of the dividends from the trustees, in his lifetime, it is an ademption *pro tanto* only:" Walton *v.* Walton, 7 Johns. Ch. 262; Hoke *v.* Herman, 21 Penn. St. 301; and where there is a bequest of the proceeds of a certain bond and mortgage, and the testator collects any portion of the mortgage debt, and appropriates it to other purposes, the legacy is so far adeemed, and the legatee will not be entitled to be reimbursed out of other property of the estate of the testator; but where the testator takes a bond, of the purchaser of a part of the mortgaged premises, for a proportionate amount of the mortgage debt, but the mortgage is not released from the land sold, such bond and its proceeds, are proceeds of the original bond and mortgage, and go to the legatee: Gardiner et al., Exrs., *v.* Printup et al., 2 Barb. 83; so, also, where a testator made a specific bequest, of all notes of hand which were then payable to him, and was then in possession of four notes, signed by two persons, and afterwards, before his death, released one of the signers, and took new notes for the debt, from the other signer, secured by a mortgage; it was held, that there was no ademption of the legacy: Ford *v.* Ford, 3 Fost. 212; and see, also, Woods et al. *v.* Moore, 4 Sandf. 589; Van Wagener, Exr., *v.* Baldwin et al., 3 Halst. Ch. 211; Whitlock *v.* Vann, 38 Geo. 562; Stout *v.* Hart et al., Exrs., 2 Halst. 414; in the latter of which, a distinction is taken between voluntary and compulsory payments, as regards the ademption of a specific legacy.

Specific legacies cannot be applied to the payment of the debts of the testator, until the general funds of the estate are exhausted: Brainerd *v.* Cowdrey, 16 Conn. 1; White et al *v.* Beattie, Exr., 1 Dev. Eq. 320; Wallace *v.* Wallace, 3 Fost. 149; Shaw *v.* McBride, 3 Jones Eq. 173.

"The courts are disinclined to recognize specific legacies, because of their liability to sink with the destruction of the thing bequeathed, or the fund charged. But as it was obviously impossible to esteem as purely pecuniary, many of the testamentary gifts, which judges inclined to withdraw from the class of specific legacies, they were driven to borrow from the civilians a term, thought to be descriptive of a species of donation, holding a middle place between specific and pecuniary, the only kinds distinctly recognized when Swineburne wrote. They are called *demonstrative* and, like general legacies, are gifts of mere quantity, but differ from these by being referred to a particular fund for payment. They are so far general, that if the particular fund be called in or fail, the legatees will be permitted to receive their legacies out of the general assets; yet so far specific, as not to be subject to abatement with general legacies, on deficiency of assets. They are thus specific in one sense, and pecuniary in another;

now standing in my name at the Bank of England,"(b) or of "100l. consols, part of my stock."(c) A specific legacy must be paid or retained by the executor in preference to those which are general, and must not be sold for the payment of debts until the general assets of the testator are exhausted.(d) It is, however, liable to *ademption* by the act of the testator in his lifetime. Thus, in the instances given above, if the testator should part with the plate, or sell the stock in his lifetime, the legacy will be adeemed, and the legatee will lose all benefit.(e) A demonstrative legacy is a gift by will of a certain sum directed to be paid out of a specific fund. Thus, "I bequeath to A. B. the sum of 50l. sterling, to be paid out of the sum of 100l. consols now standing in my name at at the Bank of England," is a demonstrative legacy. Such a legacy is not liable to ademption by the act of the testator in his lifetime; for it [*345] is considered to be the testator's *intention that the legatee should at all events have the legacy; but that it should, if possible, be paid out of the fund he has pointed out. If therefore the testator in this case should sell the 100l. consols in his lifetime, the 50l. will still be payable to the legatee out of the general assets.(f) A demonstrative legacy is accordingly more beneficial to the legatee than a specific legacy. And it is also more beneficial than a legacy which is merely

(b) Roper on Legacies, c. 3; Gordon v. Duff, 28 Beav. 519.

(c) Kirby v. Potter, 4 Ves. 750 a; Hayes v. Hayes, 1 Keen 97; Shuttleworth v. Greaves, 4 Myl. & Cr. 35.

(d) Brown v. Allen, 1 Vern. 31; Hinton v. Pinke, 1 P. Wms. 539; Sleech v. Thorington, 2 Ves. sen. 560.

(e) Ashburner v. M'Guire, 2 Bro. C. C. 108.

(f) Roberts v. Pocock, 4 Ves. 150; Attwater v. Attwater, 18 Beav. 330.

specific, as given out of a particular fund, and not out of the estate at large; pecuniary, as consisting only of definite sums of money, and not amounting to a gift of the fund itself, or any aliquot part of it, the mention of the fund being considered rather by way of demonstration than condition—rather as showing how, or by what means the legacy may be paid, than whether it shall be paid at all. . . . In this, as in other questions, springing from the construction of wills, the intention of the testator is to be principally ascertained, and it is said to be necessary, that the intention be either expressed in reference to the thing bequeathed, or otherwise clearly appear from the will, to constitute a legacy specific. If it be manifest there was a fixed and independent intent to give the legacy, separate and distinct from the property designated as the source of payment, the legacy will be deemed general or demonstrative, though accompanied by a direction to pay it out of a particular estate, or fund, specially named:" Walls v. Stewart, 16 Penn. St. 280. And see also, Enders, Exr., v. Enders, 2 Barb. 362; In re Barklay's Estate, 10 Penn. St. 387; Bullict's Appeal, 14 Id. 461; Wallace v. Wallace, 3 Fost. 149; Walton v. Walton, 7 Johns. Ch. 262; Giddings v. Seward, 16 N. Y. 365; Irwin's Ap., 28 Penn. St. 363; Glass v. Dusen, 17 Ohio St. 413; Armstrong's Ap., 63 Penn. St. 312.

general; for being payable out of a specific fund, it is not, while that fund exists, liable to abatement with the general legacies.(*g*) A general legacy is one payable only out of the general assets of the testator, and is liable to abatement in case of a deficiency of such assets to pay the testator's debts and other legacies. A bequest to A. of 100*l.* sterling is a general legacy; so is a bequest of 100*l.* consols, without referring to any particular stock to which the testator may be entitled.(*h*) A bequest of a mourning ring, of the value of 10*l.* is also a general legacy, no specific ring of the testator's being referred to.(*i*) In the two last cases, the executor would be bound to set apart or buy the stock, or purchase the ring for the legatee out of the general assets of the testator, supposing them sufficient for the purpose; and should there be a deficiency, the amount of the stock, or the value of the ring to be purchased, would abate proportionably. If, however, any legacy should be given for a valuable consideration, it will not be liable to abatement with the other general legacies. An example of this exception to the usual rule occurs in the case of legacies given by husbands to their wives in consideration of their releasing *their dower.(*k*) And by the act [*346] for the amendment of the law relating to dower,(*l*) it is provided,(*m*) that nothing therein contained shall interfere with any rule of equity or of any ecclesiastical court, by which legacies bequeathed to widows in satisfaction of dower are entitled to priority over other legacies.

When a legacy is bequeathed by a testator to his creditor, it is considered to be a satisfaction of the debt, if the legacy be equal to or greater than the amount of the debt.(*n*)[1] But if it be less than the

(*g*) Acton *v.* Acton, 1 Meriv. 178; Livesay *v.* Redfern, 2 You. & Col. 90.

(*h*) Wilson *v.* Brownsmith, 9 Ves. 180. See, however, Townsend *v.* Martin, 7 Hare 471, *qu.?*

(*i*) 1 Roper on Legacies, c. 3, s. 2.

(*k*) Burridge *v.* Bradyl, 1 P. Wms. 127; Norcott *v.* Gordon, 14 Sim. 258.

(*l*) Stat. 3 & 4 Will. IV. c. 105. (*m*) Sect. 12.

(*n*) Fowler *v.* Fowler, 3 P. Wms. 353; Fourdrin *v.* Gowdey, 3 M. & K. 383, 409; 2 Roper on Legacies, c. 17, s. 1; Edmonds *v.* Low, 3 Kay & J. 318.

[1] A legacy will not be a satisfaction of the testator's debt, unless it was so intended. In the case of Byrne et al. *v.* Byrne et al., Exrs., 5 S. & R. 54, Judge Yeates, in deciding this principle, uses the following language: "A rule has prevailed, that whenever a person, by his will, gives a legacy as great, or greater than the debt he owes to the legatee, such legacy shall be a satisfaction of the debt, on the presumption that a man must be intended to be just before he is bountiful, and that his intent is to pay a debt, and not to give a legacy. The rule itself is not founded in reason, and often tends to defeat the bounty of testators: and able chancellors have thought it more agreeable to equity, to construe a testator to be

debt,(o) or payable at a different time,(p) or of a different nature from the debt,(q) or if the debt be contracted subsequently to the date of the will,(r) or if the will contain an express direction for payment of debts and legacies,(s) the legacy will not be a satisfaction. The leaning of the courts is against the doctrine of the satisfaction of debts by legacies, a doctrine which seems to have been established on rather questionable grounds. When, however, a sum of money is due to a child by way of portion, the inclination of the courts is against double portions; and a legacy to such a child is accordingly regarded as a satisfaction of the

(o) Graham *v.* Graham, 1 Ves. sen. 262.

(p) Nicholls *v.* Judson, 2 Atk. 300; Hales *v.* Darrell, 3 Beav. 324.

(q) Alleyn *v.* Alleyn, 2 Ves. sen. 37; Bartlett *v.* Gillard, 3 Russ. 149; Fourdrin *v* Gowdey, 3 Myl. & K. 383, 409.

(r) Cranmer's Case, 2 Salk. 508.

(s) Richardson *v.* Greese, 3 Atk. 65; Hassell *v.* Hawkins, 4 Drew. 468.

both just and generous, where the interest of third persons are not affected. And courts of justice will now lay hold of slight circumstances to get rid of the rule. Legacies are considered as gratuities, and are always construed favorably. If they be less than the sum due, payable on a contingency, or a future day, on these, and *the like circumstances*, they will be construed as additional bounties, and not as satisfactions. And, although the contingency does not actually happen, and the legacy thereby becomes due, yet it shall not go in satisfaction of the debt, because a debt which is certain, shall not be merged or lost by an uncertain and contingent recompense. For, whatever is to be a satisfaction of a debt, *ought to be so in its creation*, and at the very time it is given, which such contingent provision is not. . . . According to the most modern decisions, *it is presumed*, that the legacy must be, *in all respects*, *ejusdem generis*, to cause a satisfaction of the debt, and *an apparent intention*, in the will, that the testator meant it as such." See, also, to the same effect: Smith, Exr., *v.* Marshall, 1 Root 159; Strong *v.* Williams, Exr., 12 Mass. 392; Williams *v.* Crary, 5 Cowen 370, s. c. 8 Id. 246, and 4 Wend. 449; Byrne et al. *v.* Byrne et al., Exrs., 5 S. & R. 54; Edelen's Exrs. *v.* Dent's Admrs., 2 Gill & Johns. 185; Fitch *v.* Peckham, Exrx., 16 Vt. 151; Perry, Exr., *v.* Maxwell, Exrx., 2 Dev. Eq. 488; Stagg *v.* Beekman, 2 Edw. Ch. 89; Van Riper et al. *v.* Van Riper et al., Exrs., 1 Green Ch. 1; Ward, Exr., *v.* Coffield, 1 Dev. Eq. 108; Dey *v.* Williams et al., 2 Dev. & Bat. Eq. 66; Ladson et al. *v.* Ward et al., Exrs., 1 Desauss. 315; Caldwell's Exr. *v.* Kinkhead et al., 1 B. Mon. 230; Cloud *v.* Clinkenbeard's Exrs., 8 B. Mon. 398; Waters *v.* Howard et al., 1 Md. Ch. Decs. 112; Parker *v.* Coburn, 10 Allen 82; Wesco's Ap., 52 Penn. St. 195; Homer *v.* McGaughy, 62 Id. 189.

Nor is a legacy by a creditor to his debtor, *primâ facie*, a discharge or release of his debt; and the debt may be set off by the executor, against the legacy: Strong's Exr. *v.* Bass et al., 35 Penn. St. 333; but, if the will, or the declarations of the testator, before, at, or after the making of the will, show that such was his intention, the law, always, if possible, favoring the wishes of the decedent, will construe in accordance with that intention: Clark *v.* Bogardus, 12 Wend. 67; Ricketts *v.* Livingston, Exr., 2 Johns. Cas. 97; Sorelle's Exrs. *v.* Sorelle, 5 Ala. 245; Stagg *v.* Beekman, 2 Edw. Ch. 89; Zeigler et al., Exrs., *v.* Eckhart, 6 Penn. St. 13; Lewis *v.* Thompson, 2 Richard. Eq. 75; Gallego *v.* Gallego's Exr., 2 Brockenb. 291.

portion either in part or in whole, notwithstanding such legacy may be less than the portion, or payable at a different period.(*t*) A [*347] *bequest of the residue, or of a share in the residue, of the testator's estate, will also be considered as a satisfaction pro tanto.(*u*) The presumption of satisfaction is indeed so strong, that it is difficult to say what circumstances of variation between the portion and the legacy will be sufficient to entitle the child to both.

By a statute of George the Second, commonly called the Mortmain Act,(*x*) no hereditaments, nor any money, stock in the public funds, or other personal estate whatsoever to be laid out in the purchase of hereditaments, can be conveyed or settled for any charitable uses (with a few exceptions), otherwise than by deed, with certain formalities mentioned in the act.(*y*) And all gifts of hereditaments, or of any estate or interest therein, or of any charge or incumbrance affecting or to affect any hereditaments, or of any personal estate to be laid out in the purchase of any hereditaments, or of any estate or interest therein, or of any charge or incumbrance affecting or to affect the same, to or in trust for any charitable uses whatsoever, are rendered void if made in any other form than by the act is directed.(*z*) This has been very strictly construed, and has been held to prohibit the bequest for charitable purposes of personal estate in any degree savoring, as it is said, of the realty. Thus, it has been decided that money secured on mortgage of real estate,(*a*) shares in a canal navigation,(*b*) *and leasehold [*348] estates,(*c*) cannot be left by will for any charitable purpose. But more recently, the strictness of the courts appears to have relaxed; and it has lately been held that money secured by a policy of assurance, although the company may invest their funds in real estates,(*d*) and shares in a banking company authorized to invest money on mortgage of real estates,(*e*) or in a mining company,(*f*) are not within the statute.

(*t*) Hinchcliffe *v.* Hinchcliffe, 3 Ves. 516; Weall *v.* Rice, 2 Russ. & My. 251.

(*u*) Rickman *v.* Morgan, 2 B. C. C. 394; Earl of Glengall *v.* Barnard, 1 Keen 769; affirmed 2 H. of L. C. 131; Beckton *v.* Barton, 27 Beav. 99, 106; Montefiore *v.* Guedalla, 1 De G., F. & J. 93; Coventry *v.* Chichester, 2 H. & Mill. 149; 2 De G., J. & S. 336, reversed Law Rep., 2 H. of L. 71.

(*x*) Stat. 9 Geo. II. c. 36, s. 1.

(*y*) See Principles of the Law of Real Property 55, 1st ed.; 58, 2d ed.; 60, 3d and 4th eds.; 63, 5th ed.; 65, 6th ed.; 67, 7th ed.; 66, 8th ed.

(*z*) Sect. 3.

(*a*) Attorney-General *v.* Meyrick, 2 Ves. sen. 44.

(*b*) House *v.* Chapman, 4 Ves. 542.

(*c*) Attorney-General *v.* Graves, Amb. 155.

(*d*) March *v.* Attorney-General, 5 Beav. 433.

(*e*) Ashton *v.* Lord Langdale, 4 De G. & Sm. 402; s. c. 15 Jur. 868; Myers *v.* Perigal, 2 De G., M. & G. 599.

(*f*) Hayter *v.* Tucker, 4 Kay & J. 243. See Morris *v.* Glynn, 27 Beav. 218.

So railway scrip,(*g*) and shares in gas companies,(*h*) docks, railways and canals,(*i*) although such shares may not be expressly declared by the acts establishing the undertakings to be personal estate, are now held to be unaffected by the statute. But debentures, by which such undertakings with their rates and tolls are mortgaged, have been held to be within the act;(*k*) though such debentures as are mere bonds or covenants to pay money, and not mortgages, are clearly unaffected by it.(*l*) With regard to the bequest of money to be laid out in the purchase of hereditaments, it has been decided that a bequest of money to be laid out in building on land already in mortmain is good;(*m*) but if some land already in mortmain be not distinctly referred to, a [*349] bequest of money for building for any charitable purpose *will be void, as implying a direction for the purchase of land on which to build.(*n*) And it has also been held that a gift is void which tends directly to bring fresh lands into mortmain, as a gift of money to a charity on condition that other persons provide the land.(*o*) This however has been overruled.(*p*) And if the purchase of land be not involved in the gift, there is no law which prevents the bequest of purely personal property to any amount for charitable purposes.[1] A bequest to a charity ought, therefore, to be directed to be paid out of such part of the testator's personal estate as he may lawfully bequeath for such a purpose. For if this precaution should be neglected,

(*g*) Ashton *v.* Lord Langdale, ubi supra.

(*h*) Thompson *v.* Thompson, 1 Coll. 381; Sparling *v.* Parker, 9 Beav. 450.

(*i*) Hilton *v.* Giraud, 1 De G. & Sm. 183; Sparling *v.* Parker, ubi supra; Walker *v.* Milne, 11 Beav. 507; Ashton *v.* Lord Langdale, ubi supra; Edwards *v.* Hall, 6 De G., M. & G. 74; Linley *v.* Taylor, 1 Giff. 67; affirmed, 2 De G., F. & J. 84.

(*k*) Ashton *v.* Lord Langdale, ubi supra; Re Langham's Trust, 10 Hare 446.

(*l*) Ashton *v.* Lord Langdale, ubi supra.

(*m*) Glubb *v.* Attorney-General, Amb. 373.

(*n*) Pritchard *v.* Arbouin, 3 Russ. 456; Smith *v.* Oliver, 11 Beav. 481; In re Watmough's Trusts, V.-C. M., Law Rep. 8 Eq. 272.

(*o*) Attorney-General *v.* Davies, 9 Ves. 535; Mathew *v.* Smith, 2 Keen 172; Trye *v.* Corporation of Gloucester, 14 Beav. 173.

(*p*) Philpott *v.* St. George's Hospital, 6 H. of L. C. 338.

[1] By the 11th section of an act of the legislature of Pennsylvania (commonly called the "Price Act," from the name of its originator), passed 26th April, 1855, it is provided, that "No estate, real or personal, shall hereafter be bequeathed, devised, or conveyed, to any body politic, or to any person, in trust for religious or charitable uses, except the same be done by deed or will, attested by two credible, and, at the time, disinterested witnesses, at least one calendar month before the decease of the testator or alienor; and all dispositions of property contrary hereto, shall be void, and go to the residuary legatee or devisee, next of kin, or heirs, according to law," etc. Purd. Dig. (1861), p. 1018, sec. 22.

the charitable legacies will fail in the proportion which the personal assets savoring of the realty may bear to those which are purely personal.(q)

Other bequests which require some care are those to illegitimate children. It has been held that a bequest to the future illegitimate children of a particular woman is void as tending to encourage immorality.(r) And it is clear that a bequest to the future illegitimate children of a particular man is also void, as the courts cannot enter into the inquiry which would be necessary to identify such children.(s) A child primâ facie means a legitimate child; a bastard is considered by *the law as *nullius filius*. Accordingly, an illegitimate child can [*350] never take under a gift to children, unless it be clear, upon the terms of the will, or according to the state of facts at the making of it, that legitimate children never could have taken.(t) An illegitimate child may, however, take under any gift in which he is sufficiently identified as the object of the testator's bounty. Thus, a bequest to the child of which a woman is now pregnant is good.(u) And if illegitimate children have acquired the reputation of being the children of the testator or any other person, and it appear by necessary implication on the face of the will that such persons were intended in a bequest to children, they will be entitled, not only on account of their being children, but on account of their reputation as such.(x)[1]

After payment of the testator's debts and legacies, the residue of his personal estate must be paid over to the residuary legatee, if any, named

(q) Attorney-General *v.* Tyndall, 2 Eden 207; s. c. 2 Amb. 614; Hodson *v.* Blackburn, 1 Keen 273; Philanthropic Society *v.* Kemp, 4 Beav. 581; and see Robinson *v.* Geldard, 3 Macn. & G. 735; Tempest *v.* Tempest, 7 De G., M. & G. 470; Beaumont *v.* Oliveira, LL. J., Law Rep. 4 Chan. 309.

(r) Medworth *v.* Pope, 27 Beav. 71. See also 2 Jarm. Wills, 153, 202, 2d ed.; 204, 3d. ed.

(s) Wilkinson *v.* Adams, 1 Ves. & B. 466.

(t) Cartright *v.* Vawdry, 5 Ves. 530; Godfrey *v.* Davis, 6 Ves. 43; Harris *v.* Lloyd, 1 T. & Russ. 310; Bagley *v.* Mollard, 1 Russ. & My. 581; Dover *v.* Alexander, 2 Hare 275; Re Overhill's Trust, 1 Sm. & G. 362.

(u) Gordan *v.* Gordan, 1 Meriv. 141.

(x) Wilkinson *v.* Adam, 1 Ves. & B. 422; Gill *v.* Shelley, 2 Russ. & My. 336; Meredith *v.* Farr, 2 You. & Col. 525.

[1] By the 3d section of an Act of the Legislature of Pennsylvania, approved the 27th of April, 1855, "Illegitimate children, shall take and be known by the name of their mother, and they and their mother shall respectively have capacity to take or inherit from each other personal estate as next of kin, and real estate as heirs in fee simple," &c. Purd. Dig. (1861), p. 565, sec. 40.

in the will. A will of personal estate has always been considered as speaking from the death of the testator; and it is now expressly enacted, that every will shall be construed, with reference to the real and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will.(*y*) Hence, it follows that all personal property acquired by the testator between the time of making his will and his decease will pass under it. If any legacy should lapse by the death of [*351] *the legatee in the testator's lifetime, or should fail from being contrary to law, it will fall into the residue, and belong to the residuary legatee. And a legacy will lapse by the death of the legatee in the testator's lifetime, although given to the legatee, his executors, administrators and assigns,(*z*) for these words are merely inserted in analogy to the limitation of real estate to a man and his heirs. If a bequest be made to two or more as joint tenants, and one of them die in the lifetime of the testator, his share will not lapse, but will survive to the others.(*a*) But if the bequest be to two or more in common, and one of them die in the testator's lifetime, his share will lapse;(*b*) unless the bequest be made to a class, as to the children of A. in equal shares, in which case all who answer that description at the testator's decease,(*c*) and also (if the period of distribution be postponed by the will) all who come into being before such period,(*d*) will be entitled to divide the bequest amongst them. It is, however, provided by the recent act for the amendment of the laws with respect to wills, that where any person, being a child or other issue of the testator, to whom any personal estate shall be bequeathed for any interest not determinable at or before the death of such person, shall die in the testator's lifetime leaving issue, and any such issue shall be living at the death of the testator, such bequest shall not lapse, but shall take effect as if the death of such person had happened immediately after the death of the testator, unless [*352] a contrary intention shall appear by the will.(*e*)[1] *The effect of this provision is curious. If the legatee had died immediately

(*y*) Stat. 7 Will. IV. & 1 Vict. c. 26, s. 24.

(*z*) Elliott *v.* Davenport, 1 P. Wms. 83. (*a*) Morley *v.* Bird, 3 Ves. 628, 631.

(*b*) Bagwell *v.* Dry, 1 P. Wms. 700; Page *v.* Page, 2 P. Wms. 489; Barber *v.* Barber, 3 Myl. & Cr. 688; Bain *v.* Lescher, 11 Sim. 397.

(*c*) Viner *v.* Francis, 2 Cox 190; 2 Jarm. Wills 74; 126, 2d ed.; 142, 3d ed.; Lee *v.* Pain, 4 Hare 250.

(*d*) Ayton *v.* Ayton, 1 Cox 327; 2 Jarm. Wills 75; 127, 2d ed.; 143, 3d ed.

(*e*) Stat. 7 Will. IV. & 1 Vict. c. 26, s. 33.

[1] Statutes resembling this provision, are in force in most of the States of the Union; but in many of them, these enactments are more comprehensive than those prescribed

after the testator, leaving a will, it is evident that the estate bequeathed to him would have passed under his will. It has been decided, there-

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by the laws of England, including devises as well as legacies, within the letter of the acts, and embracing other than lineal descendants. Thus, in New Hampshire, "The heirs in the descending line, of any devisee or legatee deceased before the testator, shall take the estate devised or bequeathed, in the same manner the legatee or devisee would have taken the same, if he had survived." Gen. Stats. of N. H. (1867), ch. 174, p. 358, sec. 12. The same is true of the laws of Pennsylvania, which also contain provisions in favor of brothers and sisters and their children, as regards such devises or legacies; as will be seen by a reference to Purd. Dig. (1861), p. 1017, secs. 14 and 15, which are in these words: "No devise or legacy in favor of a child, or other lineal descendant of any testator, shall be deemed or held to lapse, or become void, by reason of the decease of such devisee or legatee, in the lifetime of the testator, if such devisee or legatee shall leave issue surviving the testator; but such devise or legacy, shall be good and available in favor of such surviving issue, with like effect as if such devisee or legatee had survived the testator, saving always to every testator the right to direct otherwise. No devise or legacy hereafter made in favor of a brother or sister, or the children of a deceased brother or sister of any testator, such testator not leaving any lineal descendants, shall be deemed, or held to lapse, or become void, by reason of the decease of such devisee or legatee, in the lifetime of the testator, if such devisee or legatee shall leave issue surviving the testator; but such devise or legacy, shall be good and available in favor of such surviving issue, with like effect as if such devisee or legatee had survived the testator, saving always to every testator the right to direct otherwise."

In Georgia, it is enacted, that "From and after the passage of this act, where any person named as legatee in the will of any other person, shall die before the testator, leaving issue that shall be alive at the death of such testator, the legacy, provided the same be absolute, and without remainder or limitation, shall not lapse as heretofore, but shall vest in such issue." T. R. R. Cobb's New Dig. of the Laws of Geo. (1851), vol. i., p. 348, sec. 194.

In some of the states, it is provided in addition to what has been already stated, that the devise or legacy so left to a legatee or devisee who has died, shall go to his child or children, as if he had died intestate; and in New Jersey, it is expressly said, that this shall be the case, even where the deceased devisee or legatee has left a will; for, to quote the words of the act, "Whensoever any estate of any kind, shall or may be devised or bequeathed, by the testament and last will of any testator or testatrix, to any person being a child or other descendant of such testator or testatrix, and such devisee or legatee shall, during the life of such testator or testatrix, die testate or intestate, leaving a child or children, or one or more descendants of a child or children who shall survive such testator or testatrix, in that case, such devise or legacy to such person so situated as above mentioned, and dying in the lifetime of the testator or testatrix, shall not lapse, but the estate so devised or bequeathed, shall vest in such child or children, descendant or descendants, of such legatee or devisee, in the same manner, as if such legatee or devisee had survived the testator or testatrix, and had died intestate," &c. Nixon's Dig. of the Laws of N. J. (1868), pp. 1031, 1032, sec. 22. For such differences as have been noticed, existing between the statutes of the several States, see Rev. Stats. of Vt. (1839), pp. 257, 258, sec. 28; Laws of Tenn. (Supplem. 1846), p. 147, sec. 3; Dig. of the Stats. of Ark., p. 991, sec. 14; Pate *v.* Pate, 40 Miss. 750; Paschall's Annot. Dig. Laws of Texas, p. 914, art. 5365; Matthew's Dig. (Va.), pp. 874, 875, sec. 13;

fore, that the will of the legatee shall, after his death, operate on the estate bequeathed to him in the same manner as if he had been living.(*f*) This provision has been held to apply to a testamentary appointment under a general power of appointment,(*g*) but to be inapplicable to a testamentary appointment under a power to appoint amongst the testator's children ;(*h*) and it does not extend to gifts to children or issue as a class, and not individually.(*i*)

If there were no residuary legatee, the residue of the testator's personal estate, after payment of debts and legacies formerly belonged to the executor for his own benefit, unless a contrary intention appeared from his being left executor in trust,(*k*) or from his having a legacy left him for his trouble,(*l*) or from other circumstances.(*m*) But by a modern statute,(*n*) it is enacted, that when any person shall die, having by will or codicil appointed any executor, such executor shall be deemed by courts of equity to be a trustee for the person or persons (if any) who would be entitled to the estate under the Statute of Distributions, in respect [*353] of any residue not expressly disposed of, unless it shall *appear by the will or any codicil thereto,(*o*) that the person so appointed executor was intended to take such residue beneficially. The Statute of Distributions is that under which the personal estate of any one dying intestate is distributed between his widow and next of kin. An account of this statute will be found in the next chapter.

(*f*) Johnson *v.* Johnson, 3 Hare 157. Probate duty attaches: Perry's Executors *v.* The Queen, Law Rep. 4 Ex. 27.

(*g*) Eccles *v.* Cheyne, 2 Kay & J. 676.

(*h*) Griffiths *v.* Gale, 12 Sim. 354; Freeland *v.* Pearson, M. R., 36 L. J. N. S. Chan. 374.

(*i*) Browne *v.* Hammond, Johnson 210.

(*k*) Pring *v.* Pring. 2 Vern. 99; Bagwell *v.* Dry, 1 P. Wms. 700.

(*l*) Rachfield *v.* Careless, 2 P. Wms. 158.

(*m*) Mullen *v* Bowman, 1 Coll. 197.

(*n*) Stat. 11 Geo. IV. & 1 Will. IV. c. 40.

(*o*) Love *v.* Gaze, 8 Beav. 472.

Rev. Stats. of N. Y. (5th ed.), vol. iii., p. 146, sec. 47; Md. Code, vol. i., p. 686, art. 93, sec. 304; Rev. Stats. of Maine (1857), p. 454, sec. 10; Rev. Code of N. C. (1855), p. 611, sec. 28; Scales *v.* Scales, 6 Jones (N. C.), Eq. 163; Rev. Stats. of Wis. (1858), p. 581, sec. 29; 2 Compil. Laws of Mich. (1857), p. 868, sec. 28; Rev. Stats. of R. I. (1857), p. 358, sec. 12; Gen. Stats. of Mass. (1860), p. 479, sec. 28.

*CHAPTER IV. [*354]

OF INTESTACY.

THE ecclesiastical courts until recently had jurisdiction not only over the wills of testators, but also over the goods of persons dying intestate. This jurisdiction, though of long standing, appears to have been at first gradually acquired. In early times the clergy, being possessed of almost all the learning, appear to have been the principal framers of wills. The power they thus acquired was exercised for their own benefit, every man being expected, on making his will, after bequeathing to his lord his heriot, in the next place to remember the church.(*a*) If, however, a man should have died intestate, without opportunity of making this provision, the distribution of his goods devolved on the church, together with his friends, the lords first having taken his heriot.(*b*) The wife and the children were entitled to their shares; and that part of the goods which the intestate had power to dispose of by his will (called the portion of the deceased) was applied by the church *in pios usus*. This application to pious uses appears to have been as follows: in the first place, the bequest, which it was to be presumed the intestate would have made to the church, was retained, and the residue was then disposed of in paying the debts of the deceased, and distributed amongst his wife and children, his parents and their relatives. That this was the case appears from the complaints which were made by the clergy of those days, of the interference of the temporal *lords in cases of intestacy, whereby the distribution of the effects in the manner pointed out was prevented.(*c*) The [*355] clergy themselves, however, do not appear to have been always free from blame; for they are accused of having frequently taken the whole of the intestate's portion to themselves, making no distribution, or at least an undue one, amongst the creditors and relatives of the de-

(*a*) Glanville, lib. 7, c. 5; Bract. 60 a; Fleta, lib. 2, c. 57.

(*b*) Bract. 60 b; Fleta, ubi supra.

(*c*) Matthew Paris 951, Additamenta 201, 204, 209 (Wats's ed., London, 1640); Constitutions of Boniface, Constitutiones Provinciales 20, at the end of Myndewood's Provinciale (Oxon. 1679), recited also in a Constitution of Archbishp Stratford (Lynd. Prov. lib. 3, tit. 13). See Gent. Mag. New Series, vol. ii., 355, 474. See also Dyke *v.* Walford, Privy Council, 12 Jurist 839.

ceased ;(*d*) and in order to remedy this evil, it was enacted in the reign of Edward I., by one of the very few statutes then passed relating to personal estate,(*e*) that the ordinary should be bound to answer the debts of an intestate, so far as his goods would extend, in the same manner as the executors would have been bounden if he had made a testament. The right of the creditor was thus clothed with a remedy; for, under this statute, an action at law might be brought by the creditor against the ordinary for the payment of his debt :(*f*) but the right of the relatives to the surplus still remained undefined.

The duty of administering intestates' effects was not, as may be supposed, usually performed by the bishops in person. For this purpose they usually appointed an administrator; but, as personal property rose in importance, it became desirable that this administrator should not be considered as the mere agent of the bishop, but should himself have a *locus standi*, in the king's courts. It was accordingly enacted by a statute of the reign of Edward III.,(*g*) that where a man died intestate the [*356] *ordinaries should depute the next and most lawful friends of the deceased to administer his goods, which persons so deputed should have action to demand and recover as executors the debts due to the deceased, to administer and dispend for the soul of the dead; and should answer also, in the king's courts, to others to whom the deceased was holden and bound, in the same manner as executors should answer. By a subsequent statute(*h*) administration might be granted to the widow of the deceased, or to the next of his kin, or to both, as by the discretion of the ordinary should be thought good. The widow was usually preferred to the next of kin in the grant of administration ;(*i*) and a joint grant was seldom made, so seldom, indeed, that the powers of co-administrators appear to be still a matter of doubt.(*j*) In granting administration to the next of kin, the ecclesiastical courts were guided by the right to the property to be administered.(*k*) This right will be hereafter explained. If none of the next of kin would take out administration, a creditor might by custom do so, on the ground that he could not be paid his debt until representation were made to the deceased ;(*l*) and, for want of creditors, administration might be granted

(*d*) Fleta, lib. 2, c. 57.

