John F. Alexander

English Ruling Cases
CITED "E. R. C."

CONTINUED BY

British Ruling Cases
CITED "B. R. C."

The Extra Annotations following this volume should invariably be examined. They give every citation of the cases reported in this volume of E.R.C. in the decisions of this country and Canada, also in the more important English decisions, indicating which citation the exact point involved and the disposition made by the Court. An additional feature is the analysis and citation of these cases in the leading text books and Annotated Reports.

English Ruling Cases

ARRANGED, ANNOTATED AND EDITED
BY
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ASSISTED BY OTHER MEMBERS OF THE BAR

WITH AMERICAN NOTES
BY
IRVING BROWNE

VOL V.
BILL OF SALE—CONFLICT OF LAWS

EXTRA ANNOTATED EDITION
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PREFACE TO VOLUME V.

In this volume the editor has received the assistance (as in previous volumes) of Mr. A. E. Randall, and has also received assistance from Mr. Agarwala, LL.B., Barrister-at-Law (holder of Inns of Court Studentship, 1893).

The present volume has been extended beyond the usual size in order to complete the important topic of "Conflict of Laws." The succeeding volume (Vol. VI.), now in the press, will comprise the whole of "Contract."

R. CAMPBELL.

August, 1895.

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No. 1. — TWYNE'S CASE.

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RULE.

BY the common law of England, a bargain and sale may be made of chattels which are capable of physical possession, so as to pass the property to the purchaser either absolutely or subject to a condition giving the transaction the effect of a mortgage, without the purchaser carrying away the chattels or taking possession of them.

But where the transaction was not an out and out sale, but was intended to operate merely as a security or by way of mortgage, the fact of the chattels being left in the possession of the original owner was considered to be evidence to go to the jury of a fraud to defeat creditors.

The legislation by the series of English Acts called the Bills of Sale Acts was commenced with the object of defining the facts which were to give rise to the presumption of fraud and to make the presumption upon those facts conclusive.

In a case not coming within the definition of the Acts, the rule of common law prevails; and if the transaction is *bonâ fide* the title acquired through it is good.

No. 1. — Twyne's Case, 3 Co. Rep. 80 b.

Twyne's Case.

3 Co. Rep. 80 b–83 b (S. C. 1 Smith's Lead. Cas. 8th ed. 1).

Assignment of Chattels. — Fraud under Statute of 13 *Eliz.*

[80 b] A., indebted to B. in four hundred pounds, and to C. in two hundred pounds, being sued in debt by C., pending the writ, makes a secret assignment of all his goods and chattels to B. generally, without exception, in satisfaction of his debt, but still continues in possession, and sells some sheep, and sets his mark on others; held that this was a fraudulent gift within the 13 Eliz. c. 5. 1st. Because the gift was general, without exception of his apparel, &c.; the donor continued in possession, and used them as his own; it was made in secret, pending the writ; there was a trust between the parties; and the deed contained an unusual clause, — that it was made *bonâ fide*, &c. 2nd. That a good consideration is not sufficient to take a case out of the statute, unless the deed be made *bonâ fide* also.

What conveyances are fraudulent within the 13 Eliz. c. 5, and 27 Eliz. c. 4.

Statutes made in suppression of fraud are to be construed liberally for that purpose.

A conveyance made with a power of revocation is fraudulent as against a purchaser, though the power be future, or to be exercised with the assent of another person. So if the power be afterwards extinguished by fine, to defraud a purchaser, the fine is void as to him.

A bond void in part by the statute law, is void *in toto*.

None but *bonâ fide* purchasers for a valuable and not inadequate consideration, can take advantage of the stat. 27 Eliz. c. 4.

In an information by Coke, the Queen's Attorney General, against Twyne of Hampshire, in the Star Chamber, for making and publishing of a fraudulent gift of goods: the case on the stat. of 13 Eliz. cap. 5 was such; Pierce was indebted to Twyne in four hundred pounds, and was indebted also to C. in two hundred pounds. C. brought an action of debt against Pierce, and pending the writ, Pierce being possessed of goods and chattels of the value of three hundred pounds, in secret made a general deed of gift of all his goods and chattels real and personal whatsoever to Twyne, in satisfaction of his debt; notwithstanding that Pierce continued in possession of the said goods, and some of them he sold; and he shore the sheep, and marked them with his own mark: and afterwards C. had judgment against Pierce, and had a *fieri facias* directed to the Sheriff of Southampton, who by force of the said writ came to make execution of the said goods; but divers persons, by the command of the said Twyne, did with force resist the said

No. 1. — Twyne's Case, 3 Co. Rep. 80 b, 81 a.

Sheriff, claiming them to be the goods of the said Twyne by force of the said gift; and openly declared by the commandment of Twyne, that it was a good gift, and made on a good and lawful consideration. And whether this gift on the whole matter was fraudulent and of no effect by the said act of 13 Eliz. or not, was the question. And it was resolved by Sir THOMAS EGERTON, Lord Keeper of the Great Seal, and by the Chief Justice POPHAM and ANDERSON, and the whole court of Star Chamber, that this gift was fraudulent, within the statute of 13 Eliz. And in this case divers points were resolved:

1st. That this gift had the signs and marks of fraud,
* because the gift is general, without exception of his ap- [* 81 a]
parel, or any thing of necessity; for it is commonly said,
quod dolus versatur in generalibus.

2nd. The donor continued in possession, and used them as his own; and by reason thereof he traded and trafficked with others, and defrauded and deceived them.

3rd. It was made in secret, *et dona clandestina sunt semper suspiciosa.*

4th. It was made pending the writ.

5th. Here was a trust between the parties, for the donor possessed all, and used them as his proper goods, and fraud is always apparelled and clad with a trust, and a trust is the cover of fraud.

6th. The deed contains, that the gift was made honestly, truly, and *bonâ fide*; *et clausulæ inconsuet' semper inducunt suspicionem.*

Secondly, it was resolved, that notwithstanding here was a true debt due to Twyne, and a good consideration of the gift, yet it was not within the proviso of the said Act of 13 Eliz., by which it is provided, that the said Act shall not extend to any estate or interest in lands, &c., goods or chattels made on a good consideration and *bonâ fide;* for although it is on a true and good consideration, yet it is not *bonâ fide*, for no gift shall be deemed to be *bonâ fide* within the said proviso which is accompanied with any trust; as if a man be indebted to five several persons, in the several sums of twenty pounds, and hath goods of the value of twenty pounds, and makes a gift of all his goods to one of them in satisfaction of his debt, but there is a trust between them, that the donee shall deal favourably with him in regard of his poor estate, either to permit the donor, or some other for him, or for his benefit, to use or have possession of them, and is contented that he shall pay him

his debt when he is able; this shall not be called *bonâ fide* within the said proviso; for the proviso saith on a good consideration, and *bonâ fide;* so a good consideration doth not suffice, if it be not also *bonâ fide:* and therefore, reader, when any gift shall be to you in satisfaction of a debt, by one who is indebted to others also; 1st, Let it be made in a public manner, and before the neighbours, and not in private, for secrecy is a mark of fraud. 2nd, Let the goods and chattels be appraised by good people to the very value, and take a gift in particular in satisfaction of your debt. 3rd, Immediately after the gift, take the possession of them; for continuance of the possession in the donor is a sign of trust. And know, reader, that the said words of the proviso, on a good consideration, and *bonâ fide,* do not extend to every gift made *bonâ fide;* and therefore there are two manners of gifts on a good consideration, *scil.* consideration of nature or blood, and a valuable consideration. As to the first, in the case before put; if he who is indebted to five several persons, to each party in twenty pounds, in [* 81 b] consideration of natural affection, gives * all his goods to his son, or cousin, in that case, forasmuch as others should lose their debts, &c., which are things of value, the intent of the act was, that the consideration in such case should be valuable: for equity requires, that such gift, which defeats others, should be made on as high and good consideration as the things which are thereby defeated are; and it is to be presumed, that the father, if he had not been indebted to others, would not have dispossessed himself of all his goods, and subjected himself to his cradle; and therefore it shall be intended, that it was made to defeat his creditors: and if consideration of nature or blood should be a good consideration within this proviso, the statute would serve for little or nothing, and no creditor would be sure of his debt. And as to gifts made *bonâ fide,* it is to be known, that every gift made *bonâ fide* either is on a trust between the parties, or without any trust; every gift made on a trust is out of this proviso; for that which is betwixt the donor and donee, called a trust *per nomen speciosum,* is in truth, as to all the creditors, a fraud, for they are thereby defeated and defrauded of their true and due debts. And every trust is either expressed, or implied: an express trust is when in the gift, or upon the gift, the trust by word or writing is expressed: a trust implied is, when a man makes a gift without any consideration, or on a consideration of

nature, or blood only: and therefore, if a man before the stat. of 27 H. VIII. had bargained his land for a valuable consideration to one and his heirs, by which he was seised to the use of the bargainee; and afterwards the bargainor, without a consideration, enfeoffed others, who had no notice of the said bargain; in this case the law implies a trust and confidence, and they shall be seised to the use of the bargainee: so in the same case, if the feoffees, in consideration of nature, or blood, had without a valuable consideration enfeoffed their sons, or any of their blood who had no notice of the first bargain, yet that shall not toll the use raised on a valuable consideration; for a feoffment made only on consideration of nature or blood, shall not toll an use raised on a valuable consideration, but shall toll an use raised on consideration of nature, for both considerations are *in æquali jure,* and of one and the same nature.

And when a man, being greatly indebted to sundry persons, makes a gift to his son, or any of his blood, without consideration, but only of nature, the law intends a trust betwixt them, *scil.* that the donee would, in consideration of such gift being voluntarily and freely made to him, and also in consideration of nature, relieve his father, or cousin, and not see him want who had made such gift to him (*vide* 33 H. VI., 33, by Prisot), if the father enfeoffs his son and heir apparent within age *bonâ fide*, yet the lord shall have the wardship of him: so note, valuable consideration is a good consideration within this proviso; and a gift made *bonâ fide* is a gift made without any trust either expressed or implied: * by [* 82 a] which it appears, that as a gift made on a good consideration, if it be not also *bonâ fide*, is not within the proviso, so a gift made *bonâ fide*, if it be not on a good consideration, is not within the proviso; but it ought to be on a good consideration, and also *bonâ fide.*

To one who marvelled what should be the reason that acts and statutes are continually made at every Parliament without intermission, and without end, a wise man made a good and short answer, both which are well composed in verse.

"Quæritur, ut crescunt tot magna volumina legis?
In promptu causa est, crescit in orbe dolus.

And because fraud and deceit abound in these days more than in former times, it was resolved in this case by the whole Court, that

all statutes made against fraud should be liberally and beneficially expounded to suppress the fraud. Note, reader, according to their opinions, divers resolutions have been made.

Between *Pauncefoot* v. *Blunt*, in the Exchequer Chamber, Mich. 35 & 36 Eliz. the case was: Pauncefoot being indicted for recusancy, for not coming to divine service, and having an intent to flee beyond sea, and to defeat the Queen of all that might accrue to her for his recusancy or flight, made a gift of all his leases and goods of great value, coloured with feigned consideration, and afterwards he fled beyond sea, and afterwards was outlawed on the same indictment; and whether this gift should be void to defeat the Queen of her forfeiture, either by the common law, or by any statute, was the question: and some conceived that the common law, which abhors all fraud, would make void this gift as to the Queen; *vide* Mich. 12 & 13 Eliz. Dyer, 295, 4 & 5 P. & M. 160. And the stat. of 50 E. III., cap. 6, was considered; but that extends only in relief of creditors, and extends only to such debtors as flee to sanctuaries, or other privileged places: but some conceived, that the stat. of 3 H. VII., cap. 4, extends to this case. For although the preamble speaks only of creditors; yet it is provided by the body of the act generally, that all gifts of goods and chattels made or to be made on trust to the use of the donor, shall be void and of no effect, but that is to be intended as to all strangers who are to have prejudice by such gift, but between the parties themselves it stands good: but it was resolved by all the Barons, that the stat. 13 Eliz. cap. 5, extends to it, for thereby it is enacted and declared, that all feoffments, gifts, grants, &c., "to delay, hinder, or defraud creditors, and others, of their just and lawful actions, suits, debts, accounts, damages, penalties, forfeitures, heriots, mortuaries, and reliefs," shall be void, &c. So that this Act doth not extend only to creditors, but to all others who had cause of action, or suit, or any penalty, or forfeiture, &c.

[*82 b] *And it was resolved, that this word "forfeiture" should not be intended only of a forfeiture of an obligation, recognizance, or such like (as it was objected by some, that it should, in respect that it comes after damage and penalty) but also to everything which shall by law be forfeited to the King or subject. And therefore if a man, to prevent a forfeiture for felony, or by outlawry makes a gift of all his goods, and afterwards is attainted or outlawed, these goods are forfeited notwithstanding

this gift: the same law of recusants, and so the statute is expounded beneficially to suppress fraud. Note well this word "declare" in the act of 13 Eliz. by which the Parliament expounded that this was the common law before. And according to this resolution it was decreed, Hil. 36 Eliz. in the Exchequer Chamber.

Mich. 42 & 43 Eliz. in the Common Pleas, on evidence to a jury, between *Standen* and *Bullock*, these points were resolved by the whole Court on the stat. of 27 Eliz. cap. 4. WALMSLEY, J., said, that Sir CHRISTOPHER WRAY, late C. J. of England, reported to him, that he, and all his companions of the King's Bench were resolved, and so directed a jury on evidence before them; that where a man had conveyed his land to the use of himself for life, and afterwards to the use of divers others of his blood, with a future power of revocation, as after such feast, or after the death of such one; and afterwards, and before the power of revocation began, he, for valuable consideration, bargained and sold the land to another and his heirs: this bargain and sale is within the remedy of the said statute. For although the statute saith, "the said first conveyance not by him revoked, according to the power by him reserved," which seems by the literal sense to be intended of a present power of revocation, for no revocation can be made by force of a future power until it comes *in esse;* yet it was held that the intent of the Act was, that such voluntary conveyance which was originally subject to a power of revocation, be it in *præsenti* or *in futuro*, should not stand against a purchaser *bonâ fide* for a valuable consideration; and if other construction should be made, the said Act would serve for little or no purpose, and it would be no difficult matter to evade it: so if A. had reserved to himself a power of revocation with the assent of B., and afterwards A. bargained and sold the land to another, this bargain and sale is good, and within the remedy of the said Act; for otherwise the good provision of the Act, by a small addition, and evil invention, would be defeated.

And on the same reason it was adjudged, 38 Eliz. in the Common Pleas, between *Lee* and his wife, executrix of one Smith, plaintiff, and *Mary Colshil*, executrix of Thomas Colshil, defendant, in debt on an obligation of one thousand marks, Rot. 1707; the case was, Colshil the testator had the office of the Queen's customer, by letters patent, to him and his deputies; and by indenture between him and Smith, the testator of the plaintiff, and for six hundred

[* 83 a] pounds paid, and one hundred pounds per annum * to be paid during the life of Colshil, made a deputation of the said office to Smith; and Colshil covenanted with Smith, that if Colshil should die before him, that then his executors should repay him three hundred pounds. And divers covenants were in the said indenture concerning the said office, and the enjoying of it: and Colshil was bound to the said Smith in the said obligation to perform the covenants; and the breach was alleged in the non-payment of the said three hundred pounds, forasmuch as Smith survived Colshil: and although the said covenant to repay the three hundred pounds was lawful, yet forasmuch as the rest of the covenants were against the statute of 5 E. VI., cap. 16, and if the addition of a lawful covenant should make the obligation of force as to that, the statute would serve for little or no purpose; for this cause it was adjudged, that the obligation was utterly void.

2nd, It was resolved, that if a man hath power of revocation, and afterwards, to the intent to defraud a purchaser, he levies a fine, or makes a feoffment, or other conveyance to a stranger, by which he extinguishes his power, and afterwards bargains and sells the land to another for a valuable consideration, the bargainee shall enjoy the land, for as to him, the fine, feoffment, or other conveyances, by which the condition was extinct, was void by the said Act; and so the first clause, by which all fraudulent and covinous conveyances are made void as to purchasers, extends to the last clause of the Act, *scil.* when he who makes the bargain and sale had power of revocation. And it was said that the statute of 27 Eliz. hath made voluntary estates made with power of revocation, as to purchasers, in equal degree with conveyances made by fraud and covin to defraud purchasers.

Between *Upton* v. *Bassett* in trespass, Trin. 37 Eliz. in the Common Pleas, it was adjudged, that if a man makes a lease for years, by fraud and covin, and afterwards makes another lease *bonâ fide*, but without fine or rent reserved, that the second lessee should not avoid the first lease.

For first it was agreed, that by the common law an estate made by fraud should be avoided only by him who had a former right, title, interest, debt, or demand, as 33 H. VI. a sale in open market by covin shall not bar a right which is more ancient: nor a covinous gift shall not defeat execution in respect of a former debt, as it is agreed in 22 Ass. 72, but he who hath right, title, interest, debt,

or demand, more puisne, shall not avoid a gift or estate precedent by fraud by the common law.

2nd, It was resolved, that no purchaser should avoid a precedent conveyance made by fraud and covin, but he who is a purchaser for money or other valuable consideration, for although in the preamble it is said "for money or other good consideration," and likewise in the body of the Act "for money or other good consideration," yet these words "good consideration" are to be intended only of valuable consideration; and that appears by the clause which concerns those who had power of revocation; for there it is said, for money or other good consideration paid, or given, and this word "paid" is to be referred to "money," and "given" is to be referred to "good consideration," so the sense is for money paid, or other good consideration given, which words exclude all considerations of * nature or blood, or [* 83 b] the like, and are to be intended only of valuable considerations which may be given; and therefore he who makes a purchase of land for a valuable consideration, is only a purchaser within this statute. And this latter clause doth well expound these words "other good consideration" mentioned before in the preamble and body of the Act.

And so it was resolved, Pasch. 32 Eliz. in a case referred out of the Chancery to the consideration of WINDHAM and PERIAM, Justices: *John Nedham*, plaintiff, v. *Beaumont, Serjeant-at-law*, defendant: where the case was, Henry Babington seised in fee of the manor of Lit-Church in the County of Derby, by indenture 10 February, 8 Eliz. covenanted with the Lord Darcy, for the advancement of such heirs male, as well those he had begot, as those he should afterwards beget on the body of Mary, then his wife (sister to the said Lord Darcy) before the feast of St. John Baptist then next following, to levy a fine of the said manor to the use of the said Henry for his life, and afterwards to the use of the eldest issue male of the bodies of the said Henry and Mary begotten in tail, &c., and so to three issues of their bodies, &c., with the remainder to his right heirs. And afterwards, 8 Maii, ann. 8 Eliz., Henry Babington, by fraud and covin, to defeat the said covenant, made a lease of the said manor for a great number of years, to Robert Heys; and afterwards levied the fine accordingly: and on conference had with the other justices, it was resolved, that although the issue was a purchaser, yet he was not a purchaser in vulgar

and common intendment: also consideration of blood, natural affection, is a good consideration, but not such a good consideration which is intended by the Stat. of 27 Eliz., for a valuable consideration is only a good consideration within that Act. In this case ANDERSON, C. J., of the Common Pleas, said, that a man who was of small understanding, and not able to govern the lands which descended to him, and being given to riot and disorder, by mediation of his friends openly conveyed his lands to them, on trust and confidence that he should take the profits for his maintenance, and that he should not have power to waste and consume the same; and afterwards, he being seduced by deceitful and covinous persons, for a small sum of money bargained and sold his land, being of a great value: this bargain, although it was for money, was holden to be out of this statute; for this Act is made against all fraud and deceit, and doth not help any purchaser, who doth not come to the land for a good consideration lawfully and without fraud or deceit; and such conveyance made on trust is void as to him who purchases the land for a valuable consideration *bonâ fide*, without deceit or cunning.

And by the judgment of the whole Court Twyne was convicted of fraud, and he and all the others of a riot.

Cookson v. Swire.

9 App. Cas. 653–670 (s. c. 54 L. J. Q. B. 249; 52 L. T. 30; 33 W. R. 181).

Title to Chattels. — Assignment by way of Security.

Interpleader to try the question of property as between the respondents (Swire and others), as plaintiffs, and the appellants (Cookson and wife) execution-creditors of Samuel Vaughan, as defendants.

In 1873 (therefore previously to the Bills of Sale Act 1878), Samuel Vaughan executed in favour of the respondents a bill of sale of his furniture by way of mortgage and with a power of sale; and, the document being unregistered and no execution-creditor being yet in existence, the respondents, under their power, sold the furniture to Charles Vaughan, who, not being able to pay the purchase-money, borrowed the whole of it from the respondents, on the security of a bill of sale executed by Charles Vaughan in their favour and duly registered. On a trial the jury found that the transaction as between the respondent and Charles Vaughan, was *bonâ fide*.

Held by the House of Lords affirming the judgment of the Court of Appeal, that the title of the respondents was good against the appellants.

[653] Appeal from an order of the Court of Appeal. The appellants having on the 25th of January, 1883, recovered

No. 2. — Cookson v. Swire, 9 App. Cas. 653, 654.

judgment against Samuel Vaughan for £734, the sheriff of Lancashire the next day seized under a *fi. fa.* certain household furniture at Croydon Villa, Blackpool, where the debtor was residing. A claim having been made by the respondents an interpleader issue was directed in which the respondents, as plaintiffs, affirmed, and the appellants, as defendants, denied that the goods seized were at the time of the seizure the property of the respondents as against the * appellants. At the [* 654] trial before CAVE, J., at Manchester in April, 1883, the following facts were proved: —

On the 10th of May, 1873, Samuel Vaughan being in difficulties the respondents paid his debts, and he executed a bill of sale whereby he assigned to the respondents the goods in question as security for loans amounting to £698 10*s.*, with a proviso that if the grantor did not upon demand pay principal and interest the grantees might take possession and sell the goods by public auction or private contract upon such conditions and in such manner as they should think fit. This bill was duly registered, but was not re-registered at the end of five years or at all.

On the 23rd of December, 1882, the appellants threatened the debtor with the action which they brought on the 8th of January, 1883. At the end of December, 1882, and after this threat, it was agreed between the debtor's son Charles Vaughan and the landlord of Croydon Villa that the son should be the tenant instead of his father the debtor. At this time the debtor was paralyzed and incapable. On the 11th of January, 1883, the respondents served a demand for the money due under the bill of 1873 and put a man in possession, and a few days after the respondent Samuel Swire (brother-in-law of Samuel Vaughan) on behalf of the respondents agreed with Charles Vaughan to sell the goods in question to him for £250, and (though no money passed) gave him the following receipt: —

£250. MANCHESTER, 19th January, 1883.

Received from Mr. Charles Vaughan the sum of two hundred and fifty pounds, being the purchase-money agreed to be paid by him for the whole of the household furniture and effects now being in, about, or upon the messuage or dwelling-house situate and being Croydon Villa, South Shore, Blackpool, in the county of Lancaster.

S. SWIRE, for self and co-mortgagees.

No. 2. — Cookson v. Swire, 9 App. Cas. 654, 655.

Charles Vaughan not being able to pay executed a bill of sale dated the 19th of January, 1883, whereby he assigned the goods to the respondents as security for the purchase-money. This bill was duly registered. These proceedings were taken by [* 655] the * respondents to protect the furniture for the benefit of the persons for whom the respondents were trustees.

The jury found that the transaction between the respondents and Charles Vaughan was a *bonâ fide* one, and found a verdict for the plaintiffs, the now respondents, and were then discharged by consent, CAVE, J., reserving the case for further consideration, with liberty to him to find any further fact that might be necessary.

Upon further consideration, on the 29th of May, 1883, CAVE, J., while adopting and approving the finding of the jury that the transaction with Charles Vaughan was a *bonâ fide* one, found as a fact that the goods were at the time of the execution in the apparent possession of Samuel Vaughan, and held that the bill of 1873 was under the Bills of Sale Acts previous to 1882 void as against the execution creditors, it being necessary for the respondents in proving their title to rely on that bill; and the learned Judge entered judgment for the defendants, the now appellants.

The Court of Appeal on the 6th of November, 1883, held that the transaction with Charles being a *bonâ fide* one the bill of 1873 was on the 19th of January, 1883, satisfied, so that the Bills of Sale Acts had no application to it; but that if those Acts were applicable, then as a matter of fact the goods were not at the time of the execution in the apparent possession of the father Samuel, but were in the actual and apparent possession of the son Charles. The Court therefore reversed the judgment of CAVE, J., and entered judgment for the respondents.

May 21, 23. Sir F. Herschell, S. G. and Arthur Charles, Q. C. for the appellants: —

The Court of Appeal were wrong on the facts in holding that Samuel Vaughan was not in apparent possession at the time of the execution, and wrong in law in holding that the Bills of Sale Acts did not apply to the bill of 1873. The only title of the respondents to the goods was through and under the bill of sale of 1873. Assuming that that bill is governed by the Bills of Sale Acts of 1854 and 1866 or of 1878, not having been re-registered it would be void against execution creditors if the

No. 2. — Cookson v. Swire, 9 App. Cas. 656, 657.

grantor were * (as he was) in apparent possession of the [* 656] goods at the time of the execution; and one question is whether the bill would be void when the grantees of that bill have parted with their interest by subsequent transactions. The words of sect. 8 of the Bills of Sale Act 1878 (41 & 42 Vict. c. 31) are similar to those of the Act of 1854 (17 & 18 Vict. c. 36) s. 1. It would defeat the whole object of these Acts if when the grantor remains in apparent possession the whole time the goods might be passed by a word of mouth transaction to another person who then makes a fresh bill of sale to the grantees of the first bill. That was what was done here: Samuel Vaughan the grantor of the bill of 1873 remaining always in apparent possession, and the goods being verbally sold to Charles Vaughan, who at the same time executes a fresh bill to the respondents. The question would not arise if the first grantor did not remain in apparent possession: if for instance the goods were removed: but if he does the case is within the Acts. The transaction was analogous to that in *Karet* v. *Kosher Meat Supply Association*, 2 Q. B. D. 361; 46 L. J. Q. B. 548, where it was held that such an arrangement could not defeat the Act. The respondents could only sell to Charles Vaughan that which they themselves had under the bill of 1873, and that bill being void for want of re-registration they could not confer on Charles Vaughan a better title than their own; nor could he cure the defect by giving a fresh bill which was registered. *Chapman* v. *Knight* (1880), 5 C. P. D. 308; 49 L. J. C. P. 425; 42 L. T. 538; 28 W. R. 919.

[Lord BLACKBURN: Under the bill of 1873 the grantees had power to sell absolutely; to sell more than they had themselves.]

In *Karet* v. *Kosher Meat Supply Association* the first bill was (apparently according to the report,) an absolute conveyance, not a mere security, and yet the transaction was held void. But even if the grantees of that bill had the power to sell absolutely and so as to be free from any equity of redemption they are in no better position than if they had been unlimited absolute owners in the first instance. The respondents gave no better title to Charles Vaughan than if instead of a verbal sale they had given him an unregistered bill. The receipt given to him required registration under the Act of 1878. A mere receipt for money * need not be registered, but if it is intended as a [* 657] record of the transaction it must: *Marsden* v. *Meadows*,

7 Q. B. D. 80; 50 L. J. Q. B. 536. This receipt was intended as a muniment, no money having passed.

The decision of the Court of Appeal that Samuel Vaughan was not in apparent possession is contrary to the principle laid down in *Ex parte Jay, In re Blenkhorn*, L. R., 9 Ch. 697; 43 L. J. Bankr., 122; No. 6, p. 87, *post*. He was in apparent possession within the meaning of sect. 7 of the Act of 1854.

Independently of the above considerations the bill of 1873 comes within the Bills of Sale Act of 1882 (45 & 46 Vict. c. 43), and is under that Act absolutely void as between every one, so that no one can take a title under it. That Act was passed in consequence of the decision of the Court of Appeal in *Davis* v. *Goodman*, 5 C. P. D. 128; 49 L. J. C. P. 344, and was intended to apply to all bills of which the registration was not renewed under the previous Acts. The provision in sect. 3 that the Act shall not apply to bills of which the registration has not lapsed, shows that the intention was that it should apply to bills which had lapsed.

Ambrose, Q. C. and C. H. M. Wharton, for the respondents were not heard.

Earl of Selborne, L. C. : —

My Lords, it appears to me that the true point upon which this case depends is that which is clearly enough put in the judgment of the Master of the Rolls, although there is much in that judgment, with reference to the question of possession and apparent ownership, on which, if it were necessary for your Lordships to express an opinion, you might, subject to what you might have heard from the other side, perhaps have hesitated to agree with that learned Judge. But the Master of the Rolls[1] says this: "At the moment when that transaction took place" (that is, between Mr. Swire and Mr. Charles Vaughan) "there was no execution creditor in existence. It is the person who has the legal property in the goods selling them by a *bonâ fide* sale to a person who has a right to buy them and does buy them; and it is an act equivalent to a carrying over by one to the [* 658] other. I * come to the conclusion on that, that the bill of sale was satisfied" (by which I understand the learned Judge to mean spent and at an end, *functum officio*) "at a time

[1] The quotations from the judgments are taken from the printed papers before the House.

when the Bills of Sale Act did not apply to it; and from that time the Bills of Sale Act never applied to that bill of sale any more, so that the question of apparent ownership with regard to the bill of sale was not one which arose at that time." If that is a correct view, I think there can be no doubt that the judgment of the Court of Appeal is correct, though some other reasons have been assigned for it, as to which, if the case had depended upon them, your Lordships would doubtless have desired to hear the respondents' counsel. And I think that view is correct.

Now, the facts necessary to be considered are few. This bill of sale was given upon the 10th of May, 1873; and, undoubtedly, according to the law as it stood at that time, under the Acts of 1854 and 1866, it was necessary that the bill of sale should be registered to make it stand against assignees in bankruptcy and execution creditors of the grantor of the bill of sale; and it was also necessary, to keep the registration on foot, that it should be re-registered at the end of five years. In point of fact it was originally registered, but at the end of five years it was not re-registered, and, for the purposes of the present argument, it must be taken as an unregistered bill of sale. Still, it was a bill of sale governed by the Acts of 1854 and 1866; and, for the reasons which I shall presently give, it was not governed, for any purpose material to this case, either by the Act of 1878 or by the Act of 1882.

That being the state of the case, and the bill of sale having been given to secure the payment of a certain sum of money on demand, with a power of sale, in the most ample terms, in the case of non-payment, it appears that a demand was made of the money by the creditor on the 11th of January, 1883. And I take it to be clear and unquestionable, that at that time, as between the debtor and the creditor, the bill of sale was in force; though, not being registered, if an execution had before that time been issued, the right of the execution creditor would have prevailed. But, as between the debtor and the creditor, it was in force according to its tenor and with all its provisions. The demand
* was duly made upon the 11th of January, 1883; and [* 659]
that demand, being in writing, expressly stated, that if
the payment were not made, the holders of the bill of sale (I will call them the mortgagees, for that was the nature of the security) " will proceed to sell your furniture and effects under the powers

contained in such bill of sale," — which, as I have said, were ample powers of sale, and if duly exercised would convey to a purchaser, not the title to the mortgage originally created by the bill of sale, but as full a title to the property as any absolute transfer could give.

The money was not paid, and on the 19th of January the transaction was completed as between the vendors and the purchaser, Mr. Charles Vaughan, in this way: the goods were delivered in a manner which, as between those parties, at all events, I take to have been perfectly sufficient to transfer the possession. A receipt was given for the purchase-money which is in these terms: "Received from Mr. Charles Vaughan the sum of £250, being the purchase-money agreed to be paid by him for the whole of the household furniture and effects." That is signed by the vendor, and on the same day a security for that money, which was accepted in lieu of payment, was given by Mr. Charles Vaughan, as the purchaser and the owner of the goods sold, to Mr. Swire and the other vendors, which security was duly registered according to the requirements of the Acts of Parliament and the Bills of Sale Act, so far as related to that transaction at all events, on the 22nd of January, three days afterwards, at which time there was no bankruptcy and no execution. The execution creditors, who are the appellants here, obtained judgment as against Samuel Vaughan, the grantor of the original bill of sale, on the 25th of January, 1883; and execution was immediately afterwards issued; but that was subsequent not only to the completion of such title as Charles Vaughan derived from the sale to him by the persons who had derived title from the original bill of sale of 1873, but also subsequent to the registration of the new security by the new bill of sale which Charles Vaughan, as owner, had given to Messrs. Swire; so that if Charles Vaughan had a title which enabled him to give that security, that security was duly registered, and the execution could not prevail over it.

[* 660] * These are the material facts. Now let us consider the questions of law which have been argued.

And first, I think that it may be well to deal with the question, by what law the case is to be governed. The Acts which were in force when this bill of sale was originally given, were the Acts of 1854 and 1866; and it appears to me to be clear, that

the subsequent Acts have no bearing at all upon the case, because the Act of 1878 is by the 3rd section expressly made applicable only, — when I say "only" I mean as to its general provisions, including the important provision of the 8th section, which avoids bills of sale against execution creditors, — it is made applicable, in that sense only, to every bill of sale executed on or after the 1st of January 1879. This bill of sale, as has been said, was executed in 1873. It is not, therefore, a bill of sale to which the Act applies under that clause. And by a later section, the 23rd, this is added, "From and after the commencement of this Act the Bills of Sale Act 1854 and the Bills of Sale Act 1866 shall be repealed; provided that except as is herein expressly mentioned with respect to construction," — (which is immaterial for this purpose) "and with respect to renewal of registration" (which is also immaterial for this purpose, for this was an unregistered bill and could not then be renewed) "nothing in this Act shall affect any bill of sale executed before the commencement of this Act; and as regards bills of sale so executed the Acts hereby repealed shall continue in force."

The Act of 1878 leaves untouched bills of sale under the former Acts, and leaves them still to be governed by those former Acts except with regard to two matters which for this purpose are immaterial; and the new Bills of Sale Act only applies as to its general provisions to bills of sale executed after the 1st of January, 1879, which this was not. That Act therefore, I think, cannot apply in any way to this case.

But then it was contended, that there were words in the 3rd section of the Act of 1882 which made that Act applicable to the present bill of sale, because it had been previously avoided by non-renewal. I think that several answers might be given to that observation. It is no doubt a singular way of making the positive provisions of an Act of Parliament applicable *retrospectively to past transactions, if it is alleged to [*661] be done merely by negative words which exclude the application of the Act to certain classes of cases within which the matter in question may not happen to come; and when we look at the affirmative provisions of the Act it seems excessively difficult to give them, at all events in such a case as this, any retrospective operation. But I am content for this purpose to lay aside the Act of 1882 upon this simple ground that the 3rd sec-

No. 2. — Cookson v. Swire, 9 App. Cas. 661, 662.

tion which contains the words which are relied on says, "The Bills of Sale Act 1878 is hereinafter referred to as 'the principal Act,' and this Act shall so far as is consistent with the tenor thereof be construed as one with the principal Act." Then are added the words which are relied upon, "but, unless the context otherwise requires, shall not apply to any bill of sale duly registered before the commencement of this Act so long as the registration thereof is not avoided by non-renewal or otherwise."

Well, it appears to me that whatever the effect of those words "but unless" and what follows, may be, as to bills of sale which are within the principal Act, the registration of which may be avoided by non-renewal, they cannot possibly have the effect of extending the provisions of the Act of 1882 to old bills of sale which are neither by any clear and express words brought retrospectively within the Act of 1882, nor are within the Act of 1878; and I have already shown that this bill of sale is not within the principal Act, the Act of 1878.

That brings us back purely and simply to the question, what is the effect of the Act of 1854? In that Act there are only two sections which are at all material to be referred to, nay, in my judgment only one, which is the first. Another has been referred to in the argument as perhaps bearing upon the question, viz., the 7th, containing the definition of apparent possession. But what is this first section of the Act of 1854? Read shortly, it is this, — that every bill of sale of personal chattels shall as against assignees in bankruptcy, and as against execution creditors, be null and void so far as regards the property in or right to the possession of any personal chattels comprised in such bill of sale,

which, at the time of the bankruptcy or of executing the [* 662] process, as the case may be, and after the expiration * of a period of twenty-one days, shall be in the possession or apparent possession of the person making such bill of sale, or of any person against whom the process shall have issued under or in the execution of which such bill of sale shall have been made or given, as the case may be. It is argued that those words, according to their true and proper meaning, overreach all intermediate transactions whatever, changing the title to the property between the original unregistered bill of sale and the execution, if, at the time of the execution, the property is "in

the possession or apparent possession of the person making the bill of sale or of any person against whom the process shall have issued under or in the execution of which such bill of sale shall have been made or given." The argument is, as I have said, that, at all events, if the goods are in the possession or apparent possession of the person who made the bill of sale, no matter what time may have elapsed, no matter what intermediate transactions may have taken place, *bonâ fide* or otherwise, no matter what alteration in the title to the goods and chattels may have been effected by those intermediate transactions, still you have only two things to look at, the original bill of sale and the final execution and the state of possession at that time. Apparent possession is defined, but it appears to me that there is nothing in the definition having any other bearing on the language of this clause, than to show that formal possession is not to exclude the operation of this first section in favour of an execution creditor.

I think it might perhaps be enough to look at the words, "comprised in such bill of sale," and the words, that the bill of sale shall "be null and void." It is impossible that those words can have been meant by the Legislature to apply to a case in which the existing title does not depend upon the bill of sale, and in which the goods are not for any present purpose comprised in the bill of sale at all. They have passed out of that condition. They have passed into the hands of a subsequent purchaser who takes a title not dependent upon the continued subsistence or efficacy of the bill of sale; and he takes it at a time when there is no execution and no bankruptcy, in respect of which the title of the person selling to him was liable to be impeached.

* It seems to me, therefore, that it is quite impossible to [* 663] say that a spent transaction of that kind — for that bill of sale is as entirely spent as if it had been null and void to all intents and purposes independently of the Act — can be revived, as it were, for the purpose of being destroyed, to let in, as against the true title, a subsequent execution creditor. It is not sufficient to say that the same thing might have happened if it had been an absolute transfer by bill of sale. I assume that it might have been, and I agree that the argument probably would have been the same. If the subsequent transferee in that case, as in

this case, leaves the goods in the apparent possession of the person who is the grantor of the original bill of sale, and himself does not register his own title, if his title is by an absolute bill of sale, or if he grants a title to somebody else, whether absolute or conditional, and if that person does not register it, then he, in the one case, and his assignee in the other, will be liable, no doubt, to have his title defeated by a subsequent execution; not because the person to whom the first bill of sale was given has not registered it, but because the person who has got the second bill of sale has not registered it, and leaves it in a position of danger. I do not think, therefore, that that varies the matter in any degree whatever; but I do think that, as against the true owner, you must find in the Acts something which takes away his right. Now there is nothing in these Acts which gives to any execution creditor any right to seize property because it is in the apparent possession of his debtor though it does not really belong to him, unless the title of the true owner depends upon a bill of sale not registered. All the other conditions of apparent possession and an ownership different from that of the apparent owner may exist; but there is nothing whatever, in this Act of Parliament at all events, which gives an execution creditor the right on that account to take property which does not belong to his debtor. If, therefore, the right is claimed, it can only be claimed upon the strict conditions of this Act; and it must be because, at the time when the execution takes place, there is a bill of sale governing the title to that particular property, in which, in that sense, the goods in question are comprised; and because, if that bill of sale were at that moment null and void, the title [* 664] would * be destroyed by its nullification. But that is not the state of the case here. Here the title had passed away from the bill of sale altogether. There had been an out and out sale, *bonâ fide*, as the jury found, to an absolute owner who held, not by virtue of that bill of sale at all, but by virtue of a sale which had been made to him; and then he, *uno flatu*, makes an assignment to another person and that other person has duly registered the bill of sale under which he claims.

I think, under these circumstances, that the judgment appealed from is right, and ought to be affirmed.

Lord BLACKBURN: —

My Lords, I am of the same opinion.

No. 2. — Cookson v. Swire, 9 App. Cas. 664, 665.

I think that in the judgment of CAVE, J., there is only one point (but that is a very important point), on which I am inclined to differ from him. The Court of Appeal indicate what in my mind is the true ground upon which CAVE, J., was wrong; but they also indicate a good many other things upon which, as the LORD CHANCELLOR has said, if it were necessary to decide upon them I should certainly at least require to hear the other side in support of them. I need not say more than that. It all turns in my mind upon the construction of a few words in an Act of Parliament, but I will first of all point out, what I think is the real object of these Acts of Parliament, before coming to the interpretation of the words.

At common law a man might take a security upon goods without carrying away the goods or taking possession of them, — he might take a sale of them out and out, and he might take the legal property in them subject to the power to redeem them (what is commonly called a mortgage), without taking possession of them. The law on the subject will be found in *Twyne's Case*, 3 Co. Rep. 80; 1 Sm. L. C. 8th Ed. 1, *ante*, p. 2, and the notes upon *Twyne's Case;* but this rule got established that when the good were not taken away, but were left in the hands of the man who had had them previously, that which had been thought before to make the transaction void was really no more than evidence to go to the jury of fraud; and if a man came forward suddenly, when there was an execution, * for [* 665] instance, issued against the person in possession of the goods, and said, at an antecedent time I had a security upon these goods, and I left them in the possession of the debtor all that time, the not having taken possession was evidence that the thing was a sham; — it was not conclusive; it was not a matter of law, but it was evidence that the thing was a sham. Upon that two evils arose, and very important ones they were. In the first place it often happened that there was really a sham put up to endeavour to defeat a man, and there was a great quantity of perjury, of fighting and expense, before it was proved to be a sham. That was a great evil. The other was that there were real honest transactions which were asserted to be shams when they were not, and in those cases there was apt to be much perjury and great expense before it was decided. For those reasons it was thought, and reasonably and properly so, that it was desirable to put a stop to this.

No. 2. — Cookson v. Swire, 9 App. Cas. 665, 666.

That was the beginning of the series of Bills of Sale Acts, the first of which was passed in 1854, and said this: Where there is a bill of sale, or where there is a written agreement in which it appears that you have got a security, or even I suppose a transfer of the whole property, at all events that you have got a security, — a bill of sale, — that shall within a short time be registered, and two things are to follow from it. In the first place its being registered will put an end to any fear that any one should start forward afterwards and say, The transaction being kept secret is a proof that it was a sham transaction, for, it being actually registered as bills of sales are required to be, it could no longer be secret, and there would be no badge of fraud in that respect. The other was, if it be not registered, then so long as the goods are in the apparent possession of the person to whom they originally belonged, so long it shall be void as against a certain class of persons, namely, execution creditors, and various other persons that were named. The only thing that I would say at the outset upon this with regard to the 1st section is, that the first Bills of Sale Act applied not only to sales and transfers by the grantor (the man who had the goods) by way of security and otherwise, but also to transfers by the sheriff, when he had seized those [* 666] goods. Nobody for a moment would suppose that it * was a possible thing when the sheriff had seized the goods and sold them, that the sheriff should make out a bill of sale, and that the sheriff should keep possession, — that was out of the question. But it was thought, and indeed it was found by experience, that a very common mode in which a sham actually took place, when there was an execution, was this — that the execution debtor bought back his own goods, getting a man of straw to come forward and pretend this, — It is I who have bought them from the sheriff, and although I have lent money to you, and you have given me security, and I let you have the goods, still it is I who buy them from the sheriff. Consequently the Act of Parliament very judiciously said bills of sale shall be registered as well when they are given by the man himself, as when the sheriff has taken them in execution from him. Nothing of that sort applies here, nothing arises here about it, for no sheriff had anything to do with this matter.

Now, coming to apply this Act to the present case, we find that in 1873 the Rev. Samuel Vaughan was in debt. Mr.

No. 2. — Cookson v. Swire. 9 App. Cas. 666, 667.

Swire, who seems to have been his brother-in-law and also trustee, I suppose, for Mrs. Vaughan, agreed to advance money to pay off that debt, and for that purpose, — it was a very proper thing to do, — he said I will take the goods from you, I will take a security if you like upon all those goods, and if you pay off that security, well and good, if not, it is evident that the intention of Mr. Swire was, that these goods should be a security to him for the money which he had advanced, whether out of his own pocket, or as trustee for his sister we really do not know, and it is not material — he intended that these goods should be a security for that advance, and it was obviously the intention that they should remain in the Rev. Samuel Vaughan's house and be used by the Rev. Samuel Vaughan and his family — in fact, be to all intents and purposes in the apparent ownership of the Rev. Samuel Vaughan. That bill of sale, as was necessary under the Bills of Sale Act which then existed (this was in 1873), was registered, and it would therefore at the end of five years require to be re-registered, or otherwise it would have the same effect as if it had never been registered, and would consequently be void as against the class of persons who were named in the Acts existing at that * time. I do not know that it is [* 667] very material to say anything further about it than that.

This security which was taken by Mr. Swire in 1873 contained at the end a provision that if Mr. Vaughan did not pay the money owed when a demand had been made in writing then it should be in the power of Mr. Swire or his assigns to sell the goods absolutely by private bargain.

Now it happened that at the time when this transaction took place it became known to people that there was a creditor who was likely to come upon the Rev. Samuel Vaughan and to seize his goods, or rather not his goods, but the goods which were in his apparent possession as it was said; and people also became aware that owing to the neglect to re-register the bill of sale, inasmuch as the term of five years had elapsed in 1878, that bill had become an unregistered bill, and was consequently void as against those against whom unregistered bills of sale were made void, though not, under the law as it then stood, void as against anybody else. That being so there is no doubt in my mind that formal notice to Mr. Vaughan to pay off the money was given in order that Mr. Swire should be in a position legally

No. 2. — Cookson v. Swire, 9 App. Cas. 667, 668.

to sell the goods. I have no doubt whatever that that was done for the very purpose and object that by selling those goods they should be able to defeat the creditor who would come against the Rev. Samuel Vaughan and would seize those goods which really and truly belonged to Mr. Swire, — at least for all substantial purposes they belonged to him, because I suppose they were mortgaged to their full value, — but which had been left as I have described in the possession of the Rev. Samuel Vaughan. There is nothing whatever illegal, there is nothing immoral, there is nothing improper in that. It is conceded that it would have been perfectly good, when that notice had been given, if Mr. Swire, acting in his own interest, had come with porters and taken the goods and carried them out of the house, although that had been done only two minutes before the sheriff's officer had turned the corner of the street to come and seize them all. I make no doubt that it was entirely with that object that the transaction took place with Charles Vaughan, the son of [* 668] the Rev. Samuel Vaughan, * who I dare say had not much money of his own, — probably no immediate money, — and Mr. Swire, advised I suppose by lawyers that this was the best course to pursue, said, I will sell them to you, Charles, as soon as I have got the right to do it. You cannot pay me I know, you have not got the money, but I will lend you the money. I agree to sell the goods to you and transfer the goods to you, and when they are transferred to you I will lend you the money if you will then give me a new bill of sale upon the goods so as to make them a security for the money I lend you. I have no doubt that that which was done in that way was intended to be done for the very purpose of defeating an execution, and of keeping these goods unsold for the benefit of the dying father and the mother and the children. It would have been very wrong and very improper to pretend to do all this no doubt, but so far from its being wrong or improper to do it I think it was, as I say, highly moral and right. The question as to whether or no it was a sham, the question whether or no there was really a *bonâ fide* transaction to the effect which I have described, was left to the jury, and their finding is unimpeached.

Then comes the question of law. Now, says CAVE, J., "They prove an agreement between Charles Vaughan and Mr. Swire by which the property in the goods was transferred from Mr. Swire

to Charles Vaughan. Now that has been found by the jury to be a *bonâ fide* agreement, and consequently the effect of that is to give to Charles Vaughan the title which Swire had." Now, had that been so, as at present advised, I should say, subject to what might be said by the other side, if it was necessary to hear them, that there was an apparent ownership in Samuel Vaughan at that time, and I should have said that if Mr. Swire had agreed to transfer the property from himself to Charles Vaughan, Charles Vaughan would be in the same position and no better than Mr. Swire. But instead of thinking that it was an agreement to do that, I think it was intended to be, and was, an agreement not that Mr. Swire would transfer his own right, after having given the due notice by which he was enabled either, as I said before, to come with porters and carry away the goods and so put an end to the matter, or to sell the property out and out of the
* Rev. Samuel Vaughan in those goods, — it was not an [* 669]
agreement that he would transfer his own right but that he would transfer the absolute property in the goods. What Mr. Swire had was the goods subject to an equity of redemption, — what he conferred upon Charles Vaughan was very likely not of more value, but it was a different thing. It was the property in the goods without any equity of redemption, and if the transaction was a *bonâ fide* one (and I do not myself see the slightest ground, when it has been explained as I have explained it, for saying it was not perfectly *bonâ fide*), I do not see how it comes within the earlier Act. The earlier Act makes that void as against the holder of a bill of sale and his assigns, and those who claim under him, but it does not make it void as against those who become entitled to the goods by virtue of his exercising the power before ever the person's claim came into existence who had the right to say that the bill of sale was void, and that was not until the time of the execution, when the sheriff's officer came in, in the present case.

It seems to me therefore that upon that point, CAVE, J., made a mistake, — was under a misapprehension. Upon the rest I should be inclined to agree with him. We have not heard the counsel for the respondents, and it may be that on some of the other points the Court of Appeal may be right. I will not say that they are not, but upon that ground I think that this was not a case in which under the Acts which had been passed down to

1878 (I do not go further than that), it would have been void as against any one else. It is said that the Act of 1882 has the effect of making it void absolutely, or to a greater extent. Whatever effect that Act may have on future bills of sale, as far as the present case is concerned, for reasons which I do not repeat as they have been stated by the Lord Chancellor, and which are satisfactory to my mind, I think that it was not intended to be retrospective so as to bring it into operation in the present case.

For these reasons I agree in the judgment which has been proposed.

Lord Watson: —

My Lords, I concur and I have nothing to add.

[* 670] * Lord FitzGerald: —

My Lords, I agree with the judgment which the Lord Chancellor has announced, and I have nothing to add.

Order appealed from affirmed; appeal dismissed with costs.

Lords' Journals, 23rd May, 1884.

ENGLISH NOTES.

According to Lord Blackburn's opinion in the latter of the above principal cases (*Cookson* v. *Swire*), the object of the Bills of Sales Acts (prior to the Act of 1882) were twofold; namely, to prevent fraud upon the body of the creditors of a person, by the debtor's property being placed out of their reach under a colourable assignment, and to protect a *bonâ fide* security against the operation of the bankruptcy laws.

The former object had been already provided for, although imperfectly, by the statute 13 Eliz. c. 5, s. 2 (made perpetual by statute 29 Eliz. c. 5) "for the avoiding of feigned, covinous, and fraudulent feoffments, gifts, grants, alienations, conveyances, bonds, suits, judgments, executions, &c., devised to the intent to delay, hinder, or defraud creditors and others of their just and lawful actions," &c. By this statute it was enacted "that all and every feoffment, gift, grant, alienation, &c., and all and every bond, suit, judgment, and execution, for any intent or purpose before declared, shall be utterly void," with a proviso that the Act shall not extend to any grants, &c., upon good consideration, and *bonâ fide*.

As to what are *indicia* of fraud within that statute, the following, among the older cases, may be added to the authority of *Twyne's case*: As to secrecy, *Mace* v. *Cammell* (1774), Lofft, 782; as to inadequacy of

consideration, *Matthews* v. *Feaver* (1786), 1 Cox, 278, 1 R. R. 39; as to continuance in possession inconsistently with the deed, *Edwards* v. *Harben* (1788), 2 T. R. 587, 1 R. R. 548. Compare *Martindale* v. *Booth* (1832), 3 B. & Ad. 498.

As to voluntary settlements, the judgment of Lord HARDWICKE in *Townsend* v. *Windham* (1750), 2 Ves. Sen. 1, is an important authority. He says (at p. 10): "There is certainly a difference between the statutes of fraud, namely that of the 13 Eliz., which is in favour of creditors, and the 27th Eliz., which is in favour of purchasers. But that difference was never suffered by way of general rule to go farther than this: on the 27th Eliz., every voluntary conveyance made, where afterwards there is a subsequent conveyance for valuable consideration, though no fraud in that voluntary conveyance, nor the person making it at all indebted, yet the determinations are that such mere voluntary conveyance is void at law by the subsequent purchase for valuable consideration. But the difference between that and the 13th Eliz. is this: if there is a voluntary conveyance of real estate or chattel interest by one not indebted at the time, though he afterwards becomes indebted, if that voluntary conveyance was for a child, and no particular evidence or badge of fraud to deceive or defraud subsequent creditors appears, that will make it void; otherwise not, for it will stand, though afterwards he become indebted. But I know of no case on the 13th Eliz. where a man indebted at the time makes a mere voluntary conveyance to a child without consideration, and dies indebted, but that it shall be considered as part of his estate for the benefit of his creditors." In *Holmes* v. *Penney* (1856), 3 Kay & J. 90, 26 L. J. Ch. 179, 3 Jur. N. S. 80, the principle was stated by V. C. Sir W. PAGE WOOD (3 K. & J. 99), as follows: "With respect to voluntary settlements the result of the authorities is, that the mere fact of a settlement being voluntary is not enough to render it void as against creditors; but there must be unpaid debts which were existing at the time of making the settlement, and the settlor must have been so largely indebted as to induce the Court to believe that the intention of the settlement, taking the whole transaction together, was to defraud the persons who at the time of making the settlement were creditors of the settlor." Where the settlement is voluntary the intent to defraud may be inferred from circumstances showing that it would necessarily defeat creditors. *Freeman* v. *Pope* (1870), L. R., 5 Ch. 538, 39 L. J. Ch. 689, 21 L. T. 816; *Mackay* v. *Douglas* (1872), L. R., 14 Eq. 106, 41 L. J. Ch. 539, 26 L. T. 721; *Spencer* v. *Slater* (1878), 4 Q. B. D. 13, 48 L. J. Q. B. 204, 39 L. T. 424. But that inference may be rebutted by showing another motive, such as that of selling the business as a going concern. *Boldero* v. *London and Westminster Discount Company* (1879) 5 Ex. D. 47, 42 L. T. 56, 28

W. R. 154. And see *Ex parte Mercer, In re Wise* (C. A. 1886), 17 Q. B. D. 290, 55 L. J. Q. B. 558, 54 L. T. 720.

In re Ridler, Ridler v. *Ridler* (C. A. 1882), 22 Ch. D. 74, 52 L. J. Ch. 343, 48 L. T. 396, the Court held that there was presumably an intention to defeat creditors, where the settlor had given a guarantee for the debt of another, and the Court drew the inference that his estate would not have been solvent if the debt had been estimated as a liability. See also *Ex parte Russell, In re Butterworth* (1882), 19 Ch. D. 588, 51 L. J. Ch. 521, 46 L. T. 113. In *Ex parte Chaplin, In re Sinclair* (C. A. 1884), 26 Ch. D. 319, 53 L. J. Ch. 732, 51 L. T. 345, there was a conveyance of substantially the whole property to a creditor, and a secret arrangement for paying the trade debts and carrying on the business. Lord Justice Fry held the transaction a fraud, within the statute of 13th Elizabeth. It was clearly an act of bankruptcy, and defeasible under the Bankruptcy Acts. In the case of *Ex parte Mercer, In re Wise* (C. A. 1886), 17 Q. B. D. 290, 55 L. J. Q. B. 558, 54 L. T. 720, the circumstances merely raised a suspicion, and there the Court held fraud not proved.

It is settled law that a parol gift of a corporeal chattel, without delivery of possession, does not pass the property to the donee. *Irons* v. *Smallpiece* (1819), 2 B. & Ald. 551; *Cochrane* v. *Moore* (C. A. 1890), 25 Q. B. D. 57, 59 L. J. Q. B. 377, 63 L. T. 153, 38 W. R. 588.

The inadequacy of the protection to creditors against secret conveyances given by the Act of Elizabeth was particularly exemplified by the case of *Martindale* v. *Booth* (1832), 3 B. & Ad. 498, which established the principle that where a sale, effected by means of a written instrument, is subject to a condition expressed in the instrument that the goods shall remain for a time in the possession of the vendor (such as is the case of a mortgage with a proviso for quiet enjoyment until default); then, as the nature of the transaction does not require a transfer of possession, the absence of such transfer is no evidence of fraud. The principle of this case was confirmed by *Reed* v. *Wilmot* (1831), 7 Bing. 577, 5 Moore & Payne, 553; and it was further held in *Cook* v. *Walker* (1845), 3 W. R. 357, that where the transaction was in effect a mortgage, the absence of an express proviso for quiet enjoyment until default was immaterial.

The first of the series of Bills of Sale Acts, made in 1854 (17 & 18 Vict. c. 36), was entitled "An Act for preventing Frauds upon Creditors by secret Bills of Sale of personal chattels," and proceeded upon a preamble stating that frauds are frequently committed upon creditors by secret bills of sale of personal chattels, whereby persons are enabled to keep up the appearance of being in good circumstances and possessed of property, and the grantees or holders of such bills of sale have the power

of taking possession of the property of such persons, to the exclusion of the rest of the creditors." Section 1 of the Act requires registration of a bill of sale of personal chattels and certain documents connected with it within 21 days of the making of the bill. — "Otherwise such bill of sale shall, as against all assignees of the estate and effects of the person whose goods or any of them are comprised in such bill of sale under the laws relating to bankruptcy or insolvency, or under any assignment for the benefit of the creditors of such person, and as against all sheriffs' officers and other persons seizing any property or effects comprised in such bill of sale in the execution of any process of any Court of Law or Equity authorizing the seizure of the goods of the person by whom or of whose goods such bill of sale shall have been made, and against every person on whose behalf such process shall have been issued, be null and void to all intents and purposes whatsoever, so far as regards the property in or right to the possession of any personal chattels comprised in such bill of sale, which at or after the time of such bankruptcy, or of filing the insolvent's petition in such insolvency, or of the execution by the debtor of such assignment for the benefit of his creditors, or of executing such process (as the case may be), and after the expiration of the said period of twenty-one days shall be in the possession or apparent possession of the person making such bill of sale, or of any person against whom the process shall have issued under or in the execution of which such bill of sale shall have been made or given, as the case may be."

The second section enacts that any condition of defeasance to which the bill of sale is subject shall be taken as part of the bill. The section is substantially the same with section 10, sub-section 3, of the Act of 1878 (41 & 42 Vict. c. 31), set forth at the end of this note. The 3rd, 4th, and 5th sections contain directions as to the keeping and inspection of the register and of entering up satisfaction.

The 7th section is as follows: "In construing this Act the following words and expressions shall have the meanings hereby assigned to them, unless there be something in the subject or context repugnant to such constructions; (that is to say) : —

> "The expression 'bill of sale' shall include bills of sale, assignments, transfers, declarations of trust without transfer, and other assurances of personal chattels, and also powers of attorney, authorities, or licences to take possession of personal chattels as security for any debt, but shall not include the following documents: that is to say, assignments for the benefit of the creditors of the person making or giving the same; marriage settlements; transfers or assignments of any ship or vessel or any share thereof; transfers of goods in the ordinary course of business of any trade

or calling; bills of sale of goods in foreign parts or at sea; bills of lading; India warrants; warehouse-keepers' certificates; warrants or orders for the delivery of goods, or any other documents used in the ordinary course of business as proof of the possession or control of goods, or authorizing or purporting to authorize, either by endorsement or by delivery, the possessor of such document to transfer or receive goods thereby represented:

"The expression 'personal chattels' shall mean goods, furniture, fixtures, and other articles capable of complete transfer by delivery, and shall not include chattel interests in real estate, nor shares, or interests in the stock, funds, or securities of any government or in the capital or property of any incorporated or joint stock company, nor choses in action, nor any stock or produce upon any farm or lands which by virtue of any covenant or agreement, or of the custom of the country, ought not to be removed from any farm where the same shall be at the time of the making or giving of such bill of sale:

"Personal chattels shall be deemed to be in the 'apparent possession' of the person making or giving the bill of sale so long as they shall remain or be in or upon any house, mill, warehouse, building, works, yard, land, or other premises, occupied by him, or as they shall be used and enjoyed by him in any place whatsoever, notwithstanding that formal possession thereof may have been taken by or given to any other person."

By the 8th and last section the Act was not to extend to Scotland or Ireland.

As to Ireland, a similar Act (17 & 18 Vict. c. 55) was passed in the same year (1854).

Scotland has had the good fortune to have escaped the bungling legislation of the English Acts, and of Acts which have copied them. The reason is, that all reasonable objects of these Acts are provided for by the ordinary law of Scotland without legislation. For, 1st, The law of reputed ownership exists in Scotland independently of statute; and the active intervention of the owner, and not merely his withdrawal of consent, is necessary to put an end to any reputed ownership which may be constituted by the circumstance of goods being left in the apparent possession of another: 2ndly, In order to transfer a right in the nature of property by way of security over tangible moveable goods, it is essential (with the exception below noted), that the possession should be transferred. In other words, the only legal security (except as below mentioned) over such goods recognized by the law, is a security constituted by way of pledge: 3rdly, The owner of a mill or other works, being the owner in fee of the ground on which the works are

carried on, can by giving a bond and disposition in security of the ground, virtually give the creditor a security also over the machinery and goods upon the ground.

The Act of 1854 (as well as the amending Act of 1866, which provided for the renewal of registration every five years) was repealed by section 23 of the Act of 1878; but the expressions of the former Act, so far as they have been above set forth, are necessary to refer to in order to understand the decisions in the intermediate period, many of which are still important as deciding questions of principle.

The principal sections of the Acts of 1878 (41 & 42 Vict. c. 31), and 1882 (45 & 46 Vict. c. 43), as they will be frequently referred to in the cases and notes under this title, are set forth at length at the end of this note.

The conveyances which are voidable as frauds on creditors within the Bankruptcy Acts, as well as the kindred topics of reputed ownership and fraudulent preference, are more particularly considered in 4 R. C., under the head of "Bankruptcy," Nos. 2 and 3 (*Robertson* v. *Liddell* and *Ex parte King, In re King*), and Nos. 5–9 of same title.

Under the Bills of Sale Act 1854 (17 & 18 Vict. c. 36), it was decided that goods in the possession of the mortgagor under a registered bill of sale were not exempt from the reputed ownership clause of the Bankruptcy Acts. The Act of 1878 abrogated this rule, and protected property included in a registered bill of sale; but this section was repealed, so far as relates to assignments in security, by the 15th section of the Act of 1882. The effect of these enactments is exemplified in *Swift* v. *Pannell* (1883), 24 Ch. D. 210, 53 L. J. Ch. 341, 48 L. T. 351, 31 W. R. 543; *Ex parte Izard, In re Chapple* (C. A. 1883), 23 Ch. D. 409, 52 L. J. Ch. 802, 49 L. T. 230, 32 W. R. 218; and *Casson* v. *Churchley* (1885), 53 L. J. Q. B. 335, 50 L. T. 568.

It may be convenient here to note some other points which were decided under the Act of 1854.

It was held that an agreement, in consideration of an immediate advance, to execute "on request" a bill of sale, was not a bill of sale within the Act; and that a bill of sale given in accordance with such previous agreement, even on the eve of bankruptcy, was good. *Ex parte Homan, In re Broadbent* (1871), L. R., 12 Eq. 598, 19 W. R. 1078; *Ex parte Izard, In re Cook* (1874), L. R., 9 Ch. 271, 43 L. J. Bank. 31, 30 L. T. 7, 22 W. R. 342. But if the giving of the bill of sale was purposely postponed until the debtor was in a state of insolvency, that might be evidence of an actual fraud upon the creditors. *Ex parte Fisher, In re Ash* (1872), L. R., 7 Ch. 636, 41 L. J. Bank. 62, 26 L. T. 931, 20 W. R. 849; *Ex parte Bolland, In re Gibson* (1878), 8 Ch. D. 230, 38 L. T. 326, 26 W. R. 481; *Ex parte Kilner, In re Barker* (1879), 13 Ch. D. 245, 41 L. T. 520, 28 W. R. 269. Also if the agreement to

give a bill of sale upon request was relied on as an equitable assignment, the non-registration of the instrument made it voidable by the creditor. *Ex parte Mackay, in re Jeavons* (1873), L. R., 8 Ch. 643, 42 L. J. Bank. 68, 28 L. T. 828, 21 W. R. 664; *Ex parte Conning, In re Steele* (1873), L. R., 16 Eq. 414, 42 L. J. Bank. 74, 21 W. R. 784; *Edwards v. Edwards* (1876), 2 Ch. D. 291, 45 L. J. Ch. 391, 34 L. T. 472, 24 W. R. 713. It will be seen that on these points the language of the Act of 1878 (41 & 42 Vict. c. 31), s. 4, points to a more extended operation of the Act.

It was held under the Act of 1854 that the effect of avoidance of a bill of sale by an execution creditor was to avoid it altogether. *Richards v. James* (1867), L. R., 2 Q. B. 285, 36 L. J. Q. B. 116, 16 L. T. 174, 15 W. R. 580; *Chapman v. Knight* (1880), 5 C. P. D. 308, 49 L. J. C. P. 425, 42 L. T. 538, 28 W. R. 919. The principle of these cases has been since questioned by the Master of the Rolls (Sir George Jessel) in *In re Artistic Colour Printing Company, Ex parte Fourdrinier* (1882), 21 Ch. D. 510, 31 W. R. 149; and it is clear that under the Act of 1878 (and where the bill of sale is not subject to absolute nullity under the Act of 1882) the avoidance only takes effect to the extent necessary for the protection of the creditors who come within the scope of the protection of the Act. *Ex parte Blaiberg, In re Toomer* (1883), 23 Ch. D. 254, 52 L. J. Ch. 461, 49 L. T. 16, 31 W. R. 906.

The rule as to fixtures established by the cases under the Act of 1854 was that, if a mortgage by a tenant gave power to the mortgagee to sever the tenant's fixtures and sell them separately from the land, it must be registered as a bill of sale; otherwise not. The leading cases were *Ex parte Daglish, In re Wilde* (1873), L. R., 8 Ch. 1072, 42 L. J. Bank. 102, 29 L. T. 168, 21 W. R. 893; and *Ex parte Barclay, In re Joyce* (1874), L. R., 9 Ch. 576, 43 L. J. Bank. 137, 30 L. T. 479, 22 W. R. 608. The rule was partially adopted, and the whole question of fixtures specifically dealt with, by the Act of 1878, sections 4, 5, and 7. See *infra*, and p. 73, *post*.

The following summary of the English Acts now in force will be sufficient to explain the case law on the subject: —

The Bills of Sale Act 1878 (41 & 42 Vict. c. 31).

Title. An Act to consolidate and amend the law for preventing frauds upon creditors by secret bills of sale of personal chattels.

1. Short title (as above).
2. Commencement 1 January, 1879.
3. Applies to bills of sale executed after commencement.
4. Interpretation of terms. (The passages where the language of the Act of 1854 has been altered are marked by italics.)

"The expression 'bill of sale' shall include bills of sale, assignments, transfers, declarations of trust without transfer, *inventories of goods with receipt thereto attached, or receipts for purchase moneys of goods*, and other assurances of personal chattels, and also powers of attorney, authorities, or licenses to take possession of personal chattels as security for any debt, *and also any agreement, whether intended or not to be followed by the execution of any other instrument by which a right in equity to any personal chattels, or to any charge or security thereon, shall be conferred*, but shall not include the following documents; that is to say, assignments for the benefit of the creditors of the person making or giving the same, marriage settlements, transfers or assignments of any ship or vessel or any share thereof, transfers of goods in the ordinary course of business of any trade or calling, bills of sale of goods in foreign parts or at sea, bills of lading, India warrants, warehouse-keepers' certificates, warrants or orders for the delivery of goods, or any other documents used in the ordinary course of business as proof of the possession or control of goods, or authorising or purporting to authorise, either by indorsement or by delivery, the possessor of such document to transfer or receive goods thereby represented:

"The expression 'personal chattels' shall mean goods, furniture, and other articles capable of complete transfer by delivery, *and* (*when separately assigned or charged*) fixtures *and growing crops*, but shall not include chattel interests in real estate, *nor fixtures* (*except trade machinery as hereinafter defined*) *when assigned together with a freehold or leasehold interest in any land or building to which they are affixed, nor growing crops when assigned together with any interest in the land on which they grow*, nor shares or interests in the stocks, funds, or securities of any government, or in the capital or property of incorporated or joint-stock companies, nor choses in action, nor any stock or produce upon any farm or lands which by virtue of any covenant or agreement or of the custom of the country ought not to be removed from any farm where the same are at the time of making or giving of such bill of sale:

"Personal chattels shall be deemed to be in the 'apparent possession' of the person making or giving a bill of sale, so long as they remain or are in or upon any house, mill, warehouse, building, works, yard, land, or other premises occu-

pied by him, or are used and enjoyed by him in any place whatsoever, notwithstanding that formal possession thereof may have been taken by or given to any other person."

5. (New). Act to apply to and include, as personal chattels, "trade machinery," meaning the machinery used in or attached to any factory or workshop, exclusive of (1st) the fixed motive powers, such as water-wheels and steam-engines, &c., (2ndly) the fixed power machinery, such as shafts and wheels, &c., transmitting the action of the motive powers, and (3rdly) the pipes for steam, gas, and water.

6. (New). Every attornment or instrument, not being a mining-lease, whereby a power of distress is given in security of a debt, is to be deemed a bill of sale of any chattels which may be seized under the power, provided this is not to extend to a mortgage of land which the mortgagee being in possession has demised to the mortgagor at a fair rent.

7. (New, and made retrospective). No fixtures or growing crops shall be deemed to be separately assigned or charged by reason only that they are assigned by separate words, or that power is given to sever them from the land, if by the same instrument any interest in the land is conveyed or assigned to the same person.

8. "Every bill of sale to which this Act applies shall be duly attested, and shall be registered under this Act, within *seven* days after the making or giving thereof, *and shall set forth the consideration for which such bill of sale was given*, otherwise such bill of sale, as against all trustees or assignees of the estate of the person whose chattels, or any of them, are comprised in such bill of sale under the law relating to bankruptcy or liquidation, or under any assignment for the benefit of the creditors of such person, and also, as against all sheriffs' officers and other persons seizing any chattels comprised in such bill of sale, in the execution of any process of any Court authorising the seizure of the chattels of the person by whom or of whose chattels such bill has been made, and also as against every person on whose behalf such process shall have been issued, shall be deemed fraudulent and void so far as regards the property in or right to the possession of any chattels comprised in such bill of sale which, at or after the time *of filing the petition for* bankruptcy *or liquidation*, or of the execution of such assignment, or of executing such process (as the case may be), and after the expiration of such seven days are in the possession or apparent possession of the person making such bill of sale (or of any person against whom the process has issued under or in the execution of which such bill has been made or given, as the case may

be)." [This section is repealed, *so far as relates to assignments in security*, by section 15 of the Act of 1882.]

9. Prevents the evasion of the Act by successive bills of sale, as practiced under the Act of 1854. A subsequent bill of sale executed within seven days and given as security for the same debt as a former bill, declared void.

10. "A bill of sale shall be attested and registered under this Act in the following manner: —

"(1) *The execution of every bill of sale shall be attested by a solicitor of the Supreme Court, and the attestation shall state that before the execution of the bill of sale the effect thereof has been explained to the grantor by the attesting solicitor:* —

"(2) Such bill, with every schedule or inventory thereto annexed or therein referred to, and also a true copy of such bill, and of every such schedule or inventory, and of every attestation of the execution of such bill of sale, together with an affidavit of the time of such bill of sale being made or given, and of its due execution and attestation, and a description of the residence and occupation of the person making or giving the same (or in case the same is made or given by any person under or in the execution of any process, then a description of the residence and occupation of the person against whom such process issued), and of every attesting witness to such bill of sale, shall be presented to and the said copy and affidavit shall be filed with the registrar within seven clear days after the making or giving of such bill of sale, in like manner as a warrant of attorney in any personal action given by a trader is now by law required to be filed: —

"(3) If the bill of sale is made or given subject to any defeasance or condition, or declaration of trust not contained in the body thereof, such defeasance, condition, or declaration shall be deemed to be part of the bill, and shall be written on the same paper or parchment therewith before the registration, and shall be truly set forth in the copy filed under this Act therewith and as part thereof, otherwise the registration shall be void.

"*In case two or more bills of sale are given, comprising, in whole or in part, any of the same chattels, they shall have priority in the order of the date of their registration respectively as regards such chattels.*

"*A transfer or assignment of a registered bill of sale need not be registered.*"

11. Provides for the renewal of registration every five years.
12. Prescribes the form of the register.
13. Certain officers of the Court to be registrars.
14. Provides for rectification of the register.
15. Provides for entry of satisfaction.
16. Copies may be taken and office copies to be evidence.
17–19. Administrative.
20. Chattels comprised in registered bill of sale not to be in reputed ownership of grantor (see p. 31, *supra*).
21, 22. Administrative.
23. Repeal of the Act of 1854, and of the Act of 1866 (which merely provided for the renewal of registration every five years).
24. The Act (like its predecessor) not to extend to Scotland or Ireland. (A similar Act was passed for Ireland in 1879, 42 & 43 Vict. c. 50.)

THE BILLS OF SALE ACT (1878) AMENDMENT ACT 1882 (45 & 46 Vict. c. 43).

1. Short title.
2. Commencement, 1 November, 1882.
3. The Act to be construed along with the Act of 1878, but not to apply to bills of sale given otherwise than by way of security for the payment of money.
4. "Every bill of sale shall have annexed thereto or written thereon a schedule containing an inventory of the personal chattels comprised in the bill of sale; and such bill of sale, save as hereinafter mentioned, shall have effect only in respect of the personal chattels specifically described in the said schedule; and shall be void, except as against the grantor, in respect of any personal chattels not so specifically described."
5. "Save as hereinafter mentioned, a bill of sale shall be void, except as against the grantor, in respect of any personal chattels specifically described in the schedule thereto of which the grantor was not the true owner at the time of the execution of the bill of sale."
6. "Nothing contained in the foregoing sections of this Act shall render a bill of sale void in respect of any of the following things, (that is to say): —
   "(1) Any growing crops separately assigned or charged where such crops were actually growing at the time when the bill of sale was executed.

"(2) Any fixtures separately assigned or charged, and any plant or trade machinery where such fixtures, plant, or trade machinery are used in, attached to, or brought upon any land, farm, factory, workshop, shop, house, warehouse, or other place, in substitution for any of the like fixtures, plant, or trade machinery specifically described in the schedule to such bill of sale."

7. "Personal chattels assigned under a bill of sale shall not be liable to be seized or taken possession of by the grantee for any other than the following causes: —

"(1) If the grantor shall make default in payment of the sum or sums of money thereby secured at the time therein provided for payment, or in the performance of any covenant or agreement contained in the bill of sale, and necessary for maintaining the security;

"(2) If the grantor shall become a bankrupt, or suffer the said goods or any of them to be distrained for rent, rates, or taxes;

"(3) If the grantor shall fraudulently either remove or suffer the said goods, or any of them, to be removed from the premises;

"(4) If the grantor shall not, without reasonable excuse, upon demand in writing by the grantee, produce to him his last receipts for rent, rates, and taxes;

"(5) If execution shall have been levied against the goods of the grantor under any judgment at law:

"Provided that the grantor may within five days from the seizure or taking possession of any chattels on account of any of the above-mentioned causes apply to the High Court, or to a Judge thereof in chambers, and such Court or Judge, if satisfied that by payment of money or otherwise the cause of seizure no longer exists, may restrain the grantee from removing or selling the said chattels, or may make such other order as may seem just."

8 "Every bill of sale shall be duly attested, and shall be registered under the principal Act within seven clear days after the execution thereof, or if it is executed in any place out of England, then within seven clear days after the time at which it would in the ordinary course of post arrive in England if posted immediately after the execution thereof; and shall truly set forth the consideration for which it was given; otherwise such bill of sale shall be void in respect of the personal chattels comprised therein."

9. "A bill of sale made or given by way of security for the payment of money by the grantor thereof shall be void unless made in accordance with the form in the schedule to this Act annexed."

10. "The execution of every bill of sale by the grantor shall be attested by one or more credible witness or witnesses, not being a party or parties thereto. So much of section ten of the principal Act as requires that the execution of every bill of sale shall be attested by a solicitor of the Supreme Court, and that the attestation shall state that before the execution of the bill of sale the effect thereof has been explained to the grantor by the attesting witness, is hereby repealed."

Section 11 contains directions to the Registrar for the purpose of local registration.

12. "Every bill of sale made or given in consideration of any sum under thirty pounds shall be void."

13. "All personal chattels seized or of which possession is taken after the commencement of this Act, under or by virtue of any bill of sale (whether registered before or after the commencement of this Act), shall remain on the premises where they were so seized or so taken possession of, and shall not be removed or sold until after the expiration of five clear days from the day they were so seized or so taken possession of."

14. "A bill of sale to which this Act applies shall be no protection in respect of personal chattels included in such bill of sale which but for such bill of sale would have been liable to distress under a warrant for the recovery of taxes and poor and other parochial rates."

15. "The eighth and the twentieth sections of the principal Act, and also all other enactments contained in the principal Act which are inconsistent with this Act are repealed, but this repeal shall not affect the validity of anything done or suffered under the principal Act before the commencement of this Act."

Section 16 contains provisions for the inspection of registered bills of sale.

17. "Nothing in this Act shall apply to any debentures issued by any mortgage, loan, or other incorporated company, and secured upon the capital stock or goods, chattels, and effects of such company."

The form of bill of sale given in the Schedule (and under section 9, to be followed under the sanction of nullity), is as follows: —

"This indenture, made the day of , between A. B.

of of the one part, and C. D. of of the other part witnesseth that in consideration of the sum of £ now paid to A. B. by C. D., the receipt of which the said A. B. hereby acknowledges [*or whatever else the consideration may be*], he, the said A. B., doth hereby assign unto C. D., his executors, administrators, and assigns, all and singular the several chattels and things specifically described in the schedule hereto annexed by way of security for the payment of the sum of £ , and interest thereon at the rate of per cent per annum [*or whatever else may be the rate*]. And the said A. B. doth further agree and declare that he will duly pay to the said C. D. the principal sum aforesaid, together with the interest then due, by equal payments of £ on the day of [*or whatever else may be the stipulated times or time of payment*]. And the said A. B. doth also agree with the said C. D. that he will [*here insert terms as to insurance, payment of rent, or otherwise, which the parties may agree to for the maintenance or defeasance of the security*].

"Provided always, that the chattels hereby assigned shall not be liable to seizure or to be taken possession of by the said C. D. for any cause other than those specified in section 7 of the Bills of Sale Act (1878) Amendment Act, 1882.

"In witness, &c.

"Signed and sealed by the said A. B. in the presence of me, E. F. [*add witness*' name, address, and description]."

The Bills of Sale Act 1890 (53 & 54 Vict. c. 53).

This Act exempts from the operation of section 9 of the Bills of Sale Act 1882 instruments or letters of hypothecation relating to goods in the interval between their being discharged from a ship and being warehoused or reshipped. (It is understood that these documents are used principally at Liverpool.)

AMERICAN NOTES.

The instruments in litigation in the two principal cases are commonly known in this country as Chattel Mortgages. Nearly every State has its own statutory system regulating these instruments. The questions indicated in the principal cases are infinitely vexed here.

By the explicit language of the statutes, or where they are silent on the point, a want of "actual and continued change of possession" is regarded as a badge of fraud, more or less conclusive. Mr. Bennett says (notes to Benjamin on Sales, 6th Am. ed., pp. 458–462), that three views seem to prevail in this country on this subject: (1) that continued possession, use, and apparent ownership in the seller is a conclusive badge of fraud as a rule of law; (2) that it is only *primâ facie* so as a rule of law; (3) that it raises a question of fact for the jury. These conclusions he corroborates by a classification of

the different adjudications according to States, to which reference may usefully be made. Mr. Benjamin's editors state the general American rule correctly as follows: "The modern English doctrine was approved by the Supreme Court of the United States so long ago as 1857, in *Warner* v. *Norton*, 20 Howard, 448, where McLean, J., said (p. 260): 'Few questions in the law have given rise to a greater conflict in the law than the one under consideration. But for many years the tendency has been, in England and the United States, to consider the question of fraud as a fact for the jury under the instructions of the Court. And the weight of authority seems to be now, in this country, favourable to this position. Where possession of the goods does not accompany the deed, it is *primâ facie* fraudulent, but open to the circumstances of the transaction, which may have an innocent purpose.'" (Benjamin on Sales, 6th Am. ed., § 589.) This view is opposed to the older view of Chief Justice Kent, in *Sturtevant* v. *Ballard*, 9 Johnson, 337; 6 Am. Dec. 281; and to that of the United States Supreme Court, in *Hamilton* v. *Russell*, 1 Cranch, 309, where it was held that retention of possession, even in good faith, would invalidate the transaction. The modern view is also found in *Hanford* v. *Artcher*, 4 Hill (New York), 271; *Brooks* v. *Powers*, 15 Massachusetts, 244; 8 Am. Dec. 99; *Smith* v. *Craft*, 123 United States, 436; *Baltimore & Ohio R. Co.* v. *Glenn*, 28 Maryland, 287; 92 Am. Dec. 688; *Miller* v. *Shrere*, 29 New Jersey Law, 250; *Boone* v. *Hardie*, 83 North Carolina, 470; *Smith* v. *Henry*, 2 Bailey (So. Car.) 118; *Sarle* v. *Arnold*, 7 Rhode Island, 582; Browne on Sales, p. 112. Consult a valuable note in 18 Lawyers' Rep. Annotated, 604.

Mr. Benjamin's editors say that "in Massachusetts, Pennsylvania, Connecticut, New Hampshire, Vermont, Illinois, and others, the retention is treated as *per se* fraudulent." According to Mr. Bennett (Notes to Benjamin on Sales, as above) this is partly incorrect, — the retention is only *primâ facie* fraudulent in Massachusetts, New Hampshire, Pennsylvania.

In the recent case of *Peabody* v. *Landon*, 61 Vermont, 318; 15 Am. St. Rep. 903, it was held that a chattel mortgage, declaring that the mortgagor might keep possession and sell and replace, is *primâ facie* valid as against creditors of the mortgagor. In a note (15 Am. St. Rep. 912), Mr. Freeman, the editor, says, no topic of the law "can be found in which judicial opinion more widely differs, and as has been said of it, 'the cases cannot be reconciled by any process of reasoning or on any principle of law.'" He takes the ground that such a mortgage should be deemed fraudulent in law as to creditors, approving the views of the dissenting opinion in *Frankhouser* v. *Ellett*, 22 Kansas, 127; 31 Am. Rep. 171, and *Robinson* v. *Elliott*, 22 Wallace (United States Sup. Ct.), 513, in which last case the question was considered independent of statutory enactments, and "the Court was free to act upon principle," as Mr. Freeman observes. But he admits that the contrary is upheld by a "line of authorities, respectable in number, at least," and proceeds to cite them from fifteen States, including Massachusetts; and he admits that seven others (and some of those first cited), including New York, hold that such a transaction is only *primâ facie* fraudulent if the instrument provides that the proceeds of all sales are to be applied in satisfaction of the debt.

If the terms of the mortgage do not require the mortgagor to account for the proceeds, it is fraudulent in law. *Eckman* v. *Munnerlyn*, 32 Florida,

367; 37 Am. St. Rep. 109, citing cases from Illinois, Minnesota, Oregon, Colorado, New Hampshire, Wisconsin, North Carolina, Mississippi, New York, Ohio, and *Robinson* v. *Elliott*, 22 Wallace (U. S. Sup. Ct.), 513. See also *Rathbun* v. *Berry*, 49 Kansas, 735; 33 Am. St. Rep. 389, and note.

The latest and most approved writer in this country on Chattel Mortgages, Mr. Jones, says (Chattel Mortgages, § 320): "The modern English doctrine, and that more generally adopted by the American Courts, is that possession by a vendor or a mortgagor is at most only *primâ facie* a badge of fraud; that the presumption arising from that circumstance may be rebutted by explanations showing the transaction to have been fair and honest; and that the question of fraud is always one of fact for the jury to determine." Citing cases from twenty-four States, including New York, Massachusetts, and New Jersey. Mr. Jones also says that the doctrine of *Twyne's Case*, "that an absolute bill of sale, which is to take effect immediately, is rendered fraudulent *per se* by leaving the property in the possession of the vendor," and so, "as to creditors of the vendor and purchasers from him, notwithstanding the sale may have been made in good faith," is approved either by statute or decision in ten States, including Pennsylvania and Illinois. "That the mortgagor's possession is provided for by the terms of the deed is generally sufficient to overcome any presumption of fraud that might otherwise arise from such possession," says Mr. Jones, citing a few cases from New York, Indiana, and Illinois. He also concludes that "there never was a time when the continuance in possession of a mortgagor until default in payment was deemed at common law conclusive evidence of fraud, rendering the security void against creditors and purchasers." (Jones on Chattel Mortgages, § 324.)

No. 3. — MANCHESTER, SHEFFIELD, AND LINCOLNSHIRE RAILWAY COMPANY *v.* NORTH CENTRAL WAGON COMPANY.

(H. L. 1888.)

No. 4. — CHARLESWORTH *v.* MILLS.

(H. L. 1892.)

RULE.

To constitute a "bill of sale" within the English Acts (1878 and 1882) a document must be "an assurance of personal chattels:" that is to say, a document through which the title to the property must be established. And, in order to come within the provisions of the Act of 1882, avoiding the document between the parties, it must be given "by way of security for the payment of money by the grantor thereof."

No. 3. — Manchester, &c. Ry. Co. v. North Central Wagon Co., 13 App. Cas. 554, 555.

Manchester, Sheffield, and Lincolnshire Railway Company (appellants and defendants) **v. North Central Wagon Company** (respondents and plaintiffs.)

(**North Central, &c. Co. v. Manchester, &c. Ry. Co.**)

13 App. Cas. 554–570 (s. c. 58 L. J. Ch. 219; 59 L. T. 730; 37 W. R. 305).

Bill of Sale. — Assurance of Personal Chattels. — Hire and Purchase Agreement.

Action by the North Central, &c. Co. against the Manchester, &c. Ry. Co., for the detention of wagons. The defendants denied the plaintiff's property in the wagons.

[554] The B. Company, being in want of money and being in possession of certain wagons in which they had an interest, applied to the plaintiffs who agreed to buy the wagons for £1000, and advanced that sum, £257 thereof being paid to the owners of the wagons and the rest, £743, to the B. Company. The plaintiffs received from the B. Company an invoice for the wagons and a receipt for the £743, and from the owners of the wagons a receipt for the £257. At the same time the plaintiffs leased the wagons to the B. Company for three years, at a yearly rent payable quarterly and calculated to replace the £1000 with seven per cent. interest, upon the terms that if all the payments were duly made the B. Company should have the option of purchasing the wagons at the end of the lease for a nominal sum, and that if the rent was not duly paid after demand the plaintiffs should be entitled to repossess and enjoy the wagons as in their former estate, and that the agreement should thereupon cease and determine. The B. Company having made default in payment of the rent, the plaintiffs claimed the wagons from a railway company into whose possession they had come, but their claim was resisted on the ground that the transaction was void under the Bills of Sale Acts 1878 and 1882, the documents not being in the form prescribed by those Acts for bills of sale.

Held, affirming the decision of the Court of Appeal (35 Ch. D. 191), that the transaction was in fact a purchase by the plaintiffs, and was not a mortgage by the B. Company or a security for the payment of money; that the documents in question were not bills of sale within the Bills of Sale Acts, but that even if they had been, the plaintiffs had made an independent title to the wagons.

[555] Appeal from a decision of the Court of Appeal, 35 Ch. D. 191; 56 L. J. Ch. 609; and in Court below, 32 Ch. D. 477; 55 L. J. Ch. 780.

The facts are sufficiently stated in the judgments of Lords Herschell and Macnaghten.

April 16, 17. *R. Henn Collins*, Q. C., and *C. A. Russell* for the appellants: —

No. 3. — Manchester, &c. Ry. Co. v. North Central Wagon Co., 13 App. Cas. 555, 556.

As to the point under the Bills of Sale Acts, the real nature of the transaction was not a purchase but an advance by the plaintiffs to the Blacker Company upon the security of the wagons of which the Blacker Company, and not the respondents, were the owners. The documents constituted in reality a bill of sale, and not being registered nor in the form required by the Act of 1882, the bill of sale was void and the whole transaction was void. If the parties to a transaction of this kind think it desirable for their own purposes to have a receipt, or an inventory, or any document of title, and make it a step in a transaction for giving security, it must conform to the Act. It is not only the form but the transaction which was avoided by the Act of 1878. The Act of 1882 enlarged the invalidity, making the bill of sale void not only as against execution creditors, &c., but also as between the grantor and the grantee. One of the authorities leading up to the Act of 1878 was *Allsopp* v. *Day*, 7 H. & N. 457; 31 L. J. Ex. 105, where a receipt was held not to be a bill of sale within the Act of 1854, 17 & 18 Vict. c. 36. So in *Woodgate* v. *Godfrey*, 5 Ex. D. 24; 49 L. J. Ex. 1, where a receipt and inventory given by a sheriff's officer for the price of goods sold under an execution was held not to be within the Act of 1854. The Act of 1878 (41 & 42 Vict. c. 31) made bills of *sale include "inventories of goods with [*556] receipt thereto attached, or receipts for purchase-moneys of goods, and other assurances of personal chattels." Then came *Marsden* v. *Meadows*, 7 Q. B. D. 80; 50 L. J. Q. B. 536, following *Woodgate* v. *Godfrey*, 5 Ex. D. 24; 49 L. J. Ex. 1. The facts in the present case resemble not those in the two last cited decisions, but those in *Ex parte Odell*, 10 Ch. D. 76; 48 L. J. Bankr. 1; *Cochrane* v. *Matthews*, 10 Ch. D. 80, n.; 48 L. J. Bankr. 3, n.; and *Ex parte Cooper*, 10 Ch. D. 313; 48 L. J. Bankr. 40, in each of which cases it was held that an inventory of goods with a receipt for purchase-money attached was a bill of sale within the Act of 1854. The first two of these three cases show that several documents may constitute a bill of sale. Nor does the existence of a hiring agreement alter the real nature of the transaction. *Ex parte Odell*, and see *Ex parte Crawcour*, 9 Ch. D. 419; 47 L. J. Bankr. 94. Even where the only document is a demise of chattels it is or may be a bill of sale. *Phillips* v. *Gibbons*, 5 W. R. 527. See also *Ex parte Parsons*, *In re Townsend*, 16 Q. B. D. 532; 55 L. J. Q. B. 137, and *Ex parte Hubbard*, 17 Q. B. D. 690, 700; 55 L. J. Q. B. 490, upon

the effect of the Act of 1882. A document providing for the payment of money — though not as a loan — may be a bill of sale. *Hughes* v. *Little*, 18 Q. B. D. 32; 56 L. J. Q. B. 96.

As to the second point, the right of detainer and sale given by the first clause of sect. 97 of the Railways Clauses Consolidation Act 1845 (8 & 9 Vict. c. 20) is alternative on both carriages and goods, *i. e.*, on carriages for toll of goods and on goods for toll of carriages.[1] At common law a carrier has such a lien. Sect. 97 must be read with sects. 98 and 101. The construction adopted by the Court of Appeal gives no meaning to the word "carriages," for the [*557] appellants' special Act gives no toll on carriages. *The toll is not a payment due on the carriage or on the goods, it is a charge for the use of the railway; s. 3. The construction contended for by the appellants has the authority of a *dictum* of PARKE, B., upon a similar enactment in *Jenkins* v. *Cooke*, 1 Ad. & E. 372, n., 375. In *Field* v. *Newport, &c. Railway Company*, 3 H. & N. 409; 27 L. J. Ex. 396, it was assumed on a similar clause that the lien extended to carriages, though the decision turned on the question of demand. These are the only authorities bearing upon the question. Under the first part of sect. 97 there was therefore a right to detain the wagons whoever was the owner. But even if this be otherwise, under the second part of that section the appellants had a right to detain the wagons since they belonged to the Blacker Company; at all events that company had an interest in the wagons, and the appellants were entitled to detain the wagons and sell such interest.

The House took time for consideration without hearing —

Rigby, Q. C., and *Phipson Beale*, Q. C., for the respondents.

July 30. Lord HERSCHELL: —

My Lords, at the conclusion of the able arguments for the appellants, all your Lordships, I believe, were of opinion that they had not succeeded in establishing any of the objections taken to the

[1] Sect. 97: "If, on demand, any person fail to pay the tolls due in respect of any carriage or goods, it shall be lawful for the company to detain and sell such carriage, or all or any part of such goods, or, if the same shall have been removed from the premises of the company, to detain and sell any other carriages or goods within such premises belonging to the party liable to pay such tolls, and out of the moneys arising from such sale to retain the tolls payable as aforesaid, and all charges and expenses of such detention and sale, rendering the overplus, if any, of the moneys arising by such sale, and such of the carriages or goods as shall remain unsold, to the person entitled thereto, or it shall be lawful for the company to recover any such tolls by action at law."

judgment of the Court below, and subsequent consideration of the case has confirmed the opinion I had then formed.

The action was brought against the defendant company, who were the appellants at your Lordships' bar, in respect of the detention of certain wagons alleged to be the property of the respondents. The appellants denied, as they were entitled to do, that the respondents were the owners of the wagons and put them upon proof of their title. They also asserted a right to detain the wagons, even if they were the property of the respondents, as security for moneys due from a firm trading as the Blacker Main Coal Company. Whether they have succeeded in making good either of these defences is the matter to be *determined. The two [*558] questions involved are entirely distinct and depend upon different considerations.

I will take first the question whether the respondents made out that they had any property in the goods which would entitle them to maintain this action.

It appears that, the Blacker Company being in want of money in the month of February, 1884, it was agreed between them and the respondents that the latter company should purchase for the sum of £1000, 100 wagons in which the Blacker Company had an interest. It was at the same time agreed that the respondents should lease these wagons to the Blacker Company for three years from the 1st of March, 1884, at the yearly rent of £372 10*s.*, payable quarterly, and that if all these payments were duly made the Blacker Company should have the option of purchasing all or any of the wagons at 1*s.* per wagon. And it was further agreed that if the rent was not duly paid after demand the respondents should be entitled to repossess and enjoy the wagons as of their former estate.

The wagons were originally the property of the Sheffield Wagon Company, and had been leased to the Blacker Company under an agreement which gave the latter company the right to become at the end of the term owners of the wagons, provided they made all the payments which by the lease they contracted to make. It was in short what is known as a hire and purchase agreement. The Blacker Company had at the time of the agreement with the respondents, the particulars of which I have mentioned, made default in paying some of the stipulated instalments, and the Sheffield Company were thereupon in a position to dispose of the wagons without regard to the Blacker Company. They had, however, intimated

that they were willing to give up their title to the wagons on receipt of £257, the sum still remaining due under their agreement. But it is clear that the wagons were then their property, and not the property of the Blacker Company. Under these circumstances it was agreed that the respondents should pay the £257 direct to the Sheffield Company and the sum of £743 (making in all £1000) to the Blacker Company.

The £257 was accordingly subsequently transmitted by cheque payable to the order of the Sheffield Company, and a receipt [*559] was *given by them to the respondents. The £743 was also on the 18th of February paid to the Blacker Company, and acknowledged by a receipt in the following terms: —

"Received of the North Central Wagon Company cheque value £743, which is placed to your credit, with thanks.

"p. pro. The Blacker Main Coal Company,

"Jno. Malleson."

The Blacker Company had two days before the receipt I have just alluded to sent to the respondents an invoice in the following terms: —

"Messrs. The North Central Wagon Company, Rotherham.

"Dr. to the Blacker Main Coal Company.

"1884 Feby. 18.	To 100 wagons, Nos. 1 to 100, and bearing Sheffield Wagon Company's plate, Nos. 8675 to 8774, and marked: — The Blacker Main Coal Company . . .	£1000
Feby. 19.	Cr. by cheque payable to Sheffield Wagon Company	257
		£743"

In further pursuance of the agreement between the parties a lease of the wagons containing the agreed terms was executed on the 18th of February.

Subsequently to the receipt of the money by the Sheffield Company their name plates indicating that they were the owners were removed from the wagons, and plates bearing the respondents' name were substituted. They thus became the ostensible owners of the wagons, which however remained in the possession of the Blacker Company, and were used by them in their business.

Under these circumstances, apart from the question raised as

to the effect of the Bills of Sale Acts, it is impossible to deny that the respondents proved a sufficient title to the wagons to enable them to maintain this action.

It is said, however, that the transaction was in reality a loan upon the security of the wagons, and that the documents which passed, and by which it is said the arrangements were carried out, or some or one of them, amounted to a bill of sale within the * meaning of sect. 9 of the Bills of Sale Act [* 560] 1882, and were by that Act rendered void.

That section provides that "a bill of sale made or given by way of security for the payment of money by the grantor thereof shall be void unless made in accordance with the form in the schedule to this Act annexed," and certainly none of the documents with which we have to deal were in that form.

Before considering the nature of these documents I have to observe that the transaction between the parties was not in my opinion really a loan upon security of the wagons. It differed materially in its incidents from such a transaction. If, *e.g.*, the Blacker Company had made default after payment of some of the quarterly sums prescribed by the agreement of lease and the respondents had taken possession of the wagons and sold them for a sum which, with these payments, exceeded £1000 and interest, the Blacker Company would have had no claim to an account and payment of the surplus.

The Bills of Sale Act 1882 contains no definition of a bill of sale. For that we are thrown back to the earlier statute, viz., the 4th section of the Act of 1878, which enacts that "the expression 'bill of sale' shall include bills of sale, assignments, transfers, declarations of trust without transfer, inventories of goods with receipt thereto attached, or receipts for purchase-moneys of goods and other assurances of personal chattels." It must be borne in mind that the object of the earlier Bills of Sale Acts was entirely different from that of 1882. The former enactments were designed for the protection of creditors, and to prevent their rights being affected by secret assurances of chattels which were permitted to remain in the ostensible possession of a person who had parted with his property in them. The bills of sale were therefore made void only as against creditors or their representatives. As between the parties to them they were perfectly valid. The purpose of the Act of 1882 was essentially distinct.

It was to prevent needy persons being entrapped into signing complicated documents which they might often be unable to comprehend, and so being subjected by their creditors to the enforcement of harsh and unreasonable provisions. A [* 561] form was accordingly provided to which bills of sale * were to conform, and the result of non-compliance with the statute was to render the bill of sale void even as between the parties to it. But, this being the object, the enactment is, as we have seen, limited to bills of sale given "by way of security for the payment of money by the grantor thereof."

It will not avail the appellants therefore to show that the documents or any of them fall within the definition of the Act of 1878, unless they can establish that they are also within the enactment I have just quoted.

There are only three documents to be considered: the lease of the 18th of February, the inventory, and the receipt. I may at once put aside the first of these. The grantors of it were the respondents, and it certainly was not given by way of security for the payment of money by them. Again the inventory was certainly not an inventory of goods "with receipt thereto attached." There remains the receipt. I think it would be an abuse of language to say that this was given by way of security for the payment of money by the grantors thereof. In my opinion it was, and was intended to be, an acknowledgment that the Blacker Company had received £743 and nothing more than that.

I may add that even if the appellants could have made out that this document was a bill of sale and therefore void, they would still have had serious difficulties to contend with. It does not appear to me to follow that it would have avoided the whole agreement between the parties and deprived the respondents of all title to the wagons, the more so as the Blacker Company were not, as I have pointed out, the legal owners of the wagons, the title of the Sheffield Company having only been given up on receipt from the respondents of £257, which, as far as I can see, they could never recover from the Sheffield Company, even if the appellants' contention were sustained.

Upon this part of the case therefore I have no hesitation in advising your Lordships to affirm the judgment of the Court of Appeal.

I pass now to the other point. The facts bearing upon it may

be very shortly stated. The appellants had hauled along their lines the wagons in question as well as others containing coal * belonging to the Blacker Company. A considerable [* 562] sum was due in respect of their services from the Blacker Company to the appellants, a part of which related to the carriage of coal in these particular wagons. Between the 19th of February and the 16th of March, 1885, the appellants took possession of them, claiming to detain them by virtue of the powers given them by sect. 97 of the Railways Clauses Consolidation Act 1845.

On or before the 19th of March, 1885, certain of the sums due from the Blacker Company to the respondents under the agreement of February, 1884, were unpaid, and they accordingly demanded them, and gave notice that in default of payment they would exercise the powers, to which I have called attention, of repossessing themselves and putting an end to the agreement.

The section relied on by the appellants as justifying the detention of the wagons provides that if on demand any person fail to pay the tolls due in respect of any carriage or goods it shall be lawful for the company to detain and sell such carriage or all or any part of such goods, or if the same shall have been removed from the premises of the company, to detain and sell any other carriages or goods within such premises belonging to the party liable to pay such tolls, and out of the moneys arising from such sale to retain the tolls and expenses.

The appellants rest their claim on both parts of this enactment. I will deal first with the latter part of the section. To bring themselves within it the appellants must establish that the carriages they seek to detain belonged to the party liable to pay the tolls, *i. e.*, to the Blacker Company. In my opinion they clearly did not. The appellants therefore, in order to succeed, must show either that if tolls are due in respect of goods they have a right to detain and sell the carriage in which the goods were carried, whoever it may belong to, or that tolls were due in respect of the wagons which they detained. I do not think they can maintain either contention. Unless compelled I would certainly not put a construction upon the section which would give the railway company the option of parting with the goods of their debtor and detaining and selling the wagon which was not his property. And I do not think this is the natural * construction of the language used. I think the right [* 563]

conferred is to detain that in respect of which the toll is payable, be it carriage or goods. And it seems to me clear that no toll was due in respect of these wagons. The special Act of the company, with which the Railways Clauses Act is incorporated, shows to my mind conclusively that the tolls were due only in respect of the coal and not of the wagons in which it was carried.

Upon this point also I entirely concur with the Court below, and I move your Lordships accordingly, that the judgment appealed from be affirmed and the appeal dismissed with costs.

Lord WATSON: —

My Lords, I also am of opinion that no cause has been shown for disturbing the judgment of the Court of Appeal.

I had the advantage, some time ago, of considering in print the judgment prepared by my noble and learned friend, Lord MACNAGHTEN, and finding there all the reasons which had occurred to me for affirming the judgment under appeal, I do not propose to repeat them. I have only to add that I fully concur in the views which have just been expressed by my noble and learned friend on the woolsack.

Lord FITZGERALD: —

My Lords, at the hearing of the cause, when once it appeared that the respondents upon the payment of a sum of £257 at the request of the Blacker Company to the Sheffield Company had acquired the rights of the Sheffield Company to the wagons in question, I thought there was an end of the case on the main defence. That defence in substance, though not in terms, alleged that the plaintiffs in the action (the present respondents) had not that property in the nine wagons in question which would enable them to maintain that action. That defence utterly failed when once that matter of fact was made clear.

My Lords, I do not intend to go in any detail into the reasons, but I concur in the motion, at the same time agreeing with the judgment which has been delivered by the noble and learned Lord on the woolsack, that even if we were of opinion [* 564] that the * subsequent documents amounted to a bill of sale, still it would not displace the title of the respondents. They still put forward and rest upon the title of the Sheffield Company. But I am further of opinion, for the reasons which have been given, that the subsequent documents did

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not amount to a bill of sale and were not in the least degree invalid.

With regard to the question of the lien for tolls, there never was in my mind the slightest doubt on the subject. I adopt the reasons which have been given by the noble and learned Lord on the woolsack, and I agree with him that no cause has been shown why we should alter or disturb the judgment of the Court of Appeal.

Lord MACNAGHTEN: —

My Lords, it seems to me that this case depends much more on matters of fact than on questions of law. Indeed, I think there is scarcely room for any question of law when the facts are ascertained. This must be my apology for recurring to the evidence, which I will do as shortly as possible.

In February, 1884, a colliery company called the Blacker Main Colliery Company, were in possession of one hundred wagons which had been let to them by the Sheffield Wagon Company under the usual purchase hire agreement. The property in the wagons belonged to the Sheffield Company, and each wagon bore a name-plate designating them as owners. The Blacker Company had paid up the greater part of the instalments payable under the agreement. But at the time they were behindhand with their payments and actually in default. They were in want of money and desirous of obtaining an advance in some shape or other. Apparently they applied to the Sheffield Company for assistance. But that company were about to retire from business and were unable or unwilling to assist them.

Under these circumstances the secretary of the Sheffield Company, not perhaps wholly from disinterested motives, introduced them to the respondents. The respondents were also a wagon company. The objects for which they were established included the business of buying wagons and of letting, selling, and supplying wagons to coal proprietors. They were therefore in a position to * help the Blacker Company if they chose to [* 565] entertain their proposal. If they bought the wagons at the instance of the Blacker Company with an understanding that the Blacker Company should then buy the wagons from them under a purchase hire agreement, the transaction would be one in the ordinary course of their legitimate business, and if the terms suited the Blacker Company the arrangement would give that company the accommodation they desired.

The Blacker Company wanted £1000 to pay off the Sheffield Company and to put themselves in funds. The respondents inspected the wagons and agreed to find the money. With part they paid off the claim of the Sheffield Company, amounting in all to £257. For this they drew a cheque payable to the order of the Sheffield Company. Then they gave the Blacker Company a cheque for £743, making up the sum of £1000 as and for the purchase-money for the wagons. As part of the arrangement they relet the same wagons to the Blacker Company for three years on the usual purchase hire agreement, at a rent payable quarterly, and calculated to repay the £1000 with interest at the rate of 7 per cent per annum. Some time afterwards the name-plates of the Sheffield Company were removed and replaced by those of the respondents.

The documents which passed between the Blacker Company and the respondents were the following: — 1. An invoice, dated the 18th of February, 1884, debiting the respondents with the 100 wagons at £1000, but crediting them with their cheque for £257, payable to the Sheffield Company. 2. A receipt dated the 20th of February, 1884, expressed to be for cheque value £743, but not on the face of it referring to the wagons or to the terms of the purchase. 3. The purchase hire agreement, which was dated the 18th of February, 1884.

The assistance afforded by the respondents did not prove of any lasting benefit to the Blacker Company. In February, 1885, they were compelled to call their creditors together. On the 19th of March, 1885, two quarters' rent for the wagons being then due, the respondents served them with formal notice that unless the amount were paid by the 23rd of March they would take possession of the wagons and put an end to the agreement.

[* 566] The * amount due was not paid, and accordingly the respondents proceeded to carry out their threat. They took possession of all the wagons, with the exception of nine. Those nine were detained by the appellants for tolls alleged to be due to them by the Blacker Company. In that state of things the respondents brought this action against the appellants, claiming the nine wagons as their absolute property.

In answer to the claim the appellants raised two points. In the first place they insisted that the respondents had no title to the wagons at all; they contended that the real transaction was

No. 3. — Manchester, &c. Ry. Co. v. North Central Wagon Co., 13 App. Cas. 566, 567.

an advance by the respondents to the Blacker Company of £1000, on the security of the 100 wagons, and that the documents which passed between the respondents and the Blacker Company amounted to a bill of sale, and a bill of sale "given by way of security for the payment of money by the grantor thereof," and so void as not being in accordance with the form prescribed by the Bills of Sale Act (1878) Amendment Act 1882. In the second place they contended that, under the 97th section of the Railways Clauses Consolidation Act 1845, they were entitled to detain and sell the wagons.

The first contention on the part of the appellants is a very singular one from every point of view. If I am right as to the result of the evidence, it is entirely beside the question. If the appellants could succeed in proving that the documents which they allege to be a bill of sale were void, and could even sweep away the whole transaction evidenced by those documents, they would not defeat the title of the respondents. At the time when the respondents came forward to assist the Blacker Company, the property in the wagons belonged to the Sheffield Company. They and they alone were the owners. The Blacker Company had no equity of redemption. They had no equitable rights whatever. At the utmost, assuming the lease not to have been forfeited, they had a contingent interest liable to be defeated by non-compliance with the terms and conditions of the lease. Whatever else may be doubtful, it was clearly the intention of the parties that that interest should be determined. The property in the wagons passed directly from the Sheffield Company to the respondents. The cheque no doubt went through the
* hands of the Blacker Company. It was thought that [* 567]
they might get some discount or allowance on handing
it over. But the cheque was drawn to the order of the Sheffield Company. It was placed in the hands of the Blacker Company for a specific purpose. They had no power to deal with it in any way except by handing it to the Sheffield Company, as the money of the respondents, appropriated to the purchase of the wagons on their behalf. It follows, therefore, that if the rest of the transaction of which that payment was part were entirely avoided there would be nothing to interfere with the title of the respondents.

In the next place, the transaction between the Blacker Com-

pany and the respondents was in no sense a security for the payment of money. It would not have been a security for the payment of money if the title derived from the Sheffield Company had been out of the way. There was no loan, no debt, no mortgage. When the respondents took possession of the wagons in the exercise of the rights reserved to them, the agreement was at an end. The Blacker Company could not have redeemed the wagons. If the wagons had fetched twice the amount of the instalments then remaining unpaid, the Blacker Company would have been none the better, and they would still have continued liable for the arrears. If the wagons had not been worth sixpence, the respondents could not have claimed from the Blacker Company anything beyond the arrears of rent then actually due. The appellants say that all the three documents which they call a bill of sale are wrong. They say that the secretaries of the two companies are both mistaken. Their whole case rests on one or two ambiguous expressions found in the correspondence. The correspondence speaks of the Blacker Company wanting £1000 on the wagons; well, so they did. The Blacker Company called it "financing the wagons," an expression equally apt or inappropriate whether they had a mortgage in view or an absolute sale with a conditional right of repurchase attached to it. As regards their legal incidents, there is all the difference in the world between a mortgage and a sale with a right of repurchase. But if the transaction is completed by redemption or repur-
[* 568] chase as the case may require there is no * difference in the actual result. The Blacker Company of course looked forward to repaying the money. There was nothing, therefore, so very improper or suspicious in their entering the transaction in their books as a loan. When it was put to the secretary of the Blacker Company, "You have said that it was not handed to you as a loan of £1000, but that it was paid for the wagons," he answered naturally enough, and not I think altogether incorrectly, "Well, it was paid for the wagons, but you might call it a loan for all that."

There is very little in the circumstance that the value of the subject dealt with was not a matter of nice bargaining at the date of the transaction. The right of repurchase must be taken into the account if the consideration is to be fairly estimated. There is nothing in the respondents saying a year afterwards that they

did not want the wagons on their hands at any price. Of course they did not. They bought to sell, not to keep in stock. They would not, I suppose, have bought these second-hand wagons at all if they had not seen their way clear to dispose of them on advantageous terms.

In all these cases the question is what was the real intention of the parties? As Lord CRANWORTH observed in a case where the documents were of a more formal character, "The rule of law on this subject is one dictated by common sense, that *primâ facie* an absolute conveyance, containing nothing to show that the relation of debtor and creditor is to exist between the parties, does not cease to be an actual conveyance and become a mortgage merely because the vendor stipulates that he shall have a right to repurchase." *Alderson* v. *White*, 2 D. & J. 105.

My Lords, as I have come to the conclusion that this transaction was not a security for the payment of money, it would not, perhaps, be a very profitable inquiry to consider, whether, under other and different circumstances, the documents in question could be treated as a bill of sale under the Act of 1878. It is enough to say that in my opinion it is difficult to see how a receipt like that in the present case could be "a receipt for purchase-money of goods" within the meaning of the Act, or how an invoice and a receipt, which are separate instruments, and * not intended to be operative in connection with [*569] each other, could be regarded as an "inventory of goods with receipt thereto attached." And I may add that I see no reason to doubt that "receipts for the purchase-money of goods" and "inventories of goods with receipt thereto attached" must be assurances of personal chattels to fall within the category of bills of sale, to which the Act of 1878 applies.

It would, I think, be equally unprofitable to review the authorities which were cited to your Lordships, and which are very fully discussed in the judgment of the Court of Appeal. I only wish to make one observation: I rather venture to doubt whether the line of demarcation between the three cases of *Cochrane* v. *Matthews*, 10 Ch. D. 80, n.; 48 L. J. Bankr. 3 n.; *Ex parte Odell*, 10 Ch. D. 76; 48 L. J. Bankr. 1, and *Ex parte Cooper*, 10 Ch. D. 313; 48 L. J. Bankr. 40, and the other cases cited by BOWEN, L. J., is quite so strong as that learned Judge seemed to think. I rather doubt whether those three cases indicate a separate current of

authority. *Ex parte Cooper* stands by itself, and must be taken with the explanation given by Sir GEORGE JESSEL, M. R., in *Woodgate* v. *Godfrey*, 5 Ex. D. 24; 49 L. J. Ex. 1. But I should be sorry to throw any doubt on the decision in either of the other two cases, though there may be some expressions in the judgments that require qualification. The documents in those two cases, as appears from the statement of counsel in *Ex parte Odell*, were word for word the same. In each case there was a loan and a debt. In each case the transaction was plainly a mortgage, and not a sale with a conditional right of repurchase.

My Lords, as regards the second branch of the appellants' argument, it seems to me that their case falls to the ground when once it is established that at the date of the writ the wagons belonged to the respondents. It is more than doubtful whether any tolls were due for the wagons. It would seem that tolls were charged only for the goods carried in the wagons. But be that as it may, it is, I think, impossible to contend that the 97th section of the Railways Clauses Consolidation Act 1845 could justify the appellants in detaining wagons belonging to the respondents for tolls due from the Blacker Company.

[* 570] * For these reasons I concur in thinking that the appeal should be dismissed.

Order appealed from affirmed; and appeal dismissed with costs.

Lords' Journals, 30th July, 1888.

Charlesworth v. Mills.

1892, A. C. 231–244 (s. c. 61 L. J. Q. B. 830; 66 L. T. 690; 41 W. R. 129).

Bill of Sale. — Assurance of Personal Chattels. — Pledge of Goods with Possession. — Possession of Auctioneer.

[231] The owner of household goods which had been seized under a *fi. fa.* agreed verbally with an auctioneer that in consideration of his paying out the sheriff the auctioneer should hold possession of the goods, sell them by auction, and pay over the balance (if any) to the owner. This agreement was reduced into writing and the sheriff was paid out, the man in possession remaining in possession for the auctioneer: —

Held, reversing the decision of the Court of Appeal (25 Q. B. D. 421) that since the written agreement did not constitute the auctioneer's title, and was not intended to and did not come into operation until possession had been actually transferred from the sheriff to the auctioneer, it was not an "assurance" or a "licence to take possession," or in any other respect a bill of sale within the Bills of Sale Acts 1878 and 1882.

No. 4. — Charlesworth v. Mills. 1892, A. C. 231, 232.

Appeal from an order of the Court of Appeal 25 Q. B. D. 421; 59 L. J. Q. B. 530, affirming a judgment of Day, J.

In December, 1887, the household furniture of Wilson was seized by the sheriff's officer under an execution at the suit of Townsend, and a man placed in possession. On the 9th of December Wilson asked the appellant Charlesworth, an auctioneer, to pay the sheriff out. Charlesworth after seeing the goods agreed to do this, and the following arrangement was verbally made. The man in possession was to remain in possession for Charlesworth, who was to sell the goods by auction, repay himself the advance and hand over any balance to Wilson. This arrangement was carried out. Charlesworth paid out the sheriff, the sheriff's officer giving the following receipt: —

"9th December, 1887. [* 232]

"*Townsend* v. *Wilson*.

"*Memo.* — That I have received from Mr. Charlesworth, auctioneer, cheque for £62 15*s.* 1*d.*, being the amount of levy and costs herein."

Wilson gave Charlesworth a letter as follows: —

"Hull, 9th December, 1887.

"Mr. Charlesworth, Auctioneer,
"Hull.

"Sir, — In consideration of your paying to Mr. C. F. Wells, the sheriff's officer, the amount of Townsend's writ and expenses, viz., £62 15*s.* 1*d.*, I hereby authorise and request you to hold possession of all my furniture and effects now on the premises No. 2, Pendrill Street, Hull, and to sell the whole by auction as soon as convenient, and after deducting the above amount and your charges, pay over the balance (if any) to me.

"Yours truly,
"A. P. Wilson."

The man in possession remained in possession for Charlesworth. On the next day, the 10th, Wilson gave a bill of sale of the same goods to the respondent Mills, who registered it. Wilson absconded, and Charlesworth removed the goods to his auction rooms and sold them for about £55. Mills having brought an action against Charlesworth claiming damages for

the detention and conversion of his goods, Day, J., who tried the action without a jury, held that the above letter was a bill of sale, and not being in the form required by the Act was void, and gave judgment for the plaintiff for £112, the amount of his loss, and costs. The Court of Appeal (Lindley and Lopes, L.JJ., Lord Esher, M.R. dissenting) affirmed this judgment. 25 Q. B. D. 421; 59 L. J. Q. B. 530. From these decisions the defendant brought the present appeal.

1892. April 1, 4. Witt, Q. C., and Montague Lush, for the appellant: —

The letter which the Court of Appeal held was a bill of sale was nothing more than a mandate, an authority, from [* 233] the owner *of the goods, Wilson, to Charlesworth, the auctioneer, to hold possession of the goods and to sell them and repay himself the advance out of them, and hand the balance to the owner. It was an ordinary auctioneer's transaction, with some of the elements of a pledge. No doubt until repayment Charlesworth was entitled to keep possession of the goods as a security. But that does not make the letter a bill of sale. The Court of Appeal seem to have been misled by the old fallacy that because the claimant "relies on" a document or "must look at it" to prove his claim the document is within the Bills of Sale Act. This document does not fall under any of the definitions of a bill of sale given in the Act of 1878: the only colourable one is a "licence to take possession," and that it was not, for possession was taken simultaneously with the advance and the creation of the document. The whole thing was one transaction, and no act remained to be done before possession was perfected. The sheriff's man at the moment he ceased to be in possession on behalf of the sheriff was in possession on behalf of Charlesworth. Wilson could not have maintained an action of detinue or conversion against Charlesworth for selling the goods the instant after the money was paid; therefore neither can Mills. It would perhaps have been better if no letter or document had been given, for then no one could have mistaken the transaction for a bill of sale. The Court of Appeal has itself pointed out the distinction in *Ex parte Hubbard*, 17 Q. B. D. 690; 55 L. J. Q. B. 490, where as here the possession was changed before or simultaneously with the calling into existence of the document. *Ex parte Parsons*, 16 Q. B. D. 532: 55 L. J. Q. B. 137, was a case of licence to take possession and has no bearing here.

No. 4. — Charlesworth v. Mills. 1892, A. C. 233, 234.

Arnold Statham and Dyer for the respondent: —

The appellant looked to the letter as the basis on which he lent his money, — as his security. There was no change of possession till after the sheriff had been paid out. The appellant would not advance the money till the document was signed, and then he paid, not Wilson, but the sheriff. Possession was therefore taken under and by virtue of the document. After the sheriff was paid out possession for a moment at least vested in Wilson, * and the document is therefore a bill of sale. [* 234] "Hold possession" in the document means become the holder. More than what had been done was required to perfect possession, and it was clearly under the authority of the document that the goods were removed to the auction rooms. If a document constitutes the authority to take possession of goods as a security for a loan it is within the Act though possession be given at the same time. If the document contemplates the possibility of an interval between the intended immediate taking of possession and the taking, it is a bill of sale. "Possession is an equivocal term: it may mean either actual manual possession or the mere right of possession." *Martin* v. *Reid*, 13 C. B. (N. S.) at p. 735; 31 L. J. C. P. 136, per Erle, C. J. When the terms of an agreement are reduced to writing you must look at the document only, as Lord Esher, M. R., said in *Ex parte Parsons;* and where you must look at the document to prove your title it is a bill of sale. It was clearly a bill of sale within the Act of 1878 because the goods were in the apparent possession of the debtor. The letter was either a "licence to take possession of personal chattels as security for a debt" — see per Bowen, L. J., in *Ex parte Hubbard* — or "an assurance of personal chattels" within the Act of 1878. If this decision be reversed auctioneers will be in a very favorable position for lending money and defeating the Bills of Sale Act of 1882.

[They also referred to *Wordall* v. *Smith*, 1 Camp. 333; *Seal* v. *Claridge*, 7 Q. B. D. 516; 50 L. J. Q. B. 316; and *Newlove* v. *Shrewsbury*, 21 Q. B. D. 41; 57 L. J. Q. B. 476.]

The appellant's counsel were not heard in reply.

Lord Halsbury, L. C.: —

My Lords, I confess that but for the doubts which have been in the minds of the learned Judges in the Court below, I should have thought that this was a very plain case. I am not quite

certain that I appreciate at this moment what the learned Judge who tried the cause meant by the phrases which he used. I can quite understand that what he called "the mischief" [* 235] intended * to be remedied by the Bills of Sale Act may have been very prominent before the learned Judge's mind, but what it had to do with the facts of this case I am not able at present to fathom.

That the Bills of Sale Acts of 1854 and 1878 were intended to prevent false credit being given to people who had been allowed to remain in possession of goods which apparently were theirs, the ownership however of which they had parted with, is manifest enough by the language of those statutes. The Acts intended, in a case with creditors, that if people were allowed to remain in possession of goods, of which nevertheless the ownership was no longer theirs, those goods and chattels should be subject to the execution of *bonâ fide* creditors who ought not to have been induced to give credit by the apparent ownership of the goods being in those persons, and who were therefore entitled to have their debts satisfied when by the default of the assignees of those goods they had been allowed to continue in the possession of persons to whom the property in them no longer belonged. That was the intended policy; and for such purposes it is manifest that the Legislature would desire to give the widest possible interpretation to every one of the documents by which the ownership was really intended to be practically changed, while the goods still remained in the apparent possession and dominion of the persons from whom the ownership had nevertheless really passed away.

My Lords, the Act of 1882 was directed to a totally different subject-matter. It was thought by the Legislature, rightly or wrongly, that a great number of impecunious debtors might be induced to sign documents the legal effect of which those persons did not understand. It was therefore intended by the Legislature, in order to protect them, to give a particular form of words which should plainly express the nature of the contract as to the loan and the security for the loan. The Legislature accordingly, in order to effect the object, gave a form of bill of sale, and made every bill of sale void unless it was in accordance with the form given by the statute. It seems to me that the Legislature neither intended to interfere, nor is it the effect of the legislation

to which I have referred to interfere, with other * trans- [* 236]
actions than those which the Legislature has expressly pointed out.

Now let us see what the transaction here is. First of all, is it within the mischief of either the Act of 1854 or the Act of 1878, the object and purpose of which I have described? The transaction here is a very plain one. The debtor has an execution in his house, the sheriff takes possession (upon what the effect and quality of that possession is, I will say a word presently), the debtor is under the impression that he can raise sufficient money upon the security of the goods of which the sheriff has taken possession to satisfy him, and also perhaps to leave a surplus for himself. For that purpose it is necessary that the execution should be paid out; the sheriff will not relinquish possession, and for his own security cannot relinquish possession until he has been paid the money. Accordingly the debtor goes to the appellant, Mr. Charlesworth, and invites him to lend him the money upon the security of the goods which at that moment are in the possession of the sheriff. Mr. Charlesworth agrees to do so, but he bargains and makes it a necessary part of the transaction, without which he will not advance his money, that he shall get possession of the goods. That is agreed to. The effect and value of what is done I will discuss presently, as I have said, when I am dealing with what was in the possession of the sheriff. That was a bargain that the possession should be changed from the person to whom the money was being advanced to the person lending it. That, therefore, undoubtedly was not within the mischief intended to be cured by the Acts of 1854 and 1878. The transaction is completed, the money is advanced, and the sheriff is paid out.

Well, but it is said that this is a bill of sale within the Act of 1882, — that the form of the instrument by which the property in these goods is changed and the assignment is made within the Act of 1882, and that inasmuch as the Act of 1882, in furtherance of the objects which I have described, makes a bill of sale in such a form void even as against the grantor himself, no property passed by this instrument. The simple answer to that is that the whole foundation of that argument fails. There was no assignment, there was no bill of sale, there was nothing that * in the meaning of the Act of 1882 can be [* 237]

relied upon by reason of its operating a change of property; no such thing took place. The instrument itself does not purport to do any such thing. The reasoning of the Court of Appeal, so far as I can follow it at present, appears to be this, that although they affirm and rely upon their own decision in *Ex parte Hubbard*, they raise what to my mind would be a most serious and important question, having very wide consequences indeed, — they raise a distinction between what is suggested as physical possession and formal possession.

Now, I must say that I received a very candid answer from the Bar when I put the question, what was the difference in the nature of the possession between the possession by the sheriff and the possession by the man who held the property on the part of Mr. Charlesworth? It was admitted with great candour that there was no difference at all in the character or quality of the possession. Then it comes to this, that the possession of the sheriff in this case — nay, I may say the possession of the sheriff in every case — must be regarded as open to that question, as to whether or not it is a physical possession or a formal possession. I am not quite certain that I am able to comprehend the exact distinction which has been pointed out. I understand what possession is (at least, I think so), and I never understood that the possession of the sheriff was other than physical and actual possession. I do not mean by that, that the sheriff's man has at every moment in his possession every article which exists in the house. It is obvious that such a possession, if it is to be limited to that, would be absolutely impossible; it would make the question of whether or not there was possession sufficient to vest the property in the sheriff a question depending upon the particular article or class of articles of which he was in possession; because some of them would be incapable of being grasped by the hand, if that is what is meant by taking physical possession. But what do I find occurred here? I find that there was a man in the house for the purpose of preventing any other person interfering with or removing or taking away any of the property in question; and it is not denied that if the [* 238] assignor or any * one on his behalf had attempted to remove any of the articles which were in the house at the time when this man was in possession on behalf of Mr. Charlesworth, he would have been immediately stopped. Therefore, I

should have thought that this possession was just as much a physical and actual possession as it is possible for any one man to have in articles which are distributed all over a house.

My Lords, under these circumstances, what is the problem which your Lordships are called upon to solve? We have the fact that the debtor has given a perfectly good mandate. I am not quite satisfied that the word "pledge" is properly applicable to it, although I do not deny that in some respects the rights of a pledgor may come in question; but the transaction is this: the man says, "I hand over these goods to you," in the only sense in which goods that are distributed over a house are capable of being handed over, "in consideration of your paying money to the sheriff and getting them out of the hands of the sheriff;" and then he draws up a document in which he says, "Now keep this possession for me, and sell the goods for what they will fetch by auction;" and of course after he has done that the person to whom they are handed holds them with this kind of trust attached to them, and when they are realized, if there is anything remaining beyond the amount of £62, which he has advanced upon them, he holds that money to the order of the person who has given him the mandate.

My Lords, that is the transaction; what that has to do either with the mischief contemplated by the Bills of Sale Acts, or what it has to do with a bill of sale at all, I confess myself totally unable to understand. It is a transaction in which, simultaneously with the handing over the goods and advancing the money (and I affirm that the words "handing over the goods" are perfectly applicable to such a transaction as this, because they are handed over in the only way in which goods distributed all over a house can be handed over), a document is signed by the borrower which says, "Pay yourself the money which you have advanced, and hand me the surplus if there is any."

It seems to me that the whole argument based upon the assumption that this is a bill of sale transaction at all entirely * fails. It therefore appears to me to be obvious [* 239] that the judgment of the Court of Appeal must be reversed.

My Lords, there is one further observation which I wish to make, because it appears to me that there has been a confusion both in the argument, and (I say it with all respect) I think in one of the judgments, between what it is necessary to establish

in a Court of Law when you are proving a transaction and the operative part of the transaction itself. I can well understand that where upon a trial, after the statement of the loan had taken place and after what the transaction was had been deposed to, one of the witnesses might have said: "There was a writing drawn up and it had relation to the transaction," then the Judge would of course insist upon the production of the instrument in order to see whether or not the rights of the parties had been reduced to writing, and would not allow a mere parole description of the transaction to go on without the writing being produced. But after all that only comes to producing the writing such as it is; and if the writing when it is produced does not affect the rights of the parties, or make them different from what they would have been before, or from what they would have been if no writing had been referred to, no particular magic is applicable to such a thing as that.

One very cogent observation which appears to me to have been made by the MASTER OF THE ROLLS on this subject, commenting on his own judgment and that of the rest of the Court of Appeal in *Ex parte Hubbard*, was this, that in *Ex parte Hubbard* the whole transaction was disclosed upon the writing, including the making of the advance and the terms upon which that advance was made; and but for one circumstance, it might very fairly and reasonably have been argued to have been a bill of sale within the Act; but the distinction was this, that, although that document did profess to disclose the whole terms of the transaction, it was held, and I think rightly held (and I should have thought that the Court of Appeal were in this case bound by their own decision in *Ex parte Hubbard*), that the Bills of Sale Act did not apply at all, that the transaction was one in which the possession had been already taken, and the relation
[* 240] * of the parties such that there was no room for the application of any of the definitions in the Bills of Sale Act.

My Lords, under these circumstances, I have to move your Lordships that the judgment of the Court of Appeal be reversed.

Lord WATSON: —

My Lords, I can have no hesitation in concurring in the judgment which has been proposed, because I am quite unable to distinguish the present case in principle from that of *Ex parte Hubbard*. The document of the 9th of December 1887, which

has been treated as a bill of sale by the majority of the Appeal Court, does not give any licence to take possession of the goods, and it did not constitute the title upon which possession was given to the appellant. It contains a mandate to hold and sell the goods; but it was not intended to operate, and did not, in point of fact, come into operation, until possession had been actually transferred from the sheriff to the appellant. In any question with the present respondent the case seems to me to be the same as if the goods had been sent for sale to the appellant's premises and an advance made against them by the appellant before the document in question was either written or delivered.

Lord HERSCHELL: —

My Lords, I am of the same opinion. The question in this case must be decided in precisely the same way as if the debtor, whose transactions have given rise to the controversy, had been himself bringing this action; and it certainly would be startling, to my mind shocking, if there were anything in the state of the law which compelled us to say that under the circumstances which occurred in this case he could successfully maintain such an action.

Now, I think that in a case of this description it is most important to bear in mind the distinction between the Acts of 1854 and 1878 relating to bills of sale and the Act of 1882. The only Act which can have any operation in this case to make the transaction void is the Act of 1882; and the earlier Act of 1878 * is only important as containing the definition [* 241] of a bill of sale which is imported into the Act of 1882. But any reference to the Act of 1878 beyond that which is necessary for the purpose of transferring, so to speak, the definition contained in that Act to the Act of 1882 can only lead to misunderstanding and mischief.

Now, my Lords, the Act of 1882 no doubt makes a bill of sale void which is not in accordance with the prescribed form; but in order to make the Act operate at all it is essential in the first place to prove that the transaction was one which was effected by a bill of sale, of course using those words in the sense which is attributed to them by the Act of 1878. Well, was it so effected? It is true that a document was drawn up simultaneously with the acts which were done for the purpose of completing the right of Charlesworth in relation to these goods;

but it is absolutely clear that it is not every document which may be drawn up at the time when a transaction is being carried out for the purpose of transferring goods from one party to another that is a bill of sale. In each case one must look at the circumstances in order to see what the transaction was, and what the document was.

Now, this document, beyond all question, was not a document which was intended to transfer, or did transfer, the property in these goods; because if there is anything clear in the transaction, it is this, that at the time at which this document, whatever its effect, began to operate, Charlesworth was in possession of the goods under an arrangement by which he was to have, for certain purposes at least, a title to them. He did not get his title under that document, — he got his title by virtue of the transaction, and the document never began to operate at a time at which he had not possession. Under those circumstances, what words in the Act of 1878 are supposed to cover it? For the reasons which I have given it cannot be an "assurance." It certainly is not "a bill of sale" in the ordinary sense of those words. Is it a "licence to take possession"? The statement which I have just made seems to me to be conclusive that it is not a licence to take possession, because those words can only apply, as was pointed out by all the Judges in *Ex parte*
[* 242] *Hubbard*, * when the possession is to be taken subsequently to the signature of the document.

The case of *Ex parte Hubbard* seems to me to be absolutely undistinguishable from the present case. In that case there was a document drawn up, containing the terms upon which the advance was to be made, the sale of the goods was to be effected, and the repayment was to be required. That was much more like a bill of sale than anything which is to be found in the present case, and yet it was held that because the transaction was one of pledge where the possession was given and taken independently of that document, although you might be obliged to have recourse to that document if there was a controversy about the terms of the advance, nevertheless you did not need to have recourse to the document for the purpose of establishing title. Now, what is the distinction between that case and the present? None that I have heard, unless it be that in this case Charlesworth was not put in possession of the goods simultaneously with the signature

of this document. If Charlesworth was not put in possession of these goods simultaneously with the signature of the document, it seems to me that the sheriff was never in possession. I am quite unable to accede to the argument that a possession which is sufficient possession to make good the title of the sheriff under his authority to seize, is not a possession as between the person giving it and the person taking it, which is the only point we have to decide in the present case. The question whether it is a possession which excludes the apparent possession of the other party might arise under the Act of 1878; but it is not of the slightest importance in the present case. Is it a possession as between the person giving it and the person taking it? When once it is admitted, as it was inevitably admitted by the learned counsel for the respondent, that it was a possession sufficient as between those two persons to constitute a good pledge, it seems to me that the case is at an end. I say "inevitably admitted," because how can it be disputed that as between the two persons to the transaction it would have been impossible for the person who had received an advance on giving this possession to say that he had not given the other person a possession of the goods which would entitle *him to hold them as [*243] a security for the advance? And that is all that a pledge is.

Then, if that be so, it seems to me to show conclusively that the case is within *Ex parte Hubbard*, because what was there decided was that if the transaction be only one of pledge arising from a delivery by one party to the other of the possession of his goods as a security for the money advanced, it is immaterial that the terms upon which those goods are pledged are reduced to writing. It does not make it a bill of sale. The decision in *Ex parte Hubbard* seems to me to be absolutely conclusive of this case.

But even if this were not a pledge, there is another possible view of it, — namely, that the goods were delivered to Charlesworth in his capacity of auctioneer, to be held by him as auctioneer, with authority to sell them, and to retain out of the money which arose from that sale the advance which he had made. If that is really the true nature of the transaction — possibly even that might be a pledge with an authority to sell — but supposing it is not, strictly speaking, a pledge, and that

what I have stated is a more accurate description of the transaction, the same result would follow, — it would be an authority to sell which would be irrevocable, except upon the terms of paying back the money; and it seems to me impossible to say, that because the document which was given in this case was given simultaneously with the entering into that transaction, it was a bill of sale in any sense in which those words are used within the definition clause of the Act of 1878.

For these reasons, it seems to me that the case of *Ex parte Hubbard* really governs this case. I desire to say that, so far as I am concerned, instead of seeing any reason to doubt the correctness of the decision in *Ex parte Hubbard*, I am very glad that that decision was arrived at; it has my hearty concurrence; and between that case and the present I can see no distinction.

Lord Morris: —

My Lords, I concur.

[* 244] * Lord Field: —

My Lords, I am of the same opinion.

Order of the Court of Appeal and judgment of Day, J., reversed, and judgment entered for the defendant below with costs here and below; cause remitted to the Queen's Bench Division.

Lords' Journals, 4th April, 1892.

ENGLISH NOTES.

It may be useful here to give a brief account of the cases in their order of date which have led up to the decisions in the principal cases.

Allsop v. *Day* (Ex. Ch. 1861), 7 H. & N. 457, 31 L. J. Ex. 105, 8 Jur. N. S. 41, 5 L. T. 320, was an important decision under the Act of 1854. The trustees under the settlement of a married woman purchased of her husband his household furniture, and he gave them a receipt as for the purchase-money of the goods mentioned in an inventory and valuation referred to in the letter containing the receipt. It was held that the title to the goods did not pass by the document, and therefore it was not a bill of sale. The authority of this case was followed in *Byerley* v. *Prevost* (1871), L. R. 6 C. P. 144, and in *Graham* v. *Wilcockson* (1876), 46 L. J. Ex. 55, 35 L. T. 601.

In *Cochrane* v. *Matthews* (1878), 10 Ch. D. 80 n., 48 L. J. Bank. 3 n., there was a document in these terms: "Received the sum of £50 for the absolute sale of the above-mentioned articles of furniture and other effects;" and there was another document in the form of a re-

demise of the chattels. LINDLEY, J., found, on the evidence, the intention to be that the goods should be held in security, and decided that the two documents formed one assurance within the true meaning of the 7th section of the Act of 1854.

In *Ex parte O'Dell, In re Walden* (C. A. 1878), 10 Ch. D. 76, 48 L. J. Bank. 1, 39 L. T. 333, 27 W. R. 274, there were two documents; one an inventory of furniture with a receipt signed by W. in these terms: "Received of C. £150 for the absolute sale to him of the whole of the above-mentioned articles;" and the other, a memorandum of agreement by which C. agreed to let on hire to W. the goods specified for 2 months for £179. There was a license to seize in default, and an agreement that on payment of the whole £170 and costs the goods should belong to W. The Court followed the decision of LINDLEY, J., in *Cochrane* v. *Matthews*: "The two documents," said Lord Justice JAMES, "are the true record of the transaction, and they show by themselves, without any other evidence, that the goods were originally W.'s goods, and that they became either at law or in equity, by means of these two documents, C.'s goods as mortgagee, but liable to be redeemed by W. The two documents, therefore, constitute in fact a bill of sale with a defeasance upon redemption."

In *Ex parte Cooper, In re Baum* (1878), 10 Ch. D. 313, 48 L. J. Bank. 40, 39 L. T. 521, 27 W. R. 298, there was a document comprising an inventory of chattels described as the property of J. B., with a receipt subjoined and signed by J. B. for the sum of £600 received from W. A. J., "being the amount of purchase-money in respect of the goods, &c., mentioned in the foregoing inventory." The Court held that the document was a complete "assurance" of the goods.

In *Woodgate* v. *Godfrey* (C. A. 1879), 5 Ex. D. 24, 49 L. J. Ex. 1, 42 L. T. 34, 28 W. R. 88, the plaintiff bought goods from the sheriff's officer who had seized them; and the officer gave him a receipt mentioning the purchase, and containing an inventory of the goods. The MASTER OF THE ROLLS (Sir G. JESSEL) distinguished the case from *Ex parte Cooper, In re Baum*, and explained that case as having been decided on the ground that there was no sale independently of the document. This explanation, as observed by Lord MACNAGHTEN in the principal case No. 3 (p. 55, *supra*), appears to reconcile the decisions in *Cochrane* v. *Matthews*, *Ex parte O'Dell, In re Walden*, and *Ex parte Cooper, In re Baum*, — with the train of cases of which *Allsop* v. *Day* is the type.

These cases amply establish the principle of the above rule as applying to transactions before the commencement of the Act of 1878. And in *Marsden* v. *Meadows* (C. A. 1881), 7 Q. B. D. 80, 50 L. J. Q. B. 536, 45 L. T. 301, 29 W. R. 816, which was identical in its circum-

stances with *Woodgate* v. *Godfrey*, the Court decided that — the title not depending on the document — the document was not a bill of sale requiring registration under the Act of 1878. This was followed by Manisty and Smith, JJ., in *Preece* v. *Gilling* (1885), 53 L. T. 763. As further examples, besides the two principal cases, and the case of *Cookson* v. *Swire*, No. 2, p. 10, *supra* (9 App. Cas. 653, 54 L. J. Q. B. 249, 49 L. T. 736, 33 W. R. 181), may be mentioned *Newlove* v. *Shrewsbury* (C. A. 1888), 21 Q. B. D. 41, 57 L. J. Q. B. 476, 36 W. R. 835; *Shepherd* v. *Pulbrook* (C. A. 1888), 59 L. T. 288; and *Haydon* v. *Brown* (1888), 59 L. T. 810.

Difficult questions have arisen, and may still arise, out of what are for shortness called hiring agreements. Where there is a simple sale by A. to B. on the hire-purchase system — the possession being at once transferred to B. — there is no question under the Bills of Sale Acts, but only one of reputed ownership, which is dealt with under "Bankruptcy," 4 R. C. p. 72. *Crawcour* v. *Salter* (C. A. 1881), 18 Ch. D. 30, 51 L. J. Ch. 495, 45 L. T. 62, 30 W. R. 21.

But where A. sells goods to B. and takes them back on a hire-purchase agreement, there is at least room for a suspicion that the whole transaction is merely a cloak for a loan, and that the title of B. really depends on the agreement. In the case of the *Manchester, &c. Railway Co.* v. *North Central Wagon Co.* (No. 3, p. 42, *supra*), it was proved that there was a real sale and a real hiring. And in *Redhead* v. *Westwood* (1888), 59 L. T. 293, Kay, J., was unable to distinguish the case, where he considered there was an evasion of the Act by a transaction intended to be a loan by B. to A., but in which the only documents were a hiring agreement by which it was agreed that B. should let the furniture to A. at a certain rent, and a cheque for the original consideration money made payable to the order of A., and indorsed by him. But in *In re Watson, Ex parte Official Receiver* (C. A. 1890), 25 Q. B. D. 27, 59 L. J. Q. B. 394, 63 L. T. 209, 38 W. R. 567, the Court of Appeal, in a similar case, held that they were not precluded by the form from looking at the real transaction which it was intended that the document should represent; and that when so looked at the hiring agreement was a bill of sale, either as a license to take possession, or as a document whereby (by estoppel or otherwise) the supposed lessor of the goods could make a title to them. This decision was again followed by the Court of Appeal in *Madell* v. *Thomas* (C. A. 1890), 1891, 1 Q. B. 230, 60 L. J. Q. B. 227, 64 L. T. 9, 39 W. R. 280, and in *Beckett* v. *Tower Assets Co.* (C. A. 1891), 1891, 1 Q. B. 638, 60 L. J. Q. B. 493, 64 L. T. 497, 39 W. R. 438.

When the actual possession is transferred by way of pledge, an accompanying memorandum recording the terms of the transaction and

regulating the rights of the parties, *e. g.* a pawnbroker's ticket or voucher, is not a bill of sale. *Ex parte Hubbard, In re Hardwick* (C. A. 1886), 17 Q. B. D. 690, 55 L. J. Q. B. 490, 59 L. T. 172 n., 35 W. R. 2; *Ex parte Close, In re Hall* (1884), 14 Q. B. D. 386, 54 L. J. Q. B. 43, 51 L. T. 795, 33 W. R. 228; *Grigg* v. *National Guardian Assurance Co.* (1891), 1891, 3 Ch. 206, 61 L. J. Ch. 11, 64 L. T. 787, 39 W. R. 684; *Wilkinson* v. *Girand* (1891), 8 Times L. R. 266; *Hilton* v. *Tucker* (1887), 39 Ch. D. 669, 57 L. J. Ch. 973, 59 L. T. 172, 36 W. R. 762.

The sections of the Acts enumerating the documents declared to be bills of sale have been fully set out under the notes to Nos. 1 & 2; but it will be convenient here to note the various classes of documents in detail, and with reference to the cases interpreting the Acts. They are: —

(1) Bills of sale, assignments, transfers.

(2) Declarations of trusts with transfers. There is nothing in the Statute of Frauds (see sec. 7) to prevent a declaration of trust of personal chattels being by parol, as when the donor declares himself or some other person to be a trustee. Where he declares another person to be trustee he must transfer, or do everything which the nature of the property requires to be done for transfer of, the property to the trustee: just as, where he makes a direct gift, he must give the actual possession to the donee. *Milroy* v. *Lord* (1862), 4 De G. F. & J. 264, 31 L. J. Ch. 798; *Jones* v. *Lock* (1865), 35 L. J. Ch. 117, 11 Jur. N. S. 913, 14 W. R. 149; *Irons* v. *Smallpiece* (1819), 2 B. & Ald. 551; *Cochrane* v. *Moore* (C. A. 1890), 25 Q. B. D. 57, 59 L. J. Q. B. 377, 63 L. T. 153, 38 W. R. 588. Should the declaration of trust with the donor as the trustee be contained in a written document, it is a bill of sale requiring registration.

(3) Inventories of goods with receipts thereto attached, and receipts for purchase-moneys of goods. These words are not in the Act of 1854; but under that Act, as now, the documents were bills of sale when they acted as assurances. They cannot, under the Act of 1882, be valid securities for the payment of money, unless drawn up in the statutory form.

(4) Other assurances of personal chattels; that is, assurances of personal chattels of the same class as, though not identical with, the preceding three classes. For instance, an entry of sale of goods at an auction in an auctioneer's book, signed by the auctioneer's clerk for the purchaser, and by the auctioneer for the vendor. *In re Roberts, Evans* v. *Roberts* (1887), 36 Ch. D. 196, 56 L. J. Ch. 952, 57 L. T. 79, 35 W. R. 684.

(5) Powers of attorney, authorities, or licenses to take possession of

personal chattels as security for any debt where the grantor is intended to and remains in possession of the goods. Such documents are also bills of sale within the Act of 1882, and will be void unless in the statutory form.

(6) Any agreement, whether intended or not to be followed by the execution of any other instrument, by which a right in equity to any personal chattels or to any charge or security shall be conferred. This comprises only documents which confer an equitable as opposed to legal title. For instance, an instrument creating a common-law or possessory lien is not within the section. *Morris* v. *Delobbel Flipo* (1892), 1892, 2 Ch. 352, 61 L. J. Ch. 518, 66 L. T. 320, 40 W. R. 492.

(7) By section 6 of the Act of 1878 "every attornment, &c., whereby a power of distress is given, &c., shall be deemed to be a bill of sale, within the meaning of the Act, of any personal chattels which may be seized or taken under such power of distress." These are not bills of sale until seizure, and therefore the instrument containing such a clause is not altogether void under section 9 of the Act of 1882, by reason of its not being in the scheduled form. Such an instrument, if unregistered, is void to the extent of personal chattels which may be taken or seized under the power of distress. *Ex parte Kennedy, In re Willis* (C. A. 1888), 21 Q. B. D. 384, 57 L. J. Q. B. 634, 59 L. T. 749, 36 W. R. 793; *Mumford* v. *Collier* (1890), 25 Q. B. D. 279, 59 L. J. Q. B. 552, 38 W. R. 716.

Instruments declared not to be bills of sale are: —

(1) Assignments for the benefit of creditors of the person making or giving the same. The assignment must be for the benefit of the creditors generally. There must be nothing in the deed to exclude a creditor who wishes to accede to the arrangement. *General Furnishing and Upholstery Company* v. *Venn* (1863), 2 H. & C. 153, 32 L. J. Ex. 220, 9 Jur. N. S. 550, 8 L. T. 432; *Paine* v. *Matthews* (1885), 53 L. T. 872; *Ex parte Parsons, In re Townsend* (C. A. 1886), 16 Q. B. D. 532, 55 L. J. Q. B. 137, 53 L. T. 897, 34 W. R. 329; *Beevor* v. *Savage* (1867), 16 L. T. 358. By the Deeds of Arrangement Act, 1887, deeds of arrangement for the benefit of creditors generally are void unless registered according to the Act.

(2) Marriage settlements, *i. e.* settlements made before and in consideration of marriage, and not post-nuptial settlements (*Fowler* v. *Foster*, 1859, 28 L. J. Q. B. 210, 5 Jur. N. S. 99), unless made in pursuance of marriage articles. The wife, at least, must have acted *bonâ fide*, so that the settlement was not merely a cloak to defraud creditors. *Bulmer* v. *Hunter* (1869), L. R., 8 Eq. 46, 38 L. J. Ch. 543, 20 L. T. 942.

(3) Transfers or assignments of any ship or vessel or any share thereof.

(4) Transfers of goods in the ordinary course of business of any trade or calling, &c. (see s. 4 of Act of 1878). A pledge of stock in trade bought but not paid for is not such transfer. *Ex parte Close, In re Hall* (1884), 14 Q. B. D. 386, 54 L. J. Q. B. 43, 51 L. T. 795, 33 W. R. 228. See *Tennant* v. *Howatson* (1888), 13 App. Cas. 489, 57 L. J. P. C. 110, 58 L. T. 646.

(5) Instruments of attornment contained in a mortgage of any estate or interest in any land, tenement, or hereditaments, which the mortgagee, being in possession, shall have demised to the mortgagor as his tenant at a fair and reasonable rent (section 6 of the Act of 1878). The demise must have been subsequent to possession by the mortgagee. *Green* v. *Marsh* (C. A. 1892), 2 Q. B. 330, 61 L. J. Q. B. 442, 66 L. T. 480, 40 W. R. 449.

(6) Instruments of hypothecation under the Act of 1890.

A mortgage of land by the freeholder, or by a leaseholder assigning his whole interest, confers on the mortgagee a right to fixtures, whether trade or tenants', affixed to the land previously or subsequently to the mortgage. *Walmsley* v. *Milne* (1859), 7 C. B. (N. S.) 115, 29 L. J. C. P. 97, 6 Jur. N. S. 125; *Williams* v. *Evans* (1856), 23 Beav. 239; *Ex parte Lusty, In re Lusty* (1889), 60 L. T. 160, 37 W. R. 304; *Meux* v. *Jacobs* (1875), L. R., 7 H. L. 481, 44 L. J. Ch. 481, 32 L. T. 171, 23 W. R. 526. The test whether the instrument in order to be valid so far as relates to the tenant's fixtures required registration was decided, under the Act of 1854, to be whether power was given to the mortgagee to sever the fixtures from the premises, and to deal with and sell them separately. *Ex parte Daglish, In re Wilde* (1873), L. R., 8 Ch. 1072, 42 L. J. Bank. 102, 29 L. T. 168, 21 W. R. 893; *Ex parte Barclay, In re Joyce* (1874), L. R., 9 Ch. 576, 43 L. J. Bank. 137, 30 L. T. 479, 22 W. R. 608. This distinction is confirmed by the Act of 1878 with regard to fixtures other than trade machinery. In the absence of an intention to the contrary being expressed in the mortgage-deed, a mortgage, whether of leasehold or real estate, will pass all fixtures to the mortgagee, notwithstanding that only some of the fixtures have been specified in the mortgage-deed. When the mortgage is by demise the right to sever the fixtures remains in the mortgagor at the end of the mortgage term, but the mortgagee has the right to use them during that term. *Southport Banking Company* v. *Thompson* (C. A. 1887), 37 Ch. D. 64, 57 L. J. Ch. 114, 58 L. T. 143, 36 W. R. 113.

No. 5. — In re STANDARD MANUFACTURING COMPANY.

(C. A. 1891.)

RULE.

Debentures or mortgages of incorporated Companies constituted under Acts of Parliament which provide otherwise for the publication of these securities, are not — although secured upon (*inter alia*) the personal chattels of the Company — struck at by the (English) Bills of Sale Acts.

In re Standard Manufacturing Company.

1891, 1 Ch. 627-648 (s. c. 60 L. J. Ch. 292; 64 L. T. 487; 39 W. R. 369)

Incorporated Company. — Debenture. — Bill of Sale. — Execution Creditors. — Priority.

Summons to determine priorities between execution creditors and debenture-holders of a Company incorporated under the Companies Act.

[627] Decided by the Court of Appeal: (1) That the words "or other incorporated company" in section 17 of the Bills of Sale Act, 1882, are not to be construed as limited to companies *ejusdem generis* with mortgage or loan companies; but, even if so construed, any incorporated company which is authorized to raise money on loan or mortgage would, for the purposes of section 17, be *ejusdem generis* with "a mortgage or loan company."

(2) That the mortgages or charges of any incorporated company for the registration of which statutory provision has already been made by the Companies Clauses Act, 1845, or the Companies Act, 1862, are not, upon the true construction of the Bills of Sale Act, 1878, bills of sale within the scope of that Act.

Appeal from the County Palatine Court of Lancaster.

The Standard Manufacturing Company, Limited (which [* 628] was *originally named William Hadwen & Co., Limited), was constituted under the Companies Acts, 1862 to 1867, in the month of September, 1881, for the purpose of purchasing and carrying on the business of manufacturers of frillings, baby linen, and underclothing, and the purchase and sale of cotton and other materials carried on by the firm of William Hadwen & Co., at Blossom Street, Manchester. Its capital was £12,000, and under the last clause of article 60 of its articles of association, as subsequently altered by special resolution duly confirmed, the following borrowing powers were conferred upon the directors: "The direc-

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tors may from time to time at their discretion borrow and reborrow as occasion shall require any sums of money for the purposes of the company on the mortgage bonds, debentures, promissory notes, bills of exchange, or other security of the company, at such rates of interest as they may deem advisable, but so that the whole amount of principal moneys so owing under this article shall not at any one time exceed the sum of £6000."

In exercise of their borrowing powers, the company, on the 8th of May, 1888, borrowed the sum of £1000 upon the security of twenty debentures of £50 each, ten of which were issued to James Lowe. The debentures issued to James Lowe bore date the 8th of May, 1888, and, so far as material, were in the following form, as were all the debentures of this issue: —

"The Standard Manufacturing Company, Limited.
"Issue of mortgage debentures not to exceed £4000, bearing interest at the rate of 6 per cent per annum.
"No. 34. Mortgage debenture £50.

"The Standard Manufacturing Company, Limited, ... will on the 1st of June, 1892, or on such earlier day as the principal moneys hereby secured shall become payable, in accordance with the conditions indorsed hereon, pay to James Lowe . . . or other the registered holder for the time being hereof, his executors, administrators, or assigns, the sum of £50.

"And the company will in the mean time pay interest thereon at the rate of 6 per cent per annum by equally quarterly payments, on . . . in every year, the first of such quarterly payments to be made on the 8th of September, 1888.

* "And the company doth hereby charge with such pay- [* 629] ments its undertaking and all its property both present and future.

"This debenture is issued upon and subject to the conditions indorsed hereon."

The conditions indorsed were, so far as material, as follows: By clause 2 the debentures of the series were to "rank *pari passu* as a first charge upon the property within mentioned," without any preference *inter se*. Clause 3 was as follows: "The charge created by the debentures shall be a floating security, and accordingly the company may, in the course of its business and for the purpose of carrying on the same, deal with the property hereby

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charged in such manner as the company may think fit, and in particular may sell the same, may pay and receive money, and may declare and pay dividends out of profits." Clause 4 empowered the company at any time to give notice to the holder of the debenture of their intention to pay off the same, and upon the expiration of a month after such notice the principal moneys secured should become payable. Under clause 5: if the company made default for one month in payment of interest on the debenture, the registered holder thereof might by notice in writing call in the principal moneys thereby secured, and in case such notice was duly given, "or in case any portion of the capital of the company uncalled at the date of this indenture shall be called up, or if an order of some Court of competent jurisdiction is made, or a special or extraordinary resolution is passed for the winding up of the company, the principal moneys hereby secured shall immediately become payable." Clause 6 empowered the registered holder at any time by one month's notice to call in the principal moneys thereby secured, and in that case such moneys should, on the expiration of the notice, become immediately payable. But in case any holder should take legal proceedings for enforcing his debentures against any of the property of the company, the whole of the moneys secured by the debentures then issued should immediately become payable. Under clause 7 the power given by clause 3 was to cease if default was made in payment of any principal money secured by the debenture, "or if any such order or resolution as aforesaid is made or passed;" and by clause 8: nothing in the [* 630] debenture *contained was to authorize the creation of any charge on the property for the time being of the company in priority to the charge created by the debentures.

In November, 1888, the Company borrowed the sum of £4000 from the Realization and Debenture Corporation of Scotland, Limited, upon the security of forty debentures of £100 each, bearing interest at £7 10s. per cent. These debentures, which were all identical in form, were as to the first two clauses substantially the same as that issued to Lowe; and the remaining clauses were so far as material as follows: "and the company doth hereby as beneficial owner charge with such payments all its present and future stock, goods, chattels, and effects, and all its real property and interest in lands, and also all its present and

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future plant, machinery, stock (manufactured and unmanufactured), book and other debts, goodwill and assets, and generally all the present and future property, real and personal, and undertaking of the company: all of which premises of every kind above specified are intended to be included in the term property wherever used herein." Then followed a covenant by the company for further assurance to the corporation and declarations that the debentures of this issue were entitled to the benefit of, and subject to the provisions contained in a trust deed, dated the 3rd of November, 1888, and made between the company and the corporation, and that the debenture was issued subject to the conditions indorsed thereon, which the company covenanted to observe and perform. The conditions indorsed were, so far as material, as follows: —

Clause 3: "The debentures of this series shall rank *pari passu* as a first charge upon the property as within defined, and without any preference or priority one over another, and shall be a floating security, but no part of the property shall at any time hereafter and before payment in full of the whole of this issue of debentures be in any way charged or mortgaged by the company so as to rank *pari passu* with or in priority to the charge hereby created; nor shall any part of the real or leasehold property of the company be sold, transferred, alienated, or otherwise dealt with in any manner, without the consent in writing of the corporation first obtained: nor shall any part of the property of the company other than the said real or leasehold property be sold, transferred, *alienated, or otherwise dealt [*651] with in any way except in the ordinary course of the business of the company."

Clause 4 empowered the company at any time after the 1st of November, 1890, to pay off the debentures after six months' notice to the registered holder; clause 5 provided that the company should insure such of the property as was insurable. Clause 6 was as follows: "The principal moneys hereby secured shall become payable immediately on the happening of any of the events hereinafter specified, and on demand of payment by the registered holder thereof, and all right of the company to deal for any purpose whatsoever with any of the property shall forthwith cease." These events were (*inter alia*): —

"(*a*) If the company makes default for twenty-one days in

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payment of any interest secured by this or any other debenture of this issue, whether the same has been demanded or not.

"(*b*) If the company makes default in the payment of any principal money. . . .

"(*c*) If the company does not insure and keep insured the property. . . .

"(*d*) If an order is made, or a . . . resolution passed for winding up the company.

"(*e*) If any execution, sequestration, extent, or other process of any Court or authority is sued out against the property of the company for any sum whatever."

And clause 7 provided that at any time after the principal moneys thereby secured should have become payable, or after a petition for winding up the company should have been presented, or a resolution for winding-up should have been passed, or if judgment was recovered and enforceable against the company for any sum exceeding £100, and in certain other cases, the corporation might at their own instance appoint a receiver or receivers of any part of the property, and every such receiver should have power (*inter alia*) to take possession of, and to sell or demise any part of the property charged.

By the trust or covering deed of the 3rd of November, 1888, above mentioned, the company as beneficial owners demised to the corporation, thereinafter called the trustees, the leasehold, warehouses in Blossom Street, Manchester, wherein their [* 632] business * was carried on, as a collateral security for the first mortgage debentures of the company for £4000, so that the trustees should have all the powers and privileges by the conditions indorsed on such debentures given to the receiver appointed thereunder; and powers were given to the trustees to concur with the company in selling or demising the hereditaments aforesaid.

The debentures and the trust deed were duly executed by the company; but none of such debentures were registered under the Bills of Sale Acts, nor was the trust deed so registered.

Between February, 1889, and the 27th of May, 1889, a number of persons obtained judgments against the company in the Queen's Bench Division, Manchester Registry, and in the Court of the Hundred of Salford, and handed writs of execution in respect of their judgment debts, in the one case to the sheriff

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of Lancashire, and in the other to the head bailiff of the Salford Hundred Court. These officers respectively took possession of the goods and chattels of the company: as to the sheriff, by virtue of the earliest writ handed to him, on the 27th of February, 1889, and as to the head bailiff, by virtue of the earliest writ handed to him, on the 28th of March, 1889; and they both remained in possession until after the company was ordered to be wound up.

On the 8th of March, 1889, James Lowe served the company with notice requiring payment of the moneys secured by his debentures, which notice expired on the 8th of April, 1889, and the company had not complied therewith at the date of the winding-up order.

On the 20th of May, 1889, Mr. T. W. Gillibrand took possession of the property, goods, chattels, and effects of the company under an authority from the Realization and Debenture Corporation of Scotland, and as receiver on their behalf.

On the 27th of May, 1889, a petition was presented for the winding-up of the company in the Chancery Court of the County Palatine of Lancaster, and a winding-up order was made thereon by that Court on the 19th of June, 1889. By this order Mr. J. P. Levy was appointed to represent and attend the proceedings on behalf of the execution creditors, whose writs of execution were in the hands of the sheriff of Lancashire and the high bailiff of * the Salford Hundred Court respectively, [* 633] and it was ordered that the sheriff and head bailiff should give up to the liquidator all property in their possession by virtue of any execution on a judgment against the company, and that this property of the company should be sold in the winding-up.

Under subsequent orders the assets of the company, except the book debts, unpaid calls, cash and leasehold interest in the premises in Blossom Street, were sold by Mr. Gillibrand and the liquidator, and a portion of the purchase-money having been paid into the Palatine Court in the winding-up, the question arose whether the debenture-holders or the execution creditors were entitled to priority of payment.

This summons was then taken out in the winding-up by Mr. J. P. Levy on the 19th of January, 1890, in order to obtain the decision of the Palatine Court as to the respective priorities of the debenture-holders and of the execution creditors of the com-

pany whose writs of execution were in the hands of the sheriff or of the head bailiff before the date of the winding-up petition.

The application came on for hearing before the Vice Chancellor of the Palatine Court, and His Honour, in delivering judgment thereon on the 20th of May, 1889, said that he was unable to distinguish the case from *Jenkinson* v. *Brandley Mining Company*, 19 Q. B. D. 568, where a Divisional Court, consisting of GROVE, J., and HUDDLESTON, B., held that the exception in sect. 17 of the Bills of Sale Act, 1882, was not in favour of debentures generally, but of debentures of mortgage or loan companies, or companies *ejusdem generis* with mortgage or loan companies, and His Honour, following that decision, held that these debentures were void for want of registration under the Bills of Sale Acts and consequently that the execution creditors were entitled to be paid in full out of the assets of the company in priority to the debenture-holders.

The debenture-holders appealed.

[*642] The *case was fully argued; it is sufficient for the purposes of this report to give the argument of Rigby, in reply: —

Limited liability companies are not within the operation or policy of the Bills of Sale Acts.

The mischief to the remedy whereof they have been directed is shown by the preamble of the Act of 1854 (17 & 18 Vict. c. 36). It was that "persons" who had granted secret bills of sale of personal chattels had been able to keep up the appearance of being in good circumstances, and possessed of property of which the grantees in effect had the possession; and that the creditors of the grantors were defrauded. In other words, such creditors had been led to give credit on the faith of property which they had seen in the possession of the grantor, while all the time it was not really his.

But when it is a question of giving credit to a joint stock company instead of an individual, the intending creditors do not want this protection, because, as regards companies within the Companies Clauses Act, 1845, and companies under the Limited Liability Acts, the Legislature has provided for them statutory protection of another character. Accordingly, while we find in the Bills of Sale Act of 1854 an intention to deal with individuals only, the whole purview of the Act of 1878 shows that incor-

porated companies are not included therein. The definition of "personal chattels" in sect. 4 excludes, in express terms, "shares or interests . . . in the capital or property of incorporated or joint stock companies;" and shareholders have, it must be remembered, shares or interests in the capital, but none in the property of the company.

But take the general scope of the Act. In sect. 8 the main object is the avoidance of unregistered bills of sale as against trustees or assignees in bankruptcy. But companies are not and *never have been within the operation of the [*643] bankruptcy laws, and when a company is wound up this Act has no operation in favour of the general creditors.

[Lord HALSBURY, L. C.: — Was not this point dealt with in *Brocklehurst* v. *Railway Printing and Publishing Company*, W. N. (1884), p. 70?]

[Radford: — It was argued in *Topham* v. *Greenside Glazed Fire-Brick Company*, 37 Ch. D. 281; 57 L. J. Ch. 583.]

The point was taken in *John Welsted & Co.* v. *Swansea Bank*, 5 Times L. R. 332, where it was held by POLLOCK, B., that these debentures did not come within sect. 17 of the Act of 1882; and he added that to class them with bills of sale would be to sin against the spirit and words of the Act.

If the Legislature had intended the Bills of Sale Acts to apply to corporations, such Acts would have contained clauses applicable to windings-up, and affording protection not merely to execution creditors but also to the general body of creditors.

The mischief aimed at by the Bills of Sale Acts does not exist with regard to incorporated companies, because under sect. 43 of the Act of 1862 every limited company must keep a register open to the inspection of any creditor or member of the company, of all mortgages and charges affecting its property, and this under penalties from its directors and officers, and without affecting the securities.

The expression "Law relating to bankruptcy or liquidation," used in sect. 8 of the Act of 1878, obviously means "liquidation in bankruptcy," a term first introduced in sect. 125 of the Bankruptcy Act of 1869, the language used in sect. 1 of the Bills of Sale Act of 1854 being "the laws relating to bankruptcy or insolvency." The scheme of liquidation in the case of incorporated companies is totally different; the property of the company is

No. 5. — In re Standard Manufacturing Co., 1891, 1 Ch. 643, 644.

not vested in the liquidator, and he acts not only for creditors but for contributories and for the company. It was held in 1867 that the official liquidator of a company was not within the Bills of Sale Act. *In re Marine Mansions Company*, L. R., 4 Eq. 601; 37 L. J. Ch. 113; *Re Asphaltic Wood Pavement Company*, 49 L. T. 159.

[* 644] * The whole scope of sect. 8 shows that the Legislature was only dealing with "persons" in the sense of individuals, and not with joint stock companies. This is also shown by the interpretation clause, sect. 4, the provisions of sect. 10 as to the attestation of bills of sale, the requirement of sect. 12 as to the index of the "surnames" of the grantors, and the reference in sect. 20 to bankruptcy, and its silence as to winding-up. I admit, of course, that by a general rule "persons" may include corporations; and in the 19th section of the Interpretation Act, 1889 (52 & 53 Vict. c. 63), it is enacted that the expression "persons" shall, unless the contrary intention appears, include any body of persons corporate or unincorporate. But up to that time there was no such enactment, and the Bills of Sale Acts contain ample evidence of the contrary intention.

Coming to the Act of 1882, the 3rd section enacts that that Act is to be construed as one with the Act of 1878 "so far as is consistent with the tenor thereof." The construction of the Act of 1878 with regard to incorporated companies was unaltered by the Act of 1882, and, to remove all doubt, a declaratory enactment was inserted in sect. 17, the true effect and meaning of which is that the Act is not applicable to any debentures of any incorporated company whatever.

Feb. 10. The judgment of the Court, consisting of Lord Halsbury, L. C., and Bowen and Fry, L. JJ, was delivered as follows by

Bowen, L. J. —

The question we have to decide is whether both or either of the debentures before us, which are in fact debentures of a joint stock company limited, and which create a charge on the floating real and personal property of the company, are void for non-registration under the Bills of Sale Acts, 1878 or 1882, or either of such Acts.

So far as the Bill of Sale Act of 1882 is concerned, it seems to us that such debentures are expressly excepted from its operation by sect. 17.

No. 5. — In re Standard Manufacturing Co., 1891, 1 Ch. 644–646.

We do not agree with the decision of GROVE, J., and HUDDLESTON, B., * in *Jenkinson* v. *Brandley Mining Com-* [* 645] *pany,* 19 Q. B. D. 568, that the words "or other incorporated company," are limited to companies *ejusdem generis* with mortgage or loan companies, whatever these last-mentioned companies may be; but even if it were otherwise, we think that any incorporated company which is authorized to raise money on loan or mortgage would be for the purposes of this section *ejusdem generis* with a "mortgage or loan company." We see no reason for doubting that the Standard Manufacturing Company, Limited, is an incorporated company within that section.

The next question to be solved is whether these debentures or either of them are bills of sale, and bills of sale to which the Bills of Sale Act, 1878, applies.

That these debentures are "agreements by which a right in equity to a charge or security on personal chattels is conferred," appears to be clear. But we are of opinion, nevertheless, that on the true construction of the Act of 1878, the mortgages or charges of any incorporated company for the registration of which a statutory provision had already been made by the Companies Clauses Act, 1845, or the Companies Act, 1862, are not bills of sale within the scope of the Bills of Sale Act of 1878.

It is impossible to follow chronologically the legislation about bills of sale without observing that until the passing of the Act of 1882 the express and avowed design of the Legislature had been to strike at the frauds perpetrated upon creditors by secret bills of sale. The title of the Bills of Sale Act, 1854, so states, and the preamble of that Act is as follows: —

"Whereas frauds are frequently committed upon creditors by secret bills of sale of personal chattels, whereby persons are enabled to keep up the appearance of being in good circumstances and possessed of property, and the grantees or holders of such bills of sale have the power of taking possession of the property of such persons, to the exclusion of the rest of their creditors. For remedy whereof," &c.

Such corporate bodies as were at this time in existence were not bodies in the habit of committing frauds of this sort; and, since corporations were not subject to the law of bankruptcy, that portion at all events of sect. 1 of the Act of 1854, which
* was for the protection of assignees in bankruptcy, could [* 646]

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not be applicable to corporations. Indeed, the definition of "apparent possession," which is of the essence of the Act of 1854, is so framed as to show that corporations were not actively at all events present to the mind of the draftsman who drafted the statute.

Prior to the Act of 1854, the Legislature had passed in 1845 the Companies Clauses Act, 1845, which provided, in the case of mortgages and bonds of companies authorized by their special Act to borrow, for a register to be kept of such mortgages and bonds, and enacted that such register might be perused at all reasonable times by any of the shareholders, or any mortgagee or bond creditor of the company, or by any person interested in such mortgage or bond without fee or reward.

Between the Bills of Sale Act of 1854, and the Bills of Sale Act of 1878, the Companies Act of 1862 was passed, which by sect. 43 provides for the registration by companies of the mortgages and charges specifically affecting their property. At the date of the Bill of Sale Act, 1878, debentures which charged the property of such companies were well known in the commercial world.

Having regard to the provisions already made by statute for their registration, such documents could hardly be described as secret, or as belonging to the class of documents by which frauds were perpetrated upon creditors by secret bills of sale. They are not really therefore within the mischief of the Act of 1878. We cannot think that the Legislature could have intended in the Bills of Sale Act, 1878, to have interfered by merely general words with such well-known commercial instruments, and it seems to us that the canon of construction laid down in *Stradling* v. *Morgan*, Plowd. 205 a, and cited by the Lord Chancellor in the recent case of *Cox* v. *Hakes*, 15 App. Cas. 506, 518; 60 L. J. Q. B. 89, 94, may be invoked with regard to the present controversy: "From which cases it appears that the sages of the law heretofore have construed statutes quite contrary to the letter in some appearance, and those statutes which comprehend all things in the letter, they have expounded to extend but to some things, and those which generally prohibit all people from doing such an act, they have interpreted to permit some [* 647] people to do it, and * those which include every person in the letter they have adjudged to reach to some persons only, which expositions have always been founded on the intent of the Legislature, which they have collected sometimes by considering

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the cause and necessity of making the Act, sometimes by comparing one part of the Act with another, and sometimes by foreign circumstances. So that they have ever been guided by the intent of the Legislature, which they have always taken according to the necessity of the matter and according to that which is consonant to reason and good discretion."

Neither the cause nor necessity for the Bills of Sale Acts, 1854 and 1878, nor a comparison of the various sections, drive us to the interpretation that such documents are included. We have said that a comparison of the various sections of the Act of 1878 does not lead to any other conclusion. We may even say that such a comparison fortifies the opinion at which we have arrived. Without going so far as to decide that no corporation can be under any circumstances within the Bills of Sale Act, 1878, we may point out that the language of sects. 4, 10, and 12 shows that the Bills of Sale Act, 1878, was not dealing specifically with corporations, although it may be that the language of sect. 3 is wide enough to include the bills of sale of a corporation,— a view which has tacitly, as we are aware, been assumed in many decided cases to be correct. The language employed in these other sections is certainly not felicitous language to be applied in the case of corporations, and warrants, we think, the observation that the debentures of companies were not actively present to the mind of the draftsman of the Act.

The view that debentures like the present are not within the Bills of Sale Act of 1878 was that adopted by Baron POLLOCK, in the case of *John Welsted & Co.* v. *Swansea Bank*, 5 Times L. R. 332, and by Lord COLERIDGE and Mr. Justice WILLS in the case of *Read* v. *Joannon*, 25 Q. B. D. 300, 302; 59 L. J. Q. B. 544; see also *Edmonds* v. *Blaina Furnaces Company*, 36 Ch. D. 215; 56 L. J. Ch. 815, and *Levy* v. *Abercorris Slate and Slab Company*, 37 Ch. D. 260; 57 L. J. Ch. 202. We agree with this view, and we think that this appeal should, therefore, be allowed with costs both here and below, on the ground that * the mortgages or charges of [* 648] any incorporated company for the registration of which other provisions have been made by the Companies Clauses Act, 1845, or the Companies Act, 1862, are not within the Bills of Sale Act of 1878. The respondents, the execution creditors, must accordingly pay the costs both of the debenture-holders and the liquidator.

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ENGLISH NOTES.

According to the statement of Chitty, J., in *Edmonds* v. *Blaina Furnaces Company* (1887), 36 Ch. D. 215, 219, 56 L. J. Ch. 815, 57 L. T. 139, 35 W. R. 798, and of the same Judge in the case of *Lery* v. *Abercorris Slate Company* (1887), 37 Ch. D. 260, 264, 57 L. J. Ch. 202, 58 L. T. 218, 36 W. R. 411, a debenture imports nothing more than an acknowledgment of a debt, and an obligation or covenant to pay it; and it is generally, though not necessarily, accompanied by some charge or security. In *Edmonds* v. *Blaina Furnaces Company* the document consisted of a memorandum by the company in consideration of a loan, containing a covenant to pay each of the lenders the sum advanced with interest, and as security for the payment charged all the undertaking and property of the company. In *Lery* v. *Abercorris Slate Company* the "debenture" was an agreement between the company and a lender whereby the company agreed to pay the money lent with interest, and charged the hereditaments of the company with payment, and further agreed to execute, on request, a legal mortgage and to issue debentures, to the extent of the loan over the capital, stocks, &c., &c., of the company. A deposit by a company of their title-deeds with bankers, along with a memorandum giving an undertaking to execute a mortgage for all sums which shall be due on their account, with a power of sale, or such further security as might be necessary for effectually passing the legal estate in the property to which the security related, has been held by North, J., not to be a debenture. *Topham* v. *Greenside Glazed Fire-Brick Company* (1888), 37 Ch. D. 281, 57 L. J. Ch. 583, 58 L. T. 274, 36 W. R. 464. The distinction was taken that there was no acknowledgment of a specific sum as a debt.

An assignment of plant, &c., to a trustee for debenture holders has been held by Field, J., not a debenture. *Brocklehurst* v. *Railway Printing and Publishing Company* (1884), W. N. 1884, p. 70. In the case of *Jenkinson* v. *Brandley Mining Company* (1887), 19 Q. B. D. 568, 35 W. R. 834, referred to in the judgment of the principal case, the company had issued debenture bonds payable to bearer professing to be secured by a mortgage deed of even date with the debentures. The debentures did not, however, refer to the mortgage-deed in such a way as to identify it. The case was decided against the debenture holders on a ground which must, since the decision in the principal case, be considered erroneous. But perhaps the debentures could not in any case have been treated as creating a specific security over the property.

No. 6. — Ex parte JAY, In re BLENKHORN.

(Ch. App. 1874.)

RULE.

To put goods out of the "apparent possession" of the grantor of the bill of sale, something must be done which takes them plainly out of his control in the eyes of every one who sees them.

Ex parte Jay, In re Blenkhorn.

L. R. 9 Ch. 697–705 (s. c. 43 L. J. Bankr. 122; 31 L. T. 260; 22 W. R. 907).

Bill of Sale. — Apparent Possession.

A mortgagee under an unregistered bill of sale of furniture and live [697] stock at a house, sent two men into the house on the 10th of February to take possession of the goods. They remained in the house, but allowed the debtors to use the goods as usual till the 14th of February. On the 11th of February the debtors executed another bill of sale, which comprised substantially all their property, to another creditor, to secure an antecedent debt. Early in the morning of the 14th of February the first mortgagee sent vans to the house, and the men in possession commenced to pack the furniture and load the vans. At half-past twelve o'clock on the same day the debtors filed a petition for liquidation. The furniture and live stock at the house were carried away by the first mortgagee before the evening: —

Held, by the Lords Justices (reversing the decision of the Chief Judge in Bankruptcy), that the furniture and live stock were in the apparent possession of the debtors until the morning of the 14th of February, within the 7th section of the Bills of Sale Act (17 & 18 Vict. c. 36), but ceased to be so when the men in possession began to pack the goods and put them in the vans; and that as the debtors committed an act of bankruptcy on the 11th by the assignment of all their property, the first bill of sale was void as against the trustee in the liquidation, and the trustee was entitled to the proceeds of the sale.

This was an appeal from a decision of the Chief Judge in Bankruptcy, discharging an order of the Judge of the Nottingham County Court.

* Sarah Anne Blenkhorn and Eleanora Maria Blenkhorn [* 698] were single ladies, who kept a school for young ladies near Caythorpe.

On the 16th of June, 1873, the two Misses Blenkhorn and their father, George Blenkhorn, executed a bill of sale of all their household furniture, fixtures, books, plate, and pictures, and all horses,

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carts, cows, and other chattels at the house, to Barnett Cohen, by way of mortgage for securing a present advance of £144, which was to be repaid by twelve monthly instalments, and power was thereby given to Cohen to take immediate possession of the property comprised in the bill of sale, notwithstanding the equity of redemption, and in case of default in payment of any of the instalments to sell the property.

This bill of sale was not registered.

On the 26th of January, 1874, the Misses Blenkhorn assigned the same property to John Kendal by way of mortgage, for securing the repayment of £100 advanced by him. This was not registered.

On the 11th of February, 1874, the Misses Blenkhorn and their father executed another bill of sale of all the household furniture, live and dead farming goods, chattels, and effects in and about their house, to the Nottingham Equitable Loan, Discount, and Investment Company, by way of mortgage to secure a past debt of £98, with a power of sale in case of default.

This bill of sale was duly registered.

On the 10th of February, 1874, the day before the execution of the last-mentioned bill of sale, Cohen sent two men to take possession of the furniture and other property comprised in his security. These men remained in possession, and slept in the house from that time, but did not disturb or remove, or in any way interfere with the debtors' goods, but allowed the debtors to continue in the occupation and enjoyment of the goods, and to carry on the school in the usual manner until the morning of the 14th of February. During that time negotiations for an arrangement went on between the debtors and Cohen's men who were in possession.

About nine o'clock on the morning of the 14th of February Cohen's men began to pack up the furniture in the house, and about ten o'clock two vans were brought into the garden, [*699] and the * men commenced placing the furniture of the principal rooms in the vans.

About three o'clock a third van was brought to the house and loaded, and at five o'clock all the vans were driven away, and some of the cows and a pony and chaise were also removed.

The bedroom furniture and kitchen utensils were not taken away, but one of the men remained to keep possession of them.

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At half-past twelve o'clock on the same day, while this was going on, the Misses Blenkhorn filed a petition for liquidation, under which a trustee was appointed. The goods taken were afterwards sold by Cohen for £130.

Under these circumstances the County Court Judge was of opinion that the bill of sale to Cohen was void as against the trustee, and that the proceeds of the sale of the goods taken by him ought to be given up to the trustee.

From this decision Cohen appealed to the Chief Judge in Bankruptcy, who held that the possession taken by him under his bill of sale was not merely formal within the meaning of the Bills of Sale Act (17 & 18 Vict. c. 36), s. 7, and that he was entitled to keep the proceeds of the sale.[1]

[1] 1874. May 26.

Sir James Bacon, C. J.: —

The question in this case is simply one of fact. The Bills of Sale Act, although it does not positively enact that every bill of sale shall be registered, requires in effect that it shall be registered, because if it is not registered all goods which are in the apparent possession of the bankrupt at the time of the bankruptcy will be held to be the property of the trustee, and not of the holder of the bill of sale. The question therefore is simply whether at the time of the commencement of the liquidation, which is said to have been at half-past twelve o'clock on the 14th of February, the goods which had been taken possession of on the 10th of February, four days before, were or were not in the apparent possession of the debtors. Well, now, taking the facts which have been proved before me, in my opinion no jury could hesitate on the subject for a moment. On the 10th of February a man comes armed with a bill of sale, lays hands upon all that is included in the bill of sale and takes possession, and leaves two men in possession. That is not mere formal possession. That is positive, actual, legal possession. To what end were the two men put into possession? To prevent anybody else touching those goods. In my opinion, it would be a most violent perversion of words to say that the possession then taken was a nominal or formal possession. It was the best possession that could be taken under the circumstances. The removal did not instantly follow, probably in consequence of the request of the debtors. That part of the case is not made very clear, and it is not of very great importance under what circumstances it was that the broker who had by his men had possession of, and held adversely, to all the rest of the world, the chattels comprised in the bill of sale, did not choose to enforce, or had not the means of enforcing, the removal of them. The removal has nothing to do with it. The possession is the thing that is to be considered. Then on the morning of the 14th, there being no reason for forbearing any longer, the removal of the goods is commenced. Can any case be found — certainly none has been referred to — which would induce me to hold that, where the actual possession is proved and the removal has commenced and is in progress, the completion of that act so begun can be frustrated by the commission of an act of bankruptcy? None of the cases in the slightest degree affect that. Then I find that with reasonable diligence, with no circumstance that would at all call in question either the good faith or the prudence or propriety of what was done on that 14th of February, as soon as it could be effected, the whole of the goods were removed. The men never ceased to hold the possession until the things were brought down upon the lawn and loaded upon the carts. In my opinion, the Act of Parliament does not in the slightest degree touch this case. There has been an attempt to show that what was taken was mere formal possession, and two cases, *Ex parte Hooman*, L. R., 10 Eq. 63, 39 L. J. Bankr. 4,

No. 6. — Ex parte Jay, In re Blenkhorn, L. R., 9 Ch. 700.

[* 706] * From this decision the trustee appealed.

Mr. De Gex, Q. C., and Mr. Finlay Knight, for the appellant: —

and *Gough* v. *Everard*, 2 H. & C. 1, 32 L. J. Ex. 210, were referred to. *Ex parte Hooman* was a case in which the owner of the bill of sale had put a man into what was clearly nominal possession, and only nominal possession, for he went into possession on the 28th of October; he retained possession until the 16th of November, and he then gave up the possession to another agent of the respondent: so that for months that possession which in the beginning was, and was meant to be, formal and nothing else, had been continued down to the very time when the question was under litigation. *Gough* v. *Everard*, in my opinion, does not touch the case at all; but in the course of the argument upon *Ex parte Hooman* reference was made to a case which has not been referred to on this occasion, — a case of *Vicarino* v. *Hollingsworth*, 20 L. T. N. S. 362, the facts of which are thus stated in the judgment in *Ex parte Hooman*, L. R., 10 Eq. at p. 68, 39 L. J. Bankr. 8: "A bill of sale had been executed by a trader to secure an advance of money. The lender, on the day of the execution of the bill of sale, sent a person who took and retained possession of the chattels assigned: and it would appear that they had been actually removed and sold: but whether before or soon after the bankruptcy, which happened within a week of the execution of the bill of sale, does not distinctly appear, nor is it material. So that no question did or could arise respecting its registration. The assignees in bankruptcy brought an action against the lender for money had and received to their use. The only ground upon which they claimed was that within the terms of the statute in bankruptcy the goods were at the time of the bankruptcy, by the consent and permission of the true owner, in the possession, order, or disposition of the bankrupt. This raised a mere question of fact, as 'order and disposition' is in all cases only a question of fact. It being proved that the agent who had taken possession was a young woman who lived in the house with the bankrupt and his family, took her meals with them, sat in the same rooms, and lived as one of the family, it was urged, on the part of the plaintiffs, that the possession by her was not real and substantial, but colourable, and that the goods, notwithstanding her presence in the house, remained in the ostensible possession of the bankrupt, and with the consent of the true owner, were in his order and disposition. The learned Judge who tried the cause directed the jury, 'if they came to the conclusion that the young woman was *bonâ fide* in possession of the furniture, so that she would not have allowed the bankrupt or any one else to deal with it contrary to her instructions, to return a verdict for the defendant,' which they did. On a motion for a new trial on the ground of misdirection, . . . it was said by the Lord Chief Justice that the current of recent decisions had been less in favour of assignees than formerly. And this may well be in cases of 'order and disposition;' but cannot, I think, in any way influence the matter now before the Court." The possession of the young woman in *Vicarino* v. *Hollingsworth* was infinitely more questionable than such possession as was taken here. Here it was exactly in the ordinary course of business. The owner of the bill of sale sends his men to take possession, and never relinquishes it from that moment until the whole of the chattels comprised in the bill of sale and seized by them on the 10th of February are carried off the premises on the 14th. As a matter of fact, in my opinion, this case is one which does not admit of question for a moment.

I am, therefore, of opinion that at the time of what is said to have been an act of bankruptcy, namely, the execution of the bill of sale on the 11th of February, the possession of Cohen was actual and positive, and not completed only because of the difficulty of carrying away the pianofortes and such like things except by means of a van. In my opinion, the right of the bill of sale holder is clear, and is not to be questioned; and upon the facts as they are admitted and agreed to here, I am of opinion that he is entitled to retain the proceeds of the goods removed until his debt secured by the bill of sale is settled.

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The Bills of Sale Act (17 & 18 Vict. c. 36), s. 1, makes every * unregistered bill of sale void against creditors in [* 701] case of bankruptcy, so far as regards all chattels which, after the expiration of twenty-one days from the execution of the bill of sale, shall be "in the possession, or apparent possession, of the person making such bill of sale;" and the last clause of the 7th section provides that "Personal chattels shall be deemed to be in the apparent possession of the person making or giving the bill of sale so long as they shall remain or be in or upon any house, mill, warehouse, building, works, yard, land, or other premises occupied by him, or as they shall be used and enjoyed by him in any place whatsoever, * notwithstanding that formal possession [* 702] thereof may have been taken by or given to any other person." The question in the present case turns upon the true construction of this last clause. At the time when the petition for liquidation was filed none of the goods had been removed; the formal or apparent possession which had been taken by Cohen's men had not ceased, and the bill of sale as regarded them was void. The fact of the goods or some of them being in the vans made no difference; for there was nothing to show to whom the vans belonged, or by whom the goods were about to be removed. *Ex parte Lewis, In re Henderson*, L. R., 6 Ch. 626; *Gough* v. *Everard*, 2 H. & C. 1, 32 L. J. Ex. 210; *Davies* v. *Jones*, 10 W. R. 779; *Ex parte Hooman*, L. R., 10 Eq. 63, 39 L. J. Bankr. 4. At all events, the possession was merely formal on the 11th of February, and it is clear that the mortgage to the Nottingham Company which was made on that day included substantially all the debtor's property, and being for an antecedent debt was an act of bankruptcy, and overrides the sale by Cohen.

Mr. Little, Q. C., and Mr. Robertson Griffiths, for Cohen: —

Cohen was not in formal but in actual possession when the petition was presented. He took possession with the *bonâ fide* intention of selling, and had been making arrangements to do so. His men began to pack the goods and load them in the vans early on the 14th of February, before the petition was presented; and therefore, even if the possession was only formal before the 14th of February, it ceased to be so as to all the goods on the morning of that day: *Carr* v. *Acraman*, 11 Ex. 566, 25 L. J. Ex. 90.

With respect to the mortgage to the Nottingham Company, there is no evidence that it comprised all the debtor's property; and if

the decision of the Court should turn on that instrument, we ask for further inquiry on that point.

Sir W. M. James, L. J.: —

Subject to the question as to the further inquiry, I am of opinion that the decision of the County Court Judge is right, and that the decision of the Chief Judge cannot be sustained. The [* 703] * question here is, whether there was actual or apparent possession of the goods which were comprised in the bill of sale to Cohen in the persons who had executed that bill of sale. Now it is admitted that, four days before the 14th of February, when the petition was filed, the mortgagee under the bill of sale put two men in possession of the property; but notwithstanding that, the property being in a boarding-school, the school went on, and the young ladies continued their usual studies; the furniture was used, the beds were slept in, and it is plain that the whole apparent course and conduct of the household went on exactly in the same way as usual, the men being there for the purpose, no doubt, of preventing any removal of the goods. Now, that is, to my view, exactly the kind of apparent possession which was aimed at by the last clause of the 7th section of the Bills of Sale Act. It seemed to all the world that the ladies held their school, and they and their scholars had the use and enjoyment of the things which were the subject of the bill of sale. There were the cows also, and the pony and carriage, all of which continued to be used in the same way. I agree that the formal possession ceased to be a formal possession, and became an actual possession not to be attacked by the Bills of Sale Act, on the morning of the 14th; for early on that morning the persons in possession brought vans, and, as rapidly as they could, began packing up the furniture. They took the things out on to the lawn and put them as fast as they could into the vans, and were in the course of removing them when the act of bankruptcy which was relied on was committed, which did not take place until half-past twelve on the same day. I cannot say that that was not as strong an assertion of ownership as could be made, — not formal, but real ownership, — particularly having regard to the character of the property and business.

That makes it important to ascertain whether there was an act of bankruptcy prior to the morning of the 14th; and certainly, having regard to the fact that there were three bills of sale of the same property, and that the ladies were in insolvent circumstances,

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the strong presumption is that the bill of sale to the Nottingham Company, which is alleged to be the act of bankruptcy, did include substantially the whole of the property of the debtors within the meaning of the cases. But as it is suggested that this was not * properly inquired into, and that there was [*704] really no positive evidence upon that subject, the Lord Justice is of opinion, and I agree with him, that, strictly speaking, the creditor is entitled to have that more thoroughly investigated than appears to have been done. Of course, he must do it at his own expense, and upon that one point, and that only; the matter will stand over for the production of evidence before us. If the inquiry is not insisted on, the order of the Chief Judge will be reversed.[1]

Sir G. Mellish, L. J.: —

I am entirely of the same opinion. In *Ex parte Lewis*, L. R., 6 Ch. 626, the construction of the Bills of Sale Act in these matters was fully considered by the Court. I am of opinion that the proper construction was put upon it in that case, and the same construction appears to have been put upon it by the Chief Judge himself in *Ex parte Homan*, L. R., 10 Eq. 63, 39 L. J. Bankr, 4. The distinction between real and formal possession was founded, in those cases, upon the authority of certain modern cases at law which were there fully considered. The distinction is, that if a broker is simply put in and remains in possession, so as to prevent the removal of the furniture, but allowing everything to go on just as it did before, permitting everything to be used by the debtor and his family, then the goods still remain in the apparent possession of the debtor. There must be something done which takes them plainly out of the apparent possession of the debtor in the eyes of everybody who sees them. There is no reason at all to depart from the distinction which is there laid down. The Chief Judge seems to have thought it depended on the fact that only a short time had elapsed between the time when the broker was put in possession and the time when he proceeded to sell, and to have thought that he had entered with a *bonâ fide* intention to sell; and that he brought his vans within a reasonable time. With submission to his judgment, I really think that is wholly immaterial. It is different from the "order and disposition" clause in the Bankruptcy Act, because there, if the true owner demands

[1] No application was made for an inquiry

[* 705] the goods, that at once prevents * the "order and disposition" clause applying. But, under the Bills of Sale Act, if the creditor does not choose to register his bill of sale, and the goods remain in the apparent possession of the debtor, and are so at the time the act of bankruptcy is committed, it does not matter at all, in my opinion, that he has used due diligence or has endeavoured to get possession. If, in point of fact, he has not got possession, and has not taken the goods both out of the actual and out of the apparent possession of the debtor, then the Bills of Sale Act applies, and the trustee can come in.

ENGLISH NOTES.

Apparent possession is distinguishable from reputed ownership in two ways, viz: First, reputed ownership is excluded by showing a possession which, although friendly and not exclusive of the debtor's full enjoyment, is effectual to prevent his disposing of the goods; whereas, to exclude apparent possession, the possession of the new owner must be complete and notorious as well as real. Secondly, reputed ownership is excluded by an attempt, even though unsuccessful, by the true owner to assume possession. This is not the case with apparent possession.

The following cases, as well as the principal case, and the cases cited in the judgment, illustrate these distinctions. *Ancona* v. *Rogers* (1876), 1 Ex. D. 285, 46 L. J. Ex. 121, 35 L. T. 115, 24 W. R. 1000; *Ex parte National Guardian Insurance Company, In re Francis* (1877), 10 Ch. D. 408, 40 L. T. 237, 27 W. R. 498. Goods in a furnished house let to a third party as tenant of the grantor, and goods lent on hire by the grantor are not in his apparent possession. *Ex parte Morrison, In re Westray* (1880), 42 L. T. 158, 28 W. R. 524; *Lincoln Wagon and Engine Company* v. *Mumford* (1879), 41 L. T. 655; *Robinson* v. *Briggs* (1870), L. R., 6 Ex. 1, 40 L. J. Ex. 17, 23 L. T. 395.

Apparent possession has been held to continue in the following cases: Where a man was put in possession of goods which were in a house belonging to the grantor, who had a key, and went in and out at his pleasure, although he did not sleep there. *Seal* v. *Claridge* (C. A. 1881), 7 Q. B. D. 516, 50 L. J. Q. B. 316, 44 L. T. 501, 29 W. R. 598. So where, under similar circumstances, placards were posted announcing a sale, but not so as to show that the sale was under the bill of sale, or not by the grantor himself. *Ex parte Lewis, In re Henderson* (1871), L. R., 6 Ch. 626, 24 L. T. 785, 19 W. R. 835. But the case is different when the person taking possession advertises the goods on sale as the goods of the grantor sold under a bill of sale. *Emmanuel* v. *Bridger* (1874), L. R., 9 Q. B. 287, 43 L. J. Q. B. 96, 30 L. T. 194, 22 W. R.

404; *Smith* v. *Wall* (1868), 18 L. T. 182; or when he seizes the whole stock, employs new men, and buys fresh stock, *Davies* v. *Jones* (1862), 10 W. R. 779; or serves the customers himself, the grantor having absconded, *Taylor* v. *Eckersley* (1877), 5 Ch. D. 740, 36 L. T. 442, 25 W. R. 527; or sells the goods to another, *Ex parte Official Receiver, In re Emery* (C. A. 1888), 21 Q. B. D. 405, 57 L. J. Q. B. 629, 37 W. R. 21. So also when circulars and advertisements were issued announcing the transfer of control, though the grantor was retained as the servant of the grantee, *Gibbons* v. *Hickson* (1885), 55 L. J. Q. B. 119, 53 L. T. 910, 34 W. R. 140; or where the transfer of control was otherwise notorious in the neighbourhood. *Ex parte Mortlock* (1881), W. N. 1881, p. 161.

Goods in the possession of an agent are in the possession of the principal. *Ancona* v. *Rogers* (1876), 1 Ex. D. 285, 46 L. J. Ex. 121, 35 L. T. 115, 24 W. R. 1000; *Pickard* v. *Marriage* (1876), 1 Ex. D. 364, 45 L. J. Ex. 594, 35 L. T. 343, 24 W. R. 886. But actual visible possession by a sheriff's officer excludes the possession of the debtor. *Ex parte Saffery, In re Brenner* (C. A. 1881), 16 Ch. D. 668, 44 L. T. 324, 29 W. R. 749.

Under section 8 of the Bills of Sale Act 1878, an unregistered bill of sale is avoided merely as against trustees for the general body of creditors and execution-creditors of the grantor. If unregistered, the bill was valid as between the grantor and the grantee. *Davis* v. *Goodman* (C. A. 1880), 5 C. P. D. 128, 49 L. J. C. P. 344, 42 L. T. 288, 28 W. R. 559. But, under section 8 of the Act of 1882, a bill of sale given *by way of security* is void *in toto* if not duly registered.

AMERICAN NOTES.

What constitutes a change of possession depends much upon the situation of the property. "When a removal is impracticable, when all has been done that reasonably can be to mark the change of ownership and possession, the law is satisfied." *Bismark, &c. Assn* v. *Bolster*, 92 Pa. St. 123. Thus if the property is not in the actual possession of the mortgagor, leaving it in the place where it is situated is not leaving it in the vendor's possession, and creditors should not be misled because it remains in the same locality. "The very fact that the property is not in the possession of the debtor leads to the inquiry how it is held and who is the owner; and the fact that the debtor was the owner, and left it at the place where it is found, leads to no legitimate inference that it continues to be his property, when he has not the possession and exercises no acts of ownership over it. To presume, without inquiry, that it remains his, is an unwarrantable presumption." *Morse* v. *Powers*, 17 New Hampshire, 286. So if the goods are in a warehouse of the mortgagor, and the mortgagee takes possession of it under a mortgage of that, and remains in exclusive possession of building and goods, that is a sufficient delivery. *Smith* v. *Skeary*, 47 Connecticut, 47.

If the goods are in possession of a third person, and he consents to hold them as agent for the mortgagee, that is sufficient. *Nash* v. *Ely*, 19 Wendell (New York), 523; *Hodges* v. *Hurd*, 17 Illinois, 363; *Gaar* v. *Hurd*, 92 Illinois, 315; *Wheeler* v. *Nichols*, 32 Maine, 233; *Tuxworth* v. *Moore*, 9 Pickering (Massachusetts), 346. But such consent is essential. *Buhl Iron Works* v. *Teuton*, 67 Michigan, 623. In case of storage with a warehouseman, notice to him of the mortgage is sufficient to imply such consent by operation of law. *Id.* In no case can a change of possession be implied in such cases without "something of a public nature" by means of authority or notice from the mortgagee. The mortgagee may not simply suffer it to remain until he chooses to take the personal charge of it. *Id.* Some Courts, however, hold notice unnecessary, especially, but not exclusively, in the case of bulky or ponderous articles. *Puckett* v. *Reed*, 31 Arkansas, 131; *Glasgow* v. *Nicholson*, 25 Missouri, 29; *Zellner* v. *Mobley*, 84 Georgia, 746; *Newcomb* v. *Cabell*, 10 Bush (Kentucky), 460; *Cofield* v. *Clark*, 2 Colorado, 101.