(*e*) Stat. 13 Edw. I. c. 19.

(*f*) 1 Ro. Abr. 906 ; Bac. Abr. tit. Executors and Administrators (E.)

(*g*) 31 Edw. III. c. 11.

(*h*) 21 Hen. VIII. c. 5.

(*i*) Webb *v.* Needham, 1 Adams 494.

(*j*) Shep. Touch. 485, 486 ; Williams on Executors, pt. 3, bk. 1, ch. 2

(*k*) In the Goods of Gill, 1 Hagg. 342.

(*l*) Webb *v.* Needham, 1 Adams 494. See Coombs *v.* Coombs, Law Rep. 1 P. & D. 288.

to any person at the discretion of the court.(*m*) But the Court of Probate Act, 1857,(*n*) has now abolished the whole of the jurisdiction of the ecclesiastical courts over the effects of intestates; and administration of the effects of deceased persons is now granted by that court in the same manner as the probate of wills.(*o*) And after the *decease of [*357] any person intestate, his personal estate vests in the judge of the Court of Probate for the time being, until letters of administration are granted, in the same manner and to the same extent as they formerly vested in the ordinary.(*p*)[1]

(*m*) Williams on Executors, pt. 1, bk. 5, ch. 2, s. 1.

(*n*) Stat. 20 & 21 Vict. c. 77, amended by stat. 21 & 22 Vict. c. 95.

(*o*) *Ante*, p. 332.

(*p*) Stat 21 & 22 Vict. c. 95, s. 19.

[1] In the State of New York, "Administration, in case of intestacy, shall be granted to the relatives of the deceased, who would be entitled to succeed to his personal estate, if they, or any of them, will accept the same, in the following order: First, to the widow; second, to the children; third, to the father; fourth, to the brothers; fifth, to the sisters; sixth, to the grandchildren; seventh, to any other of the next of kin, who would be entitled to share in the distribution of the estate. If any of the persons, so entitled, be minors, administration shall be granted to their guardians; if none of the said relatives or guardians will accept the same, then to the creditors of the deceased; and the creditor first applying, if otherwise competent, shall be entitled to a preference; if no creditor apply, then, to any other person or persons legally competent; but in the city of New York, the public administrator shall have preference, after the next of kin, over creditors and all other persons. And in the case of a married woman dying intestate, her husband shall be entitled to administration, in preference to any other person, as hereinafter provided.

"Where there shall be several persons, of the same degree of kindred to the intestate, entitled to administration, they shall be preferred in the following order: First, males to females; second, relatives of the whole blood, to those of the half blood; third, unmarried women, to such as are married; and when there are several persons equally entitled to administration, the surrogate may, in his discretion, grant letters to one or more of such persons;" 3 Rev. Stats. of N. Y. (5th ed.), pp. 158, 159, secs. 27 and 28.

In Massachusetts, "Administration of the estate of an intestate, shall be granted to some one or more of the persons hereinafter mentioned; and they shall be respectively entitled thereto, in the following order, to wit:

"First, his widow, or next of kin, or both, as the judge of probate shall think fit; and if they do not voluntarily either take or renounce the administration, they shall, if resident within the county, be cited by the judge for that purpose.

"Secondly, if the persons so entitled to administration, are incompetent, or evidently unsuitable for the discharge of the trust, or if they neglect, without any sufficient cause, for thirty days after the death of the intestate, to take administration of his estate, the judge of probate shall commit it to one or more of the principal creditors, if there be any competent, and willing to undertake the trust.

"Thirdly, if there be no such creditor, the judge shall commit administration to such other person as he shall think fit; provided, however,

"Fourthly, that if the deceased were a married woman, administration of her estate shall in all cases be granted to her husband, if competent and willing to under-

The administrator, when appointed, has the same right to and power over all the personal estate of the intestate as his executors would have had if he had made a will,(*q*) and this right and power relate back to the time of the intestate's decease.(*r*) The same duty also devolves upon the administrator of paying the debts in the first place. The provisions of the recent statutes for protection of executors in distributing the

(*q*) Williams on Executors, pt. 2, bk. 1, ch. 1.

(*r*) Tharpe *v.* Stallwood, 5 M. & G. 760 (E. C. L. R. vol. 44); Foster *v.* Bates, 12 M. & W. 226; Welchman *v.* Sturgis, 13 Q. B. 552 (E. C. L. R. vol. 66).

take the trust, unless she shall, by force of a marriage settlement, or otherwise, have made some testamentary disposition of her separate estate, or some other provision, which shall render it necessary or proper to appoint some other person to administer her estate; and provided, also,

"Fifthly, that if the deceased leaves no widow or next of kin in this State, administration of his estate shall be granted to a public administrator in preference to creditors:" Gen. Stats. of Mass. (1860), p. 483, § 1.

In Pennsylvania, "Whenever letters of administration are by law necessary, the register having jurisdiction shall grant them in such form as the case shall require, to the widow, if any, of the decedent, or to such of his relations or kindred, as by law may be entitled to the residue of his personal estate, or to a share or shares therein after payment of his debts, or he may join with the widow in the administration, such relation or kindred, or such one or more of them, as he shall judge will best administer the estate, preferring always of those so entitled, such as are in the nearest degree of consanguinity with the decedent, and also preferring males to females; and in case of the refusal or incompetency of every such person, to one or more of the principal creditors of the decedent, applying therefore, or to any fit person at his discretion; provided, that if such decedent were a married woman, her husband shall be entitled to the administration in preference to all other persons: and provided further, that in all cases of an administration with the will annexed, where there is a general residue of the estate bequeathed, the right to administer shall belong to those having the right to such residue, and the administration in such case shall be granted by the register, to such one or more of them as he shall judge will best administer the estate." Purd. Dig. (1861), p. 277, sec. 28.

For the statutes of the several States on this subject, see Gen. Stats. of N. H. (1867), p. 360, ch. 176, sec. 2; Stats. of S. C., vol. i., pp. 108, 109, sec. 16; Caruthers & Nicholson's Stat. Laws of Tenn., p. 72, sec. 8; Laws of Del., Rev. Code (1852), p. 297, sec. 9; Dig. of the Stats. of Ark., p. 111, secs. 6, 7 and 8; How. & Hutch. Stat. Laws of Miss., p. 395, sec. 35; Paschall's Annot. Dig. Laws of Texas, p. 304, arts. 1273, 1274; 2 Matthews's Dig. (Va.), p. 554, § 4; 2 Compiled Laws of Michigan (1857), p. 876, art. 2879, sec. 3; Code of Ala. (1852), p. 338, § 1667; 1 Md. Code (1860), p. 621, art. 93, secs. 18–31; Rev. Stats. of Maine (1857), p. 411, sec. 13; Nixon's Dig. Laws of N. J. (1868), p. 303, sec. 7; Rev. Code of N. C. (1855), p. 282, sec. 2; vol. i., Rev. Stats. of Ky. (1860), p. 502, art. 2; 1 Rev. Stats. of Ohio (1860), p. 568, sec. 12; Laws of Iowa (1860), p. 409, sec. 2343; Cobb's New Dig. of the Laws of Geo. (1851), vol. i., p. 305, sec. 59; Thomps. Dig. of the Laws of Fla., p. 196, sec. 5; Rev. Stats. of Vt. (1839), pp. 263, 264, sec. 3; Civil Code of La., arts. 1114 to 1117; Gross's Stats. of Ill. (1869), p. 808, sec. 71.

assets of their testator extend also to the administrator of the effects of an intestate.(s) He has also the same privilege as an executor of retaining his own debt in preference to all others of the same degree.(t) But the surplus, after payment of the debts, must be distributed amongst the relatives of the intestate in proportions to be hereafter mentioned. In order to enable the administrator to inform himself of the state of the assets, and to pay the debts of the deceased, the same period of a year from the time of the decease as is allowed to an executor is also given to the administrator before he can be required to make any distribution.(u) But, notwithstanding this delay, the interest of the persons entitled to the surplus vests in them from the time of the decease *of the intestate; so that in case any of them should die within a twelvemonth after the decease of the intestate, the share of the person so dying will pass to his own executors or administrators.(x) [*358]

In some instances administration is granted for a limited purpose, or confined to a given time. Of this we have already had an instance in the case of administration *durante minore ætate*, when the sole executor named in a will is under age;(y) and the same sort of administration is granted on intestacy, in case of the minority of the next of kin.(z) So if the executor or next of kin, as the case may be, should be out of the realm at the time of the decease of the testator or intestate, the court will grant a limited administration *durante absentiâ*, which will expire the moment of the return of such executor or next of kin. And if the executor should prove the will, or if any person should obtain letters of administration, and afterwards go to reside out of the jurisdiction of the English courts, the court is empowered by act of parliament(a) to grant administration, at the end of the year from the death of the testator or intestate. Again, when a suit concerning the right of administration is pending in the Court of Probate, that court may appoint an administrator *pendente lite*, who will have all the rights and powers of a general administrator, other than the right of distributing the residue of the personal estate;(b) and the administrator so appointed may receive such reasonable remuneration for his trouble as the court may think fit.(c)

(s) Stats. 13 & 14 Vict. c. 35, s. 19; 22 & 23 Vict. c. 35, ss. 27, 28, 29; 23 & 24 Vict. c. 38, s. 14, *ante*, pp. 341, 342; but not stat. 23 & 24 Vict. c. 145, s. 30, *ante*, p. 340.

(t) Warner *v.* Wainsford, Hob. 127; Williams on Executors, pt. 3, bk. 2, ch. 2, s. 6.

(u) Stat. 22 & 23 Car. II. c. 10, s. 8.

(x) Edwards *v.* Freeman, 2 P. Wms. 442.

(y) *Ante*, p. 329.

(z) Williams on Executors, pt. 1, bk. 5, ch. 3, s. 3.

(a) Stat. 38 Geo. III. c. 87, ss. 1-5, extended by stats. 20 & 21 Vict. c. 77, s. 74; 21 & 22 Vict. c. 95, s. 18.

(b) Stat. 20 & 21 Vict. c. 77, s. 70.

(c) Sect. 72.

[*359] The court also may appoint such *administrator or any other person receiver of the real estate of the deceased pending any suit touching the validity of his will, if it affect such real estate.(*d*) So if a will should have been made, but the executors should have renounced, or died before their testator, the court will appoint the person having the greatest interest in the effects, generally, the residuary legatee, to administer the same according to the directions of the will, in which case the administration granted is termed an administration *cum testamento annexo*, with the will annexed.(*e*) And it is now provided, that, if by reason of the insolvency of the estate of the deceased, or other special circumstances, the court shall think it necessary or convenient to appoint as administrator any other person than the person by law entitled to the grant, the court may do so; and every such administration may be limited as the court shall think fit.(*f*)[1]

Letters of administration, as well as probates, are liable to the payment of an *ad valorem* stamp duty on the value of the personal estate of the deceased within the United Kingdom, if it exceeds in value the sum

(*d*) Stat. 20 & 21 Vict. c. 77, s. 71.
(*e*) Williams on Executors, pt. 1, bk. 5, ch. 3, s. 1.
(*f*) Stat. 20 & 21 Vict. c. 77, s. 73; In the Goods of Llanwarne, Law Rep. 1 P. & D. 306; In the Goods of Fraser, Law Rep. 1 P. & D. 327.

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[1] This last kind of administrator is called a special administrator, or an administrator *ad colligendum*, who may be appointed by the officer having the proper authority, according to his discretion, for the purpose of preserving the estate of the decedent, until regular letters testamentary or of administration are granted, or until the will is established, and in such like cases.

"Letters *ad colligendum*, may be granted by the Orphans' Court of the county in which the will was proved or authenticated, or where letters of administration ought to be granted, in cases of delay, on account of absence from the State of an executor, a contest relative to the will, or right of administration, or the absence or neglect of an executor or person entitled to administration, to qualify, or from any other cause; and such letters may be granted to one or more persons, in the discretion of the court, in case the personal estate of the deceased shall be supposed to be in different counties." Vol. i, Md. Code (1860), p. 630, art. 93, sec. 60.

And see, for the provisions of the different States, Cobb's New Dig. of the Laws of Geo. (1851), p. 283, sec. 6, and p. 311, sec. 73; Thompson's Dig. of the Laws of Fla., p. 198, sec. 1; How. & Hutch. Stat. Laws of Miss., pp. 391, 392, sec. 24; Gen. Stats. of Mass. (1860), p. 484, sec. 6; Rev. Stats. of N. Y. (5th ed.), vol. iii., pp. 160, 161, sec. 38; 2 Compil. Laws of Michigan (1857), p. 877, art. 2881, sec. 5; Code of Ala. (1852), p. 339, sec. 1676; Rev. Stats. of Maine (1857), p. 413, sec. 27; Rev. Code of N. C. (1855), p. 283, secs. 9 and 10; 1 Rev. Stats. of Ohio (1860), p. 569, sec. 14; Gross's Stats. of Ill. (1869), pp. 803, 804, sec. 38, &c.; Paschall's Annot. Dig. Laws of Texas, pp. 305, 306, arts. 1287, 1288, 1289.

of 100*l.*; (*g*) but the duty on letters of administration, where there is no will, is after a higher rate than the duty on probates, or on letters of administration with the will annexed.(*h*)[1] A heavy penalty is imposed by the Stamp Act on any person who shall take possession of, or in any manner administer any part of the personal estate of any deceased person, without obtaining *probate or administration within six calendar [*360] months after his or her decease, or within two calendar months after the determination of any suit or dispute respecting the will or the right to administration.(*i*) The same exemptions from duty in favor of seamen, marines and soldiers, which have been established with respect to the probate duty,(*k*) apply also to the duty on letters of administration.

The office of administrator is not transmissible, like the office of executor.[2] On the decease of an administrator, before he has distributed all the effects of the intestate, a new administrator must be appointed; for the administrator or executor of such administrator has no right to intermeddle. So if an executor should die intestate, without having completely distributed his testator's effects, an administrator must be appointed to distribute, according to the will of the testator, such of his effects as were not distributed by the deceased executor.(*l*) In each of these cases the administration granted is called an administration *de bonis non administratis*, of the goods not administered, or, more shortly, *de bonis non*.(*m*) All second and subsequent grants of probate or letters of administration must be made in the principal registry of the Court of Probate, or in the district registry where the will is registered or the original grant of administration has been made, or to which it may have been transmitted.(*n*)

The application of an intestate's effects, after payment of his debts, is now regulated by statutes of the reign *of Charles II. and James [*361] II.,(*o*) commonly called the Statutes of Distribution, by which

(*g*) *Ante*, p. 336.

(*h*) Stat. 55 Geo. III. c. 184.

(*i*) 100*l.*, and ten per cent. on the stamp duty. Stat. 55 Geo. III. c. 184, s. 37.

(*k*) *Ante*, pp. 337, 338.

(*l*) Shep. Touch. 465; Williams on Executors, pt. 1, bk. 3, ch. 4.

(*m*) Williams on Executors, pt. 1, bk. 5, ch. 3, s. 2.

(*n*) Stat 21 & 22 Vict. c. 95, s. 20.

(*o*) 22 & 23 Car. II. c. 10; 1 Jac. II. c. 17, s. 7. See Watkins on Descents, Appendix, 257 *et seq.* 4th edit.

[1] In this country, there is no distinction made, as to revenue duty, between letters of administration, where there is no will, and probates, or letters of administration, with the will annexed. See *ante*, note 1, p. 336.

[2] See *ante*, p. 329, note.

statutes the rights of the relations of the deceased appear to have been first definitely ascertained and rendered legally available.[1] Under these statutes, if the intestate leave a widow and any child or children, or descendant of any child, the widow shall take a third part of the surplus of his effects. If he leave no child, nor descendant of any child, she shall have a moiety. In this respect, the distribution is the same as took place under the ancient law. The husband of a married woman is entitled to the whole of her effects.(*p*) If the intestate leave children, two-thirds of his effects if he leave a widow, or the whole if he leave no widow, shall be equally divided amongst his children, or, if but one, to such one child. But the descendants of such children as may have died in the intestate's lifetime, shall stand in the place of their parent or ancestor.(*q*) Such children, however, as have been advanced by the parent in his lifetime must bring the amount of their advancement into hotchpot, so as to make the estate of all the children to be equal, as nearly as can be estimated. But the heir at law, notwithstanding any lands he may have by descent or otherwise from the intestate, is to have an equal part in the distribution with the rest of the children, without any consideration of the value of such land.(*r*) If the intestate leave no children or representatives of them, his father, if living, takes the whole; or, if the intestate should have left a widow, one-half. If the father be dead, the mother, brothers and sisters of the intestate shall take in equal shares,(*s*) [*362] *subject, as before, to the widow's right to a moiety; and brothers or sisters of the half blood have an equal claim with those of the whole blood.(*t*) If any brother or sister shall have died in the lifetime of the intestate, leaving children, such children shall stand *in loco parentis*, provided the mother or any brother or sister be living.(*u*) If there be no brother or sister, nor child of such brother or sister, the mother shall take the whole, or, if the widow be living, a moiety only, as before; but a stepmother can take nothing.(*x*) If there be no mother, the brothers and sisters take equally, the children of such as may be dead standing *in loco parentis*. Beyond brothers' and sisters' children, no

(*p*) Stat. 29 Car. II. c. 3, s. 25.
(*q*) See Burton's Compendium, pl. 1402.
(*r*) Stat. 22 & 23 Car. II. c. 10, s. 5; Boyd *v.* Boyd, V.-C. W., Law Rep. 4 Eq. 302.
(*s*) Stat. 1 Jac. II. c. 17, s. 7.
(*t*) Jessopp *v.* Watson, 1 Myl. & K. 665; Burnet *v.* Mann, 1 Myl. & K. 672, n.
(*u*) Lloyd *v.* Tench, 2 Ves. sen. 215; Durant *v.* Prestwood, 1 Atk. 454; West 448.
(*x*) Duke of Rutland *v.* Duchess of Rutland, 2 P. Wms. 216.

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[1] Each State of the Union has its own Statute of Distributions; and these, slightly differing from each other, are but modifications of the Statutes of Charles II., and James II.

right of representation belongs to the children of relatives with respeot to the shares which their deceased parents would have taken. And if there be neither brother, sister or mother of the intestate living, his personal estate will be distributed in equal shares amongst those who are next in degree of kindred to him.

In tracing the degrees of kindred in the distribution of an intestate's personal estate, no preference is given to males over females, nor to the paternal over the maternal line,(y) nor to the whole over the half blood, as in the case of descent of real estate; nor does the issue stand in the place of the ancestor. The degrees of kindred are reckoned according to the civil law, both upwards to the ancestor and downwards to the issue, each generation counting for a degree.(z) Thus from *father to son, or from son to father, is one degree; from grandfather [*363] to grandson, or from grandson to grandfather, is two degrees; and from brother to brother is also two degrees; namely, one upwards to the father, and one downwards to the other son. So from uncle to nephew is three degrees, one upwards to the common ancestor, and two downwards from him; and from nephew to uncle is also three degrees, two upwards and one downwards. If therefore there be neither issue, father, brother, sister nor mother of the intestate living, such persons as are his next of kin, according to the rule above laid down, are entitled in equal shares *per capita* to his personal estate, subject to his wife's right to a moiety, should she survive him. As the kindred becomes more distant, the number of persons entitled, if living, as well as the difficulty of proving their respective pedigrees, becomes prodigiously augmented. "It is at the first view astonishing," says Blackstone,(a) "to consider the number of lineal ancestors which every man has within no very great number of degrees: and so many different bloods is a man said to contain in his veins as he hath lineal ancestors. Of these he hath two in the first ascending degree, his own parents; he hath four in the second, the parents of his father and the parents of his mother; he hath eight in the third, the parents of his two grandfathers and two grandmothers; and, by the same rule of progression, he hath an hundred and twenty-eight in the seventh; a thousand and twenty-four in the tenth; and at the twentieth degree, or the distance of twenty generations, every man hath above a million of ancestors, as common arithmetic will demon-

(y) Moor *v.* Barham, 1 P. Wms. 53.

(z) Mentney *v.* Petty, Pre. Cha. 593; Wallis *v.* Hodson, 2 Atk. 117; 2 Black. Com. 504, 515.

(a) 2 Black Com. 203.

strate." The number of collateral relations who may claim through such ancestors is of course far more numerous.

[*364] *The estates of intestate freemen of the city of London,(*b*) and of persons having their fixed or general residence within the archiepiscopal province of York (excepting the diocese of Chester), were until recently distributed according to peculiar customs, apparently derived from the ancient mode of distribution.(*c*) Some parts of Wales also appear to have been subject to peculiar customs of distribution; for these several customs, though postponed to the right of testamentary disposition by the statutes to which we have already referred,(*d*) were nevertheless not abolished by those statutes in the event of no will being made. But a recent statute has now altogether abolished all customary modes of administration.(*e*)

The shares of persons claiming any personal estate of the amount or value of 20*l.* or upwards under an intestacy are subject to the same duty as legacies to persons of the same degree of kindred.(*f*)[1] If there be no next of kin, the crown, by virtue of its prerogative, will stand in their place,(*g*) but subject always to the widow's right to a moiety in case she should survive.(*h*)

The division of the personal estate of an intestate, effected by the Statute of Distributions, is remarkable for its fairness. The only provision which might be amended is that which places the half blood on an equality with the whole. A corresponding equality in interest and feeling but rarely exists in actual life. The [*365] *proper place for the half blood appears to be that now assigned to them in the descent of real estate, according to the recommendation of the Real Property Commissioners, namely, next after those of the same degree of the whole blood.(*i*) The appointment of an executor or administrator, in whom the whole personal property is vested, with full power of

(*b*) Onslow *v.* Onslow, 1 Sim. 18.

(*c*) Williams on Executors, pt. 3, bk. 4, ch. 2.

(*d*) *Ante*, p. 321.

(*e*) Stat. 19 & 20 Vict. c. 94.

(*f*) Stat. 55 Geo. III. c. 184. See *ante*, pp. 342, 343.

(*g*) Taylor *v.* Haygarth, 14 Sim. 8; Powell *v.* Merrett, 1 Sm. & Giff. 381. See stat. 15 & 16 Vict. c. 3.

(*h*) Cave *v.* Roberts, 8 Sim. 214.

(*i*) See Principles of the Law of Real Property 77, 1st ed.; 82, 2d ed.; 86, 3d and 4th eds.; 91, 5th ed.; 97, 6th ed.; 100, 7th ed.; 103, 8th ed.

[1] See *ante*, p. 343, note.

disposition, tends greatly to simplify the title to leasehold estates and other property of a personal nature. It could be wished, however, that the office of an administrator were transmissible in the same manner as that of an executor. In other respects, the distribution of personal estate on intestacy approaches far more nearly to the disposition which the deceased himself would probably have made, than the descent of real property, either at the common law or according to the custom of gavelkind. A person possessed only of small landed property usually devises it to trustees for sale, with full power to give receipts to purchasers, and directs the division of the produce by his trustees amongst his children in such shares as he may think just, with regard to the provision already made for any of them in his lifetime. He does not leave his younger children to beggary in order that his whole property may devolve to his eldest son, according to the course of the common law, a course pursued, as the author believes, in no other civilized country in the world.(*k*) Neither does he leave it to all his sons equally in undivided shares, thus inflicting an injustice on his daughters, and allowing all plans for the improvement of the lands to be checked by one dissentient voice, unless a partition should be resorted to, by which the property would be split up into parcels too small for the convenience of agriculture. If by any accident a man *should die without making his will, it would seem to be the province of an equitable legislature to make such a disposition of his property as would, in ordinary circumstances, most nearly correspond with his intention. It is true that when property is large, it is usually entailed on the eldest son and his issue, subject to moderate portions for the younger children. This custom of primogeniture is suited to the institutions of our country, and to the habits of the class to which large landed property usually belongs, and the author has no wish to see it disturbed. The settlements, however, by which these entails are created are more frequently made by deed than by will. They almost invariably contain provisions for the portions of younger children, varying in amount with the value of the property; and, whether made by deed or will, they are usually long and intricate in their nature, providing for the numerous contingencies which may arise under the peculiar circumstances of each family. Nothing in fact can be more different than the devolution of an estate to the eldest son under a family settlement, and the descent on an intestacy to the eldest son as heir at law. In the one case he takes subject to the proper claims of the other members of his family; in the other he is bound to them by no obligation at all. There seems to be no method of

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(*k*) Co. Litt. 191 a, n. (1), vi. 4.

making, in case of intestacy, any sort of disposition of landed property which might be reasonably simple, and at the same time resemble an ordinary family settlement. If such a settlement be not made by deed, the owner has ample power of effecting the same object by his will. Intestacy, in fact, rarely happens to the owner of large landed property. The property which descends to heirs under intestacies, though large in the aggregate, is generally small in individual cases. When the wishes of all cannot be consulted, that which would have been the wish of the [*367] generality of intestates ought apparently *to form the foundation of the rule. From a consideration of these circumstances the reader may perhaps be induced to think, that if, in case of intestacy, the rules for the devolution of real and personal estate were identical, and with some slight variations similar to those which now exist as to personalty, the law on this subject would be rendered both more simple and more just.

The descent of real estate to distant heirs, and the devolution of personalty to distant kindred, involve an amount of learning and litigation, the abolition of which would perhaps be desirable. The family and near relations of an intestate have generally claims upon his bounty, which ought not to be disappointed by the accident of his decease without making a will. But distant relatives have seldom any such claims, nor consequently any expectation of such claims being fulfilled. To withhold from them, therefore, that which they had never expected to enjoy, would not be to inflict a loss. Under the present system, the property of an intestate who has no near relations, is not unfrequently frittered away in expensive contests between opposing claimants, or else it devolves unexpectedly upon persons who, for want of previous education, are unable to make use of it with benefit either to themselves or to the community. In a country so heavily burdened as our own, any addition to the public income, not having the pressure of a tax, would be a very desirable acquisition. Such an addition might, as it appears to the author, be very properly made by the devolution to the public of the properties of intestates having none but distant relatives. The country in which a man has lived, and in which his property has been acquired, or at any rate protected, has certainly some claims upon him,—claims which seem preferable to those of the man who, in the case of real estate, [*368] founds his title on his descent from the *most *remote* male paternal ancestor of the intestate,(*l*) or who claims a share in the

(*l*) See Principles of the Law of Real Property 78, 1st ed.; 83, 2d ed.; 87, 3d and 4th eds.; 92, 5th ed.; 98, 6th ed.; 101, 7th ed.; 104, 8th ed.

personalty because he chances to be a survivor amongst the multitude standing in the fifth or sixth degree of a series of kindred which increases, as it grows distant, in geometrical progression.(*m*)

(*m*) The author's attention has since been called to a similar proposal in Mill's Political Economy, vol. 1, pp. 272, 273, 2d ed.

[*369] *CHAPTER V.

OF THE MUTUAL RIGHTS OF HUSBAND AND WIFE.

MARRIAGE, being essential to the welfare of the community, and also involving important consequences to the individuals concerned, is not on the one hand allowed to be unduly restrained, nor on the other to be brought about by unfair means.

Amongst the many striking differences between the laws of real and personal property, by which our legal system is complicated, will be found the rules relating to attempted restraints on marriage. Real estate is governed by the rules of the common law; but personal estate, when bequeathed by will, has, as we have seen,(*a*) long been subject to the jurisdiction of the ecclesiastical courts. These courts have adopted, with some modification, the rules of the civil law, which is more favorable than the common law of England to liberty of choice in marriage. Hence it follows that some restrictions on marriage, which are valid when applied to a gift of real estate, are void when attempted to be imposed on a gift of personal property. The rules respecting real and personal estate so far agree that a condition annexed to a gift of either, that a person shall not marry at all, is void.(*b*) But a gift of either by a husband to his wife during her widowhood is valid;(*c*) neither would a gift of the income of property to a single person until marriage, with a [*370] gift over on *marriage appear to be invalid.(*d*) When, however a gift is made, with a condition that it shall be forfeited if the donee marry without the consent of certain trustees or other persons, the difference between the laws of real and personal estate becomes conspicuous. If the gift be of real estate, or of money charged on real estate, it will cease on the event of marriage without the required con-

(*a*) *Ante*, p. 333.

(*b*) Shep. Touch. 132; Perrin *v.* Lyon, 9 East 170, 183; Rishton *v.* Cobb, 9 Sim. 615; 5 Myl. & Cr. 145; Morley *v.* Rennoldson, 2 Hare 570.

(*c*) Barton *v.* Barton, 2 Vern. 308.

(*d*) See Right d. Compton *v.* Compton, 9 East 267; Morley *v.* Rennoldson, 2 Hare 570, 580; Webb *v.* Grace, 2 Phil. 701; Lloyd *v.* Lloyd, 2 Sim., N. S. 255; Heath *v.* Lewis, 3 De G., M. & G. 954; Evans *v.* Prosser, V.-C. W., 10 Jur. N. S. 385.

sent.(*e*) But if it be a bequest of personal property, the condition is regarded as merely *in terrorem* and void,(*f*) unless accompanied by a bequest over to some other person on the marriage taking place without consent;(*g*) so that the legatee will be entitled to retain the legacy, notwithstanding his or her marriage without consent, unless on that event it be expressly given in some other manner. Such conditions in bequests of personalty when unaccompanied by a gift over, are called *in terrorem*, because, says Lord Eldon, "they are supposed to alarm persons, when we know they contain no terror whatsoever."(*h*)[1]

(*e*) Reynish *v.* Martin, 3 Atk. 330, 333. (*f*) Bellasis *v.* Ermine, 1 Cha. Ca. 22.

(*g*) Stratton *v.* Grymes, 2 Vern. 357; Harvey *v.* Aston, 1 Atk. 361; Clarke *v.* Parker, 19 Ves. 1, 13.

(*h*) 19 Ves. 13.

[1] Contracts in restraint of marriage, are regarded as contrary not only to the law and order of our nature, but also as contrary to sound policy, and hence are illegal and void. "Marriage, no doubt, may be made the subject of regulation by qualified restrictions, under certain circumstances, but under no circumstances whatever, ought a general and entire restriction of it, to be countenanced and sanctioned by law. . . . Conditions, also, in restraint of marriage, are *odious;* and are, therefore, held to the utmost rigor and strictness. They are contrary to sound policy." Middleton *v.* Rice, 6 Pa. L. J. 240. A condition in restraint of marriage, is void, therefore, when it is annexed to a legacy, without a limitation over; but if there is a limitation over, the condition is good: McIlvaine *v.* Gethen et al., 3 Whart. 583; Hoopes *v.* Dundas, 10 Penn. St. 77; Commonwealth *v.* Stauffer, Id. 350; Middleton *v.* Rice, 6 Pa. L. J. 230; Bennett *v.* Robinson, 10 Watts 350; Stroud *v.* Bailey, 3 Grant's Cas. 310; Hughes *v.* Boyd, 2 Sneed 512; Hotz's Est., 48 Penn. St. 422; Otis *v.* Prince, 10 Gray 581; Parsons *v.* Winslow, 6 Mass. 169; in the last of which cases, Judge Sedgwick remarks: "It is a general rule, that a condition annexed to a devise or bequest for life, whereby it is to be divested by the marriage of the devisee or legatee, is to be considered as intended purely *in terrorem*, and it is therefore void. To this rule there is an exception, that such condition shall be effectual, if the subject of the devise or bequest be given over, so as to create an interest in another person. And again, this exception is restrained and limited. To give it effect, the giving over to a third person, must be an *express* giving over of the *particular* devise or legacy, unincorporated with any other subject; and it must also be *immediate*, to take effect at the time of the marriage." But the doctrine just stated, will not apply to any case of conditional limitation; for, as was said in Middleton *v.* Rice, "we must be careful not to confound limitations with conditions, for *limitations* may be good, notwithstanding they are seemingly in restraint of marriage, and were so by the civil, as well as by the common law. As, for instance, where the meaning of the testator is not to forbid marriage, but to grant the use of the thing bequeathed until the legatee shall marry; or where the prohibition of marriage is not made conditionally by this word, *if*, . . . but by other words or adverbs of time; as when the testator willeth that his daughter or wife shall be executrix, or have the use of his goods, *so long* as she shall remain unmarried." And see, also, Coppage *v.* Alexander's Heirs, 2 B. Mon. 314; Napier *v.* Davis et al., 7 J. J. Marsh. 286; Hoopes *v.* Dundas, 10 Penn. St. 77; Bennett *v.* Richardson, 10 Watts 350.

In order to prevent marriages from being unfairly obtained, it is a rule in equity that all contracts for reward for procuring marriages (called marriage brocage) are void.(*i*) And if a parent or guardian should stipulate for any private benefit for the marriage of his child or ward, such stipulation would be void, and money actually paid under it would be decreed to be refunded.(*j*)

[*371] *Few marriages are now contracted between persons possessing any amount of property, without a previous settlement of such property being made, in some stipulated manner, for the benefit of the intended husband and wife and the children of the marriage. As marriage is a valuable consideration,(*k*) such settlements are binding on both parties if of full age. And an act of parliament has recently been

(*i*) Hall *v.* Potter, 3 Levinz 411; Shower's Par. Cas. 76.
(*j*) 1 Fonblanque on Equity 262; Smith *v.* Bruning, 2 Vern. 392.
(*k*) *Ante*, p. 74.