Separating the mortgaged goods from the rest of the stock in the mortgagor's store, and tagging them with the mortgagee's name, is not such immediate delivery or actual and continued change of possession as dispenses with the necessity of filing the mortgage. *Button* v. *Rathbone*, 126 New York, 187. So in *Steele* v. *Benham*, 84 New York, 638, it was said: "To satisfy the statute the possession must be actual, not merely constructive or legal. In *Topping* v. *Lynch* (2 Robertson, 484), it was said that the words 'actual and continued change of possession' in this statute 'mean an open, public change of possession,' which is to continue and be manifested continually by outward and visible signs such as render it evident that the possession of the judgment debtor has ceased. In *Crandall* v. *Brown* (18 Hun, 461), it was said that 'constructive possession cannot be taken under a chattel mortgage;' that 'possession must be taken in fact,' and that 'possession cannot be taken by words and inspection.' The case of *Hale* v. *Sweet* (10 New York, 97) shows how literally the Courts construe this statute as to the actual change of possession." So in *Menzies* v. *Dodd*, 19 Wisconsin, 343, where the property consisted of stacks of wheat, which had been delivered to the mortgagee only by words of delivery, and remained on the mortgagor's land and under his control, it was held no delivery. So in *Wilson* v. *Hill*, 17 Nevada, 401, the property was 324 cords of wood at the roadside. Mere words of delivery were used. The wood was not marked, and no one was put in charge. The mortgagee went daily to see it for a week, and thereafter from once to twice a week. *Held*, no delivery. Citing *Long* v. *Knapp*, 54 Pennsylvania St. 514. See also *Manuf. Bank* v. *Rugee*, 59 Wisconsin, 221; *Siedenbach* v. *Riley*, 111 New York, 560; *Swiggett* v. *Dodson*, 38 Kansas, 702; *Allen* v. *Agee*, 15 Oregon, 551; 3 Am. St. Rep. 206; *Stephens* v. *Clifford*, 137 Pennsylvania St. 219; 21 Am. St. Rep. 868; *Renninger* v. *Spatz*, 128 Pennsylvania St. 524; 15 Am. St. Rep. 692; *Pearson* v. *Quist*, 79 Iowa, 54.

"In the case of ponderous or bulky articles, manual delivery is not necessary to pass title, but delivery may be sufficiently evidenced by delivery of a bill of sale, a warehouse receipt, order, or the key of the place of storage, or by marking or otherwise designating or by pointing out the goods, and by declarations." Browne on Sales, p. 154, citing *Bethel St. M. Co.* v. *Brown*, 57

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Maine, 1; 99 Am. Dec. 75 (raft); *Hall* v. *Richardson*, 16 Maryland, 397; 77 Am. Dec. 303 (flour); *Winslow* v. *Leonard*, 24 Penn. St. 14; 62 Am. Dec. 354; *Van Brunt* v. *Pike*, 4 Gill (Maryland), 270; 45 Am. Dec. 126 (pig iron); *Smith* v. *Wheeler*, 7 Oregon, 49; 33 Am. Rep. 698 (steam boiler); *Calkins* v. *Lockwood*, 17 Connecticut, 154; 42 Am. Dec. 729 (piles of iron); *Pleasants* v. *Pendleton*, 6 Randolph (Virginia), 473; 18 Am. Dec. 726 (lot of flour); *Pollen* v. *Le Roy*, 30 New York, 549 (cargo of lead); *Cocke* v. *Chapman*, 2 English (Arkansas), 197; 44 Am. Dec. 536 (negro slaves); *Tognini* v. *Kyle*, 17 Nevada, 209; 45 Am. Rep. 444 (charcoal in pits marked with buyer's name); *Hayden* v. *Demets*, 53 New York, 426; *Leonard* v. *Davis*, 1 Black (U. S. Sup. Ct.), 476; *Thompson* v. *Baltimore, &c. R. Co.*, 28 Maryland, 396. But mere delivery of a bill of sale of cattle, although their mark is therein described and the branding-iron is delivered, is not sufficient. *Walden* v. *Murdock*, 23 California, 540; 83 Am. Dec. 135. And so of delivery of a handful of grass on sale of a growing crop. *Lamson* v. *Patch*, 5 Allen (Mass.), 586; 81 Am. Dec. 765. As to warehouse receipts, see *Davis* v. *Russell*, 52 California, 611; 28 Am. Rep. 647; *Merchants' &c. Bank* v. *Hibbard*, 48 Michigan, 118; *Burton* v. *Curyea*, 40 Illinois, 320; *Allen* v. *Maury*, 66 Alabama, 10; *Cochran* v. *Ripy*, 13 Bush (Kentucky), 495; *Second Nat. Bank* v. *Walbridge*, 19 Ohio State, 419; 2 Am. Rep. 408; *Whitlock* v. *Hay*, 58 New York, 484.

"If the goods are so situated that immediate delivery cannot be made without disproportionate expense, the purchaser has a reasonable time to take possession, even as against creditors." Browne on Sales, p. 155, citing *Kingsley* v. *White*, 57 Vermont, 565 (where saw-logs were inaccessible until the ground froze); *Badlam* v. *Tucker*, 1 Pickering (Mass.) 389; 11 Am. Dec. 202 (goods at sea); *Conrad* v. *Atlantic Ins. Co.*, 1 Peters (United States Supr. Ct.), 386; *Dawes* v. *Cope*, 4 Binney (Pennsylvania), 258; *Ricker* v. *Cross*, 5 New Hampshire, 570; 22 Am. Dec. 480 (chaise and harness in hands of hirer at a distance); *Walden* v. *Murdock*, 23 California, 540; 83 Am. Dec. 135 (cattle straying on plains). "But he must exercise his right within a reasonable time," citing *Putnam* v. *Dutch*, 8 Massachusetts, 287; *Veazie* v. *Somerby*, 5 Allen (Mass.), 281. "In such cases part delivery may answer for the whole." Citing *Shurtleff* v. *Willard*, 19 Pickering (Mass.), 202; *Boynton* v. *Veazie*, 24 Maine, 286.

In *Morrow* v. *Reed*, 30 Wisconsin, 81, where logs were mortgaged, it was held sufficient that the mortgagor went with the mortgagee to the place where they lay on the lake shore, and pointed them out to him, and said that he delivered them to him. This is apparently practically overruled in *Menzies* v. *Dodd*, *supra*, and seems to be in conflict with the balance of authority. It is generally held that even if the articles are ponderous or bulky, a delivery by mere words is ineffectual. There must be some clear and unequivocal indication of the change of possession. "The delivery should be such that creditors and subsequent purchasers will not be misled or left in doubt as to the nature of the transaction." Jones on Chattel Mortgages, § 187; *Manuf. Bank* v. *Rugee*, *supra*: *Doak* v. *Brubaker*, 1 Nevada, 218. In the last case the subject of sale was four hundred head of cattle, and there was not even a change of herdsman, which the Court said "would have been

an act evidencing the change of property, and would probably have been sufficient to have effected a delivery." While admitting that a symbolical delivery would be sufficient where actual delivery would be very difficult, as in the case put by Chancellor KENT, of a column of granite, the Court found "no authority which would sustain a delivery of this kind where the property is in the charge of a servant, and is susceptible of actual delivery," citing *Hurlburd* v. *Bogardus*, 10 California, 519. The same was held in *Anderson* v. *Brenneman*, 44 Michigan, 198, a case of a mortgage of pig-iron, and in *First National Bank* v. *Summers*, 75 Michigan, 107, a mortgage of hotel furniture.

But there may be an effectual constructive delivery and possession, as where household furniture was in a store-room, and the mortgagor delivered the key to the mortgagee, who put on a new lock and kept the key. *Giffert* v. *Wilson*, 18 Bradwell (Illinois Appellate), 214; and same principle, *Benford* v. *Schell*, 55 Pennsylvania State, 393; *Chappel* v. *Marvin*, 2 Aikens (Vermont), 79; 16 Am. Dec. 684.

Possession is changed if the mortgagee assumes control by putting his own agent in charge, who accounts to him for the property, although it remains in the same place, as in the case of a stock of goods. *Weaver* v. *Reilly*, 21 Hun (New York Supr. Ct.), 585. See *Wright* v. *Tetlow*, 99 Massachusetts, 397.

There can be no concurrent possession valid as against purchasers and creditors. As where the parties agreed that the mortgaged boat should be run on joint account, *Hale* v. *Sweet*, 40 New York, 97; and where the mortgagor of a yoke of oxen, a farmer, took a bond from the mortgagee for the support of himself and his wife for life, and the mortgagee continued to live on the farm with them. *Flagg* v. *Pierce*, 58 New Hampshire, 348. Same principle, *Sumner* v. *Dalton*, Ibid., 295; and so where the mortgagee took possession, but afterward put the possession in the mortgagor as his agent and clerk, *Swiggett* v. *Dodson*, 38 Kansas, 702; and so of a sale of cattle on a farm by husband to wife. *McKee* v. *Gurcelon*, 60 Maine, 165; 11 Am. Rep. 200; *Wheeler* v. *Selden*, 63 Vermont, 429; 25 Am. St. Rep. 771. And see *McClure* v. *Forney*, 107 Penn. St. 414.

In short, as Mr. Jones says (Chattel Mortgages, § 185), agreeing with the Rule, "The change of possession must be apparent to those who have occasion to observe it;" and as Mr. Browne says (Sales, p. 152): "it is ordinarily held that there must be a *visible* change of possession, in the absence of which the creditor may reasonably presume the title still to be in the seller."

No. 7. — Ex parte CHARING CROSS, &c. BANK. In re PARKER.

(C. A. 1880.)

No. 8. — COUNSELL *v.* LONDON AND WESTMINSTER LOAN AND DISCOUNT COMPANY.

(C. A. 1887.)

RULE.

To render a bill of sale valid under the (English) Acts, the statement of the consideration must be substantially true; and any condition, defeasance, or stipulation for redemption must be inserted.

Ex parte Charing Cross, &c. Bank. In re Parker.

16 Ch. D. 35-40 (s. c. 50 L. J. Ch 157-160; 44 L. T. 113; 29 W. R. 204).

Bill of Sale. — Statement of Consideration.

In the operative part of a bill of sale it was expressed to be made in [35] consideration of £120 advanced upon its execution by the grantee to the grantor. In fact, only £90 was paid to the grantor, £30 being retained by the grantee for "interest and expenses." The execution of the deed was attested by a solicitor, and the attestation clause stated that before its execution the effect of the deed was explained by him to the grantor. At the foot of the deed, immediately after the attestation clause, there was a receipt, signed by the grantor, which stated that the £90, "together with the agreed sum of £30 for interest and expenses," made the sum of £120, "the consideration money within expressed to be paid": —

Held, that the receipt was not part of the deed: and that the deed did not set forth the consideration for it, and was therefore made, by sect. 8 of the Bills of Sale Act, 1878, void as against the trustee in the liquidation of the grantor.

This was an appeal from a decision of Mr. Registrar HAZLITT, acting as Chief Judge in Bankruptcy.

On the 7th of November, 1879, John Parker, a builder at Clapton, executed a bill of sale of his furniture and other chattels to the Charing Cross Advance and Deposit Bank. The deed contained a recital that the mortgagor had applied to the mortgagees to advance him the sum of £120, which the mortgagees had * agreed to do upon the terms therein after expressed. [* 36]

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And it was witnessed that, "in consideration of the sum of £120 by the morgagees paid to the mortgagor at or before the execution hereof (the receipt of which said sum the mortgagor hereby acknowledges)," the mortgagor assigned unto the mortgagees his furniture and other chattels by way of security for the repayment of the £120 in the manner therein mentioned. In fact, £90 only was paid by the bank to Parker on the execution of the deed, £30 being retained by the bank for interest and expenses. The execution of the deed by Parker was attested by a solicitor of the Supreme Court, and the attestation clause stated that the effect of the deed was, before its execution, explained by him to Parker. At the foot of the deed, immediately below the attestation clause, there was the following receipt signed by Parker: —

"Received the day and year first within written of and from the within named mortgagees the sum of £90, which sum, together with the agreed sum of £30 for interest and expenses, makes the sum of £120, being the consideration money within expressed to be paid by them to me." The deed was registered. In February, 1880, Parker filed a liquidation petition, and on the 6th of April the Registrar, on the application of the trustee, made an order declaring the bill of sale void as against him, on the ground that the consideration for the deed was not set forth in it in compliance with the provisions of sect. 8 of the Bills of Sale Act, 1878. The bank appealed.

Guiry, for the appellants: —

Even without looking at the receipt, the consideration is set forth in the deed so as to satisfy sect. 8. The retention of the £30 by the bank was in pursuance of a collateral bargain as to the application of part of the consideration which it was not necessary to state in the deed: *Ex parte National Mercantile Bank, In re Haynes*, 15 Ch. D. 42, 49 L. J. Bankr. 62. But, at any rate, the receipt is a part of the deed, and is filed with it, and it fully explains the transaction. It is sufficient that the true consideration should appear from some part of the deed. Indeed, sect. 10 of the Act requires that if a bill of sale is made "subject to any [* 37] defeasance or condition or * declaration of trust not contained in the body thereof, such defeasance, condition, or declaration shall be deemed to be part of the bill, and shall be written on the same paper or parchment therewith before the registration, and shall be truly set forth in the copy filed under

this Act therewith, and as part thereof, otherwise the registration shall be void." The receipt may be considered as a "condition" within that section.

J. F. H. Bethell, for the trustee: —

[James, L. J. The only question is whether the deed can be supplemented by the receipt. We think it is clear that if the deed stood alone the consideration would not be set forth as required by sect. 8.]

Sect. 8 means that the true consideration must be set forth in the deed in the ordinary way, and not that it should be spelt out by means of a receipt at the foot or on the back of the deed. The grantees are estopped by the operative part of the deed from saying that the consideration was not to be £120. The transaction was clearly a sham one. The receipt is not part of the deed. The decision of the Chief Judge in *In re Rogers, Ex parte Challinor* (June 14, 1880) [1] is an authority that where a part of the expressed consideration was retained for the solicitor's costs of the bill of sale and the charges of an auctioneer for valuing the property comprised in it, the consideration had not been properly stated in the deed.

[Winslow, Q. C., *amicus curiæ*, referred to *Jones* v. *Harris*, L. R. 7 Q. B. 157, 41 L. J. Q. B. 6; *Ex parte Mackenzie*, 42 L. J. (Bankr.) 25.]

Guiry, in reply: —

A true copy of the bill of sale could not be registered without setting out the receipt.

[James, L. J. If the receipt was part of the deed, the attestation ought to have come after it.]

That is a mere matter of form.

James, L. J.: —

I am of opinion that the judgment of the Registrar must be * affirmed. It is clear that the true consideration is not [*38] set forth in the bill of sale. The very object of the Act was to prevent the setting forth as part of the consideration that which was retained by the grantor in the shape of interest and expenses. In *Ex parte National Mercantile Bank, In re Haynes*, 15 Ch. D. 42, 49 L. J. Bankr. 62, the consideration was stated to be a loan of £2050 by the grantees to the grantor, and it was not the less a loan of that amount because by a collateral agreement £550,

[1] Subsequently reversed by C. A. 16 Ch. D. 261, 51 L. J. Ch. 476.

part of it, was to be applied in the payment of a real *bonâ fide* debt from the grantor to the grantees existing at the time, and not arising out of the then transaction between the parties. In the present case there was really an evasion of the provisions of the Act, and it is not at all like *Ex parte National Mercantile Bank, In re Haynes.*

With regard to the other point, whether we can look at the receipt which is subscribed at the foot of the deed for the purpose of supplementing, or rather of correcting, the statement of the consideration on the face of the deed, it appears to me that, independently of the position of the receipt after the attestation clause, it is impossible to say that the receipt is part of the bill of sale, and the Act says that the bill of sale shall set forth the consideration, otherwise it shall be void as against the trustee in bankruptcy of the grantor. Here the bill of sale does not set forth the consideration. But it is further required by the Act that the execution of the bill of sale "shall be attested by a solicitor of the Supreme Court, and the attestation shall state that before the execution of the bill of sale the effect thereof has been explained to the grantor by the attesting solicitor." In the present case the execution is attested by a solicitor who states that before its execution he explained the effect of it to the grantor, and after the attestation there comes something which never has been attested, and as to which there is no statement that it has been explained to the grantor. I am of opinion, therefore, that the receipt cannot be looked at as a statement of the consideration.

Cotton, L. J.: —

The first question is whether the bill of sale really states the consideration, and in my opinion it does not. It states that [* 39] £120 * was the consideration, whereas in fact only £90 was advanced to the grantor, and the rest of the £120 was retained by the bank for "interest and expenses." The case is not like *Ex parte National Mercantile Bank, In re Haynes,* 15 Ch. D. 42, 49 L. J. Bankr. 62, for there the retainer was for the purpose of satisfying a debt existing independently of the transaction of loan. In the present case, on the contrary, the whole of the liability for "interest and expenses" arose out of that transaction of loan which the bill of sale completed and rendered effectual. In the other case the debt existed independently, and would have remained if the loan secured by the bill of sale had not been made.

I think that this kind of retainer was the very thing aimed at by the Act; the object was to prevent the giving of a security for a sum said to be advanced, when in fact a large part of it was retained by the grantee. Independently, therefore, of the other point, there is an end of the case.

It is said, however, that we ought to look at the receipt, and that if we do so, the real consideration for the bill of sale is stated. But we are bound by the provisions of the Act, and to my mind it is impossible to say that the deed in this case does state the consideration. The receipt is not part of the deed. It is said that it may be used to correct the statement in the deed, but that is not what is required by the Act. I did at one time entertain a doubt by reason of those decisions upon the Bills of Sale Act, 1854, to which Mr. Winslow, as *amicus curiæ*, has referred us. That Act required that on the registration of a bill of sale there should be filed with it an affidavit giving a description of the residence and occupation of the grantor, and it was held that an insufficient description in the affidavit might be explained by a reference to the description given in the bill of sale itself. But I think that those cases are distinguishable from the present case. In *Jones* v. *Harris*, L. R. 7 Q. B. 157, 41 L. J. Q. B. 6, the affidavit which was made by the attesting witness, stated that the grantor resided at Dynevor Lodge, and was an auctioneer. That was held to be an insufficient description. But the bill of sale itself described the grantor as "of Dynevor Lodge, in the parish of Llanarthney, in the county of Carmarthen, auctioneer," and it was held that the copy of the bill of sale which was filed might be referred to, in order to explain * and supplement the description given by the affidavit, and [* 40] that consequently the Act had been complied with. In *Ex parte Mackenzie*, 42 L. J. Bankr. 25, it was held that an insufficient description of the attesting witness to a bill of sale contained in his affidavit filed on the registration of the bill of sale might be cured by reference to a sufficient description of him in the attestation clause of the bill of sale. In the present case it is sought, not to correct an insufficient statement in the bill of sale by reference to another document, but entirely to contradict the statement in the bill of sale. I found my decision on this, that the Act requires that the bill of sale should state the consideration. It does not state it, and we are bound to give effect to the fair construction of the Act.

Lush, L. J.: —

The Act says that the bill of sale shall set forth the consideration for which it was given. The consideration is that which the grantor receives from the grantee for giving the bill of sale, and it means, of course, the true consideration. Now, in that part of the bill of sale in the present case in which the consideration is referred to, it is stated to be £120, whereas the grantor received only £90. No doubt this fact is stated in the receipt, but the Act says that the consideration must be stated in the bill of sale. Is, then, the receipt part of the bill of sale? In the first place, it is not necessary there should be a receipt at all. And, certainly, in the present case, the receipt is not part of the bill of sale, for the Act requires that the execution of the bill of sale should be attested, and the receipt is not attested. Reliance has been placed on the provision of sect. 10, that if a bill of sale is made subject to any defeasance or condition, such defeasance or condition shall be deemed to be part of the bill. That section, however, while it expressly refers to a defeasance or condition, does not refer to a receipt. I think, therefore, that the provisions of the Act have not been complied with.

Counsell v. London and Westminster Loan and Discount Company.

19 Q. B. D. 512–516 (s. c. 56 L. J. Q. B. 622, 36 W. R. 53).

Bill of Sale — Defeasance.

By a bill of sale, drawn in accordance with the form in the schedule [512] of the Bills of Sale Act, 1882, and duly registered, the grantor assigned certain specified chattels to secure to the grantees the repayment of a sum of £80, and interest thereon at 30 per cent.; the principal sum to be paid, together with the interest then due, by equal monthly payments of £5 6*s.* on specified days until the whole sum and interest should be fully paid. The grantor at the same time gave a separate promissory note bearing the same date as the bill of sale, promising to pay the grantees, or order, £95 12*s.*, by equal monthly instalments of £5 6*s.*, payable on the same days as the monthly payments in the bill of sale, until the whole sum of £95 12*s.* should be fully paid; and the note contained a stipulation that in case of default in payment of any instalment the whole of the same sum should become due and payable.

Held (affirming the decision of the Queen's Bench Division), that by reason of this stipulation the promissory note was a defeasance of the bill of sale within the meaning of the Bills of Sale Act, 1878, s. 10, because if at any time the whole sum payable on the note were paid, the rights of the grantees under the bill of sale would cease; and therefore the bill of sale was void.

No. 8. — Counsell v. L. & W. Loan, &c. Co., 19 Q. B. D. 512, 513.

Appeal from a decision of the Queen's Bench Division (MATHEW and GRANTHAM, JJ.).

Action for damages for a trespass by the defendants in breaking and entering the plaintiff's house, and for wrongfully seizing and taking possession of certain goods therein.

The defence alleged that the defendants lawfully entered the plaintiff's house and seized the goods under a bill of sale made by the plaintiff in favour of the defendants.

At the trial before DENMAN, J., and a jury the following material facts were proved or admitted: —

By a bill of sale, dated September 30, 1885, the plaintiff assigned to the defendants certain chattels and things in the plaintiff's house, to secure the repayment of a sum of £80 and interest thereon at 30 per cent., the principal sum to be paid, together with the interest then due, by equal monthly payments of £5 6*s.*, the first payment to be made on November 1, and the remainder on the first day of every succeeding month, until the whole of the said * sum and interest should be fully paid. This bill of [* 513] sale was in accordance with the form in the schedule to the Bills of Sale Act 1883.

The plaintiff also at the same time gave the defendants a promissory note in the following terms: —

"LONDON, September 30, 1885.

"B/Sale. 18 mos.

"£95 12*s.* No. 56,423.

"I promise to pay the London and Westminster Loan and Discount Company, Limited, or order, the sum of £95 12*s.* for value received, by instalments in manner following, that is to say: the sum of £5 6*s.* on the 1st day of November, and the sum of £5 6*s.* on the 1st day in every succeeding month, until the whole of the said £95 12*s.* shall be fully paid, and in case default is made in payment of any one of said instalments the whole of the said £95 15*s.* remaining unpaid shall become due and payable."

The plaintiff having made default in payment of one of the instalments, the defendants entered and seized the goods assigned by the bill of sale.

DENMAN, J., at the trial, held that the bill of sale was void on the authority of *Simpson* v. *Charing Cross Bank*, 34 W. R. 568, and the jury assessed the plaintiff's damages at £400.

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The defendants moved for a new trial on the ground that the learned judge had misdirected the jury in telling them that the bill of sale was void.

The Divisional Court held that they were bound by the decision in *Simpson* v. *Charing Cross Bank*, and refused to grant a new trial.

The defendants appealed.

Channell, Q. C. (Melsheimer with him), for the defendants. The bill of sale is not rendered void by reason of the promissory note having been given. It was given as a collateral security merely, and there is nothing in the statutes which prohibits the grantee from taking such collateral security for the payment of the sum secured by the bill of sale, so long as the pledge of chattels [* 514] is not * affected. The question here arises between grantor and grantee; the right of any third party, such as an execution creditor or trustee in bankruptcy, is not affected. It is submitted that the decision in *Simpson* v. *Charing Cross Bank* was wrong. The two documents are not of necessity to be read together. This note is assignable as a negotiable instrument, and on default being made by the maker in payment of one of the instalments, an indorser would be liable for the whole amount: *Carlon* v. *Kenealy*, 12 M. & W. 139, 13 L. J. Ex. 64. It forms no part of the consideration for the bill of sale; nor is it a "defeasance, condition, or declaration of trust," within s. 10 of the Bills of Sale Act, 1878. It is not affected by any provision of the Bills of Sale Acts. *Ex parte Odell, In re Walden*, 10 Ch. D. 76; 48 L. J. Bankr. 1, does not apply here, because the facts show that the bill of sale and the promissory note were given as separate and independent documents.

Crispe (MacIntyre, Q. C., with him), for the plaintiff. The bill of sale and promissory note form part of the same transaction, and are evidence of one contract between the grantor and grantees. The promissory note imposes an additional condition upon the grantor, under which the grantees can obtain payment of the whole sum in the case of the grantor making default in payment of one instalment. They could not obtain that advantage under the bill of sale. It is such a condition as s. 10, sub-s. 3, of the Act of 1878 requires should appear in the bill of sale and be registered. *Ex parte Southam, In re Southam*, L. R. 17 Eq. 578, 43 L. J. Bankr. 39, shows that a condition not relating to the

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goods required registration under the Bills of Sale Act, 1854. The promissory note is an agreement to pay under certain circumstances a larger rate of interest on the principal sum than the rate of interest payable under the bill of sale. The bill of sale is therefore void.

Channell, Q. C., replied. *Cur. adv. vult.*

Aug. 11. Lord Esher, M. R. In this case the question is whether a bill of sale given by the plaintiff to the defendants is good or bad? In one sense the bill of sale is drawn in
*accordance with the form in the schedule of the Bills of [*515]
Sale Act, 1882, and therefore, if it stood alone, no difficulty would arise with respect to it. But the defendants, who took the bill of sale in that form, at the same time, and as part of the same transaction, took from the plaintiff a promissory note by which the plaintiff promised to pay them £95 12*s.*, — the exact sum representing the principal and interest secured by the bill of sale, — payable by exactly the same instalments and on the same days as in the bill of sale. The promissory note also stipulated that "in case default is made in payment of any one of the said instalments the whole of the said £95 12*s.* remaining unpaid shall become due and payable."

Now a bill of sale is the contract of the parties reduced into writing. That contract may be contained in two documents or only in one. Whether the contract is contained in two documents or only in one must be a question of fact. Having regard to the identity of the figures and dates in the two documents in question here, and to the fact that beyond doubt both documents relate to the same transaction, I come to the conclusion that the parties have reduced their contract into writing, contained both in the bill of sale and the promissory note. I cannot doubt that there was but one contract between the parties contained in the two documents. Now one of the documents has been registered; the other has not. It is necessary to consider whether the unregistered has any effect upon the registered document. Suppose all the money due on the promissory note became payable at once, and was paid, — suppose the note was discounted and got into the hands of a holder for value, and he received payment of the whole sum due on it, — I should say that in equity, if not in law, it would be impossible after that had happened to say that the bill of sale could have any effect.

Therefore, by payment of the promissory note, the bill of sale would be defeated. It would no longer be available as a security against the grantor. Under these circumstances, therefore, I am of opinion that the promissory note constitutes a defeasance of the bill of sale within the meaning of s. 10 of the Bills of Sale Act, 1878, and that defeasance not being contained in the body of the bill of sale, or written upon the same paper, the registration of the bill of sale is void.

[* 516] * LINDLEY, L. J. I am of the same opinion. The effect of the promissory note is to render the goods, which are the security of the bill of sale, liable to be redeemed upon the performance of a condition not contained in the bill of sale, but in another unregistered document; and by s. 10 of the Act of 1878, that condition ought to have been contained in the body of the bill of sale or written on the same paper. I am of opinion that the promissory note constitutes a defeasance within s. 10, and that as the promissory note is neither contained in the body of the bill of sale, nor written on the same paper, the bill of sale is bad. The appeal therefore, must be dismissed.

LOPES, L. J., concurred.

Appeal dismissed.

ENGLISH NOTES.

Section 8 of the Bills of Sale Act 1878 is expressed to be repealed by section 15 of the Amendment Act 1882, but it still applies to bills of sale given otherwise than as security for the payment of money (to which the Act of 1882 does not apply — sect. 3), as well as to bills of sale registered under the Act of 1878 before the 1st of November, 1882. Section 8 of the Act of 1882 re-enacts the corresponding provision of the previous Act requiring the consideration to be truly set forth, with the more stringent sanction that "otherwise such bill of sale shall be void in respect of the personal chattels comprised therein." A small inaccuracy in the statement of consideration is not sufficient to avoid a bill of sale. *Ex parte Winter, In re Fothergill* (C. A. 1881), 44 L. T. 323 (per JESSEL, M. R. p. 324), 29 W. R. 575. Substantial, as opposed to literal, accuracy in the statement of the consideration is all that is necessary. *Roberts* v. *Roberts* (C. A. 1884), 13 Q. B. D. 794, 53 L. J. Q. B. 313, 50 L. T. 351, 32 W. R. 605.

In *Hamlyn* v. *Betteley* (1880), 5 C. P. D. 327, 49 L. J. C. P. 465, 42 L. T. 373, 28 W. R. 956, the bill of sale recited that the grantor, having two executions on his premises, had applied to the grantee to lend him £182 3*s.* to enable him to pay out such executions. The wit-

nessing clause stated the payment of £182 3*s.* as the consideration for the bill of sale. In fact only part of this sum was paid by the grantee to pay off executions, £25 was paid to the grantor's solicitor for money lent and costs, and the remainder was handed over to the grantor. The consideration was held to be truly stated. So in *Ex parte National Mercantile Bank, In re Haynes* (C. A. 1880), 15 Ch. D. 42, 49 L. J. Bank. 62, 48 L. T. 36, 28 W. R. 848, where £550 out of £2050 of the money stated to be the consideration paid to the mortgagor at or before the execution of the instrument was immediately returned to the grantee (a Bank) to meet a certain bill and promissory notes on which he was liable to the Bank, and which were then shortly to become due. So in *Credit Company* v. *Pott* (C. A. 1880), 6 Q. B. D. 295, 50 L. J. Q. B. 106, 44 L. T. 506, 29 W. R. 326, where the consideration stated in the bill of sale as then paid to the grantor, was applied in satisfaction of the balance of account due to the grantee, and no money actually passed. So in *Ex parte Hunt, In re Cann* (1884), 13 Q. B. D. 36, where the greater part of the consideration stated to be "now paid" was not paid to the grantor, but to his solicitors with his consent, in payment of the costs of a contemporaneous transaction. So in *Ex parte Allam, In re Munday* (1884), 14 Q. B. D. 43, 33 W. R. 231, the consideration stated to be "now paid" had been in fact paid on an earlier bill of sale, which turned out to be irregular, and it had been arranged to grant a new bill instead. In all these cases the consideration was held to be substantially and truly stated.

In *Thomas* v. *Searles* (C. A. 1891) 1891, 2 Q. B. 408, 60 L. J. Q. B. 722, 65 L. T. 39, 39 W. R. 692, the debtor being indebted in £235 already secured by an existing bill of sale, executed a second bill of sale of the same chattels to secure £290 on the understanding that out of such sum he should pay off the existing debt. The bill of sale was expressed to be made in consideration of £290 then paid, without alluding to the application of the money, £235 of which was returned to the grantee in satisfaction of the old debt. The consideration was held to be truly stated.

Other cases illustrating the same principle are *Ex parte Bolland, In re Roper* (C. A. 1882), 21 Ch. D. 543, 52 L. J. Ch. 113, 47 L. T. 488, 31 W. R. 102; *Ex parte Nelson, In re Hockaday* (C. A. 1887), 55 L. T. 819, 35 W. R. 264; *Ex parte Johnson, In re Chapman* (C. A. 1884), 26 Ch. D. 338, 53 L. J. Ch. 763, 50 L. T. 214, 32 W. R. 693.

The case of *Mayer* v. *Mindlevich* (1888), 59 L. T. 400, decided by a Divisional Court, CAVE and WILLS, JJ., against the validity of the bill of sale, was acknowledged to be a hard case. The consideration was stated in the bill as a sum of £312 "then owing" by the grantor to the grantee. The facts were that out of the £312 a sum of £126

was, in pursuance of an arrangement between the parties, retained by the grantee to meet certain acceptances of the grantor, which were in fact paid by the grantee when they became due. It does not appear by the report how long the acceptances had to run; but it may be assumed that the time was considerable; otherwise the expression "then owing" would hardly seem to be a substantial misstatement. The actual transaction is very like that in *Ex parte National Mercantile Bank, In re Haynes*, p. 109, *supra*, except that in that case the liability on the instruments was nearly matured. But there the statement of consideration was that the money was paid, and the principle of the decision was that the giving back of the money to provide for the liability on the notes was a collateral transaction. At all events, the decision will not be generally applied to a case where part of the consideration is retained to meet a liability upon running bills. *Richardson* v. *Harris* (C. A. 1889), 22 Q. B. D. 268, 37 W. R. 426, where *Ex parte National Mercantile Bank* is discussed, and its application narrowed to the special facts.

In *Ex parte Rolph, In re Spindler* (C. A. 1881), 19 Ch. D. 98, 51 L. J. Ch. 88, 45 L. T. 482, 30 W. R. 52, the bill of sale was stated to be in consideration of £50 paid by the assignee to the assignor at or before the execution thereof. In fact, only £21 10*s*. was paid, £3 10*s*. being retained by the assignee for the expenses of the deed, and £25 for rent accruing and to accrue during the currency of the security. It was held by the Court of Appeal, reversing the decision of Bacon, J., that the consideration was not truly stated.

Interest on the consideration cannot be due at the date of the execution of the bill of sale; nor are the expenses of the preparation of the documents due until after its execution. Any sum retained by way of interest, expenses, and *a fortiori*, by way of bonus or commission renders the statement of the consideration false. *Ex parte Charing Cross Bank, In re Parker* (No. 7, p. 99, *ante*); *Hamilton* v. *Chaine* (C. A. 1881), 7 Q. B. D. 319, 50 L. J. Q. B. 456, 44 L. T. 764, 29 W. R. 670; *Ex parte Firth, In re Cowburn* (C. A. 1882), 19 Ch. D. 419, 51 L. J. Ch. 473, 45 L. T. 120, 30 W. R. 529; *Ex parte Bernstein* (1885), 74 L. T. J. 245; *Ex parte Challinor, In re Rogers* (C. A. 1880), 16 Ch. D. 260, 51 L. J. Ch. 476, 44 L. T. 122, 29 W. R. 205; *Cohen* v. *Higgins* (1891), 8 Times L. R. 8.

A defeasance is any agreement or clause which prejudicially affects the grantee by diminishing his rights in the estate granted, for instance a power of redemption given to the grantor, or an agreement providing him with a means of avoiding the bill of sale in some other way, *e. g.* by payment of a promissory note taken with the bill of sale, and intended to make one contract along with it. See the principal case

No. 8. *Counsell* v. *London and Westminster Loan, &c. Co.*, p. 104 *ante* (19 Q. B. D. 512, 56 L. J. Q. B. 622, 36 W. R. 53).

An agreement not qualifying the rights of the grantee need not be inserted; for instance, deposit by the grantor of a policy of insurance at the time of executing the bill of sale by way of collateral security. *Carpenter* v. *Deen* (C. A. 1889), 23 Q. B. D. 566. The same as to an agreement that the grantee should first resort to securities other than the bill of sale. *Heseltine* v. *Simmons* (1892), 2 Q. B. 547, 62 L. J. Q. B. 5, 67 L. T. 611, 41 W. R. 67.

In *Ex parte Collins, In re Lees* (1875), L. R., 10 Ch. 367, 44 L. J. Bank. 78, 32 L. T. 106, 23 W. R. 862 a case under the Act of 1854, there was a memorandum signed at the same time with the bill of sale, which stated that a sum of £30 (which in fact represented bonus and interest, though stated as part of the advance made), was to be paid in full, notwithstanding the money secured by the bill of sale might be repaid, or the mortgagee's rights enforced before the expiration of the time limited for payment. The Court held that the memorandum was not a condition, within section 2 of the Act of 1854. This decision was disapproved by the Court of Appeal in *Edwards* v. *Marcus* (C. A. 1894), 1894, 1 Q. B. 587, where the principle is laid down that, in considering whether a defeasance or condition is within section 10, sub-section 3. of the Act of 1878, it makes no difference whether it is in favour of the grantor or grantee.

A verbal stipulation to pay by instalments is a condition within the meaning of the section. *Ex parte Southam, In re Southam* (1874), L. R. 17 Eq. 578, 43 L. J. Bank. 39, 30 L. T. 132, 22 W. R. 456. An agreement not to register the bill of sale is not such a condition. *Ex parte Popplewell, In re Storey* (C. A. 1882), 21 Ch. D. 73, 52 L. J. Ch. 39, 47 L. T. 274, 31 W. R. 35.

The statutory enactment in question may perhaps be regarded as an extension of the common law doctrine that where a debtor conveys his property to a trustee for creditors (so as to vary their priorities at common law), an unlimited power of revocation, combined with retention of possession and secrecy of the deed, is a badge of fraud. *Tarback* v. *Masbany*, (1695), 2 Vern. 510.

No. 9. — DAVIS *v.* BURTON (BLAIBERG CLAIMANT).

(C. A. 1883.)

No. 10. — THOMAS *v.* KELLY.

(H. L. 1888.)

RULE.

To be valid within the Bills of Sale Act of 1882, a bill of sale must be an instrument embodying a simple transaction. It must be substantially to the effect of the statutory form contained in the schedule to the Act; and (with certain specified exceptions) it must not purport to include after-acquired property of the grantor.

Davis v. Burton (Blaiberg Claimant).

11. Q. B. D. 537–543 (s. c. 52 L. J. Q. B. 636, 32 W. R. 423).

Bill of Sale — Statutory Form — Nullity.

[537] By a bill of sale the grantor assigned to the grantee the goods enumerated in the schedule thereto, by way of security for the payment of £300 money advanced and £180 for agreed capitalised interest thereon at the rate of 60 per cent. per annum, making together the sum of £480, by instalments of a certain amount, at certain specified dates. The grantor also covenanted, amongst other things, that she would deliver to the grantee the receipts for rent, rates, and taxes, in respect of the premises on which the goods assigned might be, when demanded "in writing or otherwise;" and also that she would not make any assignment for the benefit of creditors, or file a petition for liquidation or composition with creditors, or do or suffer anything whereby she should render herself liable to be made or become a bankrupt. It was also by the said bill of sale agreed, that if the grantor should break any of the covenants, all the moneys thereby secured should immediately become due and be forthwith paid to the grantee, and it was provided that the chattels assigned should not be liable to seizure for any other cause than those specified in the Bills of Sale Act (1878) Amendment Act, 1882: —

Held, that the bill of sale was void, as not made in the form given in the schedule: —

Held, also, that the bill of sale could not be supported, inasmuch as it enabled the grantee to seize the goods upon a failure by the grantor to produce the receipts for rent, rates, and taxes, after a verbal demand.

Judgment of the Queen's Bench Division (10 Q. B. D. 414) affirmed.

No. 9. — Davis v. Burton, 11 Q. B. D. 537, 538.

Appeal by the claimant from the judgment of the Queen's Bench Division (CAVE and DAY, JJ.,) upon a special case in favour of the execution creditor.

The facts are fully stated in the report of the proceedings [538] before the Queen's Bench Division, 10 Q. B. D. 414, 52 L. J. Q. B. 334, and may be gathered from the above head-note.

June 27, 28. Winslow, Q. C., and A. T. Lawrence, for the claimant. It is provided by the Bills of Sale Act (1878) Amendment Act, 1882, s. 7, sub-s. 1, that the grantee may seize the chattels assigned by a bill of sale for non-performance of a covenant necessary to the maintenance of the security. In the present case the covenants, including that for the production of the receipts for the rent, rates, and taxes, when demanded "in writing or otherwise," were necessary to the maintenance of the security; and the parties could lawfully agree that upon the failure to perform any one of them, the whole amount secured by the bill of sale should become due, and in that case the goods might be lawfully seized under s. 7, sub-s. 1: this construction is not inconsistent with the provisions of sub-s. 4. If the contention for the execution creditor is upheld, no bill of sale will be good which provides for the payment of interest by instalments. Chitty, J., in *Wilson* v. *Kirkwood*, 27 Sol. Jour. 296; Weekly Notes (1883), 40, 44, appeared to think that a bill of sale very similar in form to that now before the Court was valid; he pointed out that the language of s. 9 did not require the form given in the schedule to be literally adopted. It is true that under the terms of this bill of sale a demand for payment may be made immediately after the execution of the bill of sale, if there be a failure to perform any one of the covenants, and the grantee may thereby at once get payment of the whole of the capitalised interest; but that is a step which he is entitled to take for the maintenance of his security.

[FRY, L. J. Surely the form given in the schedule requires that the interest shall be computed year by year, or month by month, or by other fixed periods, as the parties may agree upon.]

The Bills of Sale Act (1878) Amendment Act, 1882, cannot have been intended to revive the laws against usury, which have been long abolished: 17 & 18 Vict. c. 90. No doubt the schedule must be construed as having an application to all bills of sale arising out of loans of money; but the statute is very loosely

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[* 539] * drawn; the only requisites of a bill of sale are (1), that the consideration shall be truly stated; (2), that it shall, substantially, follow the form in the schedule; and (3), that the statutory powers as to entry and seizure shall be strictly observed; but the parties may agree as to the terms and the time at which the amount may become payable. S. 7, sub-s. 1, clearly allows entry and seizure by the grantee upon non-payment of the money due and upon non-performance of the covenants; and this enactment renders valid the provisions of this bill of sale.

Meadows White, Q. C. (C. C. Scott, with him), for the execution creditor. Every bill of sale must be in accordance with the form in the schedule, and must be precise as to the liability of the grantor; but the bill of sale in the present case does not comply with those conditions; for the capitalised interest is not computed rateably, and it is uncertain when the grantor may be called upon to pay the whole of it. [He was then stopped.]

A. T. Lawrence did not reply.

Brett, M. R. The Bills of Sale Act (1878) Amendment Act, 1882, will give rise to many discussions on questions of law: its provisions have been drawn with stringency against the holders and the takers of bills of sale. Whatever may be thought of the wisdom of this legislation, I feel myself bound to come to the conclusion that the object of the statute was twofold: first, that the borrower should understand the nature of the security which he was about to give for the debt due from him; and, secondly, that a creditor upon merely searching the register should be able to understand the position of the borrower, and should not be compelled to go to a solicitor in order to get counsel's opinion as to the meaning of a security already created by the borrower. These objects are carried out by s. 9, which requires that bills of sale shall, as nearly as possible, be in the form given in the schedule; that form is very simple, and an intending creditor has the opportunity of ascertaining how far he ought to trust the borrower, and he need not take advice as to the document before him. The legislature intended that the loan of money upon the security of a bill of sale shall be a simple transaction; a bill of sale given by way of security for the payment of money shall be void [* 540] against * all the world, even as against the grantor, if it does not comply with the provisions of s. 9. That enactment provides that a bill of sale shall be "in accordance with the form

in the schedule." That must mean that every bill of sale shall be substantially like the form in the schedule. Nothing substantial must be subtracted from it, and nothing actually inconsistent must be added to it. The real principle of the form is that whatever may be the consideration for the sum of money secured by the bill of sale, a fixed sum shall be stated therein in figures and in direct terms, and that sum with rateable interest thereon shall be recovered by the holder; that interest shall be calculated up to the time when the sum mentioned as the principal amount shall be called in. The grantee must not attempt to alter the sum secured, and nothing must be added to it except by way of rateable interest. The statute does not prevent payment of the principal sum by instalments together with interest from time to time falling due: and at the time of paying each instalment interest at the agreed and named rate may be added. And I do not think that the statute prevents the payment of interest by instalments becoming due at fixed periods. But if upon failure to pay the first instalment the whole of the interest, which the grantee is ultimately upon performance of the contract to receive, becomes immediately payable, the bill of sale would, I think, be contrary to the form in the schedule of the Act; for interest is payable upon money only so long as it is due, and it is contrary to the nature of interest to make it payable before it is due, on the ground that a condition has not been performed, or because a certain event has happened; that is an alteration of, and a departure from the form given in the schedule to the Act. There is, therefore, a blot upon the bill of sale before us; for upon breach of the covenants, it may be immediately after the execution of the bill of sale, the sum secured may be altered into a larger sum by means of what is called "capitalised interest:" in truth, it is not interest at all, because the holder of the bill of sale may at any time repay himself the £300 and take the £180 besides. The effect of the provisions is that upon breach of any of the covenants he shall be paid those two amounts in full. This consideration is alone sufficient to uphold the judgment of the Queen's Bench Division.

And I * think the other blot pointed out by CAVE, J., [* 541] fatal; it was intended by the parties to the bill of sale to allow the grantee to seize in a manner not permitted by the statute. There may be further blots upon this bill of sale, but as it is unnecessary to decide upon them, I think it better not to express

any opinion as to them. The judgment of the Queen's Bench Division must be affirmed.

Lindley, L. J. I am of the same opinion. The questions to be decided are: first, what is the true construction of the statute? and, secondly, does this bill of sale conform to it?

The material sections of the Act for us to decide upon are the 7th and 9th; a bill of sale is rendered void by s. 9, unless it is in the form given in the schedule. Various kinds of forms of bills of sale exist; but the legislature has fixed upon one form, and every bill of sale must be "in accordance with" it. When we look at the form given by the statute, we see what it contains: it is framed with reference to s. 7. A better precedent might have been adopted; but the provisions of the statute must be worked out by courts of law. The bill of sale before us has the vice of asking for too much. It allows the grantee to seize under circumstances under which the Act does not permit him to avail himself of his security; the form and the provisions of this bill of sale render s. 7 of the statute nugatory. That is the real and fatal blot in the claimant's case, and it is one which he cannot do away with.

Fry, L. J. I am of the same opinion. The meaning of s. 9 is that every bill of sale which is not substantially "in accordance with the form in the schedule," shall be void. The schedule provides that the grantor shall assign his chattels subject to redemption upon payment of a fixed sum and interest thereon. The interest secured by every bill of sale must be rateable, otherwise there will be a variance in substance from the form given in the schedule. That form allows the rate of interest to be such as may be agreed upon; but whatever the amount may be, the interest must be rateable; in the bill of sale before us the interest is in one sense rateable, but, if a breach of the cove-
[* 542] nants is * committed, the rate is varied because the whole amount becomes immediately payable. The legislature has provided for two purposes that the rate of interest must be ascertained: first, that the borrower may be protected; secondly, that publicity may be given so that persons dealing with the borrower may know what rate of interest he is bound to pay. A fixed sum by way of interest may be lawful. The argument for the claimant overlooks the fact that the legislature intended to make all bills of sale certain in their terms, and therefore that certainty is very material in drawing bills of sale; but this bill of sale leaves it

uncertain at what time the grantee may become entitled to the whole of the capitalised interest. This is not a case to which the maxim applies, *Id certum est quod certum reddi potest.* Then is the bill of sale contrary to the provisions of s. 7? That section applies to all bills of sale under the Act. It is said that the provision, which causes the money to become due upon failure to produce the receipts, is lawful. The suggested mode of construing s. 7 opens the door to the insertion of every clause which it was intended to exclude; the bill of sale before us sins against s. 7, sub-s. 4, because it enables the grantee, who has lent the money, to seize the goods upon a failure to comply with a verbal demand for the production of receipts for rents, rates, and taxes, and this is a stipulation which is impliedly forbidden by sub-s. 4. It is said that this is only a covenant for the maintenance of the security, and is therefore good within sub-s. 1, which allows the goods to be seized whenever the money secured by the bill of sale is due; but a covenant of that kind cannot be good, if it is prohibited by the legislature. The goods cannot be seized under sub-s. 1, upon the plea, that the money is due owing to a failure to perform a covenant which is unlawful. The covenant which I have mentioned is bad, because it alters the relation between the parties which the legislature intended to allow. The legislature has declared that a covenant of this kind shall be void, and the parties cannot alter the effect of the Act of Parliament. The provision that the money shall become due upon the failure to comply with an illegal covenant is bad, and cannot be supported under sub-s. 1. Several other objections may perhaps be raised; but as to these I say nothing. The bill of sale before us sins
* against ss. 7 and 9, and therefore the judgment of the [* 543] Queen's Bench Division was right and ust be affirmed.

Judgment affirmed.

Thomas v. Kelly.

58 L. J. Q. B. 66–74 (s. c. 13 App. Cas. 489; 60 L. T. 114; 37 W. R. 353).

Bill of Sale.— Assignment of after-Acquired Chattels.— Statutory Form.— Nullity.

A bill of sale given by way of security for the payment of money purported to assign certain chattels specifically described in the schedule thereto, together with all other chattels the property of the grantor then in or about certain premises, and also all chattels which might during the continuance of the security be in or about the same or any other premises of the grantor; —

No. 10. — Thomas v. Kelly, 58 L. J. Q. B. 67.

Held, by the House of Lords, affirming the decision of the Court of Appeal, that it is an essential feature of the statutory form of bills of sale, under the Act of 1882 (45 & 46 Vict. c. 43), that all the chattels assigned should be described in the schedule, and that the bill of sale in question was void *in toto* under the 9th section of the Act, for non-compliance with the form in that respect.

[67] This was an appeal from a decision of the Court of Appeal, reported *sub nom. Kelly* v. *Kellond*, 57 L. J. Q. B. 330; 20 Q. B. D. 569, which affirmed one of a Divisional Court.

By a bill of sale, Kellond assigned to the appellant, by way of security for the payment of a certain sum of money and interest, all the chattels specifically described in the schedule, together with all other chattels and things, the property of the mortgagor, then in and about certain premises. And also all chattels and things which might at any time during the continuance of the security be in or about the same or any other premises of the mortgagor (to which the said chattels or things or any part thereof might have been removed), whether brought there in substitution for, or renewal of, or in addition to, the chattels and things thereby assigned.

The respondents recovered judgment from the grantor, and in execution thereof some of the chattels comprised in the bill of sale were seized by the sheriff of Middlesex. The appellant thereupon claimed the chattels, and the sheriff interpleaded. The proceedings were transferred, under section 17 of the Judicature Act, 1884, to the Marylebone County Court. The appellant abandoned all claim to goods not specifically described in the schedule to the bill of sale.

The County Court Judge held the bill of sale void under section 9 of the Bills of Sale Act, 1882. His decision was affirmed by the Divisional Court, but leave to appeal was given. The Court of Appeal affirmed the decisions of the Courts below.

A preliminary question was now raised, whether any appeal lay from the Divisional Court. It was contended for the respondents that the right to appeal had been taken away by the Appellate Jurisdiction Act, 1876 (39 & 40 Vict. c. 59), s. 30. On the other side, *Crush* v. *Turner*, 47 L. J. Ex. 639; 3 Ex. D. 303, was relied upon, and it was pointed out that in that case, and in *The Manchester, Sheffield, and Lincolnshire Railway Co.* v. *Brown*, 53 L. J. Q. B. 124; 8 App. Cas. 703, and *The Great Western Railway Com-*

pany v. *Bunch*, 57 L. J. Q. B. 361; 13 App. Cas. 31; "Carrier," No. 15, *post*, appeals were carried to the House of Lords and there decided, the question of jurisdiction, however, not having been raised.

The Lords were of opinion that *Crush* v. *Turner* was rightly decided, and the appeal was ordered to be argued on the merits.

Sir H. Davey, Q. C., and Jelf, Q. C. (W. H. Clay and C. C. Scott with them), for the appellant. The decision of the Court of Appeal practically strikes sections 4, 5, and 6 out of the Act of 1882, for it is impossible to give effect to those sections if the schedule is to describe specifically all that is assigned. *Ex parte Jardine*, L. R., 10 Ch. 322; 44 L. J. Bankr. 58, and *Witt* v. *Banner*, 56 L. J. Q. B. 550; 57 L. J. Q. B. 141; 19 Q. B. D. 276; 20 Q. B. D. 114. It is enough if there is a substantial compliance with the form so far as it is applicable. *Roberts* v. *Roberts*, 53 L. J. Q. B. 313; 13 Q. B. D. 794. A bill of sale is none the less in accordance with the form if it contains additional matter not included in the form but necessary to convey effectually that which the Act says may be conveyed. *Ex parte Stanford, In re Barber*, 55 L. J. Q. B. 341; 17 Q. B. D. 259, was wrongly decided. It lays down an incorrect canon of construction and carries it to extravagant lengths. Section 4 contemplates the schedule not containing a description of substituted chattels. One section of an Act cannot repeal another. *Castrique* v. *Page*, 13 C. B. 458; 22 L. J. C. P. 145. The whole Act must be read, and a construction adopted which gives reasonable effect to all its provisions. It was clearly intended that
[*68] *substituted fixtures, &c., should pass by a bill of sale (section 6, sub-section 2). Such chattels must, therefore, be put either in the body of the deed or in the schedule. As they do not admit of specific description the body of the deed is the proper place for them.

Lumley Smith, Q. C., and Rose-Innes, for the respondents. What is meant by saying that a bill of sale must be "in accordance with" the statutory form? Two interpretations were suggested in *Ex parte Stanford*, and if either be adopted, this bill of sale is bad. Fry, L. J., held that absolute uniformity of form was made compulsory, except so far as a variation is allowed by the words in italics. The other members of the Court thought that any form would be sufficient which had the same legal effect as the statutory form. One object of the Act was to protect borrowers; hence it

should be construed strictly against lenders. *Davis* v. *Burton*, No. 9, p. 112, *ante*; 11 Q. B. D. 537; 52 L. J. Q. B. 636; *Ex parte Parsons*, 55 L. J. Q. B. 137; 16 Q. B. D. 532; *In re Williams*, 53 L. J. Ch. 500; 25 Ch. D. 656; and *Melville* v. *Stringer*, 53 L. J. Q. B. 482; 13 Q. B. D. 392.

[The Lord Chancellor. The form requires payment by equal instalments. Is this obligatory?]

The contrary has been held in *In re Cleaver*, 56 L. J. Q. B. 197; 18 Q. B. D. 489; *In re Morritt*, 56 L. J. Q. B. 139; 18 Q. B. D. 222; and *Furber* v. *Cobb*, 56 L. J. Q. B. 273; 18 Q. B. D. 495.

The object of requiring a schedule was that any one should be able to see at a glance what were the goods assigned. The legal conveyance and the inventory were to be kept distinct.

As to the effect of an assignment of after-acquired property, see *Collyer* v. *Isaacs*, 51 L. J. Ch. 14; 19 Ch. D. 342; and *Joseph* v. *Lyons*, 54 L. J. Q. B. 1; 15 Q. B. D. 280.

Levy v. *Polack*, 52 L. T. 551, was also referred to.

Jelf, Q. C., in reply, as to the interpretation of inconsistent provisions in a statute, cited *Ebbs* v. *Boulnois*, L. R., 10 Ch. 479; 44 L. J. Ch. 691; and *Pretty* v. *Solly*, 26 Beav. 606 610.

Cur. adv. vult.

The Lord Chancellor (Lord Halsbury). I cannot say that any construction of this obscure statute seems completely satisfactory or gives an adequate solution to all the difficulties suggested in the argument. I certainly do not myself mean to express any opinion upon the numerous cases which have been brought under review, except so far as may be necessary to determine this case.

I do not think it can be seriously doubted that the statute did intend to make void absolutely, and not merely against all but the grantor, every bill of sale given by way of security for money, unless made in accordance with the form in the schedule to the Act. Some faint effort was made in the argument to suggest that the word "void" in section 9 must be read as a repetition of the same word in sections 4 and 5, and that, therefore, we must by construction add the words "except as against the grantor." That such a construction would involve the necessity of adding words, and that it would involve the necessity of supposing that the Legislature meant to express the same thing in the same statute by two wholly different sets of phrases, would be enough to con-

No 10. — Thomas v. Kelly, 58 L. J Q. B. 68, 69.

demn it as untenable. But whatever else is obscure in the statute, this is plain, that it did intend to place a restriction upon the form of a bill of sale; that it did intend to make some departure from form fatal to the bill of sale which should contain it.

Further, I think that the 9th section must be construed to enact not only what a bill of sale must contain, but also what it must not contain; so that the statute must be understood to have prohibited bills of sale of personal chattels as security for money to which the form given by the * statute is not [* 69] appropriate. It is, however, true that the form given is so far elastic that the statute does not make every word imperative, but provides that no form shall be permitted except one made "in accordance with the form in the schedule." The degree of latitude involved in these words it would be difficult, perhaps impossible, to define. It is, in my view, only necessary to apply them to the concrete case, and applying the test of the statute as a test to see whether the bill of sale challenged is within or without the line prescribed by the statute.

No one, of course, can be insensible to the difficulties so acutely pressed upon your Lordships by both the learned counsel who argued the case for the appellant; and undoubtedly the only answer that I can find is that suggested by Lord Justice Fry; and that answer has this to recommend it, that if adopted it does give a meaning to each part of the statute, and that the distinction between the body of the deed and the schedule is one well warranted by a comparison of the wording of the 4th, 5th, and 9th sections, in which certainly the bill of sale is distinguished from the schedule to which the earlier sections refer.

I own I have had great difficulty in dealing with the second sub-section of section 6. It undoubtedly seems to indicate that goods not capable of specific description, and to be afterwards supplied, may nevertheless be so included in the security as yet not to make the bill of sale void. But if one supposes the assignment to be of all such goods as are the subject of the proviso in question, and that in the schedule they were properly described, but added thereto were the words which give rise to the argument, — namely, such goods as should be in substitution thereof, — the form of the deed would be in accordance with the statute, though the schedule should contemplate substituted articles.

I have come to the conclusion, not without great difficulty, that

it is possible to suppose a present assignment to apply to goods properly described as presently existing goods, but which, when one looks to the schedule, one finds are, nevertheless, not presently assigned, but are to be substituted for them. It is to be observed that the 4th and 5th sections are only referred to in the sixth, and the statute must be supposed to have some meaning in this specific reference.

Applying the principles I have suggested, there can be no difficulty in the decision of this case. An essential condition of the deed appears to me to be a present assignment of goods capable of specific description and present assignment (see definition in the Act of 1878). It is obvious that a bill of sale which purports to assign after-acquired property, whether in the form of a covenant (its true legal effect), or as stated specifically in words as part of the security, is not in accordance with the "form," and therefore void. I doubt whether the reason why it is void is adequately given when it is said that such property is incapable of specific description. I think it also introduces a covenant not in accordance with the form; and the form is here, in my judgment, intended to be exhaustive of what may or may not be included in such a deed.

This bill of sale purports to assign all the chattels specifically described, and then "all other chattels and things, the property of the mortgagor, now in and about the premises known as 119 Shirland Road, Paddington, in the county of Middlesex. And also all chattels and things which may at any time during the continuance of this security be in or about the same or any other premises of the mortgagor (to which the said chattels or things or any part thereof may have been removed), whether brought there in substitution for, or renewal of, or in addition to the chattels and things hereby assigned by way of security for the payment of the said sum of £40, and interest thereon at the rate of sixty per cent. per annum." It would be impossible to imagine words apparently more designedly contrived to sweep up everything of which the mortgagor might at any time thereafter become possessed. It appears to me that, whatever else was permitted by the bills of sale contemplated by the statute, it never could have been intended that words so wide, whatever legal effect may be given to such words, could have been permitted so as to render it possible for a lender of money to have a claim against all future property, either on the [* 70] premises upon which the assigned * goods then were, or on

any other premises upon which those goods, or any part of them might thereafter be, — any goods, not only in substitution for or renewal of, but in addition to any goods that the mortgagor was then possessed of. I have therefore no difficulty whatever in saying that this bill of sale is absolutely outside the limit of interpretation which can be properly given to the language in the form prescribed by the statute, and consequently in holding that this bill of sale is void. I accordingly move your Lordships that the order appealed from be affirmed, and that this appeal be dismissed, with costs.

Lord FITZGERALD. The bill of sale on the validity of which your Lordships are called on now to decide, has written thereon a schedule containing an inventory of some, but not all, "of the personal chattels comprised in it," and though objections have been raised to that schedule on the allegation that in some particulars it is insufficient, yet we assume for the purposes of the present case that, so far as it extends, the personal chattels "are specifically described in the said schedule." The instrument, however, professes to assign other goods not described in the schedule, — namely, No. 1, in the passage which the LORD CHANCELLOR has just read, "all other chattels and things, the property of the mortgagor, now in and about the premises known as 119 Shirland Road," and No. 2, which may be called an attempt to assign after-acquired property, — "and also all chattels and things which may at any time during the continuance of this security be in or about the same or any other premises of the mortgagor (to which the said chattels or things or any part thereof may have been removed), whether brought there in substitution for, or renewal of, or in addition to, the chattels and things hereby assigned by way of security for the payment of the said sum of £40 and interest thereon at the rate of sixty per cent. per annum." The schedule does not include any description of the personal goods comprised in No. 1, and does not, and it obviously could not, give any specific description of the subjects which might come within No. 2 as after-acquired property.

We assume for the purposes of the present decision that if it had not been for the assignment in the bill of sale of Nos. 1 and 2, the instrument and the schedule to it would have been sufficient within the provisions of section 9 of the Act of 1882, and the bill of sale in accordance with the form given in the schedule to that Act.

No. 10. — Thomas v. Kelly, 58 L. J. Q. B. 70, 71.

The question is whether those additional matters which are not to be found in the statutable form render it invalid as not being "made in accordance with the form in the schedule."

Thirty-four years have elapsed since the passing of the Act of 1854. It was amended by the Act of 1866, and the two were repealed by the Act of 1878, which is still the leading Act, though altered and amended in some particulars by the Act of 1882. The title and preamble of the Act of 1854, carried on as they are by the subsequent Acts, still afford some light. The whole code is designed to prevent frauds on creditors (that is, the public), and also to protect the borrower from the exercise of oppressive powers on the part of the lender.

The Act of 1854 seems to have dealt only with bills of sale of existing goods capable of being seized and taken possession of, and which might be the subjects of "ostensible ownership." It does not seem to have contemplated that a bill of sale as such could apply to goods not in existence, and which might never exist. The definitions in that Act of "bills of sale" and "personal chattels," and the exclusions from these definitions, lead to that conclusion. The definition of "bill of sale" in the Act of 1878 is very large, and intended to meet the devices by which the previous Acts had been evaded; but, according to judicial decision, it was interpreted to include as bills of sale instruments which, departing from the old simplicity of the common law, professed to assign after-acquired property. The amending Act of 1882 was probably intended, *inter alia*, to limit the evils arising from attempts to bind future-acquired property.

The bill which eventuated in the Act of 1882 received the most critical consideration from the most capable men of the day, both in 1881 in the House of Commons, and in 1882 in select [*71] committees of both *Houses of Parliament, aided by the answers to a circular sent to Judges and Registrars as to the operation of, and defects, if any, in the Act of 1878. It was apparently intended to put an end to the almost interminable legal controversies which had arisen on the previous Acts. The Act of 1882 has not had in the latter respect the effect which the Legislature intended.

We have now to consider some of the provisions of that Act. It is an amending Act, and, so far as is consistent with the tenor thereof, is to be construed as one with the principal Act (the Act of 1878).

No. 10. — Thomas v. Kelly, 58 L. J. Q. B. 71.

"The expression 'bill of sale' is to have the same meaning as in the Act of 1878 except as to bills of sale or other documents mentioned in section 4 of the Act of 1878, which may be given otherwise than by way of security for the payment of money," to which the provisions of the Act of 1882 are not to apply. It leaves such instruments to the Act of 1878; the Act of 1882 is not to apply to them.

We thus see that the provisions of the Act of 1882 which your Lordships have now to interpret are limited to the ordinary and simple transactions of every-day life specified in section 9. A sale of goods, a grant or mortgage of goods, could at common law be effected without writing; but it should be accompanied by possession; and an assignment of non-existent property, that is, of property which might or might not be acquired in the future, was at common law inoperative; but if for value, it was in equity regarded as a contract, of which specific performance might be enforced when, if ever, the thing came into actual existence.

The bill of sale before your Lordships is one "made by way of security for the payment of money," which section 9 declares "shall be void unless made in accordance with" the statutable form. The bill of sale is to be between the parties directly, — that is to say, between on the one hand the borrower, and on the other the lender; and the "form" seems to have been intended to attain, first, certainty and simplicity; secondly, the statement of the consideration, a sum in moneys numbered and (reading the language of the form) "now paid to" the grantor, the receipt of which the grantor thereby acknowledges; thirdly, that the assignment is confined to the chattels and things specifically described in the schedule thereto annexed; fourthly, that it shall be by way of security for the same sum then advanced, with interest at a specified rate, to be repaid to the grantee with the interest then due by equal payments on fixed days; fifthly, the insertion of the terms which the parties have agreed to for the maintenance of the security or its defeasance; and sixthly, the incorporation by reference of the provisions of section 7 which restrict the right of the grantee to take possession.

Does the bill of sale before your Lordships conform to the provisions of the statute? Is it in accordance with the "form"? I do not think that the Legislature intended by the words "in accordance" a literal conformity with the statutable form of the bill of sale. I adopt the view of Lord Justice Bowen, that it is suffi-

cient if the bill of sale is substantially in accordance with, and does not depart from, the prescribed form in any material respect.

I concur in the opinion expressed by the noble and learned Lord on the woolsack (and on this I have never had any doubt), that this bill of sale is not in conformity with the statute, and varies from the "form" in material and substantial particulars, — I have already alluded to them, and the noble and learned Lord has stated them in detail. The result follows that it is void against all parties.

In *Ex parte Stanford* Lord Justice Bowen, in laying down a rule of construction as the judgment of the whole six Judges of the Court of Appeal, says: "A divergence only becomes substantial or material when it is calculated to give the bill of sale a legal consequence or effect either greater or smaller than that which would attach to it if drawn in the form which has been sanctioned;" and he adds: "We must consider whether the instrument as drawn will, in virtue either of addition or omission, have any legal effect which either goes beyond or falls short of that which would result from the statutory form." That he states to be the rule of construction. I would hesitate to criticise a proposition coming [* 72] from a tribunal so * important and so weightily constituted.

I am not now called on to do so; nor shall I say more than that I am not now to be taken as adopting in all its terms that rule of construction as affording an inclusive as well as an exclusive test.

As to the question whether the general words of section 9 are to be restrained by the language of sections 4 and 5, I have only to say that I agree with your Lordships and with the reasoning of Lord Justice Fry in the present case, and I can add nothing to what the learned Lord Justice has there so well said.

The bill of sale in the present case is on a printed form, and contains in print the passages which have raised the objection. It seems like a sweep net adopted after the decision in *Roberts* v. *Roberts* in 1884; but now the decision of the Court of Appeal in this case, affirmed by your Lordships, prohibits in effect the assignment of future-acquired property in bills of sale coming within section 9 of the Act of 1882; and I may add that it accomplishes a most desirable result.

Lord Macnaghten. To say that the Bills of Sale Act (1878), Amendment Act, 1882, is well drawn, or that its meaning is rea-

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sonably clear, would be to affirm a proposition to which I think few lawyers would subscribe, and which seems to be contradicted by the mass of litigation which the Act has produced, and is producing every day. For my own part the more I have occasion to study the Act, the more convinced I am that it is beset with difficulties which can only be removed by legislation.

At the same time I cannot help thinking that some of the puzzles which were presented in the course of the argument disappear if the scope of the Act is steadily kept in view.

The Act of 1882 (as well as the Act of 1878) is concerned only with assurances of personal chattels. The expression "personal chattels" is strictly defined in the Act of 1878. The Act says: "The expression 'personal chattels' shall mean goods, furniture, and other articles capable of complete transfer by delivery, and (when separately assigned or charged) fixtures and growing crops." Then follows an enumeration of things which, subject to one exception in the case of trade machinery, are not included in the expression "personal chattels." The Act of 1882 adopts the definition in the earlier Act, but deals with it in certain particulars by way of explanation or modification. As regards growing crops, it explains, with perhaps unnecessary caution, that the expression is confined to crops actually growing at the time when the bill of sale is executed; as regards fixtures separately assigned or charged (with which the Act couples plant and trade machinery), it seems to extend the definition of personal chattels to fixtures, plant, and trade machinery used in, attached to, or brought upon any land, factory, or other place, in substitution for any of the like fixtures, plant, or trade machinery specifically described in the schedule to the bill of sale. This appears to be the meaning of the Act, because section 4 clearly imports that a bill of sale to which the Act of 1882 applies may "have effect" in respect of the chattels mentioned in section 6, sub-section 2. That can only be if such chattels are brought into the category of personal chattels as defined by the Act.

Notwithstanding a remark made by Lord CHELMSFORD in *Holroyd* v. *Marshall*, 10 H. L. Cas. 191, 227; 33 L. J. Ch. 193, 198, which obviously was not required for the decision of the case, I am disposed to think that the expression "capable of complete transfer by delivery" means capable of such transfer at the time when the bill of sale is executed. That was the view of the Divisional Court,

consisting of the present MASTER OF THE ROLLS and Mr. Justice ARCHIBALD, in *Brantom* v. *Griffits*, 45 L. J. C. P. 588; 1 C. P. D. 349. The MASTER OF THE ROLLS there said: "The Act" — it was the Act of 1854 — "only applies to things which, at the moment when the bill of sale is given and the provisions of the Act are to be applied to it, might be delivered to the assignee, and are not, but are left in the enjoyment of the assignor." Mr. Justice [*73] ARCHIBALD concurred. "The application of the statute," * he said, "must be limited to articles of which possession could have been given to the vendee, and which are capable of removal." I am the more inclined to adopt this view of the meaning of the expression "capable of complete transfer by delivery" because the decision in *Brantom* v. *Griffits*, which was given in 1876, was standing unchallenged when the Act of 1878 was passed, and must have engaged the attention of the framers of that Act.

If this view be correct, the definition of "personal chattels" excludes future or after-acquired chattels, for the simple reason that they are not capable of transfer by delivery.

Under the Act of 1878, an assurance of things not within the description of personal chattels, as defined by the Act, was none the better for being in a registered bill of sale. On the other hand, a bill of sale under the Act of 1878 was none the worse for including in its terms an assurance of things not coming within the definition of personal chattels.

The question on this appeal is, whether under the Act of 1882 a bill of sale is void which includes in the body of the instrument an assignment of future or after-acquired chattels, as well as an assignment in general terms of existing chattels in or about the mortgagor's premises other than those specifically described in the schedule. In the present case the future or after-acquired chattels do not seem to be within the protection of section 6. But, in my view of the Act, nothing turns upon that circumstance.

The Act gives a form of bill of sale, and declares that "a bill of sale, made or given by way of security for the payment of money by the grantor thereof, shall be void unless made in accordance with the form in the schedule to this Act annexed" (section 9).

This section seems to me to deal with form, and form only. So purely is it, I venture to think, a question of form that I should be inclined to doubt whether a bill of sale would not be void which omitted the proviso referring to section 7, though I cannot see that

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the omission would alter the legal effect of the document in the slightest degree, or mislead anybody It has been held — and I think rightly — that section 9 does not require a bill of sale to be a verbal and literal transcript of the statutory form. The words of the Act are, "in accordance with the form," not "in the form." But then comes the question, When is an instrument, which purports to be a bill of sale, not in accordance with the statutory form? Possibly when it departs from the statutory form in anything which is not merely a matter of verbal difference. Certainly I should say, when it departs from the statutory form in anything which is a characteristic of that form. Now it seems to me that if there is any one thing which is plainly and obviously a characteristic of the statutory form it is this: that in the body of the instrument there is no substantive description of the things intended to be assigned. Following the directions contained in section 4, the statutory form relegates to a schedule the description of the personal chattels intended to be comprised in the bill of sale.

It probably would not be difficult to suggest reasons, more or less satisfactory, why the Legislature should require an inventory of the personal chattels comprised in a bill of sale, and require that inventory to be contained in a schedule. It is convenient to have the things which are the subject of assignment specified in a list, so that one may see at a glance what is and what is not included. Besides, it has become very much the practice to use printed forms of bills of sale. An illiterate person might naturally take it for granted that everything that was in print was right; and then he might afterwards find himself bound to terms which were never really brought to his notice, especially since the Act of 1882 has repealed the provision requiring the attestation of a solicitor, and a certificate by the solicitor that he had explained the effect of the bill of sale to the grantor. However that may be, whatever reasons may have influenced the Legislature, it seems to me clear that the Act of 1882 does require that the schedule to a bill of sale shall contain, and that the body of the bill of sale shall not contain, a description of the personal chattels comprised therein.

There was a very formidable argument * urged on behalf [* 74] of the appellant against this view, which it is impossible to pass over in silence. It was to this effect: section 4 does not avoid a bill of sale as against the grantor in respect of personal chattels not specifically described in the schedule. Section 5 does

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not avoid a bill of sale as against the grantor in respect of personal chattels specifically described in the schedule, of which the grantor was not the true owner at the time of the execution of the bill of sale. Such assignments are therefore permissible as against the grantor in a bill of sale. Room, then, must be found for them somewhere, — either in the schedule or in the body of the instrument. You cannot put them in the schedule if you follow the statutory form. Besides, the body of the deed is the natural and proper place, it was said. If the statutory form does not make provision for including that which may be lawfully included, you must adapt the form to meet the particular case. That, it was urged, was common sense. This, I think, was the substance of the argument. For the present purpose it is only necessary to determine that the description of all the chattels intended to be comprised in a bill of sale must be found in the schedule.

I desire not to be understood as expressing an opinion on any question not immediately and directly before the House. But I am inclined to think that the difficulty suggested is more apparent than real, and that the range of the exceptions in sections 4 and 5 is extremely limited. The Act, as I have said, deals only with personal chattels as defined by the Acts of 1878 and 1882. That definition, if I am right, excludes from the category of personal chattels future or after-acquired chattels, except in the one case mentioned in sub-section 2 of section 6; chattels falling within that case are referred to in section 5 as "specifically described," though the description of such chattels cannot be made more specific than it is in section 6, except that the articles for which they may be substituted would of course be specified. The Act, therefore, seems to recognize the description in section 6 as a specific description. It seems to follow that chattels which come under the description contained in section 6 would find their proper place in the schedule. The other personal chattels referred to in section 5, of which the grantor may not be the true owner, must be chattels actually in existence, in reference to which the expression "true owner" is more appropriate than to things of which there can be no owner, true or apparent. They are, therefore, certainly capable of being specifically described. They, too, would find their place in the schedule. The exception in section 4 only extends to personal chattels which admit of specific description, but by some mistake or inadvertence are not so described. The schedule seems to be

the proper place for them. Whether a bill of sale, overladen in its schedule with a description of things for which the statutory form has no room, and for which the Act makes no provision, would or would not be held to be in accordance with the statutory form, is a matter on which I express no opinion.

The explanation I have offered may possibly be a solution of the difficulty on which the argument of the learned counsel for the appellant was mainly founded. There may be other explanations. But even if the difficulty should seem insoluble, that circumstance would not, in my opinion, authorize a departure from the comparatively clear provisions of the Act in regard to the form of the bill of sale.

For the reasons I have given I concur in thinking that the appeal ought to be dismissed.

Order appealed from affirmed, and appeal dismissed with costs.

ENGLISH NOTES.

The object of section 9 of the Bills of Sale Act 1882 is that every bill of sale given by way of security should be a simple transaction, so that the borrower may understand the nature of the security, and a creditor may know the borrower's position on merely searching the register. To attain compliance with the spirit of the section, a bill of sale must conform substantially, though not literally, with the schedule to the Act. In *Ex parte Stanford, In re Barber* (C. A. 1886), 17 Q. B. D. 259, 55 L. J. Q. B. 341, 54 L. T. 894, 34 W. R. 287, 507, the full Court of Appeal laid down the test, that a bill of sale conforms to the schedule when it produces not merely the like effect, but the same effect, — *i. e.*, the legal effect, the whole legal effect, and nothing but the legal effect, which it would produce if cast in the exact mould of the schedule.

Analyzing the chief features of the statutory form, they appear to be as follows: —

1. The Parties. The grantee must be named and described so as to be easy of identification without the aid of extrinsic evidence; and payment should be secured to the grantee. Debts due to several persons should not be joined — even under cover of a further advance by all the creditors with a separate covenant of payment to each. Thus, where a bill of sale was made between the mortgagor and four sets of mortgagees, to secure different sums owing to each, and a further advance by them all, the grantor covenanting separately with each mortgagee to pay on demand the sum owing to each mortgagee, power being given to the mortgagees to realise the security in default; the bill of

sale was held void for deviation. *Melville* v. *Stringer* (C. A. 1884), 13 Q. B. D. 392, 53 L. J. Q. B. 482, 50 L. T. 774, 32 W. R. 890.

2. The Consideration. As to the true statement of the consideration, see Nos. 7 & 8, pp. 99, 104, *ante*, and notes p. 108, *ante*.

3. The assignment of the chattels specifically described in the inventory.

Only personal chattels must be assigned. If anything else — for instance, a leasehold interest — is assigned with personal chattels, the bill is void for departure. *Cochrane* v. *Entwistle* (C. A. 1890), 25 Q. B. D. 116, 59 L. J. Q. B. 418, 62 L. T. 852, 38 W. R. 587.

An inventory, with specific descriptions of the goods assigned, must be annexed to a bill of sale. A description will be considered sufficiently specific when it makes the chattels assigned distinguishable from other chattels of the same class. This will depend on the special circumstances of each case. A description insufficient for the ordinary stock of a tradesman may be specific enough for chattels belonging to a private householder. Thus a description of chattels as "roan horse 'Drummer,' brown mare and foal, three rade carts," was held sufficient, the grantors having no other articles of the same description at the time of executing the bill of sale. *Hickley* v. *Greenwood* (1890), 25 Q. B. D. 277, 59 L. J. Q. B. 413, 63 L. T. 288, 38 W. R. 686. Description by numbers will not do when the grantor may have other articles of the same class. For instance, "450 oil paintings in gilt frames, 300 oil paintings unframed, 50 water colours in gilt frames, 20 water colours unframed, 20 gilt frames," was held to be an insufficient description of a trader's stock in trade. *Witt* v. *Banner* (C. A. 1887), 20 Q. B. D. 114, 57 L. J. Q. B. 141, 58 L. T. 34, 36 W. R. 115. *In Carpenter* v. *Deen* (C. A. 1889), 23 Q. B. D. 566, "21 milch cows" was held by a majority of the Court, an insufficient description.

The chattels assigned should be capable of specific description, otherwise the bill of sale is void. *Thomas* v. *Kelly*, No. 10, p. 117, *ante*; *Hadden, Best & Co.* v. *Oppenheim* (1889), 60 L. T. 962. Where the grantor had, prior to the bill of sale, parted absolutely with the chattels comprised in it to a third person, it was held void, as including property of which the grantor was not the true owner. *Tuck* v. *Southern Counties Deposit Bank* (C. A. 1889), 42 Ch. D. 471, 58 L. J. Ch. 699, 61 L. T. 348, 37 W. R. 769. But the owner of an equitable or beneficial interest over chattels, such as an equity of redemption, may give a valid bill of sale. *Usher* v. *Martin* (1889), 24 Q. B. D. 272, 59 L. J. Q. B. 11, 61 L. T. 778.

At common law, an assignment of property to be thereafter acquired was inoperative unless accompanied by a license to seize acted upon by the vendee, or unless the grantor ratified the assignment after acquisi-

tion of the property. In equity, an assignment for value of property to be subsequently acquired created a beneficial interest over the property as soon as it was acquired. *Holroyd* v. *Marshall* (1862), 10 H. L. Cas. 191, 33 L. J. Ch. 193, 7 L. T. 172, 11 W. R. 171. In that case A. by deed assigned to B. all the machinery in and about a certain mill; and the machinery which, during the continuance of the security, might be fixed in addition to or substitution for the existing machinery was to be subject to the trusts of the assignment. A. undertook to do all that was necessary to vest the substituted and added machinery in B. The beneficial interest in the property on its acquisition was held to have passed to B. See also *Leatham* v. *Amor* (1878), 47 L. J. Q. B. 581, 38 L. T. 785, 26 W. R. 739; *Lazarus* v. *Andrade* (1880), 5 C. P. D. 318, 49 L. J. C. P. 847, 43 L. T. 30, 29 W. R. 15; *Clements* v. *Mathews* (C. A. 1883), 11 Q. B. D. 808, 52 L. J. Q. B. 772; *Tailby* v. *Official Receiver* (1889), 13 App. Cas. 523, 58 L. J. Q. B. 75, 60 L. T. 162, 37 W. R. 513.

In order to pass the property in equity the following conditions must be fulfilled: The contract must have been such that a court of equity could decree its specific performance; it must have purported to confer an interest in the future chattels, immediately by its own force, and without the necessity of any further act (*e. g.* seizure) of the assignee on the future chattels coming into existence, *Reeve* v. *Whitmore* (1863), 4 De G. J. & S. 1, 33 L. J. Ch. 63, 9 L. T. 311, 12 W. R. 113; and the property must be capable of identification when it comes into existence. *Tailby* v. *Official Receiver* (1889), 13 App. Cas. 523, 58 L. J. Q. B. 75, 60 L. T. 162, 37 W. R. 513. The principles of these cases still apply to bills of sale to which the Act of 1882 does not apply, — that is, to bills of sale which are not given in security for money.

4. The statement that the assignment is by way of security for a specified principal sum and interest at a specified rate; and —

5. An agreement to pay the principal with the interest then due at the stipulated times.

The sum secured must be a fixed sum. Nothing should be added to it except by way of rateable interest. Thus in *Cooke* v. *Taylor* (C. A. 1887), 3 Times L. R. 800, a bill of sale made to cover present and future advances was held void. A covenant, without a power of seizure on default, may, however, be given to the mortgagee to pay rent, insurance, &c., which the mortgagor may neglect to pay, and to add the same to the sum secured. *Ex parte Stanford, In re Barber* (C. A. 1886), 17 Q. B. D. 259, 55 L. J. Q. B. 341, 54 L. T. 894, 34 W. R. 287, 507; *Goldstrom* v. *Tallerman* (C. A. 1886), 18 Q. B. D. 1, 56 L. J. Q. B. 22, 55 L. T. 866, 35 W. R. 68; *Topley* v. *Crosbie* (1888), 20 Q. B. D. 350, 57 L. J. Q. B. 271, 58 L. T. 312, 36 W. R. 352; *Real and Personal Ad-*

rance Company v. *Clears* (1888), 20 Q. B. D. 304, 57 L. J. Q. B. 164, 58 L. T. 610, 36 W. R. 256.

Interest, another essential feature of the form, must be *rateable*. Where a lump sum is stipulated as interest, the total of principal and interest made payable by instalments, and the whole sum declared to be payable on failure of one instalment, the interest is not *rateable*. *Myers* v. *Elliott* (C. A. 1886), 16 Q. B. D. 526, 55 L. J. Q. B. 233, 54 L. T. 552, 34 W. R. 338. But it is no departure from the form to stipulate for payment of principal and interest by monthly instalments, and, on default of a payment, to make the whole of the principal unpaid and the interest *then due* payable. *Lumley* v. *Simmons* (C. A. 1887), 34 Ch. D. 698, 56 L. J. Ch. 134, 35 W. R. 422. A bonus cannot be stipulated for. *Ex parte Peace, In re Williams* (1883), 25 Ch. D. 656, 53 L. J. Ch. 500, 49 L. T. 475, 32 W. R. 187; *Thorp* v. *Cregeen* (1885), 55 L. J. Q. B. 80, 33 W. R. 844. Interest on interest cannot be stipulated for; but interest upon instalments of principal may. *Haslewood* v. *Consolidated Credit Company* (C. A. 1890), 25 Q. B. D. 555, 60 L. J. Q. B. 13, 63 L. T. 71, 39 W. R. 54. Interest must not be capitalized. *Davis* v. *Burton*, No. 9, p. 112, *ante* (11 Q. B. D. 537, 52 L. J. Q. B. 636, 32 W. R. 423).

The time of payment must be certain; at all events it must not depend on the choice and volition of the grantee, or on an uncertain or contingent event. Thus payment on demand, or within a stipulated time after demand in writing, avoids the bill of sale. *Hetherington* v. *Groome* (C. A. 1884), 13 Q. B. D. 789, 53 L. J. Q. B. 577, 51 L. T. 412, 33 W. R. 103; *Sibley* v. *Higgs* (1885), 15 Q. B. D. 619, 54 L. J. Q. B. 525, 33 W. R. 748; *Bishop* v. *Beale* (1884), 1 Times L. R. 140. In *Hughes* v. *Little* (C. A. 1886), 18 Q. B. D. 32, 56 L. J. Q. B. 96, 55 L. T. 476, 35 W. R. 36, a bill of sale was given for moneys which the grantee should be called upon to pay under a guarantee. The grantee's liability depended on a contingency, and the time of payment was uncertain; for he might not be called upon to pay at all, and if he was, the time when he would be called upon was not fixed. The bill was held to be void.

6. Agreement upon terms "as to insurance, payment of rent, or otherwise, which the parties may agree to for the maintenance or defeasance of the security."

7. The proviso that the chattels shall not be liable to seizure for any cause other than those specified in section seven of the Bills of Sale Act (1878) Amendment Act, 1882.

The form of the Schedule to the Act of 1882 allows insertion of covenants for the maintenance or defeasance of the security. Where a covenant inserted for the maintenance of the security is necessary for such maintenance, a power of seizure on default in performance may

also be given. *Ex parte Pope, In re Paxton* (1889), 60 L. T. 428. Agreement of the parties cannot make a stipulation necessary for the maintenance of the security, unless it is so in fact. Covenants for insurance against fire, for production of the receipt of the current premiums, for payment by the grantee of the rents, rates, and taxes, in default on the part of the grantor, with power to add the monies so paid to the sum secured, have been held to be reasonable and necessary for the maintenance of the security. *Hammond* v. *Hocking* (1884), 12 Q. B. D. 291, 53 L. J. Q. B. 205, 50 L. T. 267; *Ex parte Stanford, In re Barber* (C. A. 1886), 17 Q. B. D. 259, 55 L. J. Q. B. 341, 54 L. T. 894, 34 W. R. 287, 507; *Goldstrom* v. *Tallerman* (C. A. 1886), 18 Q. B. D. 1, 56 L. J. Q. B. 22, 55 L. T. 866, 35 W. R. 68; *Watkins* v. *Evans* (C. A. 1887), 18 Q. B. D. 386, 56 L. J. Q. B. 200, 56 L. T. 177, 35 W. R. 313; *Duff* v. *Valentine* (1883), W. N. 1883, p. 225. Where the terms agreed upon for maintaining the security are not necessary, power of seizure, in default in performance, should not be given. *Topley* v. *Crosbie* (1888), 20 Q. B. D. 350, 57 L. J. Q. B. 271, 58 L. T. 342, 36 W. R. 352.

The following agreements have been held reasonable for maintaining the security: Agreements to replace chattels worn out with others of equal value; not to permit or suffer the chattels to be destroyed, injured, or deteriorated in a greater degree than by reasonable wear and tear, and to replace, repair, and make good the same; not to have the goods taken in execution or distrained. *Ex parte Allam, In re Munday* (1884), 14 Q. B. D. 43, 33 W. R. 231; *Consolidated Credit Corporation* v. *Gosney* (1885), 16 Q. B. D. 24, 55 L. J. Q. B. 61, 54 L. T. 21, 34 W. R. 106.

The following are not agreements for the maintenance of the security, and avoid a bill of sale: An agreement that, upon sale by the mortgagee under his power, the purchaser shall not be bound to see or enquire whether a default has been made, *Blaiberg* v. *Beckett* (C. A. 1886), 18 Q. B. D. 96, 56 L. J. Q. B. 35, 55 L. T. 876, 35 W. R. 34; — that the mortgagee shall exercise the power of sale conferred by the Conveyancing Act of 1881 as if section 20 of that Act had not been passed, *Ex parte Official Receiver, In re Morritt* (C. A. 1886), 18 Q. B. D. 222, 56 L. J. Q. B. 139, 56 L. T. 42, 35 W. R. 277; *Watkins* v. *Evans* (C. A. 1887), 18 Q. B. D. 386, 56 L. J. Q. B. 200, 56 L. T. 177, 35 W. R. 313; — for further assurance, *Ex parte Rawlins, In re Clearer* (C. A. 1887), 18 Q. B. D. 489, 56 L. J. Q. B. 197, 56 L. T. 593, 35 W. R. 281; — authorizing the grantees to retain their commission as auctioneers out of the proceeds of the sale of the chattels, *Furber* v. *Cobb* (C. A. 1887), 18 Q. B. D. 494, 56 L. J. Q. B. 273, 56 L. T. 689, 35 W. R. 398; — giving the grantee a power to sell the goods, or to have them valued and to purchase them at such valuation, *Lyon* v. *Morris* (C. A. 1887), 19 Q. B. D. 139, 56 L. J. Q. B. 378, 56 L. T. 915.

Any other covenant inserted in a bill of sale is attended with risk; for if it varies the legal effect of the statutory form, or is inconsistent with any express provisions of the Act, the bill is invalidated. Thus a covenant for quiet enjoyment implied by assigning as "beneficial owner" is inconsistent with section 13. *Ex parte Stanford, In re Barber, supra.* So also a covenant to perform covenants other than those in the bill of sale, for instance, covenants in a deed recited by the bill of sale. *Lee* v. *Barnes* (1886), 17 Q. B. D. 77, 34 W. R. 640. See *Sharp* v. *McHenry* (1887), 38 Ch. D. 428, 57 L. J. Ch. 961, 57 L. T. 606; *Calvert* v. *Thomas* (C. A. 1887), 19 Q. B. D. 204, 56 L. J. Q. B. 470, 57 L. T. 441, 35 W. R. 616; *Watson* v. *Strickland* (C. A. 1887), 19 Q. B. D. 391, 56 L. J. Q. B. 594, 35 W. R. 769.

8. The attesting clause, including the address and description of the attesting witness.

The address and description is here essential; and want of it is not cured by the address and description being given in the affidavit filed on registering the bill of sale. *Parsons* v. *Brand* (C. A. 1890), 25 Q. B. D. 110, 59 L. J. Q. B. 189, 62 L. T. 479, 38 W. R. 388.

AMERICAN NOTES.

In most of the United States every species of personal property, in actual or prospective existence, may be mortgaged.

But when the mortgagor has no possession or right of possession, and the property is not the natural product or increase of property of which he has possession or the right of possession, the mortgage is void as against prior creditors subsequently obtaining judgment and levying on it before delivery. *Parker* v. *Jacobs*, 14 South Carolina, 112; 37 Am. Rep. 724.

There is considerable debate as to when property is actually or potentially in existence.

"The thing sold must be in existence at the time of the sale, or it must be bargained for so as to come into existence as the natural product or expected increase of something already belonging to the seller." Brown on Sales p. 30. So one may sell on mortgage the unborn young of animals during or even before gestation. *Hull* v. *Hull*, 48 Connecticut, 250; *McCarty* v. *Blevins*, 5 Yerger, 195; 26 Am. Dec. 262; *Fonville* v. *Casey*, 1 Murphey, 389; 4 Am. Dec. 559; *Sawyer* v. *Gerrish*, 70 Maine, 254; 25 Am. Rep. 323. The same has been held of a crop then growing or sown on the seller's land. *Cotton* v. *Willoughby*, 83 North Carolina, 75; 35 Am. Rep. 561; *Stephens* v. *Tucker*, 55 Georgia, 543; *Sanborn* v. *Benedict*, 78 Illinois, 349; *Wilkinson* v. *Ketler*, 69 Alabama, 135; *Polley* v. *Johnson*, 52 Kansas, 478; 23 Lawyers' Reports Annotated, 258; *Minnesota Linseed Oil Co.* v. *Maginnis*, 32 Minnesota, 193; *Rider* v. *Edgar*, 52 California, 127; *Cook* v. *Steel*, 42 Texas, 53; *Orcutt* v. *Moore*, 131 Massachusetts, 48; *Hutchinson* v. *Ford*, 9 Bush (Kentucky), 318; 15 Am. Rep 711.

This doctrine has been extended to the case of such a crop to be planted

or grown on the seller's or mortgagor's land. *Watkins* v. *Wyatt*, 9 Baxter (Tennessee), 250; 40 Am. Rep. 290; *Evermann* v. *Robb*, 52 Mississippi, 653; 24 Am. Rep. 682; *Heald* v. *Builders' Ins. Co.*, 111 Massachusetts, 38; *Smith* v. *Atkins*, 18 Vermont, 461; *Johnson* v. *Grissard*, 51 Arkansas, 110; 3 Lawyers' Rep. Annotated, 795; *Cutting Packing Co.* v. *Packers' Exchange*, 86 California, 574; 21 Am. St. Rep. 63; *Arques* v. *Wasson*, 51 California, 620; 21 Am. Rep. 718; *Miller* v. *McCormick, &c. Co.*, 35 Minnesota, 399; *Headrick* v. *Brattain*, 63 Indiana, 138; *Taylor* v. *Hodges*, 105 North Carolina, 344; *Moore* v. *Bynum*, 10 South Carolina, 452; 30 Am. Rep. 58; *Wheeler* v. *Becker*, 68 Iowa, 723; *Couderman* v. *Smith*, 41 Barbour (New York Supreme Ct.), 404 ("the butter and cheese to be made this season"); *Van Hoozer* v. *Cory*, 34 Ibid. 9; an admirable treatment of this subject. See also *Andrews* v. *Newcomb*, 32 New York, 417; *Rawlings* v. *Hunt*, 90 North Carolina, 270. In *Watkins* v. *Wyatt*, *supra*, it is said: "The question presented is, whether a crop of cotton yet to be planted is the subject of a valid mortgage; and the adjudged cases seem to be very much in conflict on the subject. A humane policy would seem to favour the policy of the proposition, as if such is the law the indigent farmer may obtain credit upon his prospects, and be enabled to sustain his family pending the cultivation of his crop. The crop has a potential existence, because it was to be the natural product and expected increase of the land then owned by him." (The importance of this consideration is apparent when it is remembered that the poor farmer frequently gives his note *at three months* for the seed, secured by mortgage on the crop, and pays the note out of the proceeds of the sale of the crop thus raised!) To the same effect, *Thrash* v. *Bennett*, 57 Alabama, 156; *Apperson* v. *Moore*, 30 Arkansas, 56; 21 Am. Rep. 170.

But many Courts hold that a chattel mortgage on a crop to be thereafter planted is void as to purchasers and creditors. *Rochester Distilling Co.* v. *Rasey*, 142 New York, 570; 40 Am. St. Rep. 635; *Collier* v. *Faulk*, 69 Alabama, 58; *Redd* v. *Burrus*, 58 Georgia, 574; *Loftin* v. *Hines*, 107 North Carolina, 360; 10 Lawyers' Rep. Annotated, 490, with note (this case limits the lien to the year of planting, and denies the lien on crops in future years); *Comstock* v. *Scales*, 7 Wisconsin, 159; *Gittings* v. *Nelson*, 86 Illinois, 591; *Shaw* v. *Gilmore*, 81 Maine, 396; *Long* v. *Hines*, 40 Kansas, 220. In *Hutchinson* v. *Ford*, 9 Bush (Kentucky), 318; 15 Am. Rep. 711, the Court said: "When the crop is growing, although not matured, it may be sold or mortgaged; but when the fruit is to be obtained from the tree that is hereafter to blossom and form it, or the grain to be grown thereafter to be sown, it is difficult to conceive how such an existence can be given it as to make it the subject of an executed contract by which the title passes to the purchaser. Agreements to sell may be made with reference to such potential interests, but no such agreement as would vest the party buying with any title."

Of this conflict of adjudication Mr. Irving Browne says (Sales, p. 33, note): "It is admitted that if the seed is sown the seller may sell or mortgage the crop the next moment. It really seems a foolish distinction to say that ownership and power to confer title depend on some motions of the seller's hand and the fall of the seed upon the earth. Undoubtedly one could sell the wool to grow on the sheep, instantly after shearing and before the

new clip had begun to grow, and there is no just difference between the cases."

Between the parties, a mortgage of growing grass is valid. *Kimball* v. *Sattley*, 55 Vermont, 285; 45 Am. Rep. 614; *Cudworth* v. *Scott*, 41 New Hampshire, 456. But a mortgage of future crops of hay to be grown on the mortgagor's land for an indefinite time is inoperative as against a *bonâ fide* purchaser of a year's crop. *Shaw* v. *Gilmore*, 81 Maine, 396. A mortgage of trees, to be cut by the mortgagor, is valid between the parties. *Claflin* v. *Carpenter*, 4 Metcalf, 580; 38 Am. Dec. 381.

At law a mortgage of property to be acquired, though valid between the parties, is void as to creditors and purchasers. *Jones* v. *Richardson*, 10 Metcalf (Mass.), 481; *Brunswick, &c. Co.* v. *Stevenson* (New York), 21 New York State Reporter, 862; *Griffith* v. *Douglass*, 73 Maine, 532; 40 Am. Rep. 395; *Roy* v. *Goings*, 96 Illinois, 361; 36 Am. Rep. 151; *Wilson* v. *Wilson*, 37 Maryland, 1; 11 Am. Rep. 518; *Long* v. *Hines*, 40 Kansas, 216; 10 Am. St. Rep. 189; *Looker* v. *Pecker*, 38 New Jersey Law, 253; *Hunter* v. *Bosworth*, 43 Wisconsin, 583; *Bank of Eutaw* v. *Alabama St. Bank*, 87 Alabama, 163; *Wedgwood* v. *Citizens' Nat. Bank*, 29 Nebraska, 165; *Williams* v. *Briggs*, 11 Rhode Island, 476; 23 Am. Rep. 518; *Parker* v. *Jacobs*, 14 South Carolina, 112; 37 Am. Rep. 724; *Grand Forks Nat. Bank* v. *Minneapolis, &c. Co.*, 6 Dakota, 357; *Wright* v. *Bircher*, 72 Missouri, 179; 37 Am. Rep. 433. Thus a mortgage on a stock in trade, framed to cover new stock bought to replace that which is sold, is ineffectual to cover such new stock as against creditors and purchasers. *Barnard* v. *Eaton*, 2 Cushing (Mass.), 294. And so a mortgage of chattels to be manufactured will not enable the mortgagee to sustain an action for conversion. *Deeley* v. *Dwight*, 132 New York, 59; 18 Lawyers' Reports Annotated, 298, with note.

After observing that "a mortgage of future property is void, at law, as against others acquiring an interest in it, except in case the mortgagee takes possession of such property before any adverse interests have been acquired," Mr. Jones continues (Chattel Mortgages, § 170): "A different rule, however, prevails *in equity*. There, while such mortgage itself does not pass the title to such property, it creates in the mortgagee an equitable interest in it, which will prevail against judgment creditors and others, although the mortgagee has not taken possession of the property, and the mortgagor has done no new act to confirm the mortgage." Citing *Holroyd* v. *Marshall*, 10 H. L. Cas. 191; *Belding* v. *Read*, 3 Hurl. & Colt. 955; 34 L. J. Ex. 212; *Lazarus* v. *Andrade*, 5 C. P. Div. 318; and *Mitchell* v. *Winslow*, 2 Story, 630. This is also "the settled American doctrine," as shown in *Beall* v. *White*, 94 United States, 382; *Apperson* v. *Moore*, 30 Arkansas, 56; 21 Am. Rep. 170; *Parker* v. *Jacobs*, 14 South Carolina, 112; 37 Am. Rep. 724; *Floyd* v. *Morrow*, 26 Alabama, 353; *Fejarary* v. *Broesch*, 52 Iowa, 88; 35 Am. Rep. 261; *Phelps* v. *Murray*, 2 Tennessee Chancery, 746; *Sillers* v. *Lester*, 48 Mississippi, 513; *Cook* v. *Corthell*, 12 Rhode Island, 1; *Griffith* v. *Douglass*, 73 Maine, 532; 40 Am. Rep. 395; *Preston Nat. Bank* v. *Purifier Co.*, 84 Michigan, 361; *Ludlam* v. *Rothchild*, 41 Minnesota, 218; *Wright* v. *Bircher*, 72 Missouri, 179; *Gregg* v. *Sanford*, 24 Illinois, 17; 76 Am. Dec. 719; *Peabody* v. *Landon*, 61 Vermont, 318; 15 Am. St. Rep. 903; *Bennett* v. *Bailey*, 150 Massachusetts, 257; *Smithurst* v. *Edmunds*,

14 New Jersey, 408; *First Nat. Bank* v. *Turnbull*, 32 Grattan (Virginia), 695; 34 Am. Rep. 791; *McCaffrey* v. *Woodin*, 65 New York, 459; 22 Am. Rep. 641; *Deeley* v. *Dwight*, 132 New York, 59; 18 Lawyers' Reports Annotated, 298. In the last case the Court said: "We find no case which holds that the legal title to property not in existence, actually or potentially, can be transferred either by way of sale or mortgage. That an equitable lien may be created on property to be brought into existence is well settled, and an action to foreclose the lien may be maintained." Citing *Coats* v. *O'Donnell*, 94 New York, 177; *Kribbs* v. *Alford*, 120 Ibid. 519; *Wisner* v. *Ocumpaugh*, 71 Ibid. 113.

The contrary view prevails, where rights of innocent third persons without notice are in question, in *Case* v. *Fish*, 58 Wisconsin, 56; *Loth* v. *Carty*, 85 Kentucky, 591; *Parker* v. *Jacobs*, 14 South Carolina, 112; 37 Am. Rep. 727. In *Beall* v. *White*, 94 United States, 382, it was held that the lien of the mortgage will not give precedence in equity over that of a landlord for rent. And in *Coats* v. *O'Donnell*, 94 New York, 177, the recognition of the equitable lien was coupled with the condition, "where there are no intervening rights of creditors or third persons," which must be taken to mean rights intervening before the possession is vested in the mortgagors or mortgagor. (See general note, 76 Am. Dec. 723.)

To effect a lien on future acquired property the instrument must in terms clearly embrace it, *Phillips* v. *Both*, 58 Iowa, 499; *Lormer* v. *Allyn*, 61 Iowa, 725; and the intention may not be shown by parol. *Montgomery* v. *Chase*, 30 Minnesota, 132; *Farmers' Loan & Trust Co.* v. *Commercial Bank*, 15 Wisconsin, 424. But it has been held that extrinsic evidence is competent to supplement a mortgage of "my entire crop of cotton and corn." *Smith* v. *Fields*, 79 Alabama, 335; and see *Johnson* v. *Grissard*, 51 Arkansas, 410; 3 Lawyers' Reports Annotated, 795.

BLANK.

As to negotiable securities issued with a blank in a material part, see "Bill of Exchange" No. 49, 4 R. C. p. 637.

No. 1. — SWAN *v.* THE NORTH BRITISH AUSTRALASIAN COMPANY.

(EX. CH. 1863.)

No. 2. — THE SOCIÉTÉ GÉNÉRALE DE PARIS *v.* WALKER.

(H. L. 1885.)

RULE.

THE execution and delivery of a deed by any person with a material part left blank does not constitute an authority to another to fill up the blank; nor can the deed when filled up be valid so far as relates to the part originally left blank, without redelivery in its complete form by the author of the deed.

But the delivery of a blank transfer of shares accompanied by deposit of the certificates without which a transfer cannot be registered, may be evidence of the intention of the depositor, so as to give a good equitable title to the depositee; although the shares are only transferable by deed.

Swan v. The North British Australasian Co.

2 H. & C. 175–192 (s. c. 32 L. J. Ex. 273, 10 Jur. N. S. 102; and in the Court below, 7 H. & N. 603, 31 L. J. Ex. 425).

Company. — Shares. — Deed. — Transfer. — Blank. — Estoppel. — Negligence.

Plaintiff who was the registered owner of shares in two Companies (A. and B.) the shares in both of which were only transferable by deed, employed a broker to sell his shares in Company B.

On the representation of this broker that it was necessary for him to execute for that purpose ten blank forms of transfer, plaintiff signed, sealed, and delivered to the broker ten blank forms of transfer to be filled up by the broker as transfers of his shares in Company B. The broker used eight of the forms for the purpose authorized; and, having stolen from a box deposited at a bank for safe custody, certificates of 1000 shares of the plaintiff's in Company A., filled up each of the two remaining forms as a transfer of 500 of the said 1000 shares in Company A. Having forged the attestations, he delivered these transfers with the certificates to *bonâ fide* purchasers for value. On these transfers being presented to the Company for registration they removed the plaintiff's name and placed on the register the names of the purchasers.

In an action by the plaintiff claiming the shares against the A. Company, — *Held* by the Court of Exchequer Chamber by a majority, — affirming the formal judgment of the Court of Exchequer where there was an equal division of opinion, — that the transfers were void, that there was no such negligence on the part of the plaintiff as to estop him from insisting that the property in the 1000 shares did not pass under the transfers; and adjudged that the plaintiff was entitled to the shares, and to have his name restored to the register accordingly.

Action alleging a wrongful refusal by the defendants, the A. Company, to place the plaintiff's name on the register. Verdict for the plaintiff, subject to a special case which stated the facts substantially as after-mentioned.

The proceedings out of which the action arose were originally commenced by an application to the Court of Common Pleas under the Joint Stock Companies Acts, 1856, 1857, — under which the Company was constituted, — to adjudge that the plaintiff was entitled to have his name entered on the register of shareholders as owner of 1000 shares, and to order the register to be rectified accordingly. The matter having been argued before the Court of Common Pleas, — two judges, WILLIAMS, J., and WILLES, J., were of opinion that the plaintiff was so entitled; ERLE, C. J., and KEATING, J., being of a contrary opinion. The arguments and judgments on this occasion are reported under the name of *Ex parte Swan*, 7 C. B. (N. S.) 429; 30 L. J. C. P. 117. A similar application was afterwards made to the Court of Exchequer who directed an action to be brought in order that the question might be put on the record. This action was brought accordingly.

The material facts are these:[1] The Company was constituted under the Joint Stock Companies Act, 1856 (19 & 20 Vict. c. 47). By the regulations of the company, the owners of shares were

[1] Extracted from the judgment of MARTIN, B., 7 H. & N. 637, 31 L. J. Ex. 438.

authorized to transfer them by deed. This deed was to be sent to the office, and a memorial to be registered. At the time of the transaction in question, it was the practice of the defendants not to register any transfer unless it was attested; and upon the certificates there was a memorandum, — "N. B. No transfer of any of these shares will be registered unless accompanied by this certificate;" and the defendants would not register a transfer unless it was so accompanied. It was also one of their rules, not to register a transfer until three days after sending to the transferor, at his address entered in the books of the company, a notice that a deed of transfer had been sent for registration. The plaintiff was the owner of 1000 shares which he had bought through a broker named Oliver. He kept his certificates in a box locked with a padlock, of which he kept the key; and, in November, 1856, he caused Oliver to deposit this box for safe custody with the London and County Bank, where Oliver kept an account. In November, 1857, Oliver represented to the plaintiff that the lock was not safe, and suggested that a "Chubb's lock" should be put on for greater security, and in consequence the box was brought from the bank to Oliver's office, where the old lock was taken off and a new one put on and locked by the plaintiff himself. This lock had been bought by Oliver, who obtained two keys, one of which he delivered to the plaintiff, who believed it to be the only one; and he locked the box with it, took it away, and always retained it in his possession; but Oliver fraudulently retained the other. On the occasion of putting the new lock on the box, the plaintiff examined the shares, found them correct, and again requested Oliver to deposit the box with the London and County Bank, which he did, and where it remained until October, 1858. In November, 1856, the plaintiff wrote to the secretary of the defendants a letter requesting him to alter his address in the address-book of the company to "Robert Swan, to the care of Oliver, &c.," which was done. The plaintiff had on two occasions employed Oliver to sell some shares in another company, which were also transferable by deed; and Oliver then represented to the plaintiff that it was necessary for him to execute *ten* deeds of transfer; and, accordingly, the plaintiff signed and sealed and sent to or delivered to Oliver *ten* forms of transfer in blank to be afterwards filled up by Oliver, who filled up and used *eight* of them for the purpose of the transfer of the shares of the other company.

On the 15th of January, 1858, Oliver filled up one of the two remaining blank forms as a transfer of 500 of the plaintiff's shares, and delivered it to the transferee, with the certificates which he had feloniously stolen from the plaintiff's box by means of the duplicate key. On the 16th of January, 1858, the transferee delivered the transfer to the secretary of the defendants, together with the certificates, who, upon the same day, in accordance with the rule of the company, wrote a letter addressed to the plaintiff at the address of Oliver, to inform him of the proposed transfer; and, after the expiration of three days, the name of the plaintiff was removed from the register, and that of the transferee placed thereon. This letter never reached the plaintiff, and probably was intercepted by Oliver. On the 22nd of July, 1858, Oliver made use of the remaining blank form to transfer the remaining 500 shares, and they were transferred to a transferee under precisely the same circumstances. In November, 1858, the fraud and forgery of Oliver was discovered; he was prosecuted by the plaintiff at the Old Bailey for stealing the certificates, found guilty, and sentenced to twenty years' penal servitude.

The question was whether upon the above facts the plaintiff is entitled to have his name entered on the register as owner of the 1000 shares.

The Court of Exchequer differed in opinion. POLLOCK, C. B., and WILDE, B., were of opinion that the defendants were entitled to judgment. They considered that the forgery by Oliver was the proximate consequence of the plaintiff's own negligence, and that he was therefore estopped from denying that the property in the shares passed by the transfers. MARTIN, B., and CHANNELL, B., were of opinion that the plaintiff was entitled to judgment. They considered that Oliver having no authority under seal from the plaintiff to fill up the blank forms of transfer, these forms were not deeds, and therefore could not operate to deprive the plaintiff of his property in the shares, which could be done only by deed; and that the doctrine of estoppel by executing instruments in blank, is confined to negotiable instruments. All the Judges were of opinion that negligence whereby another is injured, to operate as an estoppel, must be the proximate cause of the injury. The junior judge, WILDE, J., having then withdrawn his judgment, a formal judgment was entered for the plaintiff. The judgments as well as the special case will be found fully reported in 7 H. & N. 603, and 31 L. J. Ex. 425.

The case then came to be argued before the Exchequer Chamber before Cockburn, C. J., Crompton, J., Willes, J., Byles, J., Blackburn, J., Keating, J., and Mellor, J.

[176] The learned Judges, having differed in opinion, now delivered the following judgments.

Mellor, J. I have read and considered the very elaborate judgments already given on the two occasions in which the facts of the present case were considered by the Courts of Common Pleas and Exchequer, wherein all the authorities were discussed and the subject exhausted.

"As a general rule, no one can found a title upon a forgery;" [1] but in certain cases, as said by my brother Wilde in the Court below, 7 H. & N. 603; 31 L. J. Ex. 436, "the law merchant validates, in the interest of commerce, a transaction which the common law would declare void for want of title or authority; and transactions within its operation are as absolutely valid and effectual as if made with title or authority." There are also cases in which, "where a man has wilfully made a false assertion calculated to lead others to act upon it, and they have done so to their prejudice, he is forbidden as against them to deny that assertion." [2] Whilst I and my brother Wilde entirely assent to that proposition, I hesitate as to the next: "that if a man has led others into a belief of a certain state of facts by conduct of culpable neglect calculated to have that result, and they have acted on that belief to their prejudice, he shall not be heard afterwards, as against such persons, to show that that state of facts did not exist." [2] Assuming for the purposes of this case both these propositions to be true, I agree that they extend to transactions in which a deed is

[* 177] required to transfer an interest or a * right; not by validating a void deed, as was supposed on the argument, but by holding that parties shall not be permitted to aver, against equity and good faith, the invalidity of a deed which either by words or conduct they have asserted to be valid, and upon which the others have acted. *Sheffield and Manchester Railway Company* v. *Woodcock*, 7 M. & W. 574; 10 L. J. Ex. 492.

I proceed, therefore, to inquire what is the false assertion of the plaintiff in the present case, which has led the defendants to their prejudice to act upon it, or what the culpable negligence which

[1] Per Erle, J., *Ex parte Swan*, 7 C. B (N. S.) 448; 30 L. J. C. P. 117.

[2] Per, Wilde, B., 7 H. & N. 633; 31 L. J. Ex. 436

has been the proximate cause that the defendants have registered a forged transfer as a genuine one, so as to estop the plaintiff from denying that his shares in the defendants' company have been transferred to Mr. Barry.

Intending to sell and transfer certain shares which he possessed in another company, he was induced by the representation of his broker to execute a blank transfer, for the purpose of enabling the broker to fill in the numbers and descriptions of the shares in that company, and the name of the vendee of those shares, in order that those shares might be transferred to such vendee; whereas, the broker fraudulently filled in the numbers and descriptions of the shares in question, which the plaintiff did not intend to sell or transfer, and by a felonious theft of the certificates of such last mentioned shares, complied with the requisition of the company, and induced them to register such deed as a genuine transfer. The false representation is the representation of the broker, not of the plaintiff, and the proximate cause which induced the company to alter their position to their prejudice, was the fraudulent and felonious conduct of the broker, and not the negligence of the plaintiff.

The doctrine established by the cases of *Pickard* v. *Sears*, 6 A. & E. 469, and *Freeman* v. *Cooke*, 2 Ex. 654; 18 L. J. Ex. 114, is a most useful one, * and I should be sorry to see it nar- [* 178] rowed or fritted away, but it appears to me to be inapplicable to the circumstances of the present case. To make the present case like those, there must have been a false representation or culpable negligence affecting the transfer of shares in the defendants' company, and not affecting an entirely different transaction.

I therefore think that the judgment of the Court of Exchequer must be affirmed.

KEATING, J. I am of opinion that the judgment should be reversed upon the ground that the plaintiff has by his culpably negligent act enabled his agent to commit a fraud to the prejudice of third persons, by fabricating a transfer to them of the shares in question, and has so estopped himself from asserting as against such third persons that the transfer did not operate. That a party may so estop himself, even in the case of a deed, although denied in the Courts below, has not been argued in this Court, and I shall therefore content myself by referring to the judgment of the Chief

Justice in *Ex parte Swan*, 7 C. B. (N. S.) 429; 30 L. J. C. P. 117, and of my brother WILDE in the present case, in the Court of Exchequer, in support of that position, merely adding that I am not aware of any decision which counteracts it. The stress of the argument here has rather been that, however true that principle may be even as applicable to a deed, the facts do not bring the present case within it. It is said there has been no representation whatever as to the Australasian shares, but only as to Australian shares, and as between the plaintiff and Oliver, no doubt the directions to sell concerned only the latter; but as to third persons, if there has been any representation as resulting from acts of culpable negligence, it applies as much to the one as to the other. Here the plaintiff delivered to his agent blank transfers, signed and [*179] sealed, to be filled up by him with the * names of the shares, transferees, and even with the names of attesting witnesses, with the intent that he should thereby obtain money from third persons for shares which he must be taken to have known his agent could not thus legally transfer, but could only make a fraudulent semblance of doing so; and when the agent has, by means of such transfers, obtained money from innocent third parties, the question is whether he can be heard to say as against such third parties that his agent filled up the names of the shares as Australasian, whereas he had directed him to fill them up as Australian shares. I think not, upon any principle that would not equally apply to a blank acceptance fraudulently filled up, but in the hands of a *bonâ fide* holder. It was argued in the Court below, that forgery and robbery were not the necessary or ordinary result of the act of delivering the blank transfers, but neither is it in the case of blank acceptances fraudulently filled up, nor was it in the case of *Young* v. *Grote*, 4 Bing. 253; 5 L. J. C. P. 165. I am aware it has been said that the principles which are in such cases applicable to negotiable instruments do not apply in other cases, but I have been unable to find any case decided upon any such distinction. Had such existed, it would have furnished a short answer in the case of *The Bank of Ireland* v. *Evans's Trustees*, in the 5th House of Lords Cases; but it does not seem to have been given to that case, nor to have been adverted to, when the case of *Young* v. *Grote* was cited in argument and commented upon in the judgments. It is true the plaintiff could not have anticipated the stealing of the certificates, but the title to the shares is

conveyed by the deed of transfer, the certificates being merely, I apprehend, a machinery, established for the convenience of the company in conducting their business, and I do not think the responsibility of the plaintiff in respect of the transfer made by his agent is affected or done away with because * the [* 180] transfer was completed by the felony of Oliver. No doubt the plaintiff, as far as appears, supposed Oliver to be an honest man, and was mistaken, — a circumstance which must always occur in every case where a question like the present is or can be raised, — but the acts which, in *Young* v. *Grote*, and in *Taylor* v. *The Great Indian Peninsular Railway Co.*, 4 De G. & J. 559; 28 L. J. Ch. 709, were said to be acts of culpable negligence, appear to me less in degree than the acts of negligence attributed to the plaintiff in the present case, and which directly and proximately enabled Oliver to effect the transfers which he made complete by his felony in stealing the certificates. I think therefore that the rule in the well-known case of *Lickbarrow* v. *Mason*, 2 T. R. 70, referred to in *Ex parte Swan*, 7 C. B. (N. S.) 400; 30 L. J. C. P. 117, applies.

Blackburn, J. I think the judgment should be affirmed. Neither Erle, C. J., nor my brother Keating, in their judgments in the Court of Common Pleas in *Ex parte Swan*, nor my brother Wilde, in his judgment in the principal case, proceed on the supposition that the plaintiff had given any authority, real or apparent, to Oliver to sell the shares now in question, and indeed it is obvious that it cannot be for a moment contended that the fact that Oliver had been employed by the plaintiff as a broker in former transactions, clothed him with any general authority as plaintiff's agent to dispose of any other property of the plaintiffs.

Neither do they contend that the supposed deed of transfer on which the defendants acted really was the deed of the plaintiff; but they proceed on the supposition that the * plain- [* 181] tiff had precluded himself as against the defendant from denying that it was his deed. Now I agree that a party may be precluded from denying against another the existence of a particular state of things, but then I think it must be by conduct on the part of that party such as to come within the limits so carefully laid down by Parke, B., in delivering the judgment of the Court of Exchequer in *Freeman* v. *Cooke*. It is pointed out by Parke, B., in the course of the argument in that case, that in the majority of

cases in which an estoppel exists, "the party must have induced the other so to alter his position that the former would be responsible to him in an action for it;" and he had before pointed out that "negligence," to have the effect of estopping the party, must be "neglect of some duty cast upon the person who is guilty of it." And this, I apprehend, is a true and sound principle. A person who does not lock up his goods, which are consequently stolen, may be said to be negligent as regards himself, but inasmuch as he neglects no duty which the law casts upon him, he is not in consequence estopped from denying the title of those who may have, however innocently, purchased those goods from the thief, unless it be in market overt.

And in the considered judgment of the Court, PARKE, B., lays down very carefully what are the limits. He says, that to make an estoppel it is essential "if not that the party represents that to be true which he knows to be untrue, at least, that he means his representation to be acted upon, and that it is acted upon accordingly; and if, whatever a man's real intention may be, he so conducts himself that a reasonable man would take the representation to be true, and believe that it was meant that he should act upon it, and did act upon it as true, the party making the representation would be equally precluded from contesting its truth; and conduct, by negligence or omission, where there is a duty cast upon a person, by usage of trade or otherwise, to disclose [*182] *the truth, may often have the same effect. As, for instance, a retiring partner omitting to inform his customers of the fact, in the usual mode, that the continuing partners were no longer authorized to act as his agents, is bound by all contracts made by them with third persons, on the faith of their being so authorized." 2 Ex. 663; 18 L. J. Ex. 114.

What I consider the fallacy of my brother WILDE'S judgment is this: he lays down the rule in general terms "that if one has led others into the belief of a certain state of facts by conduct of culpable neglect calculated to have that result, and they have acted on that belief to their prejudice, he shall not be heard afterwards, as against such persons, to show that state of facts did not exist." This is very nearly right, but in my opinion not quite, as he omits to qualify it by saying that the neglect must be in the transaction itself, and be the proximate cause of the leading the party into that mistake; and also, as I think, that it must be the neglect of

some duty that is owing to the person led into that belief, or, what comes to the same thing, to the general public of whom the person is one, and not merely neglect of what would be prudent in respect to the party himself, or even of some duty owing to third persons, with whom those seeking to set up the estoppel are not privy; and these distinctions make in the present case all the difference. I think that all the cases cited by ERLE, C. J., in his judgment in *Ex parte Swan*, 7 C. B. (N. S.) 429; 30 L. J. C. P. 117, may be easily shown to be consistent with the limitations laid down in *Freeman* v. *Cooke*, except *Coles* v. *Bank of England*, 10 Ad. & E. 437; 9 L. J. Q. B. 36 (which in a Court of Error I may say I consider not to be binding), and *Young* v. *Grote*. I am relieved from making any comments on the latter case by the very lucid manner in which the authorities bearing on it are stated by WILLIAMS, J., in *Ex parte Swan*. It may be that case is to be supported on some of the grounds there stated, or upon the broader ground, apparently * supported by the authority of Pothier, in the [*183] passage cited in *Young* v. *Grote*, that the person putting in circulation a bill of exchange does, by the law merchant, owe a duty to all parties to the bill to take reasonable precautions against the possibility of fraudulent alterations in it; it is not necessary in this case to inquire how that may be. It is sufficient to point out that a party signing in blank a cheque or bill, or other negotiable instrument, does intend that it shall be filled up and delivered to a series of holders, and therefore he stands to all those holders in the position indicated in the first branch of the judgment of *Freeman* v. *Cooke*. He means the holder to be induced to take the instrument as if it had been filled up from the first. And that makes a marked distinction between such a case and the present, in which Mr. Swan never did mean that any one should take this transfer of the shares as genuine.

And the facts in this case seem to me to be such as to make it fall precisely within the authority of *The Bank of Ireland* v. *Trustees of Evans's Charity*, 5 H. L. Cas. 389.

BYLES, J. I am of opinion that the judgment of the Court of Exchequer should be affirmed.

The shares, by the constitution of the company regulated by statute, could have been transferred by deed only. The alleged deed is confessedly void, because when it was executed by the plaintiff, the grantor, the subject-matter of the conveyance was not

therein described, but left in blank, the blank being afterwards fraudulently filled up by the defendant's agent Oliver. It is plain upon all the authorities that the deed as a deed is void. Void upon two grounds: first, that the subject of conveyance was inserted after execution; secondly, that it was fraudulently inserted, so that the deed is a forgery.

[* 184] * But it is alleged that the plaintiff is estopped by his own negligence from relying on the facts and showing the truth, to wit, that the alleged deed is for these reasons not his deed.

In support of the doctrine that a man may in a Court of law be estopped by mere negligence from showing that a deed is not really his deed, no authority has been produced at the bar. Such a doctrine might lead to very dangerous consequences, as my brother Williams has shown. A man prepares and executes in blank a deed for the conveyance of a cottage, his agent by the negligence of his principal is tempted and enabled to fill up the blank with the description of a large estate belonging to his principal. Can it be contended in a Court of law that the large estate has passed by the forged deed?

I am far from denying that in the case of his own fraud a man might be estopped from showing that a deed is not his deed. Suppose, for example, the vendor of an estate to have received the purchase-money and to have handed over a void deed to the purchaser, I conceive that he might be estopped from setting up the invalidity of the execution of the deed. To dispute his own signing and sealing of the deed would be to perpetrate a fraud. This question, however, could not often arise, for in most of such cases ratihabition would have cured defects; fraud, moreover, is an exception to all rules.

But the position that mere negligence of an alleged grantor may estop him from showing that an instrument purporting to be his deed is not his deed, seems to me both novel and dangerous.

The arguments drawn from negotiable instruments appear altogether inapplicable. The object of the law merchant, as to bills and notes made or become payable to bearer, is to secure their

[* 185] circulation as money; therefore honest acquisition * confers title. To this despotic but necessary principle the ordinary rules of the common law are made to bend. The misapplication of a genuine signature written across a slip of stamped

paper (which transaction being a forgery would in ordinary cases convey no title) may give a good title to any sum fraudulently inscribed within the limits of the stamp, and in America, where there are no stamp laws, to any sum whatsoever. Negligence, in the maker of an instrument payable to bearer, makes no difference in his liability to an honest holder for value; the instrument may be lost by the maker without his negligence or stolen from him, still he must pay. The negligence of the holder, on the other hand, makes no difference in his title. However gross the holder's negligence, if it stop short of fraud he has a title. So that the argument from negotiable instruments if it were applicable might be retorted, for there, as here, a plaintiff who has been guilty of negligence may prevail against a defendant who has been defrauded without any negligence of his own at all. The truth is that in the case of a bill of exchange or promissory note, as well as in the case of a deed, the law respects the nature and uses of the instrument more than its own ordinary rules.

I have hitherto assumed that the plaintiff in the case before the Court has been guilty of negligence, but I do not think he has been guilty of negligence.

It appears by the regulations and practice of the company that no transfer could be or ever was registered on production of the deed of transfer only, but that that deed must have been, and always has been in practice, accompanied by the certificate of the shares intended to be transferred. Now the plaintiff kept those certificates, without which the blank deed of transfer would have been inoperative to transfer the shares in question, locked up in a box of which he held the key, and as he supposed and had a right * to suppose the only key. He had even at Oliver's [* 186] suggestion put on a Chubb lock for greater security, and had afterwards satisfied himself by personal inspection that the certificates were safe in the box, when the key of the locked box was in his own pocket. It is probable that the practice of Messrs. Chubbs to deliver duplicate keys, was known to Oliver, but unknown to the plaintiff, and was the motive for Oliver's suggestion; at all events it was the *causa sine qua non* of the fraud.

This case therefore is not the case of a principal entrusting his agent with blank transfers simply, but with blank transfers restrained by a bridle which the principal held in his own hand, as he had a right to suppose. The plaintiff therefore seems to me to

have exercised reasonable care. He might undoubtedly have taken additional precautions, he might have used consummate, perfect care. But who does? If the law were so extreme to mark negligence, what transactions could stand?

For these reasons I think the plaintiff not chargeable with negligence.

But, assuming that he was chargeable with negligence, still I think the plaintiff can recover, because the plaintiff's assumed negligence was not the proximate cause of the transfer by the defendants. Between the plaintiff entrusting Oliver with the blank transfers and the actual transfer by the defendant a series of causes intervened. First, the fraudulent secretion of the duplicate key by Oliver; next the trespass and larceny by Oliver in opening the box and stealing the securities; and, lastly, the treble forgery committed by Oliver in inserting the subject-matter of the transfer and the names of both the attesting witnesses.

Lastly, even had the plaintiff been guilty of negligence, and had that negligence been the proximate cause of loss to the de-
[* 187] fendants the legitimate consequence seems to me * to be that an action lies at the suit of the defendants against the plaintiff rather than that the rules of the common law touching the execution of deeds should be violated.

For these reasons I agree with the judgment of the Court below.

Willes, J. If I am at liberty to express an opinion, not having heard the whole of the argument, I concur with the judgment of the majority of the Court.

Crompton, J. I am of opinion that the conduct of the plaintiff below was not such as to prevent him from setting up the truth, according to the rule laid down in *Freeman* v. *Cooke*, and that there was no such negligence on his part as to disentitle him from recovering, according to the opinion of the Judges, as delivered by Baron Parke in *The Bank of Ireland* v. *The Trustees of Evans's Charity*; and I therefore think that the judgment of the Court below should be affirmed.

Cockburn, C. J. I am of opinion that the judgment of the Court of Exchequer should be affirmed.

The plaintiff was a registered shareholder of the company, the defendants in this action. According to the constitution of the company, he could only be removed from the register of share-

holders, and another person be registered in his place, on his shares being transferred by deed. His name has been removed from the register, and that of another person has been substituted, on a deed, which, though it purported to be his, and was in fact executed by him, yet, having been executed in blank, and afterwards filled in contrary to his intention, is admitted to have been in point of law a forgery.

Now, it is plain that no title to property, whether real * or personal, can be conferred by an instrument which, [* 188] being forged, is in law void and inoperative. It is, however, contended that, though no title to these shares could pass by this deed, yet that, practically, the right of the plaintiff to have them treated as his is barred, because, as it is alleged, he is estopped by his own conduct from disputing the genuineness of the instrument. The estoppel thus contended for is based, first, on the ground that the plaintiff has, by executing the transfers, led the company, on the reasonable assumption of their genuineness, to register another party as shareholder, and thereby to place themselves in a false and prejudicial position with reference to the supposed transferee, so as to bring the case within the principle of the decisions in *Pickard* v. *Sears* and *Freeman* v. *Cooke;* and, secondly, on the ground that the plaintiff has by his negligence enabled a third party to convert a genuine instrument into a forged one, and thereby to practise a fraud on the company so as to bring the case within the principle of the decision in *Young* v. *Grote*, and the cases decided on bills of exchange and other negotiable instruments. I am of opinion that neither of these positions is tenable, and that no estoppel arises in the present case to prevent the plaintiff from contesting the validity of this transfer.

To bring a case within the principle established by the decisions in *Pickard* v. *Sears* and *Freeman* v. *Cooke*, it is in my opinion essentially necessary that the representation or conduct complained of, whether active or passive in its character, should have been intended to bring about the result whereby loss has arisen to the other party, or his position has been altered. Here, nothing can have been further from the intention of the plaintiff than that the deed signed by him should be used for the purpose of transferring these shares, or that the name of another person should be substituted for his on the register.

* As regards the alleged estoppel by reason of the plain- [* 189]

tiff's negligence, I am of opinion that negligence alone, although it may have afforded an opportunity for the perpetration of a forgery by means of which another party has been damnified, is not of itself a ground of estoppel. The rule relating to negotiable instruments stands on peculiar grounds. The law relating to these instruments is part of the law merchant, which, in order that the negotiability of such instruments, which is of the very essence of their commercial utility, shall not be impaired, establishes that if a man once puts his name to such an instrument, he shall be liable to a *bonâ fide* owner without notice, in respect of what may be added to give effect or negotiability to the instrument, notwithstanding this may be done in the absence of authority, or even for the purposes of fraud.

The case of *Young* v. *Grote*, on which so much reliance has been placed, and which is supposed to have established this doctrine of estoppel by reason of negligence, when it comes to be more closely examined, turns out to have been decided without reference to estoppel at all. Neither the counsel in arguing that case, nor the Judges in deciding it, refer once to the doctrine of estoppel. The question arose on a disputed item in an account between a banker and his customer which had been referred to arbitration, and the question raised by the arbitrator was on whom the loss which had arisen from payment of a cheque, in which, by the carelessness of the customer, an opportunity had been afforded for increasing the amount, should fall.

It was held, not that the customer was estopped from denying that the cheque was a forgery, but that, as the loss which would otherwise fall on the banker, who had paid on a bad cheque, had been brought about by the negligence of the customer, the latter must sustain the loss. As the question arose on an ac-
[* 190] count submitted to arbitration, the * matter was decided without reference to any technicality; but I am disposed to think that, technically looked at, the matter would stand thus: the customer would be entitled to recover from the banker the amount paid on such a cheque, the banker having no voucher to justify the payment; the banker, on the other hand, would be entitled to recover against the customer for the loss sustained through the negligence of the latter.

Possibly, to prevent circuity of action, the right of the banker to immunity in respect of the loss so brought about would afford him

a defence in an action by the customer to recover the amount. So, in the present case, if through the negligence of the plaintiff, the company should sustain a loss with reference to the party who has been substituted for him, the plaintiff might possibly be liable to the company; and if his present demand were simply a money demand for the value of his shares, it may be that the loss sustained through his negligence might be an answer to the plaintiff's action. But the plaintiff here asks, not for a compensation of money alone, but also for a mandamus to restore him to his status as a registered shareholder of the company; and it appears to me therefore, that, if the company have any claim on the plaintiff in respect of damage sustained through his negligence, they must be left to their cross action or such other remedy as may be available to them.

I must, however, say that, even if negligence could form a ground of estoppel to the denial of the genuineness of an instrument known to have been forged, negligence does not appear to me to be sufficiently established in this case. The mere execution of these deeds in blank would not have sufficed to enable Oliver, the plaintiff's agent, to commit the fraud on the company.

By the rules and regulations of the company, it was * necessary to the transfer that the certificates of the shares [* 191] should be produced on the registration of the transfer. The certificates of these shares the plaintiff knew to be shut up in a box, of which, so far as he had reason to believe, he alone possessed a key.

It seems to me scarcely enough to constitute negligence, that he did not contemplate, and therefore render physically impossible, the felonious act of his agent in possessing himself of the certificates.

Even if what was done by the plaintiff could be held to amount to negligence, I am of opinion that the negligence would be too remote from the result on which the defendants rely, to constitute a defence. In *The Bank of Ireland* v. *The Trustees of Evans's Charities*, 5 H. L. Cas. 410, PARKE, B., in delivering the opinion of the Judges in the House of Lords, says: "If there was negligence in the custody of the seal, it was very remotely connected with the act of transfer. The transfer was not the necessary or ordinary or likely result of that negligence. It never would have been but for the occurrence of a very extraordinary event, that persons should

be found either so dishonest or so careless, as to testify on the face of the instrument that they had seen the seal duly affixed."

Now, here, the transfer deeds delivered in blank by the plaintiff were intended to have effect on shares not in this but in another company. To repeat the language of PARKE, B., "but for the occurrence of a very extraordinary event," namely, the forgery and felony of the plaintiff's agent, the act of the plaintiff could not have had any effect on the shares now in question. If there was negligence at all, that negligence had reference to the shares of the plaintiff in the Scottish Australian Investment Company.

[*192] *By the felonious act of another, which could not have been within the contemplation of the plaintiff, or have been calculated upon as likely to flow out of that which plaintiff did, the negligence of the plaintiff, if any, was converted into the means of committing a fraud in respect of these shares.

The proximate cause of the fraud perpetrated was the forgery and felony of the agent, and his fraudulent conduct in converting deeds intended to operate on shares in one company into the means of disposing of shares in another.

It is to be observed that, in the case in the House of Lords to which I have referred, it was unnecessary to decide the larger question, whether negligence leading to a forgery by which another party was defrauded estops the party guilty of it from disputing the genuineness of the instrument. The absence of negligence immediately leading to the result was at once a sufficient ground on which to dispose of the case. In *Tayler* v. *The Great Indian Peninsular Railway Company*, 4 De G. & J. 559; 28 L. J. Ch. 709, where transfers had been executed in blank as to the particular shares, and the blanks had been fraudulently filled up by the broker with shares not intended by the transferor, and the shares had been sold, the Lords Justices held on appeal confirming the decision of Vice Chancellor WOOD, that the transfer was void, and that the original owner was entitled to have the shares delivered up and their registration in the name of the purchaser restrained. That case is in point to the present, and, in my opinion, is an important authority in support of the view I have taken in this case.

Judgment affirmed.

No. 2. — Société Générale de Paris v. Walker, 11 App. Cas. 20, 21.

The Société Générale de Paris v. Walker.

11 App. Cas. 20–45 (s. c. 55 L. J. Q. B. 169; 54 L. T. 389; 34 W. R. 662).

Company. — Shares. — Deed. — Transfer. — Blank. — Equitable Assignment.

M., the holder of shares in a company, deposited with S. certificates of [20] the shares and a blank transfer, as security for a debt. Afterwards he fraudulently executed a blank transfer in respect of the shares and deposited it with the appellants, as security for a debt. On being applied to by the appellants for the share certificate he stated that it was lost or mislaid. The appellants stamped their transfer, filled up the blanks, had it executed by their manager as the transferee, and sent it to the company's office with a request that the company would "certify it," and with an indemnity against any claim in respect of the missing certificates. The company did not accept the indemnity and declined to certify. Shortly afterwards the executors of S. (who had died) gave notice to the company of their charge upon the shares. The company was incorporated under the Companies Act, 1862. The articles of association provided that the shares should be transferable only by deed; that lost certificates might be renewed upon satisfactory proof of the loss, or in default of proof, upon a satisfactory indemnity being given; and that the company should not be bound by or recognize any equitable interest in shares. Each certificate stated, under the company's seal, that no transfer of any portion of the shares represented by the certificate would be registered until the certificate had been delivered at the company's office. The appellants having brought an action against the executors for a declaration of their title to the shares and to restrain the executors from dealing with the shares: —

Held, affirming the decision of the Court of Appeal, that the transfer to the appellants, not having been re-delivered by the transferor after the blanks were filled up, was not his deed, and that the appellants had no legal title to the shares; that as between themselves and the company they never * had an absolute and unconditional right to be registered as the [*21] shareholders; that nothing that had happened gave them a right on equitable grounds to displace the original priority of the equitable claim of the executors; and that the action could not be maintained.

Appeal from an order of the Court of Appeal.

The following is an outline of the facts which are set out at length in the report of the decision below. 14 Q. B. D. 424; 54 L. J. Q. B. 177.

James Montgomery Walker, holding 100 shares in the Tramways Union Company, Limited, in March, 1881, executed a blank transfer and deposited it and the certificates of his shares with James Scott Walker as security for a debt to him. The transfer was not executed by the transferee, and did not contain any name or date, or the number or numbers of the shares.

No. 2. — Société Générale de Paris v. Walker, 11 App. Cas. 21, 22.

On or about the 15th of December, 1882, James Montgomery Walker, being pressed by the appellants for a debt owing to them, executed a blank transfer which by a contemporaneous memorandum he called a "transfer for 100 Tram Unions," and sent it with the memorandum to Colladon, the appellants' manager. This transfer contained the name of the transferor and the date, "14th of December, 1882," but not the name of any transferee, nor the number or numbers of the shares. Colladon at once applied to James Montgomery Walker for the certificate of the shares, and was told by him that it had been lost or mislaid. The appellants were desirous of selling the shares and, for that purpose, of having the transfer put in order. With this object communications passed between Colladon and a clerk in the office of the Tramways Union Company, and between Colladon and James Montgomery Walker, which are set out at length in the judgment of Lord Blackburn. In the result the transfer was stamped, and the blanks were filled up with the name of Colladon as the transferee, and with the number and numbers of the shares, and the transfer was executed by Colladon. In this state it was on the 30th of December, 1882, sent by Colladon to the office of the Tramways Union Company, with a request to "certify the transfer" [*22] * and a letter of indemnity against any loss which might arise in the event of the missing certificates being forthcoming at any future time. The company's clerk said that an indemnity by James Montgomery Walker's bankers would be required. This was offered, but the clerk refused to "certify the transfer." The appellants contended that what passed between Colladon and James Montgomery Walker before the 30th of December amounted or was equivalent to a re-delivery of the transfer deed after the blanks had been filled up, but (as will be seen) the House held that there was no sufficient evidence of this.

On the 4th of January, 1883, the respondents, executors of James Scott Walker (who had died in February, 1882), gave notice to the company that they were in possession of the share certificates and a transfer signed by J. M. Walker, and warned the company not to allow J. M. Walker to deal with the shares.

The Tramways Union Company was incorporated under the Companies Act, 1862. The articles of association material to this report were as follows: —

Article 22. The company shall not be bound by or recognise

any equitable, contingent, future, or partial interest in any share, or any other right in respect of a share, except an absolute right thereto in the person from time to time registered as the holder thereof, and except also as regards any parent, guardian, committee, husband, executor or administrator, or trustee in bankruptcy, his right under these presents to become a member in respect of or to transfer a share.[1]

VII. Transfer of Shares.

Article 26. Subject to the exercise by the company of the powers conferred by the Companies Act, 1867, of issuing share warrants to bearer and to any regulations of the company in that behalf, shares shall be transferable only by deed executed by the transferor and transferee and duly entered in the register of transfers.

* Article 28. The register of transfers shall be kept by [* 23] the secretary under the control of the board.

Article 32. A person shall not be registered as the transferee of a share until the instrument of transfer duly executed has been left with the secretary to be kept with the records of the company, but to be produced at every reasonable request, and such transfer fee has been paid as is provided by or in accordance with the last article, but in any case in which, in the judgment of the board, this article ought not to be insisted on it may be dispensed with.

VIII. Share Certificates.

Article 33. The certificates of shares shall be under the seal and shall be signed by one director and countersigned by the secretary.

Article 35. If any certificate be worn out or lost, it may be renewed on such proof as satisfies the board being adduced to them of its being worn out or lost, or in default of such proofs, on such indemnity as the board deem adequate being given, and an entry of the proof or indemnity shall be made in the minutes of their proceedings.

[1] By sect. 30 of the Companies Act 1862 (25 & 26 Vict. c. 89), "No notice of any trust, expressed, implied, or constructive, shall be entered on the register, or be receivable by the registrar, in the case of companies under this Act and registered in England or Ireland."

No. 2. — Société Générale de Paris v. Walker, 11 App. Cas. 23, 24.

Each certificate was sealed with the company's seal, and contained the following: —

Note. — No transfer of any portion of the shares represented by this certificate will be registered until the certificate has been delivered at the company's office.

On the 6th of January, 1883, the appellants brought the present action against the Tramways Union Company and the executors of James Scott Walker. The action having been stayed as regards the company, the appellants claimed as against the executors a declaration of title to the shares; that the executors should deliver up to the appellants the certificates and the transfer; an injunction to restrain the executors from requiring any registration of or dealing with the shares otherwise than as the appellants should direct.

Lopes, J. (who heard the action without a jury), gave judgment for the plaintiffs. The Court of Appeal (Brett, M. R., [* 24] Cotton and * Lindley, L. JJ.) reversed this decision, and entered judgment for the defendants.

From this decision the plaintiffs appealed.

Dec. 8, 9. Finlay, Q. C., and J. M. Solomon, for the appellants.

The appellants' claim is based first on legal, and secondly on equitable grounds. The true view of the facts is that J. M. Walker executed the completed transfer to the appellants as a deed, or (at all events) that what passed amounted to a redelivery after the blanks had been filled in. This gave the appellants the legal ownership of the shares, or at least the legal right to be registered as owners of the shares for valuable consideration without notice of the respondents' claim. It is true that Lord Mansfield's decision in *Texira* v. *Evans*, cited in *Master* v. *Miller*, 1 Anst. 228; was overruled or doubted in *Hibblewhite* v. *McMorine*, 6 M. & W. 200, 215; 9 L. J. Ex. 217, where it was held that a blank transfer of shares did not operate as a deed. But what passed in the present case after the blanks were filled in amounted to a redelivery. A manual redelivery of a deed is not necessary. Shepp. Touch., p. 57; *Hudson* v. *Revett*, 5 Bing. 368, 388, 389; 7 L. J. C. P. 145, recognised in *Tupper* v. *Foulkes*, 30 L. J. C. P. 214. See also *Goodright* v. *Straphan*, 1 Cowp. 201. Assuming that there was an execution of the transfer, the observations of

Wood, V. C., in *Dodds* v. *Hills*, 2 H. & M. 424, apply. The legal right to demand a transfer is equivalent to a legal title. The offer to give an adequate indemnity bound the company to dispense with the production of the certificates and to register.

Further, even if the appellants had no legal title to be registered they had an equitable title to the shares; and if their title is only equitable their equity is better than the respondents'. There being a valid contract on good consideration by J. M. Walker to transfer, the appellants had a valid equitable title to the shares. To give notice of an equitable title all that is necessary is to tell the company that the claimant has an equitable title, — as was done here. It is not necessary to describe the nature of the title. The true meaning of the rule *qui prior est *tempore potior est* [*25] *jure*, is given by Kindersley, V. C., in *Rice* v. *Rice*, 2 Drew. 73, 77; 23 L. J. Ch. 289. The executors of James Scott Walker intentionally abstained from perfecting their title and enforcing their security and taking any steps which would have prevented J. M. Walker from dealing with the shares, in order that he might remain a director. The appellants, on the other hand, did all they could to have their title registered, and have therefore a better equitable title than the respondents, by reason of their superior diligence. The respondents do not now (as they did before Lopes, J.) allege that the executors of J. S. Walker at the funeral or otherwise gave notice of their claim to the company. What took place on or about the 28th of December was good notice of a beneficial title in the appellants.

[Lord Blackburn: Was it anything more than notice that J. M. Walker was trying to transfer?]

Primâ facie it must be taken — being a transfer to a commercial company — to be a transfer for value. The letter of indemnity given by the appellants dispels any idea that Colladon was acting otherwise than as trustee for the appellants. The notice was a valid notice that the appellants claimed to be entitled to the shares as beneficiaries, and it was assumed to be a good notice by all the Judges below. The *dicta* of Lord Cottenham in *Mangles* v. *Dixon*, 1 M. & G. 437, 446; 19 L. J. Ch. 240, remain untouched, though the decision was afterwards overruled. 3 H. L. C. 702. See also on this point, *Etty* v. *Bridges*, 2 Y. & C. Ch. 486, 492; 12 L. J. Ch. 474, per Knight Bruce, V. C., and the cases there referred to. The doctrine that a second incumbrancer who gives notice takes priority

over an earlier incumbrancer who does not give notice, was first applied in the case of debts. *Ryall* v. *Rowles*, 1 Ves. Sen. 348; 2 W. & T. L. C. 5th ed. 729. Giving notice to the company was equivalent to taking possession. *Dearle* v. *Hall*, 3 Russ. 1.

[Lord FITZGERALD referred to *Dunster* v. *Lord Glengall*, 3 Ir. Ch. 47, 51, 52, in 1853.]

Dearle v. *Hall* was summarised and explained by Lord [*26] * LYNDHURST in *Foster* v. *Cockerell*, 3 Cl. & F. 456, 473. If J. Montgomery Walker had become bankrupt the title of the appellants would have prevailed over the assignee's. The shares would not have been in the order and disposition of the bankrupt. *Ex parte Littledale*, 6 D. M. & G. 714; 24 L. J. Bk. 9; *Ex parte Boulton*, 1 De G. & J. 163, 178, 179; 26 L. J. Bk. 45, per TURNER, L. J.; and see *Ex parte Union Bank of Manchester*, L. R., 12 Eq. 354; 40 L. J. Bk. 57, per BACON, V. C.

[Lord FITZGERALD referred to *In re Hennessy*, 2 D. & War. 555, 561.]

The reasoning upon which it has been held that notice to the company takes shares out of the order and disposition of a bankrupt applies equally to the case of successive incumbrances. It may be noted in passing that the question whether a share in an incorporated company is a *chose in action* was discussed in *Colonial Bank* v. *Whinney*, 30 Ch. D. 261, now under appeal to this House. Notice to the company of an equitable title is valid and effectual, notwithstanding any provision in the company's articles of association, or in the Companies Acts, that trusts shall not appear upon the register; see *Ex parte Agra Bank* L. R., 3 Ch. 555, 37 L. J. Bk. 23, which case arose under the Companies Act 1862, as appears from the report in 18 L. T. N. S. 154, 866.

Sect. 30 of the Companies Act of 1862 has not the effect attributed to it by the Judges below. There is not a word in it to say that the company shall not be affected by notice of a trust. A company cannot exclude notice of trusts by any provision in their deed. *Binney* v. *Ince Hall, &c. Co.*, 35 L. J. Ch. 363. The object of sect. 30 was to keep the register clear, not to prevent the company being affected by notice. The present case is a stronger one than *Ex parte Stewart*, 4 De. G. J. & S. 543; 34 L. J. Bk. 6. If, as some of the Lords Justices seemed to think, a company would be bound by a notice that a trustee was going to commit a fraud, then they must be bound by any notice. Logically there is no dividing

line. The executors of J. S. Walker, having omitted to give the notice which they ought to have given, must be postponed to the appellants. *Cumming* v. *Prescott*, 2 Y. & C. Eq. Ex. 488.

* It was said below that the absence of the certificate was [* 27] notice to the appellants of the prior equity of the executors. But that was not so: a reasonable explanation of the non-production was given.

[Lord BLACKBURN: That point does not arise. LOPES, J., was not asked to find any issue on it.]

The mere possession of the certificates is not enough to give a prior equitable title. *Shropshire Union Railways and Canal Co.* v. *Reg.*, L. R., 7 H. L. 496; 45 L. J. Q. B. 31. The judgments of the Court of Appeal in *Bradford Banking Co.* v. *Briggs & Co.*, 29 Ch. D. 149; 31 Ch. D. 19, following the decision of the Court of Appeal in the present case, show to what startling consequences that decision must lead. The absence of the certificates did no more than put the appellants upon inquiry, and they did all that was incumbent on them, viz., inquire, and receive a reasonable explanation. A reasonable excuse for the non-production of title deeds is sufficient to prevent the legal mortgagee being postponed to an equitable mortgagee, in the absence of fraud or gross negligence. *Hewitt* v. *Loosemore*, 9 Hare, 449. The present case is *à fortiori*, for in personal property the possession of title deeds is not of the importance that it is in real property. There is nothing in the Companies Act of 1862 or in the articles of this company to make the production of the certificate a condition precedent to a transfer. The offer of the indemnity was equivalent to the production of the certificates.

Rigby, Q. C., and B. B. Rogers for the respondents were not heard, Lord HALSBURY, L. C., saying that the decision below would be affirmed for reasons to be given on a future day.

Dec. 17. EARL OF SELBORNE: —

My Lords, the appellants in this case cannot succeed unless they show, either that they have acquired a legal title to the shares in question, unaffected, as between them and the respondents, by any equity; or that (both titles being equitable) their equity, though posterior in time, ought to be preferred to that of the respondents.

* A complete legal title to these shares could not be ac- [* 28] quired without registration; and there has been none. The

transfer, however, from James Montgomery Walker, under which the appellants claim, had been produced for registration to the officers of the Tramways Union Company before the 4th of January, 1883, at which time the request for such registration was met by the opposing claim of the respondents, stated in their letter of that date to the secretary of the company. It seems to have been thought (though not decided) in the Courts below, that if the appellants' transfer (signed in blank, and without any numbers of shares or name of transferee) had been delivered by the transferor as his deed after the blanks were filled up, the appellants would have had a legal title, preferable (as such) to the equitable title of the respondents. Without such delivery the completed transfer was not James Montgomery Walker's deed. *Hibblewhite* v. *McMorine*, 6 M. & W. 200; 9 L. J. Ex. 217; *Tayler* v. *Great Indian Peninsular Railway Company*, 28 L. J. Ch. 285; *Swan* v. *North British Australasian Company*, 7 H. & N. 603; 2 H. & C. 175; 31 L. J. Ex. 425, p. 140, *ante*.

The Courts below both thought (and I agree with them) that there was not, as against the respondents, any sufficient evidence of a delivery of the completed transfer by James Montgomery Walker. But even if there had been such evidence, I should not myself have considered a merely inchoate title by an unregistered transfer equivalent for the present purpose to a legal estate in the shares. Such a transfer might, indeed, give a legal right of action against the company if they, without just cause, refused to register it; it might also be a good foundation for an application to a competent Court to rectify the register. But it could not, under the 26th article of association of the Tramways Company, confer (while unregistered) a legal title to the shares themselves; nor do I think that the fact of its execution and of a claim having been made to register it before the company had notice of the prior equitable title would necessarily make it the duty of the company, after receiving such notice, to register it, or of a Court to compel them to do so, and thereby to effectuate a fraud, till then incom-
[*29] plete. If, indeed, all necessary conditions *had been fulfilled to give the transferee, as between himself and the company, a present, absolute, unconditional right to have the transfer registered, before the company was informed of the existence of a better title, the case might be different. But, in this case, I am of opinion that the appellants had not, on the 4th of January,

1883, any such right, even if the transfer, after the blanks were filled up, had been delivered as his deed by James Montgomery Walker. That transfer was not accompanied by the certificates which, in companies of this kind, are the proper (and, indeed, the only) documentary evidences of title in the possession of a shareholder, and which, according to the usual course of dealing with such shares, ought to come into the hands of a *bonâ fide* transferee for value. The respondents, when they took their prior security, did obtain possession of those certificates; and on the face of each such certificate there was an engagement under the company's common seal that no transfer of any portion of the shares thereby represented should be registered without delivery of the certificate at the company's office. The appellants did not, indeed, know that the certificates were thus in the respondents' hands: and they may not have known that they were in that form. But they knew that they had not themselves got them; and that the company (as was said by Lord CAIRNS in the case of the *Shropshire Union Railway and Canal Company* v. *Reg.*, L. R., 7 H. L. 509; 45 L. J. Q. B. 31), though it might not be bound to insist on their production before registering a transfer, was at least entitled to do so if it thought fit. They knew (as their manager, Mr. Dove, in his evidence admitted) that their own transfer was one which was "no good," "not in order," "of no value," for want of these certificates. The company (or those who in this matter acted for it) did in fact refuse to register that transfer without production of the certificates, unless the requisites for the issue of new certificates under their 35th article of association were first satisfied; and the liability which they might be under to any *bonâ fide* holder of the outstanding certificates was (in my judgment) an amply sufficient reason for that refusal. Those requisites were never satisfied, either before or after (if they could have been * satisfied [* 30] after) the 4th of January, 1883, on which day both the company and the appellants became aware that the certificates had not been lost or mislaid (as James Montgomery Walker had falsely alleged) but that they were in the hands of the respondents as *bonâ fide* holders for value prior in date to the appellants.

The appellants therefore have not shown either a legal title to these shares, or (or as between themselves and the company) an absolute and unconditional right to be registered as shareholders in place of James Montgomery Walker. Unless they can establish

a right on equitable grounds to displace the original priority of the respondents, that priority must remain; and must, under these circumstances, prevail. Have they then made out any equitable case as against the respondents? I not only think that they have failed to do so, but I think the respondents have the better equity, not on the ground of time alone, but on the merits of the case. The respondents not only had the certificates, but they had the company's undertaking under seal that there should be no change of the registered title unless those certificates were produced. What more could be necessary, on any reasonable or intelligible principle, to "perfect" their equitable title, which they were under no obligation to convert into a legal title by registration? If they had given any notice of the kind required in cases within the principle of *Dearle* v. *Hall*, 3 Russ. 1, to the company, they would not thereby have constituted, between themselves and the company, any such relation as, in cases of that class, is the effect of notice. I think that according to the true and proper construction of the Companies Act of 1862, and of the articles of this company, there was no obligation upon this company to accept, or to preserve any record of, notices of equitable interests or trusts, if actually given or tendered to them; and that any such notice, if given, would be absolutely inoperative to affect the company with any trust; and if the company is not affected by it, I do not see how the directors or officers of the company individually can be. The Court of Appeal, without reference to the certificates, thought the principle of *Dearle* v. *Hall* inapplicable to shares of this kind; and I agree with them. I do not under-
[*31] stand in *what respect a notice not operative as against the company or its officers can have the effect of "perfecting" the equitable assignee's title. No authority was cited to show that the doctrine of *Dearle* v. *Hall* had been applied to such shares; and the reasons for that doctrine are, in my judgment, not applicable. The case is not like those under the bankrupt laws, in which the fact, or presumption, of a continuance (after a change in the equitable title) of the prior state of "order and disposition," or reputed ownership, "with the consent of the true owner," has to be in some way disproved. But in the case before your Lordships, that was actually done by the company's engagement under the deed in the respondents' possession, which could not have been done by any mere notice. This being the respondents' position,

what is that of the appellants? They were content to trust to the statement of their transferor, that the certificates were "lost or mislaid," — (as Mr. Colladon adds), that they "most likely had been mislaid with his private papers at home." What could be more easy, more obvious than to require him to go at once and search for them among those papers? The appellants did no such thing. To obtain new certificates from the company, under article 35, if the old were lost, one of two alternatives was necessary, — either (1) proof of the loss, satisfactory to the board; or (2) an indemnity, deemed by the board adequate. The appellants, passing over the first alternative, — neither requiring themselves from the transferor, nor offering to furnish to the directors of the company, any evidence of the alleged loss, — went straight to the other, that of indemnity. That negotiation came to nothing; the indemnity offered was not accepted; indeed, it never came for consideration before the board of directors. But the fact remains, that what the appellants proposed to give was not evidence of loss of the certificates, but indemnity, if it should turn out (as the fact was) that they were in the hands of some one to whom the company, if it registered the shares without their production, might be liable.

I am of opinion, that there is nothing here to displace the original equitable priority of the respondents; and I move your Lordships to dismiss this appeal with costs.

* Lord BLACKBURN: — [*32]

My Lords, the argument of the appellants' counsel in this appeal was begun but not completed on the 21st of July last, when the peers present were the LORD CHANCELLOR, Lord WATSON, Lord FITZGERALD, and myself. On the 8th of December the noble Earl (SELBORNE) was also present, and the argument was recommenced. The counsel for the appellants were heard. All of your Lordships were agreed that the appeal must be dismissed with costs, but judgment was not given at once, principally, I believe, because I wished, before stating my reasons for affirming the judgment, to examine more carefully how far it was necessary to express an opinion on a point of great practical importance, namely, what was the effect of the certificates of the shares having been delivered by the registered owner of the shares to one who took an interest from that owner by an instrument not amounting to a transfer of the shares.

The action was commenced by a writ of summons issued on the 6th of January, 1883, by the now appellants as plaintiffs against the Tramways Union Company, Limited, James Montgomery Walker, and the present respondents, who are the personal representatives of James Scott Walker, and which was served on all three defendants. On the motion of the plaintiffs on the 9th of January, PEARSON, J., made an order that the defendants, the Tramways Union Company, Limited, be restrained until after the 11th day of January, 1883, or further order, from registering, and "that the defendants James Montgomery Walker, Janet Walker, William Stuart Walker, and Frederick Ramsay Walker be restrained until after the said 11th of January, 1883, or further order, from directing the registration of any transfer of the one hundred shares of £5 each fully paid up, numbered 28,979 to 28,998 and 30,772 to 30,851 inclusive, in the undertaking of the defendants, the Tramways Union Company, Limited, at the instance of the other defendants, or otherwise than to the plaintiffs or as they shall direct, and that the defendants, the Tramways Union Company, Limited, James Montgomery Walker, Janet Walker, William Stuart Walker, and Frederick Ramsay Walker be restrained until after the said 11th of January, 1883, or further order, from dealing, parting [*33] with, disposing of or *delivering the said shares, or any of them, or the certificates thereof, or any of them, or any transfers or alleged transfers thereof, otherwise than to the plaintiffs or as they shall direct."

On the 18th of January, by the consent of all parties, save James Montgomery Walker, it was ordered that the motion do stand over till the trial of this action, and that all further proceedings in this action against the defendants, the Tramways Union Company, Limited, be stayed.

The other defendant, James Montgomery Walker, never appeared to the writ. He was made bankrupt about the 20th of January, 1883. Something was said as to whether these shares might not be property divisible amongst his creditors, under sect. 15 of the Bankrupt Act 1869, the statute then in force, but no such question having been raised, I say nothing on that.

From the making of the order of the 18th of January, 1883, the action proceeded as depending on the question whether the plaintiffs or the representatives of the testator had the better title to these shares.

The Tramways Union Company, Limited, was formed under the Companies Act 1862. The sections of that Act which seem to me material are the 22nd, 30th, 31st, and 35th. I do not think it necessary to read them.

The articles of association which I think material I will read. They are as follows: [His Lordship read articles 26, 28, 32, 33, 35, which are set out above].

The name of James Montgomery Walker was entered on the register, and he obtained, as he was entitled to do, two certificates, one dated on the 13th of May, 1875, for eighty fully paid-up £5 shares, numbered 30,772 to 30,851, both inclusive; the other dated the 16th of December, 1875, for twenty full paid-up £5 shares, No. 28,979 to No. 28,998, both inclusive. Each of these certificates was under the seal of the company, and was signed by a director and countersigned by J. E. Walker, then and still secretary to the company.

On each of the certificates was printed: "Note. No transfer of any portion of the shares represented by this certificate will be registered until the certificate has been delivered at the company's office." Before stating what makes this, in my opinion, *important in this case, I think it better to state briefly [*34] what is the state of the legislation on the subject.

When first shares in joint stock companies were made transferable, and actions were brought by vendors against purchasers of such shares, a difficulty arose as to what was sufficient evidence of the title of the vendor to the shares which he required the purchaser to accept. To meet this difficulty, in the first Joint Stock Companies Act, that of 1844, 7 & 8 Vict. c. 110, s. 52, it was enacted "that it shall be the duty of all Courts of justice, Judges, Justices, and others to admit such certificate as *primâ facie* evidence of the title of the shareholder to the share therein specified; nevertheless the want of such certificate shall not prevent the holder of any share from disposing thereof."

And in the Companies Clauses Consolidation Act 1845, and the Companies Clauses Consolidation (Scotland) Act 1845, under the head Distribution of Capital, is a clause (sect. 12) the same in both Acts: "The certificate shall be admitted in all courts as *primâ facie* evidence of the title of such shareholder, his executors, &c., to the share therein specified; nevertheless the want of such certificate shall not prevent the holder of any share from disposing thereof."

The Act of 1844 was repealed by the Joint Stock Companies Act

1856, the 20th and 21st sections of which are: "20. The transfer of any share in the company shall be in the form marked F in the schedule hereto, or to the like effect; and shall be executed both by the transferor and transferee; the transferor shall be deemed to remain a holder of such share until the name of the transferee is entered in the register book in respect thereof. 21. A certificate under the common seal of the company specifying any share or shares held by any shareholder shall be *primâ facie* evidence of the title of the shareholder to the share or shares therein specified."

This Act again was repealed by the Companies Act 1862. The Companies Clauses Consolidation Acts of 1845 have not, as far as I am aware, been altered, as far as regards this subject, by any subsequent legislation.

Now, I quite agree that the Legislature did not enact that the production of the transferor's certificate should be a condi-
[*35] tion *precedent to the registration of the transfer; and in the earlier Acts it was expressly declared that the want of possession of a certificate should not prevent the holder of a share from disposing of the same. But very soon (I cannot tell how soon) those who took as security from the holder of shares an engagement by which he bound himself not to part with the shares to any one else until that security was discharged, perceived that the security would practically be much better if they had the certificates in their possession. The registered holder of the shares still might, if dishonest enough, in violation of his contract, execute a transfer, but he would have much more difficulty in finding a transferee who *bonâ fide* would be led to believe that he was entitled to do so. And, I do not know how soon, those who managed companies of this kind and had the control of the register became aware that, if they registered a transfer at once on its being presented to them, even if it was accompanied by the certificates, or, as it is called, "in order," there was a risk that they might register a forged transfer, and not only do an injury to others, but put the company itself in a difficulty. It became, therefore, usual when a transfer was brought, not to register it at once, but, as one precaution, to write to the registered address of the shareholder, and inform him that such a transfer had been lodged, and that if no objection was made by him before a day specified, it would be registered. This was the course pursued in *Taylor* v. *Great Indian Peninsular Railway Company*, 28 L. J. Ch. 285, and the

notice thus given enabled Tayler to prevent the registration of what turned out to be forgery. Soon after this the case arose of *Ex parte Swan*, 7 C. B. (N. S.) 400; 30 L. J. C. P. 113; *Swan* v. *North British Australasian Company* (*Limited*), No. 1, p. 140, *supra*. That company was framed under the Act of 1856. The certificate was under the seal of the company, and on it was a note: "No transfer of any of these shares will be registered unless accompanied by this certificate." It is printed in the report of *Ex parte Swan*, 7 C. B. (N. S.) 411; 7 H. & N. 613, and was dated the 15th of September, 1857. This is the earliest mention that I can find of such a note. What purported to be a transfer duly executed by Swan to Horace Barry, accompanied by the certificates, was lodged with the company. The transfer
*deed and the certificate are set out in the report, 7 C. B. [*36] (N. S.) 410. The secretary of the company adopted the same precaution as had been adopted by the Great Indian Peninsular Company, and, before registering, wrote to the address given by Swan to them, viz., Robert Swan, care of W. L. Oliver, 4 Austin Friars, Old Broad Street, describing the transfer lodged and the certificate, and adding, "The transfer will be retained here for three clear days from the date hereof, in order to afford you an opportunity of communicating with me in the event of there being any irregularity in the transaction; and failing your reply within the time mentioned, the transfer will be registered, and a new certificate issued to the purchaser." The forger, Oliver, who was afterward convicted, intercepted this letter. The transfer was registered and a new certificate issued to Barry The result of the litigation showed that even after all those precautions the company did suffer from registering the transfer, being obliged in the end to restore the shares to Swan.

In *In re Bahia and San Francisco Railway Company*, L. R., 3 Q. B. 584; 37 L. J. Q. B. 176, the facts were very similar, but the point decided was not quite the same. The certificate is set forth in the special case, L. R., 3 Q. B. 587; 37 L. J. Q. B. 177, and probably had not on it such a note, at all events it is not there set out. But the point decided was that the company were liable to make good their loss to persons who had purchased and paid for the shares from those who produced genuine transfers from those who had been registered along with genuine certificates granted to them, although that register was set aside. All the Judges put it

on the ground that in the usual course of business the production of the certificates along with the transfer entitled the transferee to pay on the faith of the certificate, which therefore amounted to a preclusion against the company.

This certainly, in my mind, shows that those on whose advice companies before registering a transfer, which would entitle the transferee to a certificate, required that the certificate already issued should be produced, or its non-production accounted for, advised well; and that the note on the certificate to this effect calling the attention of those who had the shares was fair and [* 37] * proper. Such a note does not prevent this company, if a proper case is made before them, from exercising the power given by article 35. Nor does a similar note on a certificate issued by a company, under the Companies Clauses Act 1845, prevent the directors from exercising the similar power given by sect. 13 of the Companies Clauses Act 1845; but it does make it important for those who purchase shares to see that the transfer is not only by a deed duly executed, but is accompanied by the certificate. Unless that is so, the transfer, to use the phrase of the witnesses in this case, is "not in order." And without going further, it at least makes it not wrong for the company to pause and make some inquiry before exercising their powers. And bearing in mind this practice I am quite unable to understand how it came to be thought that the plaintiffs had given to the company a notice of an equitable title, such as to make them trustees for the plaintiffs, even if the company could be bound to take notice of trusts.

It appears that James M. Walker was extensively engaged in transactions on the Stock Exchange with the plaintiffs. On the 14th of December, 1882, he was indebted to them on the balance of account £7000 and upwards, and Mr. Colladon, the manager for the plaintiffs, had intimated to him that he must pay or be sued. The writ was not actually issued till the 16th of December, nor served till the 18th of December; but J. M. Walker, on the 14th or 15th of December, offered amongst other things to give Colladon a hold on 100 £5 shares in the Tramways Union Company (Limited), and sent to him what is called a blank transfer. Had the certificate accompanied that blank transfer there would have been in my opinion a sufficient indication of an intention that Colladon should hold that certificate. But Dove, Colladon's clerk, seeing that the certificate was not there, went to James M. Walker, and as he

swears (Appendix, p. 53), "pointed out that the certificate was not attached, and it was not in order, and that it was no good." He asked J. M. Walker for the certificate (Appendix, p. 54), "and he said he had not got it. He said that it had been lost or mislaid, that if I went to the company I would find that it would be put in order." Dove did go to the company's office and saw the company's clerk, Mr. Mitchell, and * Mr. Mitchell told him [* 38] (Appendix, p. 55), "he had not any instructions from Mr. Walker, besides which the transfer was not stamped and did not contain the numbers;" certainly very sufficient objections. I gather, though it is not very clearly brought out, that Mitchell then referred to the register and showed Dove that J. M. Walker was on the register for 100 £5 shares, and told him what the numbers were.

We now come to written evidence. On the 19th of December J. M. Walker wrote to Colladon: "The Tramways Union shares will also be in order for delivery on account day." On the 20th of December Colladon's broker sold 100 Tramways Union shares for the account day, the 29th of December, and, I suppose, according to the usual practice, advised Colladon that he had done so. On the 22nd of December Colladon, writing on behalf of the plaintiffs to J. M. Walker on a number of other subjects says (p. 168): "We must insist on your putting the Tramways Union transfer in order. We have been promised day after day that it would be attended to, but so far without result." No clearer evidence could be given that the transfer was not in order for want of certificates, and that the plaintiffs knew that it was not so in order.

On the 28th of December, the day before the account day, J. M. Walker wrote a letter addressed to the Secretary of the Tramways Company, which he signed both with his own name and with the name of his firm, in which he was sole partner. I will read it: "The Secretary, Tramways Union Company, Limited. — 9 Old Broad Street, London, E. C., 28th of December, 1882. Dear Sir, — The certificates of 100 shares, numbered 28,979 to 28,998 and 30,772/51, in your company in favour of James Montgomery Walker, of 9 Old Broad Street, E. C., having been lost or mislaid, we shall feel obliged if you will certify the enclosed transfer, and we hereby undertake to hold you harmless and indemnified against any loss which may arise in the event of the missing certificates being forthcoming at any future time. Yours truly, — J. M. Walker, — Walker, Russell, & Co."

I never before met with the phrase "to certify a transfer," and I do not understand it. It is plain enough that J. M. Walker requested the secretary, and through him the company, to do [* 39] * something which would put the transfer in order; and the board of the company and the secretary, acting together under the 35th article, could have renewed the certificates which would have had that effect. And perhaps the board might have waived the condition for which they had stipulated by the note indorsed on the certificate, and registered a transfer though the certificate was not produced; the secretary alone could do neither, still less could the clerk. This letter was carried by Dove, the plaintiff's clerk, to Mitchell, the clerk of the company, who in the absence of the secretary, who had during the whole month of December been on the continent, acted for him. The transfer, which was taken down along with the letter, had now been filled up so as to appear on the face of it to have been executed by the parties, and it was duly stamped. Whether or not Mitchell knew that it had not really been executed after it was filled up, we do not know; for though Mitchell was in Court neither side called him as a witness. He certainly made no objection on that ground, and if he had done so, it would have been in the power of J. M. Walker to cure the objection by re-executing the transfer. Mitchell seems to have said nothing could be done without a banker's guarantee.

On the 30th of December a letter, similar in all respects but the date to that of the 28th, was brought down stamped and signed as a guarantee by the plaintiffs, who are bankers. Mitchell seems to have said he meant the bankers of Mr. Walker, and on Dove offering to procure the guarantee of Glyn's refused to do anything. I infer that he by this time suspected that J. M. Walker was not solvent, for as far as regards security to the company it was not material whether the bankers who gave the guarantee were those with whom J. M. Walker kept his account or others. The 30th of December in that year was on Saturday. On Monday, the 1st of January, 1883, the secretary returned from abroad and resumed his duties, and Mitchell reported to him what had taken place; he approved of it. On the 4th of January, 1883, Messrs. Miller, Smith, & Bell, solicitors for the representatives of the testator, who had been pressing J. M. Walker to execute a transfer of the shares, gave to the secretary a formal letter, which I will [* 40] read: "3 Salters' Hall Court, E. C., 4th * January, 1883.

Dear Sir, — On behalf of the trustees and executors of the late Mr. James Scott Walker we have to give you notice that the certificates for shares in your company numbered 28,979 to 28,998, and Nos. 30,772 to 30,851, were deposited by Mr. James Montgomery Walker with the late Mr. James Scott Walker with a transfer signed by Mr. James Montgomery Walker, and that the share certificates are now in our possession on behalf of the executors, and we have to warn your company not to allow Mr. James Montgomery Walker to deal with these shares, as should the company recognise any such dealings we should, on behalf of the executors, claim from the company the value of the shares. Yours faithfully, Miller, Smith, & Bell. J. E. Walker, Esq."

Lindley, L. J., in the present case, says (14 Q. B. D. 458; 54 L. J. Q. B. 189): "If he, J. M. Walker, had executed a proper transfer to the plaintiffs the plaintiffs would have acquired a legal right to have the transfer to them registered, if they gave the company a proper indemnity against the consequences of registering the transfer without the production of the certificate of the ownership of the transferor." He adds, "The right to the shares passes by the transfer, and the articles of the company do not make the production to the company of the transferor's certificate a condition precedent to the registration of the transfer."

In the view of the facts which all the Judges below took, James M. Walker, though there was nothing to prevent his actually executing a deed transferring the shares to the plaintiffs, never did execute one, and therefore on this view of the facts it was not necessary to decide this point.

But it was strongly argued at your Lordships' bar that there was evidence from which it ought to be, or at least might be, inferred that he had legally executed a deed of transfer. And though I individually think that the evidence does not show that he had done anything equivalent to an execution of the transfer after it was filled up, I believe some of your Lordships were not prepared to decide upon that ground. And I think it quite clear that the clerk of the company never did put their objection on the ground that the transfer was not duly executed by James M.
* Walker. If he had done so the plaintiffs might, and I [* 41]
suppose would, have asked James M. Walker to execute the transfer over again; and he, having gone so far as he had done, would probably have done so if requested.

If, therefore, I agreed with the law as stated in the passage I have read, I should certainly feel much difficulty in deciding against the plaintiffs. But I think that there are important qualifications which should be put on this statement of the law, and it was partly because I was desirous of stating accurately what these were that your Lordships did not deliver judgment at once.

I think the authorities to which I have referred show, that even if a transfer is in order, that it is accompanied by the certificate, the company are not bound to register it at once. They are entitled (it is not necessary to inquire whether they are bound) to delay for a reasonable time, and to make reasonable inquiries before registering; and it is, I believe, the general practice to delay the registration at least till there has been an opportunity given to the registered holder to answer a letter of advice telling him that a transfer has been lodged.

It is not necessary to inquire whether if the company were to register a transfer without any delay or making any inquiry, they would incur any responsibility against which this company would require a guarantee. It is enough to say that, even if the transfer had been duly re-executed by J. M. Walker, there was nothing that had occurred previous to the 4th of January, when the notice was given by Messrs. Miller, Smith, & Bell, to make it obligatory on the company to register the transfer. After the receipt of that notice nothing which they did could have affected the prior right of the respondents.

I do not doubt that the Judges in the Court of Appeal put the right construction on the Companies Act 1862, as to the notices of trust, but I do not think it necessary to decide that.

Lord Watson: —

My Lords, I concur. I do not think there are facts proved in this case sufficient to warrant the inference that the transfer of these shares was after its completion redelivered to the ap-
[* 42] pellants * by Mr. James Montgomery Walker; but whether it be true that the transfer in question was or was not duly executed by Mr. Walker, I am still of opinion that upon either of those assumptions the respondents are entitled to our judgment.

Lord FitzGerald: —

My Lords, I concur in your Lordships' decision.

The defendants have the prior equitable title in point of time

and the question is whether the appellants (plaintiffs) have established that on the facts and in law their subsequent title, if they have any, ought to be preferred.

As the question relates to shares in an institution which derives its vitality from the statute of 1862, we must look to that statute and the articles of association of the company to ascertain the position of a shareholder and his powers of transfer, and the provisions made by the statute and the articles for the protection of the association. The sections of the statute have been already referred to by two of the noble Lords who have preceded me, and therefore I abstain from again referring to them. "*Primâ facie* title," in sect. 31, means that the certificates shall be evidence that the title of the holder is correct until the contrary shall be made to appear. James Montgomery Walker does not appear to have been an original member of the company. He seems to have acquired his shares by transfer in 1875, and he accepted the shares "subject to the articles of association and to the regulations of the company," one of which is specially expressed in the note indorsed on the certificate.

The appellants (the plaintiffs) contended, first, that they had obtained an actual valid transfer of the legal ownership in the shares, and had therefore the legal right to be registered; and, secondly, that if their title was only equitable, that equitable title was at least equal to that of the respondents, and had obtained priority by notice to the company.

The step which the plaintiffs had first to establish was that after the blank transfer had been completely filled up, James Montgomery Walker, being aware of its contents, had acknowledged it, and done some act equivalent to delivery of it as his deed. I was for some time very much struck with the consideration * that on this question the letters of the 28th [* 43] and 30th of December, or the inference to be deduced from them, would probably have operated by way of estoppel against James Montgomery Walker, had the litigation been with him. It seems different, however, as between the plaintiffs and the present defendants, who are pledgees of the shares for value, and whose prior title the plaintiffs seek in this litigation to displace. The onus lies on the plaintiffs to prove, as against the defendants, the due execution and delivery of the deed of transfer in a complete form as a deed. They have failed to prove, as against the defend-

ants, that after the transfer had been filled up James Montgomery Walker ever saw it or was aware of its complete contents or of Colladon being the transferee; and Dove states that when he got the letter of the 28th of December, signed by James Montgomery Walker, the transfer was not produced to him. The plaintiffs have therefore failed to do that which was incumbent on them, viz., to prove as against the defendants the due execution of the transfer.

We are therefore relieved from considering what might have been the effect of a due execution of the deed of transfer, without more, on the rights of the parties, having regard to the provision of the 26th of the articles of association, that "shares shall be transferable *only* by deed executed by the transferor and transferee, *and* duly entered in the register of transfers."

I have now to consider the first branch of the plaintiffs' second proposition, viz., that the equities of the two parties were equal in all respects. Treating the plaintiffs' title (if any) to be equitable only, the facts to establish it in every respect exhibit infirmity. The documents on which it is supposed to be founded are the letter of the 15th of December, 1882, and an unstamped form of a deed of transfer signed by James Montgomery Walker and called, and justly called, the blank transfer, for it was a complete blank; and the letter, though it mentions "100 Tram Unions," fails to earmark or pledge any particular shares; and Dove admitted the supposed transfer to be of no value. On the 16th of December Dove knew this. Nothing appears to have been done until the 28th, when the instrument was filled up on information probably [* 44] derived from the clerk of the company as * to the numbers of the shares on the register in Walker's name, and Colladon signed as transferee. Then followed the incomplete transactions of the 28th and 30th.

I assume, however, for the purposes of my judgment, that the plaintiffs had obtained an equitable lien on the shares in question. On the other hand, the prior equitable title of the defendants is clear, plain, simple, and without a blot, and is accompanied by a delivery and pledge of the certificates of the shares.

Now, the statute and the articles of association must be taken together. The former shows that the certificates are to be *primâ facie* evidence of the title to the shares; and the latter that the certificates are the only instruments and evidence of title which

the member is entitled to have delivered to him. The certificate is his title deed. The 12th article provides that the share capital is issued "on such terms and conditions and in such manner as the board may think fit;" and one of those conditions is expressed to be that "no transfer of any portion of the shares represented by the certificate will be registered until the certificate has been delivered at the company's office."

It seems to me that the parties are not in all respects in an equal position, — that the defendants have the earlier pledge rendered effectual by the possession of the certificates, and that their prior and superior title has not been displaced by the evidence given by the plaintiffs. The opinion which I have thus formed renders it unnecessary for me to consider whether the notice alleged to have been given by the plaintiffs of their supposed equitable title to the company was a sufficient notice, and, if it was, whether it was inoperative to affect the position of the parties by reason of the 30th section of the statute, or the 22nd of the articles of association. I assume the notice to have been sufficient in substance, and am of opinion that it was operative for some purposes, but on the very large and important question decided by the Court of Appeal I do not feel it necessary to express any opinion. I entertain some doubt on the subject.

Lord HALSBURY, L. C.: —

My Lords, at the close of the second argument in this case I had no doubt as to the judgment at which your Lordships should *arrive. Having since that time had an oppor- [*45] tunity of perusing the opinion which has been delivered by the noble and learned Lord, Lord BLACKBURN, I wish only to express my entire concurrence in the conclusion at which he has arrived and in the grounds by which that conclusion is supported.

Order appealed from affirmed; and appeal dismissed with costs.

Lords' Journal, 17th December, 1885.

ENGLISH NOTES.

In *France* v. *Clark* (C. A. 1884), 26 Ch. D. 257, 53 L. J. Ch. 588, 50 L. T. 1, F., the registered owner of shares in a company transferable without seal, deposited in the hands of C. to secure a loan of £150 the certificates with an instrument in the form of a deed of transfer signed by him, but blank as to the date, the consideration and the

name of the transferee. C., without the knowledge of F., deposited the certificates and blank transfer with Q., to secure a loan of £250. Q. inserted his own name as transferee. It was held that C., being only an equitable mortgagee of the shares, could only transfer to Q. such rights as he had himself: that Q. had no authority from the plaintiff to insert his own name: and that the shares were redeemable by F. on payment of the £150 and interest. In this case Selborne, L. C., points out that even if the transfer had been a negotiable instrument the result would have been the same. He observed that the principle of the rule as to negotiable instruments is that the person who has signed a negotiable instrument in blank or with blank spaces is (on account of the negotiable character of the instrument) estopped by the law merchant from disputing any alteration made in the document, after it has left his hands, by filling up blanks (or otherwise in any way not *ex facie* fraudulent) as against a *bonâ fide* holder for value without notice; but this estoppel is only in favour of the *bonâ fide* holder; and a man who, after taking it in blank, has himself filled up the blanks in his own favour without the consent of the person to be bound, has never been treated in English Courts as entitled to the benefit of the doctrine. For this he cited *Hogarth* v. *Latham, & Co.* (1878). 3 Q. B. D. 643, *per* Bramwell, B., p. 647, 47 L. J. Q. B. 339. 39 L. T. 75; *Hatch* v. *Searles* (1854). 2 Sm. & Giff. 147, *per* V. G. Stuart, p. 152. 23 L. J. Ch. 467, affirmed on appeal, 24 L. J. Ch. 22: *Taylor* v. *Great Indian Peninsular Railway Co.* (1859). 4 De G. & J. 559, *per* Turner, L. J. p. 574, 28 L. J. Ch. 285, 709.

It may be observed that in *Zwinger* v. *Samuda* (1817), 7 Taunt. 265, 1 Moore 12, Holt, N. P. 395, 18 R. R. 476, where the defendant, a pawnee of coffee, had given up to the pawnor the dock-warrants indorsed with an order for the delivery of the goods "to ———," he was held estopped from claiming the property against a *bonâ fide* holder to whom the pawnor had delivered the warrant, apparently without filling up the blank. There was evidence that persons engaged in the trade treat and consider these warrants as passing by indorsement. And, although the majority of the Court did not consider the evidence sufficient to establish a custom making the warrants negotiable, they appear to have treated the transaction as a representation by the defendant that the pawnor was the owner of the coffee.

In *Colonial Bank* v. *Whinney* (H. L. 1886), 11 App. Cas. 426, 56 L. J. Ch. 43, 55 L. T. 362, where a registered shareholder in a company had deposited his certificates and executed a blank transfer in security of an advance, it was held upon the bankruptcy of the shareholder that the shares were not in his reputed ownership. The certificates in this case were similar to those in the principal case No. 2 (*The*

Société Générale de Paris v. *Walker*), and the authority of that case was followed on the point that if the shareholder had attempted to transfer the shares to another person without producing the certificates, the transaction would not have been "in order," and the company would have refused to register it.

The principal case No. 2 is again followed by STIRLING, J., in *Roots* v. *Williamson* (1888), 38 Ch. D. 485, 57 L. J. Ch. 995, 58 L. T. 802.

The *Colonial Bank* v. *Cady* (appeal from *Williams* v. *Colonial Bank*), (H. L. 1890), 15 App. Cas. 267, 63 L. T. 27, is an important case. A., the registered owner of shares in an American Railway Company, held certificates stating that the shares were held by him, and were "transferable in person or by attorney on the books of the company only, on the surrender and cancellation of this certificate by an indorsement thereof hereon." Indorsed on the certificates was a form of transfer blank in the names of the transferor and transferee, and including a power of attorney (blank in the name of the attorney) to carry out the transfer. After the death of A., his executors, in order to have the shares transferred into their names sent the certificates to their London brokers, having previously signed as executors (but without filling up the blanks) the blank transfer on the back of each certificate. One of this firm of brokers fraudulently deposited the certificates with a bank as security for advances. The bank retained the certificates, and took no steps to obtain registration. It was held that the conduct of the executors in delivering the transfers was consistent with the intention to have themselves registered as the owner, and therefore did not estop them from setting up their title against the bank; for the bank might have inquired into the broker's authority.

Another important case in which the principal case (No. 2) is followed is *Powell* v. *London and Provincial Bank* (C. A. 1893), 1893, 2 Ch. 555, 62 L. J. Ch. 795, 69 L. T. 421. In this case, A. was the registered holder of stock in a company under the Companies Clauses Act 1845 (which by sect. 74 enacts that transfers of stock shall be by deed). A. deposited with a bank as security for a loan the stock certificate, a blank transfer executed by himself, and a loan note undertaking to execute a proper assignment when required. The stock in fact formed part of a fund of which A. was the sole trustee. The bank, who had no notice of the trust, inserted their own name in the blank transfer, and executed it as the transferees, but the deed was not re-executed by A. The transfer was duly registered by the company, and the bank informed A. of this. It was held by the Court of Appeal affirming the decision of WRIGHT, J., that the transfer was not the deed of A., and did not pass the legal title to the stock; and therefore the title of the bank, being equitable only, must be postponed to the prior equitable

title of the beneficiaries under the trust. *Powell* v. *London and Provincial Bank* (C. A. 1893), 1893, 2 Ch. 555, 62 L. J. Ch. 795, 69 J. T. 421.

As to the effect of blanks in negotiable instruments, see also "Bill of Exchange," No. 49 and notes, 4 R. C. p. 637 *et seq.*

AMERICAN NOTES.

The first branch of the Rule finds more or less support in *Burns* v. *Lynde*, 6 Allen, 305; *Preston* v. *Hull*, 23 Grattan (Virginia), 600; 14 Am. Rep. 153 (bond blank as to obligee); *Upton* v. *Archer*, 41 California, 85; 10 Am. Rep. 266 (deed blank as to grantee); *Viser* v. *Rice*, 33 Texas, 139; *United States* v. *Nelson*, 2 Brockenbrough, 64; *Cross* v. *State Bank*, 5 Pike (Arkansas), 525; *Bragg* v. *Fessenden*, 11 Illinois, 544; *Ingram* v. *Little*, 14 Georgia, 173; 58 Am. Dec. 549; *Williams* v. *Crutcher*, 5 Howard (Mississippi), 71; 35 Am. Dec. 422; *Graham* v. *Holt*, 3 Iredell Law (North Carolina), 300; 40 Am. Dec. 408; *Wallace* v. *Harmstad*, 15 Pennsylvania State, 462; 53 Am. Dec. 603; *Hanford* v. *McNair*, 9 Wendell (New York), 54.

But it has been held that a deed delivered to the grantor's agent, containing blanks, may subsequently be filled up and effectually delivered by him. *Duncan* v. *Hodges*, 4 McCord (South Carolina), 239; 17 Am. Dec. 734; *Field* v. *Stagg*, 52 Missouri, 534; 14 Am. Rep. 435 (there was parol authority to fill blanks); *Swartz* v. *Ballou*, 47 Iowa, 188; 29 Am. Rep. 470; *Vose* v. *Dolan*, 108 Massachusetts, 155; 11 Am. Rep. 331 (parol authority to fill blanks); *Owen* v. *Perry*, 25 Iowa, 412; 96 Am. Dec. 49 (deed entrusted to negotiate sale); *Van Etta* v. *Evenson*, 28 Wisconsin, 33; 9 Am. Rep. 486 (mortgage blank as to mortgagee); *Gibbs* v. *Frost*, 4 Alabama (N. S.) 720; *Bridgeport Bank* v. *N. Y., &c. R. Co.*, 30 Connecticut, 231; *Camden Bank* v. *Hall*, 2 Green (New Jersey), 383; *Ex parte Kerwin*, 8 Cowen (New York), 118; *Reed* v. *Morton*, 24 Nebraska, 760; 1 Lawyers' Rep. Annotated, 736.

The point is very learnedly examined in *Inhab. of So. Berwick* v. *Huntress*, 53 Maine, 89, where it is held that one signing and delivering a bond, as his deed, in an imperfect state, must be deemed as agreeing that the blanks may be filled. The Court cite *Eagleton* v. *Gutteridge*, 11 M. & W. 466; *Wiley* v. *Moor*, 17 Sergeant & Rawle (Pennsylvania), 438; 17 Am. Dec. 696; *Commercial Bank* v. *Kortwright*, 22 Wendell (New York), 361; *Wooley* v. *Constant*, 4 Johnson (New York), 54; 4 Am. Dec. 246; *Ex parte Decker*, 6 Cowen (New York), 60; *Humphreys* v. *Guillow*, 13 New Hampshire, 385; 38 Am. Dec. 499; and *Drury* v. *Foster*, 2 Wallace (United States Sup. Ct.), 24, in which the Court say: "We agree that by signing and acknowledging the deed in blank, and delivering the same to an agent, with an express or implied authority to fill up the blank and perfect the conveyance, its validity could not well be doubted. Although it was at one time doubted whether a parol authority was adequate to authorize an alteration or addition to a sealed instrument, the better opinion at this day is that the power is sufficient."

A deed being delivered to a vendee with the vendee's name blank, he may insert his own name. *McCleery* v. *Wakefield*, 76 Iowa, 529; 2 Lawyers' Rep. Annotated, 529, with notes.

In *State* v. *Matthews*, 14 Kansas, 596; 10 Lawyers' Rep. Annotated, 308, it is

said (in reference to deeds). "It is generally held that if the instrument is filled up in accordance with the instructions, written or oral, of the maker, in his presence or absence, before or after its delivery, and under it the property at that time or afterwards comes into the hands of some innocent and *bonâ fide* holder for value, the instrument will be held to be valid." Citing *Pence* v. *Arbuckle*, 22 Minnesota, 417, and other cases above cited.

Upon the second branch of the Rule, it was held, in *Commercial Bank* v. *Kortright*, 22 Wendell (New York), 348; 34 Am. Dec. 317, that a power to transfer stock, made in blank, by the owner's placing his name and seal, witnessed, on the back of the certificate, which is subsequently filled up by the person to whom it is delivered, is valid. Cited *McNeil* v. *Tenth Nat. Bank*, 46 New York, 331; 7 Am. Rep. 335; *Bartlett* v. *Board of Education*, 59 Illinois, 371. In *McNeil* v. *Tenth Nat. Bank*, *supra*, the first principal case was referred to at length, the Court observing: "Some of these questions received a most elaborate discussion, and there was a strong array of judicial opinions sustaining the validity of transfers of stock, unauthorized in point of fact, on the ground that by mere negligence and unintentionally the true owner had enabled another to deliver an apparently valid title to the stock, and thus deceive third parties."

See 2 Daniel on Negotiable Instruments, § 1708, *g*.

BLOCKADE.

No. 1. — THE NEPTUNUS.

(1799.)

RULE.

A BLOCKADE *de facto* expires *de facto;* but a blockade by notification (accompanied by the fact) is *primâ facie* presumed to continue till the notification is revoked. So that, in the latter case, the burden of proof is thrown on the party claiming restitution.

The Neptunus.

1 C. Rob. 170–173.

Blockade. — De facto or by Notification. — Presumption.

A blockade *de facto* expires *de facto;* but a blockade by notification [170] is *primâ facie* presumed to continue till the notification is revoked: this presumption throws the *onus probandi* on the claimant.

No. 1. — The Neptunus, 1 C. Rob. 170, 171.

This was the case of a ship taken coming out of the Texel, September 7th, 1798.

Judgment: —

Sir W. Scott. This case comes on now upon the ship only. In the affidavit annexed to the claim it is said that there is an authority given to claim the cargo, and that there are some facts which may take that part of the case out of the law which has been laid down respecting a breach of blockade; I shall therefore reserve that till a future day, saying at present only that I shall expect the claim to be very special, and the proof to be very satisfactory as to the time when the transaction took place.

There are two questions respecting the ship: a question of property, and a question arising on a breach of blockade. As the Court has frequently decided that neutral vessels breaking a [*171] blockade * are liable to confiscation; if I am satisfied that the ship has been guilty of that offence, it may be unnecessary to enter into the former question, or to inquire whether the property belongs to the claimant or to the Dutch merchants Messrs. De Sylva, who have, in a letter found on board, certainly expressed themselves very much with the anxiety and authority of owners.

The capture was made on the 7th of September off the Vlie passage by two English armed ships, about seven miles from the Dutch coast. The Court has before laid down the rule that a blockade is broken as much by coming out with a cargo as by going in; and the only exception which the Court has noticed in laying down this rule is that of a cargo shipped or delivered to the master, for the use of his owner, before the commencement of the blockade.

There are two sorts of blockade: one by the simple fact only; the other by a notification accompanied with the fact In the former case, when the fact ceases otherwise than by accident or the shifting of the wind, there is immediately an end of the blockade. But where the fact is accompanied by a public notification from the government of a belligerent country to neutral governments, I apprehend, *primâ facie*, the blockade must be supposed to exist till it has been publicly repealed. It is the duty undoubtedly of a belligerent country, which has made the notification of blockade, to notify in the same way, and immediately, the discontinuance of it. To suffer the fact to cease, and to apply the notification again, at a distant time, would be a fraud on neutral nations, and a

conduct which we are not to suppose that any *country [*172] would pursue. I do not say that a blockade of this sort may not in any possible case expire *de facto;* but I say such a conduct is not hastily to be presumed against any nation; and therefore, till such a case is clearly made out, I shall hold that a blockade by notification is, *primâ facie*, to be presumed to continue till the notification is revoked.

The notification of the blockade of this port was made on the the 11th of June, 1798. The ship was in the Texel at the time; the owner was at Embden; and the blockade must have been perfectly well known there by the latter end of the month. Her duty was to have retired. But it is said that the cargo was Portuguese property, and purchased before the notification. Perhaps it might be so; but there could be no obligation on this Prussian vessel to take it away. Instead of pursuing the prudent conduct of withdrawing, just after the blockade began, in the months of July and August, this ship is employed in taking a cargo on board.

That it should be done with an intention of continuing there till the blockade ceased is not probable. The presumption is that it must have been done with a fraudulent design of slipping out, if any accident should afford an opportunity of escaping. In the month of September the ship sails, and is immediately stopped by these two armed vessels. But it is said that there was no blockade *de facto;* and that this small number of vessels only is a proof that there was no efficient actual blockade. I am of a contrary opinion; for surely it is not necessary that the whole blockading force should lie in the same tier; nor is it material that a vessel had escaped the *rest. These ships were in the exterior [*173] line, as I understand it; and if there had been only these, I should have held them to be quite sufficient. It is unnecessary for me to consider, however, whether the blockade was continued by these ships or not, as the presumption being raised by the notification, it rests on the other side to prove the contrary.

ENGLISH NOTES.

It is necessary that a blockade should be intimated to neutral merchants in some way or other. It may be notified in a public and solemn manner, by declaration to foreign governments; and this mode would always be most desirable, although it is sometimes omitted in practice; but it may also commence *de facto*, by a blockading force giving notice on the spot to those who come from a distance, and who may therefore

be ignorant of the fact. Vessels going in are, in that case, entitled to a notice before they can be justly liable to the consequences of breaking a blockade. But no notice is necessary to affect vessels coming out of the blockaded port. *The Vrouw Judith* (1799), 1 C. Rob. 150, 152.

In this case of *The Vrouw Judith*, Lord Stowell gives the following definition of a blockade, which is quoted by Bramwell, B., in *Rodocanachi* v. *Elliott* (Ex. Ch. 1874), L. R., 9 C. P. 518, 523, 43 L. J. C. P. 255, 258, 31 L. T. 239, as precisely applicable to an investment by land, such as that of Paris by the Germans in 1870: "A blockade is a sort of circumvallation round a place, by which all foreign connection and correspondence is, so far as human force can effect it, to be entirely cut off. It is intended to suspend the entire commerce of that place; and a neutral is no more at liberty to assist the traffic of exportation than that of importation." Lord Stowell proceeds: "The utmost that can be allowed to a neutral vessel is that, having already taken on board a cargo before the blockade begins, she may be at liberty to retire with it. But it must be considered as a rule which this Court means to apply, that a neutral ship departing can only take away a cargo *bonâ fide*, purchased and delivered, before the commencement of the blockade; if she afterwards takes on board a cargo, it is a fraudulent act, and a violation of the blockade."

A vessel coming out of a blockaded port with a cargo is *primâ facie* liable to seizure; and cargo taken on board after the commencement of the blockade is also liable to be condemned. *The Frederick Moltke* (1798), 1 C. Rob. 85. Tudor's L. C. on Mercantile Law, 3 ed. p. 1011.

A blockade by notification directed against one State cannot be enforced so as to prevent free access to a conterminous state not included in the notification. So a blockade of the ports of Holland was held not violated by a destination to Antwerp. *The Frau Ilsabe* (1801), 4 C. Rob. 63.

A neutral ship cannot innocently place itself in a situation where she may with impunity break the blockade at pleasure. *The Neutralitet* (1805), 6 C. Rob. 30, 35. So a ship which has notice of a blockade is not entitled to sail to the mouth of the blockaded port to inquire whether the blockade is still in existence. *The Spes und Irene* (1804), 5 C. Rob. 76, 81.

The notice given of a blockade must not be more extensive than the blockade itself. *Northcote* v. *Douglas* (1855), 10 Moo. P. C. 37, 59.

Where a ship is condemned for breach of blockade the cargo generally follows the same fate; and it is not competent to the owners of the cargo to show their innocence, as they are concluded by the illegal act of the master. *Baltazzi* v. *Ryder* (P. C. 1858), 12 Moo. P. C. 168. But

where at the time of shipment, the shippers could not have known of the blockade, the goods may be restored, notwithstanding the subsequent illegal act of the master in breaking the blockade. *The Mercurius* (1798), 1 C. Rob. 80. To this extent the ruling of Lord STOWELL in the latter case — although too broadly expressed — appears to be acknowledged as law in the judgment of the Judicial Committee delivered by Lord KINGSDOWN in *Baltazzi* v. *Ryder*.

AMERICAN NOTES.

The principal case is cited by the United States Supreme Court, with *The Betsey*, 1 Robinson, 282; in *The Circassian*, 2 Wallace, 150, the Court observing: "Of such a blockade, it was well observed by Sir William SCOTT: 'It must be conceived to exist till the revocation of it is actually notified.' The blockade of the rebel forts, therefore, must be presumed to have continued until notification of discontinuance. It is, indeed, the duty of the belligerent government to give prompt notice; and if it fails to do so, proof of the discontinuance may be otherwise made; but subject to just responsibility to other nations, it must judge for itself when it can dispense with blockades."

No. 2. — THE BETSEY.

(1798.)

No. 3. — THE COLUMBIA.

(1799.)

RULE.

IN order to render a neutral ship liable to capture for breach of blockade, the blockade must be actual, amounting to a state of investment by the enemy.

But the blockade may continue legally to exist, although the blockading squadron has been temporarily blown off by adverse winds.

The Betsey.

1 C. Rob. 92a–101.

Blockade. — Actual Investment necessary.

A declaration of blockade by a commanding officer without an [92a] actual investment will not constitute a legal blockade. In a case of neutral property captured by the English and recaptured by the French, compensation sued from the original British captors, but refused, on the ground

No. 2. — The Betsey. 1 C. Rob. 92, 93.

of a *bonâ fide* possession; irregularities to bind a former captor, being a *bonâ fide* possessor, must be such as produce irreparable loss, or justly prevent restitution from the recaptors.

This was a case of a ship and cargo taken by the English at the capture of Guadaloupe, April the 13th, 1794, and retaken, together with that island, by the French in June following. The ship was claimed for Mr. Patterson, of Baltimore, and the cargo as American property. The captors, being served with a monition to proceed to adjudication, appeared under protest; and the cause now came on upon the question, Whether the claimants were entitled to demand of the first British captors restitution in value for the property which had passed from them to the French recaptors? The first seizure was defended on a suggestion that *The Betsey* had broken the blockade at Guadaloupe.