In the case, however, of a devise of real estate, to cease on the event of a subsequent marriage, it matters not whether the gift be coupled with a condition or a conditional limitation; for, in either case, it will be good: Phillips *v.* Medbury, 7 Conn. 573; Bailey *v.* Teackle et al., Exrs., Wythe 173; Vance *v.* Campbell's Heirs, 1 Dana 229; Commonwealth *v.* Stauffer, 10 Penn. St. 350; Bennett *v.* Robinson, 10 Watts 350; Arnold *v.* Gilbert, 5 Barb. 191; Corneil *v.* Lovett's Exr., 35 Penn. St. 103; Vaughn *v.* Lovejoy, 34 Ala. 437; and although in Middleton *v.* Rice, 6 Pa. L. J. 230, the learned judge seemed to incline to the opinion, that a devise of real estate, upon a condition subsequent in restraint of marriage generally, would be void as to the condition, yet that decision may be considered as overruled by Commonwealth *v.* Stauffer, and McCullough's Appeal, 12 Penn. St. 197; in which last it was said, "The provision for the wife, in this case, is a devise of the profits, and, consequently, of the land, to her for life, in the first instance; but coupled with a condition, or a conditional limitation, no matter which, that she do not marry. Whether it be the one or the other, a limitation over is unnecessary, to give it effect; for it is a familiar principle, that devises of land, whether to a widow or any one else, are governed, not by the civil, but by the common law, which knows nothing of a condition *in terrorem*." In the case, however, of Williams et al. *v.* Cowden, 13 Mo. 211; where one, by his will, devised to his son, and to his daughter, in equal moieties, a tract of land, with the provision, that "if his said daughter should marry or die," the land should belong exclusively to his said son, it was held that the above condition attached to the estate of the daughter, is in restraint of marriage, and is void. And see also, Otis *v.* Prince, 10 Gray 581.

"A condition annexed to the vesting of a legacy, requiring the guardian's approbation of the legatee's marriage, is not *in terrorem* only, when the condition is confirmed to marriage under twenty-one, and there is a limitation over:" Collier, Exr., *v.* Slaughter's Admr., 20 Ala. 263.

For further instances of gifts or devises during widowhood, see Drury et al. *v.* Grace, 2 Har. & Johns. 356; Crosby *v.* Wendell et al., 6 Paige Ch. 548; Picot *v.* Armistead, 2 Ired. Ch. 226; Bankhead, Admr., *v.* Carlisle, Admr., 1 Hill Ch. 358; Williams *v.* Vancleave, 7 Mon. 388; Dandridge et al. *v.* Dorrington, 6 Call 351; Blunt et al. *v.* Gee et al., Id. 481; Taylor *v.* Birmingham, 29 Penn. St. 306.

passed,(*l*) enabling every infant not under twenty if a male, and not under seventeen if a female, to settle his or her property, whether real or personal, upon marriage, provided the sanction of the Court of Chancery be obtained. But if the settlement be not made under the provisions of this act, and either husband or wife should be under age, the settlement will not be binding on him or her,(*m*) although the other party, if of full age, will be bound by it.(*n*) And if both of them should be under age, neither of them will be bound by it. The circumstance of the settlement of an infant's personal property being fair and reasonable, and made with the approbation of his or her guardians, was formerly considered as giving it validity;(*o*) but this circumstance seems now to have no weight.[1] It has, however, been decided that a competent legal jointure(*p*) settled on the intended wife, then an infant, with the concurrence of her guardians, in lieu of her right to dower out of her husband's freehold lands, and in lieu of her distributive share of his personal estate in the event of his intestacy, was sufficient to deprive her both of her *dower and of her distributive share in her husband's personalty.(*q*) When the intended wife only is an infant, [*372] a settlement of her personal estate in possession is valid, on account of the interest which, as we shall see, the law gives to the husband in such personal estate. The settlement in such a case is in fact not made by the wife, but by the husband, who being adult, is bound by its provisions to the extent of the interest which he would have taken had no settlement been made.(*r*)

If no settlement be made, the principles which govern the rights of husband and wife to personal property must still be traced to the circumstances of ancient rather than of modern times. In ancient times

(*l*) Stat. 18 & 19 Vict. c. 43; Re Dalton, 6 De G., M. & G. 201, extended to the Court of Chancery in Ireland, by stat. 23 & 24 Vict. c. 83.

(*m*) Ellison *v.* Elwin, 13 Sim. 309; Le Vasseur *v.* Scratton, 14 Sim. 116.

(*n*) Durnford *v.* Lane, 1 Bro. C. C. 106; Milner *v.* Lord Harewood, 18 Ves. 259.

(*o*) 2 Roper's Husband and Wife 26.

(*p*) See Principles of the Law of Real Property 174, 1st ed.; 184, 2d ed.; 191, 3d ed.; 192 4th ed.; 201, 5th ed.; 211, 6th ed.; 216, 7th ed.; 225, 8th ed.

(*q*) Earl of Buckingham *v.* Drury, 3 Brown's Par. Cas. 492.

(*r*) Trollope *v.* Linton, 1 Sim. & Stu. 477, 487.

[1] The beneficial contracts of infants, are voidable only, and may be ratified by them after arriving at maturity, by express agreement, or by positive acts, equivalent thereto: N. H. M. F. Ins. Co. *v.* Noyes, 32 N. H. 345; Manning *v.* Johnson, 26 Ala. 446; Proctor *v.* Sears, 4 Allen 95; McCormic *v.* Leggett, 8 Jones L. 425; Henry *v.* Root, 33 N. Y. 526; but mere acquiescence, without anything else, is not generally sufficient evidence of affirmance: Irvine *v.* Irvine, 9 Wall. U. S. 617.

landed property was by far the most important; and the wife was accordingly entitled to a provision out of the lands of her husband, in the event of her surviving him, which no alienation that he could make, nor any debts which he might incur, were able to set aside.(*s*) But in those days personal property was of too insignificant a value to be the subject of any such provision. And if a woman now marry without a settlement, she has still no claim on her husband's personal estate, however large, unless he should happen to die intestate, in which case, as we have already mentioned, she is entitled to a third or a half of what he may leave, according as he may or may not leave issue surviving him. A husband, on the other hand, was in ancient times considered absolutely entitled to such personal chattels as his wife might possess. In this respect the law was then both simple and sufficient. By the act of marriage, the wife placed herself under the coverture or protection of her [*373] husband. She became in *the law French of those days a *feme covert*. Thenceforth all demands to which she was personally liable were to be answered by her natural protector. The wife was considered as merged in her husband, and both were regarded as but one person.(*t*) So long therefore as the coverture continued, that is, during the joint lives of the husband and wife, the husband was absolutely entitled to all personal property which his wife might acquire, and was also liable to the payment of all debts which she might previously have incurred.[1] These simple principles still pervade the law relating to the

(*s*) See Principles of the Law of Real Property 172, 1st ed.; 182, 2d ed.; 189, 3d ed.; 190, 4th ed.; 199, 5th ed; 209, 6th ed.; 213, 7th ed.; 223, 8th ed.

(*t*) Principles of the Law of Real Property 164, 1st ed.; 176, 2d ed.; 183, 3d ed.; 184, 4th ed.; 190, 5th ed.; 200, 6th ed.; 207, 7th ed.; 214, 8th ed.

[1] For the statutes of the several states on this subject, see generally, the titles Husband and Wife, Abatement, Alimony, Conveyance, Curtesy, Divorce, Dower, Feme Covert, Jointure, Marriage, Married Women, Widow, &c. &c., as contained in the respective Digests.

By the sixth section of the Act of the Legislature of Pennsylvania of the eleventh of April, 1848, it is provided that "Every species and description of property, whether consisting of real, personal or mixed, which may be owned by or belong to any single woman, shall continue to be the property of such woman, as fully after her marriage as before; and all such property, of whatever name or kind, which shall accrue to any married woman during coverture by will, descent, deed of conveyance or otherwise, shall be owned, used and enjoyed by such married woman as her own separate property; and the said property, whether owned by her before marriage, or which shall accrue to her afterwards, shall not be subject to levy and execution for the debts or liabilities of her husband, nor shall such property be sold, conveyed, mortgaged, transferred or in any manner encumbered by her husband, without her written consent first had and obtained, and duly acknowledged . . . that such consent was not the result of coercion on the part of her said husband, but that the same was voluntarily given

husband's interest in his wife's personal estate; although the several different species of personal estate to which modern civilization has given rise, conjoined with the rules of equitable administration laid down by the Court of Chancery, have given to this branch of law a perplexity unknown to the simple, though somewhat harsh, rules of our ancestors.

In the first place, then, personal property of the ancient kind, namely, chattels, personal or movable goods, belonging to the wife at the time of her marriage, or given to her afterwards, become the absolute property of her husband in the same manner precisely as if they had been originally his own, or had been subsequently given to him.(*u*) He may dispose of them as he pleases in his lifetime or by his will; they will be subject to his debts; and if he should die intestate, the wife will have no further claim to them than to any other of his effects. So imperative is this rule, that if chattels personal be given to a married woman jointly with a stranger, the law will instantly sever the jointure, *and make the husband and the stranger tenants in common.(*v*) [*374]

The only exceptions to this sweeping rule are the wife's *paraphernalia*, so called from the Greek παραφερνη, being things to which the wife is entitled over and above her dower. The wife's paraphernalia consist of her apparel and ornaments suitable to her rank and degree;(*x*) and gifts made by the husband to his wife of jewels or trinkets to be worn by her as ornaments are considered as part of her paraphernalia.(*y*) These articles, equally with the wife's other personal chattels, may be disposed of by the husband in his lifetime,(*z*) and, with the exception of the wife's necessary clothing, are also liable to his debts.(*a*) The wife also herself has no power to dispose of them by gift or will during her husband's lifetime.(*b*) But paraphernalia differ from the wife's other personal chattels in this respect, that the husband, though he may dispose of them in his lifetime, has no power to bequeath them away from his wife by his will.(*c*) Gifts of jewels or trinkets made to

(*u*) Co. Litt. 300 a; 351 b; Bac. Abr. tit. Baron and Feme (C.) 3; 1 Rop. Husband and Wife 169.

(*v*) Bracebridge *v.* Cook, Plowden 411. See Re Barton's Will, 10 Hare 12.

(*x*) 2 Bl. Com. 436; 2 Rop. Husband and Wife 140; 11 Vin. Abr. tit. Executors (Z. 5).

(*y*) Graham *v.* Londonderry, 3 Atk. 394; Jervoise *v.* Jervoise, 17 Beav. 566.

(*z*) Ibid.; 2 Rop. Husband and Wife 141.

(*a*) 2 Bl. Com. 436; Ridout *v.* Earl of Plymouth, 2 Atk. 104; Lord Townsend *v.* Wyndam, 2 Ves. sen. 1, 7.

(*b*) 2 Rop. Husband and Wife 141.

(*c*) Tipping *v.* Tipping, 1 P. Wms. 730; Northey *v.* Northey, 2 Atk. 77.

and of her own free will. Provided, That her said husband shall not be liable for the debts of the wife contracted before marriage:" . . . Purd. Dig. (1861), p. 699, sec. 11.

the wife by a relative or friend, either upon or after her marriage, will generally be considered in equity as intended for her *separate use*, (*d*) in which case they will not be reckoned amongst her paraphernalia, but [*375] will, as we shall hereafter see, be exempt from the *control and debts of her husband, and may be disposed of by the wife in the same manner as if she were unmarried.

With regard to such of the wife's personal estate as is not in possession, but for which she has only a right to sue, the rights of the husband are different, according as the proceedings against the persons liable to be sued must be taken in a court of law or of equity. Property of this nature, as we have already seen,(*e*) is termed in law French *choses in action*, such as may be recovered by action at law are called legal choses in action, and such as may be recovered by suit in equity are called equitable choses in action. With regard to each of them, the rights of the husband are of a different kind, although in each the same rule applies, that if he can get them into his possession during the coverture he has a right to keep them, otherwise they will belong to his wife.(*f*)

Legal choses in action consist principally of debts due to the wife, and secured or not by bond, or by bills or promissory notes. Of all these the husband has a right to receive payment, and should payment be refused him, he may sue for them in the joint names of himself and his wife ;(*g*) but bills and notes of the wife payable to order, being transferable by endorsement, may be endorsed by the husband alone,(*h*) or sued for in his own name.(*i*)[1] All such legal choses in action as accrued to the wife *after* [*376] her marriage may be sued *for by the husband, either in the joint names of himself and his wife, or in his own name only ;(*k*) but if the wife has really no interest, he cannot of course make use of her name.(*l*) If the husband should sue in the joint names of himself and his wife, the benefit of the judgment of the court will in case of his de-

(*d*) Graham *v.* Londonderry, 3 Atk. 394 ; 2 Rop. Husband and Wife 143 ; *post*, p. 384.

(*e*) *Ante*, p. 4.

(*f*) 2 Bl. Com. 434 ; 1 Williams on Executors, pt. 2, bk. 3, ch. 1, s. 3.

(*g*) 1 Rop. Husb. and Wife, 213, 214 ; Sherrington *v.* Yates, 12 M. & W. 855. In this case the note was not payable to order, and therefore not negotiable.

(*h*) Mason *v.* Morgan, 2 Ad. & E. 30 (E. C. L. R vol. 29).

(*i*) Burrough *v.* Moss, 10 B. & C. 558 (E. C. L. R. vol. 21).

(*k*) 1 Rop. Husb. and Wife 213.

(*l*) Abbot *v.* Blofield, Cro. Jac. 644.

[1] Evans *v.* Secrest, 3 Ind. 545 ; Holland *v.* Moody, 12 Id. 170 ; Young *v.* Ward, 21 Ill. 223 ; Tritt's Admr. *v.* Colwell's Admr., 31 Penn. St. 228 ; Roberts *v.* Place, 18 N. H. 183 ; King *v.* Gottschalk, 21 Iowa 512.

cease survive to her ;(*m*) but if he sue in his own name, the benefit of the judgment will form part of his own personalty. If, however, the husband should not have received the money in his lifetime, or should not have obtained judgment for it in his own name, his wife will, on his decease, be entitled by survivorship to the chose in action so remaining still unreduced into possession ;(*n*) and bills and notes form no exception to this rule.(*o*) But, if the wife should die before her husband, these choses in action, still remaining unreduced, will form part of her personal estate; and her husband must take out administration to her effects before he can proceed to recover them :(*p*) when recovered, they will, with the rest of her personalty, belong to himself absolutely, after payment of her debts.(*q*) The only exception to this rule occurs in the case of the husband being entitled, in right of his wife, to "any estate in fee simple, fee tail, or for term of life, of or in any rents or fee-farms;" in which case the husband, after the death of his wife, is empowered by statute(*r*) to recover the arrears accrued to his wife before marriage *by action of debt or distress. But this provision does not apply to the rents reserved upon leases for years.(*s*) [*377]

Equitable choses in action consist principally of legacies, residuary personal estate of testators, and money in the funds. But all kinds of property, including, as is now decided, both freehold estates(*t*) and chattels real,(*u*) vested in trustees, who are answerable only to the Court of Chancery, are subject to a rule of equity, by which equitable choses in action are mainly distinguished from such as are merely legal. This rule is as follows: that the Court of Chancery will not assist, nor, if the wife should dissent, will it allow, the husband to recover or receive any property of his wife recoverable only in that court, without his settling a

(*m*) 1 Vern. 396; 1 Rop. Husb. and Wife 212.

(*n*) Co. Litt. 351 b.

(*o*) Richards *v.* Richards, 2 B. & Ad. 447 (E. C. L. R. vol. 22); Gaters *v.* Madeley, 6 M. & W. 423; Hart *v.* Stephens, 6 Q. B. 937 (E. C. L. R. vol. 51); Scarpellini *v.* Atcheson, 7 Q. B. 864 (E. C. L. R. vol. 53).

(*p*) 1 Rop. Husb. and Wife 205. See Betts *v.* Kimpton, 2 B. & Ad. 273 (E. C. L. R. vol. 22).

(*q*) Stat. 29 Car. II. c. 3, s. 25, *ante*, p. 361.

(*r*) Stat. 32 Hen. VIII. c. 37, s. 3.

(*s*) Prescott *v.* Boucher; 3 B. & Ad. 849 (E. C. L. R. vol. 23).

(*t*) Sturgis *v.* Champneys, 5 Myl. & Cr. 97; Wortham *v.* Pemberton, 1 De G. & Sm. 644; Gleaves *v.* Paine, 1 De G., J. & Sm. 87. See, however, Sugd. V. & P. 450, 13th ed.; 560, 14th ed.

(*u*) Hanson *v.* Keating, 4 Hare 1.

due proportion of such property on his wife and children.(*x*) The right of the wife to such a provision is termed *the wife's equity for a settlement.*(*y*)[1] In fixing the proportion to be settled, a prior settlement will always be taken into account.(*z*) But where no settlement has previously been made, the proportion required to be settled on the wife is most frequently one-half;(*a*) and sometimes the court has gone so far as to [*378] require a settlement of the whole fund.(*b*) *Although the children are usually inserted in the settlement, yet the right is personal to the wife, and may be waived by her;(*c*) nor will it survive to the children in case of her decease before the court has made its decree;(*d*) but if she die after the decree, it will still be carried into effect for the benefit of the children.(*e*) This rule of the Court of Chancery is founded on one of the maxims of equity, that he who would have equity must do what is equitable;(*f*) it cannot, therefore, be enforced until the time arrives when the fund becomes payable to the husband.(*g*) If, however, as most frequently happens, the husband can obtain from the executor or trustee of the fund in question payment of it to himself, without the assistance of the court, he has a right to do so, and in this case the wife's equity is at once excluded; and if the time of payment has arrived the executor or trustee may safely pay over the fund to the husband, unless the wife shall have already filed her bill in Chancery to enforce her right to a settlement;(*h*) and the receipt of the fund by the

(*x*) It was formerly held that the wife's equity to a settlement did not extend to sums under 200*l.*; Foden *v.* Finney, 4 Russ. 428; but this distinction is now abolished: In re Cutler, 14 Beav. 220; Re Kincaid, 1 Drew. 326.

(*y*) 1 Rop. Husb. and Wife 256 *et seq.*

(*z*) March *v.* Head, 3 Atk. 720; Lady Elibank *v.* Montolieu, 5 Ves. 737; Erskine's Trust, 1 Kay & John. 302; Spirett *v.* Willows, L. C. 12 Jur. N. S. 538; 1 Law Rep. Ch. Ap. 520.

(*a*) 1 Rop. Husb. and Wife 260; Archer *v.* Gardiner, 1 C. P. Coop. 430.

(*b*) Brett *v.* Greenwell, 3 You. & Coll. 230; Gardiner *v.* Marshall, 14 Sim. 575; Scott *v.* Spashett, 3 Macn. & G. 599: Dunkley *v.* Dunkley, L. C. 16 Jur. 767; 2 De G., M. & G. 390; Marshall *v.* Fowler, 16 Beav. 249; Gent *v.* Harris, 10 Hare 383; Re Welchman, 1 Giff. 31.

(*c*) Murray *v.* Lord Elibank, 13 Ves. 6. But the wife having once insisted on her right cannot afterwards waive it: Barker *v.* Lea, 6 Mad. 630; Whittem *v.* Sawyer, 1 Beav. 593.

(*d*) De la Garde *v.* Lempriere, 6 Beav. 344; overruling Steinmetz *v.* Halthin, 1 Glyn & Jam. 64; Baker *v.* Bayldon, 8 Hare 210; Wallace *v.* Auldjo, V.-C. K., 9 Jur. N. S. 687; 2 Drew. & Sm. 216, affirmed by Lords Jus. 11 W. R. 972; 1 De G., J. & S. 643.

(*e*) Groves *v.* Clarke, 1 Keen 132; s. c. Groves *v.* Perkins, 6 Sim. 584.

(*f*) 2 P. Wms. 641.

(*g*) Osborn *v.* Morgan, 9 Hare 432.

(*h*) 1 Rop. Husb. & Wife, 273; Murray *v.* Lord Elibank, 10 Ves. 90.

[1] Poindexter *v.* Jeffries, 15 Gratt. 363; Lowe *v.* Cody, 29 Geo. 117; Smith *v.* Long, 1 Metc. (Ky.) 486; Coppedge *v.* Threadgill, 3 Sneed 577; Moore *v.* Moore, 14 B. Mon. 259. See also Hill on Trustees, pages 405, and 408 to 415, and notes.

husband, when it has thus become payable, is also an effectual bar to the wife's right by survivorship.(*i*)[1]

*If the husband, instead of obtaining payment of the fund, should assign it to a third person,(*k*) or if he should become bankrupt,(*l*) his assignee will take subject to the wife's equity for a settlement, in the same manner as if no assignment had been made. But if the interest to which the wife is entitled consists of an equitable estate for her life only, an assignee from the husband of such life interest for valuable consideration will be entitled to hold it as against the wife's equity for a settlement;(*m*) although she would be entitled to a settlement as against his assignees, or now his creditors' trustee, in bankruptcy.(*n*) If the husband should die before the assignee has got possession of the fund, leaving his wife surviving, the wife's right by survivorship will prevail over the title of the assignee, whether in bankruptcy(*o*) or for valuable consideration.(*p*) [*379]

A recent act of parliament(*q*) enables every married woman, with the concurrence of her husband, by deed to dispose of every future or reversionary interest, whether vested or contingent, of such married woman, or her husband in her right, in any personal estate to which she shall be entitled under any instrument (except her marriage settlement) *made after the* 31*st December*, 1857; also to release or extinguish any power in regard to any such personal estate; and also to *release and extinguish her equity to a settlement out of her personal estate in possession under any such instrument as aforesaid. But every such [*380]

(*i*) 1 Rop. Husb. and Wife, 220; Rees *v.* Keith, 11 Sim. 383; Cunningham *v.* Antrobus, 16 Sim. 436.

(*k*) 1 Rop. Husband and Wife, 271; Malcom *v.* Charlesworth, 1 Keen 73, 74; Scott *v.* Spashett, 3 Macn. & G. 599; Carter *v.* Taggart, 5 De G. & Sm. 49; 1 De G., M. & G. 286. See Ward *v.* Yates, 1 Drew. & S. 80.

(*l*) 1 Rop. Husband and Wife, 268.

(*m*) Elliott *v.* Cordell, 5 Mad. 149; Stanton *v.* Hall, 2 Russ. & My. 175, 182; Tidd *v.* Lister, 10 Hare 140, 154; 3 De G., M. & G. 857; Re Duffy's Trust, 28 Beav. 386.

(*n*) Wright *v.* Morley, 11 Ves. 17.

(*o*) Pierce *v.* Thornley, 2 Sim. 167.

(*p*) Hutchings *v.* Smith, 9 Sim. 137; Ellison *v.* Elwin, 13 Sim. 309; Ashby *v.* Ashby, 1 Coll. 553; Le Vasseur *v.* Scratton, 14 Sim. 116; Michelmore *v.* Mudge, 2 Giff. 183.

(*q*) Stat. 20 & 21 Vict. c. 57.

[1] It has been decided in Pennsylvania, that since the Act of 1848, when a husband receives his wife's money, the legal presumption is that he receives it solely for her use, and consequently must account for it, by showing that it was returned, or expended for her use, at her request, or that he received it as a gift from his wife: Young's Est., 65 Penn. St. 101; Johnston *v.* Johnston, 31 Id. 450; Geabill *v.* Moyer, 45 Id. 530.

disposition must be separately acknowledged by her in the manner required by the act for the abolition of fines and recoveries.(r) And nothing therein contained is to extend to any reversionary interest, to which she shall become entitled under any instrument by which she shall be restrained from alienating or affecting the same.

If the wife should be entitled to any chose in action, whether legal or equitable, of a reversionary nature, not within the above-mentioned act, the effect of an assignment by the husband will be different under different circumstances. The wife, of course, cannot assign; for by the act of marriage she deprives herself of all power so to do; and the husband can only assign to another the interest to which he may be entitled himself. Suppose therefore that the wife is entitled, on the death of A., a person now living, to a sum of stock standing in the names of trustees, and that her husband should make an assignment of this reversionary interest to B., a purchaser; the benefit which will accrue to B. by virtue of this assignment will vary, according as the husband, the wife, or A., the tenant for life, may happen to die first. If the husband should die first, B. will lose his purchase; for the wife, having survived her husband, will now on the death of A. be entitled to the stock, which has never been reduced into the possession of her husband, or of B., his assignee.(s) If A. should die first, B. may then obtain a transfer of the stock, if the trustees choose to transfer it to him, and if the wife should [*381] not have filed a bill to enforce her equity to a *settlement.(t) But if the trustees should refuse to transfer without the direction of the Court of Chancery, or if the wife should insist upon her right, then B. will, as we have seen,(u) most probably obtain only half of the fund for his own benefit, and will be obliged to settle the other half on the wife and children. If, however, the wife should die first, then this chose in action, remaining unreduced into possession, will, like a legal chose in action, under the same circumstances,(x) remain part of the wife's personal estate; and the husband, on taking out administration to his wife, will be bound by his previous assignment. B. will accordingly in this single event obtain the whole fund, subject however to the wife's debts, if any. It was once thought that if an assignment could be obtained from the tenant for life, of his life interest in a fund circumstanced

(r) Stat. 3 & 4 Will. IV. c. 74. See Principles of the Law of Real Property 189, 4th ed.; 197, 5th ed.; 207, 6th ed.; 212, 7th ed.; 222, 8th ed.

(s) Purdew v. Jackson, 1 Russ. 1; Honner v. Morton, 3 Russ. 65.

(t) Greedy v. Lavender, 13 Beav. 62. (u) *Ante*, p. 377.

(x) *Ante*, p. 376.

as above mentioned, to the married woman entitled to the reversion, she would be in the same situation as if the whole fund had been originally held in trust for her absolutely; and that after such an assignment, the whole fund might therefore be transferred to the husband.(*y*) But it is contrary to the general principle of equity to allow the rights of parties to be affected by any merger or extinguishment of interests; and the doctrine in question has been overruled.(*z*)

The same principles which apply to the assignment by a husband of his wife's reversionary interest in a chose in action, apply also to his release, which will be as little binding or her as his assignment, in case of her *being the survivor.(*a*) If, however, the reversionary chose in action of the wife consist of money charged on real estate, the wife's interest can either be released or assigned by a deed acknowledged by her, with the concurrence of her husband, under the provisions of the act for the abolition of fines and recoveries.(*b*) The contrary was decided in a recent case,(*c*) which may now be considered as overruled.(*d*) [*382]

The same principle of the merger of the wife in the husband, which gives him such important rights in her personal estate, renders him answerable for all the debts and liabilities of his wife contracted previously to her marriage.(*e*) But if the judgment for any debt be not recovered during the continuance of the marriage, the liability ceases, except to the extent of the assets to which the husband may be entitled as his wife's administrator;(*f*) and if the wife survive, she will again become solely liable. The husband is also bound during the coverture to supply his wife with necessaries suitable to her station in life. She is therefore, whilst living with him, considered as his agent for the purchase of any such necessary articles with which he may not have supplied her.(*g*) And even if the

(*y*) Creed *v.* Perry, 14 Sim. 592; Hall *v.* Hugonin, 14 Sim. 595; Bishopp *v.* Colebrook, V.-C. E., 11 Jur. 793.

(*z*) Whittle *v.* Henning, 11 Beav. 222; affirmed, 2 Phil. 731; Hanchett *v.* Briscoe, 22 Beav. 496.

(*a*) Rogers *v.* Acaster, 14 Beav. 445; Harley *v.* Harley, 10 Hare 325.

(*b*) Stat. 3 & 4 Will. IV. c. 74. See Principles of the Law of Real Property 189, 4th ed.; 197, 5th ed ed.; 207, 6th ed.; 212, 7th ed.; 222, 8th ed.

(*c*) Hobby *v.* Allen, V.-C. Knight Bruce, 15 Jur. 835; s. c. nom. Hobby *v.* Collins, 4 De G. & S. 289.

(*d*) Sugd. Real Property Statutes, p. 240, 1st ed.; p. 233, 2d ed.; Briggs *v.* Chamberlain, V.-C. Wood, 18 Jur. 56; s. c. 11 Hare 69; Tuer *v.* Turner, 20 Beav. 560.

(*e*) 2 Roper's Husband and Wife 73; Palmer *v.* Wakefield, 3 Beav. 227; Luard's Case, 1 DeG., F. & J. 533.

(*f*) Heard *v.* Stamford, 3 P. Wms. 409.

(*g*) 2 Roper's Husband and Wife 110; Seaton *v.* Benedict, 5 Bing. 28 (E. C. L. R. vol. 15).

articles should not be necessaries, yet if the husband be aware of the [*383] purchase,(h) *or if he recognise it, by allowing his wife to use or wear the articles bought,(i) she will be considered as having bought them with his authority, and he will consequently be liable to pay for them.

The burdens with which the husband is thus chargeable are the consideration which he pays for his marital rights in his wife's property. It is therefore a rule of law, that the husband shall not, previously to the marriage, be defrauded of those rights by his intended wife.(k) Accordingly if the wife, after an engagement to marry, should assign away any of her property without the knowledge and consent of her intended husband, such assignment would be void, as a fraud on his marital rights.(l) And the circumstance of the intended husband's being ignorant of her possession of the property in question would be immaterial.(m)

The right of the husband to the whole of his wife's personal estate, in the event of her decease in his lifetime, may be waived by his giving her authority to dispose of such estate, or any part of it, by her will; and such a will will be valid and binding on the husband if he once allow it to be proved.(n) But during the wife's lifetime, and even after her death, until probate of the will, this authority may be revoked; and if the husband should die before the wife, such a will would not be binding on the wife's next of kin.(o)

[*384] *But at the present day, power to dispose of property of any kind may be given to a married woman, independently of her husband, by means of a trust for her *separate use*, which trust may be enforced in equity.(p) When personal estate is so given, the wife has the same powers of ownership as if she were a feme sole; she may accordingly dispose of such property without her husband's concurrence, either in her lifetime or by her will.(q) But should she die in his life-

(h) Petty *v.* Anderson, 3 Bing. 170 (E. C. L. R. vol. 11).

(i) See Montague *v.* Benedict, 3 B. & C. 631, 638 (E. C. L. R. vol. 10).

(k) Countess of Strathmore *v.* Bowes, 1 Ves. jun. 22, 28.

(l) England *v.* Downs, 2 Beav. 522; Taylor *v.* Pugh, 1 Hare 608; Prideaux *v.* Lonsdale, 4 Giff. 159; affirmed, 1 De G., J. & S. 433; Downes *v.* Jennings, 32 Beav. 290.

(m) Goddard *v.* Snow, 1 Russ. 485.

(n) 1 Rop. Husband and Wife 169, 170.

(o) 15 Ves. 156.

(p) See Principles of the Law of Real Property 164, 1st ed.; 174, 2d ed.; 181, 3d ed.; 18, 3d ed.; 182, 4th ed.; 190, 5th ed.; 200, 6th ed.; 207, 7th ed.; 214, 8th ed.

(q) Fettiplace *v.* Gorgas, 1 Ves. jun. 46; s. c. 3 Bro. C. C. 8; 2 Rop. Husband and Wife 182.

time without having made any disposition, her husband will become entitled to it either in his marital right(*r*) or as her administrator,(*s*) according as the property may be in possession or in action. A trust for a woman's *separate use* is properly and technically created by means of the words "separate use." A gift, however, to a woman for her sole use has now been decided not to create a trust for her separate use, unless aided by the context.(*u*) And a gift to a woman for her own use,(*x*) or to be paid into her proper hands for her own proper use and benefit,(*z*) will not be sufficient to exclude the rights of her husband.[1]

[*385] *A simple gift of property for a married woman's separate use is not so usual as the gift of the income only of the property during her life or during the joint lives of herself and her husband.(*a*) A gift of the income of property to a woman's separate use may be made either after her marriage, or in contemplation of marriage, or whilst she is sole; and the gift may be made either independently of her present husband, if any, or of any future husband. When the gift is made to a woman's separate use, independently of any fututre husband, the act of her marriage will confer no interest in the property on her husband, but she will enjoy, after marriage, the same interest and power of disposition as she had before.(*b*) It is, however, more usual, when the income only of property is given to a wife's separate use, to insert a condition that she shall not dispose of the same in any mode of anticipation. Conditions restraining the alienation of property are generally invalid, as being contrary to the policy of the law. But the courts of equity have made an exception to this rule in favor of married woman, and having once established a trust for a woman's separate use, they have permitted such a trust to be made effectual by depriving the wife herself of the power of disposition.(*c*) When the income of property is given to a

(*r*) Molony *v.* Kennedy, 10 Sim. 174; Tugman *v.* Hopkins, 4 Man. & Gran. 384 (E. C. L. R. vol. 43).

(*s*) Watt *v.* Watt, 3 Ves. 246, 247; Proudley *v.* Fielder, 2 Myl. & K. 57.

(*t*) Lee *v.* Prieaux, 3 Bro. C. C. 381.

(*u*) Massy *v.* Hayes, L. J., Ireland, 15 W. R. 376; affirmed in the House of Lords, 16 July, 1869; Gilbert *v.* Lewis, 1 De G., J. & S. 38.

(*x*) Roberts *v.* Spicer, 5 Madd. 491; Kensington *v.* Dollond, 2 Myl. & K. 184.

(*y*) Tyler *v.* Lake, 2 Russ. & Myl. 183. (*z*) Blacklow *v.* Laws, 2 Hare 49.

(*a*) See Appendix B.

(*b*) Tullett *v.* Armstrong, 1 Beav. 1; 4 Myl. & Cr. 390; Scarborough *v.* Borman, 1 Beav. 34; 4 Myl. & Cr. 377.

(*c*) Brandon *v.* Robinson, 18 Ves. 434; Robinson *v.* Wheelwright, 6 De G., M. & G. 535.