Judgment: —

Sir W. Scott. This is a case which it will be proper to consider under two heads. I shall first dispose of the question of blockade; and then proceed to inquire on whom the loss of the recapture by the French ought to fall, under all the circumstances of the case.

On the question of blockade three things must be proved: 1st, The existence of an actual blockade; 2ndly, The knowledge of the party; and, 3dly, Some act of violation, either by going in or by coming out with a cargo laden after the commencement of
[*93] *blockade. The time of shipment would on this last point be very material; for although it might be hard to refuse a neutral liberty to retire with a cargo already laden, and by that act already become neutral property, yet, after the commencement of a blockade, a neutral cannot, I conceive, be allowed to interpose in any way to assist the exportation of the property of the enemy. After the commencement of the blockade, a neutral is no longer at liberty to make any purchase in that port.

It is necessary, however, that the evidence of a blockade should be clear and decisive. In this case there is only an affidavit of one of the captors, and the account which is there given is "that, on the arrival of the British forces in the West Indies, a proclamation issued, inviting the inhabitants of Martinque, St. Lucie, and Guadaloupe, to put themselves under the protection of the English; that on a refusal hostile operations were commenced against them all;" though it cannot be meant that they began immediately against all

at once; for it is notorious that they were directed against them separately and in succession. It is farther stated "that, in January, 1794 (but without any more precise date), Guadaloupe was summoned, and was then put into a state of complete investment and blockade."

The word "complete" is a word of great energy; and we might expect from it to find that a number of vessels were stationed round the entrance of the port to cut off all communication. But from the protest I perceive that the captors entertained but a very loose notion of the true nature of a blockade; for it
*is there stated "that, on the 1st of January, after a gen- [*94]
eral proclamation to the French islands, they were put into
a state of *complete* blockade." It is a term, therefore, which was applied to all those islands at the same time under the first proclamation.

The Lords of Appeal have determined that such a proclamation was not in itself sufficient to constitute a legal blockade. It is clear, indeed, that it could not in reason be held to produce the effect which the captors erroneously ascribed to it. From the misapplication of these phrases in one instance I learn that we must not give too much weight to the use of them on this occasion; and from the generality of these expressions I think we must infer that there was not that actual blockade which the law is now distinctly understood to require.

But it is attempted to raise other inferences on this point from the manner in which the master speaks of the difficulty and danger of entering; and from the declaration of the municipality of Guadaloupe, which states "the island to have been in a state of siege." It is evident that the American master speaks only of the difficulty of avoiding the English cruisers generally in those seas; and as to the other phrase, it is a term of the new jargon of France which is sometimes applied to domestic disturbances, and certainly is not so intelligible as to justify me in concluding that the island was in that state of investment from a foreign enemy which we require to constitute blockade. I cannot, therefore, lay it down that a blockade did exist till the operations of the forces were actually directed against Guadaloupe in April.

*It would be necessary for me, however, to go much [*95]
further, and to say that I am satisfied also that the parties
had knowledge of it; but this is expressly denied by the master.

He went in without obstruction. Mr. Incledon's statement of his belief of the notoriety of the blockade is not such evidence as will alone be sufficient to convince me of it. With respect to the shipment of the cargo, it does not appear exactly under what circumstances or what time it was taken in; I shall therefore dismiss this part of the case.

The case being on the first point pronounced a case of restitution, a second point arises out of the recapture of the property by the French; and the question is, Whether the original captors are exonerated of their responsibility to the American claimants? It is to be observed that at the time of recapture America was a neutral country, and in amity with France. I premise this fact as an important circumstance in one part of the case; but the principal points for our consideration are, Whether the possession of the original captors was, in its commencement, a legal *bonâ fide* possession? and, 2ndly, Whether such a possession, being just in its commencement, became afterwards, by any subsequent conduct of the captors tortious and illegal? for on both these points the law is clear "that a *bonâ fide* possessor is not responsible for casualties, but that he may by subsequent misconduct forfeit the protection of his fair title, and render himself liable to be considered as a trespasser from the beginning." This is the law, not of this Court only, but of all Courts, and one of the first principles of universal jurisprudence.

[*96] *The cases in which it has been particularly applied in this Court, have been cited in the arguments; and I will briefly advert to the circumstances of them, as they will afford much light to direct us in the present case. *The Nicolas and Jan*, Adm. March 5, 1784, was one of several Dutch ships taken at St. Eustatius, and sent home under convoy to England for adjudication. In the mouth of the channel they were retaken by the French fleet; there was much neutral property on board, sufficiently documented; and in that case a demand was made on behalf of a merchant of Hamburgh, for restitution in value from the original captor. It was argued, I remember, that the captors had wilfully exposed the property to danger, by bringing it home, whilst they might have resorted to the Admiralty Courts in the West Indies, and therefore that the claimants were entitled to demand indemnification from them; but on this point the Court was of opinion that, under the dubious circumstances in which those cases were involved, and

under the great pressure of important concerns in which the commanders were engaged, they had not exceeded the discretion which is necessarily intrusted to them by the nature of their command. It was urged also against the claimants in that case, that since the property had been retaken by their allies, they had a right to demand restitution *in specie* from them; and on these grounds our Courts rejected their claims.

In *The Hendrick and Jacob* (*Hendrick and Jacob*, Lords, July 21, 1790) also the case turned upon similar considerations of the nature of the possession. It was a case of a Hamburghese ship taken erroneously as Dutch, and retaken by a French *privateer. In going into Nantz the vessel foundered and [*97] was lost. On demand for restitution against the original British captor, the LORDS OF APPEAL decided that as it was a seizure made on unjustifiable grounds, the owners were entitled to restitution from some quarter; that as the French recaptor had a justifiable possession under prize taken from his enemy, he was not responsible for the accident that had befallen the property in his hands; that if the property had been saved indeed, the claimant must have looked for redress to the justice of his ally the French; but since that claim was absolutely extinguished by the loss of the goods, the proprietor was entitled to his indemnification from the original captor. Under a view of these precedents, we must inquire first into the nature of the original seizure in the present case: Whether it was so wrongful, as to bring upon the seizor all the consequences of that strict responsibility which attaches to a tortious and unjustifiable possession?

It has been rather insinuated, than affirmed openly in argument, that there was any thing wrong or unjustifiable in the first capture; but it is said that the great injustice arises from the detention, and from that irregularity of conduct in the captors, which has put it out of the power of the claimants to support their claim, and obtain restitution from the French.

In respect to the first seizure, although it is admitted now that there was not a blockade, yet it must be allowed also, on the other side, that the island of Guadaloupe was at that time in a situation extremely ambiguous and critical. It could be no secret in America *that the British forces were advancing against [*98] the island; and that the planters would be eager to avail themselves of the interference of neutral persons, to screen and

carry off their property. Under such a posture of affairs, ships found in the harbours of Guadaloupe must have fallen under very strong suspicions, and have become justly liable to very close examination. The suspicion besides would be still farther aggravated, if it appeared, as in this case it did appear, that those for whom the ships were claimed kept agents stationed on the island; and might, therefore, be supposed to be connected in character and interests with the commerce of the place. It is true, indeed, the LORDS OF APPEAL have since pronounced the island to have been not under blockade; but it was a decision that depended upon a greater nicety of legal discrimination than could be required from military persons, engaged in the command of an arduous enterprise.

The same considerations which justify the seizure apply also to the second charge of detention in this case; for, under these suspicions and these doubts, it was not a slight examination of formal papers that could be deemed sufficient. The captors were entitled to reserve the property so taken for legal adjudication; and as they could not erect a jurisdiction on the spot, so neither were they at leisure then to send their prizes to distant Courts. The first capture was made April 13; the recapture took place so early as the 2d of June following; there was an interval but of six weeks. The French were, as the subsequent event [* 99] proves, in great force in those parts; the * Commanders had much to occupy their attention; the number of vessels taken under these circumstances was very considerable; and, therefore, it is not to be mentioned as an injurious or unnecessary delay, that in six weeks, so employed, no means were found to bring the ships to adjudication.

But it is said, the irregular proceedings of the captors have rendered them liable to the strictest responsibility. Now, on this point I must distinctly lay it down, that the irregularities, to produce this effect, must have been such as would justly prevent restitution by the French. If such a case could be supported, I will admit there might then be just grounds for resorting to the British captor for indemnification; but till this is proved, the responsibility which lies on recaptors to restore the property of allies and neutrals will be held by these Courts to exonerate the original captors.

What then has been the nature of the irregularities? It is said, that the masters and proprietors were sent away from their

ships; and, that from that cause there was no one to apply for restitution at the time of recapture. But what was there to prevent them from making their applications afterwards? Are the French more than the English Courts exempted from subsequent restitution? They hold, indeed, that possession of twenty-four hours will convert the property of prize: but this is not applicable to a neutral vessel. So strongly did the maritime jurisprudence of ancient France consider neutral property to be in a state of absolute inviolability, that no salvage was allowed, on retaking neutral vessels, on the *supposition that no service had [*100] been rendered to them. Such was the language of their law; and, therefore, no bar to restitution can have arisen from the impossibility of making immediate application.

It is said farther that the papers were all thrown confusedly together; by which it was put out of the power of the claimants to produce that proof and those documents which the courts of France require. I know it was a maxim of the French law, and a maxim not deficient in justice, that if in time of war a ship is found sailing about the world without any credentials of character, she is liable to confiscation; but if a just reason could be given for this defect, if accident or force could be shown to have stripped her of her proper documents, can it be conceived that the general rule would be applied to such a case? Unless the Courts of France have renounced every principle of justice, such a consequence could not have ensued from the want of documents in these cases; and, therefore, it is not in reason to be presumed. Supposing these irregularities to have existed, and in the censurable degree which this argument imputes, they have not in any manner taken off the obligation which the French lie under to restore this property. I must determine that they would not, under any proceedings of justice, have prevented restitution from the French.

On no other ground can the proprietors be entitled to claim it from the British. If the neutral has sustained any injury, it proceeds not from the British captor, but from the French; and there is no reason that British captors should pay for French injustice. I *must pronounce the protest to be well [*101] founded, and the captors to be discharged from any farther proceedings.

Laurence said, that there was a quantity of silver on board which had not been retaken.

King's Adv. After what has fallen from the Court, I cannot object to the restitution of the specie.

June 22, 1799. This cause was re-heard before the Lords of Appeal. The sentence of the Court below was affirmed.

The Columbia.

1 C. Rob. 154–157.

Blockade. — Breach. — Sailing with Intent.

The actual sailing with an intention to break a blockade is a breach of the blockade. And the blockade continues legally to exist although the blockading squadron has been temporarily blown off by adverse winds.

[154] This was a case of an American vessel taken on a voyage from Hamburgh to Amsterdam, August 20th, 1798.

Judgment.

Sir W. Scott. There is pretty clear proof of neutral property in this case, both of the ship and cargo; but the vessel was taken attempting to break a blockade.

It is unnecessary for me to observe that there is no rule of the law of nations more established than this; that the breach of a blockade subjects the property so employed to confiscation. Among all the contradictory positions that have been advanced on the law of nations, this principle has never been disputed; it is to be found in all books of law, and in all treaties; every man knows it; the subjects of all states know it, as it is universally acknowledged by all governments who possess any degree of civil knowledge.

This vessel came from America, and, as it appears, with innocent intentions on the part of the American owners; for it was not known at that time in America that Amsterdam was in a state of investment. There is no proof therefore immediately affecting the owners. But a person may be penally affected by the misconduct of his agents, as well as by his own acts; and if he delegates general powers to others, and they misuse their trust, his remedy must be against them.

[* 155] * The master was by his instructions to go north about to Cruxhaven. This precaution is perhaps liable to some unfavourable interpretation: the counsel for the claimant have endeavoured to interpret it to their advantage; but at the best, it can be but a matter of indifference. When he arrived at Cruxhaven, he was to go immediately to Hamburgh, and to put himself

No. 3. — The Columbia, 1 C. Rob. 155, 156.

under the direction of Messrs. Boué and Company. They therefore were to have the entire dominion over this ship and cargo. It appears, that they corresponded with persons at Amsterdam, to whom farther confidential instruction had been given by the owners; and these orders are found in a letter from Messrs. Vos and Graves, of New York, to Boué and Company, informing them, that the *Columbia* was intended for Amsterdam, — consigned to the house of Crommelin, to whom Boué and Company are directed to send the vessel on "if the winds should continue unsteady and keep the English cruisers off the Dutch coast;" if not, they were to unload the cargo, and forward it by the interior navigation to Amsterdam. Boué and Company accordingly direct the master "to proceed to Amsterdam, if the winds should be such as to keep the English at a distance." There is also a letter from the master to Boué from Cruxhaven; in which he says, "Amsterdam is blockaded."

We have this fact then, that when the master sailed for Amsterdam, the blockade was perfectly well known both to him and the consignees; but their design was to seize the opportunity of entering whilst the winds kept the blockading force at a distance. Under these circumstances, I have no hesitation in saying, that the blockade was broken. * The blockade was to be [* 156] considered as legally existing, although the winds did occasionally blow off the blockading squadron. It was an accidental change which must take place in every blockade; but the blockade is not therefore suspended. The contrary is laid down in all books of authority; and the law considers an attempt to take advantage of such an accidental removal, as an attempt to break the blockade, and as a mere fraud.

But it has been said, that by the American treaty there must be a previous warning; certainly where vessels sail without a knowledge of the blockade, a notice is necessary; but if you can affect them with the knowledge of that fact, a warning then becomes an idle ceremony, of no use, and therefore not to be required. The master, the consignees, and all persons intrusted with the management of the vessel, appear to have been sufficiently informed of this blockade; and, therefore, they are not in the situation which the treaty supposes.

It is said also, that the vessel had not arrived; that the offence was not actually committed, but rested in intention only. On

this point I am clearly of opinion that the sailing with an intention of evading the blockade of the Texel, was a beginning to execute that intention; and is to be taken as an overt act constituting the offence. From that moment the blockade is fraudulently invaded. I must, therefore, on full conviction, pronounce, that a breach of blockade has been committed in this case; and that the act of the master will affect the owner to the extent of the whole of his property concerned in the transaction. The ship and [*157] cargo belong to the same individuals, *and therefore they must be both involved in the sentence of condemnation.

12th Aug. 1801. This case was heard on appeal, when the sentence of the Court below was affirmed.

ENGLISH NOTES.

Where a blockade has been notified, but the blockading squadron has been driven off by a superior force, there is an end of it; and if the blockade is resumed, it must, to become binding on neutral States, be again notified or become notorious *de facto*. *The Hoffnung* (1805), 6 C. Rob. 112; *The Triketen* (1805), 6 C. Rob. 65.

If a vessel comes out of a port where it is alleged but not proved that there is a blockade *de facto*, and the vessel does not meet with any blockading squadron, but is afterwards captured by a cruiser on a different service, there seems a presumption that there is no breach of blockade; *The Christina Margaretha* (1805), 6 C. Rob. 62; although, where there is an effective blockade intentionally broken, the ship so breaking it is not free merely by getting past the blockading force, but it is competent to any cruiser to seize and proceed against her for the offence. *The Welvaart Van Pillaw* (1799), 2 C. Rob. 128, 130. *The Juffrow Maria Schroeder* (1800), 3 C. Rob. 147.

Where the blockade is raised, the vessel intending to break it is no longer *in delicto*; so that the original purpose becomes immaterial. *The Lisette* (1807), 6 C. Rob. 387, 395.

If some vessels are permitted to pass, others will have a right to infer that the blockade is raised. *The Rolla* (1807), 6 C. Rob. 364, 372. *The Juffrow Maria Schroeder*, *supra*.

The blockading squadron may lawfully lie at any distance convenient for shutting up the port blockaded. *Naylor* v. *Taylor* (1828), Mood. & Mal. 205.

A so-called blockade which is relaxed in favour of belligerents to the exclusion of neutrals is not a legal blockade. *Northcote* v. *Douglas* (*The Fransciska*) (1855), 10 Moo. P. C. 37.

AMERICAN NOTES.

"An accidental removal of the fleet does not suspend the blockade, provided the fleet uses all due diligence to reassume its station." *Radcliff* v. *United Ins. Co.*, 7 Johnson (New York), 54, by KENT, C. J. "If he knows or is fairly chargeable with notice of the cause of the absence of the fleet, and that cause be an accidental dispersion by winds or storms, an attempt to take this opportunity to enter and to carry provisions to the besieged would be a fraud upon belligerent rights and a breach of blockade. It would be taking an unjustifiable part in the contest, which no candid neutral, bound to good faith, would advise, and which no belligerent power would tolerate. Though ignorance of the cause of the removal of the investing force will excuse the neutral, yet the blockade is still recognized by the law of nations as existing. This is said to be so laid down by all the writers who treat on the subject."

BOND (NEGOTIABLE).

No. 1. — GORGIER *v.* MIEVILLE.

(1824.)

No. 2. — GOODWIN *v.* ROBARTS.

(H. L. 1876.)

RULE.

BONDS of a foreign government which are sold in the market and passed from hand to hand, like exchequer bills, are negotiable.

The same is the case with scrip issued by the agent of a foreign government purporting to entitle the bearer, upon payment of a certain amount in instalments, to a definitive bond for that amount. It being proved that such scrip (the amount having been fully paid) has, according to a general usage of more than fifty years, been dealt with in the same way as the bonds themselves; the legal consequence is that the scrip, like the bonds themselves, is negotiable.

No. 1. — Gorgier v. Mieville, 3 Barn. & Cress. 45, 46.

Gorgier v. Mieville.

3 Barn. & Cress. 45–47.

Negotiable Instrument. — Foreign Bond to Bearer.

[45] Where a foreign prince gave bonds, whereby he declared himself and his successors bound to every person who should for the time being be the holders of the bonds for the payment of the principal and interest in a certain manner: — *held*, that the property in those instruments passed by delivery as the property in bank notes, exchequer bills, or bills of exchange, payable to bearer; and that, consequently, an agent in whose hands such a bond was placed for a special purpose might confer a good title by pledging it to a person who did not know that the party pledging was not the real owner.

Trover for a Prussian bond. Plea, not guilty. At the trial before Abbott, C. J., at the London sittings after last Michaelmas Term, it appeared that the bond in question had been deposited by the plaintiff in the hands of Messrs. Agassiz and Co., to hold for the benefit of the plaintiff, and receive the interest upon it. Agassiz and Co., being in want of money, pledged the bond to the defendants. By the bond, the King of Prussia declared himself and his successors bound to every person who should for the time being be the holder of the bond, for the payment of the principal and interest, in the manner there pointed out. It was further proved, that bonds of this description were sold in the market, and passed from hand to hand daily, like exchequer bills, at a variable price, according to the state of the market. Upon these facts the Lord Chief Justice was clearly of opinion that this bond might be pledged to any person who did not know that the person pledging it was not the real owner, and he directed the jury to find a verdict for the defendants, unless they thought [* 46] that the defendants knew * that Messrs. Agassiz and Co. were not the owners of the bond at the time when they deposited it in their hands. The jury having found a verdict for the defendants, a rule *nisi* for a new trial was obtained in last Hilary Term. And now

Scarlett, Marryatt, Gurney, and F. Pollock showed cause, and contended that a bond of this description being payable to bearer, and the subject of sale like exchequer bills, the property in it passed by delivery, and therefore, like bank-notes or bills of exchange indorsed in blank, might be pledged by any person holding it in character of agent; and they cited *Miller* v. *Race*, 3 R. C. 626;

1 Burr. 452; *Grant* v. *Vaughan*, 3 Burr. 1516; *Peacock* v. *Rhodes*, Doug. 633; *Collins* v. *Martin*, 1 Bos. & P. 648; 4 R. R. 752; *Wookey* v. *Pole*, 4 B. & Ald. 1.

The Attorney-General and D. F. Jones, *contra*. This case falls rather within *Glyn* v. *Baker*, 13 East, 509; 12 R. R. 414, in which it was held that the property in an India bond did not pass by delivery. The principal ground upon which bank-notes, bills of exchange indorsed in blank, and exchequer bills have been held to pass by delivery is, that such instruments constitute a part of the circulating medium of the country, which would be materially impeded if they could be followed. That reason does not apply to a security of a foreign State.

Abbott, C. J. I think that this rule must be discharged. This instrument, in its form, is an acknowledgment by the King of Prussia that the sum * mentioned in the bond is due to [*47] every person who shall for the time being be the holder of it; and the principal and interest is payable in a certain mode, and at certain periods mentioned in the bond. It is therefore, in its nature precisely analogous to a bank-note payable to bearer, or to a bill of exchange indorsed in blank. Being an instrument, therefore, of the same description, it must be subject to the same rule of law, that whoever is the holder of it has power to give title to any person honestly acquiring it. It is distinguishable from the case of *Glyn* v. *Baker*, because there it did not appear that India bonds were negotiable, and no other person could have sued on them but the obligee. Here, on the contrary, the bond is payable to the bearer, and it was proved at the trial that bonds of this description were negotiated like exchequer bills.

Rule discharged.

Goodwin v. Robarts.

1 App. Cas. 476–497 (s. c. 45 L. J. Q. B. 748; 35 L. T. 179; 24 W. R. 987).

Negotiable Instrument. — Foreign Scrip. — Custom or Usage of Market.

The scrip of a foreign government, issued on negotiating a loan [176] (which scrip promises to give to the bearer, after all instalments have been duly paid, a bond for the amount paid, with interest), is, by the custom of all the stock markets of Europe, a negotiable instrument, and passes by mere delivery to a *bonâ fide* holder for value. English law follows this custom, and any person taking the scrip in good faith obtains a title independent of the title of the person from whom he took it.

No. 2. — Goodwin v. Robarts, 1 App. Cas. 476, 477.

G. purchased through his broker some Russian and some Hungarian scrip: the undertaking in the scrip was to give to the bearer a bond for the money advanced payable, with interest, in the way there stated. G. left the scrip (to be exchanged for bonds or sold, as he should direct) in the hands of his broker, who fraudulently deposited it with a banker as security for a loan to himself: —

Held, that the scrip was a negotiable instrument, transferable by mere delivery; and that the banker, being a *bonâ fide* holder for value, was not liable to G. either in trover for the scrip itself or in assumpsit for the value received upon it.

This was an appeal against a judgment of the Court of Exchequer Chamber, which had affirmed a previous judgment of the Court of Exchequer. The plaintiff had brought trover with a count for money had and received. The facts were turned [*477] into *a special case. The Court was to be at liberty to draw any inference of fact. The case expressly found that there had been a usage on the English and foreign exchanges to treat this scrip as passing by delivery.

In February, 1874, the plaintiff purchased £200 of Russian scrip, forming part of a loan then raised by the Russian government, and £300 of Hungarian scrip, part of a loan raised by the Austro-Hungarian government. He employed one Herbert E. Clayton, a stockbroker, to make these purchases. The two sorts of scrip (both of which were afterwards fully paid up) were issued under the authority of the two governments, and the firms of Messrs. Rothschild & Sons, of London, and Messrs. De Rothschild, of Paris, were the bankers employed by the two governments to negotiate the loans.

The Russian loan was for a sum of £15,000,000. The Russian scrip was in this form: —

"Imperial Government of Russia. Issue of £15,000,000 sterling, nominal capital, in 5 per cent. Consolidated Bonds of 1873. Negotiated by Messrs. N. M. Rothschild & Sons, London, and Messrs. De Rothschild, Brothers, Paris. Bearing interest half yearly, payable in London from the 1st of December, 1873.

"Scrip for £100 stock, No. . Received the sum of £20, being the first instalment of twenty per cent. upon one hundred pounds stock; and on payment of the remaining instalments at the period specified the bearer will be entitled to receive a definitive bond or bonds for one hundred pounds, after receipt thereof, from the Imperial Government. London, 1st of December, 1873."

No. 2. — Goodwin v. Robarts, 1 App. Cas. 477. 478.

There was a statement of the times when the remaining instalments were to be paid, and a declaration that: "In default of payment of these instalments at the proper dates all previous payments will be liable to forfeiture."

The bonds were executed in Russia, and afterwards delivered to Messrs Rothschild, who, about the month of June, 1874 (the instalments having been duly paid), issued them in England and France to the bearers of the scrip.

The bond declared, "The bearer of this bond is entitled to £100 sterling, with interest at 5 per cent.," &c., "which will be * paid on presentation of the coupons hereunto attached;" [*478] and there was a provision for the delivery of "new coupons to the bearer" when a bond was not drawn for redemption, and the old coupons had been exhausted.

Everything done in this matter was done under the authority of an ukase issued by the Russian government, containing several articles, one of which (5th) was in these terms: —

"The subscription for these bonds shall be opened abroad through the medium of the banking houses of Messrs. N. M. Rothschild & Sons, of London, and of Messrs. De Rothschild, of Paris, and in Russia by the care of the Minister of Finances."

The Austro-Hungarian government issued a Hungarian loan for £7,500,000 about the same time, and the scrip and all the documents connected with it were almost identically in the same form.

When the purchase of the scrip was made the plaintiff did not take it into his own hands, but left it with Clayton, his broker, to be exchanged for bonds, or disposed of as he, the plaintiff, might direct. On the 27th of February, 1874, Clayton applied to the defendants, bankers in London, for a loan for himself, and obtained an advance of £800, and part of the security he deposited for this loan was this scrip of the Russian and the Hungarian loans. He afterwards absconded, and the defendants, for the purpose of repaying themselves, sold this scrip on the Stock Exchange in the usual way, obtaining thereby a sum of £471 5s. At that time the defendants did not know that the plaintiff had any claim upon it.

The special case, in paragraph 9, contained the following statement: —

"The scrip of loans to foreign governments, entitling the bearers thereof to a bond for the same amount when issued by the government, has been well known to, and largely dealt in by

No. 2. — Goodwin v. Robarts, 1 App. Cas. 478, 479.

bankers, money dealers, and the members of the English and foreign stock exchanges, and through them by the public for over fifty years.

"It is and has been the usage of such bankers, money dealers, and stock exchanges during all that time to buy and sell [*479] such * scrip, and to advance loans of money upon the security of it before the bonds were issued, and to pass the scrip upon such dealings, by mere delivery as a negotiable instrument transferable by delivery, and this usage has always been recognised by the foreign governments or their agents delivering the bonds when issued to the bearers of the scrip.

"This usage extended alike to scrip issued abroad by foreign governments, and scrip issued by their agents in England, and it extended to the scrip now in question, which was largely dealt in as above-mentioned. Such scrip often passes through the hand of several buyers and dealers in succession before the issue of the bonds represented by it."

The question for the opinion of the Court, as stated in the special case, was whether the defendants were, as against the plaintiff, entitled to the said scrip and to the proceeds thereof.

The Court of Exchequer, consisting of Barons Bramwell and Cleasby, held that the defendants were so entitled, and directed judgment to be entered for them.[1] By the Court of Exchequer Chamber, consisting of Lord Chief Justice Cockburn and Justices Mellor, Lush, Brett, and Lindley, this judgment was affirmed. L. R., 10 Ex. 337, 44 L. J. Ex. 157. The case was then brought up to this House on Error.

Mr. Benjamin, Q. C., and Mr. Anstie, for the plaintiff in error: —

The paper here claimed by the plaintiff was his property, and could only be transferred by his will and act. It could not be transferred by the act of a person to whom he had given no authority to make the transfer, and who had attempted to make it in fraud of the true owner. Such a person could not give a title to it better than he himself possessed, for the paper, whatever it might be called, was not in its nature or its form negotiable. It was not a promise to pay money, it was a mere promise to do something which would amount to an undertaking to pay money. It did not, therefore, in any way, fall within the character of a bill of exchange or a promissory note as those instruments were recog-

[1] L. R. 10 Ex. 76, where the documents are set out in full.

No. 2. — Goodwin v. Robarts, 1 App. Cas. 479, 480.

nized in our general law, or in our Stamp Acts, nor did it even resemble a bill of lading, for it was not a symbol of property, * and would not pass property. It was not like a bond, which [*480] might be negotiable even though it was entirely a foreign bond, and it did not therefore fall within the principle of *The Attorney-General* v. *Bouwens*, 4 M. & W. 171 ; 7 L. J. Ex. 297, which treated the bonds of foreign governments as marketable securities in this country ; besides, as an English paper it was not a foreign security at all ; it was issued by the Rothschilds in this country, and had therefore no character of a bond issued by a foreign government. The bond might be saleable and transferable by delivery only, but this scrip was a mere promise by the Rothschilds at a certain time and under certain circumstances to give such a bond, and was a promise contingent for its performance on the happening of those circumstances; so much was it contingent, that if several payments were made upon it but the last was not made, the whole might be forfeited. This was therefore a mere *chose in action*, enforceable, if at all, by the form of proceeding peculiar to subjects of that description.

It does not follow because an instrument may be transferred from hand to hand, that therefore it possesses the full legal quality of negotiability. Bills of lading, for instance, are now taken to be symbols of property, and may be so transferred; but the case of *Gurney* v. *Behrend*, 3 El. & Bl. 622, 634; 23 L. J. Q. B. 265, decided that the title to a cargo might not pass with the possession of a bill of lading, for that such bills were not negotiable to the same extent and with the same legal effect as bills of exchange. And that case has been followed in America; Parsons on Maritime Law, Bk. 1, c. x. 359, 360, n., the author there saying: "In this country it is well settled that the bill of lading is *quasi* negotiable only." And that is the true description, for bills of lading are subject to the equities attaching to them in the hands of the original holder, so that the unpaid vendor of the goods may stop the goods *in transitu*. That right has not been taken away by the statute 18 & 19 Vict. c. 111.

If it should be argued that this paper was an instrument which had become negotiable by virtue of any mercantile custom, the existence of that custom must be clearly shown ; its recognition by the law of England, and its applicability to the sort of instrument now under consideration, must be established. No one of those

[*481] *circumstances could be shown here. Any custom to be available for such a purpose must be a general, not a merely local or particular custom, and must be such as by the Common Law of England, or by the express provisions of an Act of Parliament, would be admitted to be valid. The authorities relied on by the other side were either inapplicable to a case like the present, or they were entirely distinguishable, and even adverse. *Miller* v. *Race*, 3 R. C. 626 (1 Burr. 452), might be taken as the first, but that was the case of a bank note, to which no one could pretend that this scrip bore the slightest resemblance. In *Edie* v. *The East India Company*, 4 R. C. 344 (2 Burr. 1216; 1 Sir W. Bl. 295) the only question was whether the omission of the words "or order" from a second indorsement had prevented its negotiability, for in its form it was plainly a bill of exchange originally payable to A., "or order," and Lord MANSFIELD admitted that he ought not to have allowed any evidence of usage of trade to be introduced there, the law being settled. *Grant* v. *Vaughan*, 3 Burr. 1516, was the case of an order on a banker; it was a distinct direction to pay the money to the "bearer," and there too the matter was held not to be for the consideration of the jury, but to be a point of law. *Wookey* v. *Pole*, 4 B. & Ald. 1, was the case of an Exchequer bill, which is an instrument issued under statute, and contains an express promise to pay the holder. An instrument not on the face of it negotiable could not be made so but by legal authority. East India bonds had therefore been held not to be negotiable, *Glyn* v. *Baker*, 13 East, 509; 12 R. R. 414; which was at the time it was decided perfectly good law as applied to East India bonds, though they were, after the decision of that case, made negotiable by Act of Parliament. The principle of law was truly stated by Lord Chancellor CRANWORTH in *Dixon* v. *Bovill*, 3 Macq. Sc. Ap. 1, where he said that if the convenience of commerce required that such instruments as were there in question (Iron Scrip notes) should be made negotiable, it must be done by the act of the Legislature, for that "the law does not either in Scotland or England enable any man by a written engagement to give a floating right of action at the suit of any one into whose hands the writing may come, and who may thus acquire a [*482] right of action *better than the right of him under whom he derives title." *Gorgier* v. *Mieville*, 3 B. & C. 45, p. 198, *ante*, is not at all in contradiction to these authorities, but really

confirms them, for there the instruments were Prussian bonds, — not mere promises to give bonds, but actual bonds, — and these bonds in words pledged the King of Prussia, for himself, and his successors, to be liable for the payment of principal and interest "to every person who should for the time being be the holder of the bond," than which a stronger declaration of the right of a bearer could hardly be given; and, on that very ground, Lord Chief Justice Abbott likened the instrument to a bank note, and declared that the case of *Glyn* v. *Baker*, the authority of which he never attempted to impugn, was distinguishable. The case of *Dixon* v. *Bovill* itself was a case of a promise to deliver property, not merely a promise to give a written authority to deliver it. There, what were called Iron Scrip notes were given; they were documents which were generally treated in the iron trade as representing property, and were treated as transferable by delivery. The note was in this form: "I promise to deliver 1000 tons of iron, when required after the 18th of September next, to the party lodging this document with me." In that document there was a distinct promise to deliver a specific quantity of iron, exactly therefore resembling a promise to pay a stipulated sum of money; and the promise was to deliver it to any one who should lodge the note with the maker (which, again, was in substance a promise to bearer), yet it was held not to be a negotiable instrument passing by delivery only, and that usage in the iron trade did not make it so. *Lang* v. *Smyth*, 7 Bing. 284, is not an authority for the defendants, for there the certificates and the coupons expressly mentioned that they were to be payable to "bearer," and they were promises to pay money and not merely promises to give security for the payment of money. In *Partridge* v. *The Bank of England*, 9 Q. B. 396; 13 L. J. Q. B. 281, in Ex. Ch. 9 Q. B. 421; 15 L. J. Q. B. 395, though the custom that dividend warrants were payable to parties presenting the same was expressly pleaded and expressly found, the Court of Exchequer Chamber held that these warrants were not negotiable by the general law, *and that the supposed custom did not make [*483] them so. That case, which had never been overruled, is decisive of the present. [The Lord Chancellor: That case seems to be a decision more on the form of the pleadings than on anything else.] The case shows that usage was not sufficient to pass the property. This was still more strongly shown in *Crouch*

v. *The Crédit Foncier*, L. R., 8 Q. B. 374; 42 L. J. Q. B. 183. The debenture there contained a promise to pay a sum certain on conditions therein named, and also interest, and yet it was held not to be a negotiable instrument, and that a custom of trade to treat it as such could not be set up against the general law.

What is the character of a usage or custom must also be considered. Here what is set up is really no more than a mere usage among bankers, — a usage in a particular trade. That alone is not sufficient. A custom or usage in the tallow market of London has been held, in this House, not binding on a purchaser of tallow who resided in Liverpool. *Robinson* v. *Mollett*, L. R., 7 H. L. 802; 44 L. J. C. P. 362. See 2 R. C. 469, 518.

There was nothing here in the alleged usage that could properly be described as part of the general law merchant recognised in the law. In the judgment in the Exchequer Chamber the Lord Chief Justice incorrectly employed the term "law merchant," for he applied it more than once under circumstances which really amounted only to the usages of a particular trade, not binding on any one not shown to have been acquainted with that trade. Now not merely the usage of a particular trade, but a general or universal usage, if contrary to the general law, could not be supported: *Meyer* v. *Dresser*, 16 C. B. (N. S.) 646; 33 L. J. C. P. 289, where what was described as a universal usage among merchants to deduct from the freight the value of missing goods, was held to be incapable of being supported. Even if it should be admitted that property of this kind could pass by delivery, the admission could only affect those cases where the delivery was made by the owner himself, not those where it was made by a person who was not the owner, and who could only transfer possession of the property by a wrongful act committed upon some other person. Under such circumstances a good title to it could not be got against the true owner.

Here the plaintiff claimed the property in the piece of [*484] paper called the *Scrip; of that paper he had been wrongfully deprived, and, whatever was the value of that paper — whether it was a mere valueless promise, or was the equivalent of money — he was entitled to recover it. Bayley on Bills, c. 5, Kent's Commentaries, Pt. v. sect. xiv. vol. iii. pp. 88, 89, and notes, Chitty on Bills, Part i. c. 5 and 6, and *Diamond* v. *Lawrence*, 37 Pennsylvania Rep. 353, were also referred to.

Mr. J. Brown, Q. C., and Mr. C. H. Robarts, for the defendants in error: —

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There is not any one of the authorities relied on by the other side which touches the real point in the present case. Whatever constitutes the right of transfer by delivery, and conveys thereby an absolute property in the thing delivered, exists here. It cannot be denied that the bonds of foreign governments are negotiable here. That has been decided in many cases: *Gorgier* v. *Mieville*, 3 B. & C. 45, p. 198, *ante*, was the first. Independently of every other consideration, if they were not negotiable, there must be, in every case of transfer, an investigation into their form and authenticity, which would be a great inconvenience and obstruction to commerce. [Lord SELBORNE: That the bonds are negotiable is admitted by the plaintiff in error; but his contention is that this scrip is not a bond, but only a promise to give a bond, and so not negotiable.] But this scrip declares the bearer to have paid money, and to be entitled, in respect thereof, to have a bond delivered to him. The same principle which makes foreign bonds negotiable must make foreign scrip negotiable. The foreign government is equally bound by its scrip as by its bonds. Here the acknowledgment of the debt is made by the Russian Government, and is issued to the world by the agents of that government, but they are no parties to the contract, which is wholly that of the government itself. A bond is merely a more formal acknowledgment of the debt. This instrument must be construed on the principle laid down in *Unwin* v. *Wolseley*, 1 T. R. 674, where it was held that a servant of the Crown contracting on the part of the Crown incurs no personal responsibility. That principle, with all the authorities, is fully set forth in Story on Agency, c. 11, ss. 302, 303.

* The use of the word "bearer" in the scrip itself made [*485] it negotiable; it made the Russian Government liable to deliver a bond, and pay money to any one who was the actual holder of the scrip at the moment fixed for the issuing of the bonds. And the actual bearer was in no way bound by any legal liability, or by any equities that might be set up as to any of the previous holders of the scrip. In the case of *Re Agra and Masterman's Bank*, L. R., 2 Ch. 391, 4 R. C. 612, this principle was applied in the instance of letters of credit, and in the *Blakely Ordnance Case*, L. R., 3 Ch. 154, to the debentures of a company. Had the scrip been granted to a particular person by name, and had the word "order" then been introduced, of course that would have required a written authority

from the first grantee. But the word "bearer," without any preceding statement as to the person, dispensed with all that, and made the instrument a negotiable security, passing by mere delivery. It did so because our law adopted, as to such matters, the law merchant, and had done so for a very long period, — for, in *Vanheath* v. *Turner*, Winch. 24. Lord HOBART expressly declared that "the Law Merchant was part of the Common Law of the kingdom, of which the Judges ought to take notice." The American law recognises the same principle. Parsons' Maritime Law, Bk. 1, c. 1, s. 2.

The first scripholder is clearly estopped from setting up a title against any subsequent honest holder, for he accepted the scrip in the first instance on the terms of its being payable to bearer. To that extent he was a party to the act of the Russian Government in issuing it: he became bound by those terms, as would a shareholder in a company whose deed said that the company would not take notice of assignments of shares on trust. Any person who afterwards honestly paid value for the scrip had a good title as "bearer" against any one who had previously held it. And the first holder, having given to another person the means of defrauding an innocent party, he cannot, as against that party, claim any benefit for himself. *Vickers* v. *Hertz*, L. R., 2 H. L., Sc. 113. The new holder was not like the assignee of a covenant running with the land. As to shares in a company, the rule was [* 486] that every holder of a share, * where the name was left in blank, though he omitted to register his own name as a shareholder, became, by the mere act of purchasing the shares and holding the scrip certificates, liable to the company, and was bound to indemnify the person from whom he purchased. *Walker* v. *Bartlett*, 18 C. B. 845; 25 L. J. C. P. 263; *De Pass's Case*, 4 De G. & J. 544; 28 L. J. Ch. 769, 772. But that was not so as to debentures issued by a company payable to "bearer," for they have been held negotiable, and the bearer has been protected against equities which existed between the company and the persons to whom the company originally issued its debentures. *In re The Imperial Land Company of Marseilles*, L. R., 11 Eq. 478.

The usage of trade is admissible here to prove the liability, and the cases cited on the other side do not displace but actually prove that doctrine. In *Glyn* v. *Baker*, 13 East, 509; 12 R. R. 414 (see the observations of BAYLEY, J., on the effect of the defendant's own negligence at 13 East, 515, 12 R. R. 418) the decision was given

on the ground, not of want of a general right, but of absence of the fact on which to found it. The bonds were in form payable to the treasurer of the company, not to bearer; and though it seemed afterwards to be considered that custom ought to render them negotiable, there was nothing on the face of them to show that they were so. The Court only refused to follow the usage of trade set up there, because the instrument on the face of it did not give rise to the applicability of any doctrine of usage. In *Lang* v. *Smyth*, 7 Bing. 284, the coupons on the Neapolitan bonds were payable to bearer, and it was distinctly declared that the evidence as to the character of the *bordereux* and coupons, and the usage applicable to them, was properly left to the jury, and found for the plaintiff. *Partridge* v. *The Bank of England*, 9 Q. B. 396; 13 L. J. Q. B. 281; in Ex. Ch. 9 Q. B. 421; 15 L. J. Q. B. 395, does not deny the admissibility of evidence of custom, for there proof of it was admitted, but the question was, whether the other parts of the case made the custom applicable, and whether the pleadings to show the negotiability of the instrument were, or not, sufficient. In *Jones* v. *Peppercorne*, Joh. 430; 28 L. J. Ch. 158, Dutch bonds payable to bearer were treated as passing by delivery, and the custom of brokers was there expressly taken into consideration. And in *The Attorney-General* v. *Bouwens*, 4 M. & W. 171; 7 L. J. Ex. 297, they, with * Russian and Danish [* 487] bonds, were treated as so exactly like money that they were held liable to probate duty. So, in *Wookey* v. *Pole*, 4 B. & Ald. 1, an exchequer bill in blank, without any name filled in was held to pass by delivery, and bills payable to a fictitious person, or where no payee was named, have been held to be payable to the bearer. *Collins* v. *Martin*, 1 Bos. & P. 648; 4 R. R. 752, where bills indorsed in blank were held to pass to the holder for value, was there distinctly recognised. In *Brandao* v. *Barnett*, No. 2 of "Banker," 3 R. C. 592; 12 Cl. & F. 787, where all the authorities were fully considered, the general lien of bankers was recognised as part of the law merchant, though it was held not to arise there on securities deposited for a special purpose only; but on the question of the law merchant generally Lord CAMPBELL said, 3 R. C. 606; 12 Cl. & F. 805: "The general lien of bankers is part of the law merchant, and is to be judicially noticed, — like the negotiability of bills of exchange, or the days of grace allowed for their payment. When a general usage has been judicially ascertained and estab-

lished, it becomes a part of the law merchant, which Courts of Justice are bound to know and recognise." And on that principle it was that in *Gorgier* v. *Mieville*, 3 B. & C. 45, p. 198, *ante*, Prussian bonds were treated as passing by delivery, for they were payable to bearer, and recognised as so payable by all mercantile men. In *Crouch* v. *The Crédit Foncier Company*, L. R., 8 Q. B. 374; 42 L. J. Q. B. 183, the instrument was held not to be a negotiable instrument, because it was only payable under certain conditions, and because it was thought not to be clear that such an instrument, issued under the seal of a corporation, could be rendered negotiable. There were particular objections to that individual instrument, but they did not contradict nor even in any way impeach the general rule, nor did the conditions existing there apply in this case. In *Ireland* v. *Livingstone*, L. R., 5 H. L. 395; 41 L. J. Q. B. 201, the usage of the sugar market in Mauritius was allowed to control the execution of a contract made here.

The Stamp Act recognises foreign scrip in words as "foreign security,"[1] the statute making liable to duty "every secur-
[* 488] ity * for money by or on behalf of any foreign or colonial state, government, municipal body, corporation, or company bearing date" after the 3rd of June, 1862, which, being payable in United Kingdom, is in any way assigned or negotiated here.

Mr Anstie replied.

The Lord Chancellor (Lord Cairns):

My Lords, the action out of which this appeal arises was an action of trover, with a count for money had and received, to recover the value of certain scrip, or scrip receipts, for portions of foreign loans, the scrip, or scrip receipts, professsing on the face of the documents to pass to bearer, and having been handed over by the broker of the plaintiff to the defendants for valuable consideration, and without notice of any claim or title of the plaintiff.

Part of the scrip in question was scrip of a Russian Government loan. Each scrip note was for £100, and represented that when the instalments in which the £100 were to be advanced, were all paid up, the bearer, would be, after receipt thereof by Messrs

[1] 33 & 34 Vict. c. 97, s. 113, schedule, tit. Scrip Certificate; see also 34 Vict. c. 4, s. 2; and see *Grenfell* v. *Commissioners of Inland Revenue*, 1 Ex. D. 242, where bonds of a company issued in New York, purchased there, and sent over to England and sold here by the agents of the purchaser, were held to be foreign securities issued in England within the 34 Vict. c. 4, s. 2.

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Rothschild, entitled to receive a definitive bond, or bonds, for £100 from the Imperial Government. The £100 were to bear interest from the first of December, 1873, and a coupon was attached to the scrip as a warrant for the payment of the half-year's interest due on the 1st of June, 1874. The other scrip related to an Austrian or Hungarian loan, and was in substance in the same form, except that although the interest began to run from the 1st of December, 1873, there was no coupon for the payment of the first half-year's interest. On all the scrip all the instalments were fully paid up before the plaintiff became owner of the scrip. The receipts for the instalments were signed by the house of Rothschilds, but it was not seriously disputed in the argument that Rothschilds acted merely as agents for the foreign governments, and that any liability which existed on the scrip was the liability of the foreign governments, and not of Rothschilds. The appellant bought the * scrip on the London Stock Exchange, through [*489] Clayton, his broker. At the time he bought it, the instalments, as I have already said, were fully paid up; that is to say, the whole amount represented by the scrip had been advanced to the foreign governments; and the scrip receipts represented, upon the face of them, that the bearer, whoever he might be, would be entitled to receive the bonds of the foreign government for the amount of the scrip.

In this state of things the appellant, without asserting that any contract exists, or existed, between him and the Russian Government in reference to this loan, or that he is the assignee of a contract with the Russian Government entitled to maintain an action in his own name, insists, notwithstanding, that he had become by purchase the legal owner of the piece of paper decribed as scrip, which piece of paper the Russian Government would, upon its production, have recognised and exchanged for a bond, and that he is entitled to recover in trover the value of the scrip, which is of course the value of the bond, of which, by reason of his loss of the scrip, he has been deprived.

The Court of Exchequer and the Court of Exchequer Chamber have unanimously decided against this claim of the appellant, and from those decisions the present appeal is brought.

The question argued in the Courts below was the negotiability of the scrip for a foreign loan, like that in the present case; but there appears to me to be a prior consideration as to the title of

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the plaintiff which would alone be sufficient to dispose of his claim. The plaintiff bought in the market scrip which, from the form in which it is prepared, virtually represented that the paper would pass from hand to hand by delivery only, and that any one who became *bonâ fide* the holder might claim for his own benefit the fulfilment of its terms from the foreign government. The appellant might have kept this scrip in his own possession, and, if he had done so, no question like the present could have arisen. He preferred, however, to place it in the possession, and under the control, of his broker or agent, and although it is stated that it remained in the agent's hands for disposal or to be exchanged for the bonds when issued, as the appellant should direct, those into whose hands the scrip would come could know nothing of the title of the appellant, or of any private instructions he might [*490] have given * to his agent. The scrip itself would be a representation to any one taking it — a representation which the appellant must be taken to have made or to have been a party to — that if the scrip were taken in good faith, and for value, the person taking it would stand to all intents and purposes in the place of the previous holder. Let it be assumed, for the moment, that the instrument was not negotiable, that no right of action was transferred by the delivery, and that no legal claim could be made by the taker in his own name against the foreign government; still the appellant is in the position of a person who has made a representation, on the face of his scrip, that it would pass with a good title to any one on his taking it in good faith and for value, and who has put it in the power of his agent to hand over the scrip with this representation to those who are induced to alter their position on the faith of the representation so made.

My Lords, I am of opinion that on doctrines well established, of which *Pickard* v. *Sears*, 6 Ad. & E. 469, at p. 474, may be taken to be an example, the appellant cannot be allowed to defeat the title which the respondents have thus acquired.

But, my Lords, I have no hesitation in saying that I also concur in what I understand to have been the *ratio decidendi* of the Courts below in this case itself. It is well established by the case of *Gorgier* v. *Mieville*, 3 B. & C. 45, p. 198, *ante*, an authority which has never been impugned, and which was not in this case disputed at the bar, that if this action had been brought for the recovery of the bonds, payable to bearer, of this foreign debt, and if there had

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been evidence of usage or custom as to the negotiability of such bonds, similar to the evidence in the case of *Gorgier* v. *Mieville*, or similar to the statements in paragraph 9 of the special case before your Lordships, the negotiability of the instruments would have been established.

But it was contended that the scrip was at most a promise to give a bond, and not a promise to pay money, and therefore was not a security for the payment of money. In my opinion it is impossible to maintain this distinction. The whole sum of £100 had been actually advanced and paid; the loan was carrying interest from the 1st of the previous December; there was nothing *more remaining to be done on the part of the [*491] holder of the scrip; and if any such holder had been asked what security he had for the advance which had been made, he would unhesitatingly have pointed to the scrip. Under these circumstances I cannot regard the scrip as playing any different part from a bond, and the statement in paragraph 9 of the case, carrying the custom as to negotiability of scrip quite as high as the evidence stating the custom in *Gorgier* v. *Mieville* as to bonds, I am clearly of opinion that we ought to hold, in this case, that this scrip was negotiable, and that any person taking it in good faith obtained a title to it independent of the title of the person from whom he took it.

On these simple grounds, and without going farther into a consideration of the numerous authorities referred to in the Court of Exchequer Chamber and in the argument before your Lordships, I am of opinion that the judgment of the Court of Exchequer Chamber ought to be affirmed, and this appeal dismissed, with costs, and I move your Lordships accordingly.

Lord HATHERLEY: —

My Lords, I concur in recommending your Lordships to come to the conclusion which has been pointed out by the noble and learned lord on the woolsack.

The question is really determined by the consideration of three paragraphs in the special case, and a consideration of what has already been held by the Courts of Law for more than fifty years since the decision in the case of *Gorgier* v. *Mieville*, there having been no decision to the contrary from that time to the present. The special case first describes what the scrip is, and then states that it is paid up, and is therefore scrip which, upon its mere pro-

duction to the Russian Government, entitles the holder, without more, to obtain a bond for the specified sum, as well as entitling him to the interest upon that money which has already been paid in respect of the scrip: — [His Lordship here read the statements of fact and usage contained in the special case, see p. 201, *ante* (1 App. Cas. 478).]

Now in that state of circumstances, the special case [* 492] having told * us how these documents pass, we find that the plaintiff himself is a person who acquired his title to the scrip in question in that way. He acquired his title by instructing a broker named Clayton to go into the market and deal with the Russian scrip in the manner in which the respondents in the case before us have themselves dealt with it; that is to say, Mr. Clayton discharged his duty towards the appellant by the delivery to him of certain Russian and Hungarian scrip fully paid up, without any inquiry whatever as to the preceding title. The appellant was satisfied with this, without taking into consideration the question whether or not the Russian Government, or the Messrs. Rothschild, as the agents, could be considered as the persons primarily liable. He was content to obtain in the market this document, which would entitle him to receive a bond upon its mere production, and, in like manner, upon his parting with it, would entitle any holder to receive a bond in the same way as he himself had become entitled to receive one. He left that document with his broker for disposal, or to be exchanged for bonds as he might think fit to direct. The broker pawned it for a debt of his own.

Now it is also found in the case that these instruments are taken as securities and pass from hand to hand as such. Here is a gentleman in possession of a document, which on the face of it entitles the holder to receive another document of a different character, a bond instead of scrip, upon the mere presentation by him of that scrip as holder. He knows that if he places this document in the hands of a broker, that broker, if he should be told to dispose of it, would dispose of it by simply handing over the scrip as it had been handed to him for his client, the appellant, when the appellant became entitled to it. The person buying of his broker would not be expected to ask, and would not necessarily ask, according to the course of business and dealing in the market, any question as to how the scrip had been acquired, or what the

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title of the previous holder of it had been. The appellant, therefore, gives the broker scrip which is, and for the last fifty years has been disposed of every day in the market, and has, for all those years, been so disposed of, upon the sole presentation by the holder, the seller, or pledger, to the person to whom he wishes to sell or to pledge it, and that without any suspicion being * aroused to suggest the necessity, or even the propriety, of [* 493] asking a single other question. Can a person who, himself, in that manner acquired the instrument, who knows that as long as he has it safe in his pocket, in his box, or in his desk, he can rely upon that instrument, but that as soon as he parts with it the new holder will, as he did, become in a position to claim those bonds which he himself might have claimed if he had retained possession of the scrip — can he, placing it in the hands of a broker with no instructions whatever except to dispose of it as he may direct — can he, according to the principle of the cases which were referred to in the course of the argument with regard to limited agency, hold any person to be bound by that limited agency, when on the face of it that which constitutes, you may say, the authority of the agent, namely, the possession of the document, appears to be sufficient alone for obtaining the bonds in question? I agree with my noble and learned friend on the woolsack in thinking that this case might be disposed of upon that ground alone.

But, my Lords, we are brought to the same conclusion if we refer to the decision in the case of *Gorgier* v. *Mieville*, and consider how that case has been acted upon for the last fifty years according to the statement contained in the special case itself. In the very able argument of Mr. Benjamin, who always addresses us very efficiently, it was pointed out that there was a distinction between that case and the present, but the only difference is this: in that case the Court had to deal with the bonds themselves on which the Prussian government was bound to make the payment; in this case we have to deal with an instrument which entitles its holder to receive those bonds, all the payments on the scrip having been made at the time when it was handed over. Can there be any rational distinction drawn between those two documents? or, as Mr. Baron BRAMWELL put the question, if a broker was able to go into the market with a portion of this scrip in one hand and a bond in the other, and sold them both, could you hold that there

was a substantial or rational distinction to be drawn between the right of a person who so acquired, according to the practice of the Stock Exchange, the one document, and the right of a person who in the same way acquired the other?

[*494] * I do not think we need go into the nice distinction which Mr. Benjamin so ingeniously laid before us by tracing the gradual extension of the doctrine of the negotiability of instruments. I think it would be sufficient to rest upon the decision in the case of *Gorgier* v. *Mieville*, and to say that there is no substantial distinction in fact between the instrument in that case and this instrument, which was immediately exchangeable for money and intended to be so; and farther, that no sufficient authority is given by the doctrine of principal and agent which would authorize your Lordships to say that a man who gives his agent full power, according to the custom of the market in which he employs him, of disposing of an instrument of that kind, by giving him an instrument which, according to the custom of that market, is passed from bearer to bearer, can be heard at the same time to say, there are secret instructions known to me and my agent only which limit his right to that right which alone I say I have conferred upon him as my agent. The appellant having entrusted this document to the agent, and the agent having parted with it according to the custom of the market, and there being a *bonâ fide* title on the part of the acquirer, it appears to me that that title is perfectly good against the appellant.

Lord SELBORNE: —

My Lords, the scrip in this case is not one of those contracts in writing which have their nature, incidents, and effects defined and regulated by British law, so that a Judge in a British Court is bound, without evidence, to know whether (and how, if at all) they are legally transferable, and to reject any evidence of a customary mode of transfer at variance with the law. It is not like the Iron note, which was the subject of Lord CRANWORTH'S remarks in *Dixon* v. *Borill*, 3 Macq. Sc. Ap. 15, nor like the bonds in the case of *Crouch* v. *Crédit Foncier Company*, L. R., 8 Q. B. 384; 42 L. J. Q. B. 183. The Court of Queen's Bench in deciding that case relied upon the distinction between "English instruments made by an English company in England," and "a public debt created by a foreign or colonial government, the title to portions of [*495] which is by them made to depend on the * possession of

bonds expressed to be transferable to the bearer or holder, on which there cannot properly be said to be any right of action at all, though the holder has a claim on a foreign government." The Russian and Austrian scrip now before your Lordships belongs, in my judgment, to the latter and not to the former category; and I know no rule or principle of English law which should prevent such instruments of title to shares in foreign loans from being transferable in this country, according to any custom or usage of trade which may be shown to prevail, if consistent with what appears upon the face of the instruments. Considering it to be clear that the engagement (whatever may be its effect) which appears on the face of this scrip is that of the foreign government, and not of Messrs. Rothschild, I desire to express my entire agreement with what was said by the late MASTER OF THE ROLLS (Lord ROMILLY) in *Smith* v. *Weguelin*, L. R., 8 Eq. 212, 213, 38 L. J. Ch. 465: "It is, in my opinion, a complete misapprehension to suppose that, because a foreign government negotiates a loan in a foreign country, it thereby introduces into that transaction all the peculiarities of the law of the country in which the negotiation is made. The place where the loan is negotiated does not, in my opinion, in the least degree affect the question of law. The contract is the same, and the obligations are the same, whoever may be the bondholders. Suppose a French or Belgian company, residing in Paris or in Brussels, should instruct an agent in London to subscribe for some of these bonds, is the contract between the Peruvian Government and a French company, or between the Peruvian Government and a Belgian company to be regulated by the English law, because the contract is made by their agents in London, or are the contracts to vary according to the domicil of the subscriber to the loan? If the French Government should negotiate a loan on certain specified terms, whether negotiated in Brussels, in London, or in Paris, the same law must regulate the whole, and that law is the law of France, as much as if it had been expressly notified in the articles that the French law would be that by which the contract must be construed and governed. So, if the English Government were to negotiate a loan in Paris or in New York, the English law must be applied to construe and regulate the contract."

*The special case on which your Lordships have to [*496]

decide is silent as to the laws of Russia and of Austria with respect to the character and negotiability of these instruments. They must be construed (as was laid down by Lord LYNDHURST in *The King of Spain* v. *Machado*, 4 Russ. 225), according to the obvious import of their terms; and the special case here states (paragraph 9) that they have been largely dealt in according to a usage which for more than fifty years has generally prevailed among bankers, money dealers, and the members of the English and foreign exchanges, with respect to the scrip of loans of foreign governments entitling the bearer thereof to bonds for the same amount, when issued by the government. This usage (which is expressly said to have extended to the scrip now in question, and to have been always recognised by the foreign governments delivering the bonds, when issued to the bearer of the scrip) has been to deal with such scrip for the purposes of purchase, sale, and loans of money on security, as a negotiable instrument transferable by delivering only. According to the opinion of Lord Chief Justice TINDAL in *Lang* v. *Smyth*, 7 Bing. 284, 9 L. J. C. P. 91, the proof of such a usage is sufficient to justify the inference that such instruments are negotiable in the states by which they were issued, so as to render evidence of the laws of those states unnecessary. Lord Chief Justice TINDAL added, 7 Bing. at p. 293, in the same case, that "the question" (when the effect not of the instrument transferred but of the transfer of that instrument in England is the thing in controversy) "is not so much what is the usage in the country whence the instrument comes, as in the country where it was passed."

The usage so stated in the special case appears to me to be the legitimate, natural, and intended consequence (unless there should be any law to prohibit it) of that representation and engagement which appears on the face of the scrip itself when construed according to the obvious import of its terms. It is, in its proper nature, a receipt or voucher for the several instalments, the payment of which in full was to entitle the bearer to a bond for the amount therein mentioned, between the person to whom it was first issued, on the payment of the first instalment, and the Russian or Austrian government; there was no other contract than this, that in exchange for his money, he should receive
[* 497] this * document as an instrument intended to give title, not to himself as an original creditor of that government,

nor to any other person as deriving title under him by assignment, but directly and immediately to any one who might happen to be the bearer when the time for the delivery of the bond should arrive. The value and marketable quality of the scrip depended on its having this particular nature and character, and to have this nature and character it was necessary that it should be capable of passing from hand to hand as a negotiable instrument. That such was the intention of the government which issued it cannot admit of doubt; and the plaintiff (whose own title was so acquired), and every other holder, must be taken to have acceded and to have become a party to the representation made upon the face of the document, by virtue of which it did in fact obtain general currency in the English markets, and also in the markets of Europe. I should myself have found no difficulty in coming to a conclusion favourable to the respondents on these grounds. But when the fact is added, that, before the delivery of this scrip to the respondents all the instalments necessary to give a complete and absolute right to the £100 stock mentioned on the face of it had been actually paid, the case becomes more clear. After those payments had been made, and receipts for them signed, the scrip was as much a symbol of money due, and as capable of passing current upon the principle explained in the authorities with respect to bank notes and exchequer bills, as the bonds themselves would have been, if they had been actually delivered in exchange for it. It represented (though in a different form) precisely the same kind and amount of indebtedness of the foreign governments which the bond would have done ; and I agree with Baron Bramwell in thinking that under these circumstances there is no substantial difference between the present case and *Gorgier* v. *Mieville*.

Judgment of the Court of Exchequer Chamber affirmed, and appeal dismissed with costs.

Lords' Journals, 1st June, 1876.

ENGLISH NOTES.

The following are classes of instruments which, by decisions earlier than the two principal cases above set forth, have been held to be negotiable (see Campbell on Sale, 2nd edit. p. 87) : —

Bank notes, *Miller* v. *Race*, No. 4 of "Banker," 3 R. C. 626, 1 Burr. 452, 1 Sm. L. Cas. 468 ; bills of exchange during currency and previous to maturity, *Lawson* v. *Weston* (1801), 4 Esp. 56;

Grant v. *Vaughan* (1764), 3 Burr. 1516; *Collins* v. *Martin* (1797), 1 Bos. & P. 648; 4 R. R. 752; *Peacock* v. *Rhodes* (1781), 2 Douglas, 636; and unless specially indorsed or expressed to be not negotiable according to the Bills of Exchange Act 1882, s. 8; *Archer* v. *Bank of England* (1781), 2 Douglas, 639; *Sigourney* v. *Lloyd*, No. 19 of "Bill of Exchange," 4 R. C. 353 (8 B. & C. 622, 5 Bing. 525); cheques on bankers, which have been described as inland bills of exchange, payable on demand. *Grant* v. *Vaughan*; *Keene* v. *Beard* (1860), 8 C. B. (N. S.) 372, 29 L. J. C. P. 287, 2 L. T. 240; *Whistler* v. *Forster* (1863), No. 16 of "Bill of Exchange," 4 R. C. 332 (14 C. B. (N. S.) 248, 32 L. J. C. P. 161, 8 L. T. 317); *Watson* v. *Russell* (1862), 3 B. & S. 34, 31 L. J. Q. B. 304; affirmed in Exch. Ch. (1864), 34 L. J. Q. B. 93; and are now included in the definition of a bill of exchange given by the Bills of Exchange Act 1882, s. 3, which is declaratory of the prior law; *McLean* v. *Clydesdale Banking Co.* (H. L. 1883), 9 App. Cas. 95, *per* Lord Blackburn, p. 106, 50 L. T. 457; 45 & 46 Vict. c. 61, s. 3, see also s. 73; promissory notes, by statute, 12 Geo. III. c. 72, s. 30; *Maclae* v. *Sutherland* (1854), 3 El. & Bl. 1, 23 L. J. Q. B. 229; and now also by the Bills of Exchange Act 1882 (45 & 46 Vict. c. 61, s. 89); East India bonds, by statute (10 June, 1811), 51 Geo. III. c. 64, s. 4; Exchequer bills, *Brandao* v. *Barnett* (1840–3), 1 Man. & Gr. 909, 935; 6 Man. & Gr. 630, 637, and (H. L. 1846) No. 2 of "Banker," 3 R. C. 592, 12 Cl. & Fin. 787; *Wookey* v. *Pole* (1820), 4 B. & Ald. 1. Bonds of a foreign government, which are transferable to bearer according to the tenor of the instrument, and according to the law of the country of issue, and which are also, by the usage of our markets, passed from hand to hand like Exchequer bills, are held to be negotiable by the law of this country. *Lang* v. *Smyth* (1831), 7 Bing. 284; *Attorney-General* v. *Bouwens* (1838), 4 M. & W. 171; *Gorgier* v. *Mieville* (1824), 3 B. & C. 45, p. 198, *ante*.

Cases on the contrary, in which the attempt to set up negotiability failed, are *Glyn* v. *Baker* (1811), 13 East, 509, 12 R. R. 414, as to East India bonds before the statute which made them negotiable; *Taylor* v. *Trueman* (1829), 1 Mood. & Mal. 453, and *Taylor* v. *Kymer* (1832), 3 B. & Ad. 320, as to East India warrants; *Partridge* v. *Bank of England* (Ex. Ch. 1846), 9 Q. B. 396, 13 L. J. Q. B. 281, as to warrants for payment of dividends at the bank, where the statement that they were negotiable according to the custom of bankers and merchants *in London* was held not to be a statement for a good *general* usage; and the Scotch case of *Dixon* v. *Bovill* (1856), 3 Macq. 1, as to certain manufacturers' contracts for delivery of iron termed "iron scrip notes."

The second principal case (*Goodwin* v. *Robarts*) was followed on

both grounds by the Queen's Bench Division in *Rumball* v. *Metropolitan Bank* (1877), 2 Q. B. D. 194, 46 L. J. Q. B. 346, 36 L. T. 240. It was an action to recover scrip certificates of the Anglo-Egyptian Banking Co. which had come into the hands of the defendants as holders for value, through the fraud of the plaintiff's agent. The certificates stated that after payment of the instalments thereunder mentioned the bearer thereof would be entitled to be registered as the holder of ten shares of £20 each in the company. The plaintiff, having paid the first instalment, had left the certificates in the hands of his broker for the purpose of paying the remaining instalments and dealing with the certificates as the plaintiff should direct. The broker had fraudulently pledged the certificates to the bank, who were not aware of the fraud. The special case stated the usage as follows: "Scrip certificates in a form similar to that of the said scrip certificates issued to the plaintiff have been issued by railway companies for 30 years past, by mining companies for 25 years past, and by banking, gas, water, and other companies for 15 years past. Each of the above classes of scrip certificates during all the period since its respective issue has been well known to and largely dealt in by bankers, discounters, money dealers, and the members of the London Stock Exchange, and through them by the public. It is and has been the usage of such bankers, discounters, money dealers, and members of the said Exchange, during all the above periods, to buy and sell the said scrip certificates respectively, and to advance loans of money upon them, and upon such dealings to pass the said scrip certificates by mere delivery as a negotiable instrument transferable by delivery, and in fact the said respective scrip certificates have been supposed to be negotiable by mere delivery, and have been dealt with as such." The Court, on the authority of the principal case (*Goodwin* v. *Robarts*), held that the defendants were entitled to the certificates; *first*, on the ground that the certificates were negotiable by the usage; and *secondly*, on the ground that the plaintiff, by depositing with his broker instruments purporting to be transferable by delivery was estopped, as against a *bonâ fide* holder for value, from denying that they were so transferable.

In the case of *Fine Art Society* v. *Union Bank of London* (C. A. 1886), 17 Q. B. D. 705, 56 L. J. Q. B. 70, 55 L. T. 536, an attempt was made to set up as negotiable a post-office order which had been paid through a banker, on the ground that, by a post-office regulation, that "any money order . . . may be presented for payment by or through any banker . . . notwithstanding that the form of receipt on such money order may not bear any signature purporting to be the signature of the person or persons to whom such money order is made payable."

But the Court distinguished the case of *Goodwin* v. *Robarts* on the ground that such a regulation did not amount to evidence of a usage such as was stated in the special case there; nor was there anything to give the bankers a better title than the person who passed the money order to them.

The case of *Picker* v. *London & County Banking Co.* (C. A. 1887), 18 Q. B. D. 515, 56 L. J. Q. B. 299, is an important decision on the point, that an instrument issued in a foreign country, and by the law of that country treated as negotiable, is not, without evidence of a general usage, recognised in the market in this country as negotiable here. The action was to recover possession from the defendants (an English bank) certain bonds issued by the Prussian Government which had been stolen from the plaintiff, and deposited with the bank by a customer to secure an overdraft. There was evidence which the Court assumed to be sufficient that the bonds were negotiable in Prussia; but there was evidence that in the English market these bonds were not negotiable without the coupon sheets for the interest, which had not been deposited with the bonds. The Court held that the evidence that the bonds were negotiable in Prussia could not be accepted as evidence that they were negotiable here; and the defence accordingly failed.

The decision of the House of Lords in *London Joint Stock Banking Co.* v. *Simmons* (H. L. 1892, appeal in action of *Simmons* v. *London Joint Stock Banking Co.*). 1892, App. Cas. 201, 61 L. J. Ch. 723, 66 L. T. 625, is an important one, as confirming and perhaps extending the principle of *Goodwin* v. *Robarts* as to what evidence is sufficient to show an instrument to be negotiable. (The case has been already commented on, as to another point, — namely, as to the knowledge which would oust the title of a purchaser for value, — in the notes to *Sheffield* v. *London Joint Stock Bank*, No. 7 of "Banker," 3 R. C. 661, 677). The question arose upon bonds commonly called "Cedulas." The description of the bond and evidence of usage is briefly and accurately stated in the opinion of Lord Watson as follows: "Each bond, according to its tenor, represents that the document will pass from hand to hand, and that any *bonâ fide* holder will be entitled to claim fulfilment of its terms from the Buenos Ayres Bank, by whom it was issued. Then there is direct testimony to the effect that, on the London Stock Exchange, the bonds do pass from hand to hand by delivery only, and are treated as negotiable securities; and no attempt was made to shake that testimony, either by cross-examination or by adducing evidence to the contrary." The Lords present — Lord Halsbury, L. C., Lord Watson, Lord Herschell, Lord Macnaghten, and Lord Field — unanimously held that the bonds in question were negotiable instruments.

AMERICAN NOTES.

Coupon bonds in this country are negotiable. 2 Daniel on Negotiable Instruments, § 1502: *Murray* v. *Lardner*, 2 Wallace (United States Sup. Ct.), 110; *Kerr* v. *City of Corry*, 105 Pennsylvania State, 282; *Copper* v. *Mayor*, 41 New Jersey Law, 634; *Gilman* v. *New Orleans, &c. R. Co.*, 72 Alabama, 566. Mr. Daniel observes (2 Negotiable Instruments, § 1504): "In England there is a growing disposition to favour the negotiability of instruments similar to the coupon bonds of this country, but they are not yet placed upon so clear and stable a footing." Citing the two principal cases.

United States treasury notes are negotiable. *Vermilye* v. *Adams Ex. Co.*, 21 Wallace (United States Sup. Ct.), 118. So of State bonds. *Railroad Companies* v. *Schutte*, 103 United States, 118; *State* v. *Cobb*, 64 Alabama, 127.

BUILDING CONTRACT.

THORN *v.* MAYOR AND COMMONALTY OF LONDON.

(H. L. 1876.)

RULE.

WHERE plans and specifications for the execution of works to be tendered for are exhibited by the person inviting tenders, that person does not thereby enter into any implied warranty that the work can be successfully executed according to those plans and specifications.

Thorn v. Mayor and Commonalty of London.

1 App. Cas. 120–138 (s. c. 45 L. J. Ex. 487; 34 L. T. 545; 24 W. R. 932).

Contract. — Implied Warranty.

T. contracted with the defendants to take down an old bridge and [120] build a new one. Plans and a specification prepared by the defendants' engineer were furnished to him, and he was required to obey the directions of the engineer. The descriptions given were stated to be "believed to be correct," but were not guaranteed; and in one particular matter at least, he was warned to make examination for himself. Part of the plan consisted in the use of caissons. These turned out to be of no value, and the work done in attempting to use them was wholly lost, and the bridge had to be built in a different

Thorn v. Mayor and Commonalty of London, 1 App. Cas. 120, 121.

manner. In this way much labour and time were wasted. The contract contained provisions as to the payment for extra work, and that work had (with the contract work) been duly paid for. The contractor sought for compensation for his loss of time and labour occasioned by the failure of the caissons, and in his declaration alleged that the defendants had warranted that the bridge could be inexpensively built according to the plans and specification. There was no express warranty to that effect in the contract.

Held, that none could be implied.

On the 5th of March, 1864, Mr. Brand, on behalf of the Bridge House Committee of the City of London, published a notice asking for "tenders for taking down and removing the present bridge at Blackfriars, and erecting a new bridge in lieu thereof." The "plans of the intended new bridge and [* 121] specification of the works * to be executed," were announced as to be seen at the office of Mr. Joseph Cubitt, the engineer, who was employed by the defendants. The plaintiff and his brother, Mr. Peter Thorn (since deceased,) tendered for the work, and their tender was accepted.

Article 30 of the specification declared that the contractors were "to take out their own quantities, no surveyor being authorized to act on the part of the corporation;" Article 36 was thus worded: "Drawings, lettered A, &c., are plans and sections of the existing bridge, and of the works executed thereon. They give all the information possessed respecting the foundations. These plans are believed to be correct, but their accuracy is not guaranteed, and the contractor will not be entitled to charge any extra should the work to be removed prove more than indicated on these drawings." Under the head of "coffer-dams," there was in the specification this article; "54. The contractor must satisfy himself as to the nature of the ground through which the foundations have to be carried; all the information given on this subject is believed to be correct, but is not guaranteed." Under the heading "Iron caissons," the specification contained the following articles: "63. The foundations of the piers will be put in by means of wrought iron caissons, as shown on drawing No. 7." "64. The casing of the lower part of which caissons will be left permanently in the work. The upper part, which is formed of buckle plates, is to be removed. The whole of the interior girder framing must be removed as the building proceeds, the work being made good close up to the underside of each girder before removal thereof."

"66. The whole of the iron used in the caissons shall be of good quality capable of bearing a tensible strain of 18 tons per square inch. Plates and bars will be selected at random by the engineer, which must be cut to the required form, and submitted to such tests as the engineer may direct." The 77th article declared that "all risk and responsibility involved in the sinking of these caissons will rest with the contractor, and he will be bound to employ divers or other efficient means for removing and overcoming any obstacles or difficulties that many arise in the execution of the works." The 79th article put the control of the quality of the concrete under the direction of the engineer.

Upon the plaintiff's tender being accepted, a deed dated the * 24th of May, 1864, was executed. This deed in [*122] various parts described the intended works as to be executed to the satisfaction of the engineer. The works (sect. 8) were to be completed, within three years, for the sum (sect. 12) of £269,045, increased by such sum as shall become payable, or, as the case may require, diminished by such sum as shall have to be deducted, (as provided in sect. 13) "in respect of alterations or variations in the works." Sect. 13 gave the engineer power "at any time or times, during the progress of the works to vary the dimensions or position of the various parts of the works to be executed under these presents, without the said contractors being entitled to any extra charge for such alteration, provided the total quantity of work be not increased or diminished thereby." Any alteration should be valued according to the schedule of prices accompanying the deed. And whenever the engineer gave notice of any such alteration or variation the contractors were to execute the work according to his directions. For delays caused by the contractors £1000 a month were to be deducted from the contract sum. By sect. 22 it was provided that in case the contractors should refuse or neglect to perform the works "as in the aforesaid specification directed or mentioned, or as shown on any of the said drawings, or to obey and comply with any order or direction to be given by the engineer," the works might be taken out of the hands of the contractors.

The work was begun in June, 1864, and neither the Bridge House Committee nor the Mayor and Commonalty ever, in any way, interfered with its progress. But after the caissons prepared as directed had been used, it was found that they would not answer

their purpose, and the plan of the work was altered. Time was thus lost, and the labour which had been given to the execution of the original plans was wasted. It was admitted that the work done under the contract had been well done, and the contract price was duly paid, and the costs of the extra work rendered necessary by alterations had been paid. But the contractor claimed compensation for loss of time and labour occasioned by the attempt to execute the original plans. This was refused, and this action was brought. In the declaration it was alleged that "the defendants guaranteed and warranted to the plaintiff that Blackfriars Bridge could be built according to certain plans and a [* 123] * specification then shown by the defendants to the plaintiff, without tidework, and in a manner comparatively inexpensive, and that certain caissons shown on the said plans would resist the pressure of water during the construction of the said bridge, whereby the plaintiff was induced to contract with the defendants for a certain sum of money, far less than he otherwise would have done;" and then the declaration went on to allege the failure of the plans and specification and of the caissons, whereby he was obliged to expend large sums of money in endeavouring to build the bridge according to such plans, and in afterwards completing the bridge: and he lost all the profits he otherwise would have realized in building the same.

The cause of the failure was that the caissons would not resist the external pressure of the water, so that the piers of the bridge had to be built independently of them, and much of the preceding work was wasted, and the piers were built as the tide permitted the work to go on which occasioned great delay.

The facts were turned into a special case for the opinion of the Court of Exchequer. The case was argued in May, 1874, and the Lord Chief Baron, Mr. Baron Pigott, and Mr. Baron Amphlett, gave judgment for the defendants on the ground that there was no implied warranty in the contract. L. R., 9 Ex. 163, 43 L. J. Ex. 115. On error, this judgment was affirmed in the Exchequer Chamber L. R., 10 Ex. 112; 44 L. J. Ex. 62. Error was then brought to this House.

Mr. Benjamin, Q. C., and Mr. H. M. Bompas (Mr. Littler, Q. C., and Mr. J. W. Batten, were with them), for the plaintiff in error: —

If a man enters into a contract by which he binds another to

do certain work for him at a certain place, he impliedly undertakes that the place shall be free and fit for the work to be done there So, if he stipulates that the work shall be done in a certain manner, he undertakes that it can be done in that manner. And this is especially so if he appoints his own servant to see that it is done in that manner, and, by his contract for the work, binds the workman to follow the directions of that servant. All this occurred * in the present case. The plans and specifica- [* 124] tion were prepared by the engineer of the defendants. The plaintiff was required to work according to those plans and specification, and was put under the direction of the engineer; he acted under that direction; he did the work according to the plans and specification. It was admitted that he did the work well; but it failed, and had to be altered because the plans and specification were erroneous. Nothing could be more in accordance with justice than that the workman whose time and labour had been thus wasted, and wasted not by his own fault but by the mistakes of the person whose directions he was bound to obey, should be compensated for the loss he had thereby suffered. He was to be punished by a heavy penalty for any delay occasioned by himself; he was equally entitled to be compensated if delay was occasioned by the act or default of others. This principle of implied liability arising from the nature of the circumstances was adopted in *Knight* v. *Gravesend &c. Waterworks Company*, 2 H. & N. 6; 27 L. J. Ex. 73; and that case ought to be followed here. The specification formed part of the contract, for one of the recitals of the contract, after mentioning its preparation by Cubitt, said, "It includes the general conditions of and in relation to the works." And the various clauses in the contract which submitted the acts of the contractor to the direction of the engineer, all showed that the contractor was not like a mere independent workman who had undertaken to perform a certain work, and was responsible for the manner of doing it, and was left to perform it in his own way; but was like a person bound to do the work in a certain form, and in no other, and to do it in that form under the directions of a particular officer. If that form led to failure, he ought not to suffer for the failure. The responsibility lay with those whose fault occasioned it. The only instance in which the contractor was required to use his own knowledge and discretion was to be found in the 54th article of the specification, but the fact that he was

there required to satisfy himself as to the nature of the ground through which the foundations were to be carried showed that, as to all other matters, the defendants took on themselves [* 125] the responsibility of the business. * Now the failure here had not been occasioned in any way through neglect as to that article, but arose entirely from the mistake of the engineer as to the strength and use of the caissons. *Roberts* v. *Bury Improvement Commissioners*, L. R., 4 C. P. 755; 38 L. J. C. P. 367, was in favour of the appellant. It had at first been decided the other way, but that was because it had been deemed there that the words of the contract gave final authority to the architect to decide on the matter, and such had been the opinion of the two dissenting Judges in the Exchequer Chamber. L. R., 5 C. P. 310; 39 L. J. C. P. 129. The majority of that Court however overruled the first decision, on the ground that the rule of law which exonerates one of two contracting parties from the performance of a contract, applied where the performance of it is prevented or rendered impossible by the act of the other party. And nobody doubted that, but for the matter of the supposed finality of the architect's determination, the Commissioners would from the first have been liable, for the fault had arisen not from the act of the contractor, but from that of the Commissioners. Here the fault was altogether that of the defendants' engineer; and the plaintiff must not suffer on that account. *Hill* v. *Corporation of London* [not reported] was a case where the contractor was held entitled because the land on which he was to build had not been given to him, and his performance of his contract was therefore rendered impossible. So here, the caissons were not merely unfit for the work, but were the occasion of mischief, and the work which had been performed was wholly wasted. But that was the fault of the engineer, not of the plaintiff; and for the fault of their engineer the defendants were responsible. *Appleby* v. *Myers*, L. R., 1 C. P. 615; 2 C. P. 651; 35 L. J. C. P. 295; 36 L. J. C. P. 331; was not adverse to the plaintiff, for there the contract itself had made the price payable only on the completion of the work, and as the work had not been completed no part of the price could be demanded. Here there was no such restraining stipulation. The work had been done, and well done. It had been done under the direction of the engineer, and what was defective was entirely occasioned by his plans, which the plaintiff was bound to follow. For the loss which had been

occasioned by following them, the plaintiff was entitled to be compensated.

* Sir H. Giffard, S. G., and Mr. Thesiger, Q. C., for the [* 126] defendants, were not called upon.

The Lord Chancellor (Lord Cairns) : —

My Lords, nothing could be more ingenious and able than the two arguments which your Lordships have heard from Mr. Benjamin and Mr. Bompas in support of the case of the appellant. But, my Lords, those arguments, ingenious and able as they were, have certainly not occasioned any doubt in my mind, and I think they have not occasioned any doubt in the mind of any of your Lordships, as to the soundness of the decision, the unanimous decision, of the two Courts from which this appeal has been brought.

My Lords, the action which was brought by the appellant in this case was upon a cause stated in his declaration, very shortly in these words : — [His Lordship read the declaration, see *ante*, p. 226.]

The action so commenced was, by an order of the learned Judge, ordered to be turned into a special case without pleadings, and we must go to the special case to find what is the question put, and what is the ground of action submitted for decision to the Court. "The question" on the special case "for the opinion of the Court is, whether there is any and (if any) what implied warranty on the part of the defendants, to the effect stated in the declaration, or so as to give to the plaintiff a cause of action against the defendants. If the Court should be of opinion that such warranty exists, and that on the facts the plaintiff has a cause of action, then judgment is to be entered for the plaintiff." "If the Court should be of a contrary opinion, then judgment to be entered for the defendants." Therefore, my Lords, the action, whether you look to the declaration or to the special case, is an action founded upon a warranty; and the question for the opinion of the Court is, whether such a warranty exists, either by expression or by implication.

I do not propose to go at any length into the narrative of the facts of this case which has been so completely and so recently put before you. Blackfriars Bridge was to be rebuilt. The defendants, who constitute the Corporation of London, called for tenders for rebuilding the bridge. They had, of course, to indicate in what way they desired the work to be constructed, and as is usual in such cases, specifications and drawings were prepared by their * engineer, Mr. Cubitt, to be the subject [* 127]

of tender. Mr. Cubitt considered that the bridge could be built in a manner which was somewhat, if not altogether, novel, by the use of caissons in the place of coffer-dams, and the specification and drawings were prepared on that footing. The contract referred to the specification, and, for the purpose of what I have to say, I will assume that the specification must be read into the contract. The specification provided, as is usual in cases of the kind, with regard to extra or varied work, that extra or varied work should be certified and accounted for, and paid for at certain specification prices. The plaintiff in this case (the appellant) says that when he came to perform the work the upper part of the caissons, inside of which the pier was to be built, was found, if constructed, as it was constructed, according to this specification, to be unable in point of strength to stand the pressure and the force of the stream; that therefore the upper part of the caisson had to be abandoned, the lower part remained in the river, and the lower part of the pier was built inside the lower part of the caisson up to low-water mark; that, in consequence of its becoming necessary to abandon the upper part of the caisson in place of building inside the caisson above low water-mark, the work had to be done between low and high water, when it could be done without the impediment of the river at that height, — and that that occasioned, as it obviously would, great delay in point of time, and considerably more expense in point of outlay.

My Lords, it appears to me, that under those circumstances, the appellant must necessarily be in this dilemma, either the additional and varied work which was thus occasioned is the kind of additional and varied work contemplated by the contract, or it is not. If it is the kind of additional or varied work contemplated by the contract, he must be paid for it, and will be paid for it, according to the prices regulated by the contract. If, on the other hand, it was additional or varied work, so peculiar, so unexpected, and so different from what any person reckoned or calculated upon, that it is not within the contract at all; then, it appears to me, one of two courses might have been open to him; he might have said: I entirely refuse to go on with the contract — *Non hæc in fœdera veni:* I never intended to construct [*128] this work *upon this new and unexpected footing. Or he might have said, I will go on with this, but this is not the kind of extra work contemplated by the contract, and if I do

it, I must be paid a *quantum meruit* for it. Or, for aught I know, for I wish to express no opinion upon the subject, having gone on with it, he might now, if this is not extra work within the contract, have maintained a proceeding for remuneration upon a *quantum meruit* for the extra work he so did. I repeat, I give no opinion whatever upon that point; but it appears to me that those courses were the only courses open to him. But that which he comes here for now is not remuneration under the contract at all; it is neither remuneration fixed by the engineer, nor remuneration on a *quantum meruit*. It is a proceeding, first according to the declaration, then in the words of the special case, upon a warranty, and for damages as for a breach of the warranty.

Now, my Lords, I own that that raises, as it appears to me, a very serious and a very alarming question, if it were to be entertained, or if it should be held that upon such a footing the appellant could succeed. The proposition which would be affirmed would not go merely to the present case, but would go to nearly every kind of work in which a contractor is employed, and in which, for convenience, specifications of the details of the work are issued by the person who desires to employ the contractor. In those specifications, and in the contracts founded upon them, an elasticity or latitude is always given by provisions for extra additional and expected work; but if it were to be held that there is with regard to the specification itself, an implied warranty on the part of the person who invites tenders for the contract, that the work can be done in the way and under the conditions mentioned in the specification, so that he is to be liable in damages if it is found that it cannot be so done, the consequences, I say, my Lords, would be most alarming. They would be consequences which would go to every person who, having employed an architect to prepare a plan for a house, afterwards enters into a contract to have the house built according to that plan. They would go to every case in which any work was invited to be done according to a specification, however unexpected might be the results from that work when it came actually to be executed.

* My Lords, it is not contended that there is any express [* 129] warranty whatever on the face of any of the documents in this case. The question may readily be asked, Is it natural to suppose that any warranty can have been intended or implied between these parties? Is it natural to suppose, can it be sup-

posed for a moment, that the defendants intended to imply any such warranty? My Lords, if the contractor in this case had gone to the Bridge Committee, then engaged in superintending the work, and had said: You want Blackfriars Bridge to be rebuilt; you have got specifications prepared by Mr. Cubitt; you ask me to tender for the contract; will you engage and warrant to me that the bridge can be built by caissons in this way which Mr. Cubitt thinks feasible, but which I have never seen before put in practice? What would the committee have answered? Can any person for a moment entertain any reasonable doubt as to the answer he would have received? He would have been told: You know Mr. Cubitt as well as we do; we, like you, rely on him, — we must rely on him; we do not warrant Mr. Cubitt or his plans; you are as able to judge as we are whether his plans can be carried into effect or not; if you like to rely on them, well and good; if you do not, you can either have them tested by an engineer of your own, or you need not undertake the work; others will do it.

My Lords, it is really contrary to every kind of probability to suppose that any warranty could have been intended or implied between the parties; and if there is no express warranty, your Lordships cannot imply a warranty, unless from the circumstances of the work some warranty must have been necessary, which clearly is not the case here, or, unless the probability is so strong that the parties intended a warranty, that you cannot resist the application of the doctrine of implied warranty.

Now, my Lords, that appears to me to exhaust the whole of this case. If this contractor is entitled to remuneration for the services he performed, it must be sought, or ought to have been sought, in a way different from the present. Damages as for a breach of warranty he is, in my opinion, in no respect entitled to; and therefore I move your Lordships that the judgment of the Court below be affirmed, and the appeal dismissed with costs.

[* 130] * Lord CHELMSFORD: —

My Lords, the question which alone is open to the appellant on the special case is, whether the defendants are liable to him upon a warranty either in the terms stated in the declaration, or to give him a cause of action. The case of the appellant is not that there was any express warranty, but that, from the facts and circumstances of the case, a warranty by the defendants to the effect stated in the declaration must be implied.

The contract entered into between the appellant and the defendants originated in an advertisement issued by the corporation inviting tenders for the rebuilding of Blackfriars Bridge according to certain plans and specifications, which it was stated might be seen, and farther particulars obtained at the office of Mr. Cubitt, the engineer for the corporation. It appears that the ordinary mode of proceeding to lay the foundations and build the piers of a bridge is, by the construction of timber coffer-dams which exclude the tidal water and enable the work to be continued uninterruptedly in every state of the tide. By this specification, instead of coffer-dams, the foundations of the piers are to be laid by means of iron caissons, and minute details are given of the quantity of iron to be used in the caissons, the form and dimension of the iron work, and the means of making them water-tight.

The plaintiff's tender for the work having been accepted, he executed a deed by which he agreed to perform, under the superintendence and according to the directions of the engineer, all the works of every description which should be required to be made, done, and executed, in building the new bridge, including all piers, &c., according to the specification and drawings. The caissons were found not to be of sufficient strength to resist the pressure of the water, and it became necessary to make great alterations in them, which brought them considerably below high water-mark, and the piers could then only be completed by tide work. This occasioned great delay in the execution of the whole work, and the appellant sustained in consequence great loss and damage, which he alleges that, upon the facts of the case, the defendants must be taken to have warranted him against.

I think the difference of opinion between two of the Judges as to whether the caissons are to be considered as work to be done, * or as the mode of performing the work, like [* 131] the scaffolding necessary for the building of a house, is quite immaterial. The plaintiff, by his contract, bound himself to execute the works of every description which should be required in building the new bridge, including the piers, according to the specification. Therefore in whatever light the caissons are to be regarded, the appellant was bound to employ them in the construction of the piers.

It is stated in the special case that, "The difficulties in carrying out the work in accordance with the plans and designs of the

engineer of the corporation, in the several respects before-mentioned, were not known by the contractors at the time of entering into the said contract, although the same might have been discovered on careful examination of the specification and drawings by a civil engineer of competent skill and knowledge. The contractors had in their employment, before and at the time of tendering for the contract, a civil engineer who saw the plans, but no such careful examination had, in fact, been made by him or by any other person on behalf of the contractors."

This passage Mr. Benjamin ingeniously turns against the engineer of the defendants, and urges it as proof that he could not have made a careful examination before he devised the new plan for the construction of the piers and prepared the specification. And he argued that, the engineer being originally in fault, no objection lay against the plaintiff on the ground of contributory negligence. It is unnecessary to consider the validity of this argument, but assuming that there was a want of care and skill on the part of the engineer, how does the act of the defendants in issuing the advertisement inviting tenders for the work according to the specification, and referring to the engineer for farther particulars, imply a warranty that the work was capable of being carried out upon the terms and under the conditions contained in the specifications?

But it is argued on behalf of the plaintiff that from the contract itself a warranty may be implied on the part of the defendants, that there are several clauses in which the defendants expressly state they will not guarantee certain things, and that, upon the maxim *Expressio unius est exclusio alterius*, there is an implied warranty in every case which is not expressly excluded. [* 132] This is * certainly a novel application, if not a total change of the purpose of the maxim, for the plaintiff's argument really is, that *Exclusio unius est expressio alterius*, that the exclusion of a warranty as to certain parts of the contract is an admission of a warranty as to the other parts. There is no principle upon which such a rule of law could exist; and certainly nothing approaching to it has ever been established.

There can be no doubt that the plaintiff, in the exercise of common prudence, before he made his tender, ought to have informed himself of all the particulars connected with the work, and especially as to the practicability of executing every part of the work contained in the specification, according to the specified

terms and conditions. It is said that it would be very inconvenient to require an intended contractor to make himself thoroughly acquainted with the specification, as it would be necessary upon each occasion for him to have an engineer by his side. Such an imagined inconvenience is inapplicable in this case, as it appears that the plaintiff had his engineer, who examined the specification for him, though not carefully. But if the contractor ought prudently and properly to have full information of the nature of the work he is preparing to undertake, and the advice of a skilful person is necessary to enable him to understand the specification, is it any reason for not employing such a person that it would add to the expense of the contractor before making his tender? It is also said that it is the usage of contractors to rely on the specification, and not to examine it particularly for themselves. If so, it is an usage of blind confidence of the most unreasonable description.

The appellant having entered into the contract with the neglect of all proper precautions, and trusting solely to the specification in a case in which the proposed substitution of iron caissons for coffer-dams was an entire novelty, and the progress of the work having disclosed the inefficiency of the plan of working described in the specification, which he might by careful examination have discovered beforehand, he endeavours to throw upon the defendants the consequences of his own neglect to inform himself of the nature of the work he was preparing to undertake, by alleging that there was an implied warranty by them that the
bridge could be built according to the plans and specifi- [133]
cation, and that the caissons shown on the plans would answer the purpose of excluding the tidal water during the construction of the bridge.

If the plaintiff had considered, as he was bound to do, the terms of the specification, he would either have abstained from tendering for the work, or he would have asked the defendants to protect him from the loss he was likely to sustain if the plan of working described in the specification should turn out to be an improper one. It is unnecessary to speculate upon what the answer would have been to such an application. But I think we may fairly assume that if the defendants had been asked for an express warranty to the effect alleged in the declaration, they would have refused to give it.

I cannot see any principle upon which, from the facts of the

case, an implied warranty can be imported into the contract making the defendants liable for the loss which the contractor has sustained by the delay caused by the insufficiency of the caissons to stand the work for which they were intended. I agree that the judgment should be affirmed.

Lord HATHERLEY: —

My Lords, I entertain the same opinion as that expressed by my noble and learned friends, and after what has been said it is only necessary for me, inasmuch as different grounds have, to a certain extent, been relied on by the Judges in the Court below, to state on what grounds it appears to me to be absolutely necessary that the conclusion must be arrived at, by your Lordships, which was arrived at by the whole body of the Judges when the case was before them.

My Lords, I put it exactly on those grounds upon which my noble and learned friend on the woolsack has put it, that the plaintiff here is placed in this extreme difficulty. It is not only that he comes here upon a case in which the proposition he contends for is not found to be supported by any authority at all, but he is inevitably in the dilemma of being obliged to say one of two things, each of which is adverse to him. He may either say:

This work which I have done and for which I now claim
[*134] to be * paid either by way of damages (that is the mode,
and the only mode in which it was put by the case originally brought before the Court), or if not by way of damages, then by way of a *quantum meruit* as within the contract; or he may say that it was not within the contract. On the one hand, if it was within the contract, then of course it would be paid for in the manner provided by the terms of the contract, which are full and explicit as to all the work done in pursuance (I agree with Mr. Bompas in his able argument on this point), and only done in pursuance, of the engagement entered into. He must be paid for it, as it is provided that all such works are to be paid for, namely, upon the amount of extras, that is to say, upon the additional work over and above the amount of work agreed to be executed under the contract. Then, of course, he would have no difficulty in obtaining his remedy.

On the other hand, if it was outside the contract, I apprehend his course would be very clear, — clear, at all events in one sense. No doubt contractors find themselves hampered by the very strong

provisions which are usually contained in engagements of this kind, but still in point of law the case would have been clear if he had said: This not being within my engagement, I will have nothing to say to this farther work. I have performed (as Mr. Benjamin once or twice forcible put it) all the work my contract requires me to do: the contract is fulfilled; it is not a question of deviating from the contract, or of not carrying the work contracted for into effect; the work has been carried into effect, and now you are calling upon me to do something new; that must be the subject of a wholly new engagement. I will not enter upon the performance of that work until a new contract has been made according to the character and nature of the new work. You have ordered me to do what is outside the contract altogether.

My Lords, in neither of these cases could he recover, because in the one case, if the transaction be within the contract, it is already sufficiently provided for, and he has been paid for it; and in the other case there is nothing to show that he entered into such new engagement at all. All that we have stated to us in the case is, that he was directed to do the work in question, and being so directed, he made no objection to it. It was ingeniously attempted by Mr. Bompas, in the last part of his argument, to say, * If anybody directs you to do that which he has [* 135] no right to direct you to do without remunerating you, he must be held to be under a contract to pay *quantum meruit*. The answer is, that that is not the case before us here. Whether that might be had recourse to any other form of action it is not for us to say. We have neither the form of case nor the statements which would enable us to arrive at a conclusion on the subject. All we have before us is a declaration stating that there was an implied engagement or warranty entered into on the part of the defendants with reference to the mode in which this work was to be executed, and a special case stated, upon which we are asked to inquire whether or not there was any such implied warranty as is stated in the declaration, "or," as would give rise to a claim for remuneration, the word "warranty" being necessary to the terms of the question. The grammatical construction requires, and no other construction could be put upon it, that the meaning of the word "warranty" there, is, either a warranty such as is stated in the declaration, or such warranty as would give this right of action. And if we should find that there is

such a warranty (here it is put properly in the conjunctive), if the warranty be found, "and" if you find farther, that the facts have occurred which carried that warranty into effect, then the remedy which the plaintiff seeks is to be accorded to him.

My Lords, if, as has been strongly contended upon this appeal, there can be found any warranty in such a contract as this, I apprehend it would be scarcely possible for any person whatever to enter upon any new work of any description; say the tubular bridge, for instance, which was originally a bold speculation, I believe, on the part of Mr. Stephenson. Any work of that kind, which must necessarily be in a great degree speculative, could scarcely be carried into effect if any person entering into a contract for the performance of that work with a contractor was to be supposed to have guaranteed to the contractor that the performance of it was possible. We have had no authority for such a doctrine as that cited before us, and I apprehend it will be impossible to find any authority, as indeed none has been found, which has gone any way whatever near to that doctrine as here contended for.

[* 136] * The last authority, *Appleby* v. *Myers*, cited by Mr. Bompas, — a case decided one way in the Court below, and afterwards varied by the Court above, — proceeded upon an entirely contrary view of the case, namely, that where there was found to be only such a result occurring as had not been foreseen by either party, you could not proceed on any such doctrine of warranty. No doubt all persons are distinctly bound not to do anything towards impeding their own engagements, but that is a very long way indeed from a case of this description. Supposing the present defendants had said in so many terms, We, the Corporation of London, are about to engage in this very important work, namely, the re-building of Blackfriars Bridge, and we have secured for our assistance in laying out the designs for that work the services of an eminent engineer. Supposing they had then proceeded to state who that engineer was, and had named Mr. Cubitt, what would that have amounted to? No more than to a representation that they had engaged an engineer, — and that that engineer is one of a certain standing in the profession. Does it go a bit beyond that? Does it proceed to say that the engineer is infallible, or has never made a mistake, or can never make a mistake for all time to come, and that the defendants give a warranty to that effect?

Nothing has been done since the date of entering into the contract by which the defendants have in any way impeded the execution of the works in the mode proposed by the specification. Instead of being something done after the contract was entered into, the case alleged is that a contract was entered into with the advice of a person, which advice turns out, unfortunately, not to have been so good as might have been expected from his position. That is no representation at all, nor does the contract amount to anything like a representation that "the advice which we have secured is such that you may confidently, acting upon it, enter into this engagement." All that was done was to inform the person with whom the contract was made, of all the surrounding circumstances in which the defendants were disposed to enter into the contract. The statement of every one of those surrounding *circumstances was correct. Mr. Cubitt had [*137] been employed, and the designs had been prepared by him, but it turned out unfortunately that there was an error made as to the feasibility of executing those designs in the way he contemplated.

Now, my Lords, I am quite clear on the point of principle here. There is nothing, I am sure, to induce your Lordships to lay down a new principle of law by which anybody entering into a contract must be supposed to have obtained an implied warranty, from the person engaging him, that the contract itself can be fully carried out without impediment, whether that impediment be one he is himself able to foresee or not.

Lord O'Hagan: —

My Lords, supposing, as I think it is perfectly clear, notwithstanding the extremely able argument that has been addressed to us, that upon the pleadings and the special case the plaintiff cannot recover damages as on a *quantum meruit*, and that the question for your Lordships' opinion regards only the implied warranty on which he has relied, I concur fully with my noble and learned friends who have addressed the House.

Confessedly there is no authority in support of the plaintiff's case. Such an action under such circumstances has never been sustained, and it lies upon the plaintiff to show that it is sustainable.

There is no express warranty, and I see no reason for implying one. The parties did not understand, in my opinion, that any

warranty was to be given. No such understanding is manifested in the contract or specification, and the notice of the defendants merely informed contractors as to the place in which they might examine the plans and specifications, and obtain farther particulars for their assistance in deciding for themselves, and with any advice which might be available to them, as to their acceptance of the proposed contract. It did not profess to do more; it gave no indication of a purpose to give such a warranty as is now alleged. And Mr. Cubitt, who was named in it, had no power within the scope of his authority indicated in the special case, as engineer or as agent, to warrant anything. At his office [*138] needful * information was to be got, and the case finds that it was ample to enable the contractors to discover the difficulties in carrying out the work which afterwards affected them so injuriously. They had an engineer, and if he was of "competent skill and knowledge," and had carefully examined the specifications and drawings, the special case informs us that he would have made that important discovery. So that the opportunities of knowledge were really very equal between the parties. It is much to be regretted that the contractors omitted a precaution which in so grave a matter would seem to have been reasonable and wise. It is unfortunate that they should be subjected to such serious loss; but I do not think that your Lordships can intervene to save them from the results of their own improvidence, by making, for the parties, a contract which they never contemplated, and inserting in it a warranty of which no one ever thought, which was never demanded on the one side, and if it had been, would, I feel assured, have been refused upon the other.

On this short ground I think the judgment of the Exchequer Chamber should be affirmed, and the appeal dismissed with costs.

Judgment of the Court of Exchequer Chamber affirmed, with costs.

Lords' Journals, 18th February, 1876.

ENGLISH NOTES.

The principle of the ruling case is again exemplified by *Tharsis Sulphur & Copper Co.* v. *M'Elroy* (H. L. 1878), 3 App. Cas. 1040, where the contractor for certain iron buildings found it impossible to cast certain girders of the weight specified, and obtained verbal permission from the engineer to erect heavier ones. By the contract no payment

was to be made for extras without the written order of the engineer. It was held that he was not entitled to payment for the extra weight.

Where the engineer's or architect's certificate has been made a condition precedent for payment, his certificate (in the absence of fraud) is conclusive between the parties. *Sharpe* v. *San Paulo Railway Co.* (1873), L. R., 8 Ch. 597, 29 L. T. 9; *Roberts* v. *Bury Improvement Commissioners* (1869 and Ex. Ch. 1870), L. R., 4 C. P. 755, 5 C. P. 310, 38 L. J. C. P. 367, 39 L. J. C. P. 129; *Richards* v. *May* (1883), 10 Q. B. D. 400, 52 L. J. Q. B. 272. But in *Roberts* v. *Bury Improvement Commissioners* the Court of Exchequer Chamber held that where the contractor's contention was that he was prevented from executing the works in due time by reason of the wrongful act or default of the other party, it will not be taken, unless unequivocally and clearly expressed in the contract, that the engineer or architect was to be sole judge of that.

The principle was acted on by the House of Lords in two cases in the year 1886, which do not appear to have been reported. Both arose out of contracts for piers or works built into the sea. In one case (*Jackson* v. *Eastbourne Local Board*, Lords Journals, 2 March, 1886) relating to works on the south coast, the claim was for extra work in building groynes which were found necessary to protect the works from the scour of the tide. In the other case, *Kinghorn* v. *Corporation of Dundee* (Lords Journals, 1st April, 1886), there was a contract to build a sea-wall and esplanade on the estuary of the Tay at Dundee. The corporation had advertised the work, with an estimate of probable quantities, and stating that plans and specifications would be seen at the office of their engineer. The appellant had contracted to carry out the work according to these plans and specifications for a lump contract price. Payment was to be made for additional works; but it was provided that the contractor should, previously to the execution of any extra works for which he should be entitled to claim payment as such, receive a written order therefor signed by the engineer. There was a power in the contract that, in case the contractor should delay the completion of the works beyond the time stipulated the corporation might, with the authority of the arbiter mentioned in the contract, dismiss the contractor, take possession of his plant, and complete the work at his expense. The appellant soon after entering on the work had found an unexpected difficulty owing to the scour of the tide; and he found it impossible to form a sea-wall of the dimensions required with the materials specified. He applied to the engineer for instructions and certificates of the extra work which would be necessary; and this the engineer refused to give. Ultimately the appellant declined to go on with the work; and acting under the strict terms of the contract the

corporation with the authority of the arbiter, dismissed him, took possession of his plant, and completed the works. The contractor claimed to be paid for the work which he had done, and the corporation claimed from him a sum for the completion of the work, and on these claims an arbitration was gone into under the contract, with the result that a considerable sum was found due from the contractor. The corporation subsequently brought an action in the Scotch Supreme Court against the contractor, in which the latter entered appearance, but did not lodge defences; and the corporation obtained a decree in absence for the amount awarded by the arbitrator. The appellant then brought his action to have the proceedings in the arbitration set aside, and claiming compensation. The case made by him was that the plans and specifications were misleading and erroneous by reason of their being framed on a basis which excluded from the view of the contractor the difficulty arising from the peculiar currents of the Tay which were known to the engineer. That owing to these currents which swept away the work as it was in progress it was found impossible to build the wall without an alteration of the plans, which the engineer refused to make, involving extra work for which the engineer refused to certify; and that the works as ultimately carried out at his expense had been made on different plans and specifications in terms of which it was possible to carry out the work. The House of Lords decided against the appellant primarily on the ground that the matter was *res judicata* by the decree of the Court of Session in the previous action. But they also heard an argument on the merits, and clearly intimated their opinion that the contractor, having undertaken to complete the work according to the plans and specifications, had no ground of complaint because it was found impossible to do so without work and materials which the specifications did not take into account.

AMERICAN NOTES.

The general principle in respect to building contracts, as in respect to all others, is that if one undertakes without reservation to erect a building, he is bound to do so, even though prevented by inevitable accident or unforeseen contingency, or to respond in damages. As where the latent softness of the soil rendered it impossible to lay the foundation. *Superintendent, &c.* v. *Bennett*, 26 New Jersey Law, 513; 72 Am. Dec. 373; *Dermott* v. *Jones*, 2 Wallace (U. S. Sup. Ct.), 1. Mr. Bishop (Contracts, § 592) thinks that prevention by act of God excuses the performance (citing *Bailey* v. *De Crespigny*, L. R., 4 Q. B. 181); but he admits that "there are cases which seem contrary to this, wherein defendants have been compelled to pay money because they could not contend successfully with the Almighty or the public enemy." Citing *Howell* v. *Coupland*, 1 Q. B. Div. 258. See *ante*, Vol. i., 347, notes.

This principle, of course, is inconsistent with any implied warranty on the part of the other party that those conditions shall not arise.

The non-performance of a contract is not excused, even by the act of God, where it may be substantially performed, although a literal and precise performance is impossible. *Williams* v. *Vanderbilt*, 28 New York, 218.

"The most that a Court of Equity can do in a case where an agreement cannot be carried into effect, according to the intention of the parties thereto, in consequence of the act of God, or something over which the parties could have no control, is to adopt such an equitable arrangement as the parties probably would have inserted in the agreement, on that subject, if they had foreseen the probability of such an event, and provided for the same." *Chase* v. *Barrett*, 4 Paige (New York Chancery), 148.

The principal case does not seem to have been cited in this country. It is reported in 9 Moak's English Reports, 175; 12 ibid. 555; and 15 ibid. 28. In the first report, KELLY, C. B., said: "No authority has been cited to show that there is any such implied warranty." If Mr. Benjamin, with his great knowledge of American law, was unable to adduce any analogous cases in this country, it is probable that none exist.

CARRIER.

SECTION I. — *Common Carriers generally.*

No. 1. — MORSE *v.* SLUE.

(1672–73.)

No. 2. — COGGS *v.* BERNARD.

(1703.)

RULE.

A COMMON carrier exercises a public employment to receive goods to be transported from place to place for a reasonable reward. He is (speaking generally) respon-

sible for the safe carriage at all events but the act of God or the King's enemies.

The master of a ship employed as a general ship exercises an employment and is subject to a responsibility similar in all respects to that of a common carrier.

The obligation to carry *with due care* (as distinguished from the obligation of a common carrier to *carry safely*) may be incurred by one who is not a common carrier, and arises upon the actual reception of the goods for carriage, although the service is to be performed without reward.

Morse v. Slue.

1 Ventr. 190, 191 and 238, 239 (s. c. 3 Keb. 72, 113, 135; Sir T. Raym. 220).

Common Carrier. — Master of Ship.

Action upon the case against the master of a ship for loss of goods received by him to be carried for reward. It was found that there were a sufficient number of men employed to look after the ship, and that the goods were taken away by a gang of thieves. *Held*, that the defendant was liable for the loss as a common carrier.

[190] Michael. *ult. Rot.* 421. An action upon the case was brought by the plaintiff against the defendant; and he declared, that whereas according to the law and custom of England, masters and governors of ships which go from London beyond sea and take upon them to carry goods beyond sea, are bound to keep safely day and night the same goods, without loss or subtraction, *ita quod pro defectu* of them, they may not come to any damage; and whereas, the 15th of May last, the defendant was master of a certain ship called the *William and John*, then riding at the port of London, and the plaintiff had caused to be laden on board her three trunks, and therein 400 pair of silk stockings, and 174 pounds of silk, by him to be transported for a reasonable reward of freight to be paid, and he then and there did receive them, and ought to have transported them, &c.; but he did so negligently keep them that, in default of sufficient care and custody of him and his servants, 17 May, the same were totally lost out of the said ship.

Upon not guilty pleaded, a special verdict was found, viz.: That

the ship lay in the river of Thames, in the port of London, in the parish of Stepney, in the county of Middlesex, *prout*, &c.

That the goods were delivered by the plaintiff on board the ship, *prout*, &c., to be transported to Cadiz in Spain.

That the goods being on board, there were a sufficient number of men for to look after and attend her, left in her.

That in the night came eleven persons on pretence of pressing of seamen for the King's service, and by force seized on these men (which were four or five, found to be sufficient as before) and took the goods.

That the master was to have wages from the owners, and the mariners from the master.

That she was of the burthen of 150 ton, &c.

So the question was, upon a trial at bar, whether the master were chargeable upon this matter?

It was insisted on for the plaintiff, that he who took goods to carry them for profit ought to keep them at his peril.

To which it was answered, that there was no negligence [191] appeared in the master. By the civil law, if goods were taken by pirates, the master shall not answer for them; and this is not the case of a carrier, for though here the goods are received at land, yet they are to be transported, and being one entire contract they shall not be under one law in the port and another at sea; the master is not liable in case of fire or sinking the ship; every one knows the ship is liable to inevitable accidents, and there is no case of this nature in experience. And Serjeant Maynard added, that this differed from the case of a carrier, for that he is paid by the owner of the goods; but here the master is servant to the owner of the ship, and he pays him, and not the merchant.

The Court inclined strongly for the defendant, there being not the least negligence in him. But it was appointed to be argued, but since I have heard it was compounded. It was agreed on all hands that the master should have answered, in case there had been any default in him or his mariners.

The case was argued two several terms at the bar, by Mr. [238] Holt for the plaintiff, and Sir Francis Winnington for the defendant; and Mr. Molloy for the plaintiff, and Mr. Wallop for the defendant; and by the opinion of the whole Court judgment was given this term for the plaintiff.

Hale delivered the reasons as followeth: —

No. 1. — Morse v. Slue, 1 Ventr. 238, 239.

First, By the Admiral Civil Law the master is not chargeable *pro damno fatali*, as in case of pirates, storm, &c., but where there is any negligence in him he is.

Secondly, This case is not to be measured by the rules of the Admiral Law, because the ship was *infra corpus comitatus*.

Then the first reason wherefore the master is liable is, because he takes a reward; and the usage is, that half wages is paid him before he goes out of the country.

Secondly, If the master would, he might have made a caution for himself, which he omitting and taking in the goods generally, he shall answer for what happens. There was a case (not long since) *Southcote's case*, 4 Co. Rep. 83 *b*, when one brought a box to a carrier in which there was a great sum of money, and the carrier demanded of the owner what was in it; he answered, that it was filled with silks and such like goods of mean value; upon which the carrier took it, and was robbed. And resolved that he was liable. But if the carrier had told the owner that it was a dangerous time, and if there were money in it he durst not take charge of it; and the owner had answered as before, this matter would have excused the carrier.

Thirdly, He that would take off the master in this case from the action must assign a difference between it and the case of a hoyman, common carrier, or innholder.

It is objected, that the master is but a servant to the owners.

Answer. The law takes notice of him as more than a servant. It is known that he may impawn the ship if occasion be, and sell *bona peritura*. He is rather an officer than a servant. In all escape the gaoler may be charged, though the sheriff is [* 239] also liable; * for *respondeat superior*. But the turnkey cannot be sued, for he is but a mere servant. By the civil law the master or owner is chargeable at the election of a merchant.

It is further objected, that he receives wages from the owners.

Answer. In effect the merchant pays him, for he pays the owner's freight, so that it is but handed over by them to the master. If the freight be lost, the wages are lost too; for the rule is, freight is the mother of wages; therefore, though the declaration is that the master received wages of the merchant, and the verdict is that the owners pay it, it is no material variance.

Objection. It is found, that there were the usual number of men to guard the ship.

Answer. True, for the ship, but not with reference to the goods, for the number ought to be more or less as the port is dangerous and the goods of value. 33 H. VI. 1. If rebels break a gaol, so that the prisoners escape, the gaoler is liable; but it is otherwise of enemies; so the master is not chargeable where the ship is spoiled by pirates. And if a carrier be robbed by an hundred men he is never the more excused.

Case may be brought against the owners, but then they must all be charged, because the contract is joint. *Boson* v. *Sandford*, 3 Lev. 268; Show. 29; No. 2, of "Abatement," 1 R. C. p. 167.

Coggs v. Bernard.

Lord Raym. 909, 917, 918, 920 (s. c. Smith Lead. Cas. 8th ed. 199).

Contract to carry Goods. — Gratuitous Bailment. — Mandate. — Negligence.

In an action on the case, for damage to goods, held, after verdict for the plaintiff, a good cause of action that the defendant had undertaken to carry the goods safely and that they sustained damage in the carriage by his neglect, — although he was not a common carrier and was to have nothing for the carriage.

In an action upon the case the plaintiff declared, *quod cum* [909] Bernard the defendant, the tenth of November, 13 Will. III., at, &c., *assumpsisset, salvo et secure elevare, Anglice* to take up, several hogsheads of brandy then in a certain cellar in *D, et salvo et secure deponere, Anglice* to lay them down again, in a certain other cellar in Water Lane, the said defendant and his servants and agents *tam negligenter et improvide* put them down again into the said other cellar, *quod, per defectum curæ ipsius* the defendant, his servants and agents, one of the casks was staved, and a great quantity of brandy, viz., so many gallons of brandy, was spilt. After not guilty pleaded, and a verdict for the plaintiff, there was a motion in arrest of judgment, for that it was not alleged in the declaration that the defendant was a common porter, nor averred that he had anything for his pains. And the case being thought to be a case of great consequence, it was this day argued *seriatim* by the whole court.

Gould, J. I think this is a good declaration. The objection that has been made is, because there is not any consideration laid. But I think it is good either way, and that any man, that undertakes to carry goods, is liable to an action, be he a common carrier, or

whatever he is, if through his neglect they are lost or come to any damage: and if a *pracmium* be laid to be given, then it is without question so. The reason of the action is, the particular trust reposed in the defendant, to which he has concurred by his assumption, and in the executing which he has miscarried by his neglect. But if a man undertakes to build a house, without anything to be had for his pains, an action will not lie for non-performance, because it is *nudum pactum*. So is the 3 H. VI. 36. So if goods are deposited with a friend, and are stolen from him, no action will lie. 29 Ass. 28. But there will be a difference in that case upon the evidence, how the matter appears; if they were stolen by reason of a gross neglect in the bailee, the trust will not save him from an action, otherwise if there be no gross neglect. So is Doct. & Stud. 129, upon that difference. The same difference is where he comes to goods by finding. Doct. & Stud., *ubi supra*, Ow. 141. But if a man takes upon him expressly to do such a fact safely and securely, if the thing comes to any damage by his miscarriage, an action will lie against him. If it be only a general bailment, the bailee will not be chargeable, without a gross neglect. So is Keilw. 160, 2 H. VII. 11, 22 Ass. 41; 1 R. 10, Bro. *action sur le case*, 78. *Southcote's case* (4 Co. Rep. 83 b) is a hard case indeed, to oblige all men that take goods to keep, to a special acceptance, that they will keep them as safe as they would do their own, which [* 910] * is a thing no man living that is not a lawyer could think of: and indeed it appears by the report of that case in Cro. El. 815, that it was adjudged by two Judges only, viz.: Gawdy and Clench. But in 1 Ventr. 121, there is a breach assigned upon a bond conditioned to give a true account, that the defendant had not accounted for £30, the defendant showed that he locked the money up in his master's warehouse, and it was stole from thence, and that was held to be a good account. But when a man undertakes specially to do such a thing, it is not hard to charge him for his neglect, because he had the goods committed to his custody upon those terms.

Powys agreed upon the neglect.

Powell. The doubt is, because it is not mentioned in the declaration that the defendant had anything for his pains, nor that he was a common porter, which of itself imports a hire, and that he is to be paid for his pains. So that the question is, whether an action will lie against a man for doing the office of a friend; when there is not any particular neglect shown? And I hold, an

action will lie, as this case is. And in order to make it out I shall first show that there are great authorities for me, and none against me; and then, secondly, I shall show the reason and gist of this action; and then, thirdly, I shall consider *Southcote's case.*

1. Those authorities in the Register, 110, *a. b.*, of the pipe of wine, and the cure of the horse, are in point, and there can be no answer given them but that they are writs, which are framed short. But a writ upon the case must mention everything that is material in the case, and nothing is to be added to it in the count, but the time and such other circumstances. But even that objection is answered by Rast. Entr. 13, *c.*, where there is a declaration so general. The Year Books are full in this point. 43 Ed. III. 33, *a.*, there is no particular act shown. There indeed the weight is laid more upon the neglect, than the contract. But in 48 Ed. III. 6, and 19 H. VI. 49, there the action is held to lie upon the undertaking, and that without that it would not lie; and therefore the undertaking is held to be the matter traversable, and a writ is quashed for want of laying a place of the undertaking. 2 H. VII. 11; 7 H. IV. 14; these cases are all in point, and the action adjudged to lie upon the undertaking.

2. Now to give the reason of these cases, the gist of these actions is the undertaking. The party's special assumpsit and undertaking obliges him so to do the thing, that the bailor come to no damage by his neglect. And the bailee in this case shall answer accidents, as if the goods are stolen; but not such accidents and casualties as happen by the act of God, as fire, tempest, &c. So it is 1 Jones, 179, * Palm. 548. For the bailee is not bound [* 911] upon any undertaking, against the act of God. Justice Jones in that case puts the case of 22 Ass. where the ferryman overladed the boat. That is no authority I confess in that case, for the action there is founded upon the ferryman's act, viz., the overlading the boat. But it would not have lain, says he, without that act; because the ferryman, notwithstanding his undertaking, was not bound to answer for storms. But that Act would charge him without any undertaking, because it was his own wrong to overlade the boat. But bailees are chargeable in case of other accidents, because they have a remedy against the wrong-doers: as in case the goods are stolen from him, an appeal of robbery will lie, wherein he may recover the goods, which cannot be had against enemies, in case they are plundered by them; and therefore in

that case he shall not be answerable. But it is objected, that here is no consideration to ground the action upon. But as to this, the difference is, between being obliged to do the thing, and answering for things which he has taken into his custody upon such an undertaking. An action indeed will not lie for not doing the thing, for want of a sufficient consideration; but yet if the bailee will take the goods into his custody he shall be answerable for them, for the taking the goods into his custody is his own act. And this action is founded upon the warranty, upon which I have been contented to trust you with the goods, which without such a warranty I would not have done. And a man may warrant a thing without any consideration. And therefore when I have reposed a trust in you, upon your undertaking, if I suffer, when I have so relied upon you, I shall have my action. Like the case of the *Countess of Salop*. An action will not lie against a tenant at will generally, if the house be burnt down. But if the action had been founded upon a special undertaking, as that in consideration the lessor would let him live in the house, he promised to deliver up the house to him again in as good repair as it was then, the [1] action would have lain upon that special undertaking. But there the action was laid generally.

3. *Southcote's* [2] *case* is a strong authority, and the reason of it comes home to this, because the general bailment is there taken to be an undertaking to deliver the goods at all events, and so the judgment is founded upon the undertaking. But I cannot think that a general bailment is an undertaking to keep the goods safely at all events. That is hard. Coke reports the case upon that reason, but makes a difference, where a man undertakes specially to keep goods as he will keep his own. Let us consider the reason of the case. For nothing is law that is not reason. Upon
[* 912] * consideration of the authorities there cited, I find no such difference. In 9 Ed. IV. 40, *b.*, there is such an opinion by Danby. The case in 3 H. VII. 4, was of a special bailment, so that that case cannot go very far in the matter. 6 H. VII. 12, there is such an opinion by the by. And this is all the foundation of *Southcote's case*. But there are cases there cited which are stronger against it, as 10 H. VII. 26, 29 Ass. 28, the case of a pawn. My Lord Coke would distinguish that case of a pawn from a bailment,

[1] *Vide* Com. 627; Barr. 1638.

[2] That notion in *Southcote's case*, 4 Co. Rep. 83, *b.*, that a general bailment and a bailment to be safely kept is all one, was denied to be law by the whole court, *ex relatione m'ri Bunbury*. Note to 3d Ed.

because the pawnee has a special property in the pawn; but that will make no difference, because he has a special property in the thing bailed to him to keep. 8 Ed. II., Fitzh. *detinue*, 59, the case of goods bailed to a man, locked up in a chest, and stolen; and for the reason of that case, sure it would be hard that a man that takes goods into his custody to keep for a friend, purely out of kindness to his friend, should be chargeable at all events. But then it is answered to that, that the bailee might take them specially. There are many lawyers don't know that difference, or however it may be with them half mankind never heard of it. So for these reasons, I think a general bailment is not, nor cannot be taken to be, a special undertaking to keep the goods bailed safely against all events. But if a man does undertake specially to keep goods safely, that is a warranty, and will oblige the bailee to keep them safely against perils, where he has his remedy over, but not against such where he has no remedy over.

Holt, C. J. The case is shortly this. This defendant undertakes to remove goods from one cellar to another, and there lay them down safely, and he managed them so negligently that for want of care in him some of the goods were spoiled. Upon not guilty pleaded, there has been a verdict for the plaintiff, and that upon full evidence, the cause being tried before me at Guildhall. There has been a motion in arrest of judgment, that the declaration is insufficient, because the defendant is neither laid to be a common porter, nor that he is to have any reward for his labour. So that the defendant is not chargeable by his trade, and a private person cannot be charged in an action without a reward.

I have had a great consideration of this case, and because some of the books make the action lie upon the reward, and some upon the promise, at first I made a great question whether this declaration was good. But upon consideration, as this declaration is, I think the action will well lie. In order to show the grounds upon which a man shall be charged with goods put into his custody, I must show the several sorts of bailments. And there are six sorts of bailments. The first sort of bailment is a bare naked bailment of goods, delivered by one man to another to keep for the use of the *bailor; and this I call a *depositum*, and it is [*913] that sort of bailment which is mentioned in *Southcote's case*.

The second sort is, when goods or chattels that are useful are lent to a friend gratis, to be used by him; and this is called *commoda-*

tum, because the thing is to be restored *in specie*. The third sort is, when goods are left with the bailee to be used by him for hire; this is called *locatio et conductio*, and the lender is called *locator*, and the borrower *conductor*. The fourth sort is, when goods or chattels are delivered to another as a pawn, to be a security to him for money borrowed of him by the bailor; and this is called in Latin *vadium*, and in English a pawn or a pledge. The fifth sort is when goods or chattels are delivered to be carried, or something is to be done about them for a reward to be paid by the person who delivers them to the bailee, who is to do the thing about them. The sixth sort is when there is a delivery of goods or chattels to somebody, who is to carry them, or do something about them gratis, without any reward for such his work or carriage, which is this present case. I mention these things, not so much that they are all of them so necessary in order to maintain the proposition which is to be proved, as to clear the reason of the obligation, which is upon persons in cases of trust.

As to the first sort, where a man takes goods in his custody to keep for the use of the bailor, I shall consider, for what things such a bailee is answerable. He is not answerable, if they are stole without any fault in him, neither will a common neglect make him chargeable, but he must be guilty of some gross neglect. There is I confess a great authority against me, where it is held, that a general delivery will charge the bailee to answer for the goods if they are stolen, unless the goods are specially accepted, to keep them only as you will keep your own. But my Lord Coke has improved the case in his report of it, for he will have it that there is no difference between a special acceptance to keep safely, and an acceptance generally to keep. But there is no reason nor justice in such a case of a general bailment, and where the bailee is not to have any reward, but keeps the goods merely for the use of the bailor, to charge him without some default in him. For if he keeps the goods in such a case with an ordinary care, he has performed the trust reposed in him. But according to this doctrine the bailee must answer for the wrongs of other people, which he is not, nor cannot be, sufficiently armed against. If the law be so, there must be some just and honest reason for it, or else some universal settled rule of law, upon which it is grounded; and therefore it is incumbent upon them that advance this doctrine, to show an undisturbed rule and practice of the law

according to this position. But to show that the tenor of the law was always otherwise, I shall give a history *of the authorities in the books in this matter, and by [*914] them show, that there never was any such resolution given before *Southcote's case*. The 29 Ass. 28, is the first case in the books upon that learning, and there the opinion is that the bailee is not chargeable, if the goods are stole. As for 8 Edw. II. Fitzh. *detinue*, 59, where goods were locked in a chest, and left with the bailee, and the owner took away the key, and the goods were stolen, and it was held that the bailee should not answer for the goods. That case they say differs, because the bailor did not trust the bailee with them. But I cannot see the reason of that difference, nor why the bailee should not be charged with goods in a chest, as well as with goods out of a chest. For the bailee has as little power over them, when they are out of a chest, as to any benefit he might have by them, as when they are in a chest; and he has as great power to defend them in one case as in the other. The case of 9 Edw. IV. 40, b., was but a debate at bar. For Danby was but a counsel then; though he had been chief justice in the beginning of Ed. IV. yet he was removed, and restored again upon the restitution of Hen. VI., as appears by Dugdale's Chronica Series. So that what he said cannot be taken to be any authority, for he spoke only for his client; and Genney for his client said the contrary. The case in 3 Hen. VII. 4, is but a sudden opinion and that but by half the court; and yet that is the only ground for this opinion of my Lord Coke, which besides he has improved. But the practice has been always at Guildhall to disallow that to be a sufficient evidence to charge the bailee. And it was practised so before my time, all Chief Justice Pemberton's time, and ever since against the opinion of that case. When I read *Southcote's case* heretofore, I was not so discerning as my brother Powys tells us he was, to disallow that case at first, and came not to be of this opinion till I had well considered and digested that matter. Though I must confess reason is strong against the case to charge a man for doing such a friendly act for his friend, but so far is the law from being so unreasonable, that such a bailee is the least chargeable for neglect of any. For if he keeps the goods bailed to him but as he keeps his own, though he keeps his own but negligently, yet he is not chargeable for them, for the keeping them as he keeps his own is an argument of his

honesty. *A fortiori* he shall not be charged, where they are stolen without any neglect in him. Agreeable to this is Bracton, lib. 3, c. 2, 99, *b*. F. S. : "Apud quem res deponitur, re obligatur, et de ea re, quam accepit, restituenda tenetur, et etiam ad id, si quid in re deposita dolo commiserit ; culpæ autem nomine non tenetur, scilicet desidiae vel negligentiae, quia qui negligenti amico rem custodiendam tradit, sibi ipsi et propriae fatuitati hoc debet imputare." As suppose the bailee is an idle, careless, drunken fellow, and comes home drunk, and leaves all his doors open, and [* 915] * by reason thereof the goods happen to be stolen with his own ; yet he shall not be charged, because it is the bailor's own folly to trust such an idle fellow. So that this sort of bailee is the least responsible for neglects, and under the least obligation of any one, being bound to no other care of the bailed goods than he takes of his own. This Bracton I have cited is, I confess, an old author, but in this his doctrine is agreeable to reason, and to what the law is in other countries. The civil law is so, as you have it in Justinian's Inst. lib. 3, tit. 15. There the law goes farther, for there it is said, "Ex eo solo tenetur, si quid dolo commiserit : culpae autem nomine, id est, desidiae ac negligentiae, non tenetur. Itaque securus est qui parum diligenter custoditam rem furto amiserit, quia qui negligenti amico rem custodiendam tradit non ei, sed suae facilitati id imputare debet." So that a bailee is not chargeable without an apparent gross neglect. And if there is such a gross neglect, it is looked upon as an evidence of fraud. Nay, suppose the bailee undertakes safely and securely to keep the goods, in express words, yet even that won't charge him with all sorts of neglects. For if such a promise were put into writing, it would not charge so far, even then. Hob. 34, a covenant, that the covenantee shall have, occupy and enjoy certain lands, does not bind against the acts of wrong-doers. 3 Cro. 214 acc., 2 Cro. 425 acc., upon a promise for quiet enjoyment. And if a promise will not charge a man against wrong-doers, when put in writing, it is hard it should do it more so, when spoken. Doct. & Stud. 130, is in point, that though a bailee do promise to redeliver goods safely, yet if he have nothing for the keeping of them, he will not be answerable for the acts of a wrong-doer. So that there is neither sufficient reason nor authority to support the opinion in *Southcote's case ;* if the bailee be guilty of gross negligence he will be chargeable, but not for any

ordinary neglect. As to the second sort of bailment, viz., *commodatum* or lending gratis, the borrower is bound to the strictest care and diligence, to keep the goods so as to restore them back again to the lender, because the bailee has a benefit by the use of them, so as if the bailee be guilty of the least neglect he will be answerable; as if a man should lend another a horse, to go westward, or for a month; if the bailee go northward, or keep the horse above a month, if any accident happen to the horse in the northern journey, or after the expiration of the month, the bailee will be chargeable; because he has made use of the horse contrary to the trust he was lent to him under, and it may be if the horse had been used no otherwise than he was lent, that accident would not have befallen him. This is mentioned in Bracton, *ubi supra*. His words are: "Is autem cui res aliqua utenda datur, re obligatur, quae commodata est, sed magna differentia est inter mutuum et commodatum; quia is qui rem mutuam *accepit ad ipsam [*916] restituendam tenetur, vel ejus pretium, si forte incendio, ruina, naufragio, aut latronum vel hostium incursu, consumta fuerit, vel deperdita, subtracta, vel ablata. Et qui rem utendam accepit, non sufficit ad rei custodiam, quod talem diligentiam adhibeat, qualem suis rebus propriis adhibere solet, si alius eam diligentius potuit custodire; ad vim autem majorem, vel casus fortuitos non tenetur quis, nisi culpa sua intervenerit. Ut si rem sibi commodatam domi, secum detulerit cum peregre profectus fuerit, et illam incursu hostium vel praedonum, vel naufragio amiserit non est dubium quin ad rei restitutionem teneatur." I cite this author, though I confess he is an old one, because his opinion is reasonable, and very much to my present purpose, and there is no authority in the law to the contrary. But if the bailee put this horse in his stable, and he were stolen from thence, the bailee shall not be answerable for him. But if he or his servant leave the house or stable doors open, and the thieves take the opportunity of that, and steal the horse, he will be chargeable; because the neglect gave the thieves the occasion to steal the horse. Bracton says the bailee must use the utmost care, but yet he shall not be chargeable, where there is such a force as he cannot resist.

As to the third sort of bailment, *scilicet locatio* or lending for hire, in this case the bailee is also bound to take the utmost care and to return the goods, when the time of the hiring is expired. And here again I must recur to my old author, fol. 62, *b*. "Qui

pro usu vestimentorum auri vel argenti, vel alterius ornamenti, vel jumenti, mercedem dederit vel promiserit, talis ab eo desideratur custodia; qualem deligentissimus paterfamilias suis rebus adhibet, quam si praestiterit, et rem aliquo casu amiserit, ad rem restituendam non tenebitur. Nec sufficit aliquem talem diligentiam adhibere, qualem suis rebus propriis adhiberet, nisi talem adhibuerit, de qua superius dictum est." From whence it appears, that if goods are let out for a reward, the hirer is bound to the utmost diligence, such as the most diligent father of a family uses; and if he uses that, he shall be discharged. But every man, how diligent soever he be, being liable to the accident of robbers, though a diligent man is not so liable as a careless man, the bailee shall not be answerable in this case, if the goods are stolen.

As to the fourth sort of bailment, viz., *vadium* or a pawn, in this I shall consider two things; first, what property the pawnee has in the pawn or pledge, and secondly, for what neglects he shall make satisfaction. As to the first, he has a special property, for the pawn is a securing to the pawnee that he shall be repaid his debt, and to compel the pawner to pay him. But if the pawn [* 917] be * such as it will be the worse for using, the pawnee cannot use it, as clothes, &c., but if it be such as will be never the worse, as if jewels for the purpose were pawned to a lady, she might use them. But then she must do it at her peril, for whereas, if she keeps them locked up in her cabinet, if her cabinet should be broke open and the jewels taken from thence, she would be excused; if she wears them abroad, and is there robbed of them, she will be answerable. And the reason is, because the pawn is in the nature of a deposit, and as such is not liable to be used. And to this effect is Ow. 123. But if the pawn be of such a nature, as the pawnee is at any charge about the thing pawned, to maintain it, as a horse, cow, &c., then the pawnee may use the horse in a reasonable manner, or milk the cow, &c., in recompense for the meat. As to the second point, Bracton, 99, *b*, gives you the answer: "Creditor, qui pignus accepit, re obligatur, et ad illam restituendam tenetur; et cum hujusmodi res in pignus data sit utriusque gratia, scilicet debitoris, quo magis ei pecunia crederetur, et creditoris quo magis ei in tuto sit creditum, sufficit ad ejus rei custodiam diligentiam exactam adhibere, quam si praestiterit, et rem casu amiserit, securus esse possit, nec impedietur creditum petere." In effect, if a creditor takes a pawn, he is bound

to restore it upon the payment of the debt; but yet it is sufficient, if the pawnee use true diligence, and he will be indemnified in so doing, and notwithstanding the loss, yet he shall resort to the pawnor for his debt. Agreeable to this is 29 Ass. 28, and *Southcote's case* is. But indeed the reason given in *Southcote's case* is, because the pawnee has a special property in the pawn. But that is not the reason of the case; and there is another reason given for it in the Book of Assize, which is indeed the true reason of all these cases, that the law requires nothing extraordinary of the pawnee, but only that he shall use an ordinary care for restoring the goods. But indeed if the money for which the goods were pawned, be tendered to the pawnee before they are lost, then the pawnee shall be answerable for them; because the pawnee, by detaining them after the tender of the money, is a wrong-doer, and it is a wrongful detainer of the goods, and the special property of the pawnee is determined. And a man that keeps goods by wrong must be answerable for them at all events, for the detaining of them by him is the reason of the loss. Upon the same difference as the law is in relation to pawns, it will be found to stand in relation to goods found.

As to the fifth sort of bailment, viz. a delivery to carry or otherwise manage, for a reward to be paid to the bailee, those cases are of two sorts; either a delivery to one that exercises a public employment, or a delivery to a private * person. [* 918) First, if it be to a person of the first sort, and he is to have a reward, he is bound to answer for the goods at all events. And this is the case of the common carrier, common hoyman, master of a ship, &c., which case of a master of a ship was first adjudged, 26 Car. 2, in the case of *Morse* v. *Slue*, Raym. 220, 1 Vent. 190, 238; *ante*, p. 244. The law charges this person thus intrusted to carry goods, against all events but acts of God and of the enemies of the king. For though the force be never so great, as if an irresistible multitude of people should rob him, nevertheless he is chargeable. And this is a politic establishment, contrived by the policy of the law, for the safety of all persons, the necessity of whose affairs oblige them to trust these sorts of persons, that they may be safe in their ways of dealing; for else these carriers might have an opportunity of undoing all persons that had any dealings with them, by combining with thieves, &c., and yet doing it in such a clandestine manner as would not be possible to be

discovered. And this is the reason the law is founded upon in that point. The second sort are bailees, factors, and such like. And though a bailee is to have a reward for his management, yet he is only to do the best he can. And if he be robbed, &c., it is a good account. And the reason of his being a servant is not the thing; for he is at a distance from his master, and acts at discretion, receiving rents and selling corn, &c. And yet if he receives his master's money, and keeps it locked up with a reasonable care, he shall not be answerable for it though it be stolen. But yet this servant is not a domestic servant, nor under his master's immediate care. But the true reason of the case is, it would be unreasonable to charge him with a trust, farther than the nature of the thing puts it in his power to perform it. But it is allowed in the other cases, by reason of the necessity of the thing. The same law of a factor.

As to the sixth sort of bailment, it is to be taken, that the bailee is to have no reward for his pains, but yet that by his ill management the goods are spoiled. Secondly, it is to be understood, that there was a neglect in the management. But thirdly, if it had appeared that the mischief happened by any person that met the cart in the way, the bailee had not been chargeable. As if a drunken man had come by in the streets, and had pierced the cask of brandy; in this case the defendant had not been answerable for it, because he was to have nothing for his pains. Then the bailee having undertaken to manage the goods, and having managed them ill, and so by his neglect a damage has happened to the bailor, which is the case in question, what will you call this? In Bracton, lib. 3, 100, it is called *mandatum*. It is an obligation, which arises *ex mandato*. It is what we call in English an acting by commission. And if a man acts by commission for another gratis, and in the executing his commission be-
[* 919] haves himself negligently, he is answerable. * Vinnius in his commentaries upon Justinian, lib. 3, tit. 27, 684, defines *mandatum* to be *contractus quo aliquid gratuito gerendum committitur et accipitur*. This undertaking obliges the undertaker to a diligent management. Bracton, *ubi supra*, says, "Contrahitur etiam obligatio non solum scripto et verbis, sed et consensu, sicut in contractibus bonae fidei; ut in emptionibus, venditionibus, locationibus, conductionibus, societatibus, et mandatis." I don't find this word in any other author of our law, besides in this place in

Bracton, which is a full authority, if it be not thought too old. But it is supported by good reason and authority.

The reasons are first, because in the case, a neglect is a deceit to the bailor. For when he intrusts the bailee upon his undertaking to be careful, he has put a fraud upon the plaintiff by being negligent, his pretence of care being the persuasion that induced the plaintiff to trust him. And a breach of a trust undertaken voluntarily will be a good ground for an action, 1 Roll. Abr. 10, 2, Hen. VII. 11, a strong case to this matter. There the case was an action against a man, who had undertaken to keep an hundred sheep, for letting them be drowned by his own default. And there the reason of the judgment is given, because when the party has taken upon him to keep the sheep, and after suffers them to perish in his default; in as much as he has taken and executed his bargain, and has them in his custody, if after he does not look to them, an action lies. For here is his own act, viz., his agreement and promise, and that, after broke of his side, that shall give a sufficient cause of action.

But secondly it is objected, that there is no consideration to ground this promise upon, and therefore the undertaking is but *nudum pactum*. But to this I answer, that the owner's trusting him with the goods is a sufficient consideration to oblige him to a careful management. Indeed if the agreement had been executory, to carry these brandies from the one place to the other such a day, the defendant had not been bound to carry them. But this is a different case, for assumpsit does not only signify a future agreement, but in such a case as this it signifies an actual entry upon the thing, and taking the trust upon himself. And if a man will do that, and miscarries in the performance of his trust, an action will lie against him for that, though nobody could have compelled him to do the thing. The 19 Hen. VI. 49, and the other cases cited by my brothers, show that this is the difference. But in the 11 Hen. IV. 33, this difference is clearly put, and that is the only case concerning this matter which has not been cited by my brothers. There the action was brought against a carpenter, for that he had undertaken to build the plaintiff a house within such a time, and had not done it, and it was adjudged the action would not lie. But there the question was put to the
* court what if he had built the house unskilfully, and it [* 920] is agreed in that case an action would have lain. There

has been a question made, if I deliver goods to A. and in consideration thereof he promise to redeliver them, if an action will lie for not redelivering them; and in Yelv. 4, judgment was given that the action would lie. But that judgment was afterwards reversed, and according to that reversal, there was judgment afterwards entered for the defendant in the like case. Yelv. 128. But those cases were grumbled at, and the reversal of that judgment in Yelv. 4 was said by the Judges to be a bad resolution, and the contrary to that reversal was afterwards most solemnly adjudged in 2 Cro. 667, Tr. 21, Jac. I. in the King's Bench, and that judgment affirmed upon a writ of error. And yet there is no benefit to the defendant, nor no consideration in that case, but the having the money in his possession, and being trusted with it, and yet that was held to be a good consideration. And so a bare being trusted with another man's goods must be taken to be a sufficient consideration, if the bailee once enter upon the trust, and take the goods into his possession. The declaration in the case of *Morse* v. *Slue* was drawn by the greatest drawer in England in that time, and in that declaration, as it was always in all such cases, it was thought most prudent to put in, that a reward was to be paid for the carriage. And so it has been usual to put it in the writ, where the suit is by original. I have said thus much in this case, because it is of great consequence that the law should be settled in this point, but I don't know whether I may have settled it, or may not rather have unsettled it. But however that happen, I have stirred these points, which wiser heads in time may settle. And judgment was given for the plaintiff.

ENGLISH NOTES.

"Persons holding themselves out to the world as common carriers are bound to act as such in respect to such goods as they profess to carry, and have accommodation to carry, on such goods being tendered to them to be carried, and, on a reasonable tender of proper remuneration, without subjecting the person tendering them to any unreasonable condition." *Per* Cockburn, C. J., in *Garton* v. *Bristol and Exeter Railway Co.* (1861), 1 B. & S. 112, 162, 30 L. J. Q. B. 273, 294.

"The obligations which the common law imposed upon the common carrier was to accept and carry all goods delivered to him for carriage according to his profession (unless he had some reasonable excuse for not doing so), on being paid a reasonable compensation for so doing; and if the carrier refused to accept such goods, an action lay against

him for so refusing; and if the customer, in order to induce the carrier to perform his duty, paid, under protest, a larger sum than was reasonable, he might recover back the surplus beyond what the carrier was entitled to receive, in an action for money had and received as being money extorted from him." *Per* BLACKBURN, J., in *Great Western Railway Co.* v. *Sutton* (appeal in action *Sutton* v. *Great Western Ry. Co.*, 1869), L. R., 4 H. L. 226, 237, 38 L. J. Ex. 177, 178.

The following have been judicially stated to be reasonable excuses for refusal: (*a*) That the carrier is not ready to set out on his accustomed journey. *Lane* v. *Cotton*, *per* HOLT, C. J., 1 Ld. Raym. 652. (*b*) That the goods were tendered at an unreasonable hour. *Garton* v. *Bristol and Exeter Railway Co.* (1861), *per* COCKBURN, C. J., 1 B. & S. 112, 162, 30 L. J. Q. B. 273, 293. But if the carrier has accepted the goods for carriage, he will not afterwards be allowed to set up the unreasonableness of the hour. *Pickford* v. *Grand Junction Railway Co.* (1844), 12 M. & W. 766. (*c*) That he has no accommodation or convenience for carrying the goods tendered. *Per* COCKBURN, C. J., in *Garton* v. *Bristol and Exeter Railway Co.*, *ut supra*. "The duty to receive is always limited by his convenience to carry." ERLE, J., in *McManus* v. *Lancashire and Yorkshire Railway Co.* (Ex. Ch. 1859), 4 H. & N. 327, 336, 28 L. J. Ex. 353, 354, citing *Jackson* v. *Rogers* (1684), 2 Shower, 327; *Johnson* v. *Midland Railway Co.* (1849), 4 Ex. 367, 18 L. J. Ex. 366. (*d*) That the carriage of the goods is attended with great danger. For instance, when at a time of public commotion, corn was the object of much fury, a carrier was held justified in his refusal to receive it for transportation. *Edwards* v. *Sherratt* (1801), 1 East, 604. (*e*) "It would be a reasonable excuse for not carrying goods of great value either if it appeared that the carrier did not hold himself out as a person ready to carry all sorts of goods, or that he had no convenient means of conveying with security such articles. And so it was held in *Jackson* v. *Rogers*, 2 Show. 327." HOLROYD, J., in *Batson* v. *Donovan* (1820), 4 B. & Ald. 21, 32. (*f*) That the goods are of a perishable or of a very fragile and delicate nature, and that he does not profess to carry such goods except under the terms of a special contract exonerating him from responsibility for deterioriation incident to the transit. *Beal* v. *South Devon Railway Co.* (1860), 5 H. & N. 875, 29 L. J. Ex. 441. (*g*) That the consignor is not ready to pay the full fare (including a reasonable amount for insurance of valuable property). *Wyld* v. *Pickford* (1841), 8 M. & W. 443, *per* PARKE, B., at p. 458, 10 L. J. Ex. 382, and see *Harris* v. *Packwood* (1810), 3 Taunt. 264, 15 R. R. 755; *Shaw* v. *Great Western Railway Co.* (1893), 1894, 1 Q. B. 373, 70 L. T. 218.

The delivery must be either to the carrier or to his agent authorised to receive the goods. Merely leaving them in the yard of an inn where

the carrier sets out, or on a wharf from which his ship sails, is not delivery to him. *Selway* v. *Holloway* (1695), 1 Ld. Raym. 46; *Leigh* v. *Smith* (1825), 1 Car. & P. 638, 640. But delivery to the keeper of a booking office or other person in charge at a place where the carrier has authorised goods to be left for him, either expressly or impliedly, by the habit of undertaking the carriage of goods so left, will be a good delivery to the carrier. *Colepepper* v. *Good* (1832), 5 Car. & P. 380.

The liability of a common carrier as an insurer of the goods is fully treated in the cases and notes Nos. 3 and 4 of "Accident," 1 R. C. 216–234. The liability of a carrier of passengers will be found distinguished in the cases Nos. 12 and 13, *infra*; and in the case of *Searle* v. *Laverick* (1874), L. R., 9 Q. B. 122, 43 L. J. Q. B. 43, 30 L. T. 89, the principle of the liability as stated by Lord Holt in *Coggs* v. *Bernard* is discussed and distinguished from the duty of care in regard to the state of his buildings required from a livery-stable keeper.

It was decided by the Exchequer Chamber in the case of *Liver Alkali Co.* v. *Johnson* (1874), L. R., 9 Ex. 338, 43 L. J. Ex. 216, that a person who exercises the ordinary employment of a lighterman by carrying goods in his flats for reward, although he may not be bound as a common carrier to receive the goods of all persons indifferently, incurs the liability of a common carrier for the safety of the goods carried by him. And in the same case, in the absence of special contract restricting the liability, would be any person who undertakes the carriage of goods for reward. See *per curiam* in *Scaife* v. *Farrant* (1875), L. R., 10 Ex. 358, 361, 44 L. J. Ex. 36, 37. In that case there was a written contract for the removal of furniture whereby the defendant had expressly undertaken the risk of breakages in transit not exceeding £5 on any one article. The Court held that this impliedly excluded the risk, in the case which happened, of destruction by accidental fire.

The liability of a common carrier as an insurer continues until delivery of the goods to the consignee at his residence, if so directed and the carrier undertakes such delivery, *Duff* v. *Budd* (1822), 3 Bro. & B. 177, 6 Moore, 469; or in the case of goods which are to be called for by the consignee, until a reasonable time has elapsed after the consignee has notice of the arrival of the goods, for him to come and receive them. *Bourne* v. *Gatliffe* (Ex. Ch. 1841, and H. L. 1844), 3 Scott N. R. 1, 3 M. & G. 643, 8 Scott N. R. 604, 11 Cl. & Fin. 45. If the consignee is in default by refusing to take delivery, or by delaying to call for the goods for an unreasonable time after notice, the carrier's responsibility as a common carrier ceases, and he is only responsible for proper care as a warehouseman. *Chapman* v. *Great Western Railway Co.* (1880), 5 Q. B. D. 278, 49 L. J. Q. B. 420, 42 L. T. 252. And so if the carrier has brought them and deposited them in a place where according

to the terms of the contract, expressed or implied, they are to remain for an indefinite time. *Garside* v. *Trent and Mersey Navigation Co.* (1792), 4 T. R. 581, 2 R. R. 468; *Rowe* v. *Pickford* (1818), 8 Taunt. 83, 19 R. R. 466; *In re Webb, &c.* (1818), 8 Taunt. 443, 20 R. R. 520. And see notes to Nos. 3 & 4 of "Accident," 1 R. C. 232.

Where a carrier receives goods to be carried to a destination beyond his own route, he is *primâ facie* (by English law) a common carrier of the goods for the whole of the journey to that destination. *Muschamp* v. *Lancaster and Preston Junction Railway Co.* (1841), 8 M. & W. 421, 10 L. J. Ex. 460; and see *per* MARTIN, B., in *Shepherd* v. *Bristol and Exeter Railway Co.* (1868), L. R., 3 Ex. 189, 37 L. J. Ex. 113, 18 L. T. 528. "If a carrier contracts to convey to and deliver goods at a particular place, his duty at that place is precisely the same whether his own conveyance goes the entire way or stops short at an intermediate place, and the goods are conveyed on by another carrier; and this carrier or his clerk at the place of destination is the agent of the original carrier for all purposes connected with the conveyance and delivery and dealing with the goods, to the same extent as his own clerk would have been at the place where his own conveyance stops with regard to the goods to be there delivered." Judgment of the majority of the Court in *Crouch* v. *Great Western Railway Co.* (1857), 2 H. & N. 491, 26 L. J. Ex. 418, 422. The dissenting judgment of BRAMWELL, B., does not disagree upon this point. The judgment was affirmed in the Exchequer Chamber, 27 L. J. Ex. 345, where it was argued that the defendants were not liable as common carriers; but this argument was rejected on the ground that the point was not made at the trial, when the declaration might have been amended so as to raise the question whether the defendants were guilty of misconduct.

By the decision in *Wilby* v. *West Cornwall Railway Co.* (1858), 2 H. & N. 703, 27 L. J. Ex. 181, the above doctrine was applied so as to import the same liability over a special route by which the goods were directed to be forwarded.

The doctrine above stated is impliedly confirmed by the judgments in the House of Lords in *Bristol and Exeter Railway Co.* v. *Collins* (appeal in action *Collins* v. *Bristol and Exeter Railway Co.*) (1859) 7 H. L. C. 264, 29 L. J. Ex. 41, where the question arose upon goods received by the Great Western Railway Co. on a contract of carriage for a through journey, and destroyed by fire upon the premises of the Bristol and Exeter Railway Co. By the special contract made with the Great Western Railway Co., they were not to be answerable for the loss of or damage to any goods arising from fire. The decision was that the Bristol and Exeter Railway Co. were not liable to the plaintiffs; for either there was no contract at all between that company and

the plaintiffs, or if the the contract in any way attached to that company the exception as to loss by fire attached to it and exonerated them from liability. In *Burke* v. *South-Eastern Railway Co.* (1880), 5 C. P. D. 1, 49 L. J. C. P. 107, 41 L. T. 554, a case of a through contract for carriage of a passenger, the Court of Common Pleas decided that the company making the contract may by special conditions exonerate themselves from all liability upon lines beyond their own control.

It has, however, been held that where the carrier (a railway company) has fulfilled the primary duty of delivering the goods safely, his secondary duty of delivering them within a reasonable time may be construed having regard to all the circumstances of the transit ; and where a delay has taken place by reason of an obstruction in a line over which he has running powers, and occurring without the fault of the contracting company, he has fulfilled his duty by delivering the goods without more loss of time than is necessarily occasioned by the obstruction. *Great Northern Railway Co.* v. *Taylor* (appeal from County Court action in *Taylor* v. *Great Northern Railway Co.* 1866), L. R., 1 C. P. 385, 35 L. J. C. P. 210.

An action, as of pure tort, for injury by negligence is maintainable by a passenger against the company by whose carelessness the injury happened, although the contract was made by another company. *Berringer* v. *Great Eastern Railway Co.* (1879), 4 C. P. D. 163, 48 L. J. C. P. 400; *Foulkes* v. *Metropolitan District Railway Co.* (C. A. 1880), 5 C. P. D. 157, 49 L. J. C. P. 361, 42 L. T. 345; *Hooper* v. *London and North-Western Railway Co.* (C. A. 1880), 50 L. J. Q. B. 103, 43 L. T. 570.

AMERICAN NOTES.

No English case has been more frequently cited in this country than *Coggs* v. *Bernard*. It forms the basis of the American law of bailment in general as well as of common carriers in particular, and the principles laid down by Ch. J. Holt have been universally adopted in this country.

1. The common carrier is responsible for the safe carriage of goods as an insurer against all hazards but the act of God or the public enemies, the nature and qualities of the goods, the conduct of the shipper, or the act or mandate of the public authorities. *Fish* v. *Chapman*, 2 Georgia, 349 ; 46 Am. Dec. 393 ; *Whitesides* v. *Thurlkill*, 12 Smedes & Marshall (Mississippi), 599 ; 51 Am. Dec. 128 ; *Colt* v. *McMechen*, 6 Johnson (New York), 160 ; 5 Am. Dec. 200 ; *Merritt* v. *Earle*, 29 New York, 115 ; 86 Am. Dec. 292 ; *Craig* v. *Childress*, 1 Peck (Tennessee), 270 ; 14 Am. Dec. 751 ; *Daggett* v. *Shaw*, 3 Missouri, 264, 25 Am. Dec. 439 ; *Robertson* v. *Kennedy*, 2 Dana (Kentucky), 430 ; 26 Am. Dec. 466 ; *Parsons* v. *Hardy*, 14 Wendell (New York), 215 ; 28 Am. Dec. 521 ; *Van Horn* v. *Taylor*, 7 Robinson (Louisiana), 201 ; 41 Am. Dec. 279 ; *Parker* v. *Flagg*, 26 Maine, 181 ; 45 Am. Dec. 101 ; *Leonard* v. *Hendrickson*, 18 Pennsylvania State, 40 ; 55 Am. Dec. 587 ; *Moses* v. *Boston and Me. Railroad*, 24

New Hampshire, 71; 55 Am. Dec. 222; *New Brunswick, &c. Co.* v. *Tiers*, 4 Zabriskie (New Jersey), 697; 64 Am. Dec. 394; *Fergusson* v. *Brent*, 12 Maryland, 9; 71 Am. Dec. 582; *Welsh* v. *Pittsburgh, &c. R. Co.*, 10 Ohio St. 65; 75 Am. Dec. 490; *Hooper* v. *Wells, &c.*, 27 California, 11; 85 Am. Dec. 211; *Blumenthal* v. *Brainerd*, 38 Vermont, 402; 91 Am. Dec. 349; *Adams Ex. Co.* v. *Daniell*, 31 Indiana, 20; 91 Am. Dec. 349; *Gulf, &c. Ry. Co.* v. *Levi*, 76 Texas, 337: 18 Am. St. Rep. 45; *Wood* v. *Crocker*, 18 Wisconsin, 345; 86 Am. Dec. 773; *Buckland* v. *Adams Ex. Co.*, 97 Massachusetts, 124; 93 Am. Dec. 68. By reference to these cases and the notes appended thereto in the "American" reprints, it will be seen that this doctrine has been adhered to up to the present time in those States, and is the rule of all the other States as well. The leading text-writers — Story, Edwards, Schouler, and Hutchinson — express the same rule.

2. The owner of a ship or steam-vessel carrying goods for hire on the ocean or on inland waters is liable as a common carrier. There is no substantial difference between a carrier by water and one by land. *Elliott* v. *Rossell*, 10 Johnson (New York), 1; 6 Am. Dec. 306; *Williams* v. *Grant*, 1 Connecticut, 487; 7 Am. Dec. 235; *Bell* v. *Reed*, 4 Binney (Pennsylvania), 127; 5 Am. Dec. 398; *McClures* v. *Hammond*, 1 Bay (S. Carolina), 99; 1 Am. Dec. 598; *Dwight* v. *Brewster*, 1 Pickering (Massachusetts), 50; 11 Am. Dec. 133; *Turney* v. *Wilson*, 7 Yerger (Tennessee), 340; 27 Am. Dec. 515; *Jones* v. *Pitcher*, 3 Stewart & Porter (Alabama), 135; 24 Am. Dec. 716; *Williams* v. *Branson*, 1 Murphey (North Carolina), 417; 4 Am. Dec. 562; *Moses* v. *Norris*, 4 New Hampshire, 304; *The Delaware*, 14 Wallace (United States Supreme Ct.), 579; *Hastings* v. *Pepper*, 11 Pickering (Massachusetts), 40; *Crosby* v. *Fitch*, 12 Connecticut, 410; 31 Am. Dec. 745 (coasting vessel). Mr. Freeman says of *Morse* v. *Slue* (note, 47 Am. Dec. 652): "That decision has ever since been recognized as of the highest authority and as settling the law on that question." Citing Angell on Carriers, § 87; Hutchinson on Carriers, § 65; Story on Bailment, § 496. As to steamboats, see cases in note, 47 Am. Dec. 652.

3. As to the particular point decided in *Coggs* v. *Bernard*, namely, that one undertaking to act as a carrier in a single instance and without reward, is bound to use reasonable and ordinary care, this is doubtless the law in the United States, although cases involving that precise point are very scarce. A few are to be found in the early days when men were accustomed to entrust goods or valuables to private persons for carriage, but none will be found since the introduction of express companies. In *Jenkins* v. *Motlow*, 1 Sneed (Tennessee), 248; 60 Am. Dec. 154, it was held that a steamboat captain gratuitously carrying money for a passenger was liable for its loss by theft if he was wanting in that ordinary diligence suited to the circumstances. So where one undertook gratuitously to carry money from Boston to New York by boat, and left it with his own in a valise in one cabin, while he slept in another, notwithstanding he was warned by the steward that it would be safer in the office, and it was stolen with his own, he was held liable for the loss. *Tracy* v. *Wood*, 3 Mason, 132. Especially would he be deemed responsible if the money intrusted was lost but his own was saved, for this would indicate that he took less care of the former than of the latter

Bland v. *Womack*, 2 Murphy (North Carolina), 373. But if he conducts the transmission of money as prudent men ordinarily do, he is not responsible for its loss. *Eddy* v. *Livingston*, 35 Missouri, 487. Where one received for gratuitous delivery a sealed letter containing money, which was never delivered, there being no proof of his opening the letter, he was held not liable. *Beardslee* v. *Richardson*, 11 Wendell (New York), 25; 25 Am. Dec. 596. "The plaintiff was bound to show that the money was lost by the defendant's negligence or could not be obtained on request. Had he shown a demand and refusal, the defendant, I think, would have been bound to account for the loss," etc. *Ibid.* Such cases are ruled by the principle, recognized here, as well as in England, that a gratuitous bailee is held only to ordinary care, skill, and diligence.

No. 3 — LYON *v.* MELLS.

(1804.)

RULE.

In every contract for the carriage of goods by a person holding himself out as the owner of a vessel ready to carry them by water, it is an implied term as the foundation of the contract that the carrier (shipowner or lighterman) engages that his vessel is tight and fit for the purpose for which he holds it forth; and a notice generally disclaiming or limiting his responsibility will not be construed so as to exonerate him from the duty to have his vessel so tight and fit.

Lyon v. Mells.

5 East, 428–439 (s. c. 7 R. R. 726–736).

Carrier. — Implied Warranty of Fitness of Vessel.

Action upon implied contract of warranty, by owner of goods damaged by the leakage of a lighter in which they were carried for hire. *Held* that the plaintiff was entitled to recover from the owner of the lighter the full amount of damage notwithstanding he had given notice that he would not be answerable for any damage unless occasioned by want of ordinary care in the master or crew of the vessel, in which case he would pay £10 per cent. upon such damage.

[428] This was an action of *assumpsit*, brought to recover the amount of damage done to a quantity of yarn of the plaintiff's delivered on board a lighter of the defendant's to be carried

therein from a quay at Hull to a sloop of one William Barton lying in a dock there, and to be delivered on board the same, for a reasonable reward to be paid to the defendant. The declaration stated (amongst others) a promise by the defendant that the lighter was tight and capable of carrying the yarn; also a promise by him that the lighter was so far as he knew a proper and substantial vessel fit for carrying the yarn without damage; and also a promise by him to stow, load, and carry the yarn carefully, and with due attention to the same. Plea *non assumpsit.* On the trial before THOMPSON, B., at the last York assizes, a verdict was found for the plaintiffs, subject to the opinion of this Court on the following case: —

On the 10th of June, 1802, several bales of yarn belonging to the plaintiffs were delivered on board the lighter, of which the defendant was the owner, in manner, and for the purpose above mentioned. The defendant kept sloops for carrying other persons' goods for hire, and also lighters for the purpose of carrying these goods to and from his sloops; and when he had not employment for his lighters for his own business, he let them for hire to such persons as wanted to carry goods to other sloops. Previous to the delivery the master of the defendant's lighter, when he was applied to fetch *the yarn, undertook to bring it in [*429] the lighter to the sloop, and being asked if the lighter were fit to carry it, said it was very fit and tight, and that he had been down the day before with hemp and flax in her to some of their vessels at South End. In carrying the yarn in the lighter to the sloop the lighter leaked, and some of the bales of yarn were thereby wetted and damaged; and on the arrival of the lighter at the sloop the master of the lighter, on its being mentioned to him that he had got water in his boat, said, there was a bit of a weep (meaning a leak) abaft. Three or four of the bales of yarn were stowed upon the top of the pump, by which it was rendered entirely useless until they were removed. Before the second bale of yarn could be hoisted into the sloop the lighter was going down, and would have sunk to the bottom of the dock with the rest of the bales, but was prevented by getting tackle fixed to her to get her up. The damage thereby done to the yarn amounted to £274 16*s.* 4*d.* The lighter was not tight and sufficient for the carriage of the yarn, but was leaky; and the master of the lighter was guilty of negligence in not stowing the yarn

properly. Previous to the shipping of the yarn on board the lighter the defendant published the following notice, of which the person who so shipped the yarn on behalf of the plaintiffs had notice, he himself being one of the persons who signed the same. "Navigation of the river Humber and of the rivers falling into the same. To all merchants, tradesmen, and others. We whose names are hereunto subscribed (by ourselves or by our respective agents) do hereby severally give notice, that we will not be answerable for any loss or damage which shall happen to any cargo which shall be put on board any of our vessels, [* 430] unless such loss or damage shall * happen or be occasioned by want of ordinary care and diligence in the master or crew of the vessel; when and in such case we will pay to the sufferers £10 per cent upon such loss or damage, so as the whole amount of such payment shall not exceed the value of the vessel on board whereof such loss or damage shall have happened, and the freight of such vessel. And we do hereby give this further notice, that any merchant or other person desirous of having their goods or merchandise carried free of any risk in respect of loss or damage, whether the same shall happen from the act of God or otherwise, may have the same so carried by entering into an agreement for the payment of an extra freight, proportionable to the accepted responsibility, on application to us or our respective agents. Hull, Oct. 1, 1800." This notice was signed by the defendant and by forty-nine other owners of vessels at Hull. The question for the opinion of the Court was, Whether the plaintiffs were entitled to more than £10 per cent. upon the above damages? If they were so entitled, the verdict was to be entered for the plaintiffs for the above sum of £274 16*s.* 4*d.*; if they were not so entitled, then the verdict was to be entered for the plaintiffs for the amount of £10 per cent. upon the damages.

The Court, after argument, took time for consideration.

[436] Lord Ellenborough, C. J., delivered judgment. The general question submitted to our determination by the special case stated at *Nisi Prius* is, whether the plaintiffs be entitled to more than £10 per cent. upon the sum of £274 16*s.* 4*d.* the damages stated to have been sustained by the plaintiffs in consequence of the injury done to their yarn while on board the defendant's lighter. That they are entitled to recover to the extent of £10 per cent. is admitted by the terms of the question.

No. 3. — Lyon v. Mells, 5 East, 436, 437.

On the part of the plaintiffs it has been argued, either that the notice given by the defendant, as set forth in the case, is illegal, being to exempt him from a responsibility cast on him by law as a carrier of goods by water for hire; or if that proposition be not maintainable, that in fact the present case does not fall within the terms and meaning of that notice. At the close of the argument the Court intimated an opinion that in the determination of this case it might perhaps not be necessary to enter into a consideration of the general question, as to the validity of these notices in point of law, and to what extent and upon what principles they may be supportable. And on further consideration we are all of opinion, that in the present case, admitting the notice given by the defendant *and the other owners [*437] of vessels to be valid as an agreement between them and the shippers of goods, the circumstances stated do not bring the plaintiff's loss within such agreement. In every contract for the carriage of goods between a person holding himself forth as the owner of a lighter or vessel ready to carry goods for hire, and the person putting goods on board or employing his vessel or lighter for that purpose, it is a term of the contract on the part of the carrier or lighterman, implied by law, that his vessel is tight and fit for the purpose or employment for which he offers and holds it forth to the public: it is the very foundation and immediate *substratum* of the contract that it is so: the law presumes a promise to that effect on the part of the carrier without any actual proof; and every reason of sound policy and public convenience requires it should be so. The declaration here states such promise to have been made by the defendant; and it is proved by proving the nature of his employment; or, in other words, the law in such case without proof implies it. The declaration avers a breach that the lighter was not tight and capable of carrying the yarn safely; and the facts stated support the breach so alleged, by showing that the vessel was leaky, and had nearly sunk in the dock before the yarn could be unloaded from the lighter into the sloop. This we consider as personal neglect of the owner, or more properly as a non-performance on his part of what he had undertaken to do, viz., to provide a fit vessel for the purpose. This brings me to consider the terms of the notice: "We will not be answerable for any loss or damage which shall happen to any cargo which shall be put on board any of our ves-

sels, unless such loss or damage shall happen or be occa-
[*438] sioned by want of ordinary care and diligence * in the master or crew of the vessel, in which case we will pay £10 per cent. upon such loss or damage, so as the whole amount of such payment shall not exceed the value of the vessel and the freight." I have before stated our opinion to be that this is clearly a neglect or breach of performance in the owner of the vessel, and not a neglect in the master or crew; it does not therefore come within the exception of such loss or damage as is to be compensated by £10 per cent. But the notice states that "they will not be answerable for any other loss or damage;" and therefore this must be contended to be within that other loss or damage for which they will not be answerable; a proposition however which seems to have struck the counsel for the defendant as not capable of being supported; for I take him to have admitted in his argument that if the defendant had himself made the promise stated in the declaration he would have been liable; and he could not contend otherwise: for it is impossible without outraging common sense so to construe this notice as to make the owners of vessels say, We will be answerable to the extent of 10 per cent. for any loss occasioned by the want of care of the master or crew, but we will not be answerable at all for any loss occasioned by our own misconduct, be it ever so gross and injurious; for this would in effect be saying, We will be at liberty to receive your goods on board a vessel, however leaky, however unfit and incapable of carrying them; we will not be bound even to provide a crew equal to the navigation of her; and if through these defaults on our part she be lost, we will pay nothing. Nay more, your compensation in case of misconduct of the master or crew can never exceed the value of the vessel and her freight; and
[*439] therefore by providing a rotten and leaky * vessel of little value, we lessen our own responsibility *pro tanto* even in the only event in which we are to be at all responsible. Ridiculous as this supposed state of the agreement must appear, yet these and more absurd stipulations must be introduced into it if we give it a construction which shall bring this case within it. Indeed that this is the true construction will further appear from the part of the notice respecting additional freight; for it is addressed to those who are desirous of having their goods carried free of risk "from the act of God or otherwise;" words importing

that the thing for which an increased freight is to be paid, is that which is properly the object of risk, and of course may or may not happen to the goods, *i. e.* that which may arise from accident and depends on chance, and not that which is certain and must inevitably be the consequence of a defect in that which the carrier has engaged to provide. Every agreement must be construed with reference to the subject-matter; and looking at the parties to this agreement (for so I denominate the notice), and the situation in which they stood in point of law to each other, it is clear beyond a doubt that the only object of the owners of lighters was to limit their responsibility in those cases only where the law would otherwise have made them answer for the neglect of others, and for accidents which it might not be within the scope of ordinary care and caution to provide against. For these reasons we are of opinion that the plaintiffs are entitled to have their verdict entered for the full sum of £274 16*s.* 4*d.* and that the *postea* be delivered to them for that purpose.

Postea to the plaintiff.

ENGLISH NOTES.

The rule in the principal case may be read with the explanation furnished by *Amies* v. *Stevens* (1718), 1 Stra. 128. "No carrier is obliged to have a new carriage for every journey. It is sufficient if he provides one which, without any extraordinary accident (as was the sudden gust of wind in that case) will probably perform the journey." *Chippendale* v. *Lancashire and Yorkshire Railway Co.* (1852), 21 L. J. Q. B. 22, is a case which at first sight appears to conflict with the rule. That was a case where the plaintiff's cattle had been delivered to be carried in the trucks of the defendants, a railway company. The ticket, which was assumed to be the contract, contained the words: "This ticket is issued subject to the owner undertaking all risks of conveyance whatever, as the company will not be liable for any injury or damage, howsoever caused and occurring to live stock of any description travelling upon the Lancashire and Yorkshire Railway, or in their vehicles." The cattle, while travelling in the trucks of the defendants, got alarmed, broke out of the trucks, and were injured. The trucks were, owing to defective construction, not fit for conveyance of cattle. The company was held not liable. The true *ratio decidendi* appears to be that given by Erle, J. "I take it that the carriage was fit for the journey and fit for the weight, and that the damage has entirely arisen from the freight being living animals, who made an effort to escape, and so injured themselves. This seems to me to be a risk for which the company

peculiarly said that they would not be responsible. I think that a limitation, however wide in its terms, being in respect of live stock, is reasonable."

McManus v. *Lancashire and Yorkshire Railway Co.* (1859), 28 L. J. Ex. 353, was an action against the same company for injuries to a horse caused by the use of an insufficient and improper vehicle for the carriage of the horse upon the railway. The company justified under the same conditions as in the case of *Chippendale* v. *Lancashire and Yorkshire Railway Co.*; but in the mean time had passed the Act of 1854 (17 & 18 Vict. c. 31), and the question was whether the condition was "reasonable" under section 7 of the Act. The Court by a majority held it was not, and was therefore void under the Act. The defendants having used an insufficient vehicle for the purpose of carriage, the plaintiff was entitled to recover on the implied warranty.

The cases where goods are carried under a bill of lading are fully treated of under the Ruling Cases of *Steel* v. *State Line Steamship Co.* (H. L. 1877), 3 App. Cas. 72, and *Tattersall* v. *National Steamship Co.* (1884), 12 Q. B. D. 297, 53 L. J. Q. B. 332, 50 L. T. 299, Nos. 4 and 5 of "Bill of Lading," 4 R. C. 697, 717.

AMERICAN NOTES.

The principal case is cited by the leading text-writers of this country. Edwards on Bailment, §§ 551, 601; Angell on Carriers, §§ 173, 202, 207.

This doctrine is recognized in *Putnam* v. *Wood*, 3 Massachusetts, 481; 3 Am. Dec. 179; *Backhouse* v. *Snead*, 1 Murphy (North Carolina), 173; *Bell* v. *Reed*, 4 Binney (Pennsylvania), 127; 5 Am. Dec. 398; *Dauchy* v. *Silliman*, 2 Lansing (New York Supreme Ct.), 361; *Dickinson* v. *Haslet*, 3 Harris & Johnson (Maryland), 345; *Collier* v. *Valentine*, 11 Missouri, 299; 49 Am. Dec. 81. In *Bell* v. *Read*, above, the Court said: "The man who undertakes to transport goods by water for hire is bound to provide a vessel sufficient in all respects for the voyage, well manned," etc. (This was in 1810; the voyage in question was on Lake Erie, the vessel a schooner, and the Court said: "is in distance not more than ninety miles, and in time not generally exceeding twenty-four hours.") A carrier is not excused by an act of God operating upon an unseaworthy vessel which would not have harmed a seaworthy one. *Packard* v. *Taylor*, 35 Arkansas, 402; 37 Am. Rep. 37.

But in *Forbes* v. *Rice*, 2 Brevard (So. Carolina), 363; 4 Am. Dec. 589, it was adjudged that in the contract of affreightment it is not a tacit or implied condition that the ship is seaworthy, as it is in insurance. (See Charter-Party, *post*, Vol. 5.)

In *Cheraw & S. R. Co.* v. *Broadnax*, 109 Pennsylvania State, 432; 58 Am. Rep. 733, holding that in an action on a general average bond it is a good defence that the loss was occasioned by the unseaworthiness of the vessel, the Court said, *obiter*, that in contracts of affreightment "there is, perhaps, an implied contract on the part of the shipowners that the ship is tight," citing the

principal case and *Putnam* v. *Wood*, *supra*; but that in such contracts no condition is implied that it is fit for the service, herein seeming to agree with *Forbes* v. *Rice*, *supra*.

The doctrine of the principal case is adopted in *Work* v. *Leathers*, 97 United States, 379, citing *Putnam* v. *Wood*, *supra*. The Court say the owner "is bound to see that she is seaworthy and suitable for the service in which she is to be employed. If there be defects known, or not known, he is not excused." But the hirer is liable for such use as he got of her.

In *The Thames* (U. S. Circ. Ct., App.), 61 Fed. Rep. 1014, it was held that a ship is impliedly warranted to be seaworthy as to the article carried (as flour), and if damage accrues in consequence of the unseaworthiness of the ship for carrying that article, she cannot be exonerated by proof that she is capable of safely carrying some different cargo.

No. 4. — DAVIS *v.* GARRETT.

(1830.)

RULE.

A COMMON carrier is bound to proceed by the usual route to the place of discharge, and to deliver the goods there according to the usage of trade, the ordinary course of business, or, where there is a special contract, the terms of the contract. Deviation is at his peril and deprives him of the benefit of any exception which would otherwise have been available to him.

Davis v. Garrett.

6 Bing. 716-725.

Carrier. — Usual Route. — Deviation.

Plaintiff put on board defendant's barge lime to be conveyed from the Medway to London. The master of the vessel deviated from the usual course, and, during the deviation and owing to tempestuous weather the sea got in and wetted the lime, and the lime becoming heated the vessel caught fire and all was lost. *Held* that the defendant was liable, the deviation being the proximate cause of the loss.

The declaration stated, that theretofore, to wit, on the [716] 22nd day of January, 1829, at London, in the parish of St. Mary-le-Bow, in the ward of Cheap, the plaintiff, at the special instance and request of the defendant, delivered to the defendant

No. 4. — Davis v. Garrett, 6 Bing. 716, 717.

on board a certain barge or vessel of the defendant called *The Safety*, and the defendant then and there had and received in and on board of the said barge or vessel from the plaintiff a large quantity, to wit, 114½ tons of lime of the plaintiff of great value, to wit, of the value of £100, to be by the defendant carried and conveyed in and on board the said barge or vessel from a certain place, to wit, Bewly Cliff in the county of Kent, to the Regent's Canal in the county of Middlesex, the act of God, the king's enemies, fire, and all and every other dangers and accidents of the seas, rivers, and navigation, of what nature or kind soever excepted, for certain reasonable reward to be therefore paid by the plaintiff to the defendant: that the said barge or vessel afterwards, to wit, on, &c. at, &c. departed and set sail on the intended voyage, then and there having the said lime on board of the same to be carried and conveyed as aforesaid, except as aforesaid, and it thereby then and there became and was the duty of the defendant to have carried and conveyed the said lime on board of the said barge or vessel from Bewly Cliff to the Regent's Canal, the act of God, and such other matters and things excepted, as were above [*717] mentioned to have *been excepted, by and according to the direct, usual, and customary way, course, and passage, without any voluntary and unnecessary deviation or departure from, or delay or hindrance in the same; but the defendant, not regarding his duty in that behalf, but contriving and wrongfully intending to injure and prejudice the plaintiff in that respect, did not carry or convey the said lime on board of the barge or vessel from Bewly Cliff aforesaid to the Regent's Canal, although not prevented by the acts, matters, or things excepted as aforesaid, or any of them, by and according to the direct, usual, and customary way and passage, without any voluntary and unnecessary deviation or departure from, or delay or hindrance in the same: but on the contrary thereof, afterwards, and before the arrival of the said barge or vessel as aforesaid at the Regent's Canal, the defendant by one John Town, the master of the said barge or vessel, and the agent of the defendant in that behalf, to wit, at, &c. without the knowledge and against the will of the plaintiff, voluntarily and unnecessarily deviated and departed from and out of such usual and customary way, course, and passage, with the said barge or vessel so having the said lime on board of the same, to certain parts out of such usual and cus-

tomary course and passage, to wit, to a certain place called the East Swale, and to a certain place called Whitstable Bay, and did then and there voluntarily and unnecessarily carry and navigate the said barge or vessel with the lime on board thereof as aforesaid to the said parts out of such usual and customary course and passage as aforesaid, and delay and detain the said last-mentioned barge or vessel with the lime on board thereof, for a long space of time, to wit, for the space of twenty-four hours then next following: and the said barge or vessel so having the said lime on board of the same, was by reason of such deviation and departure, and delay and detention * out of [* 718] such usual and customary course and passage, and before her arrival at the Regent's Canal, aforesaid, to wit, on, &c. at, &c. exposed to and assailed by a great storm and great and heavy sea, and was thereby then and there wrecked, shattered, and broken, and by means thereof the said lime of the plaintiff so on board the said barge or vessel as aforesaid, became and was injured, burnt, destroyed, and wholly lost to the plaintiff, to wit, at, &c. whereby the plaintiff lost divers great gains, profits, and emoluments, amounting to a large sum of money, to wit, the sum of £50, which he might and otherwise would have made thereby, to wit, at, &c.

At the trial before TINDAL, C. J., London sittings after Michaelmas term last, it appeared, that the master of the defendant's barge had deviated from the usual and customary course of the voyage mentioned in the declaration, without any justifiable cause; and that afterwards, and whilst such barge was out of her course, in consequence of violent and tempestuous weather, the sea communicated with the lime which thereby became heated, and the barge caught fire; and the master was compelled, for the preservation of himself and the crew, to run the barge on shore, where both the lime and the barge were entirely lost.

A verdict having been found for the plaintiff,

Taddy, Serjt., obtained a rule *nisi* for a new trial, or to arrest the judgment, on the ground, first, that the deviation by the master of the barge was not a cause of the loss of the lime sufficiently proximate to entitle the plaintiff to recover, inasmuch as the loss might have been occasioned by the same tempest if the barge had proceeded in her direct course; and, secondly, that the declaration contained no allegation of any undertaking on the

[*719] part of the defendant to carry the lime directly *from Bewly Cliff to the Regent's Canal.

After argument, the Court took time for consideration.

[722] Tindal, C. J. There are two points for the determination of the Court upon this rule; first, whether the damage sustained by the plaintiff was so proximate to the wrongful act of the defendant as to form the subject of an action; and, secondly, whether the declaration is sufficient to support the judgment of the Court for the plaintiff.

As to the first point, it appeared upon the evidence that the master of the defendant's barge had deviated from the usual and customary course of the voyage mentioned in the declaration without any justifiable cause; and that afterwards, and whilst such barge was out of her course, in consequence of stormy and tempestuous weather, the sea communicated with the lime, which thereby became heated, and the barge caught fire, and the master was compelled for the preservation of himself and the crew to run the barge on shore, where both the lime and the barge were entirely lost.

Now the first objection on the part of the defendant is [*723] not rested, as indeed it could not be rested, on the *particular circumstances which accompanied the destruction of the barge; for it is obvious, that the legal consequences must be the same, whether the loss was immediately, by the sinking of the barge at once by a heavy sea, when she was out of her direct and usual course, or whether it happened at the same place, not in consequence of an immediate death's wound, but by a connected chain of causes producing the same ultimate event. It is only a variation in the precise mode by which the vessel was destroyed, which variation will necessarily occur in each individual case.

But the objection taken is, that there is no natural or necessary connection between the wrong of the master in taking the barge out of its proper course, and the loss itself; for that the same loss might have been occasioned by the very same tempest, if the barge had proceeded in her direct course.

But if this argument were to prevail, the deviation of the master, which is undoubtedly a ground of action against the owner, would never, or only under very peculiar circumstances, entitle the plaintiff to recover. For if a ship is captured in the course

of deviation, no one can be certain that she might not have been captured if in her proper course. And yet, in *Parker* v. *James*, 4 Camp. 112, where the ship was captured whilst in the act of deviation, no such ground of defence was even suggested. Or, again, if the ship strikes against a rock, or perishes by storm in the one course, no one can predicate that she might not equally have struck upon another rock, or met with the same or another storm, if pursuing her right and ordinary voyage.

The same answer might be attempted to an action against a defendant who had, by mistake, forwarded a parcel by the wrong conveyance, and a loss had thereby *ensued; and [*724] yet the defendant in that case would undoubtedly be liable.

But we think the real answer to the objection is, that no wrong-doer can be allowed to apportion or qualify his own wrong; and that as a loss has actually happened whilst his wrongful act was in operation and force, and which is attributable to his wrongful act, he cannot set up as an answer to the action the bare possibility of a loss, if his wrongful act had never been done. It might admit of a different construction if he could show, not only that the same loss might have happened, but that it must have happened if the act complained of had not been done; but there is no evidence to that extent in the present case.

Upon the objection taken in arrest of judgment, the defendant relies on the authority of the case of *Max* v. *Roberts*, 12 East, 89. 2 Bos. & P. (N. R.) 454. The first ground of objection upon which the judgment for the defendant in that case was affirmed is entirely removed in the present case. For in this declaration it is distinctly alleged, that the defendant had and received the lime in and on board of his barge, to be by him carried and conveyed on the voyage in question.

As to the second objection mentioned by the learned Lord, in giving the judgment in that case, viz., that there is no allegation in the declaration that there was an undertaking to carry directly to Waterford, it is to be observed, that this is mentioned as an additional ground for the judgment of the Court, after one, in which it may fairly be inferred from the language of the Chief Justice that all the Judges had agreed; and which first objection appears to us amply sufficient to support the judgment of the Court. We cannot, therefore, give to that second reason the same weight as if it were the only ground of the judgment of

the Court. And at all events, we think there is a dis-
[*725] tinction between the * language of this record and that of the case referred to. In the case cited, the allegation was, that it was the duty of the defendant to carry the goods directly to Waterford; but here the allegation is, "that it was his duty to carry the lime by and according to the direct, usual, and customary way, course, and passage, without any voluntary and unnecesssary deviation and departure."

The words usual and customary being added to the word direct, more particularly when the breach is alleged in "unnecessarily deviating from the usual and customary way," must be held to qualify the meaning of the word direct, and substantially to signify that the vessel should proceed in the course usually and customarily observed in that her voyage.

And we cannot but think that the law does imply a duty in the owner of a vessel, whether a general ship or hired for the special purpose of the voyage, to proceed without unnecessary deviation in the usual and customary course.

We therefore think the rule should be discharged, and that judgment should be given for the plaintiff.

Rule discharged.

ENGLISH NOTES.

The rule in the principal case does not mean that the shortest route out is to be adopted. In *London and South Western Railway Co.* v. *Myers* (1870), L. R., 5 C. P. 1, 39 L. J. C. P. 57, 21 L. T. 461, the railway company contracted to carry the plaintiff's goods from Southampton to Luton *via* the Great Northern Railway. The goods were conveyed from Southampton to Clapham Junction, thence to Nine Elms, the defendant's goods station, then back to Clapham Junction, thence to Blackfriars and Kings Cross. The plaintiff disputed their liability to pay for the mileage from Clapham Junction to Nine Elms and back. It was conceded that the route was usual and customary. It was held that the defendants were entitled to charge for the mileage in question.

A similar effect to that of deviation arises by the carrier handing over the goods to another person contrary to his undertaking to carry them. This is exemplified by *Garnett* v. *Willan* (1821), 5 B. & Ald. 53; *Sleat* v. *Fagg* (1821), 5 B. & Ald. 342. In the former of these cases (*Garnett* v. *Willan*), a parcel of a value exceeding £5 was delivered to A. & B., common carriers, who carried it a short distance in their coach, and then left it to be carried in another coach, of which A.

was one of the proprietors, and in which B. had no concern. The parcel was lost. The carriers had to pay damages in spite of a notice that they would not be liable for any package containing specified articles, or which with its contents should exceed £5 in value, unless insured. In the latter case (*Sleat* v. *Fagg*) damages were recovered for the loss of country bank notes, value £1500, under similar circumstances. The judgment is based by Bayley, J., on the ground that what was done was not a mere breach in the mode of performance, but a direct contravention of the contract, and a misfeasance.

The principal case is applied and followed in the case of a deviation under a charter-party in *Scaramanga* v. *Stamp* (1879), 5 C. P. D. 295, 49 L. J. C. P. 674, 42 L. T. 840, and the principle is applied to the case of a warehouseman who deposited the goods in a receiving place, and so lost the benefit of an insurance. *Lilley* v. *Doubleday* (1881), 7 Q. B. D. 510, 51 L. J. Q. B. 310, 44 L. T. 814.

A similar principle had been applied by the Court of King's Bench in *Ellis* v. *Turner* (1800), 8 T. R. 531, 5 R. R. 441, in a case where the goods had been carried beyond their destination and lost. It appeared that the act of carrying them beyond their destination was intentional, as it was stated that the master, after delivering some of the goods, and finding it inconvenient to deliver the rest, went on his voyage. But in *Morritt* v. *North Eastern Railway Co.* (C. A. 1876), 1 Q. B. D. 302, 45 L. J. Q. B. 289, 34 L. T. 940, where the master had negligently carried the goods beyond their destination, it was held that he was protected by the Carrier's Act of 1830 (11 Geo. IV. and 1 W. IV. c. 68, ss. 1 & 2), which enacts that the carrier by land shall not be liable for the loss of or injury to articles of the description therein mentioned when the value of the goods in a parcel exceeds £10, unless the value is declared, &c. A similar decision is given in *Millen* v. *Brasch* (C. A. 1883), 10 Q. B. D. 142, 52 L. J. Q. B. 127, 47 L. T. 685, where the goods directed to be sent *via* Liverpool to Italy were negligently sent to New York, and so were considered to be temporarily lost.

AMERICAN NOTES.

The principal case is pronounced "the leading case" by Mr. Hutchinson (Carriers, § 191). Also in *Crosby* v. *Fitch*, 12 Connecticut, 410; 31 Am. Dec. 745, where, to avoid ice, a sloop went outside Long Island instead of through the Sound; and in *Powers* v. *Davenport*, 7 Blackford (Indiana), 497; 43 Am. Dec. 100, where a wagoner took a circuitous route in order to go by his own house. Also in *Smith* v. *Whitman*, 13 Missouri, 352; *Robertson* v. *Nat. S. Co.*, 139 New York, 416.

This principle is recognized in *Merchants' Desp. Trans. Co.* v. *Kahn*, 76 Illinois, 520, where goods destined for Mattoon were carried by Chicago instead

of the usual and direct route by Indianapolis, and there were burned up in the great fire of 1871. So in *Hand* v. *Baynes*, 4 Wharton (Pennsylvania), 204; 33 Am. Dec. 54, where, on information that the locks were out of order, the vessel proceeded down Delaware Bay instead of through the Delaware and Chesapeake Canal. See *Lawrence* v. *McGregor*, Wright (Ohio), 193; *Phillips* v. *Brigham*, 26 Georgia, 617; 71 Am. Dec. 227.

The carrier is also liable at all hazards if he unnecessarily deviates from his instructions for his own convenience, *Johnson* v. *N. Y. Cent. R. Co.*, 33 New York, 610; 88 Am. Dec. 416. So, if being directed to send by one line of boats, and it refuses to receive the goods, he sends by another; he should report and await further directions. *Goodrich* v. *Thompson*, 44 New York, 324. So where he violates his contract to carry without change of cars. *Stewart* v. *Merch. Desp. Trans. Co.*, 47 Iowa, 229. But a necessary break in crossing a ferry in such case is justifiable. *Maghee* v. *Camden, &c. R. Co.*, 45 New York, 514; 6 Am. Rep. 124.

If he has choice of routes he is not justified in adopting the more expeditious when he knows it is the more dangerous. *Express Co.* v. *Kountze Brothers*, 8 Wallace (United States Supreme Ct.), 342.

He may however deviate from his usual route to save the goods, and it is his duty to do so. *Johnson* v. *N. Y. Cent. R. Co.*, above; *Maryland Ins. Co.* v. *Le Roy*, 7 Cranch (United States Supreme Ct.), 26; *Sager* v. *Portsmouth, &c. R. Co.*, 31 Maine, 228; 50 Am. Dec. 659. But a mere apprehension of danger does not justify deviation. *Riggin* v. *Patapsco Ins. Co.*, 7 Harris & Johnson (Maryland), 279; 16 Am. Dec. 302.

In *Maghee* v. *Camden, &c. R. Co.*, *supra*, the Court say: "If it could be shown in such a case that the loss must certainly have occurred from the same cause, if there had been no default, misconduct, or deviation, the carrier would be excused;" citing the principal case. This is certainly a misconception. Mr. Lawson says: "It is difficult to see how such proof would be possible" (Contracts of Carriers, § 11).

The deviation must be actual and not merely purposed. So where a deviation was directed by the shipowner and intended by the master, but the vessel was lost before it reached the point of intended deviation, a policy of insurance on the vessel was held not to be avoided. *Mosher* v. *Providence Ins. Co.*, 33 New York Supplement, 85.

The principle is firmly established in this country that the act of God or inevitable accident, to excuse the carrier, must be the sole and proximate cause, and if the carrier's fault contributes in any active and operative degree, he is not excused. See Notes, 1 Eng. Rul. Cases, 209, 233; 97 Am. Dec. 409; *Wolf* v. *Am. Ex. Co.*, 43 Mo. 421; 97 Am. Dec. 406; *Read* v. *Spaulding*, 30 New York, 630; 86 Am. Dec. 426 (delay subjecting to flood, citing principal case); *Trans. Co.* v. *Tiers*, 24 New Jersey Law, 697; 64 Am. Dec. 394; *Caldwell* v. *So. Ex. Co.*, 1 Flippin (U. S. Circ. Ct.), 85 (exposure to capture). Such is the general rule, although a few cases hold that if the carrier's fault contributes only remotely or indirectly, it does not prejudice his claim to exemption. *Morrison* v. *Davis*, 20 Pennsylvania State, 171; 57 Am. Dec. 695; *Michigan Cent. R. Co.* v. *Burrows*, 33 Michigan, 15; *Denny* v. *N. Y. Cent. R. Co.*, 13 Gray, 481; 74 Am. Dec. 645. But the weight of authority is the other way.

Consent of the owner excuses deviation. *Hendricks* v. *The Morning Star*. 18 Louisiana Annual, 353; *Harris* v. *Rand*, 1 New Hampshire, 259; 17 Am. Dec. 421. But see Lawson's Contracts of Carriers, § 143, as to the last case.

An apparent deviation may be explained by a notorious and unvarying custom with reference to which the contract of shipment was made. Thus in *Robertson* v. *National S. Co.*, 139 New York, 416, defendant had a line of steamers running from London to New York. It received goods at Havre for transportation to New York *via* London. These goods were transported from Havre to Southampton by steamers, and thence by railroad to London, where they were shipped on defendant's steamers. The steamers from Havre and the railroad were owned by another company, which had thus a regular line of transportation from Havre to London. Its steamers never went further than Southampton. One of them was named the *Wolf*. Neither said company nor defendant ever carried goods entirely by water to London. The business had been thus carried on for many years, and the method of doing it was notorious and well known to persons dealing with defendant's agents at Havre. Those persons received from I. & M. certain merchandise, issuing to them a bill of lading by which they acknowledged the receipt of the goods, "to be forwarded by the steamer *Wolf* to London and there to be transshipped" on board one of the defendant's steamers named lying in the port of London, bound for New York. The bill of lading contained a stipulation exempting defendants from perils "of land-transit of whatsoever nature or kind." The goods were shipped on board the *Wolf*, carried to Southampton, thence by rail to London, and there shipped on board defendant's steamer and carried to New York. On arrival there they were found to be damaged. In an action to recover the damages on the ground that the defendant had become an insurer by reason of a deviation from the route stipulated, it was held that there was no deviation, because it appeared from the contract and the circumstances that the parties contemplated a carriage by the *Wolf* to Southampton and thence by rail to London, and that the proof of usage was proper to be considered, as it did not contradict, but was simply explanatory of the bill of lading.

See *Constable* v. *Nat. St. Co.*, 154 United States, 51.

No. 5. — SKINNER *v.* UPSHAW.

(1701.)

RULE.

A COMMON carrier has a right to his fare for their carriage, and may retain the goods until it is paid.

Skinner v. Upshaw.

2 Ld. Raym. 752.

The plaintiff brought an action of trover against the [752] defendant, being a common carrier, for goods delivered to

him to carry, &c. Upon not guilty pleaded, the defendant gave in evidence, that he offered to deliver the goods to the plaintiff, if he would pay him his hire; but that the plaintiff refused, &c., and therefore he retained them. And it was ruled by HOLT, Chief Justice, at Guildhall (the case being tried before him there) May 12, 1 Ann. reg. 1702, that the carrier may retain the goods for his hire; and upon direction, the defendant had a verdict given for him.

ENGLISH NOTES.

The right of lien exists whether the goods are the property of the consignor or of some third party from whom they have been stolen or fraudulently taken. *Exeter Carrier's Case* (1701), 2 Ld. Raym. 867.

The custom of the realm only gives the carrier a lien for the carriage of the particular goods carried, and it is against the policy of the custom and of the common law for him to claim a general lien; and if he claims such general lien upon evidence of an alleged usage of the trade, it must be so strong as to show that the customer necessarily had notice of, and assented to it. *Rushforth* v. *Hadfield* (1805), 6 East, 519, 7 East, 224, 8 R. R. 520, 528. And see *Wright* v. *Snell* (1822), 5 B. & Ald. 350, where the same principle is implied, but the case was decided on the point that, assuming that the notice of a general lien given by the carrier would have bound the owner in respect of a debt due by him, it did not bind him for the debt of the consignor, who was a mere factor.

In *Oppenheim* v. *Russell* (1802), 3 Bos. & P. 42, 6 R. R. 604, the opinion was expressed that a common carrier has no right to make terms that he will only accept goods on the condition of having a general lien upon them. "I hope," says Lord ALVANLEY (3 Bos. & P. 48, 6 R. R. 608), "that it will never be established that common carriers who are bound to take all goods to be carried for a reasonable price tendered to them may impose such a condition upon persons sending goods by them." He distinguished the case of a common carrier from that of dyers, bleachers, &c., who, in *Kirkman* v. *Shawcross* (1794), 6 T. R. 14, 3 R. R. 103, had given public notice that they would only accept goods on these terms, because these persons may (as the common carrier may not) take or refuse goods at their option. But at all events he held, and the Court (in *Oppenheim* v. *Russell*) decided, that if the carrier had as against the consignee a right of general lien, it could not oust the right of the consignor to stop *in transitu* on tendering the price of carriage of the goods. In a Scotch case in 1864, *Scottish Central Ry. Co.* v. *Ferguson*, 2 Macph. 781, it was decided that the contract of a railway company to carry goods on the terms of having a

general lien was not just and reasonable, and the condition was therefore invalid under the Railway & Canal Traffic Act 1854.

The lien is a particular and not a general one. So that the goods may not be detained for anything beyond the cost of their carriage, for instance, not for warehousing charges. *Somes* v. *British Empire Shipping Co.* (1860), 8 H. L. Cas. 338, 30 L. J. Q. B. 229.

AMERICAN NOTES.

This doctrine is well settled in this country. Edwards on Bailments, § 645, *et seq.*; *Ames* v. *Palmer*, 42 Maine, 197; 66 Am. Dec. 271; *Galena, &c. R. Co.* v. *Rae*, 18 Illinois, 488; 68 Am. Dec. 574; Redfield on Carriers, § 270, citing the principal case.

The lien cannot be acquired unless the goods were delivered for carriage with the consent of the owner, although the carrier was innocent. *Robinson* v. *Baker*, 5 Cushing (Massachusetts), 137; 51 Am. Dec. 54; *Fitch* v. *Newberry*, 1 Douglass (Michigan), 1; 40 Am. Dec. 33; *Pingree* v. *Detroit, &c. R. Co.*, 66 Michigan, 143; 11 Am. St. Rep. 479. So where goods are carried merely for the convenience and at the request of the bailee of them. *Gilson* v. *Gwinn*, 107 Massachusetts, 126; 9 Am. Rep. 13. See *Bassett* v. *Spofford*, 45 New York, 387; 6 Am. Rep. 101; *Stevens* v. *Boston, &c. R. Corp.*, 8 Gray (Massachusetts), 262. So where the carrier receives goods from another connecting carrier with knowledge that the owner directed them to be sent by another route. *Hill* v. *Denver, &c. R. Co.*, 13 Colorado, 35; 4 Lawyers' Reports Annotated, 376. To the contrary is a *dictum* in *King* v. *Richards*, 6 Wharton (Pennsylvania), 418; 37 Am. Dec. 420. Where goods are missent by the owner's agent the carrier's lien exists. *Whitney* v. *Beckford*, 105 Massachusetts, 271.

As to the lien on goods given for carriage without the owner's assent: "In England it seems to be settled beyond controversy that the lien attaches to the goods under such circumstances in favour of both the carrier and an innkeeper." Hutchinson on Carriers, § 489, citing Holt's opinion in *Yorke* v. *Greenough*, 2 Ld. Raym. 866 (Powell's however was to the contrary).