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[1] See Hill on Trustees, star page 405, note 2, and star page 420, note 2, where the American authorities are collected.

woman's separate use, without power of anticipation, she is not thereby deprived of the power of alienation so long as she continues single.(*d*) Previously to or in contemplation of marriage she may therefore make such disposition or settlement of such income as she may think proper. But should she marry without a settlement, the restraint on alienation [*386] will *then attach, and so long as she remains under coverture she will have no further power than that of receiving the income as it grows due.(*e*) On her widowhood her power of alienation will again revive,(*f*) but will cease on her second marriage without having previously made any disposition,(*g*) provided the restriction on alienation be not, by the terms of the gift, confined to her first marriage.(*h*) The intention to restrain alienation ought always to be clearly expressed. A direction to pay the income of property into the hands of a married woman, and not otherwise,(*i*) or on her personal appearance and receipt,(*k*) will not be sufficient to restrain her from disposing of her interest, the words being considered as intended only to exclude the marital claims of her husband. But if an intention can be collected from the terms of the instrument, not only to exclude the husband's claims, but also to prevent the wife from anticipating, such intention will prevail, although it may be expressed rather in popular than in strictly technical language.(*l*)[1]

In addition to trusts for separate use, powers of appointment may, as we have seen,(*m*) be given to married women independently of their husbands, by means of which they may be enabled to dispose of property [*387] without their husband's concurrence ;(*n*) and any *appointment under a general power may be made by a married woman in favor of her husband, as well as of any other person.[2]

(*d*) Woodmeston *v.* Walker, 2 Russ. & Myl. 197; Brown *v.* Pocock, 2 Russ. & Myl. 210.

(*e*) Tullett *v.* Armstrong, 1 Beav. 1; 4 Myl. & Cr. 390; Scarborough *v.* Borman, 1 Beav. 34; 4 Myl. & Cr. 377; Clive *v.* Carew, 1 Johns. & H. 199.

(*f*) Barton *v.* Briscoe, Jacob 603.

(*g*) Tullett *v.* Armstrong, ubi supra.

(*h*) Re Gaffee, 1 Macn. & G. 541.

(*i*) Acton *v.* White, 1 Sim. & Stu. 429.

(*k*) Ross's Trust, 1 Sim., N. S. 196.

(*l*) Brown *v.* Bamford, 1 Phil. 620; Moore *v.* Moore, 1 Coll. 54; Harrop *v.* Howard, 3 Hare 624; Harnett *v.* Macdougall, 8 Beav. 187; Field *v.* Evans, 15 Sim. 375; Baker *v.* Bradley, 7 De G., M. & G. 597; Goulder *v.* Camm, De G., F. & J. 146.

(*m*) *Ante*, p. 270.

(*n*) See Appendix B.

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[1] See *ante*, p. 284, note.

[2] A married woman having a power of appointment over real or personal estate, may dispose of it without the consent of her husband: Osgood *v.* Breed, 12 Mass. 532; Hoover *v.* The Samaritan Society, 4 Whart. 453; Towers *v.* Hagner, 3 Id. 48; Holman *v.* Perry et al., 4 Metc. 496; Bra-

Unhappy differences between husband and wife sometimes end in a separation. Such a state of things is not, however, encouraged by the

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dish *v.* Gibbs et al., 3 Johns. Ch. 536; Newlin *v.* Freeman et al., 1 Ired. 514; West *v.* West et al., 10 S. & R. 149; Barnes Lessee *v.* Irwin et al., 2 Dall. 201; Leigh, Admr., *v.* Smith et al., 3 Ired. Ch. 442; Wilkinson *v.* Wright, &c., 6 B. Mon. 577; Strong *v.* Wilkin et al., 1 Barb. Ch. 1; Moerhing *v.* Mitchell, &c., Id. 264; Robins *v.* Abrahams et al., 1 Halst. Ch. 465; Cruger *v.* Cruger, 5 Barb. 226; s. c. *nomine* Cruger *v.* Douglass, 4 Edw. Ch. 433; Ladd *v.* Ladd et al., 8 How. 10; Pollock *v.* Glassell, 2 Gratt. 439; Woodson *v.* Perkins, 5 Id. 351; Hicks, Exr., *v.* Cochran et al., Exrs., 4 Edw. Ch. 107; Am. Home Missionary Society *v.* Wadhams, 10 Barb. 604; Chapman *v.* Gray, Exr., 8 Geo. 341; Barton et al. *v.* Holly, 18 Ala. 408; Petty *v.* Mallier, 14 B. Mon. 246; Jackson *v.* West, 22 Md. 71. In the case of Thompson *v.* Murray, 2 Hill Ch. 214, it was said by O'Neall, J.: "Notwithstanding in general legal contemplation, the existence of the wife is merged in that of her husband during coverture, yet this rule is not of such universal application as to render every act of the wife void. . . . . A feme covert may execute any kind of power, whether simply collateral, appendant, or in gross, and *it is immaterial whether it was given to her while sole or married. The concurrence of the husband is in no case necessary.* . . . . . It may be well, however, to look at the manner in which an appointment operates, to show that no objection can in fact exist to an execution of it by a feme covert. The appointee is merely designated by the person making the appointment; his estate and rights are derived from the deed creating the power. . . . . This being the case, and the appointee taking nothing from the wife, but all from the person creating the power, there can be no reason to avoid her act on account of coverture, the disability of which, is intended both for the protection of her husband, and also for herself." Such powers will be good, though created by articles of agreement, made between husband and wife before coverture, without the intervention of a trustee, for "it is now no longer deemed necessary that the legal estate should be vested in trustees, to enable a feme covert to dispose of her estate in equity. A mere agreement, entered into before marriage with her husband, that she should have the power to dispose of her real and personal estate during coverture, will enable her to do so. Although such an agreement becomes extinguished, at law, by the subsequent marriage, yet equity supports it, and will compel the husband to perform it: Strong *v.* Skinner, 4 Barb. 552; Emery, Admr., *v.* Neighbour et al., 2 Halst. 142; Bradish *v.* Gibbs et al., 3 Johns. Ch. 536; Newlin *v.* Freeman et al., 1 Ired. 514; Barnes's Lessee *v.* Irwin et al., 2 Dall. 201; Resor *v.* Resor, 9 Ind. 347; and the cases referred to in the note to page 297, *ante.* And a feme covert may execute these appointments as well in favor of her husband as a stranger: Hoover *v.* The Samaritan Soc., 4 Whart. 453; Towers *v.* Hagner, 3 Id. 48; Bradish *v.* Gibbs, 3 Johns. Ch. 536; Dallam *v.* Wampole et al., Pet. C. C. 116; Jaques et al. *v.* The Trustees of the M. E. Church, 17 Johns. 548; Whitall *v.* Clark et al., 2 Edw. Ch. 159; Cruger *v.* Cruger, 5 Barb. 226; s. c. *nomine* Cruger *v.* Douglass et al., 4 Edw. Ch. 433; Gardner *v.* Gardner et al., 22 Wend. 526; Meriam *v.* Harsen et al., 4 Edw. Ch. 70; Imlay et al. *v.* Huntington et al., 20 Conn. 173; Converse *v.* Converse, 9 Rich. Eq. 535. As regards the formalities required to be observed in the execution of these powers, see Jackson *v.* Edwards, 7 Paige Ch. 402; Picquet *v.* Swan et al., 4 Mas. 461; Emery, Admr. *v.* Neighbour et al., 2 Halst. 142; Newlin *v.* Freeman et al., 1 Ired. 514; Leigh, Admr., *v.* Smith et al., 3 Ired. Ch. 442; Heath *v.* Withington, 6 Cush. 497.

It has been repeatedly decided, that a *feme covert* is, in respect to her separate estate, to be deemed a *feme sole:* Leaycraft

law. A clause in a marriage settlement providing for the event of a separation, has been considered to be void;(o) and so has a condition in

(o) Cocksedge *v.* Cocksedge, 14 Sim. 244; Cartwright *v.* Cartwright, 3 De G., M. & G. 982; H. *v.* W., 3 Kay & J. 382. See also Hindley *v.* Marquis of Westmeath, 6 B. & C. 200 (E. C. L. R. vol. 13); Merryweather *v.* Jones, 4 Giff. 499.

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v. Hedden, 3 Green Ch. 512; N. A. Coal Co. *v.* Dyott, 7 Paige Ch. 1; s. c. 20 Wend. 570; Virouneau *v.* Pegram, 2 Leigh 183; Williamson *v.* Beckham, 8 Id. 20; Cumming et al. *v.* Williamson et al., 1 Sandf. Ch. 17; Martin *v.* Dwelly et al., 6 Wend. 1; McCroan et al. *v.* Pope et al., 17 Ala. 612; Albin *v.* Lord, 39 N. H. 196; Gibson *v.* Walker, 20 N. Y. 476; Cooke *v.* Husbands, 11 Md. 492; Marten *v.* Bebo, 6 Florida 381; and this is no doubt true where her separate estate is without qualification, limitation or restriction, as to its use and enjoyment: Dallas *v.* Heard, 32 Geo. 604; but the placing of the property of a married woman, by statute, under her sole control, and to be held, owned, possessed and enjoyed as if she were unmarried, does not authorize her to dispose of it in any other mode than that which the statute conferring the power of limitation requires: Scovil *v.* Kelsey, 46 Ill. 344; Philbrooks *v.* McEwen, 29 Ind. 397; Bartlett *v.* Fleming, 3 W. Va. 163; Nichols *v.* Gorden, 25 Texas 109; Graham *v.* Long, 65 Penn. St. 383. There is considerable variance among the decisions, as to the extent of her ability to dispose of her estate under a power, some holding that she may grant or devise in any manner not expressly negatived in the instrument creating the power; and others maintaining that she can only exercise those powers expressly given, and in the manner pointed out, and not otherwise. The weight of authority is decidedly in favor of the latter doctrine; thus in Pennsylvania, although in the case of Newlin et al., Exrs., *v.* Newlin, 1 S. & R. 274, it was held, "that if a man devise his real estate to trustees to raise a sum of money, which when raised, they are to put out at interest, for the sole and separate use of his daughter, a *feme covert*, who is to receive the interest annually, and whose receipt is to be a discharge, she may release her interest, though no express power of appointment be given in the will;" yet, that decision has been overruled, and there is no question that it is now the law of that state, "that instead of having every power from which she is not negatively debarred in the conveyance, she will be deemed to have none but what is positively given or reserved to her:" Thomas *v.* Folwell et al., 2 Whart. 11; Lancaster *v.* Dolan, 1 Rawle 231; Rogers *v.* Smith, 4 Penn. St. 93; Lyne's Exr. *v.* Crouse et al., 1 Id. 114; Dorrance *v.* Scott, 3 Whart. 316; Wallace *v.* Costen, 9 Watts 137; Estate of Wagner, 2 Ash. 448; Wright *v.* Brown et ux., 44 Penn. St. 224; Penna. Co. *v.* Foster, 35 Id. 134.

The law of Tennessee, Kentucky, South Carolina, Alabama, Georgia, Illinois, Mississippi, and Maryland, is similar to that of Pennsylvania, as will be seen from the following cases, which agree in principle with the Pennsylvania decisions: Morgan *v.* Elam et al., 4 Yerg. 375; Litton *v.* Baldwin et al., 8 Humph. 209; Ware et al. *v.* Sharpe, 1 Swan 489; Calhoun *v.* Calhoun et al., 2 Strobh. Eq. 231; Ewing et al. *v.* Smith et al., 3 Desauss. 456; Reid *v.* Lamar, 1 Strobh. Eq. 27; Maywood et al. *v.* Johnston et al., 1 Hill Ch. 230; Clark *v.* Makenna, Cheeve Eq. 163; Doty et al. *v.* Mitchell, 9 Sm. & M. 435; Montgomery et al. *v.* The Agricultural Bank, 10 Id. 566; Wylly et al. *v.* Collins & Co., 9 Geo. 237; Weeks *v.* Sago, Admr., 9 Id. 199; Tarr et al. *v.* Williams, 4 Md. Ch. Decs. 68; Williams *v.* Donaldson et al., Id. 414; Miller et al. *v.* Williamson et al., 5 Md. 220; Swift *v.* Castle, 23 Ill. 209; Fletcher *v.* Coleman, 2 Head 384; Hoyle *v.* Smith, 1 Id 90; Andrews *v.* Jones, 32 Miss. 274; Hahn *v.* Prudell, 1 Bush 538; Schlosser's Ap., 58 Penn. St. 493.

In the State of New York, so long ago

a gift of personal estate to a woman living apart from her husband, that the gift shall cease in case she should cohabit with him.(p) It is how-

(p) Wren v. Bradley, 2 De G. & Sm. 49.

as the case of The Trustees of the M. E. Church v. Jaques et al., 3 Johns. Ch. 77, it was decided by Chancellor Kent, that a "*feme covert*, with respect to her separate property, is to be considered as a *feme sole*, to the extent only of the power given to her by the marriage settlement. Her power of disposition is not absolute, but *sub modo*, to be exercised according to the mode prescribed in the deed or will, under which she becomes entitled to the property. Therefore, if she has a power of appointment by *will*, she cannot appoint by *deed*, or where she is empowered to appoint by *deed*, the giving a bond, or note, or a parol promise, without reference to the property, or making a parol gift of it, is not such an appointment." But that decision was reversed in Jacques et al. v. The Trustees of the M. E. Church, 17 Johns. 548, where it was held, that "though a particular mode of disposition be specifically pointed out, in the instrument, or deed of settlement, it will not preclude her adopting any other mode of disposition, unless there are *negative* words restraining her power of disposition, except in the very mode so pointed out; and this still continues to be the law in that state: The Firemen's Insurance Co. of Albany v. Bay, 4 Barb. 413; s. c. 4 Comst. 9; Knowles et al. v. McCamly et al., 10 Paige 342; Strong v. Skinner, 4 Barb. 552; Gardner v. Gardner et al., 22 Wend. 526; although the doctrine has been somewhat modified by the enactment of the Revised Statutes, since which, " where real estate is settled to a married woman's separate use, neither the estate, nor the rents and profits, can be charged for any debt or liability, created or imposed upon it by her. It is no longer *her estate*. The whole estate is in the trustees, and her interest inalienable;" Noyes v. Blakeman, 3 Sandf. 531; L'Amoreaux v. Van Rensselaer et al., 1 Barb. Ch. 34; Rogers v. Ludlow et al., 3 Sandf. Ch. 104. See also, Wadhams v. American Home Missionary Society, 2 Kernan 415.

In Connecticut, it was said by Storrs, J., in the case of Imlay et al. v. Huntington et al. 20 Conn. 173: "The principle is established, by the decided weight of authorities in this country, in accordance with what is now universally conceded to be the established doctrine in England, that an ante-nuptial settlement, by a woman, of her property, to her separate use after marriage, gives her, in equity, the full power of disposing of such property, by any suitable act or mode of conveyance, in the same manner, and to the same extent, as if she were a *feme sole*, excepting so far as there is some expressed or implied restriction upon such power of disposition, in the instrument of settlement, and that no such restriction is implied, from the circumstance that it is provided in such settlement, that she may dispose of it any particular mode therein pointed out; but that such provision must either expressly, or by necessary implication, exclude any other mode of disposition, in order to constitute such a restriction." The same has been held also in North Carolina, Missouri and Virginia: Claffin v. Van Wagoner, 32 Mo. 352; Penn v. Whitehead, 17 Gratt. 503; Harris et al. v. Harris et al., 7 Ired. Eq. 111.

As to the manner in which a married woman may charge her separate estate, for the debts of herself or her husband, see Conn et al. v. Conn et al., 1 Md. Ch. Decs. 212; Price et al. v. Bigham's Exrs., 7 H. & Johns. 296; Tiernan v. Poor et al., 1 Gill & Johns. 216; Frazier et al. v. Brownlow et al., 3 Ired. Eq. 237; Boarman v. Groves, 23 Miss. 380; Cherry v. Clements, 10 Humph. 552; Greenough v. Wiggington, 2 Green 435; Bradford v. Greenway et al., 17 Ala. 797; Coats et al. v. Robinson et al., 10 Miss. 760; Forrest et al. v. Robinson, Exr., 4 Port. 44; Sadler

ever clear, that a deed making provision for an immediate separation between husband and wife is not void for illegality,(q) and any infringement of the covenants contained in it will be restrained by the injunction of the Court of Chancery.(r) One of the usual provisions of a deed of separation is, a covenant on the part of some friend of the wife's to indemnify the husband against any debts she may incur whilst living apart. Such a covenant is a valuable consideration for any settlement which the husband may make for the benefit of his wife, and places such settlement on the same footing as any other alienation made for valuable consideration.(s) But if there be no such covenant, nor any other valuable consideration,(t) a settlement made by a husband on separating from his wife stands in the same position as any other voluntary deed;(u) and, though binding on himself, may not be [*388] *binding on his creditors.(x) The circumstance of voluntary separation gives to the wife no further power of disposition over property than she possessed whilst living with her husband.(y) Accordingly she will not, should she

(q) Jones v. Waite, 4 Man. & Gr. 1104 (E. C. L. R. vol. 43.)
(r) Sanders v. Rodway, 16 Beav. 207.
(s) Stephens v. Olive, 2 Bro. C. C. 90; Worrall v. Jacob, 3 Meriv. 256, 269.
(t) See Wilson v. Wilson, 14 Sim. 405; 1 H. of L. Cas. 538.
(u) See *ante*, pp. 297, 298.
(x) Fitzer v. Fitzer, 2 Atk. 511; Clough v. Lambert, 10 Sim. 174.
(y) Lord St. John v. Lady St. John, 11 Ves. 531.

et al. v. Houston et al., Id. 208; Heugh v. Jones, 32 Penn. St. 432; Hall v. Faust, 9 Rich. Eq. 294; Marshall v. Miller, 3 Metc. (Ky.) 333; Hubble v. Wright, 23 Ind. 322; Wolff v. Van Metre, 19 Iowa 134; Lippincott v. Hopkins, 57 Penn. St. 328.

A distinction is to be noted between real and personal property of the wife, as regards the ability of the husband to consent to her making disposal thereof; thus, "A husband may waive the interest which the law gives him in his wife's estate, and empower her to dispose of her personal estate by will; and his assent alone, to a bequest by her of money or chattels, will make it valid; but as to the real estate of the wife, the rule is different; and his assent cannot cause that to be a lawful conveyance of her estate, which, by the general rules of law, would not be so." Estate of Wagner, 2 Ash. 448; West v. West et al., 10 S. & R. 149; Grimke v. Exrs. of Grimke, 1 Desauss. 366; Exrs. of Smelie v. Reynolds et al., Exrs., 2 Id. 66; Starret v. Wynn et al., 17 S. & R. 130; Butler et al. v. Buckingham, 5 Day 492; Barton et al. v. Holly, 18 Ala. 408; Townsley v. Chapin, 12 Allen 476; Dunham v. Wright, 53 Penn. St. 167; Ezelle v. Parker, 41 Miss. 520; but where the husband is sole heir of the wife, he may also consent to her disposal of the realty: Wagner v. Ellis, 7 Penn. St. 411.

In New Hampshire, New York, Pennsylvania, and several other states, a *feme covert* is empowered, by statute, to make a will of her real or personal estate. In the latter state, the wording of the act is as follows: "Any married woman may dispose, by her last will and testament, of her separate property, real, personal or mixed, whether the same accrues to her before or during coverture; provided, that said last will and testament be executed in the presence of two or more witnesses, neither of whom shall be her husband." Purd. Dig. (1861), p. 1016.

survive her husband, be bound by any disposition of her personal estate made on the separation, which her husband would have been unable to make, without her concurrence, had no separation taken place.(*z*) If after separation the parties become reconciled,(*a*) or if a restitution of conjugal rights be decreed by the Court for Divorce and Matrimonial Causes,(*b*) the provisions of the deed of separation will thenceforth become inoperative.

In the event of separation, the custody of the infant children belongs by law to the father as the natural guardian.(*c*) And it has been decided that he is incompetent to relinquish a duty thrown upon him by the law, and that, therefore, a covenant on his part to give up the children to the care of their mother is illegal.(*d*) If, however, the conduct of the father should be such that the children would be exposed to cruelty or gross corruption of morals from being left in his custody, the law will deprive him of a charge for which he has shown himself totally unfit.(*e*)[1]

(*z*) Stamper *v.* Barker, 5 Madd. 157; Slatter *v.* Slatter, 1 You. & Col. 28.

(*a*) Bateman *v.* Ross, 1 Dow 235, 245; Lord St. John *v.* Lady St. John, 11 Ves. 537; Wilson *v.* Wilson, 15 Sim. 487, 500; 1 H. of L. Cas. 538. See, however, Hulme *v.* Chitty, 9 Beav. 437.

(*b*) Fletcher *v.* Fletcher, 2 Cox 99; stat. 20 & 21 Vict. c. 85.

(*c*) Co. Litt. 88 b, n. (12); Rex *v.* Sherrington, 3 B. & Ad. 714 (E. C. L. R. vol. 23).

(*d*) Lord St. John *v.* Lady St. John, 11 Ves. 531; Vansittart *v.* Vansittart, 4 Kay & J. 62; 2 De G. & J. 249; Hope *v.* Hope, 22 Beav. 351; 3 Jur. N. S. 454, Lords Just.; Walrond *v.* Walrond, 1 John. 18.

(*e*) Cruise *v.* Hunter, 2 Bro. C. C. 400; Wellesley *v.* Duke of Beaufort, 2 Russ. 1; Rex *v.* Greenhill, 4 Ad. & E. 624 (E. C. L. R. vol. 31); Swift *v.* Swift, L. J. 11 Jur. N. S. 458; 34 Law Journ. Chancery 394.

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[1] In the case of The United States *v.* Green, 3 Mas. 485, Judge Story, speaking of this subject, says: "As to the question of the right of the father to have the custody of his infant child, in a general sense it is true. But this is not on account of any absolute right of the father, but for the benefit of the infant, the law presuming it to be for its interest, to be under the nurture and care of his natural protector, both for maintenance and education. When, therefore, the court is asked to lend its aid, to put the infant into the custody of the father, and to withdraw him from other persons, it will look into all the circumstances, and ascertain whether it will be for the real, permanent interests of the infant; and if the infant be of sufficient discretion, it will also consult his personal wishes. It will free it from all undue restraint, and endeavor, as far as possible, to administer a conscientious, parental duty, with reference to its welfare. It is an entire mistake to suppose, that the court is at all events bound to deliver over the infant to his father, or that the latter has an absolute vested right in the custody."

The principles contained in this decision, are well supported by the authorities, for the father is, in general, entitled to the custody of his child: Commonwealth *v.* Nutt, 2 Brown 143; In the matter of Mitchell, R. M. Charlton 489; Ahrenfelt *v.* Ahrenfelt, 1 Hoff. Ch. 497; s. c. 4 Sandf. Ch. 493; The People *v.* Mercien, 8 Paige Ch. 47; s. c. 25 Wend. 64, and 3

[*389] And by a modern act of *parliament,(f) power is given to the judges of the Court of Chancery(g) upon the petition of the

(f) Stat. 2 & 3 Vict. c. 54; Ex parte Bartlett, 2 Coll. 661.
(g) In re Taylor, 10 Sim. 291.

Hill 400; The People v. Chegaray et al., 18 Wend. 637; The People v. ———, 19 Id. 16; In the matter of Kottman, 2 Hill (S. C.) 363; The State v. Paine, 4 Humph. 523; Miner v. Miner, 11 Ill. 48; The State v. Stigall et al., 2 Zabr. 286; Tarkington et al. v. The State, 1 Cart. 171; Valentine v. Valentine, 2 Halst. Ch. 219; Ex parte Schumpert, 6 Rich. 344; The Commonwealth v. Sear (D'Hauteville Case), Pamph. 1840, Philadelphia; People v. Olmsted, 27 Barb. 9; Ex parte Hewitt, 11 Rich. 326; State v. Banks, 25 Ind. 495; Johnson v. Terry, 34 Conn. 259; and his parental rights to the custody of his infant child may be transferred by deed: State v. Barrett, 45 N. H. 15; yet courts of justice may control his right, when the safety or interests of the child imperiously require it: In the matter of Mitchell, R. M. Charlton 489; The People v. Chegaray et al., 18 Wend. 637; Cowls v. Cowls, 3 Gilm. 440; Miner v. Miner, 11 Ill. 48; Cornelius v. Cornelius, 31 Ala. 479; Lusk v. Lusk, 28 Mo. 91; and though the courts will not lightly exercise this authority: Bryan v. Bryan, 34 Ala. 516; yet the interest of the child is the leading if not the paramount consideration: Wand v. Wand, 14 Cal. 512.

Thus, in cases of tender infancy, the custody of the children may be given to the mother in preference to the father: Ahrenfeldt v. Ahrenfeldt, 1 Hoff. Ch. 497; s. c. 4 Sandf. Ch. 493; Prather v. Prather, 4 Desauss. 33; The State v. Smith, 6 Greenl. 462; The State v. Paine, 4 Humph. 523; Cowls v. Cowls, 3 Gilm. 440; The State v. Stigall et al., 2 Zabr. 286; Valentine v. Valentine, 4 Halst. Ch. 219; Ex parte Schumpert, 6 Rich. 344; Commonwealth v. Sears (D'Hauteville Case), Pamph. 1840, Philadelphia; Levering v. Levering, 16 Md. 213. In the Commonwealth v. Addicks, 5 Binn. 520, the court gave the custody of two female children, one of ten and the other of seven years of age, to the mother, notwithstanding her husband had been divorced from her for her adultery; and, three years subsequently, delivered them to the care of their father, "the children no longer requiring those attentions which a mother alone can properly bestow, and having arrived at an age when their morals were likely to be injured by bad example:" Commonwealth v. Addicks et al., 2 S. & R. 174; Mercein v. The People, 25 Wend. 64, and s. c. 3 Hill 400; People v. Humphreys, 24 Barb. 521; and this has been done even where it was shown that the temper of the wife was high and imperious, the proof also showing her affection for the child, and her proper care of it, and that the exciting cause of her temper was the conduct of the children of her husband by a former wife: Demott v. Commonwealth, 64 Penn. St. 305; and female children, of somewhat advanced age, have sometimes been held to require the society and sympathy of their mother, as was held in Miner v. Miner, 11 Ill. 48, where Caston, J., says, "An infant of tender years is generally left with the mother (if no objection to her is shown to exist), even when the father is without blame, merely because of his inability to bestow upon it that tender care which nature requires, and which it is the peculiar province of the mother to supply. This remark will apply with much force, in cases of female children of a more advanced age. While the affections of parents for daughters may be equal, yet the mother, from her natural endowments, her position in society, and her constant association with them, can give them that care, attention and advice, so indispensable to their welfare, which a father, if the same children were left to his supervision, would be compelled, in a great degree, to confide to strangers." So, where the father is leading a grossly immoral life, and the mother

mother of any infant, being in the sole custody of the father, or of any person by his authority, or of any guardian after the death of the father,

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is a virtuous woman, she shall have the care and control of the children: Williams *v.* Williams, 4 Desauss. 183; The People *v.* ———, 19 Wend. 16; State *v.* Baird, 3 Green 194; Cole *v.* Cole, 23 Iowa 433; or if the father maltreats the children, or seeks to maintain possession of them for an ill purpose, he may be deprived of their company: The People *v.* ———, 19 Wend. 16; In the matter of Kottman, 2 Hill (S. C.) 363; Codd *v.* Codd, 2 Johns. Ch. 141; and in a case where a child lived with its maternal grandfather, the mother being dead, and this was the only grandchild, the grandfather being rich, the court refused to give the custody of the child to the father, who was insolvent, although the paternal grandmother was able and willing to maintain it; upon the ground that the child's future prospects might be injured by such a decree: In the matter of Waldron, 13 Johns. 418; and the court will give the custody to the mother, wherever from the relative habits and situation of the parents, it appears most beneficial to the child to do so: 1 Bush. 15; it seems, also, that a father will not be allowed to keep his child if he cannot support it: The People *v.* ———, 19 Wend. 16; but in Sandford *v.* Lebanon, 31 Maine 124, it was decided, that, although, from the inability of a father to support his children, they had been in the care of the overseers of the poor, as paupers, he did not, thereby, lose his right to have the custody of them; but where the custody of a child was awarded to the mother, it was held, in the absence of evidence to the contrary, at least to relieve the father from the obligation to furnish support upon the call of the mother: Burritt *v.* Burritt, 29 Barb. 124. In the State of Pennsylvania, if a father cannot command or control his children, they may be sent to the House of Refuge: Ex parte Crouse, 4 Whart. 9. The above doctrines do not, however, apply to a stepfather, who is neither entitled to the custody of his wife's children, nor liable for their support: Williams *v.* Hutchinson, 3 Comst. 312.

After the father, the mother is, by law, entitled to the custody of the children: Dedham *v.* Nantick, 16 Mass. 135; Nightingale *v.* Withington, 15 Id. 272; Miner *v.* Miner, 11 Ill. 48; The Commonwealth *v.* Fee, 6 S. & R. 254; Armstrong *v.* Stone, 9 Gratt. 102; and this is the case, even where there is a testamentary guardian: People *v.* Boice, 39 Barb. 307; and they will not be removed from her custody, on the ground that she lives with a second husband, who is profane and of exceptionable morals, where the children are in other respects properly cared for: Striplin *v.* Ware, 36 Ala. 87; but she may vest this right in another, when for the children's good: Dumain *v.* Gwynne, 10 Allen 270; Foster *v.* Alston, 6 How. (Miss.) 406. Where, however, both father and mother are persons of immoral character, the court may, in a dispute between them, order a child to be taken care of by some third person: The Commonwealth *v.* Nutt, 1 Browne 143; Adams *v.* Adams, 1 Duvall 167.

In New York, in cases of separation, or divorce, of man and wife, the court is, by statute, gifted with a discretionary power of determining who shall have the child, or children, of the marriage. In Ahrenfeldt *v.* Ahrenfeldt, 1 Hoff. Ch. 497, s. c. 4 Sandf. Ch. 493, the vice-chancellor, in commenting upon this statute, says: "The language of the present act is, that in any suit brought by a married woman for divorce, or for a separation from her husband, the court may, during the pendency of the cause, or at its final hearing, or afterwards, as occasion may require, make such order as between the parties, for the custody, care, and education of the children of the marriage, as may seem necessary and proper, and may vary and annul the same." 2 Rev. Stats. 148, sec. 59. "I look upon this statute, especially where a decree has been pronounced for a separa-

to make order for the access of the petitioner to such infant, at such time and subject to such regulations as shall be deemed convenient and just; and, if such infant shall be within the age of seven years, to made order that such infant shall be delivered to and remain in the custody of the petitioner until attaining such age, subject to such regulation as shall be deemed convenient and just. If adultery had been established against the mother, no order can be made in her favor under this act.(*h*)

The jurisdiction anciently possessed by the ecclesiastical courts over matrimonial causes has been transferred to a new court called the Court

(*h*) Stat. 2 & 3 Vict. c. 54, s. 4.

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tion, as neutralizing the rule of the common law; as annulling the superiority of the *patriæ potestas*, and placing the parents upon an equality as to the future custody of the children, even if it does not create a presumption in favor of the wife. And this is the case, because no decree for a separation can be pronounced, without evidence of such a violation of duty, in one relation of life, as implies a probability of the disregard of every other. . . . . Under our statute, this court might make the children wards of the court, appointing a guardian of their persons and estates, and regulating the right of access of both parents. It seems, however, that this power will be exercised, only in cases of a separation of husband and wife by judicial decree, or by mutual consent; and not where the wife, of her own accord, without justifiable cause, withdraws herself from the protection of her husband:" The People *v.* ———, 19 Wend. 16. And see Barrere *v.* Barrere, 4 Johns. Ch. 187; Cooke *v.* Cooke, 1 Barb. Ch. 639; People *v.* Brooks, 35 Barb. 85. Similar statutes exist in the States of Illinois, Indiana and Iowa: Miner *v.* Miner, 11 Ill. 98; Tarkington *v.* The State, 1 Cart. 171. And see also on this subject, Hoffman *v.* Hoffman, 15 Ohio St. 427; Rice *v.* Rice, 21 Texas 58; Hunt *v.* Hunt, 4 Greene 216.

It would seem, also, that an agreement between parents, upon a separation, as to the custody of their children, is void. This question was raised in Mercein *v.* The People, 25 Wend. 64, and was subsequently decided in the negative, in the same case, reported in 3 Hill 400. The more recent suit of Cook *v.* Cook, 1 Barb. Ch. 639, decided, that such an agreement can have no effect upon the discretion of the court, under the New York statute. The State *v.* Smith, 6 Greenl. 462, leans to the other side, but is not decisive.