The lien attaches as soon as the carrier's liability as such begins: "as soon as he receives the goods on a contract of carriage. The contract being, as we have seen, entire, the shipper or customer delivering the goods can only take them back on paying the freight." Edwards on Bailment, § 617, citing *Tindal* v. *Taylor*, 4 El. & B. 219; *Keyser* v. *Harbeck*, 3 Duer (New York Superior Ct.), 373. But Redfield says (Carriers, § 298): "The carrier's lien for freight does not attach upon the loading of the goods on board, or until the voyage is entered upon." Citing *Burgess* v. *Gunn*, 3 Harris & Gill (Maryland), 225; *Clemson* v. *Davidson*, 5 Binney (Pennsylvania), 392. Mr. Hutchinson says (Carriers, p. 385, note): "The better opinion would seem to be that the lien attaches to the goods as soon as they are delivered to the carrier. They cannot be demanded of him by the owner after such delivery without a tender of the whole freight which the carrier would earn by carrying them to destination, and giving him an indemnity, if it be required, against the

consequences of any outstanding bill of lading which he may have given for the goods. And although the carriage may not have actually commenced, the carrier, by the delivery, has assumed the risk of the safety of the goods as an insurer." Citing *Tindall* v. *Taylor*, 4 Ell. & Bl. 219; *Thompson* v. *Small*, 1 C. B. 328, 354; *Thompson* v. *Trail*, 2 C. & P. 334; *Bartlett* v. *Carnley*, 6 Duer (New York Superior Ct.), 191; *Van Buskirk* v. *Purinton*, 2 Hall (New York Superior Ct.), 561; *Collman* v. *Collins*, ibid. 569. "Other cases," he continues, "state the law as being that no right to freight accrues until the voyage has commenced, or as it is usually expressed, until the ship has broken ground." Citing *Bailey* v. *Damon*, 3 Gray (Massachusetts), 92; *Curling* v. *Long*, 1 Bos. & P. 634, 4 R. R. 747; *Clemson* v. *Davidson*, 5 Binney (Pennsylvania), 392; *Burgess* v. *Grove*, 3 Harris & Johnson (Maryland), 225.

The lien on part delivered is valid against the residue. *Lane* v. *Old Colony Railroad*, 14 Gray (Massachusetts), 143; *Frothingham* v. *Jenkins*, 1 California, 42; 52 Am. Dec. 286; *New Haven & N. Co.* v. *Campbell*, 128 Massachusetts, 104; 35 Am. Rep. 360; but not where the goods belong to different shippers. *Hale* v. *Barrett*, 26 Illinois, 195; 79 Am. Dec. 367; or have been sold to different parties. Edwards on Bailment, § 649.

The lien is valid as against the consignor's right of stoppage in transit. *Potts* v. *N. Y., &c. R. Co.*, 131 Massachusetts, 455; 41 Am. Rep. 247; *Newhall* v. *Vargas*, 15 Maine, 314; 33 Am. Dec. 617. But the lien does not extend beyond the charges on the particular goods, when they are stopped by the consignor in transit, and there are no arrearages for other freight, although the bill of lading provides that they may be held for all arrearages of freight on other goods. *Pennsylvania R. Co.* v. *Am. Oil Works*, 126 Pennsylvania State, 485; 12 Am. St. Rep. 885.

The lien is valid only for carriage, and not for another debt. *Pharr* v. *Collins*, 35 Louisiana Annual, 939; and it does not extend to cartage after the goods have come to their destination. *Richardson* v. *Rich*, 104 Massachusetts, 156; 6 Am. Rep. 210.

The lien is good for charges paid on the goods to other connecting carriers from whom they were received. *Briggs* v. *Boston, &c. R. Co.*, 6 Allen Massachusetts, 246; *Bissel* v. *Price*, 16 Illinois, 408; *Bowman* v. *Hilton*, 11 Ohio, 303. But not where the owner did not consent to the carriage by the claimant. *Stevens* v. *Boston & W. Railroad*, 8 Gray (Massachusetts), 262.

No lien arises on account of the consignee's neglect to take the goods. *Crommelin* v. *N. Y. & H. R. Co.*, 4 Keyes (New York), 90.

No lien arises where it is otherwise provided in effect by contract, as where a time is fixed for payment of the freight subsequent or without reference to delivery. *Pinney* v. *Wells*, 10 Connecticut, 103; *Chandler* v. *Belden*, 18 Johnson (New York), 157; 9 Am. Dec. 193.

No lien can be acquired as against the national government. *Dufolt* v. *Gorman*, 1 Minnesota, 301.

No lien can be enforced for more than the amount of the carrier's charges when agreed upon beforehand, although the goods prove to be of greater value than he supposed. *Baldwin* v. *Liverpool, &c. S. Co.*, 74 N. Y. 125; 30 Am. Rep. 277.

No. 5. — Skinner v. Upshaw. — Notes.

If the consignee accepts the goods short of the destination a lien *pro rata* attaches. *Lorent* v. *Kentring*, 1 Nott. & McCord (S. Carolina), 132; *Hunt* v. *Haskell*, 24 Maine, 339; 41 Am. Dec. 387.

The lien is lost by surrender of possession, voluntarily or through negligence. *Norfolk S. R. Co.* v. *Barnes*, 104 North Carolina, 25; 5 Lawyers' Reports Annotated, 611; *Hale* v. *Barrett*, 26 Illinois, 195; 79 Am. Dec. 367; *Boggs* v. *Martin*, 13 B. Monroe (Kentucky), 239. Even though it is mutually agreed that the lien shall continue. *McFarland* v. *Wheeler*, 26 Wendell (New York), 467.

And so when the carrier refuses to deliver on the ground that the goods are not in his possession. *Adams Express Co.* v. *Harris*, 120 Indiana, 73; 16 Am. St. Rep. 315; 7 Lawyers' Reports Annotated, 214. Or puts his right to hold them on some other ground. *Everett* v. *Coffin*, 6 Wendell (New York), 603; 22 Am. Dec. 551.

And so, in the absence of special contract, where the goods are destroyed before the carriage is completed. *New York Cent., &c. R. Co.* v. *Standard Oil Co.*, 87 New York, 486; *Barker* v. *Schooner*, 1 Mackey (District of Columbia), 24; 47 Am. Rep. 234. And so where by delay the consignee is injured to an amount equal to the freight. *Dyer* v. *Grand Trunk Ry. Co.*, 42 Vermont, 441; 1 Am. Rep. 350; *Peebles* v. *Boston, &c. R. Co.*, 112 Massachusetts, 498; *Hill* v. *Leadbetter*, 42 Maine, 572; *Bartram* v. *McKee*, 1 Watts (Pennsylvania), 39. But not in case of injury by inevitable accident. *Lee* v. *Salter*, Lalor, Supplement (New York), 163. If the carrier pays for the loss of the goods he may deduct freight. *Hammond* v. *McClures*, 1 Bay (So. Carolina), 101.

The lien is not lost when the goods are seized by judicial process. *Newhall* v. *Vargas*, 15 Maine, 314; 33 Am. Dec. 617.

Nor by delivery on fraudulent promise of the consignee to pay the freight. *Bigelow* v. *Heaton*, 6 Hill (New York), 43.

The lien is not lost by properly warehousing the goods, even in his own name. *Gregg* v. *Illinois Cent. R. Co.*, 147 Illinois, 550; 37 Am. St. Rep. 238; *Western Trans. Co.* v. *Barber*, 56 New York, 544; *Bickford* v. *Metropolitan S. Co.*, 109 Massachusetts, 151; *Brittan* v. *Barnaby*, 21 Howard (U. S. Supr. Ct.) 527.

The carrier may not sell the goods to enforce his lien, he must resort to equity. *Briggs* v. *Boston, &c. R. Co.*, 6 Allen (Massachusetts), 246; 83 Am. Dec. 626; *Moore's Exr.* v. *Patterson*, 28 Pennsylvania State, 505. Such a sale is a conversion.

The lien is assignable. *Everett* v. *Coffin*, 6 Wendell (New York), 603; 22 Am. Dec. 551. But it does not pass with a wrongful sale or pledge of the goods. *Everett* v. *Saltus*, 15 Wendell (New York), 474.

Section II. — *Special Limitations to Liability.*

No. 6. — PEEK *v.* NORTH STAFFORDSHIRE RAILWAY COMPANY.

(H. L. 1863.)

No. 7. — RICHARDSON *v.* NORTH-EASTERN RAILWAY COMPANY.

(1872.)

RULE.

A COMMON carrier, in order to avoid liability (otherwise than by the act of God or the Queen's enemies) for loss of or damage to the goods committed to him must show that his liability is limited by Statute, or by a lawful special contract, or that the loss or damage arises from inherent vice in or natural deterioration of the object carried, or from negligence on the part of the bailor.

[* 473] *** Peek v. North Staffordshire Railway Company.**

10 H. L. C. 473–588 (s. c. 32 L. J. Q. B. 241; 8 L. T. 768; 11 W. R. 1023).

Carrier's Liability. — Railway Companies. — "Conditions." — "Special Contract."

All parts of the 7th section of the "Railway and Traffic Act 1854" must be read together, and therefore the "Conditions" there spoken of as capable of being imposed by railway companies in limitation of their liability as common carriers must not only be, in the opinion of a Court or Judge, just and reasonable, but must also be embodied in a Special Contract in writing, signed by the owner or sender of the goods.

The owner of some marble chimney-pieces desired to send them to London. Messages and notes passed between him and the agent of a railway company on the subject of the terms on which they were to be carried. The agent stated, as a Condition, that the company would not be responsible for damage to goods sent by the railway, unless their value was declared and they were insured, the rate of insurance being fixed at 10 per cent on the declared value. After some delay the agent received a note requesting that the marbles might be forthwith sent to London "not insured;" they were sent, and suffered damage:

No. 6. — Peek v. North Staffordshire Ry. Co., 10 H. L. C. 474. 475.

Held (Diss. Lord CHELMSFORD), that the Condition thus sought to be imposed by the company was not just and reasonable; that there was not any special contract signed by the parties within the meaning of 17 & 18 Vict. c. 31, s. 7; that the note could not be connected with the other communications so as to constitute the required contract; that the words "not insured" could not be made the subject of explanation by parol evidence; and that they left the rights and liabilities of the parties as at common law.

* The declaration in this case stated that the defendants [* 474] being common carriers for hire, the plaintiff delivered to them as such common carriers three marble chimney-pieces to be carried from Stoke-upon-Trent to London, and that the defendants so negligently carried the same that they were greatly damaged.

There were several pleas, of which the 4th and 5th alone require now to be noticed.

4th plea. That the goods in the declaration mentioned were delivered and received by the defendants, to be carried after the passing of the Railway and Canal Traffic Act, 1854,[1] and under and subject to a certain special contract in that behalf, signed by one George Whittingham, for and on account of one Charles Meigh, who was the person delivering * the said goods [* 475] to the defendants for carriage; whereby it was agreed that the defendants should not be responsible for the loss of, or injury to, marbles, unless declared and insured according to their value. And that the goods in the declaration mentioned were marbles, and that the same were not, nor was any part of the same

[1] 17 & 18 Vict. c. 31. The sections on which the case turns are as follows: —

Section 7. "Every such company as aforesaid shall be liable for the loss of, or for any injury done to any horses, cattle, or other animals, or to any articles, goods, or things, in the receiving, forwarding, or delivering thereof, occasioned by the neglect or default of such company or its servants, notwithstanding any notice, condition, or declaration made and given by such company contrary thereto, or in anywise limiting such liability, every such notice, condition or declaration being hereby declared to be null and void. Provided always, that nothing herein contained shall be construed to prevent the said companies from making such conditions with respect to the receiving, forwarding and delivering of any of the said animals, articles, goods, or things, as shall be adjudged by the Court or Judge before whom any question relating thereto shall be tried, to be just and reasonable. . . . Provided also, that no special contract between such company and any other parties respecting the receiving, forwarding, or delivering of any animals, articles, goods or things as aforesaid shall be binding upon or affect any such party, unless the same be signed by him, or by the person delivering such animals, articles, goods, or things respectively for carriage: Provided also, that nothing herein contained shall alter or affect the rights, privileges or liabilities of any such company under the said Act of the 11 Geo. IV., and 1 Will. IV. c. 68, with respect to articles of the description mentioned in the said Act."

declared or insured by the plaintiff, in the manner provided by the said agreement.

5th plea. That the said goods were delivered and received after the passing of the said Act, under and subject to a certain just and reasonable condition made by the defendants, and assented to by the plaintiff, with respect to the receiving, forwarding, and delivering the said goods: that is to say, that the defendants should not, nor would be responsible for the loss or injury to marbles, unless declared and insured according to their value.

Issue was taken on these pleas.

The case came on for trial before Mr. Justice Erle, at the London sittings, after Hilary Term, 1858, when the following evidence was given: —

The plaintiff in July, 1857, was the owner of three marble mantel-pieces, then in Staffordshire; a Mr. Meigh, of Hanley in that county, had instructions from him to forward the same to London on his behalf by the defendants' railway. The defendants had a station at Stoke-upon-Trent, in Staffordshire, and Mr. Meigh was in the habit of delivering goods to the defendants at that station to be carried to London. On the 30th of June and the 20th of July, 1857, printed notices were delivered by the defendants to Mr. Meigh, which commenced as follows: "The North Staffordshire Railway Company hereby give notice, that they will receive, forward, and deliver goods solely subject to the conditions hereunder stated."

[* 476] * Among the conditions so referred to was the following, printed on the same paper: —

"That the company shall not be responsible for the loss of, or injury to any marbles, musical instruments, toys, or other articles which, from their brittleness, fragility, delicacy, or liability to ignition, are more than ordinarily hazardous, unless declared and insured according to their value."

In July, 1857, Mr. Meigh gave directions to a carter of the defendants to call for the marble chimney-pieces which were then at Mr. Meigh's house, at Sheton, in Staffordshire, and to convey them to the defendants' station at Stoke; and at the same time he desired the carter to inquire at the station what the insurance would be. The carter fetched the chimney-pieces, and they were placed in the defendants' warehouse at Stoke; he also inquired of Mr. Corden, the defendants' head clerk at Stoke, what would be the insurance

of the goods, and was told by him he did not know, unless the value of them was stated; and the carter communicated this on the following day to Mr. Meigh.

A day or two afterwards Mr. Corden wrote and sent to Mr. Meigh, referring to the marbles which had been sent, and the message delivered by the carter, and stating that the amount of insurance depended on the value of the marbles, and requesting to know for what amount they were to be insured. No answer was sent to this note.

Further correspondence took place as to the rate of insurance.

On the 28th July Mr. Whittingham, on behalf of Mr. [477] Meigh, called at the Stoke station and saw Mr. Corden, and inquired why the chimney-pieces had not been forwarded to London. Mr. Corden said that Mr. Meigh was perfectly well aware why they had not been forwarded; that he had desired they should be insured, and at the same time he did not declare the value; that Mr. Meigh had been repeatedly waited upon and asked to declare the value, and that he did not do so. Mr. Whittingham said the marble was much wanted, and asked Mr. Corden to forward it. Mr. Corden said he could not do so unless he had written instructions from Mr. Meigh as to whether they should forward it at Mr. Meigh's risk, *or at the risk of the company, [*478] insured, or uninsured. That if the marble was forwarded at the uninsured rate, the company's charge would be £2 15*s.* a ton; but that if Mr. Meigh chose to have it insured, it would be 10 per cent. on the declared value in addition. Mr. Whittingham said he would see into the matter. On the 1st of August, Mr. Corden received the following note, signed by Mr. Whittingham, on behalf of Mr. Meigh: —

"Please to forward the three cases of marble, not insured, as directed, to W. Peek, Esq., to be called for at Camden Goods Station, London."

On the same evening the goods were sent off by the defendants, and invoiced to Mr. Meigh, at the rate of £2 15*s.* per ton, the uninsured rate. They arrived at the Camden Goods Station on the 2nd of August.

* On the 8th of August, the plaintiff sent for the chimney- [*479] pieces (which were proved to be of the value of £70 each), when it was found that they had received damage from wet, and

that rust from the nails of the packages had soaked through the cases and discoloured the marble. The damage was stated to amount to £52.

At the trial the learned Judge directed a verdict to be entered for the defendants on the 4th and 5th pleas, but reserved leave to the plaintiff to move to enter the verdict for the plaintiff for £52, in case the Court should be of opinion that this direction was incorrect in point of law.

In Easter Term a rule for this purpose was obtained.

Cause was shown in Trinity Term before Lord CAMPBELL, [*480] Mr. Justice COLERIDGE, Mr. Justice ERLE, and Mr. * Justice CROMPTON. Mr. Justice COLERIDGE retired from the Bench before judgment was delivered. The rule was made absolute, Mr. Justice ERLE dissenting. El. Bl. & El. 958; 5 El. & Bl. 958; 27 L. J. Q. B. 465.

The decision of the Court of Queen's Bench was, on appeal, reversed in the Exchequer Chamber, El. Bl. & El. 986; 5 El. & Bl. 989; 29 L. J. Q. B. 97, by Lord Chief Baron POLLOCK, Mr. Baron MARTIN, Mr. Justice WILLES, Mr. Baron WATSON, and Mr. Baron CHANNELL, Mr. Justice WILLIAMS expressing his opinion that it ought to be affirmed.

This appeal was then brought.

Gordon Allan and Henry James, for the appellant. They cited: *Wyld* v. *Pickford*, 8 M. & W. 443, 10 L. J. Ex. 342; *Shaw* v. *York and North Midland Railway Company*, 13 Q. B. 347, 18 L. J. Q. B. 181; *Carr* v. *Lancashire and Yorkshire Railway Company*, 7 Exch. 707, 21 L. J. Ex. 261; *Walker* v. *North Midland Railway Company*, 2 El. & Bl. 750, 23 L. J. Q. B. 73; *Simons* v. *Great Western Railway Company*, 18 C. B. 805, 26 L. J. C. P. 25; *London and North-Western Railway Company* v. *Dunham*, 18 C. B. 829, 26 L. J. C. P. 25; *M'Manus* v. *Lancashire and Yorkshire Railway Company*, 4 H. & N. 327, 28 L. J. Ex. 353; *McCance* v. *London and North-Western Railway Company*, 7 H. & N. 477, 31 L. J. Ex. 65; *Harrison* v. *London and Brighton Railway Company*, 2 B. & S. 122, 152, 29 L. J. Q. B. 209; *Leroux* v. *Brown*, 12 C. B. 801; *Smith* v. *Neale*, 2 C. B. 67; *Boydell* v. *Drummond*, 11 East, 142, 2 Camp. 157, 10 R. R. 450; *Kenworthy* v. *Schofield*, 2 B. & C. 945; *Hinde* v. *Whitehouse*, 7 East, 558, 3 Smith, 528, 8 R. R. 676; *Holmes* v. *Mitchell* 7 C. B. (N. S.) 361, 28 L. J. C. P. 32.

[485] Phipson and Quain, for defendants in error. They cited:

Nicholson v. *Great Western Railway Company*, 5 C. B. (N. S.) 366; *Beal* v. *South Devon Railway Company*, 5 H. & N. 875, 29 L. J. Q. B. 441; *Morse* v. *Slue*, p. 244, *ante*; *Riley* v. *Horne*, 5 Bing. 217; *Hutchinson* v. *Bowker*, 5 M. & W. 535; *Gabay* v. *Lloyd*, 3 B. & C. 793; *Goldshede* v. *Swan*, 1 Exch. 154, 16 L. J. Ex. 284; *Bainbridge* v. *Wade*, 16 Q. B. 89, 20 L. J. Q. B. 7; *Doe* v. *Hiscocks*, 5 M. & W. 363, 9 L. J. Ex. 27, 2 R. C. 718; *Macdonald* v. *Longbottom*, 1 E. & E. 977, 987, 28 L. J. Q. B. 293.

Gordon Allan replied. [490]

The following questions were ordered to be put to the Judges: —

First, Is the condition that the company should not be responsible for injury to the goods (that is, the marbles), *unless the same were declared and insured according [*491] to their value, a just and reasonable condition within the true intent and meaning of the 17 & 18 Vict. c. 31, § 7?

Secondly, Is the plaintiff entitled to have the verdict entered for him upon the fourth plea?

Thirdly, Is the plaintiff entitled to have the verdict entered for him upon the fifth plea?

Opinions upon these questions were delivered by Blackburn, J., Willes, J., Crompton, J., Martin, B., Williams, J., Pollock, C. B., and Cockburn, C. J., of which it may suffice — as an opinion elaborately reasoned and illustrated by authorities and the effect of which was adopted by the majority of the Lords — to set out the opinion of:

Mr. Justice Blackburn. My Lords, the answers to be given to the questions put by your Lordships, in my opinion, to a great extent depend upon the true construction of the 7th section of the Railway and Canal Traffic Act, 1854 (17 & 18 Vict. c. 31).

That enactment affects the whole of the very extensive traffic carried on the railways and canals of the United Kingdom. Questions upon it daily arise. In general the sums in dispute are so small that the question is determined in the County Courts, not subject to appeal, further than to one of the Superior Courts. But there have been already four cases originating in the Superior Courts, and brought in error into the Exchequer Chamber. These four cases are, *M'Manus* v. *Lancashire and Yorkshire Railway Company*, 4 H. & N. 327, decided by the Exchequer Chamber in 1859; *Peck* v. *North Staffordshire Railway Company*, El. Bl. & El. 958, 986, decided by the Exchequer Chamber in 1860, and now

before your Lordships; *Harrison* v. *London and Brighton Railway Company*, 2 B. & S. 122, 152, decided by the Exchequer Chamber in February, 1862; and *Beal* v. *South Devon Railway Company*, 5 H. & N. 875; which has been argued in the Court of Exchequer Chamber, but on which no judgment has yet been delivered by that Court. [*492] *The result of these cases has been to show that there exists a great diversity of opinion amongst the Judges as to what is the effect of the enactment; so great that the law cannot be considered as settled.

This is the first time in which any question upon the subject has come before this, the ultimate Court of Appeal; and as your Lordships' decision, so far as it shall extend, will conclusively fix the law, unless and until the Legislature again intervenes, the importance of the present case is very great, although the sum in dispute is not large.

The Railway and Canal Traffic Act, 1854, was passed in consequence of disputes between the companies and their customers, which had led to much litigation, resulting in a series of decisions fixing the law in such a manner that the Legislature thought fit to intervene.

In *Heydon's case*, 3 Co. Rep. 7 *b*, Lord COKE says, that it was resolved, "that for the sure and true interpretation of all statutes in general (be they penal or beneficial, restrictive or enlarging of the common law), four things are to be discerned and considered: 1st, What was the common law before the making of the Act? 2d, What was the mischief and defect for which the common law did not provide? 3d, What remedy the Parliament hath resolved and appointed to cure the disease of the Commonwealth? And, 4th, The true reason of the remedy. And then the office of all the Judges is always to make such construction as shall suppress the mischief and advance the remedy." Independently of the high authority of Lord COKE, I think there is much reason in this; and, in conformity with the spirit of those resolutions, I shall proceed to examine what was the state of the law just before [*493] *the 10th of July, 1854, on which day the Railway and Canal Traffic Act received the Royal Assent.

At the common law, a carrier who received goods as such was responsible for every injury occasioned to them by any means, except the act of God or of the Queen's enemies. He was also bound to receive goods tendered to him for carriage, and was liable to an

action if he refused to receive them without reasonable excuse; and such an action may still be maintained. *Crouch* v. *London and North-Western Railway Company*, 14 C. B. 255; s. c. 23 L. J. C. P. 73. But many years ago a practice began by which carriers sought to restrict their liability by giving notice that they would not be answerable for loss, except on conditions limiting the extent of their common law liability as carriers. The effect of such a notice is discussed in *Gibbon* v. *Poynton*, 4 Burr. 2299, decided in 1769. It is apparent from that case that the practice was not then new, though I cannot find when it first arose. After 1769, and before the 23rd of July, 1830, when the first Carriers' Act (11 Geo. IV. & 1 Will. IV. c. 68), received the Royal Assent, the cases on carriers' notices are very numerous.

Mr. Justice Story, in his Commentaries on the Law of Bailments, section 549 (published in 1832, after the Carriers' Act, but in America, where that Act had no effect), states, as I think, accurately, what was the effect of the decisions up to that time. "It was," says he, "formerly a question of much doubt how far common carriers on land could by contract limit their responsibility, upon the ground that, exercising a public employment, they are bound to carry for a reasonable compensation, and had no right to change their common law rights and duties. And it was said that, like innkeepers, they were bound to receive and accommodate all persons, as far as they * may, and could not insist [* 494] upon special and qualified terms. The right, however, of making such qualified acceptances by common carriers seems to have been asserted in early times. Lord COKE declared it in a note to *Southcote's case* (4 Co. Rep. 83 *b*), and it was admitted in *Morse* v. *Slue*. It is now recognized and settled beyond any reasonable doubt." So far the passage is cited and adopted in the judgment of the Court of Common Pleas in *Austin* v. *Manchester, &c. Railway Company*, 10 C. B. 454, 21 L. J. C. P. 179, a case decided in 1852, to which I shall hereafter have to call attention; and, so far, I think this, according to the decisions subsequent to 1832, still remained law in 1854, when the Railway and Canal Traffic Act was passed. But Mr. Justice Story proceeds to say: "Still, however, it is to be understood that common carriers cannot by any special agreement exempt themselves from all responsibility, so as to evade altogether the salutary policy of the common law. They cannot, therefore, by a special notice, exempt themselves from all

responsibility in cases of gross negligence and fraud, or, by demanding an exorbitant price, compel the owner of the goods to yield to unjust and oppressive limitations of their rights. And the carrier will be equally liable in case of the fraud or misconduct of his servants, as he would be in case of his own personal fraud or misconduct."

In my opinion, the weight of authority was in 1832 in favour of this view of the law; but the cases decided in our Courts between 1832 and 1854 established that this was not law, and that a carrier might by a special notice make a contract limiting his responsibility even in the cases here mentioned, of gross negligence, misconduct, or fraud on the part of his servants; and, as it seems to me, the reason why the Legislature intervened in the Rail-
[*495] way * and Canal Traffic Act, 1854, was because it thought that the companies took advantage of those decisions (in Story's language), "to evade altogether the salutary policy of the common law." Such is my opinion; but to maintain it, I must examine the cases in more detail.

Before doing so, however, I must observe that Story's expressions are, that the carriers might by "contract" or by "special agreement" limit their liability, — expressions showing, I think, that his idea was, that conditions in a notice operated by way of agreement or contract.

Mr. Justice Erle, in his judgment, dissenting from that of the majority of the Judges of the Exchequer Chamber in *M'Manus* v. *Lancashire and Yorkshire Railway Company*, contends at some length that this is a mistake, and that conditions operate as restrictions on the public profession of the carrier, and not as parts of a contract. Before the Carriers' Act (11 Geo. IV. & 1 Will. IV. c. 68), this might have been plausibly contended, but if it had been so, as it seems to me, it would have followed that it was not necessary to show that the notice was brought home to the individual customer; for if the carrier was exempted from the common-law liability on the ground that his public profession was only to be a carrier subject to conditions imposing a restricted liability, no one could have a right to charge him as a carrier with general liability, unless it could be shown that the carrier had so acted towards the individual suing him as to induce that individual to employ him on the supposition that he was a carrier professing unlimited liability. Under such circumstances, the carrier would be precluded, as against

that particular individual, from setting up the conditions. In no other way, as far as I can see, could he be charged on this supposition, merely because the customer was not informed of the restriction. But in * *Kerr* v. *Willan*, 6 M. & S. 150, [* 496] 2 Starkie, 53, 18 R. R. 337, decided in 1817, and I think in all the subsequent cases, it was held that the notice, to be effectual, must be brought home to the particular customer; which, in my opinion, shows that the condition operated entirely by way of contract, and not by way of restriction on the public profession. So completely was the necessity of bringing the notice home to the particular party established, that Mr. Smith in the first edition of his Leading Cases (which was published in 1837) says, "If this notice was not communicated to the employer, it was of course ineffectual." And this expression of the self-evident nature of the proposition has been allowed to stand in all the editions of his work, without remark or qualification by any of his very learned editors. Mr. Smith proceeds to add, "But if it could be brought home to his knowledge, it was looked upon as incorporated into his agreement with the carrier, and he became bound by the contents." That very learned gentleman evidently considered that at the time when he wrote (1837) it had become settled that the notice operated as a special contract with those to whom it was brought home, and not as a public condition limiting the profession of the carrier.

However much this might have been open to question before the first Carriers' Act (11 Geo. IV. & 1 Will. IV. c. 68), it seems to me, with all deference to those who hold the opposite opinion, to be incontrovertible after that Act. By that Act, after giving, by the first three sections, effect to public notices restricting the liability of carriers as to certain articles, it is by the 4th section provided that from and after the 1st of September, 1830, "no public notice or declaration heretofore made, or * hereafter to be made, [* 497] shall be deemed or construed to limit or in anywise affect the liability at common law" of any carrier; but every such carrier shall, except as to goods brought within that Act, be liable as at the common law, "any public notice or declaration by them made and given contrary thereto or in anywise limiting such liability notwithstanding." By section 6, it is provided that nothing in that Act should "affect any special contract between such carrier" and any other parties for the conveyance of goods

and merchandise. It certainly seems to me that, whatever might have been the case before this enactment, it is clearly enacted that no condition shall in future operate merely as being a public condition or public declaration, and that, to be effectual at all, it must be incorporated in a special contract.

In *Wyld* v. *Pickford*, decided in 1841, the question before the Court arose on demurrer. The first count was against the defendants for a breach of duty as carriers in not taking proper care of maps, which they had received to be carried. The second count was in trover. To the first count was a plea that, "at the time of the delivery to the defendants of the maps, they gave notice to the plaintiffs, and the plaintiffs had notice that the defendants would not be responsible for loss or damage done" (*inter alia*) "to maps, unless insured and paid for at the time of the delivery to the defendants; and that the defendants accepted the maps under the terms and conditions of the notice and no others, as the plaintiffs at the time knew; and that they were not paid for or insured."

There was a similar plea to the count in trover, averring [*498] that the conversion was a loss by a mis-delivery * through mistake and inadvertence. To these pleas was a demurrer.

The judgment was delivered by Mr. Baron PARKE, after some time had been taken to consider; and it has, I believe, always been considered as one of great authority. The Court, after first stating the argument of counsel, that fraud was not alleged at all and that a special contract was at all events not sufficiently alleged, said, "We agree that if the notice furnishes a defence, it must be either on the ground of fraud, or of a limitation of liability by contract, which limitation it is competent for a carrier to make, because being entitled by common law to insist on the full price being paid beforehand, he may, if such price be not paid, refuse to carry them upon the terms imposed by the common law, and insist upon his own, and if the proprietor of the goods still chooses that they should be carried, it must be on those terms. And probably the effect of such a contract would be only to exclude certain losses, leaving the carrier liable as upon the custom of England for the remainder. It seems to us, however, that in the present case there is a sufficient allegation of such a special contract." The judgment then proceeds to support the plea to the first count.

This seems to me to show very strongly that (independently

of the statute 11 Geo. IV. & 1 Will. IV. c. 68, which was not referred to in *Wyld* v. *Pickford*) a condition or declaration was considered to operate only as being incorporated in a special contract. The judgment, however, was that the plea to the count in trover was bad. This was on the ground that, on the weight of authority, a notice in the terms stated in the plea, viz., that the carriers "would not be responsible for loss or damage done to goods" unless insured, did not make * the carrier irre- [* 499] sponsible for every loss, but only for such as occurred without negligence, whether gross or ordinary, and the inadvertent misdelivery admitted on the plea might be even grossly negligent though inadvertent. This was in conformity with the latter part of the section from Story on Bailments, which I have already cited; (*ante*, p. 293) but it differs from him in this, that Story seems to me to consider that a condition so expressed as to manifest an intention to exempt the carrier from liability for gross negligence was void in law, whilst the judgment in *Wyld* v. *Pickford* seems to me to proceed on the ground that the authorities bound the Court to put a construction on the terms of the notice, that the carrier "would not be responsible for loss or damage," making them mean, would not be responsible for loss or damage unless caused by negligence. This certainly seems to me not the natural meaning of the words, or the sense in which they would be understood, either by a carrier or his customer; and though the weight of authority might, at the time when *Wyld* v. *Pickford* was decided, compel one of the Courts below to put this forced meaning on the words, I think your Lordships would hardly even then have considered yourselves bound to do so.

But in the subsequent case of *Hinton* v. *Dibben*, 2 Q. B. 646, 11 L. J. Q. B. 113, in 1842, this matter had to be considered. There the action was against a carrier for the negligent loss of silk above the value of £10. The plea set up the Carriers' Act by which the carriers are "not to be liable for the loss of or injury to" (*inter alia*) silk, unless the value be declared and insured.

The replication was, that the loss was occasioned by gross negligence of the carrier. The words in the Carriers' * Act are the same as those in the plea in *Wyld* v. *Pickford*. [* 500] On the demurrer in *Hinton* v. *Dibben*, the question raised was whether those words were to be construed as containing an implied exception of gross negligence. The decision of the Court

was that the words were, in the Carriers' Act, to be understood in their natural sense as exempting the carriers from liability arising from negligence as well as from accident.

This decision has always been acquiesced in. I am not aware of any case in which a Court has subsequently put a construction upon those words when used in a notice; but it certainly seems to me very undesirable that a different effect should be given to such words, when used by a carrier, from that which is given to them if used by the Legislature, or by an ordinary person.

It was about the time of the decison of *Hinton* v. *Dibben* that railways came into general use, and began to supersede all other modes of conveyance. The companies became in the habit of imposing conditions on their customers intended to restrict, and in some cases entirely to remove, their liability to an extent many persons thought unreasonable The validity of such restrictions was questioned in various actions, and the series of decisions arose which resulted in settling the law in such a manner as to cause the Legislature to intervene by the Railway and Canal Traffic Act, 1854.

The first case was that of *Shaw* v. *York and North Midland Railway Company*, decided in 1849. There the declaration was against the defendants, as carriers of horses. There was a plea of not guilty, and a traverse of the allegation that the horses were received to be safely and securely carried. It appeared [*501] upon the trial that when *the horses were received by the defendants, a ticket was given to the plaintiff containing this memorandum: "N. B. This ticket is issued subject to the owners undertaking all risks of conveyance whatsoever, as the company will not be responsible for any injury or damage, howsoever caused, occurring to horses or carriages while travelling, or in loading or unloading." It appeared that the injury to the horse in that case, which caused its death, was occasioned by a defect in one of the horse-boxes in which the plaintiff's horses were placed, and which defect was pointed out to the defendants' servants, who tried, but unsuccessfully, to cure it. Baron ALDERSON, before whom the cause was tried, was of opinion that the special notice did not exempt the defendants from the obligation to use ordinary care; and also, on the authority of *Lyon* v. *Mells*, p. 266, *ante*, 5 East, 428, 1 Smith, 478, 7 R. R. 726, that a contract in the terms of the memorandum was subject to an

implied exception of injury arising from the insufficiency of the carriage provided by the defendants; and he directed a verdict for the plaintiff. The Court of Queen's Bench, however, granted a new trial on the ground of misdirection; Lord DENMAN, in delivering the judgment, saying, "It appears to us to be clear that the terms contained in the ticket given to the plaintiff at the time the horses were received, formed part of the contract for the carriage of the horses between the plaintiff and the defendants, and that the allegation in the declaration that the defendants received the horses to be safely and securely carried by them, which would throw the risks of conveyance upon the defendants, is disproved by the memorandum at the foot of the ticket; and the alleged duty of the defendants safely and securely to convey and carry the horses, would not arise * upon such a contract. [* 502] It may be that, notwithstanding the terms of the contract, the plaintiff might have alleged that it was the duty of the defendants to have furnished proper and sufficient carriages, and that the loss happened from a breach of that duty; but the plaintiff has not so declared; but has alleged a duty which does not arise upon the contract as it appeared in evidence."

The next case was that of *Austin* v. *The Manchester, Sheffield and Lincolnshire Railway Company*, 16 Q. B. 600, 20 L. J. Q. B. 440, in 1851. The declaration stated that the defendants "received the plaintiff's horses to be carried for reward," from New Holland to Shoreditch; and then alleged a case of gross negligence against the defendants' servants. There was a plea traversing the allegation that the horses were received as alleged. On the trial it appeared that the horses were received under a ticket signed by the plaintiff, by which the proprietor of the horses took upon himself all risks of conveyance. The Court of Queen's Bench held that the plea was proved, and was good. This case, like the former, was decided on the form of the declaration, but it went far to show that in the opinion of the Court of Queen's Bench no good declaration could have been proved. The same plaintiff brought another action subsequently, in the Court of Common Pleas, which I shall notice presently.

The next case in order of date was *Chippendale* v. *The Lancashire and Yorkshire Railway Company*, 21 L. J. Q. B. 22, decided in November, 1851. That was an appeal from the County Court, which, as the law then was, was heard before two Judges only, COLE-

RIDGE, J. and ERLE, J. In that case it was held, in spite [* 503] of an able argument by the * late Mr. Cowling, that the condition in the Lancashire and Yorkshire ticket protected them from being liable for any injury, even if caused by a defect in the carriages. This, being a case in the County Court, was decided without reference to any forms of pleadings.

The next case was that of *Austin* v. *The Manchester, Sheffield and Lincolnshire Railway Company*, decided in 1852. There the declaration (stating that there was a ticket and its effect), averred gross and culpable negligence in the defendants' servants. These averments were proved at the trial: but the Court of Common Pleas arrested the judgment. The elaborate judgment delivered by Mr. Justice CRESSWELL puts it on the ground that the question depended upon the nature of the contract entered into between the parties in the case, and that the contract contained in the ticket in that case, which exempted the defendants from responsibility for damage, however caused, did protect them from responsibility for the loss in that case, arising from the neglect of the defendants' servants on the journey, "whether," says the judgment, "it was called negligence merely, or gross negligence, or culpable negligence, or whatever epithet might be applied to it, it was within the exemption."

The next case was that of *Carr* v. *The Lancaster and Yorkshire Railway Company*, decided in May, 1852. There the declaration stated that the defendants had received a horse to be carried for hire in a horse-box on their railway, subject to the conditions in a notice at the foot of a ticket for the conveyance of the horse, in these words: "This ticket is issued, subject to the owner's undertaking all risks of conveyance whatsoever, as the [* 504] * company will not be responsible for any injury or damage (howsoever caused) occurring to live stock of any description travelling upon the Lancashire and Yorkshire Railway, or in their vehicles." The declaration then proceeded to allege that whilst the horse was in the custody of the defendants, and through the improper conduct and gross negligence, and from want of proper care on the part of the defendants, the horse-box was propelled on the railway against certain trucks, and the horse thereby killed. The jury found as a fact that the accident was occasioned by the gross negligence of the defendants, and this finding was not complained of. Nevertheless, the judgment was arrested.

This was certainly a very strong case. The gross negligence of the defendants occasioning a collision by which a horse was killed, would have afforded a cause of action to the owner of that horse, if he had been a stranger whose horse was casually there, or even if he had been, as in *Davies* v. *Mann*, 10 M. & W. 546, 12 L. J. Exch. 10, a wrong-doer, unless by reasonable skill and diligence on his part he could have avoided the consequence of the gross negligence of the defendants. Yet the Court of Exchequer held, and I think rightly held, that this was a special contract by which the plaintiff had taken upon himself all risk, and agreed that the company should not be responsible for any injury or damage, however caused; and Mr. Baron PARKE concluded his judgment by saying, "It is not for us to fritter away the true sense and meaning of these contracts merely with a view to make men careful. If any inconvenience should arise from their being entered into, that is not a matter for our interference, but it must be left to the Legislature, who may, if they please, put a * stop to this mode which the carriers have adopted of [* 505] limiting their liability. We are bound to construe the words used, according to their proper meaning, and according to the true meaning and intention of the parties as here expressed. I am of of opinion that the defendants are not liable." In every word of this I thoroughly concur. I think that such was the law at the time this judgment was given; and I think that the Court was bound to act upon it. But, when we come to construe an Act of Parliament, passed soon after this decision with a view to alter the law, and inquire, in the spirit of the resolutions in *Heydon's case*, what was the mischief and defect for which the law did not provide, and what remedy the Parliament hath resolved and appointed to cure the disease of the law, it seems to me impossible to avoid coming to the conclusion that this judgment was in the contemplation of the Legislature.

One more case occurred before the passing of the Railway and Canal Traffic Act, 1854, to which it is necessary to call attention. In *Walker* v. *The York and North Midland Railway Company*, decided in 1853, the defendants had caused notices to be personally served on a number of the fishermen at Scarborough. By these notices the defendants declared that they would not carry fish, except subject to certain conditions limiting their responsibility, and stated that the station clerks and servants of the company had no power to alter these conditions. The fishermen

objected much; there was somewhat of a riot; and the notices were torn up. After this the plaintiff sent fish by the railway. There was a controversy at the trial as to whether he was one of the persons served with the notice or not. The Judge told [* 506] the jury that if they * thought the plaintiff was one of those served with the notice, they might infer from that fact a special contract according to its terms; and he advised them to draw that inference from the receipt of the notice, and the subsequent sending of the goods, unless in the interim the plaintiff had unambiguously refused to deliver the goods on the terms of the notice, and the defendants had acquiesced in that refusal. The jury having found that there was a special contract, the Court of Queen's Bench held that the direction had been right and the verdict was not disturbed. In this case, also, I think that the Court were right; but there is no doubt that many persons thought it hard that a special contract to abide by a notice should be inferred from the acts of a man who supposed himself to be protesting against it; and this case also was, as I conceive, in the contemplation of the Legislature, when passing the Railway and Canal Traffic Act, 1854.

The Great Northern Railway Company v. *Morville*, 21 L. J. Q. B. 319; *The York, Newcastle and Berwick Railway Company* v. *Crisp*, 14 C. B. 527, 23 L. J. C. P. 125; *Hughes* v. *The Great Western Railway Company*, 14 C. B. 637, 23 L. J. C. P. 153, and *Slim* v. *The Great Northern Railway Company*, 14 C. B. 647, 23 L. J. C. P. 166, are cases decided in the course of 1852, 1853, and 1854, in which the Courts acted upon the decisions of *Austin* v. *The Manchester, Sheffield and Lincolnshire Railway Company* and *Carr* v. *The Lancashire and Yorkshire Railway Company*. It is not necessary to enter into the particulars of these cases, further than to say that their number leaves no doubt that there was dissatisfaction on the part of many persons with the existing state of the law.

Now if this be a correct statement of the authorities be- [* 507] fore 1854 (and I am not aware that I have omitted * anything), we find that by the express enactment of the Legislature in 11 Geo. IV. & 1 Will. IV. c. 68, no public notice or declaration could as such in any ways affect the liability of a carrier as regarded goods in general, though special contracts might be made as at common law; and it had been decided that such notices or declarations, when brought home to the customer, did operate as

being the basis of a special contract to carry on the conditions contained in such notices. It had also been decided that such conditions, when thus made part of a special contract, were binding, even when protecting the company from responsibility for all loss or injury, however caused. It had further been decided that a special contract ought to be inferred from the act of a party sending goods after the receipt of a notice, even where the party protested against the notice. And this state of the law, it was alleged by many persons, was taken advantage of by the railway companies, who had a practical monopoly of the carriage of goods, and, it was alleged, abused their advantages so as (in the language of Story, already cited) "to evade altogether the salutary policy of the common law."

It was under these circumstances that the Railway and Canal Traffic Act, 1854, was passed. The 7th section is in these terms: — [See *ante*, p. 287.]

The language of this section has been very severely criticised, and I do not attempt to defend it; for the section is very inartificially framed; and the difference of opinion that has existed as to its construction shows that, when looked at by itself, it is obscure. But I think that when the previous state of the decisions is looked to, and the language of the Statute is construed, as it ought to be, with reference to them, the intention of the Legislature is clear.

* In *Pardington* v. *The South Wales Railway Company*, [* 508] 1 H. & N. 392, 26 L. J. Ex. 105, Baron BRAMWELL threw out an opinion that a condition incorporated in a signed contract was not within the enactment at the beginning of the 7th section. And the same opinion has been twice strenuously maintained by Chief Justice ERLE, and I believe is entertained by others. But I think, when it is borne in mind that the decisions which were complained of, and which gave rise to the legislation, were all of them on the effect of conditions contained in special contracts, and all, except *Walker* v. *The North Midland Railway Company*, on the effect of conditions contained in signed contracts, it is impossible to suppose that the Legislature did not intend to provide for such cases, — I think that those who put such a construction on the Act can hardly be said, in the language of Lord COKE, in *Heydon's case*, to "make such construction as shall suppress the mischief and advance the remedy." And if we look to the words used, it seems to me, inasmuch as conditions (as I think) could not operate

unless contained in a special contract, and at all events, in practice, were only made operative as the basis of a special contract, that the language of the Act by which a proviso expressed to relate to a special contract is engrafted on an enactment in terms referring only to conditions, though doubtless inartificial and ill expressed, is by no means insensible. In truth it seems that the intention of the Legislature was to correct the practical mischief supposed to arise from the decision in *Carr* v. *The Lancashire and Yorkshire Railway Company*, that any conditions made in a contract with a railway company were binding because contained in a contract; but to provide that conditions, if adjudged to be reason-
[* 509] able * might still be made as heretofore; and also, having reference to the decision in *Walker* v. *The York and North Midland Railway Company*, to provide that the contract by which the condition is made binding must be express, and signed, and not constructive.

The true construction of the Act is, I think, that which is very clearly expressed by Lord Chief Justice JERVIS, in delivering the judgment of the Common Pleas in *Simons* v. *The Great Western*, and *The London and North Western* v. *Dunham*, where he says, "The fair meaning of the section, as it seems to me, is this: The first branch of it declares that all notices, conditions, or declarations made and given by the company shall be null and void, in so far as they go to release the company from liability for loss of or injury to goods, &c., in the receiving, forwarding, or delivering thereof, occasioned by the neglect or default of the company or its servants. But then it goes on to provide in the next branch that this shall not prevent the company from making such conditions which shall be adjudged by the Court or Judge before whom any question relating thereto shall be tried to be just and reasonable. And further, though just and reasonable, such condition or special contract shall not be binding unless signed by the person sending or delivering the goods."

This judgment was adopted by the majority of the Queen's Bench, in the present case, and by the majority of the Exchequer Chamber in *M'Manus* v. *The Lancashire and Yorkshire Railway Company*. The Judges who concurred in these decisions were Lord CAMPBELL, C. J., Lord Chief Justice JERVIS, Mr. Justice CRESSWELL, Mr. Justice WILLIAMS, Mr. Justice CROMPTON,
[* 510] Mr. Justice CROWDER, and Mr. Justice WILLES. * certainly

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forming a very great weight of authority; but undoubtedly there is great authority on the other side; and your Lordships will probably rather be influenced by what you consider the value of the reasons on which the judgments are founded than on the names of those who joined in them.

I shall now proceed to answer your Lordships' questions, assuming that I have established that a condition exempting a railway company from liability for loss or injury done to goods occasioned by the neglect or default of the company or its servants is void, unless it be such as the Court, as a matter of law, adjudges to be reasonable, and unless also it is contained in a signed contract.

I answer your Lordships' first question in the negative. I think the condition is not a just and reasonable condition within the meaning of the Act.

If the effect of the condition were merely to stipulate that the carriers should not be responsible for any loss or injury accruing to the articles from accident (other than the act of God or the Queen's enemies), leaving them liable for all loss or injury which could be shown to arise from their neglect or default, the condition would, I think, be reasonable, or rather it would not be within the enactment which renders void only those conditions which limit the liability of the company for loss or injury occasioned by neglect or default on their part. But I do not think that this is the meaning of the condition. A condition to that effect would afford the company some protection, but not much. It would oblige the plaintiff to give some evidence of negligence or default; but such evidence can generally be given, and when it was given, it would be a question for the jury. Now, the object of the companies is to withdraw the question from the jury. They say (I fear with some truth), that the bias of a * jury is so decidedly [*511] against them, that, especially in the county courts, they do not get impartial justice. And the Legislature have been so far impressed by this, that it is provided that the reasonableness of the condition shall be adjudged by the Court. I think that those who framed the condition in the present case intended to stipulate that the company should not be liable for any loss or injury accruing in the course of the carriage, so that there might be no question for the jury at all. And with this view they have chosen the very words used by the Legislature in the first Carriers' Act (11 Geo. IV. & 1 Will. IV. c. 68). Those very words were de-

termined in *Hinton* v. *Dibben* to exempt the carrier from liability for loss or injury occasioned by gross negligence of the carrier's servants. That decision was come to in 1842, now twenty years ago. It has, I believe, been uniformly acted on ever since; and I think that when we find carriers using those very words in a notice; we should construe them as intended to have that effect; and independently of this, I think, such must have been the object of their using the words, and the words are such as must, I think, have been understood in that sense by any ordinary person unacquainted with the decisions

Assuming that the condition has this meaning, is it reasonable? I think that a condition exempting the carriers wholly from liability for the neglect and default of their servants is *primâ facie* unreasonable. I do not go so far as to say that it is necessarily in every case unreasonable and void. A carrier is bound to carry for a reasonable remuneration, and if he offers to do so, but at the same time offers in the alternative to carry on the terms [* 512] that he shall have no liability at all, and holds * forth as an inducement a reduction of the price below that which would be reasonable remuneration for carrying at carrier's risk, or some additional advantage, which he is not bound to give, and does not give, to those that employ him with a common law liability, I think a condition thus offered may be reasonable enough. For the terms of a special contract entered into by a person who has the option of employing the carrier on the terms of the contract, or on the terms of his undertaking common law liability, are necessarily reasonable as regards the person having that option. Accordingly, in *Simons* v. *The Great Western Railway Company*, where the Great Western Railway Company gave notice that they carried goods in general on certain terms, and also that they would carry goods at special or mileage rates, it was held, on this principle, that the 15th condition, which stipulated (*inter alia*) that the company would not be responsible for damage to goods carried at special or mileage rate, however caused, was valid. But then, as it seems to me, to bring a case within this principle it must appear that the customer really had an alternative; that he had power, if he pleased, to have sent his goods at the ordinary rates and on the ordinary terms as to liability, and having that option elected to send them otherwise. But in the present case there is no such option: the defendants refuse to carry the goods at all

unless the customer either consents that they should be carried without liability for neglect or default, or agrees to pay whatever amount they choose to fix as an insurance. I do not deny that the carrier's risk is greater where the article is fragile and valuable than in other cases, and therefore the carrier's remuneration may be *increased where the article is of such a nature. [*513] But I think that the onus lies strongly on the carriers to show that the extra sum they demand is no more than is necessary to raise the ordinary charge to that which is reasonable with regard to the particular article. In the present case the charge which the company sought to impose was £10 per cent. on the value, or £21. No attempt was made at the trial to show that this was reasonable; probably because this high charge was intended to be a deterring rate, and it was felt by the company's advisers useless to attempt to show the contrary. But at all events no evidence was given to show that the charge was reasonable, and I think the onus of proving that it was, lay on the company. I cannot, therefore, look upon this as a case in which the defendants offer the customer a *bonâ fide* practical choice, either to have his goods carried in the ordinary way for a reasonable remuneration, or at his own risk at a lower rate, but as an instance of what is called by Story in the passage cited by me (*ante*, p. 293), attempting, by demanding an exorbitant fine, to compel the owner of the goods to yield to unjust and oppressive limitations on his rights, and I consequently come to the conclusion that the condition is unreasonable. This was the view taken by the Court of Queen's Bench, in *Harrison* v. *The London and Brighton Railway Company*. The majority of the Court of Exchequer Chamber reversed that decision, and of course in a lower Court I should be bound by that authority. But here, in your Lordships' House, I am not so bound; and after carefully considering the judgment of the majority delivered by Chief Justice ERLE, and the judgment of my Brother WILDE, who agreed with *the Queen's Bench, I have not [*514] been able to acquiesce in the opinion of the majority. I forbear, however, to enter into the arguments there used, as they are in print, and your Lordships can refer to them. I would only observe that in my view of the matter it is quite immaterial in this, as it was, I think in that case, whether the injury arose from the neglect of the company or not. The condition, as I think, was either void or valid *ab initio*, and before the injury accrued. If

it was valid it protected the defendants, even though the injury was occasioned by their neglect; if it was void, there was nothing to relieve the defendants from their common-law liability as carriers.

The next question asked by your Lordships is whether the plaintiff is entitled to have the verdict entered for him on the fourth plea. Your Lordships do not ask whether that plea is good. I have already indicated in what I have written, that in my opinion the plea ought to have gone on to show that the special contract was not only made, but was reasonable. In my view of the matter, however, this is of no consequence, as I think the plea, as pleaded, is not proved.

The substance of that plea is, that there was a special contract signed by George Whittingham for Meigh, who was the person delivering the goods to the defendants, whereby it was agreed that the defendants should not be responsible for the loss or injury to marbles, unless declared and insured according to their value. That the goods were marbles, and that they were not declared or insured by the plaintiffs. In my opinion, there is ample evidence of the averments that the goods were marbles, and that the value was not declared, and that they were not insured in any sense; and there is evidence, from which the jury might, and, as [* 515] I think, ought to have * found, that there was an agreement or special contract between the plaintiff, through his agent Meigh, and the defendants, that the defendants should not be responsible for loss or injury to these marbles, but I think that there is no evidence that this contract was in writing, or signed by any one.

The following seem to me the material parts of the evidence. First, there is a public notice by the defendants, that they will receive, forward, and deliver goods solely subject to the conditions thereunder stated; one of those conditions being, "That the company shall not be responsible for the loss of or injury to any marbles," &c., "unless declared and insured according to their value." There is evidence that Meigh & Co., who were the agents of the plaintiff, and who, for this purpose, must be considered as identified with the plaintiff, had notice of this condition, and were told, partly by word of mouth and partly by letters, that the company would not accept the marbles in question to be carried on any other terms, unless the plaintiff would pay 10 per cent. on their value. And then comes the letter of 1st of August, 1857, on which the question turns. It is in these terms (see *ante*, p. 289).

There is ample evidence that the signature of Meigh was affixed to this letter by a person having authority to sign it for him, and there is ample evidence that Meigh was the person delivering the goods to the defendants. The only question therefore left is, whether the signing of this letter was the signing of a contract to the effect that the defendants should not be responsible for loss or injury to the marbles.

The letter is an instrument in writing, and its construction is for the Court as a question of law. I take the law on this subject to be accurately stated in *Neilson* v. *Harford*, 8 [*516] M. & W. 823; 10 L. J. Ex. 493, where Baron Parke says, "The construction of all written instruments belongs to the Court alone, whose duty it is to construe all such instruments as soon as the true meaning of the words in which they are couched and the surrounding circumstances, if any, have been ascertained as facts by the jury; and it is the duty of the jury to take the construction from the Court, either absolutely, if there be no words to be construed as words of art or phrases used in commerce, and no surrounding circumstances to be ascertained; or conditionally, when these words or circumstances are necessarily referred to them."

This is, I believe, universally admitted to be an accurate statement of the law, though difficulty is at times felt in applying it. But the true meaning of the written instrument when ascertained, is only one step towards determining the question whether it constitutes a contract. If the parties to an agreement have reduced it to writing, that writing, at law, determines what is the contract, and evidence cannot be received to contradict, add to, subtract from, or vary the terms of the writing. Even if it be the fact that the contract has been by mistake written down in terms quite different from those the parties had really agreed on, the remedy is to be sought by a suit in equity to reform the contract, not by giving evidence to alter it. The principle on which this rule is founded is, that the parties having put the contract in writing, have made that writing the record of the contract. By doing so they have superseded all previous negotiations, and may not depart from the terms in writing. But then there is always a preliminary *question in each case; viz., whether the par- [*517] ticular writing is in that case the written record of the contract, by which the parties are bound, or whether it is merely one of the facts given in evidence, by which the agreement between the parties is to be proved.

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If the writing is the contract, the Judge is bound to exclude all evidence to show that the real intention of the parties to the agreement was different from that which appears on the writing, or, if such evidence has been received before it appeared that the contract was reduced to writing, he is bound to direct the jury to disregard it. This is the rule as to all evidence to show what the parties intended to express in the writing, though evidence may be received to apply the writing and enable the Court to understand what is the intention expressed by it.

This, I think, is the principle laid down by Sir James Wigram in his celebrated treatise on Extrinsic Evidence, s. 10, p. 9, when he says that the distinction "between evidence which is ancillary only to a right understanding of the *words* to which it is applied, and which is, therefore, simply *explanatory of the words* themselves, — and evidence which is applied to prove *intention itself* as an independent fact, is broad and palpable," and he adds that "this distinction is essential to a right understanding of the subject."

I apprehend that the question whether there is a contract in writing, depends upon the question whether the circumstances are such as to show that the agreement was put into writing so as to supersede all previous negotiations, and exclude all evidence of intention as an independent fact. And this, as I have already said, is a preliminary question to be decided by the Judge, not as [* 518] a * matter in his discretion, but as a mixed question of law and fact; and his decision upon such a point is open to review on such a rule as the present. And I propose now to examine the evidence in the case with a view to see whether it ought to have been decided that this contract was put into writing.

In deciding it, the nature of the writing alleged to be the agreement is always important, though not conclusive. Now, looking at the letter of the 1st of August, 1857, I find in it nothing requiring any parol evidence to explain the meaning of the words. It is a plain direction to send the marbles "not insured." That means, in ordinary language, without paying any insurance money, or entering into any contract of insurance respecting them. Your Lordships have to say whether the parties intended to make this letter the record of their contract, so as to abrogate all previous negotiation on the subject, and confine their rights and liabilities to those which, as a matter of law, would arise from a delivery and receipt of the goods on those terms. To me it seems that

they did not. I think that this letter is conclusive evidence of the fact, that Meigh refused to pay any insurance, which is a very material fact to go to the jury in determining what the contract was; but that the other facts in the case are to be taken along with it, not as what Sir James Wigram calls explanatory evidence, to enable the Court to understand what is the meaning of the words in a written contract contained in the letter of the 1st of August, but as evidence to prove intention as an independent fact; which is admissible, because the letter of the 1st of August is *not* the written contract, and which evidence would not be admissible if it were the written contract.

The parol evidence shows that notice was given to the plaintiff that unless the marbles were insured the defendants
* would not accept them except on the terms that they [* 519] would not be responsible for the loss or injury to them.
And, according to *Wyld* v. *Pickford*, and *Walker* v. *The York and North Midland Railway Company*, I think that a jury would be justified in finding, or perhaps I should say bound to find, that when, with that notice he sent the goods, he made a special contract that the company should not be responsible for loss or injury. But the parol evidence might have been different, and such as to show that notice was given to him that this company would not accept them, except on the terms of the Lancashire and Yorkshire Company, which are expressed so as more distinctly to limit the responsibility of the company, namely, not to be responsible for loss or injury, *however caused;* or on terms expressed so as not to limit the responsibility of the company so much, such as those of the South Devon Company, which stipulates that it will not be responsible for loss or injury unless caused by gross negligence or fraud on the part of the company or its servants. And, if the parol evidence had shown that the notice given by the defendants was in the terms of the notices of either of those companies, I think that the agreement which the jury would have been bound to find would be the agreement to carry with the responsibility more or less extensive which the parol evidence would have shown was that really intended. This was pointed out by my brother CROMPTON in his judgment below, but the force and effect of his argument did not appear to be appreciated by the counsel who argued at your Lordships' bar. To my mind it is conclusive to show that the parol evidence of what was brought to the notice

of the plaintiff is evidence of the class which Sir J. Wigram calls "evidence to prove intention itself as an independent
[* 520] * fact," which cannot therefore be admitted if the letter of the 1st of August was a contract.

In the judgment of the majority of the Exchequer Chamber, delivered by my brother MARTIN, it is argued that the letter is a contract between a customer and a carrier, and that the parties are therefore to be supposed to have the Carriers' Act in contemplation, and to use the word "insured" in the sense in which it is used in section 3 of that Act. But I think that this letter was expressed not with reference to the Carriers' Act, but to the previous negotiations. I base my opinion upon the conclusion which, as a mixed question of law or fact, I draw from the whole of the evidence, that the letter was not written or sent, as being a reduction of the contract into writing, so as to exclude the evidence of the previous negotiations. It chances in this case that the intention of the parties, proved by these negotiations and the letter together, was to make an agreement to carry, not being responsible for loss or injury to the marbles; but it might have happened that a letter in the same terms was written, and yet that the intention of the parties, as shown by the negotiations, was to make an agreement to carry with a responsibility not so limited as this, though still with a responsibility less than that of carriers at common law; and if it had been so proved, I think that would have been the agreement.

I therefore think that there was not a special contract signed, as I think that the letter which was signed was not a contract, and that therefore the plaintiff is entitled to the verdict on this plea.

In answer to the last question, I think the plaintiff is entitled to have the verdict entered on the fifth plea. I have already at some length given my reasons for thinking that the condi-
[* 521] tion was not just or reasonable, * and that even if it had been reasonable the plaintiff did not assent to it, within the meaning of the plea. He did, it is true, assent to it in one sense, but I think that after verdict the allegation in the plea would be understood to mean that he assented to it so as to bind himself; and as I have already argued at some length, he did not bindingly assent to it, inasmuch as there was no contract signed on his behalf.

[* 566] * THE LORD CHANCELLOR (Lord WESTBURY): My

Lords, this is a question of great interest to the community at large, and of special importance to the railway companies. We are much indebted to the learned Judges for the elaborate opinions which they have given in this case. I regret that those opinions are much at variance with one another. I attribute that difference of opinion to the conflicting decisions upon this subject; but, with deference, I cannot believe that there is in the matter itself any very serious difficulty.

The question depends almost entirely upon the construction to be given to the seventh section of the Railway and Canal Traffic Act, passed in the year 1854. My Lords, I concur with the interpretation put upon that section by Lord Chief Justice JERVIS, in the case of *Simons* v. *The Great Western Railway Company*. I think the true construction of that section may be expressed in a few words. I take it to be equivalent to a simple enactment that no general notice given by a railway company shall be valid in law for the purpose of limiting the common law liability of the companies as carriers. Such common law liability may be limited by such conditions as the Court or Judge shall determine to be just and reasonable; but with this proviso, that any such condition so limiting the liability of the company shall be embodied in a special contract in writing between the company and the owner or person delivering the goods to the company, and which contract in writing shall be signed by such owner or person. It is true that the section is expressed in a confused manner, but those conclusions, I think, are plainly *deducible from the cumbrous lan- [* 567] guage which is there employed.

The first point, therefore, which arises in the present case is this: Is the condition on which the company in the present appeal rests its defence, a just and reasonable condition?

It is important, in the first place, to observe, that not only does the section of the Act of Parliament to which I have referred, declare that the general conditions shall be invalid so far as they seek to affect the common law liability of railway companies as carriers, but the words expressly state that any condition, having for its object to relieve a company from liability occasioned by the neglect or default of such company, shall be null and void. Now if the present condition had been embodied in a contract between the company and the owner of the goods delivered to be carried by that company, the necessary effect of such a contract would be, that it

would exempt the company from responsibility for injury, however caused, including therefore gross negligence and even fraud or dishonesty on the part of the servants of the company. For the condition is expressed without any limitation or exception.

I am therefore, in the first place, clearly of opinion, that the condition insisted upon by the company, even if it had been duly embodied in a special contract between the parties to this appeal, is a condition which it would have been the duty of a Court or Judge to hold to be neither just nor reasonable.

The effect, therefore, of this view of the case would be that the plaintiff, Peek, in the Court below, would be entitled to a verdict upon the fifth plea; for the fifth plea depends entirely upon the averment that the condition was just and reasonable.

[* 568] * But, my Lords, it is not only necessary that the condition should be just and reasonable, but it is also necessary, as I have already observed, that it should be embodied in a special contract in writing, signed by the owner of the goods, or the person delivering the goods. And the second question that arises (although in truth, the first point would dispose of the whole case), is whether there does exist in this case any special contract in writing, embodying the condition, signed by the owner of the goods, or the person delivering the goods. It is insisted by the plaintiff that that requisition of the statute is answered and fulfilled by the letter of the 1st of August, 1857; it is contended by the company that the words which are found in that letter, "not insured," do refer to and incorporate the condition. I am clearly of opinion, that there is no foundation for that contention on their part, and I am also of opinion that it is not competent by any description or parol evidence, so to interpret the words "not insured," as to embody, or incorporate, the condition itself into the letter, and thereby make it a special contract in writing. Such special contract in writing, signed by the party delivering the goods, must itself, either in terms or by distinct reference, set out or embody the condition in question. But I am of opinion, that those words "not insured" do not refer to the written condition, or afford any ground upon which the written condition can be regarded as incorporated with the letter. In order to embody in the letter any other document or memorandum, or instrument in writing, so as to make it part of a special contract contained in that letter, the letter must either set out the writing referred to, or so clearly and definitely refer to the writing,

that by force of the reference the writing itself becomes part of the instrument it refers to.

* I am, therefore, of opinion that even if the condition [* 569] had been just and reasonable, there would not be found in the present case any special contract in writing sufficient to answer the exigency of the seventh section; and I should therefore have been of opinion that, in the Court below the plaintiff, Peek, was entitled to a verdict on the fourth plea. On every ground, therefore, my Lords, I humbly submit to your Lordships that the judgment of the Court of Exchequer Chamber is wrong, and that the plaintiff is entitled to a verdict upon the fourth and fifth pleas in the action.

Lord CRANWORTH. My Lords, the question to be decided by your Lordships, on this appeal is, whether, on the issues joined on the fourth and fifth pleas, the verdict ought (considering the enactments of the Carriers' Act, and of the Railway and Canal Traffic Act), to be entered for the plaintiff or the defendants.

The fourth plea is to the following effect: [His Lordship read it, see *ante*, p. 287.]

By the Carriers' Act, 11 Geo. IV., and 1 Will. IV., c 68, various enactments were made regulating the rights and duties of carriers in reference to goods delivered to them to be carried. And the sixth section provides that nothing in the Act contained should extend to annul or affect any special contract between the carrier and other parties for the conveyance of goods.

Then came the Railway and Canal Traffic Act, 17 & 18 Vict. c. 31, on the seventh section of which the present question arises. [His Lordship read it, see *ante*, p. 287, *n.*]

The special contract referred to in this proviso must, I think, be a contract similar to that which by the sixth section of the 11 Geo. IV. and 1 Will. IV., c. 68, is excepted * from the [* 570] general operation of that Act, the only difference being that by the express provision of the latter Act, every such special contract must be signed by the party delivering the goods.

The question on the fourth plea is, whether there was such a contract in writing, signed by the plaintiff or his agent, agreeing that the goods in question should be carried on the terms stated in the plea, *i. e.*, that the company should not be responsible for injury to them, unless declared and insured according to their value.

The only document which can be contended to be a document

answering this description, is the letter of the 1st of August, 1857. This letter may be taken to be a document signed by the person delivering the goods; but unless it is apparent on the face of it that the person signing it thereby agreed that the company should not be responsible for injury to the goods, unless they were insured according to their value, it is not a contract which sustains the plea. I think it is wholly insufficient for this purpose. It shows that the person sending the goods chose to send them with the incidents attaching by law to the sending of them uninsured; but it does not show that he agreed to a stipulation by the defendants, that they were to be absolved from responsibility by reason of the goods being so sent; still less that he so agreed by reason of their not being insured according to their value. Even if it could be held that there is a well-recognized distinction in the carrying trade between the extent of liability in the carriage of goods where they are insured and where they are uninsured, it by no means follows that insurance must necessarily be according to the value of the goods. It might be by doubling or trebling the ordinary rate of charge, without reference to the value of the goods to be carried.

[* 571] * It is not necessary to consider whether there was not in this case what would, independently of the statute requiring a signed contract, have amounted to a valid contract absolving the defendants from responsibility in consideration of their demanding only the lower rate of 55*s.* per ton for the goods carried. Looking to all which had previously passed between the plaintiff's agent and the defendants, the jury might perhaps reasonably come to the conclusion that such a contract had been proved; but that would not be a special contract in writing, such as is required by the statute. There is no written document signed by the person delivering the goods, either stating the terms on which, according to the fourth plea, the marbles were to be carried, or referring to any other document which on general principles of law could be referred to, and which would prove those terms. On these grounds, I think the verdict ought to be entered for the plaintiff on the fourth plea.

I am farther of opinion that on the fifth plea also, the verdict should be entered for the plaintiff. That plea is as follows: [His Lordship read it, see *ante*, p. 288.]

The evidence may be taken to show that the marbles were de-

livered by the plaintiff to the defendants, subject to the condition that the defendants would not be responsible for any injury to them, unless, in addition to the ordinary charge of 55*s.* per ton, the plaintiff would pay, by way of insurance, 10 per cent. on their value. By the express terms of the statute, no such condition is valid unless the Judge is satisfied that it is a just and reasonable condition. I do not think that there is anything appearing on the special case which ought to have satisfied the Judge, or by consequence, which now ought to satisfy your Lordships, that this was such a condition. For this purpose, I think it was incumbent on the defendants * to show by evidence, not [* 572] only that marbles were subject to more than ordinary risk when carried by railway, but, farther, that 10 per cent. on their value was no more than a fair compensation to the carrier for that additional risk. Whether there is or is not more than ordinary risk in the carriage of marbles, is a question not of law, but of fact, and as to which, therefore, a Judge cannot have any judicial knowledge. I own it is a surprise to me to learn, as a matter of fact, that it is so. It is according to the every-day experience of all of us, that goods of a much more fragile nature than marbles, such, for instance, as glass and china, when properly packed, are sent great distances both by railway and by sea, transferred often from a railway to a ship, and thence again to a railway, and yet that they usually reach their destination without injury. This of course has no bearing on the present question, except so far as it shows that there ought to have been evidence on the point. But even if it had been shown that there is more than ordinary risk in the conveyance of marbles, still I think the defendants were bound to show farther, that 10 per cent. on the value was no more than a reasonable extra charge. If the defendants are right in their contention, they could have had no difficulty in establishing all which (if uncontradicted) would be necessary; some of their own servants would probably have been able to depose to the fact of additional risk; and if it was shown that 10 per cent. is the usual extra charge, that, if uncontradicted, would probably have been all which the Judge would have required. But in the absence of any evidence, I cannot think that the Judge was warranted in holding that the condition was just and reasonable. The onus of proof, it will be observed, is on the company. The plaintiff was not bound to show that the condition was unjust or unreasonable.

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[* 573] * Even, however, if it had been shown that an extra charge of 10 per cent. on their value was no more than was reasonable by reason of extra risk, still I think that the fifth plea was not proved, for I do not think that the plaintiff assented to the condition in the sense in which such assent would be understood after verdict; *i. e.*, I do not think that he agreed that the goods should be carried by the defendants on the terms that they should be absolved from all liability by reason of there being no insurance. The fair interpretation of what passed was, in my opinion, that the plaintiff sent the goods desiring the defendants to take them with such liabilities only as attached to them as carriers of goods uninsured. The plaintiff had full notice of the condition imposed by the defendants, but I do not interpret what he said or did as implying that he agreed to send the goods on the terms embodied in that condition, but only that, having notice of its terms, he did not choose to purchase, on the terms offered, the extra security which would be afforded by insurance.

I have not, in the few observations I have offered to your Lordships, adverted specially to the opinion of the learned Judges who assisted the House, but this is not because I do not feel how valuable that assistance has been. They have differed in the opinions which they have delivered here, as they did in the Courts below, but, thus differing, they have presented the question in every point of view, and it is mainly on an attentive consideration of their arguments that I have formed the opinion with which I have troubled your Lordships.

Lord Wensleydale. My Lords, I am sure your Lordships are greatly indebted to the learned Judges for the extra-
[* 574] ordinary pains * they have taken in considering the questions left to them, and the full and able opinions which they have given to your Lordships. We have to endeavour to discover the intentions of the Legislature, in a clause which is far from clearly expressed, and was probably drawn by more than one person.

I have satisfied myself, however, after full consideration of the very learned and careful opinions which we have heard, that I ought to concur with the majority of the learned Judges, who have given their advice, and that the judgment of the Exchequer Chamber ought to be reversed.

The questions proposed to the Judges were these: [His Lordship read them, see *ante*, p. 291.]

The conclusion to which I have come is, that the first question ought to be answered in the negative, and the second and third in the affirmative.

Mr. Justice BLACKBURN, in his very able and clear judgment, has fully stated and explained most of the various decisions which have taken place as to the liability of carriers. At one time, in this country, it was thought by some that notices given by carriers of the conditions on which they would carry, operated as restrictions of the public character of a carrier, according to which only he was bound to carry, and not as being evidence of a special contract. By others it was treated as evidence of a special contract. Since the Carriers' Act, 11 Geo. IV. and 1 Will. IV., c. 68, there was no longer a question on this subject.

The first section of that Act expressly provides that no public notice or declaration should be deemed or construed to limit, or otherwise affect, the liability of public common carriers, and that such carriers should be liable, at common law, to answer for the loss of, or injury to, *any articles in respect [*575] whereof they may not be entitled to the protection of the Act, any public notice made by them, and given contrary thereto, or anywise limiting such liability notwithstanding; but a subsequent section (6) provided that nothing in the Act contained should annul, or in any wise affect, any special contract between such common carrier, or any other parties for the carriage of goods.

Numerous subsequent cases between the years 1832 and 1854 established that a carrier might make a contract by notice limiting his responsibility, even in cases of gross negligence or misconduct. At length, such having become frequent, it was suggested, in the case of *Carr* v. *The Lancashire and Yorkshire Railway Company*, that, if any inconvenience should arise from such contracts being entered into, it was not matter for the interference of Courts, but that it must be left to the Legislature, who might, if it pleased, put a stop to this mode which the carriers had adopted to limit their liability.

The Legislature apparently answered that appeal by passing "The Railway and Canal Traffic Act, 1854" (17 & 18 Vict. c. 31), and the sole question is, What is the construction to be put upon that ill-penned Act? The terms of the 7th section of the Act are these: [His Lordship read the first part: see *ante*, p. 474, *n.*].

Then it is provided that no greater damages should be recovered

in the case of animals than those mentioned in the Act. And then, at the end of the section, there is this proviso, requiring every specific contract to be signed by the person delivering animals, articles, goods, or things for carriage.

I have considered these terms fully, and I have satisfied
[* 576] * myself that the Legislature meant to allow carriers to limit their responsibility by reasonable conditions, but that a Judge in an ordinary trial, or possibly the Court on a trial at bar, should determine whether those conditions were reasonable or not, subject to the control of the Court above. The provision that the company may make conditions, if thought reasonable by the Judge or Court, comes by way of qualification of the general prohibition of exempting companies from losses arising from their own neglect or default, or that of their servants. It means that, notwithstanding that general prohibition, they may make a fair bargain for their remuneration, such bargain being sanctioned by the Judge or Court. When the peculiar condition is sanctioned by the Judge and the Court, in case of appeal, as reasonable, the previous prohibition is done away with.

But it was also intended that no special contract should be binding, unless signed by the party sending or delivering goods to the carriers. It is, however, impossible to suppose that the Legislature meant that such an express written contract should contain *any* species of conditions on which the parties could agree, whether unreasonable or not, which they could not impose where the contract was implied. It seems to me that it was intended that every special contract for carriage, *i. e.*, subject to any other than the common law liabilities of the carrier, should be a contract in writing, and signed as mentioned, and should contain reasonable conditions.

I agree, therefore, entirely with the view of this statute entertained by Chief Justice JERVIS, in *Simons* v. *The Great Western Railway Company*, and expressed in very clear and intelligible terms. [His Lordship read it: see *ante*, p. 304.]

[* 577] * This being, as I think, the true construction of the statute, we have then to decide the three questions which your Lordships have put to the Judges.

The first question is, whether the condition is a just and reasonable condition, within the true intent and meaning of the 17 & 18 Vict. c. 31? And connected with that is the third question: Is

the plaintiff entitled to have the verdict entered for him on the fifth plea, which states that the goods were carried on a just and reasonable condition, made by the defendants and assented to by the plaintiff, that the defendants should not be responsible for loss or injury to marbles, unless declared and insured according to value, and that the goods were marbles, and were not insured?

What then is the meaning of the alleged condition? Does it mean to protect the company from all liability, however occasioned? Or, is there an implied exception of the default or neglect of the company or its servants?

I think it impossible to give this construction to the alleged condition, for the condition is pleaded in bar to the *whole* cause of action. The condition must be proved to apply to loss or damage of every kind, in order to sustain this plea. To be a good plea, in the limited sense, it should have been pleaded in bar to all, except to that part of the damage which was caused by the neglect or default of the company and its servants; probably the principal part of the damage sustained. As the plea is pleaded, it is unquestionably meant as an answer to the whole damage sustained.

In that sense, it is quite clear that the condition was unreasonable.

As such marbles are liable, more than many other goods, [* 578] to be damaged by breakage or damp, and to require greater and more constant care to protect them from that damage, in the course of their transit to the place of destination, and the damage when done is generally more serious, I think it would be perfectly fair and reasonable to ask an increase of the rate of remuneration above that of ordinary goods; and if the notice had stipulated that the defendants would not carry marbles, etc., at the ordinary rate for goods, but should require a larger compensation, to be agreed upon, or a specified or fixed sum, being apparently reasonable, I do not doubt that such a condition would have been perfectly reasonable, within the meaning of the Act. I need not inquire whether the offer of an alternative rate, as some of the Judges have suggested, might be reasonable also. But I am clearly of opinion that it is not reasonable for a carrier to say, I will not be liable as a carrier at all, for neglect, or any other injury in the course of the carriage of the goods delivered to me unless I receive a price for insuring the goods against *all* pos-

sible loss. I will not be responsible for any loss, unless you pay me a fixed sum for indemnifying you against all.

I must add, with reference to this part of the case, that, if my reasoning above stated is correct, the plea that there was a condition, simply, is a bad plea, therefore the verdict ought to be entered for the plaintiff; for under the Act, a special contract would be necessary to exempt the company from responsibility.

The next question is, Is the plaintiff entitled to have the verdict entered for him upon the fourth plea?

The fourth plea is, that the goods were carried on the terms of a special contract signed by the parties delivering, whereby [*579] it was agreed that the defendants *should not be responsible for the loss or injury to marbles, unless declared and insured according to their value; and the goods were marbles, and not insured.

I am clearly of opinion that the plaintiff was so entitled, for it is perfectly clear that no special contract at all was entered into; certainly not such a special contract as I think the statute requires, that is, a contract for the receiving, carrying, or delivery of these goods, signed by the plaintiff, or the party delivering such goods for carriage. There was no contract, in truth, for the carriage of the marbles on any special terms. The correspondence between Mr. Corden and Mr. Meigh about sending these marbles, ultimately comes to this, that they were to be sent without any special terms at all, but were delivered in the ordinary way to the defendants as carriers, subject to their ordinary liabilities as such.

The fifth plea is that the goods were carried subject to a just and reasonable condition, made by the defendants and assented to by the plaintiff, that the defendants should not be responsible for the loss or injury to the marbles unless declared and insured according to their value, and that the goods were marbles, and were not insured.

In answering the former questions, I have already given my reasons for saying that this plea is not proved.

I think, therefore, that the judgment ought to be reversed.

Lord Chelmsford. My Lords, I have the misfortune to differ from all my noble and learned friends who were present at the hearing of the appeal. When I found that this was likely to be the case, I thought it right to reconsider carefully the grounds of the opinion which I had formed, in order to discover the error

into which I was satisfied I must have fallen. But though I have sought for reasons I have not * been able to find [* 580] any which are sufficiently satisfactory to my own mind to lead me to adopt the conclusion at which my noble and learned friends have arrived. My only consolation is, that if I err in judgment in this case, my error is countenanced by many Judges of great learning and ability.

At the outset of this inquiry the question arises whether your Lordships concur in the opinion of Lord Chief Justice JERVIS, and the Court of Common Pleas, in *Simons* v. *The Great Western Railway Company*, and *The London and North-Western Railway Company* v. *Dunham*, and the judgment of the Court of Exchequer Chamber in *M'Manus* v. *The Lancashire and Yorkshire Railway Company*, decided after the judgment of the Queen's Bench in the present case, but before the argument in the Exchequer Chamber, where the counsel for the company was compelled to abandon the fifth plea, in consequence of that decision. If those two cases were rightly decided, the judgment of the Exchequer Chamber under consideration cannot be supported. In the case decided in the Common Pleas, Lord Chief Justice JERVIS, in summing up his examination of the Statute of the 17 & 18 Vict. c. 31, said, "The result seems to be this: a general notice is void, but the company may make special contracts with their customers, provided they are just and reasonable, and signed; and whereas the monopoly created by railway companies compels the public to employ them in the conveyance of their goods, the Legislature have thought fit to impose the further security that the Court shall see that the condition or special contract is just and reasonable." In *M'Manus* v. *The Lancashire and Yorkshire Railway Company*, the same view of the statute was taken, the Exchequer Chamber in effect deciding that there was no * difference between notices, [* 581] conditions, or declarations made and given by a railway company and special contracts entered into with them; but that all, without distinction, must be signed, and must be such as the Judge, before whom any question relating to them may be tried, shall adjudge to be just and reasonable.

In two prior cases, *Wise* v. *The Great Western Railway Company*, 1 Hurl. & N. 63; 25 L. J. Ex. 258, and *Pardington* v. *The South Wales Railway Company*, the Judges of the Court of Exchequer appeared to consider the provisions in the statute as to

notices and conditions to be distinct from those relating to special contracts.

In order to determine the correct interpretation of the Act, it is necessary to consider shortly the previous state of the law. Before the passing of the Carriers' Act, 11 Geo. IV. and 1 Will. IV. c. 68, carriers had been in the habit for a long course of years of protecting themselves against their extensive common law liability by means of general notices. These notices afforded them no protection unless they were brought home to the knowledge of the customer; but when so known, they entered into and formed part of the terms upon which the goods were to be carried in each particular case. But besides these notices, upon the mere knowledge of which the terms of carriage were fixed between the parties, it was always open to the carrier and the owner of goods to enter into special agreements with respect to their carriage.

This distinction between notices and agreements is recognised by the Carriers' Act; for, while it excludes the liability of carriers for the loss of certain goods above the value of £10 except upon certain terms, and prevents the limitation of their liability [*582] for any other goods * by any public notice or declaration, it provides that nothing in the Act contained shall annul or in any way affect any special contract for the conveyance of goods and merchandises. After the passing of this Act, although carriers could no longer limit their liability by a general notice, yet it was held in several cases, amongst which it will be sufficient to mention *Carr* v. *The Lancashire and Yorkshire Railway Company*, and *Austin* v. *The Manchester, &c. Railway Company*, that a notice expressing the terms on which goods would be carried delivered to the owner of the goods and assented to by him, amounted to a special contract which might exempt the carrier from liability even for negligence.

It was after these decisions, and in all probability in consequence of them, that the provisions in question were inserted in the 17 & 18 Vict. c. 31. That Act, in the last proviso of the 7th section, provides that nothing therein contained shall alter or affect the rights, privileges, or liabilities of any company under the 11 Geo. IV. and 1 Will. IV., c. 68. Therefore the limitation of the carrier's liability as to certain descriptions of goods, the prohibition against general notices and the right to make special contracts were all continued. The Legislature by the 7th section of

the Act evidently intended with reference to what had been previously enacted by the Legislature and decided by the Courts, to place the relation between railway and canal companies and their customers upon a more reasonable footing for the future.

To guard therefore against the unreasonableness of companies being allowed to protect themselves from responsibility for negligence, it enacts, in the first place, that companies should be liable for any loss or injury occasioned * by the neglect [* 583] or default of themselves or of their servants, notwithstanding any notice, condition, or declaration made and given by them contrary thereto, and it declares "every such notice, condition, or declaration to be null and void." Having thus protected the public by preventing the companies relieving themselves from liability for negligence by a notice, condition, or declaration, the section proceeds to provide for the case of conditions imposed by companies upon the receiving, forwarding, and delivering of goods; and having an eye to the decisions which had determined that a notice delivered to the owner of goods, and assented to by him, amounted to a contract as to the terms of carriage, and knowing that the assent which is supposed to be given at the time of the delivery of the goods is often without any actual knowledge of the conditions contained in the delivery ticket, it provides that only such conditions shall be made (that is, shall enter into the terms of the contract) "as shall be adjudged by the Court or Judge before whom any question relating thereto shall be tried to be just and reasonable." The section having thus provided fully against limitation of liability by notices or conditions (which are evidently used as synonymous expressions) in one case absolutely prohibiting them, in the other submitting their reasonableness to the judgment of the Judge, provides by one of its many provisoes that no special contract between such company and any other parties shall be binding upon, or affect any such party unless the same be signed by him or by the person delivering such animals, articles, goods, or things respectively for carriage.

I have no doubt (and here I have the concurrence of my noble and learned friend Lord Cranworth) that the special contract intended by this proviso is the same * description of con- [* 584] tract which is mentioned in the 6th section of the 11 Geo. IV. and 1 Will. IV. c. 68 (which Act by the very next proviso in this 7th section is to be in force), with this additional provision that

the special contract shall not be binding unless signed. I suppose it may be assumed that under the 11 Geo. IV. and 1 Will. IV. c. 68, the carriers were at liberty to make special contracts with the owners of goods upon any terms of carriage that might be mutually arranged between them. If so, and the special contracts contemplated in the two Acts are of the same description, what is there in the 7th section of the latter Act to deprive the parties of their liberty to agree upon their own terms unless a Court or Judge shall adjudge them not to be just and reasonable?

The appellant contends for a construction of this rather complicated and involved section, which would leave no distinction between notices, conditions, or declarations and special contracts, but would require that notices, &c., should be signed, and that special contracts should, in the opinion of the Judge, be just and reasonable. I cannot accede to this interpretation of the section. I find a marked distinction in terms between the two species of engagements, and I must suppose that the Legislature intended something different by their difference of language. Nor can I perceive anything unreasonable in supposing that the Legislature meant to apply a different rule to notices and to special contracts. It might be very inconvenient, when goods are to be sent by railway, if the terms on which they are to be carried are ordinary and reasonable, to require that a contract should be signed upon each occasion, the owner of the goods being sufficiently protected against any surprise, or the imposition of hard terms, by interposing the judgment of the Judge as to their unreasonableness.

[* 585] * But it is quite a new principle that parties are to be debarred from making contracts for themselves, not being contrary to law or to public policy, because the uncertain opinion of some Judge who accidentally has to try any question relating to them should adjudge them not to be just and reasonable. I venture to think that the best test of the reasonableness of the contract is not the occasional opinion of the Judge who happens to preside in court when the contract is in question, but of the parties who have deliberately chosen to enter into it.

Why, if owners are willing, upon terms which they consider advantageous to themselves, to undertake the risk of all goods sent by railway, even including the negligence of servants of the company, and agree with the company to bind one another by a special contract duly signed to that effect, should a Judge be in-

vested with authority to say, Whatever you may think, I consider your contract not just and reasonable, and however willing you may be to be bound, I release you from your engagement.

I am, of course, not intending to deny the power of the Legislature to impose any restrictions, however unreasonable, upon contracts; but I am insisting upon the unreasonableness, as a ground for adopting a different construction of the Act, if the words are fairly capable of it. Now, it appears to me that the 7th section is not only capable of, but demands a different construction from that which is contended for by the appellant, not only from the change of expression in the different provisoes of the section, but also from the difference of the subjects to which each part of it is applicable. The former part is confined to notices or conditions (treating these as the same), and providing for them in every case, by declaring a certain class of them to be null and void, *and all of them to be subject to the approval of a [*586] Judge. The latter deals with "special contracts" (a description made familiar to the Legislature by the Act of 11 Geo. IV. and 1 Will. IV. c. 68, which was before it when it was framing this 7th section of the latter), and does not prohibit such contracts from containing terms at variance with the provisions respecting notices; but merely provides that they shall not be binding unless they are signed.

I think, therefore, that where a special contract is entered into, and duly signed between a railway company and other parties within this section, it is not subject to any judicial discretion as to whether it is just and reasonable in its character or not.

I think that the condition, that the defendants should not be responsible for the loss or injury to marbles unless declared and insured according to their value, is a just and reasonable condition. In this respect also I concur with my noble and learned friend, Lord CRANWORTH. Of course, if the condition means that the defendants were to be exempt from responsibility for the neglect and default of themselves or of their servants, it would be null and void by the express words of the Act. But this interpretation would be contrary to what must have been the understanding of the parties. It must be assumed, in considering this question, that the plaintiff assented to this condition, and that his goods were to be carried on the terms which it contained.

Now, both parties must be taken to have known the Act of

Parliament, and could not be supposed to have agreed upon conditions of carriage of the goods, which the Act expressly declares shall be null and void. The words of the condition, therefore, must have been understood by both parties, and ought reasonably to be [* 587] * construed as if there had been an exception of the default or neglect of the defendants or their servants, which exception, I think, the Act itself would engraft upon the condition; and with this reasonable (not to say necessary) limitation of the generality of its terms, the condition appears to be unobjectionable.

I think that the special contract alleged in the fourth plea was established by the evidence, and that the defendants were entitled to the verdict upon that plea. The letter of the 1st of August, 1857, directs the defendants to forward the cases of marbles, "not insured." Those words are not self-interpreting, but require some explanation to ascertain their particular meaning between the parties. I think that the previous correspondence might be resorted to to furnish this explanation, although the letter in question contains no reference to it. It seems to me to fall exactly within the principle stated with so much clearness by Sir James Wigram in his admirable treatise, as it is "evidence which is ancillary only to a right understanding of the words to which it is applied, and which is simply explanatory of the words themselves," and not "evidence which is applied to prove intention itself as an independent fact." The intention is clear, that the goods shall be carried "uninsured." What this means is explained by the notices which were delivered to Mr. Meigh, containing the condition as to the responsibility of the defendants, upon the footing of which all the subsequent correspondence proceeded. The correspondence cannot be used as part of the agreement, as there is no reference to it in the letter which accompanied the delivery of the goods, but that letter constitutes the agreement, and with the explanatory aid of the correspondence is rendered complete in itself.

[* 588] It will be collected from what I have already said * that, in my opinion, the judgment ought to have been entered for the defendants upon the fifth plea, which alleges that the goods were carried subject to a just and reasonable condition made by the defendants and assented to by the plaintiff. I think it is competent to a company, under the 17 & 18 Vict. c. 31, to impose conditions upon the carriage of goods without having a signed con-

tract, provided the conditions do not extend to exonerate them from liability for wilful neglect or misfeasance, and are such as ought to be adjudged to be just and reasonable. For the reasons which I have given, I consider that the condition exonerating the defendants from responsibility for the loss of, or injury to, certain articles (including marbles), unless declared and insured according to their value, does not extend to losses or injuries arising from neglect, or default of the company or its servants, and, therefore, that the condition ought to have been adjudged to be just and reasonable. For these reasons I think that the judgment of the Exchequer Chamber ought to be affirmed.

Judgment of the Court of Exchequer Chamber reversed; and judgment of the Court of Queen's Bench affirmed.

Lords' Journals, 28 July, 1863.

Richardson and Sisson v. North Eastern Railway Company.

L. R., 7 C. P. 75–83 (s. c. 41 L. J. C. P. 60; 26 L. T. 131; 20 W. R. 461).

Railway Company. — Carriers. — Bailee. — Negligence. [75]

A valuable greyhound was delivered by its owner to the servants of a railway company, who were not common carriers of dogs, to be carried, and the fare demanded was paid. At the time of delivery the greyhound had on a leathern collar with a strap attached to it. In the course of the journey, it being necessary to remove the greyhound from one train to another which had not then come up, it was fastened by means of the strap and collar to an iron spout on the open platform of one of the company's stations, and, while so fastened, it slipped its head from the collar and ran upon the line and was killed: —

Held, that the fastening the greyhound by the means furnished by the owner himself, which at the time appeared to be sufficient, was no evidence of negligence on the part of the company.

Appeal against a decision of the County Court of Westmoreland, holden at Appleby, in an action brought by the plaintiffs, joint owners of a greyhound bitch, to recover £50 damages against the North Eastern Railway Company, for the loss of the animal through the alleged negligence of the company's servants.

1. On the 19th of February, 1870, the greyhound was taken by Sisson to the defendants' station at Temple Sowerby, for the purpose of being conveyed thence to Morpeth, another station on the defendants' line of railway. Sisson applied to the collector at Temple Sowerby station, and stated that he required the grey-

hound to be conveyed to Morpeth. He paid the fare which the collector demanded, and gave the greyhound into the charge of the guard of the train by which she was to be conveyed on her journey.

[*76] *2. The plaintiffs did not declare the value of the dog, and paid no extra charge for its conveyance. No ticket was issued. The greyhound, when delivered to the guard, had round her neck a collar of leather, and was clothed with a sheet, which, however, did not so cover the collar as to prevent its being examined. The bitch was proved to be of the value of seventy guineas. She was safely carried to Kirkby Stephen station, where the train from Temple Sowerby stopped. The remainder of the journey to Morpeth was intended by the defendants, for their own convenience, to be performed in another train, which, on its arrival from Tebay, was to proceed from the Tebay side of Kirkby Stephen station; the train from Temple Sowerby arriving at the other side (known as the Eden Valley side) of the Kirkby Stephen station. The greyhound was taken from the van in which up to that point she had been carried, and was taken from the Eden Valley side of the platform to the Tebay side, to await the arrival of the train from Tebay, then due. The train from Tebay being a few minutes late, the greyhound was fastened by the company's servant to an iron spout by a strap which one of the plaintiffs before delivery to the defendants had attached to her collar; and, having been so fastened, she was left alone to await the arrival of the train. Within three minutes afterwards she slipped her head through the collar, and escaped, and ran away down the line. The next day she was found dead, having been run over by a train.

3. At the time Sisson brought the greyhound to Temple Sowerby station, a bill, a copy of which marked B. was annexed to the case, was exposed on a board in the open platform shed of the station, and another bill, a copy of which marked A. was also annexed to the case, was tacked to the wall inside the passengers' waiting-room. The notice marked B., but which had no reference to dogs,[1] could be easily seen by any person entering

[1] The material part of this notice was paragraph 9, which was as follows: —

"The said company hereby give notice and declare that they never have been, and are not, and decline to become, common carriers of horses, cattle, sheep, pigs, and other animals, and will only undertake the carriage thereof upon a special contract in each case first entered into by them with the owner or person sending

the open * platform shed where tickets are given; but [* 77] the printed paper marked A., which was a time-table, and contained a marginal note about dogs,[1] could only be seen by persons who had entered the waiting-room; but there was no evidence to show that Sisson had, and Sisson swore that he never had, seen or heard of either of these notices, or of the terms contained therein.

4. The defendants are not common carriers of dogs; but it was proved that on one previous occasion they had for hire carried the same dog for the plaintiffs, when no ticket was given; and there was no evidence that the plaintiffs had on that occasion any knowledge of the above notices.

5. It was contended for the plaintiffs, that the defendants having undertaken, for valuable consideration, to carry the dog safely from Temple Sowerby station to Morpeth, on the complete delivery of the dog to them they became responsible for the security of the dog, and the dog then remained at the risk of the defendants, who were bound to lock the dog up or take other proper means to secure it; that the defendants were guilty of negligence, in the first place, in not making the strap secure, and, in the second, in tying the dog to an iron spout in the open station of Kirkby Stephen and leaving it alone in a strange place, amongst strangers, instead of keeping it either in hand or in the van of the Temple Sowerby train or in a building until the Tebay train arrived, and then transferring the dog direct from the Temple Sowerby train to the Tebay train; that there was no notice to the plaintiffs of any special conditions by which the company limited

or delivering the same, the special terms whereof may be learnt on application to the company's collector at the station, and will appear in the note at the foot of or indorsed upon the ticket or memorandum of each such contract issued or made by him, and according to which alone the company authorize him to contract on their behalf."

[1] The note in question was as follows: —

"Horses, Carriages, Dogs. The company are not carriers of horses, cattle, dogs, and other animals, which are received, forwarded, and delivered solely on and subject to the following conditions, &c., &c.

"The company will not accept dogs for conveyance unless they have proper chains and collars attached, and then only upon condition that they are not responsible for loss of or injury to the animals in the event of these fastenings proving insufficient; and they will not receive dogs for conveyance except on the terms that they shall not be responsible for any greater amount or damages for the loss thereof or injury thereto beyond the sum of £2, unless a higher value be declared at the time of delivery to the company, and a percentage of 5 per cent paid upon the excess of value so declared."

No. 7. — Richardson and Sisson v. North Eastern Ry. Co., L. R., 7 C. P. 78, 79.

[*78] their liability; *and that, having been guilty of negligence, the defendants could not take advantage of their own wrong or avail themselves of any notice to the purport or effect of the notices above referred to.

6. It was contended for the defendants that the loss arose through no negligence on their part, but from the insecurity of the collar placed on the greyhound by the plaintiffs; and that, the defendants not being common carriers of dogs, but only professing to carry dogs on the terms stated on the bills marked A and B., they were not liable at all under the circumstances, and in any event could not be liable in damages beyond £2.

7. The Judge gave a verdict for the plaintiffs for the full amount claimed, viz. £50, on the several grounds following: The defendants were guilty of negligence in not seeing that the strap was properly secured when the dog was in their charge, and also in leaving the dog alone amongst strangers in a strange place in the station at Kirkby Stephen tied to a spout from which it almost immediately escaped, instead of securing it in the van or in some other safe place, they being responsible for its security. The collar might be sufficiently fastened for ordinary circumstances; but the dog, being left alone, fought itself loose, which in all probability would not have happened if it had been conducted by one of the company's servants from one van to the other. The printed paper A. suggested as a notice, is not a notice within the meaning of the statute (17 & 18 Vict. c. 31, s. 7) for several reasons, viz.: It does not purport to be a public notice, but merely a time-table showing the times of arrival and dispatch of trains; it is not signed by any authority of the company: the paragraph applying to dogs is a mere marginal note, and is in no way a leading feature in the document: the notice B. does not apply to dogs unless specifically named, and is not in conformity with the Railway and Canal Traffic Act, but is in small print, and is directly at variance with the requirement of the statute that such a notice shall be in legible characters. There should have been a special contract signed by the parties. In *Peek* v. *North Staffordshire Ry. Co.*, 10 H. L. C. 473, p. 286, *ante*, the House of Lords held that "all the parts of s. 7 of 17 & 18 Vict. c. 31, must be read together; and not only must the terms limiting liability be reasonable, but they must be embodied in a special [*79] *contract in writing signed by the owner or sender of the

goods." It is no defence in this case for the company to say that the dog was delivered to them so near to the time of the departure of the train as not to afford time for giving a ticket, as they might well have refused to take it until the next train.

The question for the opinion of the Court was whether or not the verdict should stand.

Shield, for the defendants. The 7th section of the Railway and Canal Traffic Act (17 & 18 Vict. c. 31) has no application to this case. The company not being common carriers of dogs, they can only be liable as bailees on the terms of the notices A. and B., upon which terms alone the collector had authority to contract on their behalf; and if he exceeded his authority in this respect, the company are not responsible: *Belfast and Ballymena Ry. Co. and Londonderry and Coleraine Ry. Co.* v. *Keys*, 9 H. L. Cas. 556. Assuming there was a contract here, there was no evidence of negligence on the part of the company or their servants; and, if there was, the negligence of the plaintiffs themselves in delivering the greyhound to the company with a collar so insecurely fastened as to enable her to escape, materially contributed to the loss. *Slim* v. *Great Northern Ry. Co.*, 14 C. B. 647; 23 L. J. C. P. 166, was also referred to.