The writ of *habeas corpus*, is for the purpose of relieving a person from an unlawful restraint; consequently, on such a writ, the court will not, in general, determine who is entitled to the guardianship of the child, but will release him from illegal confinement: In the matter of McDowles, 8 Johns. 328; In the matter of Wollstonecraft, 4 Johns. Ch. 80; Ex parte Schumpert, 6 Rich. 344; Armstrong *v.* Stone, 9 Gratt. 102; Nicholls *v.* Nicholls, 3 Duer 642; and the child, being of sufficient age, will thus be allowed to go where he chooses: In the matter of McDowles, 8 Johns. 328; In the matter of Wollstonecraft, 4 Johns. Ch. 80; In the matter of Kottman, 2 Hill (S. C.) 363; The Commonwealth *v.* Hamilton, 6 Mass. 273; The State *v.* Stigall et al., 2 Zabr. 286; Ex parte Schumpert, 6 Richard. 344; Armstrong *v.* Stone, 9 Gratt. 102; but if the child is not of sufficient age to decide for itself, the court will determine what is for its interest. See cases just cited, and State *v.* Libbey, 44 N. H. 321; In re Goodenough, 19 Wis. 274; Demott *v.* Commonwealth, 64 Penn. St. 305.

for Divorce and Matrimonial Causes, which has been established since the eleventh of January, 1858.(*i*) Instead of the ancient degree for a divorce à mensâ et thoro, a decree for a judicial separation has been substituted, which has the same force and consequences.(*k*) The very doubtful benefit formerly enjoyed only by the richer classes of obtaining by act of parliament a dissolution of the marriage with liberty to marry again, is now extended to all persons by petition to the court.(*l*) A beneficial provision has however been inserted empowering a woman, who has been deserted by her husband, to apply to a magistrate or to the court or the judge ordinary *thereof, for an order to protect any money or property she may acquire by her own lawful industry, [*390] and property which she may become possessed of after such desertion, against her husband or his creditors; and in such case her earnings and her property, whether held beneficially or as executrix, administratrix or trustee, and whether in possession or reversion, will belong to herself as if she were a feme sole.(*m*) In every case of a decree either for judicial separation or for the dissolution of the marriage, the court has power to order the husband to secure to the wife for her life a separate maintenance under the name of alimony, either by annual, monthly or weekly payments.(*n*) And in every case of a judicial separation the wife is, from the date of the sentence and whilst separated, to be considered as a feme sole with respect to her property, whether held beneficially or as executrix, administratrix or trustee, and also for the purposes of contract, and wrongs and injuries, and suing and being sued in any civil proceeding; and her property may be disposed of by her in all respects as a feme sole; and on her decease the same will, in case she shall die intestate, go as it would have gone if her husband had then been dead.(*o*) If, however, alimony has been ordered to be paid to the wife, and the same shall not be duly paid by the husband, he will be liable for necessaries supplied for her use. But the wife may, during such separation, join with the husband in the exercise of any joint power given to herself and him.(*p*) And if the wife should again cohabit with her husband, all such property as she may be entitled to when such cohabitation shall take

(*i*) Stat. 20 & 21 Vict. c. 85, amended by stats 21 & 22 Vict. c. 108; 22 & 23 Vict. c. 61.

(*k*) Stat. 20 & 21 Vict. c. 85, s. 7. (*l*) Sects. 27, 57.

(*m*) Stat. 20 & 21 Vict. c. 85, s. 21, amended by stat. 27 & 28 Vict. c. 44; 21 & 22 Vict. c. 108, ss. 6, 7, 8, 9, 10; Re Kingsley's Trust, 26 Beav. 84; Cook *v.* Fuller, 26 Beav. 99; Re Whittingham, V.-C. W., 10 Jur. N. S. 818.

(*n*) Stats. 20 & 21 Vict. c. 85, ss. 24, 32; 29 Vict. c. 32.

(*o*) Stat. 20 & 21 Vict. c. 85, ss. 25, 26; 21 & 22 Vict. c. 108, s. 7; Re Insole, 35 Beav. 92.

(*p*) Stat. 20 & 21 Vict. c. 85, s. 26.

[*391] place, shall be held to *her separate use, subject, however, to any agreement in writing made between herself and her husband whilst separate.(q) In every case of a suit for judicial separation or for nullity or dissolution of marriage, the court or the judge ordinary is empowered either before or after its final decree, to make provision with respect to the custody, maintenance and education of the children of the marriage, or for placing the children under the protection of the Court of Chancery.(r) Whenever the court shall pronounce a sentence of divorce or judicial separation for adultery of the wife, it has power to order a settlement to be made of her property, whether in possession or reversion, for the benefit of the innocent party and the children of the marriage, or either or any of them.(s) And any instrument executed pursuant to any order of the court made under this enactment, at the time of or after the pronouncing of a final decree of divorce or judicial separation, shall be deemed valid and effectual in the law, notwithstanding the existence of the disability of coverture at the time of the execution thereof.(t) And after a decree of nullity or dissolution of marriage, the court may inquire into the existence of antenuptial or postnuptial settlements made on the parties whose marriage is the subject of the decree, and may make such order with reference to the application of the whole or a portion of the property settled, either for the benefit of the children of the marriage or of their respective parents, as to the court shall seem fit.(u) But this provision does not appear to apply if there be no child of the marriage living at the date of the order.(x)

[*392] *A comparison of the laws of husband and wife relating to real estate, with those which affect personal property, will show a great discrepancy between them. Historically, no doubt, this discrepancy is easily accounted for; but practically, as things now exist, it is not so easy to give a satisfactory reason for the difference. Since the intended amendment of the law relating to dower, the wife's rights in her husband's real estate have, for the satisfaction of conveyancers, been reduced to as low a level as her rights in his personalty. But the husband's rights in his wife's property still materially vary, according as it may happen to be invested in real or in personal estate. If it consist of real estate, he has only a life interest as tenant by the curtesy,

(q) Stat. 20 & 21 Vict. c. 85, s. 25. (r) Sect. 35; 22 & 23 Vict. c. 61, s. 4.

(s) Sect. 45.

(t) Stat. 23 & 24 Vict. c. 144, s. 6, made perpetual by stat. 25 & 26 Vict. c. 81.

(u) Stat. 22 & 23 Vict. c. 61, s. 5.

(x) Thomas *v.* Thomas, 2 Sw. & Tr. 89; Corrance *v.* Corrance, 16 W. R. 893; Law Rep. 1 P. & D. 495; Graham *v.* Graham, 17 W. R. 628.

provided he has issue by his wife born alive, who might by possibility inherit as her heir.(*y*) If it be personal estate, he has a right to appropriate to himself all that he can lay hands on. Again, the real estate of the wife is guarded from alienation by the most careful provisions. Formerly the fictitious and cumbersome machinery of a *fine* was requisite; and now every conveyance of her real estate must be not only signed by her, but also *acknowledged* by her before commissioners, apart from her husband, as her own act and deed.(*z*)[1] Recently the same principle has been applied to the release of her equity to a settlement, and to the assignment of her reversionary interests.(*a*) But, in all cases not within the act for these purposes, the assignment of her personal estate, if made at all, can only be made by her husband; and her concurrence or objection is quite immaterial. When personal estate consists of mere movable articles, the nature of the *property no doubt [*393] affords a sufficient reason for the difference between the laws which dispose of it, and those which regulate estates in fixed and immovable landed property. But when personalty assumes the form of such solid investments as mortgages or consols, when it becomes like land disposable by deed rather than by delivery, the laws which affect it should rather depend on its present nature than on its past history. It seems hardly fair that a married woman should have no voice in the disposition of property of this kind belonging to herself. At the same time, the present system of taking her acknowledgment on a conveyance of her real estate is often found to be a burdensome expense without any practical benefit. For if a husband can persuade his wife to sign a deed, he can easily prevail on her to make an acknowledgment before two commissioners, notwithstanding that during the two minutes which the transaction lasts she may remain "separate and apart" from him. If, whenever the wife's property of any kind should be alienated by deed, her signature were necessary, but her separate examination were dispensed with, the law both of personal and real estate would perhaps be improved.

(*y*) See Principles of the Law of Real Property 167, 1st ed.; 177, 2d ed.; 184, 3d ed.; 185, 4th ed.; 193, 5th ed.; 203, 6th ed.; 209, 7th ed.; 218, 8th ed.

(*z*) Ibid. 171, 1st ed.; 181, 2d ed.; 188, 3d ed.; 189, 4th ed.; 197, 5th ed.; 207, 6th ed.; 213, 7th ed.; 222, 8th ed.

(*a*) Stat. 20 & 21 Vict. c. 57; *ante* p. 379.

[1] In general, throughout the United States, the acknowledgment of a married woman to a deed conveying her real estate, is to be taken separate and apart from her husband, by a judge, commissioner, alderman, notary or justice of the peace, as the case may be. The method in which this is to be done, is pointed out with precision in the statutes of each State.

The Court of Chancery, by the establishment of trusts for separate use, and by giving the wife an equity to a settlement of part of her personal property when claimed through the medium of that court, has done much to mitigate the simple rigor of the common law. Trusts for separate use are now, after much wavering, firmly settled, it is to be hoped, into a system according both with the interests of the community and the general principles of the law. Such trusts, however, generally require to be established by deed or will, and are very seldom implied. And the wife cannot assert her equity to a settlement without taking the serious step of making an application to the Court of Chancery. The theory of that court certainly *is, that its assistance is free and open to everybody, and that those who neglect to avail themselves of its aid suffer by their own fault. Experience, however, is too apt to suggest that the remedy may sometimes prove worse than the disease.

[*394]

*PART V. [*395]

OF TITLE.

THE title to personal estate varies according as it may consist of money or negotiable securities, or of ordinary choses in possession, or of choses in action.

And, first, with regard to money or negotiable securities, no title at all is required to be shown by the payer in any *bonâ fide* transaction. Thus, if a sovereign or a bank note be offered in payment of a debt, it is no part of the duty of the creditor, under ordinary circumstances, to ask the debtor how he came by it. The reason of this rule is founded on the currency of the articles in question, and on the great inconvenience to trade and commerce which would ensue if the rule were otherwise.(*a*) And the rule applies to all negotiable securities, that is, to all instruments the delivery of which passes the legal right to the property secured by them. Promissory notes and bills of exchange payable to bearer, or payable to order, and endorsed in blank, are accordingly within the rule.(*b*) But if there be any *mala fides* on the part of the person receiving any money or negotiable security, or such gross negligence as may amount in itself to evidence of *mala fides*, the true owner may recover such property, provided its identity can be ascertained.(*c*)[1] A

(*a*) Miller *v.* Race, 1 Burr. 452; 1 Smith's Leading Cas. 250.

(*b*) Grant *v.* Vaughan, 3 Burr. 1516; Peacock *v.* Rhodes, 2 Doug. 333; see *ante*, p. 85.

(*c*) Clarke *v.* Shee, Cowp. 197; Foster *v.* Pearson, 1 C. M. & R. 849; s. c. 5 Tyrw. 255; Goodman *v.* Harvey, 4 Ad. & E. 870 (E. C. L. R. vol. 31).

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[1] See Mauran *v.* Lamb, 7 Cowen 174; Pearce *v.* Austin, 4 Wheat. 489; Barbarin *v.* Daniels, 7 La. 481; Denton *v.* Duplessis, 12 Id. 92; Hill *v.* Holmes, Id. 96; Cruger *v.* Armstrong, 3 Johns. Cas. 5; Conroy *v.* Warren, Id. 259; Thurston *v.* McKown, 6 Mass. 428; Wheeler *v.* Guild, 20 Pick. 545; Aldrich *v.* Warren, 16 Maine 465; Lapice *v.* Clifton, 17 La. 152; Munroe *v.* Cooper, 5 Pick. 412; Story on Bills 215; Story on Promissory Notes 465, 469, 470; Hoffman *v.* Foster & Co., 43 Penn. St. 137; Paulette *v.* Brown, 40 Misso. 52; Benior *v.* Paquin, 40 Vt. 199; Turnbull *v.* Bou-

[*396] delivery order does not of itself pass *the property in the goods mentioned in it; it is therefore not a negotiable security within the rule above mentioned; and the transferee is accordingly bound to inquire into the title of the transferor.(*d*)

With regard to ordinary choses in possession, a valid title to them is generally obtained by a purchase in an open market, or *market overt*, although no property may have been possessed by the vendor.(*e*)[1] And

(*d*) Kingsford *v.* Merry, 1 H. & N. 503.

(*e*) 2 Black. Com. 449.

yer, 2 Rob. (N. Y.) 406; Winstead *v.* Davis, 40 Miss. 785; Lane *v.* Krekle, 22 Iowa 399; Belmont Branch Bank *v.* Hoge, 35 N. Y. 65. Where strong circumstances of fraud in the origin of the instrument have been shown, the holder should show that he gave value for it: Smith *v.* Sac County, 11 Wallace (U. S.) 139. Not having paid a fair and reasonable price, is evidence of *mala fides:* Baily *v.* Smith, 14 Ohio St. 396; De Witt *v.* Perkins, 22 Wis. 473; although not conclusive: Brown *v.* Penfield, 36 N. Y. 473; but in the absence of all proof, good faith and a consideration given will be presumed: Lathrop *v.* Donaldson, 22 Iowa 234. The doctrine, that possession carries with it the evidence of property, so as to protect a person acquiring it in the usual course of trade, is limited to cash, bank bills, and bills payable to bearer: Saltus et al. *v.* Everett, 20 Wend. 268; and the securities commonly called coupon bonds. See, also, County of Beaver *v.* Armstrong, 44 Penn. St. 63; Murray *v.* Lardner, 2 Wallace (U. S.) 110; Mercer County *v.* Hacket, 1 Id. 83; Gelpcke *v.* City of Dubuque, Id. 175; Meyer *v.* City of Muscatine, Id. 384; note 1, *ante*, pp. 5 and 26.

[1] There are no markets overt in the United States: Hosack *v.* Weaver, 1 Yeates 478; Hardy *v.* Metzgar, 2 Id. 347; Easton *v.* Worthington, 5 S. & R. 130; Lecky *v.* McDermott, Admr., 8 Id. 500; Mowry et al. *v.* Walsh, 8 Cowen 238; Wheelright *v.* Depeyster, 1 Johns. 480; Dane *v.* Baldwin, 8 Mass. 518; Browning *v.* Magill, 2 Har. & Johns. 308; McGrew *v.* Browder, 2 Condens. Rep. S. C. La. 579; Roland *v.* Grundy, 5 Ohio 202; Griffith *v.* Fowler, 18 Vt. 390; Worthy et al. *v.* Johnson et al., 8 Geo. 236; Hoffman et al. v. Carow, 22 Wend. 285; Fawcett *v.* Osborn, 32 Ills. 411. For the general rule regulating this matter is, that a second vendee is not entitled to stand in any better position than his vendor, in regard to the title of personal property; but this rule is not applicable to negotiable instruments: Putnam *v.* Lamphier, 36 Cal. 151. In the case of Ventress et al. *v.* Smith, 10 Peters 175, Judge Thompson said: "It is a general rule of law, that a sale by a person who has no right to sell, is not valid against the rightful owner. . . . . It was a maxim of the civil law, that *nemo plus juris in alium transferre potest, quam ipse habet;* and this is a plain dictate of common sense. It was a principle of the English common law, that a sale out of market overt, did not change the property from the rightful owner; and the custom of the city of London, which forms an exception to the general rule, has always been guarded and restricted by the courts with great care and vigilance, that all such sales should be brought strictly within the custom. It has sometimes been contended, that a *bonâ fide* purchase for a valuable consideration, and without notice, was equivalent to a purchase in market overt under the English law, and bound the property against the party who had the right. But we are not aware that this Saxon institution of markets overt, which controls and interferes with the application of the common law, has ever been recognised in any of the United States, or received any judicial sanction."

every shop in the city of London, where goods are openly sold, is considered as a market overt within this rule, for such things as by the trade of the owner are put there for sale.(*f*) But the shops at the west end of the town do not appear to possess this privilege. If the sale is not made in market overt, the purchaser, though he purchase *bonâ fide*, acquires no further property in the article sold than was possessed by the vendor.(*g*) And formerly, if a writ of execution should have been actually in the hands of the sheriff on a judgment against the vendor, the goods, if not sold in market overt, were subject, in the hands of the purchaser, to the sheriff's right to seize, in the same manner as if they had remained in the hands of the vendor.(*h*) But a recent enactment now protects a purchaser *bonâ fide* for valuable consideration, without notice of any writ.(*i*) So if the goods have been stolen, a *bonâ fide* purchaser, who has not bought them in market overt, will be bound to restore them to the true owner;(*j*) whereas, a sale in market overt would have given the *purchaser a valid title. There is one case, however, in which [*397] even a sale in market overt will not protect a purchaser, namely, the case of the goods having been stolen, and the true owner prosecuting the thief and obtaining his conviction. In this case the property in the goods, wherever they may be, vests, on the conviction, in the true owner;(*k*) and the only exception allowed is, where the article stolen is some valuable security, which shall have been paid or discharged *bonâ fide* by the person liable, or being a negotiable instrument, shall have been *bonâ fide* transferred or delivered for a just and valuable consideration, without any notice, and without any reasonable cause to suspect that the same had been obtained by any felony or misdemeanor.(*l*) If a person suffer the loss of his goods by theft, he cannot by any civil action recover them from the felon.(*m*) To do this, he is bound to suffer the further loss of time or money incurred in a prosecution. If he should succeed in obtaining a conviction, he is then rewarded for his good fortune by a restitution of his property, whether in the hands of the felon himself, or of any innocent purchaser who may have chanced

(*f*) The Case of Market Overt, 5 Rep. 83 b; Lyons *v.* De Pass, 11 Ad. & E. 326 (E. C. L. R. vol. 39).

(*g*) Peer *v.* Humphrey, 2 Ad. & E. 495 (E. C. L. R. vol. 29); White *v.* Spettigue, 13 M. & W. 603.

(*h*) Samuel *v.* Duke, 3 M. & W. 622. See *ante*, p. 51.

(*i*) Stat. 19 & 20 Vict. c. 97, s. 1, *ante*, p. 52, not retrospective. Williams *v.* Smith, 2 H. & N. 443.

(*j*) White *v.* Spettigue, 13 M. & W. 603.

(*k*) Scattergood *v.* Sylvester, 15 Q. B. 506 (E. C. L. R. vol. 69).

(*l*) Stat. 7 & 8 Geo. IV. c. 29, s. 57.

(*m*) Stone *v.* Marsh, 6 B. & C. 551, 564 (E. C. L. R. vol. 13); 2 Wms. Saund. 47 b, n. (*p*).

to buy them, although in open market.[1] Such is the application made by the law of the righteous principle of restitution.(*n*)

With regard to horses, a sale in market overt will not confer on the purchaser any further title than is possessed by the vendor, unless the sale be made according to the directions of certain statutes;(*o*) and even [*398] then the true owner may, at any time within six *months after his horse has been stolen, recover his property on tender to the person in possession of the price he *bonâ fide* paid for it.(*p*)

A factor or agent in the possession of goods could not by the common law give any further title to the goods than he was authorized to do by his principal, either expressly or by implication arising from the usual course of his employment.(*q*) And when one man is appointed the agent of another for any particular purpose by power of attorney, his authority must still be strictly pursued, otherwise his principal will not be bound.(*r*)[2]

(*n*) See Chowne *v.* Baylis, 31 Beav. 351.
(*o*) Stats. 2 & 3 P. & M. c. 7; 31 Eliz. c. 12; 2 Black. Com. 450.
(*p*) Stat. 31 Eliz. c. 12, s. 4.
(*q*) Pickering *v.* Busk, 15 East 38, 43.
(*r*) Attwood *v.* Munnings, 7 B. & C. 278 (E. C. L. R. vol. 14).

[1] Bell *v.* Troy, 35 Ala. 184; and see Piscataqua Bank *v.* Turnley, 1 Miles 314, which decided, that where one had stolen a quantity of bank notes, the bank could not maintain foreign attachment against him, because the foundation of the claim was matter *ex delicto;* and in the comparatively recent case of Hutchinson *v.* Bank of Wheeling, 41 Penn. St. 42, it was held, that the public prosecution for the theft, does not supersede or in any way control, the private action for the value of the thing stolen, though it is suspended until the public prosecution for the offence, has been duly conducted and ended; and as the person wronged by the theft is not chargeable with the conduct of the prosecution, he cannot be affected by the result, even though it be a verdict of acquittal. But in New York, the doctrine that the private injury is merged in the public wrong, is abolished by statute; see a note to the case of Hoffman et al. *v.* Carow, 22 Wend. 285.

[2] "That an agent is bound to pursue the orders of his principal, and is answerable for any injury consequent on his departure from them, however fair may have been his motives for such departure, is a plain principle of law:" Manella, Pujalls & Co. *v.* Barry, 3 Cranch 415; Keener *v.* Harrod et al., 2 Md. 63; Bruce *v.* Davenport, 36 Barb. 349; Imboden *v.* Richardson, 15 La. Ann. 534; Sawyer *v.* Mayhew, 51 Maine 398; nor will the principal be bound for his acts, whether the agency be general or special, if it was known to the party with whom he dealt, that the agent was exceeding his powers: Sandford *v.* Handy, 23 Wend. 260; State of Illinois *v.* Delafield, 8 Paige Ch. 527; Fox *v.* Fisk, 6 How. (Miss.) 328; Longworth *v.* Conwell, 2 Blackf. 469; Walsh et al. *v.* Peirce, 12 Vt. 138; Hemphill *v.* The Bank, 6 Sm. & M. 44; Goad *v.* Hurts's Admrs., 8 Id. 787; Robertson *v.* Ketchum, 11 Barb. 652; Reeves et al. *v.* Baldwin, 1 Cart. 216; McCoy *v.* McKowen, Admr., 26 Miss. 487; Lewin *v.* Delie et al., 17 Id. 64; North River Bank *v.* Aymar, 3 Hill 266; Bank of the United States *v.* Dunn, 6 Peters 51; Bank of the Metropolis *v.* Jones, 8 Id. 12; Angel *v.* The Town of Pownal, 3 Vt. 461; Huntington et al. *v.* Wilder, 6 Id. 334.

But by modern acts of parliament a more extended authority has, for the convenience of commerce, been conferred on factors and agents.(*s*) The

(*s*) Stats. 4 Geo. IV. c. 83; 6 Geo. IV. c. 94; 5 & 6 Vict. c. 39.

A special agent is one who is employed about one specific act, or certain specific acts, alone: Walker *v.* Skipwith, 1 Meigs 507; Bryant *v.* Moore, 26 Maine 86; a general agency, however, is not the reverse of this, and does not mean the substituting one in the place of another, for transacting all manner of business, since there are few instances in common use of an agency of that description, but is an authority not unlimited, and must necessarily "be restrained to the transactions and concerns, appurtenant to the business of the principal:" Odiorne et al. *v.* Maxcy et al., 13 Mass. 181; Salem Bank *v.* Gloucester Bank, 17 Id. 29; Walker *v.* Skipwith, 1 Meigs 507; Anderson *v.* Coonley, 21 Wend. 279; Rossiter *v.* Rossiter, 8 Id. 494; Stowe et al. *v.* Wyse, 7 Conn. 214; Hodge *v.* Combs, 1 Black (U. S.) 192; Stevenson et al. *v.* Hoy, 43 Penn. St. 191; but a general agent, is one whom a man puts in his place, to transact all his business of a particular kind: Loudon, &c., Soc. *v.* Hagerstown, &c., Bank, 36 Penn. St. 498.

A distinction is to be noticed between general and special agencies, as regards third persons; for although in the former an attorney in fact will be responsible to his principal, if he exceeds any private instructions which may be given limiting his general powers, yet the persons with whom he deals will not be bound by such private instructions, for they cannot be supposed to know anything about them: Lobdel *v.* Baker, 1 Metc. 193; Mann *v.* The Commis. Co., 15 Johns. 54; Beals *v.* Allen, 18 Johns. 363; Allen *v.* Ogden, 1 Wash. C. C. 174; Gordon et al. *v.* Buchanan et al., 5 Yerg. 71; Rossiter *v.* Rossiter, 8 Wend. 494; Tradesman's Bank *v.* Astor et al., 11 Id. 90; Jaques *v.* Todd, 3 Id. 83; Fisher et al. *v.* Campbell, 9 Port. 213; Longworth *v.* Conwell, 2 Blackf. 469; Morrison's Exr. *v.* Taylor, 6 B. Mon. 85; Johnson *v.* Jones, 4 Barb. 369; Walsh et al. *v.* Peirce, 12 Vt. 138; Gibbs et al. *v.* Linsley, 13 Id. 208; Arnold et al. *v.* Halenbrake et al., 5 Wend. 34; Bryant *v.* Moore, 26 Maine 86; Lamothe *v.* St. Louis Marine Railway and Dock Co., 17 Mo. 204; Lightbody *v.* The N. A. Ins. Co. 23 Wend. 22; Lance *v.* Barrett, 1 Hill (S. C.) 204; Lagow *v.* Patterson. 1 Blackf. 252; Loudon, &c., Soc. *v.* Hagerstown, &c., Bank, 36 Penn. St. 498; Williams *v.* Getty, 31 Id. 461; Baltimore *v.* Reynolds, 20 Md. 1; Davenport *v.* Ins. Co., 17 Iowa 276; Edwards *v.* Schaffer, 49 Barb. 291; Butler *v.* Maples, 9 Wall. U. S. 766; whereas in special agency, the authority must be strictly pursued, or the principal will not be bound: Schimmelpenich et al. *v.* Bayard et al., 1 Peters 264; Andrews *v.* Kneeland, 6 Cowen 354; Lightbody *v.* The N. American Ins. Co., 23 Wend. 22; Lobdell *v.* Baker, 1 Metc. 193; Anderson *v.* Coonley, 21 Wend. 279; Mann *v.* The Commis. Co., 15 Johns. 54; Beals *v.* Allen, 18 Id. 363; Thompson *v.* Stewart, 3 Conn. 183; Allen *v.* Ogden, 1 Wash. C. C. 174; Bleene *v.* Proudfit, 3 Call 207; Gordon et al. *v.* Buchanan et al., 5 Yerg. 71; Rossiter *v.* Rossiter, 8 Wend. 494; Tradesmen's Bank *v.* Astor et al., 11 Wend. 90; Denning *v.* Smith, 3 Johns. Ch. 344; State of Illinois *v.* Delafield, 8 Paige Ch. 527; Jaques *v.* Todd, 3 Wend. 83; Fisher et al. *v.* Campbell, 9 Port. 213; Dresser Manufacturing Co. *v.* Waterston et al., 3 Metc. 18; Cowan *v.* Adams et al., 10 Maine 374; Morrison's Exr. *v.* Taylor, 6 B. Mon. 85; Lance *v.* Barrett, 1 Hill (S. C.) 204; Lagow *v.* Patterson, 1 Blackf. 252; Thorndike *v.* Godfrey, 3 Greenlf. 431; Dehart, &c., *v.* Wilson, &c., 6 Mon. 581; Admrs. of Mitchell et al. *v.* Sproul, 5 J. J. Marsh. 267; Powell *v.* Buck, 4 Strobh. 427; Scott *v.* McGrath, 7 Barb. 53; Reany *v.* Culbertson, 21 Penn. St. 507; Shepley *v.* Little, 6 Watts 500; Parsons *v.* Webb, 8 Greenl. 38; Stewart *v.* Donnelly, 4 Yerg. 177; Snow *v.* Perry, 9

provisions of these acts are too long to be here inserted; but their general effect is to render valid sales and pledges made by factors or agents, not-

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Pick. 539; Arnold et al. *v.* Hallenbrake et al., 5 Wend. 34; Pursley *v.* Morrison, 7 Ind. 356; and one dealing with a special agent is bound to inquire, and ascertain the extent of his authority: Schimmelpenich et al. *v.* Bayard et al., 1 Peters 264; Snow *v.* Perry, 9 Pick. 539; Fisher et al. *v.* Campbell, 9 Port. 213; Murdock *v.* Mills et al., 11 Metc. 5; Powell *v.* Buck, 4 Strobh. 427; Powell *v.* Henry, 27 Ala. 612; Tidrick *v.* Rice, 13 Iowa 214; Berry *v.* Anderson, 22 Ind. 36; particularly where one is acting in a public capacity, or as the representative of a corporation, for then the limit of his power may be readily ascertained by a reference to statute or records: Salem Bank *v.* Gloucester Bank, 17 Mass. 29; Bryant *v.* Moore, 26 Maine 86; Denning *v.* Smith, 3 Johns. Ch. 344; Baltimore *v.* Eschbach, 18 Md. 276; Murray *v.* Carothers, 1 Metc. (Ky.) 171; State *v.* Haskell, 20 Iowa 276; but even in the case of a limited agency, the deputy may have a general authority to accomplish the purpose for which he was created, "or be limited to do it in a particular manner. If the limitation, respecting the manner of doing it, be public, or known to the person with whom he deals, the principal will not be bound, if the instructions are exceeded and violated. If such limitation be private, the agent may accomplish the object in violation of his instructions, and yet bind his principal by his acts:" Bryant *v.* Moore, 26 Maine 86; Hotch *v.* Taylor, 10 N. H. 538; Walker *v.* Skipwith, 1 Meigs 507; Lightbody *v.* The N. A. Ins. Co., 23 Wend. 22; N. River Bank *v.* Aymar, 3 Hill 266; and if the principal has by his declarations, given rise to the opinion, that he has granted greater powers than have in fact been given, he will not be allowed to avail himself of the imposition, to ward off responsibilities which have arisen from his representations: Schimmelpenich et al. *v.* Bayard et al., 1 Peters 264; Perkins *v.* The Washington Insurance Co., 4 Cowen 645; Dodge *v.* McDonnell, 14 Wis. 553.

In accordance with the above principles, it has been held, that a factor cannot pledge the goods of his principal: Kinder et al. *v.* Shaw et al., 2 Mass. 398; Van Amringe *v.* Peabody et al., 1 Mass. 440; Rodrighez *v.* Hofferman et als., 5 Johns. Ch. 417; Evans *v.* Potter, 2 Galls. 13; Kelly et al. *v.* Smith et al., 1 Blatch. 290; Michigan State Bank *v.* Gardner, 15 Gray 362; First, &c., Bank *v.* Nelson, 38 Geo. 391; and the reason is, that his authority is only to sell: Laussatt *v.* Lippincott et al., 8 S. & R. 391; nor can he deliver the goods of his principal, to a creditor in payment of his own debt, even though he have a lien upon them: Benny et al. *v.* Rhodes, 18 Mo. 147; Same *v.* Pegram, Id. 191; but if the factor has a lien, he may pledge the goods for his own debt, to the amount of the lien: Warner *v.* Martin, 11 How. 209; where, however, an agent has pledged his employer's goods, he does not thereby lose his right to sell them; and if he does so, and the pledgee afterwards disposes of them, he will be liable to the purchaser: Nowell et al. *v.* Pratt et al., 5 Cush. 111; but by statute, generally, a factor may pledge his principal's goods, and if the pledgee takes with notice that the pledgor is a factor, he will acquire only the lien which the factor had; if, however, he takes without notice, he will have the same interest as he would if the factor had been owner. An agent authorized to assist in a settlement, has no power to pledge: Swelt et al. *v.* Brown, 5 Pick. 178; Wood *v.* McLain, 7 Ala. 800; Jones *v.* Farley, 6 Greenl. 226; Hewes *v.* Doddridge, 1 Rob. (Va.) 143; nor is a power to settle, a power to arbitrate: Huber *v.* Zimmerman, 21 Ala. 488; nor a power to sell land, a power to exchange: Reese *v.* Medlock, 27 Texas 120; or to make partition: Bosel *v.* Rollins, 30 Cal. 408. A power to draw notes is not fulfilled by giving a bond: Banorgee *v.* Hovey et al., 5 Mass. 11; and when authorized to be drawn or endorsed for one purpose, the

withstanding any notice of the fact of their being merely factors or agents, provided the party dealing with them have no notice that they are acting

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authority does not extend to negotiating them for any other object: Hortons et al. *v.* Townes, 6 Leigh 47; Planters' Bank *v.* Cameron et al., 3 Sm. & M. 609; Suckley *v.* Turner et al., 1 Brev. 257, s. c., 2 Bay 505; Palmer *v.* Garrington, 1 Ohio St. 253; so, if directed to be drawn payable on a certain day, they cannot be made payable at an earlier time: Batty *v.* Carswell et al., 2 Johns. 48; Tate et al. *v.* Evans et al., 7 Mo. 419; Johnson *v.* Craig, 21 Ark. 533; in the case of The Bank of the United States *v.* Bevine et al., 1 Gratt. 539, where nine persons jointly authorized J. B. S. to endorse for them, jointly, all notes drawn payable to J. B. S., it was held that this power did not extend to the endorsing of a note drawn payable to one of the principals. On the other hand, an agent cannot bind his principal, by giving a note, when he is merely authorized to pay a sum of money: Webber *v.* The President, &c., of Williams College, 23 Pick. 302; Savage *v.* Rix et al., 9 N. H. 263; or to make purchases: Taber *v.* Cannon et al., 8 Metc. 456; Emerson et al. *v.* The Providence Hat Manufacturing Company, 12 Mass. 237; Dennison *v.* Tyson, 17 Vt. 550; or to manage a grocery: Smith et al. *v.* Gibson, 6 Blackf. 369; or to take care of a plantation: Scarborough *v.* Reynolds, 12 Ala. 252; nor will a power to receive and pay debts, or take notes, or construct carriages, authorize the issuing of a promissory note: Martin *v.* Walton & Co., 1 McCord 16; McCulloch *v.* McKee, 16 Penn. St. 289; Paige *v.* Stone et al., 10 Metc. 160; Hays et al. *v.* Lynn, 7 Watts 524; Temple *v.* Pomroy, 4 Gray 128. A power to purchase, with money furnished for that purpose, is no power to buy on credit: Boston Iron Company *v.* Hale, 8 N. H. 363; Patton *v.* Brittain, 10 Ired. 8; Weight *v.* Burbank, 64 Penn. St. 247; nor is the credit system allowable, to one who is empowered to conduct a business on cash principles: Stoddard & Co. *v.* McIlvain et al., 7 Rich. 525; and special authority to sell does not authorize a sale on credit: Payne *v.* Potter, 9 Iowa 549; or include a power of substitution: Coxe *v.* England, 15 Penn. St. 212; or to receive confederate notes in lieu of money: Thomas *v.* Thompson, 19 La. Ann. 487; Shiner *v.* Green, 3 Cold. (Tenn.) 419; or, even to receive the purchase-money: Law *v.* Stokes, 3 Vroom 249. There are many similar cases, deciding that an agent's power is to be restricted to the authority creating him: Hefferuan *v.* Adams, 7 Watts 116; Hopkins *v.* Blanc, 1 Call 361; Calef *v.* Foster, 32 Maine 92; Shriver *v.* Stevens, 2 Jones L. 258; Hampton et al. *v.* Matthews et al., 14 Penn. St. 105; Nash *v.* Drew, 5 Cush. 422; Soule *v.* Dougherty, 24 Vt. 92; Yrquhart *v.* McIver, 4 Johns. 113; Ives *v.* Davenport, 3 Hill 273; Woodbury *v.* Larned, 5 Min. 339; Cochran *v.* Richardson, 33 Vt. 169; Hagerstown Bank *v.* Loudon Saving Fund Society, 3 Grant's Cas. 135; Tate *v.* Citizens, &c., Insurance Company, 13 Gray 79; Hazletine *v.* Miller, 44 Maine 177; Seiple *v.* Irwin, 30 Penn. St. 513; Brander *v.* Columbia Insurance Company, 2 Grant's Cas. 412; and see, Cox et al. *v.* Robinson, 2 Stew. & Port. 91. Where a personal trust or confidence is reposed in an agent, and especially where the exercise or application of the power, is made subject to his judgment or discretion, the authority is purely personal, and cannot be delegated to another, unless he has a special power of substitution: Lyon *v.* Jerome, 26 Wend. 485; Warner et al. *v.* Martin, 11 How. 209; Blantin et al. *v.* Whitaker et al., 11 Humph. 313; Pruitt *v.* Miller, 3 Port. 16.

In the cases of Gibson *v.* Colt et al., 7 Johns. 390; Nixon *v.* Hyserott et al., 5 Id. 159, and Liscomb *v.* Kiterell, 11 Humph. 256, it was held that a power to sell, did not authorize a covenant of warranty; but the two former cases have been overruled, and the prevailing opinion is, that an agent who is empowered to sell, is

without authority or *malâ fide.* The authority of an agent acting under a power of attorney, determines by the decease of the person giving the

presumed to possess the power of warranting, unless the contrary appear: Nelson *v.* Cowing et al., 6 Hill 336; Woodford *v.* McClanahan, 4 Gilm. 85; Peters *v.* Farnsworth, 15 Vt. 155; Taggart *v.* Stanberry, 2 McLean 543; Skinner *v.* Gunn et al., 9 Port. 305; Gaines *v.* McKinley, 1 Ala. 446; Milburn *v.* Belloni, 34 Barb. 607; Egell *v.* Franklin, 2 Sneed 236; Cocke *v.* Campbell, 13 Id. 286; in other words, a power to sell, *implies* a power to warrant; unless there is some restriction in the power of sale: Schuchardt *v.* Allens, 1 Wall. (U. S.) 359; and this is certainly the case where the sale is usually attended with warranty: Smith *v.* Tracy, 36 N. Y. 79; for every power whether general or special, includes all means necessary for carrying it into effect or operation, in accordance with the legal maxim *cui cunque aliquid conceditur etiam et id sine quo res ipsa non esse potest:* Peck et al. *v.* Harriott et al., 6 S. & R. 146; Andrews *v.* Kneeland, 6 Cowen 354; The Chesapeake Insurance Company *v.* Stark, 6 Cranch 268; Perrotin *v.* Cuculla, 6 La. 587; N. River Bank *v.* Aymar, 3 Hill 266; The Merchants' Bank of Georgia *v.* The Central Bank of Georgia, 1 Kelly 418; Rouse et al., Overseers, &c., *v.* Moore et al., Overseers, &c., 18 Johns. 407; Andover *v.* Grafton, 7 N. H. 298; Sandford *v.* Handy, 23 Wend. 260; Valentine *v.* Piper, 22 Pick. 92; Vanada's Heirs *v.* Hopkins, Admr., &c., 1 J. J. Marsh. 285; Wilson *v.* Troup, 2 Cowen 197; Goodale *v.* Wheeler, 11 N. H. 424; Babcock *v.* The Western Railroad Corporation, 9 Metc. 556; McAlpin *v.* Cassidy, 17 Texas 449; hence, where an agent is directed to purchase, and no money is furnished, he may buy on credit: Sprague et al. *v.* Gillett et al., 9 Metc. 91; Chomqua *v.* Mason et al., 6 Gall. 342; or power to collect, authorizes institution of suit: Joyce *v.* Duplessis, 15 La. Ann. 242; and it is presumed that goods are to be sold, when placed in the possession of one whose business it is to sell: Gibbs et al. *v.* Linsley, 13 Vt. 208; so in all cases where no express direction is given in regard to the manner of performing the duty, it is implied that it is to be done in the ordinary way, and that any custom or known usage shall be followed: Van Allen *v.* Vanderpoel, 6 Johns. 69; James et al. *v.* McCredie et al., 1 Bay 294; State of Illinois *v.* Delafield, 8 Paige Ch. 527; McClure *v.* Richardson, Rice 218; Ives *v.* Davenport, 3 Hill (N. Y.) 373; May *v.* Mitchell, 5 Humph. 365; Leland *v.* Douglass, 1 Wend. 490; Frost *v.* Wood, 2 Conn. 23; Bates *v.* The Keith Iron Company, 7 Metc. 225; Owings *v.* Hall, 9 Peters 608; Fraser & Co. *v.* Tenants & Co., 5 Richard. 375; Northern, &c., Railroad Company *v.* Bastian, 15 Md. 494; Hutchings *v.* Ladd, 16 Mich. 493; Merchants' Bank *v.* State Bank, 10 Wall. (U. S.) 604. But the implied powers of agents, will not extend, beyond the regular and general course of their business employment: Jones *v.* Warner, 11 Conn. 11; Pourie et al. *v.* Fraser, 2 Bay 269; Topham *v.* Roche, 2 Hill (S. C.) 307; Kerns *v.* Piper, 4 Watts 222; Washington Bank *v.* Lewis, 22 Pick. 24; Cox *v.* Hoffman, 4 Dev. & Bat. 180; Morton *v.* Scull, 23 Ark. 289.

The principal may ratify the acts of an agent who has exceeded his powers; and if, being informed of the disobedience of his orders, the principal makes no objection, or is silent respecting it, it is considered a recognition of his agent's acts: Courcier *v.* Ritter, 4 Wash. C. C. 549; Snow *v.* Perry, 9 Pick. 539; Cox et al. *v.* Robinson, 2 Stew. & Port. 91; The Merchants' Bank of Geo. *v.* The Central Bank of Geo., 1 Kelly 418; Wood *v.* McCain, 7 Ala. 800; Despatch Line of Packets *v.* Bellamy Manufacturing Co., &c., 12 N. H. 205; Weed et al. *v.* Carpenter, 4 Wend. 219; Bosley *v.* Farquhar et al., 2 Blackf. 61; Hotch *v.* Taylor, 10 N. H. 538; Patton *v.* Britton, 10 Ired. 8; Burrit's Survivors *v.* Rench et al., 4 McLean 325; Very *v.* Levy, 13 How. 345;

power.(*t*) But by a recent act, no trustee, executor or administrator making any payment or doing any act *bonâ fide* in pursuance of any power of attorney, in ignorance of the death of the person who gave the

(*t*) Bacon's Abridgment, tit. Authority (E); Lepard *v.* Vernon, 2 Ves. & B. 51. Otherwise where expressed to be valid notwithstanding death. Kiddill *v.* Farnell, 3 Sm. & G. 428.

Cowen *v.* Wheeler, 31 Maine 439; Bigelow et al. *v.* Denison, 33 Vt. 565; Blantier et al. *v.* Whitaker et al., 11 Humph. 313; Little *v.* Stillheimer, 13 Mo. 572; Law *v.* Cross, 1 Black (U. S.) 533; Klopp *v.* Witmoyer, 43 Penn. St. 226; Seymour *v.* Wyckoff, 10 N. Y. 213; Wright *v.* Boynton, 37 N. H. 9; Workman *v.* Guthrie, 29 Penn. St. 495; Phila. W. & B. Railroad Co. *v.* Cowell, 28 Id. 329; Blen *v.* Company, 20 Cal. 602; Overby *v.* Overby, 18 La. Ann. 546; and tacit recognition by voluntary execution is as conformatory as express ratification: Decuir *v.* Leguire, 15 La. Ann. 569; such a ratification relates back to the time of the granting of the original power, and is equivalent to an authority given in the first instance: Perry *v.* Hudson, 10 Geo. 362; Irons *v.* Reyburn, 6 Eng. 378; Baleston Spa Bank *v.* Marine Bank, 16 Wis. 120; Lowry *v.* Harris, 12 Minn. 255; but this adoption cannot be apportioned, extending only to a part of the acts of the agent, and rejecting others, but must embrace the whole or nothing: Hoductt *v.* Tatum, 9 Ga. 70; Crawford et al. *v.* Barkley, 18 Ala. 270; Widner *v.* Lane, 14 Mich. 124; Henderson *v.* Cummings, 44 Ills. 325; Mundorf *v.* Wickersham, 63 Penn. St. 87.

In order to authorize the inference of a general agency, it is not necessary that the person should have done an act, the same in species with that in question; for if he have usually done things of the same general character and effect, with the assent of his principal, it is enough: Com. Bank *v.* Norton et al., 1 Hill (N. Y.) 501; Arnold et al. *v.* Halenbrake et al., 5 Wend. 34; Kelly *v.* Lindsey, 7 Gray 287; and where an agency is proved, and its extent is not shown, the presumption is, that it is a general agency: Methune Co. *v.* Hayes, 33 Maine 169.

The opinion of Chief Justice Collin, in the case of Dearing *v.* Lightfoot, 16 Ala. 31, contains an epitome of the subject of this note; he says, "Powers of attorney are ordinarily subject to a strict construction, and the authority is never extended beyond that which is given in terms, or is necessary and proper for carrying the authority so given into full effect. . . . . But in all cases, whether the agency be general or special, it is said to be a universal principle, that unless the inference is expressly excluded, by other circumstances, it includes all the usual modes and means of accomplishing the objects and aims of the agency. . . . . The distinction between a *general* and *universal* agent is recognised, and it was said that such a universal authority as the latter may exercise, will never be inferred from any general expression, however broad, but the law will restrain them to the particular business of the party, in respect to which it is presumed, his intention to delegate the authority was principally directed. . . . The difference between a *general* and a *special* agent, is said to be this: the former is appointed to act in the affairs of his principal, generally, and the latter to act concerning some particular object. In the former case, the principal will be bound by the acts of his agent, *within the scope of the general authority conferred on him*, although those acts are violative of his private instructions and directions. In the latter case, if the agent exceeds the special power conferred on him, the principal is not bound by his acts. . . Although the acts of the agent may be inoperative against the principal, yet it is competent for the latter to ratify them."

power, or of his having done some act to avoid the power, shall be liable for the money so paid or the act so done.(*u*)

[*399] *In ancient times the sale of lands was usually accompanied by a warranty of their title; and some words, such as the word *give* in a feoffment, had the effect of an implied warranty, when none was expressed.(*v*)[1] When warranties fell into disuse, the purchasers of lands acquired a right to covenants for the title, varying in their stringency according to the nature of the title of the vendor.(*x*) No warranty, however, rises from the mere sale of goods, unless it be expressly given, or implied from the custom of the trade or the nature of the contract;(*y*) but the sale of goods in an open shop or warehouse has lately been held to be an implied warranty that the seller is the owner of the goods.(*z*) Every affirmation made by the vendor at the time of sale respecting the goods is an express warranty, if it appear to have been so intended.(*a*) And if the vendor state that the goods are his own, this amounts to a warranty of his title;(*b*) but if the contract for sale be in writing, the warranty must be in writing also.(*c*) And a warranty made subsequently to the sale is void for want of consideration.(*d*) Contracts made in the course of any trade are always subject to the custom of that trade; and if by the custom of the trade a warranty is implied in any [*400] contract, the vendor *will be bound by it, in the same manner as if he had given an express warranty.(*e*) So the nature of the contract may be such as to imply a warranty. Thus a contract to furnish goods for a particular purpose, contains an implied warranty that they are fit for that purpose;(*f*) and a contract to furnish manufac-

(*u*) Stat. 22 & 23 Vict. c. 35, s. 26.

(*v*) See Principles of the Law of Real Property 344, 1st ed.; 346, 2d ed.; 359, 3d ed.; 365, 4th ed.; 376, 5th ed.; 399, 6th ed.; 407, 7th ed.; 426, 8th ed.

(*x*) Ibid, 348, 1st ed.; 349, 2d ed.; 362, 3d ed.; 368, 4th ed.; 379, 5th ed.; 402, 6th ed.; 410, 7th ed.; 429, 8th ed.

(*y*) Chanter *v.* Hopkins, 4 M. & W. 399; Burnby *v.* Bollett, 16 M. & W. 644; Morley *v.* Attenborough, 3 Exch. Rep. 500; Bagueley *v.* Hawley, Law Rep. 2 C. P. 625.

(*z*) Eicholtz *v.* Bannister, C. P., 11 Jur. N. S. 15; 17 C. B. N. S. 708 (E. C. L. R. vol. 112).

(*a*) See Richardson *v.* Brown, 1 Bing. 344 (E. C. L. R. vol 8); Sheppard *v.* Kain, 5 B. & Ald. 240 (E. C. L. R. vol. 7); Power *v.* Barham, 4 Ad. & E. 473 (E. C. L. R. vol. 31); Carter *v.* Crick, 4 H. & N. 412.

(*b*) Furniss *v.* Leicester, Cro. Jac. 474; Medina *v.* Stoughton, 1 Salk. 210.

(*c*) Pickering *v.* Dowson, 4 Taunt. 779. (*d*) Finch, L. 189. See *ante*, p. 73.

(*e*) Jones *v.* Bowden, 4 Taunt. 847.

(*f*) Jones *v.* Bright, 5 Bing. 533 (E. C. L. R. vol. 15); Brown *v.* Edgington, 2 Man. & Gr. 279 (E. C. L. R. vol. 40).

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[1] See "Rawle on Covenants for Title," p. 467, *et seq.*

tured goods implies a warranty that they shall be of a merchantable quality.(*g*)[1] And an important addition to the law of warranty has been

(*g*) Laing *v.* Fidgeon, 6 Taunt. 108 (E. C. L. R. vol. 1).

[1] No particular form of words is required to constitute a warranty of personal property, nor is the word "warrant" necessary: Bacon *v.* Brown, 3 Bibb 35; Chapman *v.* Murch, 19 Johns. 290; Roberts *v.* Morgan, 2 Cowen 438; The Oneida Manufacturing Soc. *v.* Lawrence et al., 4 Id. 440; Osgood et al. *v.* Lewis, 2 Har. & G. 429; Whitney *v.* Sutton, 11 Wend. 411; Ricks, Admr. *v.* Dillahunty, 8 Port. 134; Towell et al. *v.* Gatewood, 2 Scam. 22; Beeman *v.* Black, 3 Vt. 53; Banfield *v.* Brutton, 7 B. Mon. 108; Corley *v.* Wilkins, 6 Barb. 557; Hawkins *v.* Berry, 5 Gilm. 36; Rogers *v.* Ackerman, 22 Barb. 134; and, even where the word "warrant" has been used, there is still room to doubt whether a technical warranty was intended: Starnes et al. *v.* Erwin, 10 Ired. 226; Isley *v.* Stewart, 4 Dev. & Bat. 160. But a mere representation, affirmation, or description, does not amount to a warranty, even though the property should turn out to be entirely different from the article described, or spurious: Barrett *v.* Halls, 1 Aik. 269; Dyer *v.* Lewis, 7 Mass. 284; Jackson *v.* Wetherill, 7 S. & R. 480; Hyatt *v.* Boyle, 5 Gill & Johns. 110; Hogins *v.* Plympton, 11 Pick. 97; Steward *v.* Doughterty, 3 Dana 479; Welsh *v.* Carter, 1 Wend. 185; Whitman *v.* Freese et al., 23 Maine 212; Wason *v.* Rowe, 16 Vt. 525; McFarland *v.* Newman, 9 Watts 55; Banfield *v.* Brutton, 7 B. Mon. 108; Lamb *v.* Crafts, 12 Metc. 355; The Richmond Trading and Manufacturing Co. *v.* Farquhar, 8 Blackf. 89; Humphreys *v.* Comline, Id. 508; Hawes et al. *v.* Lawrence et al., 4 Comst. 345; Mackay *v.* Rhinelander et al., 1 Johns. Cas. 408; Wetherill *v.* Neilson, 20 Penn. St. 448; Weimer *v.* Clement, 37 Id. 149; Rockafellow *v.* Baker, 41 Id. 319; Hotchkiss *v.* Gage, 26 Barb. 141; O'Neal *v.* Bacon, 1 Houst. 215; Wheeler *v.* Read, 36 Ill. 81; and the purchaser cannot claim indemnity, if the goods differ in quality or kind from those represented, unless there has been an express warranty, or fraud, or such circumstances as will amount in law, to an implied warranty: Snell et al. *v.* Moses et al., 1 Johns. 86; Perry *v.* Aaron, Id. 129; Seixas et al. *v.* Woods, 2 Caines 48; Holden *v.* Dakin, 4 Johns. 421; Davis *v.* Meeker, 5 Id. 354; Sands et al. *v.* Taylor et al., Id. 404; Cunningham *v.* Spier, 13 Id. 392; Kimmel *v.* Lichty, 3 Yeates 262; Allen *v.* Cockerill; 4 Bibb 264; Wilson *v.* Shackleford, 4 Rand 5; Neilson et al. *v.* Dickerson, 1 Desauss. 133; Kingsbury *v.* Taylor, 29 Maine 508; Carley *v.* Wilkins, 6 Barb. 557; Weimer *v.* Clement, 37 Penn. St. 147; Eagan *v.* Call, 34 Id. 236; nor can he complain, for "if he is unwilling to trust his own judgment, he may insist upon a warranty of the quality;" and this will be binding, even where the goods have been examined by the buyer: Willings et al. *v.* Consequa, Peters C. C. 317; s. c. Id. 172; Pinney *v.* Andrus, 41 Vt. 631; where, however, a representation or description, is understood by the parties as an absolute assertion, as contradistinguished from a mere expression of opinion, it is a warranty: The Oneida Manufacturing Co. *v.* Lawrence et al., 4 Cowen 440; Osgood et al. *v.* Lewis, 2 Har. & G. 495; Kinley *v.* Fitzpatrick, 4 How. (Miss). 59; Morrill *v.* Wallace et al., 9 N. H. 111; Baum *v.* Stevens, 2 Ired. 411; Erwin *v.* Maxwell, 3 Murph. 241; Ayres *v.* Parks, Admr., 3 Hawkes 89; Gilchrist *v.* Marrow, 2 Carol. L. Repos. 608; Foggart *v.* Blackweller et al., 4 Ired. 238; House *v.* Firt, 4 Blackf. 293; Winsor et al. *v.* Lombard, 18 Pick. 57; McFarland *v.* Newman, 9 Watts 55; Foster *v.* Caldwell, 18 Vt. 176; Beeman *v.* Buck, 3 Id. 53; Carley *v.* Wilkins, 6 Barb. 557; Tyre *v.* Causay, 4 Harring. 425; Hawkins *v.* Berry, 5 Gilm. 36; Hilman *v.* Wilcox, 30 Maine, 170; Ender *v.* Scott, 6 Ill. 35; Taymon *v.* Mitchell et al., 1 Md. Ch. Decs. 496; Beals *v.* Olmstead, 24 Vt. 114; Lamme *v.* Gregg, 1 Metc. (Ky).

made by the Merchandise Marks Act, 1862, to the provisions of which we have before referred.(*h*)

(*h*) Stat. 25 & 26 Vict. c. 88, *ante*, p. 257.

444; Warren *v.* Van Pelt, 4 E. D. Smith 202; Randall *v.* Thornton, 43 Maine 226; Hahn *v.* Doolittle; 18 Wis. 196; Jones *v.* Quick, 28 Ired. 125. In the case of Towell et al. *v.* Gatewood, 2 Scam. 22, this distinction was lucidly drawn by Chief Justice Wilson, who says: "Where the representation is positive, and relates to a matter of fact, it constitutes a warranty, as that a ship is an American or French ship, or that a crew consists of so many hands. But where the representation relates to that which is a matter of opinion, or fancy, as, for example, the value of a horse or painting, in such case, the representation is to be regarded as an expression of opinion, rather than such a verification of a fact, as will amount to a warranty, unless that idea is excluded by an express warranty, or such other declaration, as leaves no doubt of the intention to make a warranty." So, also, if the affirmation be accompanied with a declaration, that the owner would not be afraid to warrant, it amounts to such: Cook *v.* Mosely, 13 Wend. 277. Whenever it is doubtful whether a warranty was intended by the parties to a contract, the question is one lying within the province of a jury to determine: Duffee *v.* Mason, 8 Cowen 25; Osgood et al., *v.* Lewis, 2 Har. & G. 495; Whitney *v.* Sutton, 11 Wend. 411; Kinley *v.* Fitzpatrick, 4 How. (Miss.) 59; Baum *v.* Stevens, 2 Ired. 411; Foggart *v.* Blackweller, 4 Id. 238; House *v.* Firt, 4 Blackf. 293; McFarland *v.* Newman, 9 Watts 55; Foster *v.* Caldwell, 18 Vt. 176; Bigler *v.* Flickenger, 55 Penn. St. 279; Terhune *v.* Dever, 36 Ga. 648; Bradford, &c., *v.* Bush, 10 Ala. 386; but where the contract is in writing, it must be interpreted by the court: Osgood et al. *v.* Lewis, 2 Har. & G. 495.

Where a person has purchased an article with the ability or opportunity of an inspection, he will be considered as having purchased on his own judgment, and will not be entitled to look to the seller, should he be disappointed in the value or quality of the article: Rose et al. *v.* Beatie, 2 N. & McC. 538; McFarland *v.* Newman, 9 Watts 55; Salisbury et al. *v.* Stainer et al., 19 Wend. 159; Barnett *v.* Stanton, 2 Ala. 195; Baird *v.* Matthews, 6 Dana 129; Dillard *v.* Moore, 2 Eng. 166; Simpson *v.* Wiggin et al., 3 Wood. & M. 413; Taymon *v.* Mitchell et al., 1 Md. Ch. Decs. 496; Calhoun *v.* Vechis, 3 Wash. C. C. 165; Curcier et al. *v.* Pennock, 14 S. & R. 51; Carson *v.* Baillie, 19 Penn. St. 375; Hill *v.* North, 34 Vt. 604; Hadley *v.* Cleiton & Co., 13 Ohio St. 502; McGuire *v.* Kearney, 17 La. Ann. 295; and this is upon the principle, "that the vendee has it in his power to guard against any *latent* defect or deception in the article purchased, by exacting a warranty from the vendor; but if, instead of taking this precaution, he will trust to his own sagacity and judgment, he should bear the loss, if they deceive him:" Welsh *v.* Carter, 1 Wend. 185; but if the seller has acted fraudulently, he will, notwithstanding, be liable: Henshaw et al. *v.* Robbins, 9 Metc. 83; Hanks *v.* McKee, 2 Litt. 227. In accordance with the above doctrine, where an article was sold at auction as barilla, and was examined by the purchaser, and a sample exhibited at the sale, and the article turned out to be kelp, it was held, that there was no warranty: Swett *v.* Colgate et al., 20 Johns. 196; and generally speaking, in executed contracts, for the sale of personal property, where there is neither fraud nor express warranty, the purchaser takes the property at his own risk, as to the quality and condition: Moses et al. *v.* Mead et al., 1 Denio 378; s. c. 5 Id. 617; Ricks, Admr., *v.* Dillahunty, 8 Port. 134; Lindsay *v.* Davis, 30 Misso. 406; Deming *v.* Foster, 42 N. H. 165. Some of the states hold, that a sound price implies a sound commodity; this is the law of North and South Carolina:

If goods and chattels should have come into the possession of persons having no title to them, such persons will, in course of time, be quieted

Crawford *v.* Wilson, 2 Constitutional R. 352; Whitefield *v.* McLeod, 2 Bay 380; State *v.* Gaillard et al., Id. 19; Lester *v.* Exrs. of Graham, 1 Constitutional R. 182; Timrod *v.* Shoolbred, 1 Bay 324; Barnard *v.* Yates, 1 N. & McC. 142; Missroon et al. *v.* Waldo et al., 2 Id. 76; Rose et al. *v.* Beatie, 2 N. & McC. 538; Ashley *v.* Reeves, 2 McC. 432; Toris *v.* Long, 1 Tayl. 17; Vaughan *v.* Campbell, 2 Brev. 53; Furman *v.* Miller, Id. 127; but most of the states entirely repudiate this doctrine: Sexas et al. *v.* Woods, 2 Caines 48; Fleming *v.* Slocum, 18 Johns. 403; Johnston *v.* Cope et al., 3 Har. & Johns. 89; Penniman *v.* Pierson, Chip. (Vt.) 394; Dean *v.* Mason, 4 Conn. 428; Cozzins *v.* Whitaker, 3 Stew. & Port. 322; Hart et al. *v.* Wright, 17 Wend. 267; s. c. 18 Id. 449; West *v.* Cunningham, 9 Port. 104; Mixer et al. *v.* Coburn, 11 Metc. 559; Hoe *v.* Sanborn, 21 N. Y. 552; Weimer *v.* Clement, 37 Penn. St. 147; Mason *v.* Chappell, 15 Gratt. 572; Hawkins *v.* King, 30 Geo. 909; and in those states, where this principle is acknowledged, it is held, that there will not be an implied warranty of soundness, in a case free from fraud, where the purchaser is acquainted with the defect in the article sold: Britain *v.* Israel et al., 3 Hawks 222; Miller *v.* Yarborough, 1 Rich. 48; Porcher, *ads.* Caldwell, 2 McM. 329; Exrs. of Hart *v.* Edwards, 2 Bail. 306; Williams *v.* Vance, Admr., Dudley L. & Eq. 97; Lyles *v.* Bass, Cheeves L. & Eq. 85; Venning *v.* Gault, Id. 87; Watson et al., Admr., *v.* Boatwright, 1 Rich. 402; Wood, Admr., *v.* Ashe, 1 Strobh. 407; Hudgins *v.* Perry, 7 Ired. 102; for a general warranty of soundness does not cover defects which are known to the vendee: Williams *v.* Ingram, 21 Texas 300; of course, there can be no implied warranty, from a sound price, where the vendor positively refuses to warrant: Farr *v.* Gist, 1 Rich. 68; McLean *v.* Green, 2 McM. 17; Limehouse *v.* Gray, 3 Brev. 321. In cases of sales by sample, most of the decisions maintain that the vendor is responsible, if the quality of the bulk of the commodity is not equal to the sample shown: The Oneida Manufacturing Co. *v.* Laurence et al., 4 Cowen 440; Rose et al. *v.* Beatie, 2 N. & McC. 538; Gallagher et al. *v.* Waring, 9 Wend. 20; Moses et al. *v.* Mead et al., 1 Denio 378; s. c., 5 Id. 617; Magee *v.* Billingsley, 3 Ala. 679; Brantley *v.* Thomas, 22 Texas 270; Hall *v.* Plassan, 19 La. Ann. 11; and this principle has been held to apply, even though the purchaser himself takes a sample from the goods: Beebe *v.* Robert, 12 Wend. 413; Boorman *v.* Jenkins, Id. 566; Williams *v.* Spafford, 8 Pick. 250; and so where the sample was made by a warehouseman: Whittaker *v.* Hueske, 29 Texas 355; but in Pennsylvania, where there is a sale by sample, there is no implied warranty that the quality of the goods shall be the same as the sample, but merely that they shall be the same in species: Borrekins *v.* Bevan et al., 3 Rawle 23; Jennings et al. *v.* Gratz, Id. 168; Willings et al. *v.* Consequa, Pet. C. C. 317; s. c., Id. 172; Carson et al. *v.* Baillie, 19 Penn. St. 375; Lord *v.* Grow, 39 Id. 91; Fraley *v.* Bispham, 10 Id. 320; in the last of which decisions, Judge Coulter says: "If that case" (Borrekins *v.* Bevan) "means anything, it means this, that when the thing is sold by sample, and without express warranty, the purchaser takes it at his own risk, unless it should prove to be an article different in kind; all gradations in quality are at the hazard of the buyer;" and in Maryland, it has been held, that in order that a sale by sample, should amount to a warranty that the bulk of the article is of the same quality as the sample, it is necessary that the sample should have been so used in contracting, as would amount to an express averment on the part of the seller of the condition and quality of the goods sold: Gunther *v.* Atwell, 19 Md. 157; some of the cases, however, seem to hold an intermediate doctrine, deciding that there is an implied warranty, that a sample taken

in their enjoyment by virtue of the Statute of Limitations.(*i*) By this statute all actions of trespass, detinue and replevin for goods or cattle

(*i*) Stat. 21 Jac. I. c. 16.

in the usual way, is a fair specimen of the thing sold: Sands et al. *v*. Taylor et al., 5 Johns. 404; Hargons *v*. Stone, 1 Seld. 73; Bevine et al. *v*. Dord, 2 Sandf. 95; and in Bradford *v*. Manly, 13 Mass. 139, it was held, that a sale by sample, is tantamount to a warranty that the article sold is of the same kind with the sample; but if an opportunity had been given for examination or inspection, it is a strong circumstance to prove that the sale has not been by sample: Bevine et al. *v*. Dord, 2 Sandf. 89; and where the sample as well as the bulk of the article contained a latent defect, it was held, that there was no implied warranty against such defect: Dickinson *v*. Gay, 7 Allen 29.

In the sale of provisions for domestic use, there is an implied warranty of freshness: Van Bracklin *v*. Fonda, 12 Johns. 468; Moses et al. *v*. Mead et al., 1 Denio 378; s. c., 5 Id. 617; but the circumstances of the sale may be such that there will be no implied warranty, as where the vendor, equally with the vendee, relies upon the brand of the inspector, or the goods are not sold for consumption: Emerson *v*. Brigham, 10 Mass. 197; Jones *v*. Murray, &c., 3 Mon. 83; Moses et al. *v*. Mead et al., 1 Denio 378; s. c. 5 Id. 617; Hyland *v*. Sherman, 2 E. D. Smith 234; and generally, wherever articles are sold for a particular use or purpose, there is an implied warranty that they are fit for that purpose: Brenton *v*. Davis, 8 Blackf. 89; Otts *v*. Alderson, 10 Smed. & Mar. 480; Singleton's Admr. *v*. Kennedy, 9 B. Mon. 222; Beals *v*. Olmstead, 24 Vt. 114; Cunningham *v*. Hall, Sprague 404; Rodgers *v*. Niles, 11 Ohio St. 48; Overton *v*. Phelan, 2 Head 445; Brown *v*. Murphee, 31 Miss. 91; Fish *v*. Tank, 12 Wis. 276; Pease *v*. Sabin, 38 Vt. 432; Divine *v*. McCormick, 50 Barb. 116; Street *v*. Chapman, 29 Ind. 142; Hoover *v*. Peters, 18 Mich. 51; but where there is no fraud in the seller, neither *suppressio veri*, nor *suggestio falsi*, and the purchaser is in possession of all the information necessary to enable him to make a correct estimate of the value of the thing he is about to purchase, or which, from its nature, would occur to an ordinary observer, the law will not raise an implied warranty on the part of the seller, that it shall answer the purpose for which the purchaser bought it: Carnochan *v*. Gould, 1 Bail. 179.

Where a purchase is made without an examination, or an opportunity for it, it seems that there is an implied warranty the thing sold shall be merchantable: Gallagher et al. *v*. Waring, 9 Wend. 20; s. c. 18 Id. 425; Howard et al. *v*. Hoey, 23 Id. 350; Fish *v*. Roseberry, 22 Ill. 288; Lanata *v*. O'Brien, 13 La. Ann. 229; Ketchum *v*. Wells, 19 Wis. 25; and there may be an implied warranty by custom; but it must be either a general usage, or both plaintiff and defendant must be acquainted with the custom, in order to raise the warranty: Stevens *v*. Smith, 21 Vt. 90. Where it is customary to examine an article before shipping it away, it has been held, that the purchaser who neglects to do so, admits the quality to be good: Vanderhorst & Co. *v*. McTaggart, 2 Bay 498. And see Thompson *v*. Ashton, 14 Johns. 316.

In every sale of a note, or other negotiable instrument, there is an implied warranty of genuineness: Turner *v*. Tuttle, 1 Root 350; Jonson *v*. Titus et al., 2 Hill 606; Herrick *v*. Whitney et al., 15 Johns. 240; Coolidge *v*. Brigham, 1 Metc. 547; s. c. 5 Id. 68; Thrall *v*. Newall, 19 Vt. 203; Aldrick *v*. Jackson, 5 R. I. 218; Thompson *v*. McCullough, 31 Mo. 224; Flynn *v*. Allen, 57 Penn. St. 482; McCay *v*. Barber, 37 Ga. 423; but in the sale and assignment of a judgment, without recourse, it is not warranted that the proceedings are free from error: Glass *v*.

must be brought within *six* years next after the cause of such action;(*j*) but if the person entitled to any such action be under age, *feme covert*,

(*j*) Sect. 3.

Reed, 2 Dana 168. In the sale of every personal chattel, there is an implied warranty of title: Defreeze *v.* Trumper, 1 Johns. 274; Rew *v.* Barber, 3 Cowen 272; Hermance *v.* Vernoy, 6 Johns. 5; Gookin et al. *v.* Graham et al., 5 Humph. 480; Ricks, Admr., *v.* Dillahunty, 8 Port. 134; Boyd *v.* Bopst, 1 Dall. 91; Chism *v.* Woods, Hard. 231; Forsythe, &c., *v.* Ellis, 4 J. J. Marsh. 298; Lanier *v.* Auld, Admr., 1 Murp. 138; Moore et al. *v.* Laugham, 3 Hill (S. C.) 299; Chancellor *v.* Wiggins, 4 B. Mon. 201; Trigg *v.* Faris, 5 Humph. 343; Charlton *v.* Lay, Id. 496; McCoy et al. *v.* Artcher, 3 Barb. 323; Dorsey *v.* Jackman, 1 S. & R. 42; Lines *v.* Smith, 4 Fla. 47; Beninger *v.* Corwin, 4 Zabr. 257; Robinson *v.* Rice, 20 Mo. 229; Sherman *v.* Champlain Trans. Co., 31 Vt. 162; Williamson *v.* Sammons, 34 Ala. 691; and it extends to freedom from prior liens or incumbrances: Dresser *v.* Ainsworth, 9 Barb. 619; Davis *v.* Smith, 7 Minn. 414; Miller *v.* Van Tessel, 24 Cal. 458; but where the sale of personal property is by a sheriff, constable, or other judicial officer, or by an executor, administrator, or other trustee; or if the article sold is not, at the time of sale, in the possession of the owner, but in that of some third person, there is no implied warranty of title: Morgan *v.* Fencher, 1 Blackf. 10; The Monte Allegre, 9 Wheat. 616; Davis *v.* Murray, 2 Constitutional R. 143; Robinson *v.* Cooper, 1 Hill (S. C.) 286; Fuller *v.* Fowler, 1 Bail. 75; Ricks, Admr., *v.* Dillahunty, 8 Port. 134; Forsythe, &c.. *v.* Ellis, 4 J. J. Marsh. 298; Hensley *v.* Baker, 10 Mo. 157; McCoy et al. *v.* Artcher, 3 Barb. 323; Edick *v.* Crim, 10 Barb. 445; Worthy et al. *v.* Johnson et al., 8 Geo. 236; Scott *v.* Hix, 2 Sneed 192; Long *v.* Hickingbottom, 28 Miss. 772; where, however, a judicial officer "steps out of his official duty, and does what the law has given him no authority to do, he may make himself personally responsible:" The Monte Allegre, 9 Wheat. 616.

The law of implied warranties extends as well to cases of exchange, as to those of purchase: Rivers *v.* Crugett, 1 McCord 100.

Where an express warranty has been given, it does not matter whether the seller knew any unsoundness in the chattel sold or not, for in either case he will be responsible: Kimmel *v.* Lichty, 3 Yeates 262; Smith *v.* Williams, 1 Car. L. Repos. 263, n.; Ricks, Admr., *v.* Dillahunty, 8 Port. 134; Beeman *v.* Buck, 3 Vt. 53; Carley *v.* Wilkins, 6 Barb. 557; Tyre *v.* Causay, 4 Harring. 425; Bartholomew *v.* Bushnell, 20 Conn. 271; Trice *v.* Cochran, 8 Gratt. 442; such a warranty, however, does not extend to anything not included within its terms: Porcher, *ads*, Caldwell, 2 McMull. 329; Stucky *v.* Clyburn, Cheeves L. & Eq. R. 186; Rodrigues, *ads*, Habersham, 1 Spear 314; McLaughlin *v.* Horton, 1 Hill (S. C.) 383; Wood, Admr., *v.* Ashe, 1 Strobh. 407; thus, a warranty of quality is no warranty of value: Lightburn *v.* Cooper, 1 Dana 274; nor will one of title extend to soundness: Smith, &c., *v.* Miller, 2 Bibb 617; Wells *v.* Spears, 1 McCord 421; Hughes, *ads*, Banks, Id. 537; nor will quantity cover quality: Jones *v.* Murray, &c., 3 Mon. 83; Taymon *v.* Mitchell et al., 1 Md. Ch. Decs. 496; but in those places where a sound price implies a sound article, an express warranty of title will not exclude an implied warranty of soundness: Roderigues, *ads*, Habersham, 1 Spear 314; Wells *v.* Spears, 1 McCord 421; Wood *v.* Ashe, 3 Strobh. 64. Even an express warranty, will not extend to open and palpable defects: Schuyler *v.* Russ, 2 Caines 202; Long *v.* Hicks, 2 Humph. 305; Caldwell *v.* Smith, 4 Dev. & Bat. 64; Stucky *v.* Clyburn, Cheeves L. & Eq. R. 186; Mulvany *v.* Rosenberger, 18 Penn. St. 203; Fisher *v.* Pollard, 2 Head 314; hence a wilful and fraudulent representation by the seller of a fire engine that it was as good as another designated

or *non compos mentis*, such person shall be at liberty to bring the same action within *six* years after the disability is removed.(*k*) The disabilities of absence beyond seas and imprisonment have been abolished by a recent statute.(*l*)[1]

(*k*) Sect. 7.

(*l*) Stat. 19 & 20 Vict. c. 97, ss. 10, 12.

engine, and a warranty that it would perform as well as any other in the western country, is not to be considered violated, because the warranted engine is inferior to others in the country, much larger and more costly, if the inferiority be evident to a common observer: The President, &c., *v.* Wadleigh, 7 Black. 102 ; but see Wilson *v.* Ferguson, Cheeves L. & Eq. R. 190.

In the case of Otts *v.* Alderson, 10 Sm. & M. 480, Judge Clayton, in speaking of warranties, uses the following language: "On this subject the general rule is, that the purchaser buys at his own peril, *caveat emptor*, unless the seller either gives an express warranty, or unless the law imply a warranty from the circumstances of the case, or the nature of the thing sold ; or unless the seller be guilty of fraudulent representation or concealment, in respect to a material inducement to the sale. No particular form of words is necessary, to the creation of a warranty—any affirmation or representation, in relation to the article sold, is sufficient, if it be intended to have that effect. There is certainly a tendency in modern cases . . . to extend the doctrine of implied warranty . . 1st. A warrant is implied, that the seller has title. 2d. That the articles are merchantable, when, from their nature or situation at the time of the sale, an examination is impracticable. This rule is most frequently brought into requisition where the seller is a manufacturer. 3d. Upon an executory contract to manufacture an article, or to furnish it for a particular use or purpose, a warranty will be implied, that it is reasonably fit and proper for such purpose and use, as far as any article of such kind can be. 4th. A warranty is implied, against all latent defects, in two cases; first, where the seller knew the buyer did not rely on his own judgment, but on that of the seller, who knew, or might have known, the existence of the defects ; and second, where a manufacturer, or producer, undertakes to furnish articles of his manufacture or produce, in answer to an order. 5th. That goods sold by sample, correspond with the sample, in quality. Another exception to the rule, that a purchaser ordinarily buys at his own risk, is, where the vendor has been guilty of fraudulent representation or concealment."

[1] The time within which a personal action may be brought, is different in the different States. In Pennsylvania, by an act of the 27th of March, 1713, it is enacted, that "All actions of trespass *quare clausum fregit*, all actions of detinue, trover, and replevin, for taking away goods, and cattle, all actions upon account, and upon the case, other than such accounts as concern the trade of merchandise, between merchant and merchant, their factors or servants, all actions of debt, grounded upon any lending or contract, without specialty, all actioos of debt for arrearages of rent, except the proprietaries' quit-rents, and all actions of trespass, of assault, menace, battery, wounding, and imprisonment, or any of them, which shall be sued or brought at any time after the 25th day of April, which shall be in the year of our Lord, 1713, shall be commenced and sued within the time and limitation hereafter expressed, and not after; that is to say, the said actions upon the case, other than for slander, and the said actions for account, and the said actions for trespass, debt, detinue, and replevin for goods or cattle, and the said actions of trespass *quare clausum fregit*, within six years next after the cause of such actions or suit, and not after. And the said actions of trespass, of assault,

Choses in action, whether legal or equitable, differ from choses in possession in this, that the title to them is endangered rather than strengthened by the Statutes of Limitation. This difference arises from the nature *of the property. Goods and chattels may exist without any owner; but if there cease to be a person entitled to [*401] a debt, the debt itself ceases to exist. The time within which actions or suits may be brought for the recovery of choses in action varies according to the nature of the security. The law on this subject has been rendered somewhat difficult by two different acts of parliament(*m*) varying from each other, passed the same session of parliament, and each intended to amend the law. The following, however, appear to be the distinctions. If the chose in action be money secured by any mortgage, judgment(*n*) or lien, or otherwise charged upon or payable out of any real estate at law or in equity, or any legacy,(*o*) or the personal estate or any share of the personal estate of a person who has died intestate,(*p*) no action or suit can be brought to recover the same but within *twenty years* next after a present right to receive the same shall have accrued to some person capable of giving a discharge for or release of the same; unless in the meantime some part of the principal money, or some interest thereon, shall have been paid, or some acknowledgment of the right thereto shall

(*m*) Stats. 3 & 4 Will. IV. cc. 27, 42.

(*n*) Watson *v.* Birch, 15 Sim. 523.

(*o*) Sheppard *v.* Duke, 9 Sim. 567.

(*p*) Stat. 23 & 24 Vict. c. 38, s. 13.

menace, battery, wounding, imprisonment, or any of them, within two years next after the cause of such actions or suits, and not after. And the said actions upon the case for words, within one year next after the words spoken, and not after:" Purd. Dig. (1861), p. 655.

In New Hampshire, it is provided, that "Actions of trespass to the person, and actions for defamatory words, may be brought within two years, and all other personal actions within six years after the cause of action accrued, and not afterward. Actions of debt upon judgments, recognisances, and contracts under seal, may be brought within twenty years after the cause of action accrued, and not afterward:" Gen. Stats. of N. H., p. 408, Chap. ccii., secs. 3 & 4. For statutes of limitation of personal actions, see Stats. of S. C. vol. ii., p. 585, &c.; Caruthers & Nicholson's Stat. Laws of Tenn., p. 439, &c.; Laws of Del. Rev. Code (1852), p. 440, &c.; Dig. of the Stats. of Arkansas, p. 696, &c.; How. & Hutch. Stat. Laws of Miss., p. 569, &c.; New Dig. Laws of Ga. (1851) by T. R. R. Cobb, vol. 1, pp. 561, 562, 564, 566; Thompson's Dig. Laws of Fla., p. 441, &c.; Rev. Stats. of Vt. (1839), p. 305, &c.; Clay's Ala. Dig. p. 326, &c.; Rev. Stats. of N. C. (1836–7), p. 372, &c.; Paschall's Dig. Laws of Texas, p. 758, art. 4604; 2 Matthews's Dig. Va. (1857), p. 405, &c.; 3 Rev. Stats. of New York (5th ed.), p. 505; Compiled Laws of Michigan, vol. ii. (1857), p. 1406, &c.; 1 Md. Code (1860), p. 395, &c.; Supple. Md. Code, p. 153, art. 57, sec. 1; Gen. Stats. of Mass. (1860) p. 777, &c.; Rev. Stats. of Maine (1857) p. 509, &c.; Nixon's Dig. of N. J. (1868) p. 509, &c.; 2 Rev. Stats. of Ky. (1860) p. 126, &c.; 2 Rev. Stats. of Ohio (1860), p. 947, &c.; Wood's Cal. Dig. (1860), p. 45, &c.; Rev. Stats. of Miss. (1845), p. 716, &c.; Gen. Stats. of Kansas (1868), art. iii., p. 632, &c.

have been given in writing signed by the person by whom the same shall be payable, or his agent,(q) to the person entitled thereto or his agent ;(r) and in such case no such action or suit shall be brought but within twenty years after such payment or acknowledgment, or the last of such payments or acknowledgments, if more than one, was made or given.(s) If the [*402] *chose in action be rent due upon an indenture of demise, or money secured by bond or other specialty, or by a recognisance, an action must also be brought within *twenty years* after the cause of such action,(t) or within twenty years after the removal of any of the disabilities of infancy, coverture or lunacy.(u) And if any person against whom there is any such cause of action shall be beyond the seas at the time such cause of action accrued, the person entitled to any such cause of action may bring the same against him within twenty years after his return.(v) And the absence of a joint debtor beyond the seas will not prevent time from running in favor of the others, who may not be beyond the seas; and the recovery of judgment against them will not prevent the creditor from commencing an action against the absent debtor after his return.(x) If any acknowledgment shall have been made, either by writing signed by the party liable,(y) or his agent, or by part payment or part satisfaction on account of any principal or interest then due, the person entitled may bring his action for the money remaining unpaid, and so acknowledged to be due, within twenty years after such acknowledgment, or within twenty years after any of the above mentioned disabilities shall have ceased, or the party liable shall returned from beyond the seas, as the case may be.(z) If the chose in action consist of arrears of dower, neither such arrears nor damages on account thereof can be recovered or obtained by any action or suit for a longer period than *six years* next before the [*403] *commencement of such action or suit.(a) Arrears of rent or of interest in respect of any sum of money charged upon or payable out of any real estate or in respect of any legacy, can be recovered only within *six years* next after the same shall have become due,

(q) Lord St. John v. Boughton, 9 Sim. 219.

(r) Blair v. Nugent, 3 Jones & Lat. 673, 677.

(s) Stat. 3 & 4 Will. IV. c. 27, s. 40. (t) Stat. 3 & 4 Vill. IV. c. 42, s. 3.

(u) Stat. 3 & 4 Will. IV. c. 42, s. 4; 19 & 20 Vict. c. 97, s. 10; Pardo v. Bingham, L. C., 17 W. R. 419.

(v) Stat. 3 & 4 Will. IV. c. 42, s. 4. (x) Stat. 19 & 20 Vict. c. 97, s. 11.

(y) See Roddam v. Morley, 1 De G. & J. 1; Moodie v. Bannister, 4 Drew. 432; Coope v. Cresswell, L. C., Law Rep. 2 Ch. Ap. 112.

(z) Stat. 3 & 4 Will. IV. c. 42, s. 5; Kempe v. Gibbon, 9 Q. B. 609 (E. C. L. R. vol. 58).

(a) Stat. 3 & 4 Will. IV. c. 27, s. 41.

or next after an acknowledgment of the same in writing shall have been given to the person entitled thereto, or his agent, signed by the person by whom the same was payable, or his agent.(*b*) But if such arrears are secured to the claimant(*c*) by indenture of demise,(*d*) or by bond or other specialty,(*e*) an action of debt or covenant may be brought for such arrears at any time within twenty years. And where a mortgagee or other incumbrancer shall have been in possession of any real estate within one year next before the action or suit of a subsequent mortgagee or incumbrancer, the latter may recover the arrears of interest which may have become due to him during the whole time that the prior mortgagee or incumbrancer was in possession.(*f*) If the chose in action consist of a simple contract debt, it must be sued for within *six years* next after the cause of action, or within *six* years next after the removal of any of the disabilities of infancy, coverture or lunacy.(*g*) And no acknowledgment or promise by words only to pay such debt shall be deemed sufficient evidence of a new or *continuing contract to take the case out of the operation of the statute, unless such acknowledgment or promise shall be made in writing, signed by the party chargeable thereby,(*h*) or his agent.(*i*)[1] Actions of debt upon any award where the submission is not by specialty, or for any fine due in respect of any copyhold estates, or for an escape, or for money levied on any *fieri facias*, must also be brought within *six years* after the cause of action, with a similar saving in respect of disabilities to that applicable in the case of actions on indentures of demise, bonds or other specialties.(*k*) And actions for penalties, damages or sums of money given to the party grieved by any statute now or hereafter to be in force, must be brought within *two years* after the cause of such actions, with the like

[*404]

(*b*) Stat. 3 & 4 Will. IV. c. 27, s. 42; Hodges *v.* Croydon Canal Company, 3 Beav. 86; Francis *v.* Grover, 5 Hare 39; Humfrey *v.* Gery, 7 C. B. 567 (E. C. L. R. vol. 62). See Toft *v.* Stevenson, 5 De G., M. & G. 735; Mason *v.* Broadbent, 33 Beav. 296; Edmund *v.* Waugh, V.-C. K., 14 W. R. 257; 1 Law Rep. Eq. 418; Bowyer *v.* Woodman, V.-C. W., Law Rep. 3 Eq. 313.

(*c*) Hughes *v.* Kelly, 3 Dru. & Warren 482.

(*d*) Paget *v.* Foley, 2 New Ca. 679.

(*e*) Sims *v.* Thomas, 12 Ad. & E. 536 (E. C. L. R. vol. 40); Hunter *v.* Nockolds, 1 Macn. & G. 640. See Elvy *v.* Norwood, 5 De G. & Sm. 240; Sinclair *v.* Jackson, 17 Beav. 405.

(*f*) Stat. 3 & 4 Will. IV. c. 27, s. 42.

(*g*) Stat. 21 Jac. I. c. 16, ss. 3, 7; 19 & 20 Vict. c. 97, ss. 10, 12.

(*h*) Stat. 9 Geo. IV. c. 14, s. 1.

(*i*) Stat. 19 & 20 Vict. c. 97, s. 13; see *ante*, pp. 77, 82.

(*k*) Stat. 3 & 4 Will. IV. c. 42, ss. 3, 4; see *ante*, p. 402.

[1] See *ante*, p. 76, notes.

saving in respect of disabilities, unless the time for bringing such action is or shall be by any statute specially limited.(*l*)

When a cause of action accrues to a person in his lifetime, the time limited by the Statutes of Limitation will run on after his decease from the period that the cause of action accrued, and will not be reckoned from the time that administration was taken out to his effects.(*m*) But if the cause of action accrue after the death of the party, the time limited by the statute will run only from the grant of the letters of administration.(*n*) On the other hand, the death of the debtor and the absence of any personal representative to his effects, will not prevent the time limited by the statute from continuing to run on.[1] For if there be [*405] once a cause of action, a plaintiff that can sue, and a defendant *that can be sued in England, the time limited by the statute will begin to run, and will not be stopped by the decease of either party.(*o*) An executor or administrator is not, however, bound to plead the Statute of Limitations to any debt or demand, but may, if he please, pay the same notwithstanding the time limited by the statute may have expired.(*p*)[2] But if the estate be administered in the Court of Chancery,

(*l*) Stat. 3 & 4 Will. IV. c. 42, ss. 3, 4. (*m*) 2 Wms. Saund. 63 k.

(*n*) Murray *v.* East India Company, 5 B. & Ald. 204 (E. C. L. R. vol. 7); Perry *v.* Jenkins, 1 Myl. & Cr. 118.

(*o*) Rhodes *v.* Smethurst, 6 M. & W. 351; Freake *v.* Cranefeldt, 3 Myl. & Cr. 499; Sturgis *v.* Darrell, 6 H. & N. 120.

(*p*) Norton *v.* Frecher, 1 Atk. 526; Ex parte Dewdney, 15 Ves. 498. See Stahlschmidt *v.* Lett, 1 Sm. & G. 415.

[1] In Pennsylvania, debts not of record, are liens against a decedent's estate for five years from the time of his death, and this is irrespective of the time the Statute of Limitations has yet to run as regards any such debt, provided the running of the statute was not completed at the time of his death: McClintock's Ap., 29 Penn. St. 360; Demmy's Ap., 43 Id. 155; McCandless's Est., 61 Id. 9.

[2] An executor or administrator is not bound to interpose the general Statute of Limitations, in bar of the recovery of a demand against the estate, which is otherwise well founded: Hodgon, Admr., *v.* White et al., 11 N. H. 108; Leigh, Admr., *v.* Smith et al., 3 Ired. Eq. 442; Walter *v.* Radcliffe, Admr., et al., 2 Desauss. 577; Kennedy's Ap., 4 Penn. St. 149; Brown et al., Admrs., *v.* Porter, 7 Humph. 373; Barnawell *v.* Smith, 5 Jones Eq. 168; nor can the legatees or creditors of the decedent require them to do so: In the matter of Smith, 1 Ash. 352; Leigh, Admr., *v.* Smith et al., 3 Ired. Eq. 442; but they may themselves intervene and plead the statute: Campbell *v.* Fleming, 63 Penn. St. 242; but the court will not allow a sale of the real estate of the testator or intestate, for the purpose of paying a debt barred by the statute: The Heirs of Bond *v.* Smith, Admr., 2 Ala. 660. Where, however, for the more speedy settlement of the estates of decedents, statutes have been passed, enacting that all claims, not presented within a certain time after his death, shall be barred, it is the duty of the executor or administrator

any party to the suit is competent to take the objection, although the executor may not have insisted on it.(*q*)

Notwithstanding the period of six years limited for the payment of simple contract debts, the debtor may by charging his real estate by his will with the payment of his debts, and, *à fortiori*, by creating an express trust for their payment out of his real estate, prevent the operation of the statute on all such debts as have not been barred by the statute in his lifetime.(*r*) Real estate, it will be remembered, was not formerly liable to the payment of any debts which were not secured by specialty binding the heirs;(*s*) and the alteration, which in this respect has been made in the law, affects only such real estates as have not been charged

(*q*) Shewen *v.* Vanderhorst, 1 Russ. & My. 347; 2 Russ. & My. 75.

(*r*) Burke *v.* Jones, 2 Ves. & B. 275; Hughes *v.* Wynne, Turn. & Russ. 307; Crallan *v.* Oulton, 3 Beav. 1.

(*s*) See Principles of the Law of Real Property 57, 1st ed.; 61, 2d ed.; 64, 3d and 4th eds.; 68, 5th ed.; 72, 6th ed.; 74, 7th ed.; 75, 8th ed.; *ante*, p. 105.

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to plead the statute: Hodgon, Admr., *v.* White et al., 11 N. H. 208; Brown *v.* Anderson, 13 Mass. 301; Thompson *v.* Brown, 16 Id. 172; Emerson *v.* Thompson, Id. 429; Heath *v.* Wells, 5 Pick. 140; Tunstall et al. *v.* Pollard's Admr., 11 Leigh 2; Brown et al., Admrs., *v.* Porter, 7 Humph. 373.

A debt is not revived by the promise of an administrator to pay it: McCann *v.* Sloan, 25 Md. 575; Campbell *v.* Fleming, 63 Penn. St. 242.

Whether one administrator may charge the estate, by refusing to plead the Statute of Limitations, although his co-administrator insist on pleading it, is doubted; but if one of the administrators stand neutral, the other may plead the statute: Scull et al., Admrs., *v.* Exrs. of Wallace, 15 S. & R. 231.

In the case of Smith *v.* Porter et al., Exrs., 1 Binn. 209, Chief Justice Tilghman, in deciding that a debt, which is barred by the act of limitations, is not revived by a clause in a will, ordering all the testator's just debts to be paid, says, "Whether the debts are just or not, must be left to the judgment of the executor, before he makes a voluntary payment; and if, upon a candid examination, he thinks a debt not justly due, it would be doing violence to the words of the testator, so to construe them, as to deprive the executor of the legal means of defence, by pleading the act of limitations. But an executor ought not to plead that act against a just debt; on the contrary, if he knows it to be just, I think it is as dishonest in him to use that plea, as it would be in the case of his own debt." But since the decision of Lewis, J., in Kittera's Estate, 17 Penn. St. 423, prudence would suggest to an administrator or executor, the propriety of pleading the statute, whenever applicable.

The death of a debtor does not suspend the running of the statute, as it respects a creditor's right of action; but it cannot be pleaded in bar of his claim, where he proceeds in the Orphans' Court for a distributive proportion of the decedent's estate; and the reason is, that it acts upon the remedy, and takes away the right of action unless suit is brought within the time limited, but it does not extinguish the debt, nor effect a trust created for its payment, as long as the trust subsists, and is acknowledged and acted upon by the parties: McCandless's Est., 61 Penn. St. 9.

by the deceased with the payment of his debts. The creditors therefore in whose favor the charge is made acquire, as before the alteration, the character of *cestui que trusts;* and in equity they will not be allowed to [*406] lose their *debts, because they do not go to law to enforce payment when they have a trustee to pay them.(*t*) But after twenty years the charge, if not enforced, will be barred like any other charge.(*u*) An express trust, however, is proof against any length of time.(*v*) But as personal estate has always been primarily liable to the payment of all debts, a trust created by a testator for the payment of his debts out of his personal estate will not prevent the operation of the statute.(*x*)

When the dividends upon any stock transferable at the Bank of England have not been claimed for ten years, such stock, together with the unclaimed dividends, is transferred to the account of the commissioners for the reduction of the national debt;(*y*) and such dividends, together with all the future dividends on the stock, are invested by the commissioners in the purchase of like stock, so as to accumulate.(*z*) And the governor or deputy governor of the bank for the time being may order the transfer of such stock and the payment of the dividends to any person showing, to his satisfaction, a right thereto; but in case such governor or deputy governor shall not be satisfied of the justice or legality of the claim, an order for transfer and payment may be obtained from the Court of Chancery by petition in a summary way, stating and verifying the claim.(*a*) But no such transfer of stock or payment of dividends, exceeding the sum of 20*l.*, can be made until three [*407] *calendar months after the application, nor until notice has been advertised in one or more newspapers circulating in London and elsewhere, as the governor and company of the bank shall think fit; which notice must state the name, description and condition of the person in whose name the unclaimed stock or dividends stood when transferred to the commissioners, and the amount thereof, and the name of the claimant, and the time at which the transfer or payment will be made if no other claimant

(*t*) Turn. & Russ. 309.

(*u*) Dundas *v.* Blake, 11 Ir. Eq. Rep. 138; Sug. Real Prop. Stat. p. 107; Jacquet *v.* Jacquet, 27 Beav. 322; Dickinson *v.* Teesdale, 31 Beav. 511.

(*v*) See the author's Essay on Real Assets, p. 40.

(*x*) Scott *v.* Jones, 4 Cl. & Fin. 382; Freake *v.* Cranefedlt, 3 Myl. & Cr. 499.

(*y*) Stats. 56 Geo. III. c. 60; 8 & 9 Vict. c. 62.

(*z*) Stat. 56 Geo. III. c. 60, s. 4.

(*a*) Stat. 56 Geo. III. c. 60, s. 5; 24 Vict. c. 3, s. 8; Ex parte Ram, 3 Myl. & Cr. 25; Hunt *v.* Peacock, 6 Hare 361.

shall soon appear and make out his claim. And when the stock or dividends are directed to be transferred or paid by any order of the Court of Chancery, the notice must also state the purport or effect of such order;(b) and any person may at any time before the actual retransfer of the stock, or payment of the dividends to any such claimant, apply to the Court of Chancery by motion or petition to rescind, alter or vary any order made for such transfer or payment.(c)

When a chose in action, whether legal or equitable, is transferred from one person to another, notice of the assignment should be given by the transferee to the person liable to the action at law or suit in equity, the right to bring which is the subject of the transfer.(d) Thus if a debt be assigned, notice of assignment should be given to the debtor.[1] If the

(b) Stat. 8 & 9 Vict. c. 62, s. 2. (c) Sect. 3.
(d) Dearle v. Hall, Loveridge v. Cooper, 3 Russ. 1; Bright's Trusts, 21 Beav. 430.

[1] An assignment of a chose in action is valid, in equity, if made upon a good consideration, and with notice to the debtor: Admr. of Sheftall v. Admr. of Clay, Charlt. 230; Anderson et al. v. Van Allen, 12 Johns. 343; Briggs v. Dorr, 19 Id. 95; Van Vechten v. Graves, 4 Id. 403; Littlefield v. Story, 3 Id. 425; Wardell v. Eden, 2 Johns. Cas. 121; Henry v. Milham, 1 Green 266; Perkins v. Parker, 1 Mass. 117; Corser v. Craig, 1 Wash. C. C. 424; Noyes v. Brown, 33 Vt. 431; but the debtor should have notice of the transfer: Wood v. Partridge, 11 Mass. 491; Foster v. Sinkler, 4 Id. 450; Comstock v. Farnum, 2 Id. 97; Davenport v. Woodbridge 8 Greenlf. 18; for, as was said in the latter case, "although upon the assignment, the original creditor ceases to be, for any beneficial purpose, the owner of the demand, and cannot receive it, or any part of it, to his own use; yet if the debtor, ignorant of such assignment, make payments to him, they are to be allowed in his favor. And this qualification of the right of the assignee, is for the equitable protection of the debtor. But if the latter has notice of the assignment, what he afterwards pays to the original debtor, he pays in his own wrong;" and notwithstanding such payments, he will still be liable to the assignee: Stevens v. Stevens, 1 Ash. 190; Jones v. Whitter, 13 Mass. 307; Jenkins v. Brewster, 14 Id. 291; Littlefield v. Story, 3 Johns. 425; Clark v. Rogers, 2 Greenl. 143; Swett v. Green, 4 Id. 384; Holland v. Dale, Minor 265; and so also, if after an assignment with notice, the original creditor execute a release, the claim is not thereby extinguished: Welsh v. Manderville, 1 Wheat. 236; s. c., 5 Id. 277; Cowan v. Shields, 1 Overt. 314; Dunn v. Snell, 15 Mass. 485; Raymond v. Squire, 11 Johns. 47; Andrews v. Becker, 1 Johns. Cas. 411; Strong v. Strong, 2 Aik. 373; Eastman v. Wright, 6 Pick. 316; Wheeler v. Wheeler, 9 Cowen 34.

Actual notice, however, of a transfer, is not necessary, for if a party acts in the face of facts and circumstances which were sufficient to put him upon inquiry, he acts contrary to good faith, and on his peril: Anderson et al. v. Van Allen, 12 Johns. 343; Tritts, Admr., v. Colwell's Admr., 31 Penn. St. 228; as was said in the case of Johnson v. Bloodgood, 1 Johns. Cas. 52, "The notice by which parties are affected, is either express or implied; under the head of implied notice, it has been held in a court of equity, 'that whatever is sufficient to put the party upon inquiry, is good notice.'" But between the parties to the contract, the assignment will be good without notice, either express or implied: Bishop v. Holcombe, 10 Conn. 444.

At law, where an assignment of a chose

subject of the assignment be the right to stock standing in the name of a trustee, notice of assignment should be given to such trustee. Until such notice be given, it is evident that the debtor may innocently pay the debt, or the trustee transfer the stock to the transferor; or the transferor may fraudulently transfer his right over again to a [*408] third person. The transferee, therefore, until he has *given notice to the party liable, has not done all that lies in his power to perfect his title. The chose in action still remains the apparent property of the transferor; and in the event of his bankruptcy it would formerly have passed to his assignees as property in his order and disposition with the consent of the true owner thereof.(*e*) This, however, is now altered by the Bankruptcy Act, 1869, which expressly excepts things in action, other than debts due to the bankrupt in the course of his trade or business.(*f*) Even the assignees themselves would formerly not have been safe, unless they had given a similar notice to the person liable to the action, the right to bring which was transferred to them by the bankruptcy.(*g*)[1] The importance of giving notice suggests the precaution that every person about to accept an assignment of a chose in action should inquire of the person liable to the action or suit, whether he has had notice of any prior assignment. And if there be two or more persons liable, inquiry should be made of every one of them; for notice by a prior assignee to any one of them would be equivalent to notice to all.(*h*) It is also advisable that a written answer should be obtained to every such inquiry, in order that if the assignee should be misled by a false answer, he may be enabled to recover damages for the misrepresentation. For it has been doubted whether the answer to such an inquiry be not a representation concerning the ability of the intended assignor [*409] within the meaning of Lord Tenterden's act, which requires *that all such representations be made in writing signed by the party

(*e*) Ex parte Munro, Buck. 300; Williams *v.* Thorpe, 2 Sim. 257; Thompson *v.* Spiers, 13 Sim. 469; Bartlett *v.* Bartlett, 1 De G. & J. 127; Re Hughes's Trusts, 2 Hem. & Mil. 89; Re Webb's Policy, V.-C. M., 15 W. R. 529; see *ante*, p. 54.

(*f*) Stat. 32 & 33 Vict. c. 71, s. 15, par. (5)

(*g*) Re Barr's Trusts, 4 Kay & J. 219.

(*h*) Smith *v.* Smith, 2 Cr. & M. 231; Meux *v.* Bell, 1 Hare 73, 87. See Browne *v.* Savage, 4 Drew. 635, 640.

in action has been made, the claim should generally be sued in the name of the assignor: Admr. of Sheftall *v.* Admr. of Clay, Charlt. 230; Boylston *v.* Green, 8 Mass. 465; but where the party who is bound, has recognised the transfer, and promised to pay the new creditor, he may bring suit in his own name; Mowry *v.* Todd, 12 Johns. 281; Tiernan et al. *v.* Jackson, 5 Peters 597; De Barry *v.* Withers et al., 44 Penn. St. 356.

See *ante*, p. 5 and 26, notes.

[1] See *ante*, p. 270, note, and p. 151 note.

to be charged therewith.(*i*) The inquiry, however, thus recommended will not of itself strengthen the title of the assignee, further than by assuring him that no previous assignment has been made. In order to obtain a good title, he must himself give notice to the person or one of the persons liable to the debt or demand assigned to him. When this has been done his title will be secure, and will prevail over that of any unknown prior assignee who may have omitted to give such notice.(*j*) If the property consist of money or stock standing in the name of the accountant-general of the Court of Chancery, or of securities in his possession,(*k*) an order of the court should be obtained restraining transfer or payment without notice to the assignee. This order is called a stop order, and will have the same effect as notice of assignment given to any private debtor.(*l*) If the property be stock standing in the name of a trustee, who has died without any administration having been taken out to his effects, a *distringas* obtained by the assignee to restrain the transfer of the stock will confer on him the same priority as notice to the trustee would have done had he been living.(*m*) When the property consists of a policy of assurance, or of shares in a joint-stock company, notice of the transfer should be given to the office of the company.(*n*) And with respect to policies of life assurance, it is, as we have seen, now provided that a written notice of the date and purport of the assignment *must be given to the company in order to pass the right to sue on the policy.(*o*)[1] [*410]

The title to personal property sometimes depends upon deeds, wills or

(*i*) Lyde *v.* Barnard, M. & W. 101; Swan *v.* Phillips, 8 Ad. & E. 457 (E. C. L. R. vol. 35); see *ante*, p. 83.

(*j*) Dearle *v.* Hall, Loveridge *v.* Cooper, 1 Russ. 1.

(*k*) Williams *v.* Symonds, 9 Beav. 523.

(*l*) Greening *v.* Beckford, 5 Sim. 195; Swayne *v.* Swayne, 11 Beav. 463.

(*m*) Etty *v.* Bridges, 2 You. & Col. N. C. 466; see *ante*, p. 205.

(*n*) Williams *v.* Thorpe, 2 Sim. 257; Thompson *v.* Spiers, 13 Sim. 469; West *v.* Reid, 2 Hare 249; Martin *v.* Sedgwick, 9 Beav. 333; Powles *v.* Page, 3 C. B. 16 (E. C. L. R. vol. 54).

(*o*) Stat. 30 & 31 Vict. c. 144, s. 3; *ante*, p. 178.

[1] Almost every policy of insurance contains a stipulation, that in case of an assignment, it shall be approved by the company within a certain specified time, after such transfer; and that, in default of such approval, the policy shall, *ipso facto*, become null and void; but in practice, assignments are approved by insurance companies, after the time limited for notice has expired, in cases which are free from suspicion of fraud or unfair dealing; and when so approved, the companies waive all benefit which they might have taken, from the want of notice within the time required by the policy.

other documents of title of the like nature, and cannot be shown without their production. Thus a reversionary interest in money in the funds, settled by deed or will, may be mortgaged and sold again and again before it becomes an interest in possession. In these cases the purchaser is entitled to an abstract of the deeds, wills, &c., which compose the title, in the same manner as if the subject of the contract had been real estate; and the original deeds, and the probates or office copies of the wills, must also in like manner be produced for the verification of the abstract.(*p*) The purchaser is also entitled either to the possession of the deeds, or if this cannot be had, to attested copies of them, and a covenant for their production, at the expense of the vendor.(*q*) And when an assignment of any kind of personal property is made by deed, it is usual for the assignor to enter into covenants for the title similar to those entered into under the like circumstances by the grantor of real estate.(*r*)

The vendor of shares in a joint-stock company is bound merely to give such evidence of the constitution of the company, as to show that the proposed transfer will give a valid title to the shares sold.(*s*)

[*411] *A recent act of parliament provides that any person shall have power to assign personal property, now by law assignable, directly to himself and another person or other persons or corporation, by the like means as he might assign the same to another.(*t*) Before this act an assignment by A. to himself and B. of leasehold property or choses in possession vested the whole of the property in B. The same act renders criminally punishable the concealment, with intent to defraud, of any deed or instrument material to a title or of any incumbrance, or the falsification of any pedigree on which a title depends.(*u*)

From what has been said it will appear that the title to personal property is far more simple than that to real estate. And amongst the plans which have appeared for the amendment of the law has been one for adapting the machinery of the funds to the transfer of landed property.

(*p*) See Principles of the Law of Real Property 349, 1st ed.; 351, 2d ed.; 364, 3d ed.; 370, 4th ed.; 381, 5th ed.; 404, 6th ed.; 412, 7th ed.; 431, 8th ed.; Hobson *v.* Bell, 2 Beav. 17.

(*q*) Ibid. 354, 356, 1st ed.; 356, 358, 2d ed.; 369, 372, 3d ed.; 375, 378, 4th ed.; 389, 5th ed.; 412, 6th ed.; 420, 7th ed.; 440, 8th ed.

(*r*) See Principles of the Law of Real Property 348, 1st ed.; 349, 2d ed.; 362, 3d ed.; 368, 4th ed.; 379, 5th ed.; 402, 6th ed.; 410, 7th ed.

(*s*) Curling *v.* Flight, 2 Phil. 613.

(*t*) Stat. 22 & 23 Vict. c. 35, s. 21.

(*u*) Sect. 24, extended by stat. 23 & 24 Vict. c. 38, s. 8.

Upon consideration, however, it will perhaps appear that the greater complexity of the title to lands arises partly from the nature of the property, and partly from the more full power of disposition to which lands are subject. Lands, unlike stock, may be converted from arable to pasture, may be cut up into roads, canals or railways, may be sold by the foot for building purposes, may be let upon lease for terms absolute or determinable, may be held for life, or in tail, as well as in fee, and may be disposed of by contingent remainders, shifting uses and executory devises, without the intervention of any trustees. Personal property, on the contrary, cannot be settled without the intervention of trustees in whom a great degree of personal confidence must necessarily be placed; but when so settled, the title to it is sometimes as long and intricate as that to real *estate. If the nature of lands could be altered, or if landowners were willing, in order to save themselves expense, to give up some of their powers of disposition, the title to real estate might doubtless be rendered as simple as that to personal property. To the latter alternative, however, few, if any, would be inclined to submit. Whilst, therefore, much might be done to simplify and improve our laws of property by an assimilation of the rules of real and personal estate, where the history of each forms the only ground of variety, care should be taken to preserve untouched such distinctions as are founded on the broad basis of practical difference.

[*412]

APPENDIX (A).

Referred to, p. 243.

Form of Letters Patent.

VICTORIA by the grace of God of the United Kingdom of Great Britain aud Ireland Queen Defender of the Faith to all to whom these presents shall come greeting WHEREAS A. B. of —— hath by his petition humbly represented unto us that he is in possession of an invention for —— —— which the petitioner conceives will be of great public utility That he is the true and first inventor thereof and the same is not in use by any other person or persons to the best of his knowledge and belief The petitioner therefore most humbly prayed that we would be graciously pleased to grant unto him his executors administrators and assigns our royal letters patent for the sole use benefit and advantage of his said invention within our United Kingdom of Great Britain and Ireland the Channel Islands and Isle of Man [COLONIES TO BE MENTIONED IF ANY] for the term of fourteen years pursuant to the statutes in that case made and provided [AND WHEREAS the said A. B. hath particularly described and ascertained the nature of the said invention and in what manner the same is to be performed by an instrument in writing under his hand and seal and has caused the same to be duly filed in —— ——] AND WE being willing to give encouragement to all arts and inventions which may be for the public good are graciously pleased to condescend to the petitioner's request Know ye therefore that we of our especial grace certain knowledge and mere motion have given and granted and by these presents for us our heirs and successors do give and grant unto the said A. B. his executors administrators and assigns our especial license full power sole privilege and authority that he the said A. B. his executors administrators and assigns and every of them by himself *and themselves or by his or their deputy or deputies servants or agents or such others as he the said A. B. [*414] his executors administrators or assigns shall at any time agree with and no others from time to time and at all times hereafter during the term of years herein expressed shall and lawfully may make use exercise and vend his said invention within our United Kingdom of Great Britain and Ireland the Channel Islands and Isle of Man(*a*) in such a manner as to him the said A. B. his executors administrators and assigns or any of them shall in his or their discre-

(*a*) The Colonies should here be mentioned, if any, though it is not so stated in the printed form annexed to the Act.

tion seem meet and that he the said A. B. his executors administrators and assigns shall and lawfully may have and enjoy the whole profit benefit commodity and advantage from time to time coming growing accruing and arising by reason of the said invention for and during the term of years herein mentioned TO HAVE HOLD exercise and enjoy the said licenses powers privileges and advantages hereinbefore granted or mentioned to be granted unto the said A. B. his executors administrators and assigns for and during and unto the full end and term of fourteen years from the —— day of —— A. D. —— next and immediately ensuing according to the statute in such case made and provided And to the end that he the said A. B. his executors administrators and assigns and every of them may have and enjoy the full benefit and the sole use and exercise of the said invention according to our gracious intention hereinbefore declared We do by these presents for us our heirs and successors require and strictly command all and every person and persons bodies politic and corporate and all other our subjects whatsoever of what estate quality degree name or condition soever they be within our United Kingdom of Great Britain and Ireland the Channel Islands and Isle of Man [COLONIES TO BE MENTIONED IF ANY] that neither they nor any of them at any time during the continuance of the said term of fourteen years hereby granted either directly or indirectly do make use or put in practice the said invention or any part of the same so attained unto by the said A. B. as aforesaid nor in anywise counterfeit imitate or resemble [*415] the same nor shall make or cause to be made any addition *thereunto or subtraction from the same whereby to pretend himself or themselves the inventor or inventors devisor or devisors thereof without the consent license or agreement of the said A. B. his executors administrators or assigns in writing under his or their hands and seals first had and obtained in that behalf upon such pains and penalties as can or may be justly inflicted on such offenders for their contempt of this our royal command and further to be answerable to the said A. B. his executors administrators and assigns according to law for his and their damages thereby occasioned And moreover we do by these presents for us our heirs and successors will and command all and singular the justices of the peace mayors sheriffs bailiffs constables headboroughs and all other officers and ministers whatsoever of us our heirs and successors for the time being that they or any of them do not nor shall at any time during the said term hereby granted in anywise molest trouble or hinder the said A. B. his executors administrators or assigns or any of them or his or their deputies servants or agents in or about the due and lawful use or exercise of the aforesaid invention or anything relating thereto PROVIDED ALWAYS and these our letters patent are and shall be upon this condition that if at any time during the said term hereby granted it shall be made appear to us our heirs or successors or any six or more of our or their Privy Council that this our grant is contrary to law or prejudicial or inconvenient to our subjects in general or that the said invention is not a new invention as to the public use and exercise thereof or that the said A. B. is not the true and first inventor thereof within this realm as aforesaid these our letters

patent shall forthwith cease determine and be utterly void to all intents and purposes anything herein contained to the contrary thereof in anywise notwithstanding PROVIDED ALSO that these our letters patent or anything herein contained shall not extend or be construed to extend to give privilege unto the said A. B. his executors administrators or assigns or any of them to use or imitate any invention or work whatsoever which hath heretofore been found out or invented by any other of our subjects whatsoever and publicly used or exercised unto whom our like letters patent or privileges have been already granted for the sole use exercise and benefit *thereof it being our will and pleasure that the said A. B. his executors administrators and assigns [*416] and all and every other person and persons to whom like letters patent or privileges have been already granted as aforesaid shall distinctly use and practise their several inventions by them invented and found out according to the true intent and meaning of the same respective letters patent and of these presents PROVIDED LIKEWISE nevertheless and these our letters patent are upon this express condition [that if the said A. B. shall not particularly describe and ascertain the nature of his said invention and in what manner the same is to be performed by an instrument in writing under his hand and seal and cause the same to be filed in —— within —— calendar months next and immediately after the date of these our letters patent] [and also if the said instrument in writing filed as aforesaid does not particularly describe and ascertain the nature of the said invention and in what manner the same is to be performed] and also if the said A. B. his executors administrators or assigns shall not pay or cause to be paid at the office of our Commissioners of Patents for Inventions the sums following that is to say the sum of ———— pounds on or before the —— day of —— A. D. —— and the stamp duty payable in respect of the certificate of such payment and the sum of ———— pounds on or before the —— day of —— A. D. —— and the stamp duty payable in respect of the certificate of such payment (*b*) AND ALSO if the said A. B. his executors administrators or assigns shall not supply or cause to be supplied for our service all such articles of the said invention as he or they shall be required to supply by the officers or commissioners administering the department of our service for the use of which the same shall be required in such manner at such times and at and upon such reasonable prices and terms as shall be settled for that purpose by the said officers or commissioners requiring the same that then and in any of the said cases these our letters patent and all liberties and advantages whatsoever hereby granted shall utterly cease determine and become void anything hereinbefore contained to the contrary thereof in anywise *notwithstanding PROVIDED THAT nothing herein contained shall prevent the granting [*417] of licenses in such manner and for such consideration as they may by law be granted AND LASTLY we do by these presents for us our heirs and successors

(*b*) By stat. 16 & 17 Vict. c. 5, no fees are now payable, but stamp duties only. See *ante*, p. 236.

grant unto the said A. B. his executors administrators and assigns that these our letters patent on the filing thereof shall be in and by all things good firm valid sufficient and effectual in the law according to the true intent and meaning thereof and shall be taken construed and adjudged in the most favorable and beneficial sense for the best advantage of the said A. B. his executors administrators and assigns as well in all our Courts of Record as elsewhere and by all and singular the officers and ministers whatsoever of us our heirs and successors in our United Kingdom of Great Britain and Ireland the Channel Islands and the Isle of Man [COLONIES TO BE MENTIONED IF ANY] and amongst all and every the subjects of us our heirs and successors whatsoever and wheresoever notwithstanding the not full and certain describing the nature or quality of the said invention or of the materials thereunto conducing and belonging In witness whereof we have caused these our letters to be made patent this —— day of ——— A. D. —— and to be sealed and bear date as of the said ——— day of ——— A. D. —— in the ——— year of our reign.

APPENDIX (B).

Referred to, pp. 263, 287, 289, 385, 386.

Marriage Settlement of a Share of a Testator's Residuary Personal Estate and of Money in the Funds upon the usual Trusts.

THIS INDENTURE made the —— day of —— 1860 Between Charles Catchpole of King Street in the city of London gentleman of the first part Grace Gurney of Harley Street in the county of Middlesex spinster of the second part and Henry Hunter of Brixton in the county of Surrey Esquire John James of Lincoln's Inn in the county of Middlesex Esquire and Leonard Lambert of Brighton in the county of Sussex Esquire of the third part WHEREAS a marriage has been agreed upon and is intended to be shortly solemnized between the said Charles Catchpole and Grace Gurney AND WHEREAS under and by virtue of the last will and testament of John Gurney late of Harley Street aforesaid Esquire deceased which said will bears date on or about the ninth day of January 1840 and was proved in the Prerogative Court of the Archbishop of Canterbury(*a*) on or about the twelfth day of March 1840 the said Grace Gurney is now entitled to one equal undivided fourth part or share or some other part or share of the residuary personal estate of the said testator or the stocks funds or securities in or upon which the same is or may be invested AND WHEREAS the said Grace Gurney is possessed of the sum of £5000 £3 per cent.

(*a*) See *ante*, p. 333.

consolidated bank annuities which said sum was lately standing in her own name in the books of the governor and company of the Bank of England AND WHEREAS upon the treaty for the said intended marriage it was agreed that the said Grace Gurney should assign the said one equal undivided fourth part or *share or other part or share to which she is entitled as aforesaid of and in the residuary personal estate of her said late father unto the said Henry Hunter John James and Leonard Lambert their executors administrators and assigns upon and for the trusts intents and purposes hereinafter expressed and declared of and concerning the same And it was also agreed that the said Grace Gurney should transfer the said sum of £5000 £3 per cent. consolidated bank annuities of which she is possessed as aforesaid into the names of the said Henry Hunter John James and Leonard Lambert to be held by them upon and for the trusts intents and purposes hereinafter expressed and declared of and concerning the same AND WHEREAS the said sum of £5000 £3 per cent. consolidated bank annuities hath been accordingly transferred by the said Grace Gurney out of her name into the names of the said Henry Hunter John James and Leonard Lambert and the same is now standing in their names in the books of the governor and company of the Bank of England as they the said Henry Hunter John James and Leonard Lambert do hereby admit and acknowledge NOW THIS INDENTURE WITNESSETH that in pursuance of the said agreement in this behalf and in consideration of the said intended marriage she the said Grace Gurney with the consent and approbation of the said Charles Catchpole testified by his being a party to and executing these presents HATH granted bargained sold assigned and transferred and by these presents DOTH grant bargain sell assign and transfer unto the said Henry Hunter John James and Leonard Lambert their executors administrators and assigns ALL that the one equal undivided fourth part or share or other part or share of her the said Grace Gurney under the hereinbefore mentioned will of her said late father John Gurney of and in the residuary personal estate of her said late father and of and in the stocks funds and securities in or upon which the same now is or shall or may at any time or times hereafter be invested and of and in the dividends interest and annual produce thereof AND all the right title claim and demand whatsoever at law and in equity of her the said Grace Gurney in and to the said one equal undivided fourth part or share or other part or share hereby assigned TO HAVE HOLD RECEIVE AND TAKE the said *one equal undivided fourth part or share or other part or share intended to be hereby assigned of and in the residuary personal estate of the said John Gurney and the investments and income thereof unto the said Henry Hunter John James and Leonard Lambert their executors administrators and assigns IN TRUST for the said Grace Gurney her executors administrators and assigns until the solemnization of the said intended marriage and from and immediately after the solemnization thereof UPON and for the trusts intents and purposes and with under and subject to the powers provisos agreements and declarations hereinafter expressed and declared of and concerning the same AND the said

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Charles Catchpole and Grace Gurney do and each of them doth hereby irrevocably nominate and appoint the said Henry Hunter John James and Leonard Lambert and the survivors and survivor of them his executors administrators and assigns to be the true and lawful attorneys and attorney of them the said Charles Catchpole and Grace Gurney and each of them(*b*) in their his or her names or name to ask recover and receive from the executors of the will of the said John Gurney and all and every persons and person liable to pay or transfer the same the said one equal undivided fourth part or share hereby assigned and to give effectual discharges for the same and on non-payment or non-transfer thereof or of any part thereof to commence carry on and prosecute any action or actions suit or suits or other proceedings whatsoever for obtaining payment or transfer thereof And also for all or any of the said purposes from time to time to substitute or appoint any attorney or attorneys under them or him And generally to do and execute all such other matters and things in the premises as shall be necessary they the said Charles Catchpole and Grace Gurney hereby agreeing to allow and confirm whatsoever the said Henry Hunter John James and Leonard Lambert or the survivors or survivors of them his executors administrators or assigns shall lawfully do or cause to be done in the premises by virtue hereof AND it is hereby agreed and declared by and between the said parties hereto that they the said Henry Hunter John James and Leonard Lambert [*421] *their executors administrators and assigns shall stand possessed of and interested in the said sum of £5000 £3 per cent. consolidated bank annuities so transferred into their names as aforesaid IN TRUST for the said Grace Gurney her executors administrators and assigns until the solemnization of the said intended marriage And from and immediately after the solemnization thereof UPON and for the trusts intents and purposes and with under and subject to the powers provisos agreements and declarations hereinafter expressed and contained of and concerning the same And it is hereby agreed and declared by and between the said parties hereto that from and after the solemnization of the said intended marriage the said Henry Hunter John James and Leonard Lambert their executors administrators and assigns shall stand possessed of and interested in the said one equal fourth part or share or other part or share hereinbefore assigned of and in the residuary personal estate of the said John Gurney and the investments thereof and the said sum of £5000 £3 per cent. consolidated bank annuities UPON TRUST that the said trustees or the trustees or trustee for the time being of these presents do and shall either continue the same respectively in their respective actual states of investment or do and shall lay out and invest the same in any of the parliamentary stocks or public funds of Great Britain or at interest upon government or real securities in England or Wales but not in stock of the Bank of England or Ireland or in East India Stock or on real securities in Ireland(*c*) and do and shall from time to time alter and vary

(*b*) This power of attorney is not absolutely necessary, as the *choses in action* which are assigned are equitable only; see *ante*, p. 117

(*c*) See *ante*, pp. 282, 283

the said stocks funds and securities for or into others of a like nature as often as the said trustees or trustee shall think fit PROVIDED that every such investment alteration and variation be made with the consent of the said Charles Catchpole and Grace Gurney during their joint lives and after the decease of either of them with the consent of the survivor of them(*d*) and after the decease of such survivor at the discretion of the said trustees or trustee for the time being of these presents AND it is hereby agreed and declared by and between the said parties hereto that after the solemnization of the said intended marriage the said trustees or *trustee for the time being of these presents shall stand possessed of and interested in the said share of [*422] the residuary personal estate of the said John Gurney and the investments thereof and the said sum of £5000 £3 per cent. consolidated bank annuities and the stocks funds and securities in or upon which the same may be invested and the dividends interest and annual produce thereof UPON and for the trusts intents and purposes and under and subject to the powers provisos agreements and declarations hereinafter expressed and declared of and concerning the same that is to say UPON TRUST that they the said trustees or trustee for the time being of these presents do and shall during the life of the said Grace Gurney pay the interest dividends and annual produce thereof unto such person or persons as the said Grace Gurney shall from time to time notwithstanding her said intended or any future coverture appoint by any writing under her hand but not by any mode of anticipation and in default of such appointment into her own hands for her sole and separate use(*e*) exclusive of the said Charles Catchpole and of any future husband but so that she shall not dispose thereof in any mode of anticipation And the receipts in writing of the said Grace Gurney or of such person or persons as she shall appoint to receive the said dividends interest and annual produce in manner aforesaid but not in any mode of anticipation shall notwithstanding her said intended or any future coverture be effectual discharges for the same AND from and immediately after the decease of the said Grace Gurney UPON TRUST that the said trustees or trustee for the time being of these presents do and shall pay the dividends interest and annual produce of the said trust moneys stocks funds and securities unto or permit the same to be received by the said Charles Catchpole and his assigns for and during the term of his natural life AND from and immediately after the decease of the survivor of them the said Charles Catchpole and Grace Gurney the said trustees or trustee for the time being of these present shall stand and be possessed of and interested in the said trust moneys stocks funds and securities and the dividends interest and annual produce thereof IN TRUST for all and *every or such one or more exclusively of the others or other of the children or child of the said intended marriage with such provision [*423] for their respective maintenance and if more than one in such shares and proportions and subject to such limitations and conditions over in favor of any

(*d*) See *ante*, pp. 285, 286. (*e*) See *ante*, p. 384.

others or other of the said children and in such manner(*f*) as the said Charles Catchpole and Grace Gurney by any deed or deeds instrument or instruments in writing with or without power of revocation and new appointment to be by them sealed and delivered in the presence of and to be attested by two or more credible witnesses shall jointly direct or appoint AND in default of such joint direction or appointment and so far as any such joint direction or appointment if incomplete shall not extend as the survivor of them the said Charles Catchpole and Grace Gurney by any deed or deeds instrument or instruments in writing with or without power of revocation and new appointment to be by him or her respectively sealed and delivered in the presence of and to be attested by two or more credible witnesses or by his or her last will or any codicil or testamentary writing to be by him or her respectively duly executed (and as to the said Grace Gurney notwithstanding any future coverture) shall direct or appoint AND in default of such direction or appointment and so far as any such direction or appointment if incomplete shall not extend IN TRUST for all and every the children or child of the said intended marriage who being a son or sons shall attain the age of twenty-one years or being a daughter or daughters shall attain that age or marry under that age with the consent of her or their parent or parents guardian or guardians for the time being and to be divided between or amongst the said children if more than one in equal shares as tenants in common and if there shall be but one such child who being a son shall live to attain the age of twenty-one years or being a daughter shall live to attain that age or marry under that age with such consent as aforesaid then the whole shall be in trust for that one or only child But no child taking any part of the said trust moneys stocks funds and securities under any appointment to be made in exercise of *any of the aforesaid powers shall be entitled to any share of the unappointed part of the said trust moneys stocks funds and securities without bringing his or her appointed share into hotchpot and accounting for the same accordingly(*g*) AND if there shall be no child or children of the said intended marriage who shall become entitled to the said trust moneys stocks funds and securities under the trusts hereinbefore declared then the said trustees or trustee for the time being shall stand possessed of the said trust moneys stocks funds and securities or so much thereof as shall not have been disposed of under the powers and authorities herein contained and the dividends interest and annual produce thereof (subject nevertheless to the trusts hereinbefore declared) UPON and for the trusts intents and purposes hereinafter expressed and declared of and concerning the same that is to say IF the said Charles Catchpole shall depart this life in the lifetime of the said Grace Gurney IN TRUST for the said Grace Gurney her executors administrators and assigns for her own benefit BUT IF the said Grace Gurney shall depart this life in the lifetime of the said Charles Catchpole then after the decease of the said Charles Catchpole and such failure of children as aforesaid UPON and for such trusts intents and purposes and in such

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(*f*) See *ante*, pp. 271, 272.

(*g*) See *ante*, p. 272.

manner as the said Grace Gurney by her last will or any codicil or testamentary writing to be by her duly executed notwithstanding her said intended coverture shall direct or appoint(*h*) AND in default of such direction or appointment and so far as any such direction or appointment if incomplete shall not extend IN TRUST for the person or persons who under the statutes made for the distribution of the estates of intestates would at the decease of the said Grace Gurney be entitled to her personal estate in case she had died possessed of the same intestate and without having been married and to be divided between or amongst the same persons if more than one in the shares in which the same would under the same statutes be divided between or amongst them PROVIDED ALWAYS and it is hereby agreed and declared by and between the said parties hereto that after the decease of the said Charles Catchpole and Grace Gurney *and whilst any child or children of the said intended marriage being a son [*425] or sons shall be under the age of twenty-one years or being a daughter or daughters shall be under that age and unmarried the said trustees or trustee for the time being of these presents do and shall apply the whole or such part as the said trustees or trustee for the time being shall think fit of the dividends interest and annual produce of the expectant or presumptive share of each such child in the said trust moneys stocks funds and securities for or towards his or her maintenance and education or otherwise for his or her benefit and that the said trustees or trustee for the time being may either themselves or himself so apply the same or may pay the same to the guardian or guardians of such child for the purpose aforesaid without seeing to the application thereof(*i*) AND do and shall lay out and invest the surplus if any of the said interest dividends and annual produce in the names or name of the said trustees or trustee for the time being in any of the stocks funds or securities hereinbefore mentioned to be from time to time altered and varied for or into any other stocks funds and securities of a like nature as often as the said trustees or trustee shall think fit so that the same may accumulate by way of compound interest and the accumulations to be so made shall be added to the fund or respective funds from which the same shall have proceeded and be subject to the same trusts and provisions in every respect and so that the dividends interest and annual produce of each such accumulated fund may be subject to the provision hereinbefore contained for the maintenance and education at any subsequent period of minority of the child from whose expectant or presumptive share the same shall have proceeded PROVIDED ALSO and it is hereby agreed and declared that it shall be lawful for the said trustees or trustee for the time being of these presents during the joint lives of the said Charles Catchpole and Grace Gurney with their consent in writing and after the decease of either of them with the consent in writing of the survivor of them which consent shall be binding whether the said Grace Gurney shall be covert or sole and after the decease of such survivor at the discretion *of the said trustees or trustee for the time being to raise and apply a sufficient part of the expectant share of any child of the said [*426]

(*h*) See *ante*, p. 269.

(*i*) See *ante*, pp. 278–281.

intended marriage in the said trust moneys stocks funds and securities for or towards his or her advancement in the world notwithstanding he or she shall not then have attained the age of twenty-one years or after he or she may have attained that age in the lifetime of the said Charles Catchpole and Grace Gurney or the survivor of them PROVIDED ALWAYS and it is hereby agreed and declared by and between the said parties hereto that it shall be lawful for the said trustees or trustee for the time being at any time or times during the lives or life of the said Charles Catchpole and Grace Gurney or the survivor of them with their his or her consent and approbation in writing signed with their his or her hands or hand to convert into money the whole or any part of the said stocks funds and securities and to lay out the moneys arising thereby in the purchase of any freehold or copyhold estates in England or Wales of an estate of inheritance in fee simple in possession free from all incumbrances except quit rents and copyhold and customary dues and services(*k*) to be conveyed or surrendered to the said trustees or trustee for the time being their or his heirs and assigns UPON TRUST nevertheless with the consent and approbation of the said Charles Catchpole and Grace Gurney or the survivor of them to be signified by writing signed with their his or her hands or hand during the lifetime of them or the survivor of them and after the decease of the survivor of them then at the discretion and of the proper authority of the said trustees or trustee for the time being of these presents to sell and dispose of the said estates which shall have been so purchased as aforesaid either by public auction or private contract in one lot or in parcels subject to such special conditions of sale and for such price or prices as to the said trustees or trustee for the time being shall seem reasonable with power at any public auction of the said premises or any of them to buy in the same or any of them and also to vary or rescind any contract for the sale of the same or any part thereof and to resell the same in manner [*427] *aforesaid without responsibility for any loss to be occasioned thereby and to convey and assure the said premises which shall be sold to the purchaser or respective purchasers thereof or as he she or they respectively shall direct AND UPON TRUST to apply the moneys arising from such sale after payment of the costs charges and expenses attending the same Upon and for such and the same trusts intents and purposes as the moneys so raised and laid out in the purchase of such estates were subject to before such purchase was made or would have been subject to if the same had not been laid out therein AND ALSO UPON TRUST in the meantime and until such estates shall be so resold to apply the rents and profits thereof in such manner as the interest dividends and annual produce of the moneys laid out in the purchase thereof would have been applicable under the trusts hereinbefore declared in case such purchase had not been made IT BEING hereby agreed and declared that the estates to be purchased under this present power as aforesaid shall when so purchased be considered as money and be subject to such and the same trusts in all respects as

(*k*) See *ante*, p. 286.

the moneys laid out in the purchase thereof were subject to before such purchase was made or would have been subject to if the same had not been laid out therein PROVIDED ALWAYS and it is hereby agreed and declared by and between the said parties hereto that it shall be lawful for the trustees or trustee for the time being of the estates so to be purchased by virtue of such power as aforesaid with the consent and approbation of the said Charles Catchpole and Grace Gurney or the survivor of them testified by some writing under their his or her hands or hand and after the decease of such survivor then at the discretion and of the proper authority of the said trustees or trustee by deed at any time or times to demise and lease the same estates or any of them or any part thereof to any person or persons whomsoever for any term of years not exceeding twenty-one years to take effect in possession and not by way of future interest at the best yearly rent that can be had or gotten for the same and without any fine or foregift for the making thereof and upon such other terms and conditions as the said trustees or trustee shall think fair and reasonable PROVIDED ALWAYS and it is hereby agreed and declared by and between *the said parties hereto that it shall be lawful for the trustees or trustee for the time [*428] being of these presents with the consent in writing of the said Charles Catchpole and Grace Gurney during their joint lives and after the decease of either of them with the consent in writing of the survivor of them and after the decease of such survivor at the discretion of the said trustees or trustee to settle and ascertain in such manner as they or he shall deem expedient the amount of any moneys properties or effects due to or claimed by them or him under these presents by virtue of the will of the said John Gurney deceased and also to pass and allow the accounts of the person or persons paying over or transferring the same moneys properties or effects or any part thereof and to accept any moneys properties or effects which the said trustees or trustee for the time being with such consent or at such discretion as aforesaid shall deem it expedient to accept in lieu of or satisfaction for the whole of the said premises hereby assigned and to give releases and discharges to the accounting party or parties for the same premises or any part thereof as fully and effectually as the trustees or trustee for the time being of these presents might or could do if they or he were absolute and beneficial owners or owner of such premises AND if any disputes or difficulties shall at any time arise in relation to the said premises hereby assigned or any part thereof it shall be lawful for the trustees or trustee for the time being of these presents if they or he shall think proper with such consent or at such discretion as aforesaid to refer any such disputes or difficulties to arbitration in the usual manner or otherwise to settle and adjust the same in such manner in all respects as the said trustees or trustee for the time being with such consent or at such discretion as aforesaid shall think proper PROVIDED ALSO and it is hereby futher agreed that it shall be lawful for the trustees or trustee for the time being of these presents in their or his discretion to postpone or forbear the exercise and enforcement of all or any of the powers and remedies hereby vested in or which shall or may be exercisable by such trustees or trustee by virtue hereof

anything herein contained or any rule at law or equity to the contrary notwithstanding PROVIDED ALSO and it is hereby agreed and declared by and between the said [*429] parties hereto *that the receipts in writing of the trustees or trustee for the time being acting in the execution of the trusts or powers of these presents for any moneys payable to them or him by virtue of these presents shall effectually discharge the person or persons paying the same from all responsibility as to the misapplication or nonapplication thereof and from all obligation of seeing to the application thereof (*l*) AND ALSO that it shall be lawful for the trustees or trustee for the time being of these presents but during the lives of the said Charles Catchpole and Grace Gurney and the life of the survivor of them with their his or her consent in writing to accept other real securities for any part of the said trust funds which may be invested in real securities and the interest thereof in lieu of and as a substitution for the hereditaments or any part of the hereditaments comprised in any such security AND ALSO to discharge from any such security any part or parts of the hereditaments therein comprised and without which the said trustees or trustee shall deem the existing security or securities sufficient and every such acceptance of a new security and every release of all or any part of the hereditaments comprised in the existing securities shall be binding on all persons interested in the said trust funds and the interest thereof and the persons deriving title to the hereditaments so released shall not be obliged to inquire into the sufficiency in point of value or title of the substituted or retained security or securities PROVIDED ALSO and it is hereby further agreed and declared by and between the said parties hereto that if the said trustees hereinbefore appointed or any or either of them or any future trustee or trustees to be appointed as hereinafter is mentioned shall happen to die or shall go to reside beyond the seas or shall be desirous of being discharged or shall decline or become incapable to act in the trusts or powers herein contained before the same shall be fully performed or otherwise satisfied then and in every such case it shall be lawful for the said Charles Catchpole and Grace Gurney during their joint lives and after the decease of either of them for the survivor of them and after decease of such survivor for the surviving or continuing trustees or [*430] *trustee for the time being of these presents or the acting executors or administrators of the last surviving or continuing trustee (and for this purpose a retiring trustee shall if willing to act in the execution of this power be considered a continuing trustee) by any deed or deeds instrument or instruments in writing to be by them him or her sealed and delivered in the presence of and to be attested by two or more credible witnesses to substitute and appoint any other person or persons to be a trustee or trustees in lieu of the trustee or trustees so dying going to reside beyond the seas desiring to be discharged declining or becoming incapable to act as aforesaid (*m*) AND THAT when any new trustee or trustees shall have been appointed as aforesaid all the said trust estates moneys and premises which shall be then vested in the trustees or trustee

(*l*) See *ante*, p. 288. (*m*) See *ante*, p. 289.

for the time being of these presents or in the heirs executors or administrators of the last surviving or continuing trustee shall with all convenient speed be conveyed assigned transferred and paid so as effectually to vest the same in the surviving or continuing trustees or trustee and such new or other trustee or trustees or if there shall be no surviving or continuing trustee then in such new trustees or trustee only upon the same trusts as are hereinbefore declared concerning the same or such of the same trusts as shall be subsisting or capable of taking effect AND it is hereby agreed and declared that every such new trustee shall in all things act and assist in the management and execution of the trusts and powers to which he shall be so appointed as effectually and with the same powers authorities exemptions and discretion as if he had been originally by these presents nominated a trustee for the purposes aforesaid IN WITNESS whereof the said parties to these presents have hereunto set their hands and seals the day and year first above written.

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