Kemp, for the plaintiffs. Contributory negligence is for the jury; and the Judge must be taken to have negatived it. The case finds that the company are not common carriers of dogs; but they are still liable, as common bailees, for negligence. Neither of the notices having been brought home to the knowledge of the plaintiffs, and the person to whom the greyhound was delivered being in the apparent position of one having authority to contract for the company, and it having been proved that the greyhound had on a former occasion been conveyed by the company for the plaintiffs upon the same terms, it is not competent to them now to set up a contract different from that which would ordinarily be implied from the circumstances. A dog, although not specifically mentioned in the proviso as to the limitation of liability, is within s. 7 of 17 & 18 Vict. c. 31: *Harrison* v. *London and Brighton Ry. Co.*, 2 B. & S. 122; 29 L. J. Q. B. 209.

[* 80] * Shield, in reply. The 7th section of 17 & 18 Vict. c. 31 is applicable only to common carriers in respect of things as to which they hold themselves out as common carriers.

Van Toll v. *South Eastern Ry. Co.*, 12 C. B. (N. S.) 75; 31 L.

J. C. P. 241; *Cahill* v. *London and North Western Ry. Co.*, 10 C. B. (N. S.) 154; 30 L. J. C. P. 289, and *Zunz* v. *South Eastern Ry. Co.*, L. R. 4 Q. B. 539; 38 L. J. Q. B. 209, were referred to.

Willes, J. This case involves a question of considerable importance with reference to the duty of railway companies to give notice where goods are to be carried only upon special terms, and with reference also to the ostensible authority of their collectors to make contracts which shall be binding upon them. We will therefore take time to consider it. *Cur. adv. vult.*

Willes, J., delivered the judgment of the Court.

This case was argued before my Brother Montague Smith and myself at the sittings in banc after last Trinity Term; and it has stood over longer than we intended, in consequence of the difficulty of communicating with him arising from the recent changes in the constitution of the Court.

It was an appeal against a judgment given by a county-court Judge in favour of the plaintiffs for the sum of £50, being the extreme amount to which his jurisdiction in such a case extends, in respect of the loss through the alleged negligence of the servants of a railway company of a valuable greyhound bitch which had been delivered to them by the plaintiffs to be carried by their railway. The facts were these: The greyhound was taken by one of the plaintiffs to the defendant's station at Temple Sowerby, for the purpose of being conveyed thence to Morpeth, and there delivered to the guard of the train by which she was to travel, the fare demanded by the collector having been duly paid. No declaration of the value of the greyhound was made, or any extra sum paid for insurance; nor was any ticket given to the plaintiffs. At the time she was delivered to the guard, the greyhound had a leather collar round her neck, to which was fastened a strap. The company only professed to carry dogs upon the [* 81] terms of certain * notices; and it was insisted before the Judge of the county court, as it was again insisted before us upon the argument of the appeal, that the guard had no right to receive the dog upon any other terms than those contained in the notices. In the view we take of the case, it becomes unnecessary to discuss that, because it is expressly found in the case that the company are not common carriers of dogs, and therefore they stand in the position of ordinary bailees, and are only liable in

respect of some negligence established against them by evidence, and are not liable if the loss was occasioned or contributed to by the negligence of the person who delivered the dog to them to be carried. It was contended on the part of the company in the Court below that there had been no negligence on their part, or that at all events there was contributory negligence on the part of the plaintiffs; and with a view to see whether that is so or not, it is necessary to state the facts further. When the train was on its way, and had arrived at Kirkby Stephen station, it was necessary for passengers and goods intended for Morpeth to be removed to another train on the other side of the station. The train by which the rest of the journey was to be performed not being ready, the guard by means of the strap which was attached to her collar fastened the greyhound to an iron spout on the platform, to wait until the train came up. The fact of her having been fastened to an iron spout has nothing to do with the decision of the case: it is not stated whether the spout was sufficient for the purpose or not. She was fastened by means of a strap which one of the plaintiffs had himself attached to the collar for the purpose of securing her. Being so fastened, she slipped her head through the collar and ran on to the line and was killed by a passing train.

The county-court Judge decided that the defendants were responsible for the escape and consequent destruction of the dog, on the ground that they by their servants were guilty of negligence, and that there was no contributory negligence on the part of the plaintiffs. We are clearly of a different opinion. The county-court Judge in deciding as he did appears to have proceeded upon a supposition that the case fell within the ruling of Lord Ellenborough in *Stuart* v. *Crawley*, 2 Stark. 323; 20 R. R. 691. That case, however, in our judgment * differs in [* 82] some essential particulars from the present. It was an action against a carrier of goods by the Grand Junction Canal for negligence in losing a valuable greyhound which had been delivered to him to be carried from London to Harefield Lock. It appeared that the servant of the plaintiff took the dog to the defendant's warehouse with a string about his neck, and the defendant's bookkeeper gave a receipt acknowledging the delivery; that the dog was afterwards tied by the cord to a watch-box, but within half an hour afterwards slipped his head through the noose.

and was lost. It was sought to charge the plaintiff with negligence in not delivering the dog to the defendant's bookkeeper in a state of security, he having no collar, but merely a cord round his neck, which was insufficient; and the case was sought to be assimilated to that of a delivery of goods imperfectly packed. But Lord Ellenborough held that the defendant was responsible. "The case," he said, "was not like that of a delivery of goods imperfectly packed, since there the defect was not visible; but in this case the defendant had the means of seeing that the dog was insufficiently secured. After a complete delivery to the defendant, he became responsible for the security of the dog: the property then remained at the risk of the defendant, and he was bound to lock him up or to take other proper means to secure him. The owner had nothing more to do than to see that he was properly delivered, and it was then incumbent on the defendant to provide for his security." That case is obviously different from this. Here the greyhound when delivered to the guard had a leathern collar on with a strap attached to it, indicating that the strap was the thing by which she was to be secured. If it was negligence on the part of the guard to fasten her by the strap, it was a negligence which was suggested by the person who delivered her to him without notice that the fastening was an unsafe one. There are, therefore, two important distinctions between that case and the present, — first, that there the defendant was a common carrier, and here the defendants are not, — and, secondly, that, when the dog was delivered to the defendants' servant, he had the means of seeing that it was insufficiently secured, whereas here the mode of securing the dog was that which is ordinarily adopted, viz. by a collar and strap.

[*83] * My Brother Smith and myself are therefore of opinion that the decision of the county court cannot be sustained, and must be reversed. In this we only follow the course pursued by this Court in the case of *Tulley* v. *Great Western Ry. Co.*, L. R., 6 C. P. 44; 40 L. J. C. P. 9; and if the rule laid down in *Schroder* v. *Ward*, 13 C. B. (N. S.) 410; 32 L. J. C. P. 150, were followed, it ought to be reversed with costs; but we do not feel inclined to act upon that rule here, because there was some laxity on the part of the defendants' servants in receiving the dog to be carried without giving a ticket. The defendants would probably not press for costs. *Judgment reversed.*

ENGLISH NOTES.

1. As to exemption or limitation of liability by statute. The Carriers' Act (1830), 11 Geo. IV. and 1 Will. IV. c. 68, enacts by section 1 that a common carrier by land for hire is not liable for a loss of any article of property of the descriptions there specified contained in any parcel or package when the value of the property contained in such parcel or package exceeds £10, unless its value has been declared by the sender at the time of delivery, and an increased charge, or an engagement to pay the same, has been accepted by the person receiving the package. The word "package" is used in its etymological sense of anything packed; for instance, an open wagon with its contents consisting of pictures, &c., packed in it has been held to be a package. *Whaite* v. *Lancashire & Yorkshire Railway Co.* (1874), L. R. 9 Ex. 67, 43 L. J. Ex. 47, 30 L. T. 272. When a carrier does not demand a higher rate, although the value has been declared by the sender, he is not protected by the statute from his common law liability. *Great Northern Railway Co.* v. *Behrens* (Ex. Ch. 1862), 7 H. & N. 950, 31 L. J. Ex. 299, 8 L. T. 328. "The person delivering the goods to the carrier must in the first instance declare the value in order to fix the carrier with responsibility, and the carrier may then require him to pay an increased rate of charge according to a tariff put up in the office. But there is nothing in the statute which protects him from liability, if after the value is declared to be such as would entitle him to demand an increased rate of charge, he chooses to accept the goods to be carried without making any demand of such increased rate, or requiring it to be either paid or promised," *per curiam*, *ibid.*

Before the Act it was decided that, notwithstanding the usual notice put up in the office of a stage-coach that they would not make good losses beyond £5, they were liable in case of "gross" negligence to make good an article of much greater value. *Bodenham* v. *Bennett* (1817), 4 Price, 31, 18 R. R. 686; *Smith* v. *Horne* (1817), 8 Taunt. 144, 2 Moore, 18, Holt N. P. 643, 17 R. R. 683, 19 R. R. 480; *Birkett* v. *Willan* (1819), 2 B. & Ald. 356, 20 R. R. 473; *Sleat* v. *Fagg* (1821), 5 B. & Ald. 342; *Wyld* v. *Pickford* (1841), 8 M. & W. 443, 10 L. J. Ex. 382. Some of these were doubtless cases of misfeasance, but in the judgment of the Court, delivered by PARKE, B., in the last-mentioned case it is said to be sufficient to prove an act of "gross" negligence in the sense of ordinary negligence. But under the Act it was decided that where a parcel of valuable goods within the description of the Act is delivered to a carrier without a declaration of the nature and value, the carrier is not liable for the loss, although it happens by the

gross negligence of his servants. *Hinton* v. *Dibben* (1842), 2 Q. B. 646, 11 L. J. Q. B. 113.

By the 4th and 6th sections of the Act public notices were declared unavailing to limit the carrier's liability, but nothing in the Act was to annul or affect any special contract.

By the 8th section of the Carriers' Act, the Act does not protect the carrier from liability to answer for loss or injury to any goods arising from the felonious act of any coachman, guard, book-keeper, porter, or other servant in his employ. It has been held under this section that the servants of a sub-contractor of the carrier are "servants in his employ," under this section. *Machin* v. *London and South Western Railway Co.* (1848), 2 Ex. 415, 17 L. J. Ex. 271. And where a parcel of valuable goods was delivered at one of the receiving offices of the defendants, a railway company, for carriage on their railway, and the parcel after being thence taken by a van of the defendant company to their station was fraudulently obtained by means of a forged order and carried away by a person in the employ of the receiving office; it was held that he was a servant in the employ of the company within the meaning of the Act, and the company were liable for the loss although the value had not been declared. *Stephens* v. *London and South Western Railway Co.* (C. A. 1886), 18 Q. B. D. 121, 56 L. J. Q. B. 171, 56 L. T. 226. The principle of these cases is recognised and approved in the judgment of Lord BLACKBURN in *Doolan* v. *Midland Railway Co.* (1877), 2 App. Cas. 792, 810, 37 L. T. 317, 319. The section has been construed to extend to such goods only as are otherwise within the protection of the Act. *Shaw* v. *Great Western Railway Co.* (1894), 1894, 1 Q. B. 373, 70 L. T. 218.

The articles specified in the Carriers' Act are the following: Gold or silver coin of this realm or of any foreign State, or any gold or silver in a manufactured or unmanufactured state, or any precious stones, jewellery, watches, clocks, or timepieces of any description, trinkets, bills, notes of the Governor and company of the Banks of England, Scotland, and Ireland respectively, or of any other bank in Great Britain or Ireland, orders, notes, or securities for payment of money, English or foreign, stamps, maps, writings, title-deeds, paintings, engravings, pictures, gold or silver plate, or plated articles, glass, china, silks, in a manufactured or unmanufactured state, and whether wrought up or not wrought up with other materials, furs, or lace, or any of them. The following articles have been held by judicial decision to be within the description: (glass), a looking-glass, although of considerable dimensions (notwithstanding the words of the preamble as to articles of great value in small compass), *Owen* v. *Burnett* (1834), 2 C. & M. 335, 3 L. J. Ex. 76; smelling-bottles, *Bernstein* v. *Baxendale* (1859),

6 C. B. (N. S.) 251, 28 L. J. C. P. 265; (trinkets), articles used primarily for ornament, although they are otherwise useful, *Bernstein* v. *Baxendale, supra;* (paintings), pencil-sketches of an artist, *Mytton* v. *Midland Railway Co.* (1859), 28 L. J. Ex. 385; but not designs or patterns, *Woodward* v. *London and North-Western Railway Co.* (1878), 3 Ex. D. 121, 47 L. J. Ex. 263, 38 L. T. 321; (pictures), frames are included, *Anderson* v. *London and North-Western Railway Co.* (1870), L. R. 5 Ex. 90, 39 L. J. Ex. 55, 21 L. T. 756; (timepieces), a ship's chronometer, *Le Conteur* v. *London and South-Western Railway Co.* (1865), L. R., 1 Q. B. 54, 35 L. J. Q. B. 40, 13 L. T. 325.

The Merchant Shipping Act 1894 (57 & 58 Vict. c. 60, sections 502 and 503, substantially re-enacting 17 & 18 Vict. c. 104, s. 503, and 25 & 26 Vict. c. 63, s. 54), gives a protection to carriers by sea somewhat similar to that given by the Carriers' Act. The description of protected articles is more limited, being confined to "gold, silver, diamonds, watches, jewels, or precious stones." On the other hand, there is no exception as to felony on the part of the servants of the owner. There is a general exception from liability for loss by fire; and there is a limitation of liability proportionate to the tonnage of the carrying ship. Where there is an entire contract to carry partly by land and partly by sea, the contract is divisible, and the carrier is protected in respect of the land journey by the Carriers' Act and in respect of the sea journey by The Merchants' Shipping Act. *Le Conteur* v. *London and South-Western Railway Co., supra; Baxendale* v. *Great Eastern Railway Co.* (1869), L. R., 4 Q. B. 244, 38 L. J. Q. B. 137; *London and South-Western Railway Co.* v. *James* (1873), L. R., 8 Ch. 241, 42 L. J. Ch. 337, 28 L. T. 48.

2. As to exemption by special contract. Carriers, other than railway and canal companies, have the power to impose any conditions or terms limiting their liability as regards the carriage of goods not professed to be carried by them.

Before the Carriers' Act of 1830 carriers frequently claimed to disclaim or limit their liability by means of public notices; but under section 4 of this Act a carrier cannot limit his liability by a public notice. It remains open to him, however, to limit his liability by a special contract. In *Walker* v. *York and North Midland Railway Co.* (1853), 2 El. & Bl. 750, 23 L. J. Q. B. 73, the company had issued notices with respect to the terms on which they would carry fish, and it was proved that one of these notices was served on the plaintiff, and that he had afterwards delivered fish to be carried. It was held that this was evidence of a special contract. The case is different as regards articles which the carrier professes to be within his line. If the consignor assents to or does not dissent from the terms imposed by the

carrier and brought to his knowledge individually, those terms may form a special contract at common law; but should the consignor object to the terms, he has a right to insist that the common carrier shall receive the goods subject to all the responsibilities incident to his employment. *Garton* v. *Bristol and Exeter Railway Co.* (1861), 1 B. & S. 112, 162, 30 L. J. Q. B. 273, 294. See *per* COCKBURN, C. J., as cited in notes to Nos. 1 & 2, p. 360, *supra*.

Railway and canal companies are, by the Railway and Canal Traffic Act, 1854 (17 & 18 Vict. c. 31), bound (by section 2) to make arrangements for receiving and forwarding traffic without unreasonable delay and without partiality. And (by section 7) railway companies are liable for the loss of or injury done to goods "by the neglect or default of the company or its servants," notwithstanding any notice limiting their liability, provided that they may make by special contract assented to and signed by the consignor, any conditions which are adjudged by the Court to be "just and reasonable." Signature of the consignor or his agent is essential to the validity of the contract. A railway agent employed by the sender to deliver and by the company to receive the goods may be treated as the consignor's agent for this purpose. *Aldridge* v. *Great Western Railway Co.* (1864), 15 C. B. (N. S.) 582, 33 L. J. C. P. 161.

Signature raises a presumption that the consignor had actual knowledge of and assented to the conditions; but such presumption may be rebutted. So in the Scotch case, *Scottish Central Railway Co.* v. *Ferguson* (1864), 2 Macph. 781, the consignor was not held to have signed the conditions, merely because he used a forwarding note with his name on it furnished by the defendant company, on the back of which the conditions were printed.

Where the company makes two alternative charges, one ordinary with full responsibility, and one lower with exemption from liability except for wilful default, this raises a strong presumption that the conditions attached to the lower rate are reasonable. *Manchester, Sheffield, and Lincolnshire Railway Co.* v. *Brown* (appeal from *Brown* v. *Manchester, Sheffield, and Lincolnshire Railway Co.* (1883), 8 App. Cas. 703, 53 L. J. Q. B. 124. And to a similar effect is the previous decision of the Court of Appeal in *Lewis* v. *Great Western Railway Co.* (1878), 3 Q. B. D. 195, 47 L. J. Q. B. 131, 37 L. T. 774. In the case of *Manchester, Sheffield, &c. Railway Co.* v. *Brown*, the sender consigned fish at a rate twenty per cent. lower than the ordinary rate, and signed a contract relieving the company, as to all fish delivered by him, from all liability for loss or damage by delay in transit, or from whatever other cause arising. Owing to pressure of traffic, the fish was not carried in time to catch the intended market. It was held that

the condition was on the facts of the case *just and reasonable*. The presumption from an alternative rate may be rebutted by proving that the higher rate is prohibitive or that the alternative is illusory. See the principal case of *Peek* v. *North Staffordshire Railway Co.*, and *per* Lord Blackburn, in *Manchester, Sheffield, &c. Railway Co.* v. *Brown*, *supra*. The question of alternative rates was again much discussed in *Great Western Railway Co.* v. *McCarthy* (1887), 12 App. Cas. 218, 56 L. J. P. C. 33, 56 L. T. 582, where a lower rate of carriage was accepted on the terms that the carrier was absolved from liability except for wilful misconduct; but an alternative was offered on terms which the Court construed to make their liability the same as that of common carriers under the Carriers' Act. The House considered that, it being proved that the sender in fact knew that there was an alternative rate and might easily have ascertained the terms, he was bound to inform himself of them, and it was for the Court to consider whether the alternative terms offered were reasonable: and the House, finding that they were reasonable, decided that the contract to carry on the lower terms without liability for negligence was valid within the Act. In the opinions of Lord Watson and Lord Fitzgerald, it was enough that the alternative rate was within the statutory maximum.

Where the plaintiff delivered cattle carriage paid to the defendant company for carriage, and signed a special contract exonerating the company from "any loss or detention of, or injury to the said animals or any of them in the receiving, forwarding, or delivery thereof, except upon proof that the loss, detention, or injury arose from the wilful misconduct of the company or its servants;" and the cattle were detained at the destination by the company claiming a lien for the cost of carriage, the clerk having omitted to enter the prepayment; the plaintiff was held entitled to recover. The Judges, Grove, J., and Lopes, J., considered that, although the wrongful refusal to deliver did not amount to wilful misconduct, it did not come within the fair meaning of "loss or detention in the receiving, forwarding, or delivery." *Gordon* v. *Great Western Railway Co.* (1881), 8 Q. B. D. 44, 51 L. J. Q. B. 58, 45 L. T. 509.

In the case of *Shaw* v. *Great Western Railway Co.* (1893), 1894, 1 Q. B. 373, 70 L. T. 218, decided by a Divisional Court of the Queen's Bench Division (Lawrence, J., and Wright, J.), a curious result was arrived at by what appears at least a narrow construction of the words in section 7 of the Railway and Canal Traffic Act, 1854, "occasioned by the neglect or default of the company or its servants." It was held that these words did not include theft by a servant of the company where there was no negligence on the part of the company; and consequently that, in regard to goods which were not within the

scope of the protection of the Carriers' Act (so as to come within section 8 of that Act), the company could, by the common law, protect themselves against liability for such theft by a special contract although such contract was not reasonable within the requirement of section 7 of the Act of 1854. The reasoning by which this result was reached was as follows: After citing *Shaw* v. *York and Midland Railway Co.* (1849), 13 Q. B. 347, 18 L. J. Q. B. 181; *Austin* v. *Manchester, Sheffield, and Lincolnshire Railway Co.* (1851), 16 Q. B. 600, 20 L. J. Q. B. 440; *Chippendale* v. *Lancashire and Yorkshire Railway Co.* (1851), 21 L. J. Q. B. 22; *Austin* v. *Manchester, Sheffield, and Lincolnshire Railway Co.* (1852), 10 C. B. 454, 21 L. J. C. P. 179; and *Carr* v. *Lancashire and Yorkshire Railway Co.* (1852), 7 Ex. 707, 21 L. J. Ex. 261, they proceed: "After these decisions the carrier's contracts or notices, when 'brought home,' protected them from everything except wilful acts, such as the conversion of the goods by the carrier himself, or by his agents for that purpose, or wilful misdelivery amounting to a renunciation of the character of bailee. . . . *Having regard to the terms of the Railway and Canal Traffic Act*, 1854, *and to the history of the law, and the occasion for the Act, it seems most reasonable to hold that it extends only to negligence, or default in the nature of negligence, or within the scope of the servants' employment.*

"The company, therefore, as regards theft without negligence, are left in the same position in which they have been at common law for at least a hundred years in relation to such theft; and that is that, subject in the case of the valuables specified in the Act of 1830 to the provisions of sect. 8 of that Act, they can, by contract, or notice 'brought home,' exempt themselves from liability for such thefts. It may be added that sect. 8 of the Act of 1830 cannot be construed as a general enactment that common carriers by land are in all cases to be liable for theft by their servants. The terms of the section confine it to the case of the valuables specified in the Act, and are in strong contrast with the language used in sect. 4."

The judgment is ingenious, and in some ways instructive; but the construction given to the words quoted from sect. 7 of the Act is questionable. Having regard to the circumstances that the common carrier is, by what is called the "custom of the realm," an insurer, and still more to the origin of the "custom" which, like the rule explained by Ulpian as the foundation of the famous edict, was doubtless based on the suspicion of collusion with thieves, it seems more reasonable to assume the intention of the Act to be to include felony of servants under the expression "default," a construction which appears consistent with the ordinary use of language.

3. As to the exemption arising from inherent vice in or natural dete-

rioration of the subject. The best illustration of inherent vice is furnished by the case of *Blower* v. *Great Western Railway Co.* (1872), L. R., 7 C. P. 655, 41 L. J. C. P. 268, which will be found set forth as a ruling case, No. 6 of "Animal," 3 R. C. 139. See also the notes to that case 3 R. C. 142, 143.

In *Hawkins* v. *Great Western Railway Co.* (1895), decided on the 15th of February, 1895, a restive horse was damaged on a journey from Plymouth to London, and the plaintiff was held not entitled to recover damages.

As to the exemption arising from natural deterioration, it is subject to the qualification that the carrier is liable for negligence, if when informed of the circumstances — such as leakage in a cask — he does not do what is reasonable to prevent further deterioration. *Beck* v. *Evans* (1812), 16 East, 244, 3 Camp. 267, 14 R. R. 340.

4. As to the exemption arising from contributory negligence. *Baldwin* v. *London, Chatham and Dover Railway Co.* (1883), 9 Q. B. D. 582, confirms the doctrine of the principal case No. 7. There damp rags were delivered by the plaintiffs in London to the defendants for conveyance to a station in Kent, where in the ordinary course they should have been delivered within twenty-four hours. By mistake they were miscarried and did not reach their destination until the lapse of three weeks. They became heated, and were completely unfit for the manufacture of paper. The consignees refusing to take delivery, the rags were ultimately destroyed. The company were held liable in nominal damages only, on the ground that the plaintiff ought to have informed the railway company that special care was necessary owing to the damp state in which the rags were packed.

AMERICAN NOTES.

In Smith's Leading Cases, 183, it is said: "That it is possible for a common carrier, either by a general notice or a special acceptance, to limit his extraordinary liability, is a position which it is believed is not supported by the authority of any adjudged case in the United States." This is probably too broad a statement, for it has been held in a few cases, mostly early, that the carrier may limit his liability by mere notice, if brought home to the shipper. *Laing* v. *Colder*, 8 Pennsylvania State, 479; *Atwood* v. *Reliance Trans. Co.*, 9 Watt (Pennsylvania), 87; 34 Am. Dec. 503; *Pennsylvania R. Co.* v. *Schwarzenberger*, 45 Pennsylvania State, 208; 84 Am. Dec. 490. In *Cole* v. *Goodwin*, 19 Wendell (New York), 251; 32 Am. Dec. 470, COWEN, J., was of opinion that the carrier might, by general notice, limit his liability to a specified amount, unless he was advised that the goods were of greater value, but not otherwise, either by notice or contract; and he said: "While we thus fulfil our constitutional duty, we are not, like Westminster Hall, obliged to lament while we enforce the law." And in *Gould* v. *Hill*, 2 Hill (New

York), 663, it was expressly decided that the carrier could not contract to limit his liability in any manner or to any extent. See *Barney* v. *Prentiss*, 4 Harris & Johnson (Maryland), 317; 7 Am. Dec. 670.

An excellent history of this matter is given in *Fish* v. *Chapman*, 2 Georgia, 349; 46 Am. Dec. 393, as follows: —

"Anterior to 1776, the common carrier was an insurer for the delivery of goods intrusted to him, and liable for losses occasioned by all causes, except the act of God and the king's enemies, and without the power to limit his responsibility. That this was the law, is proven by the numerous authorities which I have before referred to. No adjudication before that time had relaxed its stringent but salutary severity. It is of consequence to establish this fact, because the common law, as it was usually of force before the Revolution, is made obligatory upon this Court by our adapting statute. It is said by Mr. Story, that Lord Coke recognized the right of modification, in a note to *Southcote's Case;* and also that this right was admitted in *Morse* v. *Slue*, 1 Vent. 238. These are *dicta* which recognized the right before the era of 1776. And these are not adjudications, — mere *dicta*, unsupported by authoritative decisions, — they reverse nothing, establish nothing. Mr. Story does not himself claim that there was any modification of the rule before that era. He does say that the right to modify their common-law liability 'is now (1832) fully recognized.' Story on Bailment, sec. 549. All the cases (and they are numerous) in support of his statement are since our Revolution. We do not, however, question that statement. Chancellor Kent says: —

"'The doctrine of the carrier's exemption by means of notice from his extraordinary responsibility is said not to have been known until the case of *Forward* v. *Pittard*, 1 T. R. 27, in 1785, and it was finally recognized and settled by judicial decision in *Nicholson* v. *Willan*, 5 East, 507; 15 R. R. 745, in 1804.' 2 Kent Com. 606.

"The saying to which the Chancellor has reference was made in 1818 by Burrough, J., in *Smith* v. *Horne*, 8 Taunt. 144; 19 R. R. 480, and is this: 'The doctrine of notice was never known until the case of *Forward* v. *Pittard*, 1 T. R. 27; 1 R. R. 142, which I argued many years ago.' 'I lament that the doctrine of notice was never introduced into Westminster Hall.' The case, then, of *Forward* v. *Pittard* is the first in which the doctrine of notice is recognized, according to Mr. Justice Burrough, and that was in 1785. It was not until 1804 that it was finally settled by judicial decision in *Nicholson* v. *Willan*, 5 East, 507. Twenty-eight years after the Declaration of Independence the question of notice in all its bearings was reviewed with great learning and ability in *Hollister* v. *Nowlen*, 19 Wendell, 234; 32 Am. Dec. 455. I refer to that case now simply for the purpose of saying that the learned Judge in that opinion declared 'that the doctrine that a carrier may limit his responsibility by notice was wholly unknown to the common law at the time of our Revolution.' Thus we think it is made manifest that in 1776, by the common law, the carrier could not limit or modify his extraordinary responsibility by notice. That it has been allowed since that time we admit, and to this point see *Nicholson* v. *Willan*, 5 East, 507; *Clay* v. *Willan*, 1 H. Bl. 298; *Harris* v. *Packwood*, 3 Taunt. 264; 15 R. R. 755; *Evans* v. *Soule*, 2 M. & Sel. 1; *Smith* v. *Horne*, 8 Taunt. 146; *Batson* v. *Donovan*, 4 Barn. & Ald. 39; *Riley* v. *Horne*, 5 Bing.

217; *Bodenham* v. *Bennett*, 4 Price, 34; 18 R. R. 686; *Down* v. *Fromont*, 4 Camp. 41. Still, however, in England, by common law, since the Revolution a carrier cannot by special agreement exempt himself from all responsibility so as to evade altogether the policy of the law; he cannot exempt himself from liability in case of negligence and fraud. Story on Bailment, sec. 549; *Riley* v. *Horne*, 5 Bing. 218; s. c. 2 Moo. & P. 331, 341; *Sleat* v. *Fagg*, 5 Barn. & Ald. 342; *Wright* v. *Snell*, Id. 350; *Birkett* v. *Willan*, 2 Id. 356; *Beck* v. *Evans*, 3 Camp. 267; s. c. 16 East. 244; 14 R. R. 340; *Smith* v. *Horne*, 4 Price, 31; s. c. 2 Moore, 18; *Newborn* v. *Just*, 2 Car. & P. 76.

"'It is perfectly well settled' (we quote from Kent) 'that the carrier, notwithstanding notice had been given and brought home to the party, continues responsible for any loss or damage resulting from gross negligence or misfeasance in him or his servants.' 2 Kent Com. 607. The notices which are allowed in England since the Revolution go only the length of protecting the carrier from that responsibility which belongs to him as an insurer. A distinction is sought to be drawn in some of the books between a notice carried home to the knowledge of the bailor and a special acceptance or contract. I cannot see that there is any difference. A notice contains the terms and conditions upon which the carrier will serve the public, or some limitation of his extraordinary responsibility which, when known and acted upon by his customer, is a contract as much as if the same stipulations were made by a separate contract with each individual customer. The only difference is in the mode of proof; the rule of evidence is different, and that is all. It has been so decided, especially in New York. *Gould* v. *Hill*, 2 Hill (New York), 623; *Cole* v. *Goodwin*, 19 Wendell (New York), 281; 32 Am. Dec. 170.

"It may safely be asserted that the American decisions, with scarcely an exception, sustain the old common-law doctrine. Mr. Wallace, in his notes to Smith's Leading Cases, holds the following language: 'That it is possible for a common carrier, by either a general notice or a special acceptance, to limit his extraordinary liability, is a position which it is believed is not supported by the authority of any adjudged case in the United States.' 1 Smith's Lead. Cas. 183. The reverse doctrine is permanently settled in New York. We then adhere to the sound principles of the common law, sustained by the Courts of our own Union, and hold notices, receipts, and contracts in restriction of the liability of a common carrier, as known and enforced in 1776, void, because they contravene the policy of the law. *Hollister* v. *Nolan*, 19 Wendell (New York), 234; 32 Am. Dec. 455; Id. 355; *Cole* v. *Goodwin*, 19 Wendell (New York), 251; 32 Am. Dec. 470; *Gould* v. *Hill*, 2 Hill (New York), 623; *Alexander* v. *Greene*, 3 Id. 9, 20; Story on Bailment, 4th ed. 558, note; *Atwood* v. *Reliance T. Co.*, 9 Watts (Pennsylvania), 87; *Barney* v. *Prentiss*, 4 Harris & Johnson (Maryland), 317; 7 Am. Dec. 670; *Jones* v. *Voorhees*, 10 Ohio, 145; 2 Kent Com. 608, note."

It is now the general and settled American rule that the carrier cannot by general or special notice, even if brought home to the shipper, limit his common-law liability. *Railroad Co.* v. *Manuf. Co.*, 16 Wallace (United States Supreme Ct.), 318; *Southern Ex. Co.* v. *Caperton*, 44 Alabama, 101; 4 Am. Rep. 118; *Little* v. *Boston, &c. Railroad*, 66 Maine, 239; *Mobile & O. R. Co.* v. *Weiner*, 49 Mississippi, 725; *Moses* v. *Boston, &c. Railroad*, 21 New Hamp-

shire, 71; *McMillan* v. *Michigan, S. &c. R. Co.*, 16 Michigan, 79; *Mann* v. *Birchard*, 40 Vermont, 326; *Kimball* v. *Rutland &c. R. Co.*, 26 Vermont, 247; 62 Am. Dec. 567; *Derwort* v. *Loomer*, 21 Connecticut, 244; *Dorr* v. *N. J. S. Nav. Co.*, 11 New York, 485; *Indianapolis, &c. R. Co.* v. *Cox*, 29 Indiana, 360; 95 Am. Dec. 640; *Illinois Cent. R. Co.* v. *Frankenberg*, 54 Illinois, 88; 5 Am. Rep. 92; *Adams Ex.* v. *Nock*, 2 Duval (Kentucky), 562; 87 Am. Dec. 510; *Davidson* v. *Graham*, 2 Ohio State, 131; *Levering* v. *Union, &c. Co*, 42 Missouri, 88; *Judson* v. *Western R. Co.*, 6 Allen (Massachusetts), 486; *Brown* v. *Adams Ex. Co.*, 15 West Virginia, 812. See note, 32 Am. Dec. 502.

The exception to this rule, stated by Cowen, J., in *Cole* v. *Goodwin, supra*, in respect to limiting liability by notice to a certain amount, in absence of information that the goods are of greater value, is generally accepted, on the ground that the carrier has a right to proportion his charges to the value of the goods and the consequent responsibility incurred. *McMillan* v. *Mich. S. &c. R. Co.*, 16 Michigan, 79; *Judson* v. *Western R. Co.*, 6 Allen (Massachusetts), 486; *Moses* v. *Boston, &c. R. Co.*, 24 New Hampshire, 71; *Orange Co. Bank* v. *Brown*, 9 Wendell (New York), 85; 24 Am. Dec. 129; *Farmers' & Mech. Bank* v. *Champlain Trans. Co.*, 18 Vermont, 131; *Oppenheimer* v. *U. S. Ex. Co.*, 69 Illinois, 62; 18 Am. Rep. 596; *Erie R. Co.* v. *Wilcox*, 84 Illinois, 239; 25 Am. Rep. 451; *Magnin* v. *Dinsmore*, 62 New York, 35; 20 Am. Rep. 442; Lawson on Contracts of Carriers, § 88; note, 32 Am. Dec. 506. In this case the carrier is not bound to inquire as to the value; the shipper's silence estops him. *Maguire* v. *Dinsmore*, 62 New York, 35; 20 Am. Rep. 442; 70 New York, 410; 26 Am. Rep. 608.

So the carrier may make the condition that any claim for damages must be presented within a certain reasonable time. *Southern Ex. Co.* v. *Hunnicutt*, 54 Mississippi, 566; 28 Am. Rep. 385; *Express Co.* v. *Caldwell*, 21 Wallace, 264; but the time must be reasonable. *Capehart* v. *Seaboard, &c. R. Co.*, 81 North Carolina, 438; 31 Am. Rep. 505, and note 509.

The doctrine that the carrier might, even by special contract, limit his common-law liability was acceded to with great reluctance by some of the American Courts. Cowen, J., in *Cole* v. *Goodwin, supra*, said: "It is, indeed, true, as Lord Ellenborough remarks, that there is no stopping-place, no half-way house. If the carrier can divest himself from liability by destruction by one kind of accident, or by one servant, he may in the same way go through the catalogue. He may exonerate himself at least from all except gross negligence or misfeasance, and even in respect to these he compasses nearly the same end by inverting the *onus* and darkening the horizon of evidence. I have said that relaxing the common-law rigour opens the highway to fraud, perjury, theft, and robbery." See *Indianapolis, &c. R. Co.*, v. *Allen*, 31 Indiana, 394.

But it is now well settled that the carrier may by contract, express or implied, written or oral, exempt himself from his extraordinary liability as insurer. *New Jersey S. Nav. Co.* v. *Merchants' Bank*, 6 Howard (United States Supreme Ct.), 344; *Cole* v. *Goodwin, supra*; *Graham* v. *Davis*, 4 Ohio State, 362; 62 Am. Dec. 285; *Bingham* v. *Rogers*, 6 Watts & Sergeant (Pennsylvania), 495; 40 Am. Dec. 581; *Buck* v. *Penna. R. Co.*, 150 Pennsylvania State, 170; 30 Am. St. Rep. 800; *Dorr* v. *New Jersey S. Nav. Co.*, 11 New York, 485; 62 Am. Dec. 125, and note, 129; *Roberts* v. *Riley*, 15 Louisiana

Annual, 103; 77 Am. Dec. 183; *Southern Ex. Co.* v. *Purcell*, 37 Georgia, 103; 92 Am. Dec. 53, and note, 56; *Grace* v. *Adams*, 100 Massachusetts, 505; 97 Am. Dec. 117; 1 Am. Rep. 131; *Merchants' Disp. T. Co.* v. *Block Bros.*, 86 Tennessee, 392; 6 Am. St. Rep. 847; *Witting* v. *St. Louis, &c. Ry. Co.*, 101 Missouri, 631; 20 Am. St. Rep. 636; 10 Lawyers' Reports Annotated, 602; *Chicago, &c. Ry. Co.* v. *Chapman*, 133 Illinois, 96; 23 Am. St. Rep. 587, and note, 593; *Pacific Exp. Co.* v. *Foley*, 46 Kansas, 457; 26 Am. St. Rep. 107; *Terre Haute, &c. R. Co.* v. *Sherwood*, 132 Indiana, 129; 32 Am. St. Rep. 239; *Ballou* v. *Earle*, 17 Rhode Island, 441; 33 Am. St. Rep. 881; *Alair* v. *Northern Pac. R. Co.*, 53 Minnesota, 160; 39 Am. St. Rep. 588; *Smith* v. *N. C. R. Co.*, 64 North Carolina, 235.

The contract for exemption may be in the form of a condition in the receipt or bill of lading, but this must be assented to by the shipper. Ordinarily his acceptance of such a document without objection is sufficient to raise a conclusive presumption of his assent. *Grace* v. *Adams, supra*: *Mulligan* v. *Illinois Cent. R. Co.*, 36 Iowa, 181; 14 Am. Rep. 514; *Kirkland* v. *Dinsmore*, 62 New York, 171; 20 Am. Rep. 475; *Germania F. Ins. Co.* v. *Memphis, &c. R. Co.*, 72 New York, 90; 28 Am. Rep. 113; *Pacific Ex. Co.* v. *Foley, supra*; *Steele* v. *Townsend*, 37 Alabama, 247; 79 Am. Dec. 49; *Ballou* v. *Earle*, 17 Rhode Island, 441; 33 Am. St. Rep. 881; *St. Louis, &c. Ry. Co.* v. *Weakly*, 50 Arkansas, 397; 7 Am. St. Rep. 104; *Durgin* v. *Am. Ex. Co.* (New Hampshire), 9 Lawyers' Reports Annotated, 453.

And the shipper will not be permitted to show that he did not read the document or know the condition. *Morrison* v. *Phillips, &c. Co.*, 44 Wisconsin, 405; 28 Am. Rep. 599; *Grace* v. *Adams, supra*; *Kirkland* v. *Dinsmore, supra*; nor even that he could not read it. *O'Reagan* v. *Cunard S. Co.*, 160 Massachusetts, 356; 39 Am. St. Rep. 484; nor that it differed from a previous oral agreement for the same carriage. *McFadden* v. *Missouri P. Ry. Co.*, 92 Missouri, 343; 1 Am. St. Rep. 721.

The rule is the same where there is no such condition in writing, but the shipper has made previous shipments with knowledge of certain regulations made by the carrier. *Miller* v. *Georgia, &c. Co.*, 88 Georgia, 563; 30 Am. St. Rep. 170. In Illinois however the acceptance of a limited bill or receipt is not conclusive, but is evidence for the jury. *Adams Ex. Co.* v. *Stettaners*, 61 Illinois, 184; 14 Am. Rep. 57.

This rule does not apply to conditions as to luggage in passenger tickets. *Rawson* v. *Penn. R. Co.*, 48 New York, 212; 8 Am. Rep. 543. (But compare *Steers* v. *Liverpool, &c. S. S. Co.*, 57 New York, 1; 15 Am. Rep. 453.) *Potter* v. *The Majestic*, 60 Federal Reporter, 625; 23 Lawyers' Reports Annotated, 716. Nor on checks for luggage. *Blossom* v. *Dodd*, 43 New York, 264; 3 Am. Rep. 701; *Mobile & Ohio R. Co.* v. *Hopkins*, 41 Alabama, 486; 94 Am. Dec. 607.

The carrier must give the shipper a reasonable opportunity to learn the contents of the document containing the limitation. He may not impose it on him in the dark where he could not read it. *Blossom* v. *Dodd, supra*. Nor in a language unknown to the recipient. *Camden, &c. R. Co.* v. *Baldauf*, 16 Pennsylvania State, 67; 55 Am. Dec. 481.

The carrier, however, may not by contract absolve himself from the consequences of his own negligence or that of his servants. *Railroad* v. *Lock*

wood, 17 United States, 347; *Guillaume* v. *Hamburgh & Am. P. Co.*, 42 New York, 212; 1 Am. Rep. 512; *Steinweg* v. *Erie Ry.*, 43 New York, 123; 3 Am. Rep. 673; *Westcott* v. *Fargo*, 61 New York, 542; 19 Am. Rep. 300; *Maynard* v. *Syracuse, &c. R. Co.*, 71 New York, 180; 27 Am. Rep. 28; *Michigan S. &c. R. Co.* v. *Heaton*, 37 Indiana, 448; 10 Am. Rep. 89; *Empire Trans. Co.* v. *Wamsutta Oil Co.*, 63 Pennsylvania State, 14; 3 Am. Rep. 515; *School District* v. *Boston, &c. R. Co.*, 102 Massachusetts, 552; 3 Am. Rep. 502; *Erie Ry. Co.* v. *Wilcox*, 84 Illinois, 239; 25 Am. Rep. 451; *Merchants' D. & T. Co.* v. *Cornforth*, 3 Colorado, 280; 25 Am. Rep. 757; *Galt* v. *Adams Ex. Co.*, MacArthur & Mackey (District of Columbia), 124; 48 Am. Rep. 742; *Shriver* v. *Sioux City, &c. R. Co.*, 24 Minnesota, 506; 31 Am. Rep. 353; *Ryan* v. *M. K. & T. Ry. Co.*, 65 Texas, 13; 57 Am. Rep. 589; *Pennsylvania R. Co.* v. *Raiordan*, 119 Pennsylvania State, 577; *Chicago, &c. R. Co.* v. *Witty*, 32 Nebraska, 275; 29 Am. St. Rep. 436; *Railroad* v. *Dies*, 91 Tennessee, 177; 30 Am. St. Rep. 871; *Pacific Ex. Co.* v. *Foley*, 46 Kansas, 457; 26 Am. St. Rep. 107; *Johnson* v. *Alabama, &c. Ry. Co.*, 69 Mississippi, 191; 30 Am. St. Rep. 534; and see 13 Lawyers' Reports Annotated, 362; 17 ibid. 339.

The limitation is always matter of agreement, subject to the shipper's express or implied assent. The carrier cannot impose it on the shipper against his will, but is bound in absence of his consent to carry under his common-law responsibility, is liable to an action for refusal, and may be compelled to carry. As where the shipper has no choice but to ship with him. *Railway Co.* v. *Cravens*, 57 Arkansas, 112; 38 Am. St. Rep. 230; *Kansas Pac. Ry. Co.* v. *Nichols*, 9 Kans. 235; 12 Am. Rep. 494, and note, 500; *Adams Ex. Co.* v. *Nock*, 2 Duvall (Kentucky), 562; 87 Am. Dec. 510; *Western Trans. Co.* v. *Newhall*, 24 Illinois, 466; 76 Am. Dec. 760; *Maybin* v. *S. C. R. Co.*, 8 Richardson Law (So. Carolina), 240; 64 Am. Dec. 753; *Fish* v. *Chapman, supra; Doty* v. *Strong*, 1 Pinney (Wisconsin), 313; 40 Am. Dec. 773; *Harvey* v. *Conn. &c. R. Co.*, 124 Massachusetts, 421; 26 Am. Rep. 673; *Kimball* v. *Rutland, &c. R. Co.*, 26 Vermont, 247; 62 Am. Dec. 567.

In the absence of special contract, the effect of receiving goods marked for carriage to a point beyond his own line is differently viewed in England and in America. In England this implies a contract for transportation to the destination, although no connection with other carriers is shown, and the price for complete carriage is not prepaid. *Muschamp* v. *Lancaster, &c. Ry. Co.*, 8 M. & W. 421; 10 L. J. Ex. 466. This doctrine has been adopted in a few of the United States. *Mobile, &c. R. Co.* v. *Copeland*, 63 Alabama, 219; 35 Am. Rep. 13; *Hawley* v. *Screven*, 62 Georgia, 347; 35 Am. Rep. 126; *Mulligan* v. *Illinois Cent. R. Co.*, 36 Iowa, 181; 14 Am. Rep. 514; *Gray* v. *Jackson*, 51 New Hampshire, 9; 12 Am. Rep. 1; *Bradford* v. *Railroad*, 7 Richardson Law (So. Car.), 201; 62 Am. Dec. 411; *East Tennessee, &c. R. Co.* v. *Rogers*, 6 Heiskell (Tennessee), 143; 19 Am. Rep. 589; *Illinois Central R. Co.* v. *Frankenberg*, 54 Illinois, 88; 5 Am. Rep. 92, and other cases cited in note, 72 Am. Dec. 234. In the New Hampshire case cited above, the Court say: "The great value of commodities transported over these connected lines; the increased risk of loss and damage from the immense distances over which they carry goods; the fact that when goods are once intrusted to carriers on these long routes, they are placed beyond all control and supervision of the owners, are cogent rea-

sons for holding those who associate in these connected lines to a rule that shall give effectual and convenient remedy to the owners whose goods have been lost or damaged in any part of the line. Any rule which should have the effect to defeat or embarrass the owner's remedy would be in conflict with the principles and whole policy of the common law." In the Illinois case cited above, the Court observe: "It would be a great hardship indeed to compel the consignor of a few barrels of flour, delivered to a railroad in this State, marked to New York city, and which are lost in the transit, to go to New York or to the intermediate lines of road, and to spend days and weeks perhaps in endeavouring to find out on what particular road the loss happened, and having ascertained it, in the event of a refusal to adjust the loss, to bring a suit in the Court of New York for his damages. Far more just would it be to hold the company who received the goods in the first instance as the responsible party, and the intermediate roads its agents to carry and deliver; and it is the more reasonable and just, for all railroads have facilities, not possessed by a consignor, of tracing loss of property conveyed by them, and all have or can have running connections with each other. Above all, when it is considered the receiving company can at the outset relieve itself from its common-law liability by a special and definite agreement, such a rule cannot prejudice them."

But according to the greater weight and number of authorities in this country such a circumstance implies only a contract to deliver to the next succeeding carrier. *Railroad Co.* v. *Manuf Co.*, 16 Wallace (U. S. Supr. Ct.), 318; *Elmore* v. *Naugatuck R. Co.*, 23 Connecticut, 457; 63 Am. Dec. 143; *Burroughs* v. *Norwich, &c. R. Co*, 100 Massachusetts, 26; 1 Am. Rep. 78; *Root* v. *Gt. West. R. Co.*, 45 New York, 524; *Clyde* v. *Hubbard*, 88 Pennsylvania State, 358; and cases in Indiana, Kansas, Kentucky, Maine, Maryland, Michigan, Minnesota, Mississippi, Missouri, Rhode Island, and Vermont, cited in note, 72 Am. Dec. 236, and in Lawson on Contract of Carriers, § 238; and an amusing discussion in *Van Santvoord* v. *St. John*, 6 Hill (New York), 157, 163. These cases urge the injustice of placing on the receiving carrier the responsibility for the negligence of persons over whom he has no control. Mr. Lawson prefers the English rule, although he admits that the preponderance of authority here is the other way. I agree with him, and cannot understand how Courts, which like those of New York, hold banks responsible for the default of distant collecting agents, should refuse to make the like rule for connecting carriers.

As to inherent defects or natural deterioration. In respect to animals, see 4 English Ruling Cases, 138 and notes. In respect to perishable property, like fruit, the carrier is not responsible for its deterioration if his own negligence does not contribute. Schouler on Bailments, 397; *American Ex. Co.* v. *Smith*, 33 Ohio St. 511; 31 Am. Rep. 561; and note, 567; *Beard & Sons* v. *Ill. Cent. Ry. Co.*, 79 Iowa, 518; 18 Am. St. 381; *Gulf, &c. Ry. Co.* v. *Levi*, 76 Texas, 337; 18 Am. St. Rep. 45.

As to the shipper's negligence. The carrier is excused if the loss or injury is occasioned, without his fault, by the shipper's carelessness, as in packing goods, or in furnishing vessels in which they are contained, occasioning breakage or leakage, or in securing animals, or in misdirecting the goods. Schouler

on Bailments, 397; *Congar* v. *Chicago, &c. Ry. Co.*, 24 Wisconsin, 157; *Erie Ry. Co.* v. *Wilcox*, 84 Ill. 239; 25 Am. Rep. 451. Or by the shipper's fraud in concealing a valuable article under the disguise of one of trifling value; as where silks and furs are packed in bedding, *Chicago, &c. R. Co.* v. *Shea*, 66 Illinois, 471; or a box of coin like common goods. *Gorham Manuf. Co.* v. *Fargo*, 35 New York Superior Court, 434; and see *Belger* v. *Dinsmore*, 51 New York, 166; *Everett* v. *So. Ex. Co.*, 46 Georgia, 303; *Hayes* v. *Wells*, 23 California, 185; *Chicago, &c. R. Co.* v. *Thompson*, 19 Illinois, 578; *Relf* v. *Rapp*, 3 Watts & Sergeant (Pennsylvania), 21; 37 Am. Dec. 528.

Section III. — *Duties under Railway and Canal Traffic Acts.*

No. 8. — LONDON AND NORTH WESTERN RAILWAY COMPANY *v.* EVERSHED.

(EVERSHED *v.* LONDON AND NORTH WESTERN RAILWAY COMPANY.)

(H. L. 1878.)

No. 9. — DICKSON *v.* GREAT NORTHERN RAILWAY COMPANY.

(C. A. 1886.)

RULE.

A COMMON carrier is, as such, bound to accept and carry goods of such kind only as he professes to carry.

But, under the Railway and Canal Traffic Acts, Railway and Canal Companies are bound to provide reasonable facilities for receiving, forwarding, and delivery of their traffic, including passengers, goods, and animals. They are consequently bound to undertake such traffic; and they cannot by special contract impose unreasonable conditions with respect to their liability. They must also (under these Acts and the Railways Clauses Consolidation Act, 1845), conduct their traffic without undue preference; and are therefore not entitled to allow one customer a rebate off the charge made to others, merely on the ground that the former customer is more favourably situated for sending his traffic by a rival company.

London & North Western Railway Company v. Evershed.

3 App. Cas. 1029–1039 (s. c. 48 L. J. Q. B. 22; 39 L. T. 306).

Carrier. — Railway Company. — Inequality of Charges. — Undue Preference.

Appeal in action by Evershed against the L. & N. W. Railway Company to recover money in respect of overcharges. Evershed was a brewer in a town served by the Midland as well as the L. & N. W. Ry. Co. Truman, another brewer in same town, had sidings connecting his premises with the line of the Midland Company. The Midland charged Truman nothing for cartage, and made a rebate in the charge from station to station conveyance. The L. & N. W. Ry. Co., in order to secure a portion of Truman's custom, allowed him similar advantages; but to others in the same trade including the plaintiff, they made the ordinary charge for cartage, and allowed no rebate on the charge for conveyance on the line: —

Held, that this was an inequality and an undue preference within the meaning of the statutes.

The plaintiff, on finding that he was subjected to this higher charge, had paid it under protest: —

Held, that he was entitled to recover back, in an action for money had and received, the difference he had so paid under protest.

Appeal against a judgment of the Court of Appeal, [1030] which had affirmed a previous judgment of the Queen's Bench Division in an action brought by Evershed, the now respondent, to recover a sum of £1356 for overcharges alleged to have been made by the present appellants in respect of goods carried by them for him.

When the case came on for trial before Mr. Justice Field, it was agreed that it should be referred to a barrister, Mr. Cave, to state a special case for the opinion of the Court. The material parts of that case were these: —

There were three railway companies having stations in the town of Burton-upon-Trent, by any one of which goods could be sent from Burton to any part of the United Kingdom. Messrs. Truman and Messrs. Ind & Coope and Messrs. Phillips were brewers at Burton. The plaintiff, Evershed, was also a brewer there. Messrs. Truman (who had become owners of the business of Messrs. Phillips,) and also Messrs. Ind had communications by sidings between the Midland Railway and their own premises. Evershed had no such communication with any line of railway in Burton. By the use of these sidings the goods of these two firms could be transferred from the breweries of these firms to the rail-

way line at less cost of time and labour than from the premises of those brewers who had no such advantages. These latter had to pay a cartage rate for bringing their goods from their premises to the line of railway. To the brewers who did possess these [* 1031] advantages the Midland * Railway directors charged no cartage; and, besides, allowed a rebate of 9*d* per ton from the carriage rate of the goods, or what was called the "station to station" rate. There was no direct communcation by sidings between the North-Western Railway and the two firms, but when their goods were sent to that railway, though the cartage work was done for them, there was no charge made for cartage, and the same rebate in the station to station rate was made, as when they were sent to the Midland Railway. In some instances, but not in all, it was more convenient for these firms to send by the North Western than by the Midland Railway, and with a view to a successsful competition with the Midland Company (but without any intention to prejudice the plaintiff) the North Western directors exactly assimilated, in favour of these two firms, their charges to those of the Midland. To the other brewers in the town, of whom Mr. Evershed was one, the ordinary charges for cartage were made, and no rebate was allowed of any kind upon the station to station rate. For a long time the traffic business of these other brewers was managed by a man named Ball, who, it was said, for his own purposes, kept the persons employing him in ignorance of these differences of charges. Ball was dismissed in September, 1874, but for some time afterwards Evershed continued the payments as before. On the 7th of January, 1875, the plaintiff wrote to the defendants, stating that he had become acquainted with the differences, and complaining of them, asked for repayment of the amounts which he alleged had been overcharged. Up to July, 1875, he still made the payments, but made them under protest. His demand was followed by a complaint to the Railway Commissioners, who, acting upon that complaint, issued their injunction forbidding the railway company to continue to make the differential charges. The defendants acted on that injunction, and had, in consequence, lost much of the outward traffic of the firms before mentioned. The plaintiff afterwards brought this action for money had and received, to recover what he alleged to have been unlawful overcharges.

No. 8. — London & North Western Ry. Co. v. Evershed, 3 App. Cas. 1031–1035.

The question for the Court was whether the plaintiff was, under the circumstances, entitled to recover the whole or any part of the alleged overcharges. The Court was to have power to draw inferences of fact.

*The special case was heard in the Queen's Bench [*1032] Division on the 19th of July, 1877, and on the 2nd of February judgment was given for the plaintiff, which judgment was, in November, 1877, affirmed by the Court of Appeal. This appeal was then brought.

Counsel having been heard for the appellant, the counsel [1034] for the respondent were not called on to address the House.

THE LORD CHANCELLOR (Lord CAIRNS): —

My Lords, this is an appeal from a unanimous decision of the Queen's Bench Division, and also of the Court of Appeal, and I cannot think that your Lordships have heard anything in the argument for the appellants which can raise a doubt in your minds as to the correctness of those decisions.

I do not propose to go over the whole of the ground which has been so completely covered by the judgments of the Courts below, I will simply make this observation: It appears to me that the question, in cases like the present, must always be simply this: Is the plaintiff in the action obliged to pay one sort of remuneration *for services which the railway company [*1035] performs for him, while the company performs the same services for other traders either for less remuneration, or for no remuneration at all? My Lords, in my opinion undoubtedly the railway company is, and that indeed is not disputed, in the collecting, loading, and delivering of goods, performing identically the same services for the plaintiff in this action as for the two other firms of brewers whose names have been referred to. Now as a matter of policy and expediency, it may well be that the appellants have good reasons for treating those other firms in the way they do; it may be that if they do not do that these other firms, from the natural advantages of the situation which they have been able to occupy, will send their goods by another railway and not by the railway of the appellants. But with those considerations the plaintiff in the action has nothing whatever to do. That is exactly one of those things which Parliament has not left open to railway companies to judge of, — whether in that way they will equalize their capacity for competing with other

lines or not. The one right, to my mind, the clear and undoubted right, of a public trader is to see that he is receiving from a railway company equal treatment with other traders of the same kind doing the same business and supplying the same traffic. In my opinion that is not the case with regard to this plaintiff, and therefore I think he is entitled to recover the moneys he has paid under protest.

My Lords, I move your Lordships that the judgment of the Court below be affirmed, and the appeal dismissed with costs.

Lord HATHERLEY: –

My Lords, I have come to the same conclusion. I have been unable to see, since the beginning of the argument, in a case where there was this difference in the charge against the respondent, how it could possibly be said that the case comes within the well-established construction of the provisions of the 90th section of the Railways Clauses Consolidation Act.

It was said indeed, and pressed on us by Mr. Mellor, that in the 17th paragraph of the case which has been stated for the opinion of the Court below, the appellants are stated to perform "gratuitously" the cartage which they perform for the three [*1036] firms; and *it was argued that the plaintiff in the present case, Mr. Evershed, could have no reason to complain because they were bountiful to others whilst to him they made this charge, and still less (it was said) could he recover from them what he has so paid as money obtained from him unduly, and for which he could sue in an action for money had and received. I apprehend that the real state of the facts appears clearly from the special case, and however the word "gratuitously" may be applied there (and it seems to be applied not perhaps unnaturally) the result is this, that in making the total charge for the total work, done in exactly the same circumstances in every respect, except that the one class of people happen to be near to a rival railway, and therefore might be tempted by some offer to hand over their business to that railway, the one brewer is charged 1*s.* 9*d.* more than the others. If that be so, surely he has the right to sue for it, in whatever form the arrangement may have been made as between the company and the others, the favoured individuals, because that arrangement comes in effect simply to this: We charge other people a lower sum of money, and we charge you a higher sum of money. But according to the strict

meaning of the Acts of Parliament, as interpreted by the decisions, from the very moment that the company charges A. a given sum, when B. another person (a mere stranger up to that time, if you will), comes to the company to have the same services rendered under the same circumstances, he cannot be charged one farthing more than has been charged to A.; he can only be charged precisely what the Act authorizes the company to charge, namely, that which has been charged to others, and the moment the directors take on themselves to charge less to another person, they must charge less to him too. The charge must be the same to all for the same services, performed in the same manner, for carrying the goods for the same distance, and for similar services rendered in every other way; it not being a case of a wholesale charge compared with a retail charge and the like, which would be a difference of circumstances, and has been decided to be an essential difference.

My Lords, in the case we have before us, there is really no essential difference of circumstances; the only difference is that the two firms of brewers are more favourably situated for dealing * with another railway company than the other [* 1037] brewer is. Therefore, I apprehend that your Lordships cannot possibly say that the appellants are entitled to make this distinctive charge and give to other traders a rebate without giving the respondent a return of the money which he has so paid in excess of the charge to other people. I think the money he has so paid, and paid under protest, can now be recovered back by him.

Lord BLACKBURN: —

My Lords, I am of the same opinion.

The 90th section of the Railways Clauses Consolidation Act says, in what seem to me very clear terms, that "all such tolls" shall "be at all times charged equally to all persons, and after the same rate, whether per ton, per mile, or otherwise, in respect of all passengers, and of all goods, or carriages of the same description, and conveyed or propelled by a like carriage or engine passing only over the same portion of the line of railway under the same circumstances." I can hardly conceive clearer words than those to express the intention of the Legislature that there should be equality of charge in respect of all goods carried upon the same railway under the same circumstances. It may very

well be that peculiar circumstances, as in some of the cases which have been referred to, make some difference. There may be the difference between wholesale and retail; a large quantity of goods may be carried cheaper than a smaller quantity of goods; that would be a difference of circumstances. And many other cases may be pointed out in which the circumstances would not be the same.

But the argument here has been almost entirely this, that because the two firms of brewers who have been mentioned happen to be so situated as to the Midland Railway that they can get cheap carriage by the Midland Railway Company, and consequently will not go to the North Western Railway Company if the North Western Company charges them the ordinary rate, therefore, because there is that difference in the persons, the North Western Railway Company may reduce the price to them in order to tempt them to bring their traffic to that company. I quite agree that this is not done with any view of injuring, or intention to injure, Mr. Evershed. It is done with a view [* 1038] to coax some of the traffic, * which would otherwise go upon the Midland Railway, to come to the North Western Railway. It may be (but I do not give any opinion as to that) that it would have been provident and proper on the part of the Legislature, in making the enactment, to say that there should be an exception in such cases, and that there might be a different rate given in order to coax and induce traffic to go by a different route from that by which it would otherwise have gone. However, whether that would have been a prudent and proper thing for the Legislature to say or not, it is not what the Legislature has said, and it is very likely that it was the intention of the Legislature not to say it, because it was thought that if equality of charge is to be disregarded under any circumstances, that might be made a cloak for making inequalities of charge under unjustifiable circumstances. I do not know whether that was the motive and intention of the Legislature or not, and I do not inquire. What the Legislature has clearly said is that the tolls must be charged equally to all persons under the same circumstances. I think that means under similar circumstances as to the goods, not as to the person. I do not think the person comes into the question at all.

My Lords, there is one more argument, and one more only,

which has been used. It was said that the word "tolls" in the interpretation clause is confined to a charge authorized by the Act of Parliament for carrying goods on the railway, from the time the goods are put on the railway, that is to say, from the time they are brought to the railway station, to the time when they are delivered, and that the shilling which has here been paid for the cartage outside is not a "toll" within the meaning of the Act. I do not think it is in the least degree necessary to consider whether that is so or not. I think it is quite clear that when the charge from station to station, and a shilling, are, both together, paid by one person for the whole service performed by the railway company including the cartage, when the amount of the tolls (supposing them to be exclusive of the cartage), and an added shilling are charged to one person, and to another person the same tolls (again treating them as exclusive of the cartage) are charged, and a shilling's worth of cartage is thrown in gratis, and not charged for, this latter person gets his goods carried upon the railway at a *cheaper rate. Whether [*1039] the shilling is part of the "toll" or not I do not care. In that case there is an inequality; there is a difference in the amount charged for carriage upon the railway which is what the Legislature intended to prevent.

As regards the only remaining question, namely, whether an action for money had and received is the proper remedy in such a case, I apprehend, my Lords, that that question was settled by the decision in *The Great Western Railway Company* v. *Sutton*, L. R., 4 H. L. 226; 38 L. J. Ex. 177, and *The Lancashire Railway Company* v. *Gidlow*, L. R., 7 H. L. 517; 45 L. J. Ex. 625, where it was determined, as I understand it, that money extorted by inequality of charge was to be recovered in exactly the same way as if it had been money extorted by making an unreasonable charge, that is to say, by an action for money had and received.

Lord GORDON: —

My Lords, I am of the same opinion.

This Act, the Railways Clauses Act of 1845, has given rise to a good deal of discussion and litigation, and I do not wonder at it altogether, considering the peculiarity of the terms which are used in what is called the equality clause, the 90th section. The words in the section, "under the same circumstances," are certainly words calculated to give rise to a good deal of litigation in

their construction; but we see how very carefully the learned Judges in the Queen's Bench Division and in the Court of Appeal applied their minds to it, and we find that they are unanimous upon the point. I listened with every attention to the arguments submitted to us by the appellant's counsel, but I must say that they failed to bring before my mind distinctly any good grounds of complaint against the judgments of the Courts below. I therefore think that the judgment ought to be affirmed.

Judgment appealed from affirmed; and appeal dismissed with costs.

Lords' Journals, 15th July, 1878.

Dickson v. Great Northern Railway Company.

18 Q. B. D. 176–193 (s. c. 56 L. J. Q. B. 111; 55 L. T. 868; 35 W. R. 202).

Carrier. — Railway Company. — Reasonable Condition.

[176] A condition, contained in a ticket signed by a person delivering a dog for carriage to a railway company, stated that "the company are not and will not be common carriers of dogs, nor will they receive dogs for conveyance except on the terms that they shall not be responsible for any amount of damages for the loss thereof, or for injury thereto beyond the sum of £2 unless a higher value be declared at the time of delivery to the company and a percentage of 5 per cent. paid upon the excess of value beyond the £2 so declared:" —

Held, that, although the railway company were not bound to be common carriers of dogs, yet, being bound by the Railway and Canal Traffic Act, 1854, to afford reasonable facilities for the carriage of dogs, they could only limit their liability in respect thereof by reasonable conditions: and that the above-mentioned condition was not just and reasonable within the meaning of the 7th section of the Act, and therefore did not protect the railway company from liability to an amount exceeding £2 in respect of damage done to the dog through the negligence of their servants.

Appeal from the judgment of the Queen's Bench Division, reversing the decision of the Judge of the Newcastle County Court.

The action was brought in the county court in respect of injury occasioned, through the negligence of the defendant's servants, to a greyhound belonging to the plaintiff, which had been delivered to the defendants for carriage from London to Newcastle. The defendants had paid £2 into Court, and with regard to any further amount pleaded the terms of a condition contained in a printed ticket signed by the plaintiff's servant, in the form required by

the defendants to be signed by all persons sending dogs by their railway, upon the delivery of the dog to the defendants for carriage. The terms of the condition were as follows: "Notice is hereby given that the company are not and will not be common carriers of dogs, nor will they receive dogs for conveyance except on the terms that they shall not be responsible for any amount of damages for the loss thereof or for injury thereto beyond the sum of £2 unless a higher value be declared at the time of delivery to the company, and a percentage of 5 per * cent. [* 177] paid upon the excess of value beyond the £2 so declared."

The value of the plaintiff's dog was £60. No declaration was made of the value at the time of the delivery of the dog to the company, nor any payment beyond the ordinary fare for the carriage of a dog from London to Newcastle, which was 6s. While the dog was in the charge of the defendants a porter negligently wheeled a barrow over its tail, and it was so much injured as to be deteriorated in value to the extent of £25. The County Court Judge held that the above-mentioned condition was unreasonable, and therefore void under the Railway and Canal Traffic Act, 1854, and gave judgment for the plaintiff for £23 over and above the £2 paid into Court.

The Divisional Court (Mathew and A. L. Smith, JJ.) on appeal reversed his decision.

J. Lawson Walton, for the plaintiff. The condition was unreasonable. The refusal of the defendants to be common carriers of dogs or to carry them except on the terms stated in the condition is a breach of the obligation imposed upon them by the Railway and Canal Traffic Act, 1854 (17 & 18 Vict. c. 31) s. 2. It is submitted that the effect of the legislation is that they are bound to carry dogs, like goods, as common carriers. They cannot refuse to be common carriers of dogs, because that would be to subject one class of traffic to an undue disadvantage. The owners of dogs, though paying the ordinary rate of fare, would not get the ordinary value for it, viz., the liability of the company as common carriers. Dogs are in no different position for this purpose from that of any other class of chattels. Assuming that the provisions of s. 7 of the Railway and Canal Traffic Act, 1854, apply to dogs, and that the defendants could by a special contract limit their liability as carriers of dogs, it must be by a contract the terms of which are reasonable. The effect of this condition is that they

will not be common carriers of dogs at all, nor will they even be liable for negligence, wilful misconduct, or dishonesty on the part of their servants, unless a percentage on the value is paid, or, in other words, an insurance rate; and, where such insurance rate is paid, they do not undertake to insure the dog, be-
[* 178] cause they do not then accept the position of common * carriers, but only of bailees for hire. Again, it is clear that in order that such a condition may be reasonable there must be a reasonable alternative offered. It may be reasonable for a company, charging a reasonable amount in respect of goods carried on the ordinary carrier's liability, to say that, if the goods are carried at a lower rate, they must be at owner's risk; but here the percentage rate is so high that in many cases there would be no real alternative but to send the dog at owner's risk. Take the case of a carriage of a dog worth £60 for a few miles. There must be some consideration to the consignor for giving up the ordinary liability of the carriers. There is none here. They cited *Harrison* v. *London, Brighton, and South Coast Ry. Co.*, 2 B. & S. 122; 31 L. J. Q. B. 209; *Ashenden* v. *London, Brighton, and South Coast Ry. Co.*, 5 Ex. D. 190; *McManus* v. *Lancashire and Yorkshire Ry. Co.*, 4 H. & N. 327; 28 L. J. Ex. 353; *Peek* v. *North Staffordshire Ry. Co.*, 10 H. L. C. 473, p. 286, *ante*; *Aberdeen Commercial Company* v. *Great North of Scotland Ry. Co.*, 3 Nev. & Macn. 205; *Manchester, Sheffield, and Lincolnshire Ry. Co.* v. *Brown*, 8 App. Cas. 703; 53 L. J. Q. B. 124; *Lewis* v. *Great Western Ry. Co.*, 3 Q. B. D. 195; 47 L. J. Q. B. 131.

Cyril Dodd, for the defendants. No statute imposes on the railway company the duty of carrying dogs, though a rate is given by their Acts in case they choose to do so. It has been decided that a railway company are only common carriers of things which they profess to carry as such. *Oxlade* v. *North Eastern Ry. Co.*, 1 C. B. (N. S.) 454; 26 L. J. C. P. 129; *Johnson* v. *Midland Ry. Co.*, 4 Ex. 367; 18 L. J. Ex. 366. It is not denied that, if they carry dogs, they are bound to carry them on reasonable terms. The condition in this case was reasonable. It is submitted that it is not necessary to contend that the condition would be reasonable as applied to all circumstances, *e. g.*, in the case of every distance, however short, for which a dog is carried. The question is whether it was reasonable as applied to the circumstances of this particular case, viz., to a carriage from London to New-

castle. A contract of this sort is reasonable, because it is precisely analogous to the provisions made by the Legislature itself with regard to some animals in the 7th * section of [*179] the Railway and Canal Traffic Act, 1854. Cases like *Harrison* v. *London, Brighton, and South Coast Ry. Co.*, and *Ashenden* v. *London, Brighton, and South Coast Ry. Co.*, are distinguishable, because there the company sought to relieve themselves of all liability whatever in respect of dogs above a certain value, unless the value was declared. Here the company undertake liability for a reasonable amount of damage, where the value is not declared. The principle of the cases is that the company cannot destroy their liability altogether, they can only limit it by reasonable conditions. He cited *Beal* v. *South Devon Ry. Co.*, 3 H. & C. 337; *Robinson* v. *London and South Western Ry. Co.*, 19 C. B. (N. S.) 51; 34 L. J. C. P. 234; *Gregory* v. *West Midland Ry. Co.*, 2 H. & C. 944; 33 L. J. Ex. 155, 157.

Walton, in reply. The condition being in its terms applicable to all cases in which dogs are carried, its reasonableness or otherwise must be considered in reference to all cases, and not only to the circumstances of the particular case. The evil at which the Railway and Canal Traffic Act, 1854, s. 7, was aimed was the attempt to impose unreasonable conditions on the public at large.

Cur. adv. vult.

Dec. 15. The following judgments were delivered: —

Lord Esher, M. R. The question in this case is whether the defendants are liable for damage occasioned to the plaintiff's dog through the negligence of their servant to a greater extent than £2, the amount paid into Court. The person who delivered the dog to the company for carriage signed a ticket containing certain terms with regard to the carriage of dogs, upon which the defendants rely. The County Court Judge held those terms to be unreasonable, and, assessing the damage done to the dog at £25, he held that the defendants were liable to the extent of £23 in addition to the amount paid into Court. The Divisional Court reversed his decision. Having regard to the views expressed by the learned Judges below, this Court has felt it necessary to consider the case with great care, but after such consideration we have arrived at the conclusion that their judgment should be reversed. * The first question that arises is whether [*180]

the company were liable as common carriers in respect of the carriage of dogs. For the reasons which will be presently given by my Brother LINDLEY, I am of opinion that they were not bound by the common law to carry dogs, and, therefore, if there had been no legislation on the subject, they could have made any terms they pleased with regard to the carriage of dogs. The case, however, does not seem to me to depend on the common law liability of the company, but on statutory enactments. By the Railway and Canal Traffic Act, 1854 (17 & 18 Vict. c. 31), provision is made for the regulation of traffic on railways and canals, and by s. 1 "traffic" is to include "animals." The 2nd section provides that the company shall afford all reasonable facilities for the receiving and forwarding and delivering of traffic, and by the 3rd section a remedy was provided where such reasonable facilities were withheld by application to the Court of Common Pleas, whose jurisdiction in such matters has since been transferred to the Railway Commissioners. Therefore it appears to me that the defendants are bound by statute to afford reasonable facilities for carrying, among other animals, dogs. Then by s. 7 of the Act it is provided that the company shall be liable for the loss of or any injury done to any horses, cattle, or other animals, or to any articles, goods, or things in the receiving, forwarding, or delivering thereof occasioned by the neglect or default of such company or its servants, notwithstanding any notice, condition, or declaration made and given by such company contrary thereto, or in anywise limiting such liability, every such notice, condition, or declaration being thereby declared void. If the section stopped there the company would be bound to carry dogs for hire, but not, I think, as common carriers. I think their liability would be that of bailees for reward, and such liability could not be affected or limited by any notice, condition, or declaration they might make or give. But then there comes a proviso to the effect that nothing contained in the Act shall be construed to prevent the company from making such conditions with respect to the receiving, forwarding, and delivering any of the said animals, articles, goods, or things as shall be adjudged by the Court or Judge before whom any question relating thereto shall [*181] *be tried to be just and reasonable. Inasmuch as the Act declares that *primâ facie* all such conditions are to be null and void, it seems to me that it lies on the company to show

that any condition upon which it may rely is just and reasonable. If the case is tried before a Judge and jury I think it is for the Judge to say whether the condition is reasonable, although, I think, if he needs any assistance with regard to facts material for the determination of that question, he may ask the jury to find such facts. But, where there are no special facts in question, it is for the Judge to say upon the construction of the condition, bringing to bear his knowledge of the world, whether it is just and reasonable. In the present case there was no evidence of any special circumstances. One of the Judges in the Court below seems to have thought that there were special risks and difficulties involved in the carriage of dogs, *e. g.*, that dogs were exceptionally liable to be stolen. I cannot assume in the absence of any evidence that a dog is peculiar in that respect, or that there is any special danger of theft in the case of a dog where reasonable care is taken. Therefore, as it seems to me, the Judge was to determine whether the condition was reasonable upon the construction of its terms without evidence of any circumstances peculiar to dogs as compared with other animals. What, then, is the nature of the condition? It is, as it appears to me, a condition of the most violent description. It absolutely absolves the company from liability for any negligence of themselves or their servants however gross, and for wilful misconduct or dishonesty of their servants. Anything more violently stringent there could not be. Superior authority, by which I am bound, has held that, if a reasonable alternative is given to the customer by which, instead of accepting these harsh terms, he can pay a higher rate and have his goods carried upon the terms of the ordinary liability, even such a sweeping exemption from liability may be reasonable.

The question is, therefore, whether there is such an alternative here. The company say that they will be liable to the ordinary liability of bailees for hire up to the amount of £2, but beyond that sum they will not be liable, unless a percentage of 5 per cent. upon the value of the dog is paid. The condition appears to be a notice to the public in general, applicable to the case of * all persons for whom dogs are carried, and I think, [* 182] therefore, we have to see whether it is reasonable as applied to all cases to which it is applicable. In this particular case the dog was to be carried for a long distance. The ordinary

fare would be 6s., but, if the percentage was paid on the value of this dog, the fare would be £3 4s. The excess over the ordinary fare may be looked at in two ways. If it is treated as a premium of insurance, the company must be looked on as contracting to insure the dog: and then the consideration at once arises that such a contract would be invalid as being *ultra vires*, and could not be enforced against the company: and therefore, in that point of view, the consideration for the excess payment fails and the condition is obviously unreasonable. On the other hand, if the excess payment is treated as extra fare, how does the case stand? The fare for the carriage of a dog of the value of £60 for the distance in question would be more than that for the carriage of a passenger in a first-class carriage for the same distance with all the liabilities attaching to the carriage of a passenger. On a short journey the same consideration would apply to a much greater extent. It is obvious to me that no person wanting to have a dog carried could submit to these terms. The cases seem to me to establish that an alternative which no reasonable person could possibly adopt is for this purpose no alternative at all. In effect, therefore, what the company do in the case of dogs, which they are bound by statute to carry on reasonable terms, is to say that they will not carry them except on the terms of being subject to no liability whatever beyond £2, and to give no alternative. The cases decide that, if no alternative is given, such terms are unreasonable. For these reasons I think that this condition was unreasonable, and therefore that the decision of the Court below should be reversed.

Lindley, L. J. In order to decide the question thus raised, it is, in my opinion, necessary to ascertain at the outset whether the company is bound to carry dogs and, if it is, upon what terms, where there is no express contract determining them. If the railway company can lawfully refuse to carry dogs at all, it seems to me to follow that any terms on which it may [*183] choose to * carry them are in the nature of concessions on the part of the company, and that no terms on which it may choose to carry can be pronounced unreasonable. In the case supposed there is no standard of reasonableness or unreasonableness: and if any particular terms were objected to or were held unreasonable, the railway company would still be masters of the situation, and be able lawfully to refuse to carry on any other

terms. A judicial decision that a particular set of terms was unreasonable would, in the case supposed, be of little practical use, and would afford no protection to the public, as the action of the Court could always be paralyzed by a refusal on the part of the railway company to carry. Unless, therefore, the railway company is bound to carry upon some terms, no contract of carriage can, in my opinion, be declared invalid on the ground of its being unreasonable. I proceed, therefore, to inquire whether the defendants here can lawfully refuse to carry dogs from London to Newcastle, and in order to determine this question it is necessary to see how a duty to carry can arise apart from express contract. Such a duty can only arise in one of two ways: first, by being a common carrier; and, secondly, by virtue of some statute.

At common law no person is bound as a common carrier to carry any goods of a kind which he does not profess to carry. Unless he professes to carry dogs for people in general, he is not bound to carry a dog for any particular individual; and if a carrier says he will not carry dogs except on certain terms, he can lawfully refuse to carry any particular dog on any other terms. In this case the defendants expressly say they are not common carriers of dogs and will not carry dogs except on their own terms. The common law, therefore, does not oblige the company to carry dogs at all; and at common law no action will lie against the company for refusing to carry a dog. Moreover, as no person is bound to enter into an agreement with one person simply because he is in the habit of entering into similar agreements with others, a company which is not a common carrier of dogs, but which may be in the habit of carrying dogs on certain terms, may at common law decline to accept any particular dog, even on those terms, and may refuse to carry the dog at all, or may refuse to carry it except upon some other terms which the company may specify. *At [* 184] common law, therefore, it seems to me the defendants can lawfully refuse to carry dogs except upon their own terms.

Passing now to the various statutes relating to railway companies, there are very few enactments which in plain and distinct terms impose upon companies the duty of carrying any particular things. They are bound to carry troops (7 & 8 Vict. c. 85, s. 12), and mails (36 & 37 Vict. c. 48, s. 18), but until the passing of the Railway and Canal Traffic Act, 1854, the duty of railway companies to carry any particular class of goods depended upon

whether they did or did not profess to carry such goods as common carriers. The Railways Clauses Consolidation Act, 1845, did not impose on railway companies any duty to carry goods of which they were not common carriers by reason of their own conduct and profession. This was decided by *Johnson* v. *Midland Railway Company*, and was recognised as clear and settled law by Vice Chancellor WOOD in *Hare* v. *London and North Western Railway Company*, 2 J. & H. 80; 30 L. J. Ch. 817. The Railway and Canal Traffic Act, 1854, materially altered the law in this respect, for it enacts by s. 2 that every railway company shall afford all reasonable facilities for receiving, forwarding, and delivering traffic; and by s. 1 the word "traffic" includes passengers and their luggage, and goods, animals, and other things. This Act imposes on railway companies the duty to afford reasonable facilities for carrying all passengers, goods, and animals. There may be an exception in the case of specially dangerous goods (see the Railways Clauses Consolidation Act, 1845, s. 105), but these are not now in question. The duty thus imposed on railway companies is inconsistent with their right to refuse to carry any particular class of goods or animals which they have facilities for carrying, and is inconsistent with their right to refuse to carry such goods or animals except upon terms which are unreasonable. The machinery for enforcing this duty is provided by the Regulation of Railways Act, 1873 (36 & 37 Vict. c. 48), to which it is unnecessary to allude further on the present occasion. The important point is that railway companies are bound to carry goods and animals which they have facilities for carrying.

It would, however, be a mistake to suppose that railway [* 185] companies are bound to carry as common carriers * everything which they can be required to carry under the provisions of the Railway and Canal Traffic Act, 1854. Railway companies are bound by that Act to provide reasonable facilities for carrying passengers, but they are not common carriers of passengers. So railway companies are bound to provide reasonable facilities for carrying animals or particular classes of goods, but it by no means follows that they are liable as common carriers for what they are bound by statute to carry. This distinction is important and requires to be borne in mind. Whether railway companies are common carriers of particular classes of goods depends upon what they habitually do or profess to do with

respect to such goods. The Railway and Canal Traffic Act, 1854, does not make railway companies liable as common carriers in respect of goods which they do not profess to carry as such. This was, in fact, decided in *Oxlade* v. *North Eastern Railway Company*.

In the case now before us the defendants are not common carriers of dogs, and are not bound to carry dogs at their own risk. But the defendants are nevertheless bound to provide reasonable facilities for carrying dogs, and are, in other words, bound to carry them at reasonable times and on reasonable terms. This brings me to the consideration of s. 7 of the Railway and Canal Traffic Act, 1854, and the application of that section to the facts of the case. The section itself must be construed in conformity with the principles finally settled by the House of Lords in *Peek* v. *North Staffordshire Railway Company* (p. 286, *ante*). According to that decision, not only must conditions made by a railway company be just and reasonable in the opinion of the Court and Judge before whom any question relating to them shall be tried, but also contracts signed by the senders of goods must be just and reasonable in the opinion of the same tribunal. Further, it was held in that case, and again in *Ashenden* v. *London, Brighton, and South Coast Ry. Co.*, that a contract or condition exempting a railway company from all liability in respect of goods unless their value was declared and an additional payment made was unreasonable. In *Peek* v. *North Staffordshire Ry. Co.*, the goods were marble mantel-pieces. In *Ashenden* v. *London,* * *Brighton,* [* 186] *and South Coast Ry. Co.*, the thing sent was a dog. As regards horses, cattle, sheep, and pigs, however, s. 7 of the Railway and Canal Traffic Act, 1854, contains a proviso which itself limits the liability of railway companies to certain specified sums unless the sender of such animals declares them to be of higher value than those sums; in which case the railway companies may demand a reasonable percentage upon the excess of the value so declared above the specified sums. This proviso does not apply to dogs, but it does not follow that a similar principle may not be applied to dogs by special contract.

The first branch of the proviso shows that as regards the animals specified a railway company is not liable in respect of horses, &c., the value of which is not declared beyond the specified amounts, even although the horses, &c., are injured by the negli-

gence or even wilful misconduct of the company's servants. The proviso is express "that no greater damage shall be recovered, &c." and there is no qualification or exception with reference to the cause of injury. The second branch of the proviso authorizes a percentage on the value declared without reference to the distance to which the animals are carried; but the percentage must be reasonable. At the same time no test of reasonableness is given. The particular contract with which we have to deal clearly indicates to the sender that the railway company are not common carriers of dogs, and that he can send his dog at his own risk beyond the amount of £2, or that he can insure it against risks arising from the negligence or misconduct of the company's servants, if he chooses to declare its value and pay £5 per cent. on the excess of its value above £2. The contract does not say in terms what risks the company take upon themselves if the higher percentage is paid, but the construction of it is reasonably plain and is to the above effect.

The learned County Court Judge, who has held the contract unreasonable, has done so mainly on the ground that it did not afford a *bonâ fide* option, intelligible to the public, to send dogs at reasonable alternative rates. I am not sure that I quite understand his view on this point; it seems to me that the ticket gives the alternative already stated. It is very true that [* 187] the company * will not on any terms carry dogs at their own risk to the same extent as they would be compellable to carry them, if the company were common carriers of dogs; but they are not compellable to carry dogs as common carriers either by their own profession or by virtue of any Act of Parliament. The contract in question is a printed form applicable indiscriminately to all senders of all dogs by all trains and to all places to which the company agree to carry dogs. This circumstance justifies the Court in looking to the contract not only with reference to the plaintiff but also with reference to its reasonableness to the public generally. It is not like a special contract, which is not a common form. Being what it is, I do not think that the company can rely, in this particular case, on s. 15 of their Special Act of 1850, or, in other words, on the fact that the dog was sent by a fast train, and to a place beyond the limits of the company's own line. There is no evidence that the company would have carried the dog at all on any other terms, and in the absence of

such evidence the circumstances to which I have alluded are, in my opinion, immaterial.

The only points remaining for consideration are the reasonableness of the limit of £2 and of the charge of 5 per cent. £2 is a small sum for a valuable dog, and 5 per cent. is a large sum on a large amount. But £2 is the sum fixed by statute as the measure of liability for a sheep or pig, the value of which is not declared, and it appears to me reasonable for dogs. So far as I know, dogs in general are not more valuable than sheep or pigs in general. On this point the statute itself affords a guide.

The real difficulty turns on the 5 per cent. demanded for more valuable animals. Here the statute is no guide except that it shows that a percentage may be reasonable irrespective of distance. But although a small percentage may be reasonable irrespective of distance, it by no means follows that the same is true of a high percentage. A charge of 5 per cent. is high enough to cover a total loss of one dog in every twenty, and appears excessive, although no doubt the risk of theft increases with the value of the dog. In the absence of evidence to show that such a charge is reasonable, I am unable to hold it to be so. Possibly the defendants might have adduced evidence to show that 5 per cent. was a *reasonable sum to charge; but, although [*188] the defendants knew that the contract signed by the plaintiff would not bind him unless it was reasonable, they produced no evidence on this point. The burden of showing that a contract of this sort is reasonable is thrown by the statute on the defendants, as was pointed out by Lord Cranworth in *Peek* v. *North Staffordshire Ry. Co.*, and by Lord Blackburn in *Harrison* v. *London, Brighton, and South Coast Ry. Co.*

The Divisional Court has held 5 per cent. to be reasonable without any evidence to show that it is so. Upon this point I am unable to agree with them. Five per cent. is so large a sum as in my opinion to require evidence to show that it is reasonable. The appeal ought therefore, in my opinion, to be allowed.

Lopes, L. J. The facts which are set out in this special case raise an important question with regard to the liabilities of railway companies as carriers, and the extent to which such liabilities may be qualified by the 7th section of the Railway and Canal Traffic Act, 1854.

I will first consider the position and liabilities of railway com-

panies as carriers before the passing of the Railway and Canal Traffic Act, 1854.

Generally railway companies like other carriers were common carriers of goods which they were bound by statute to carry, or which they professed to carry, or actually carried, for persons generally, but not of goods which they did not profess to carry, and were not in the habit of carrying, or only carried under special circumstances or subject to express stipulations limiting their liability in respect of them. In 1830 the Carrier's Act was passed for the protection of common carriers against the loss of or injury to parcels delivered to them, the value and contents of which were not declared. In 1845 the Railway Clauses Act was passed. Sect. 86 of that Act is permissive, and railway companies are not as such bound to be carriers, and s. 89 provides that nothing in the Act contained is to make railway companies liable further or in any other case than they would have been liable as common carriers. So that up to 1854, railway [* 189] companies, unless compelled * by some statute, could have refused to carry dogs or any other traffic which they did not profess to carry and did not generally carry, as common carriers, and no action would lie to compel them.

Two important matters are aimed at and hit by the Railway and Canal Traffic Act, 1854. It provides that railway companies shall afford all reasonable facilities for receiving, forwarding, and delivering traffic without delay and without partiality ("traffic" by the interpretation clause including animals), and gives a remedy, if facilities are withheld, on application to the Court of Common Pleas, a jurisdiction now transferred to the Railway Commissioners.

Since the passing of that Act railway companies cannot in my opinion absolutely refuse to carry traffic which they have facilities for carrying, even if they did not profess to carry and did not generally carry such traffic, but would be compellable to carry it, not as common carriers, but with the liabilities of ordinary bailees, and subject to reasonable conditions limiting that liability.

Applying that principle to the present case, I am of opinion that the defendants were not common carriers of dogs and were not bound to carry them at their own risk, but could not refuse to carry them on reasonable terms and subject to reasonable conditions.

No. 9. — Dickson v. Great Northern Ry. Co., 18 Q. B. D. 189, 190.

Such being the position of railway companies with regard to dogs, I proceed to consider the 7th section of the Railway and Canal Traffic Act, 1854, under which section the defendants claim to be exonerated from liability beyond £2. Admittedly the dog was injured by the carelessness of a servant in the defendant's employ, and admittedly the value was far in excess of £2. The defendants are liable therefore to compensate the plaintiff for the full value of the dog, unless exonerated by the special contract which they set up under the 7th section of the Railway and Canal Traffic Act, 1854. If the terms on the ticket sought to be imposed by the defendants are reasonable, the defendants are protected; if they are not, the defendants are liable to pay to the plaintiff the value of his dog. It is for the defendants to make out that the terms they have sought to impose are reasonable; no evidence was given by them: the Court must therefore
* form its opinion by construing the notice, which is in [* 190] writing, and determine for itself whether the terms are reasonable.

When the Railway and Canal Traffic Act was passed the law in respect to the liability of carriers had been much relaxed, and the weight of the decisions at that time established that carriers might by special notice make contracts limiting their responsibility even in cases of gross negligence, misconduct, or fraud on the part of their servants. The Legislature thought that the companies took advantage of these decisions to evade the salutary policy of the common law, and accordingly intervened and passed the Railway and Canal Traffic Act, 1854.

The 7th section is the material section, and in that section the Legislature says in effect that any terms or conditions purporting to free a railway or canal company from responsibility for the negligence of their servants are void unless they are adjudged reasonable by a Judge or a Court. In determining whether the terms imposed by the defendants on the conveyance of dogs are just and reasonable, it is material to consider whether such terms are to be regarded in their general application to the public or only in their application to the conveyance of this particular dog from London to Newcastle. At first I was inclined to think the Court must look at the terms in the abstract as affecting this particular contract between the plaintiff and the defendants, and not in their general application to the public. Having regard,

however, to the fact that the terms are contained in a printed notice and are used indiscriminately whatever the ordinary fare may be, and whether the distance is long or short, I am of opinion that the reasonableness of the terms must be determined with reference to the public at large, and not with reference to the conveyance of this particular dog from London to Newcastle. It is clear to my mind that there is nothing unjust or unreasonable in the *form* of the terms, or perhaps I should say mode of contracting. It is the form expressly authorized by the Legislature in the case of horses, neat cattle, sheep, and pigs. The 7th section of the Railway and Canal Traffic Act has been held to extend to all animals although the limitation of particular amounts of damages is confined to those animals expressly named in the proviso. I have no doubt, however, but that the Legislature [* 191] intended special * contracts limiting liability in respect of other animals to be framed on the same lines, and, *mutatis mutandis*, to be similar to those expressly provided for. So far there is nothing unjust or unreasonable in the form of the terms imposed by the defendants. But on other grounds I am of opinion that the terms are unjust and unreasonable. To be just and reasonable they should not be oppressive, excessive, nor deterrent. What is the position of the owner of the dog in this case? He has a dog of the value of £60 which he wishes to send from London to Newcastle. Practically the defendants have a monopoly and he must send it over their railway. They say to him, we will carry your dog and, if any harm happens to it, or if it is lost, even by the negligence, wilful misconduct, or dishonesty of our servants, we will only pay you £2, unless you declare its value at £60 and pay in addition to 6*s.* (the ordinary fare of the dog) a percentage of 5 per cent. *i. e.*, £2 18*s.*, which with the ordinary fare of 6*s.* would make the cost for the carriage of that dog £3 4*s.* The fare of a first-class railway passenger from London to Newcastle is £1 8*s.* 3*d.*, so that the dog would cost one-third more than a human being conveyed over the same distance in a first-class railway carriage, where the liability for negligence would be unlimited. It is to be observed, too, that 6*s.* is the ordinary fare for the carriage of the dog, and the additional charge is just ten times the ordinary fare. There are many other illustrations which might be suggested. Take a short journey of twenty miles, where the ordinary fare of the dog would be at the most 1*s.*

6*d*. The dog is worth £10. The owner wishes to secure himself against the neglect, misconduct, or dishonesty of the servants of the defendants. To effect this object he must pay 8*s*. extra, that is 9*s*. 6*d*. for his dog, or be satisfied in case of loss or damage to recover £2. This would be a higher charge for the dog than would be payable for a first-class passenger traversing the same distance where the liability was unlimited. In the case I have just stated, if the dog was worth £20, the extra charge would be 18*s*., making together 19*s*. 6*d*.

In these circumstances it is, as I have said before, for the defendants to make out that the terms which they have sought to impose are reasonable. A condition exempting the carrier wholly from liability for the neglect and default of his servants * is *primâ facie* unjust and unreasonable, but it is not of [* 192] necessity so in every case. A carrier is bound to carry for a reasonable remuneration, and, if he offers to do so, but at the same time offers in the alternative to carry on the terms that he should have no liability at all, and holds forth, as an inducement, a reduction in the price below that which would be a reasonable remuneration for carrying at the carrier's risk, or some additional advantage, which he is not bound to give to those who employ him with a common-law liability, a condition thus offered may be just and reasonable. *Manchester, Sheffield, and Lincolnshire Ry. Co.* v. *Brown*. These are no doubt cases where the railway companies are carrying as common carriers, but the same principle applies. Here there is no reasonable alternative offered, no *bonâ fide* practicable choice. The defendants say, liability of £2 only or payment of £3 4*s*. The alternative is so heavily weighted as to be practically no reasonable alternative at all. In *Beal* v. *South Devon Ry. Co.*, CROMPTON, J., in delivering the judgment of the Exchequer Chamber, says: "The real question is whether the individual and the public are sufficiently protected from being unjustly dealt with by the parties having the monopoly," and again, Lord BLACKBURN in *Manchester, Sheffield, and Lincolnshire Ry. Co.* v. *Brown*, says, "In order to judge whether the condition is reasonable or not, you must look at this consideration. Are the individual and the public sufficiently protected from being unjustly dealt with by the effect of the monopoly?"

I think the plaintiff in this case is entitled to say, the extra charge you impose on me is more than an equivalent for, and is

out of proportion to, the extra risk you undertake in carrying a dog as valuable as mine, and on the other hand, if I do not pay the extra charge, £2 is too small a sum to be a fair consideration for the responsibility from which you are exonerated. An extra charge of 5 per cent. on the declared value above £2 seems unreasonable to those sending animals such as dogs by railway.

I regard the terms imposed as too onerous, and as practically making it compulsory on the customer to run the risk [* 193] himself * rather than incur the heavy cost of the additional payment, a cost far more than a fair equivalent for the extra risk undertaken by the defendants.

Much of the reasoning in *Peck* v. *North Staffordshire Ry. Co.* is applicable to this case. In *Ashenden* v. *London, Brighton, and South Coast Ry. Co.*, the defendants sought to exonerate themselves from all liability without any limit, unless the additional charge was paid, and in that respect the case is distinguishable from the present case. For these reasons I think the terms imposed by the defendants unjust and unreasonable, and therefore void.

The decision of the Divisional Court must be reversed, and this appeal allowed. There will be judgment for the plaintiff for damages, £23 over and above the £2 paid into Court.

Appeal allowed.

ENGLISH NOTES.

The following is a summary of the statutory enactments bearing upon the above rule: —

By the Railways Clauses Consolidation Act 1845 (8 Vict. c. 20, s. 90), railway companies may vary their tolls from time to time, "provided that all such tolls be at all times charged equally to all persons, and after the same rate, whether per ton, per mile, or otherwise, in respect of all passengers, and of all goods or carriages, of the same description, and conveyed or propelled by a like carriage or engine, passing only over the same portion of the line of railway under the same circumstances."

By the Railway and Canal Traffic Act 1854 (17 & 18 Vict. c. 31), which regulates the traffic of railways and canal companies, it is enacted, by section 2, that "no such company shall make or give any undue or unreasonable preference or advantage to or in favour of any particular person or company, or any particular description of traffic, in any respect whatsoever, nor shall any such company subject any par-

ticular person or company or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever," and the same section further provides that the company shall afford due and reasonable facilities for receiving and forwarding through traffic without any such preference.

By the Railway and Canal Traffic Act 1888 (51 & 52 Vict. c. 25, s. 27), the burden of proving absence of undue preference where there is in fact an inequality of rates is thrown on the railway company. And by the same section the Court or the railway commissioners, in deciding whether a lower charge or difference in treatment does or does not amount to an undue preference, may, so far as they think reasonable, take into consideration whether such lower charge or difference in treatment is necessary for the purpose of securing in the interests of the public the traffic in respect of which it is made, and whether the inequality cannot be removed without unduly reducing the rates charged to the complainant, provided that no railway company shall make, nor shall the Court or the commissioners sanction, any difference in the tolls, rates, or charges made for, or any difference in the treatment of home and foreign merchandise, in respect of the same or similar service. The Court or the commissioners are also empowered to direct that no higher charge shall be made to any person for services in respect of merchandise carried over a less distance than is made to any other person for similar services in respect of the like description and quantity of merchandise carried over a greater distance on the same line of railway. By sect. 29 of the same Act a railway company may, for the purpose of fixing the rates to be charged for the carriage of merchandise to and from any place on their railway, group together any number of places in the same district, situated at various distances from any point of destination or departure of merchandise, and charge uniform rates of carriage for merchandise to and from all places comprised in the group. Provided that the distances shall not be unreasonable, and that the group rates charged and the places grouped together shall not be such as to create an undue preference.

The phrases "goods of the same description" and "under the same circumstances" in section 90 of the Railways Clauses Consolidation Act 1845 are explained in the *Great Western Railway Co.* v. *Sutton* (1869), L. R., 4 H. L. 226, 38 L. J. Ex. 177. In that case which relates to "packed parcels" it was said in the judgment of Willes, J., which was substantially adopted by the House: "The question what is the meaning of the equality clause when it speaks of things of the 'like description' conveyed under the 'like circumstances,' ought I think to be answered by saying that things are of a 'like description' when — although their component parts are not 'identical,' which would be

expressed by 'the same description,' not 'like description,' — they are similar in those qualities which affect the risk and expense of carriage, and that they are conveyed under like circumstances where the labour, risk, and expense are in the opinion of the jury the same; otherwise not. . . . In each case the question ought, I think, to be, in fact, whether the sort of thing was like or different for the purposes of carriage, that being the subject dealt with. The railway company might also make a distinction between the prices charged to all the world for articles not distinguished in this respect because of there being a great traffic in one and small in another; as, for instance, in the carriage of coals and the carriage of coke from a district in which the one was abundant and the other not so, to such an extent that the former employed a greater number of waggons with a less expensive staff, the price of carriage being proved to depend more upon the wages of the staff than upon the wear and tear of the waggons. This would affect the expense, and make the articles, though in one respect like as minerals, in another unlike as to remuneration. I think 'like description' is exhausted upon the goods, and 'like circumstances' upon the carriage, and that neither can be extended to the personal qualities of the individual who sends the goods."

The words "passing only over the same portion of the line of railway" in the same Act refer only to goods carried between the same points of a railway, and over no other part of the line. Mere inequality in the rate of charges in case of unequal distances, provided the cost of carriage for the lesser distance exceed not the cost of carriage for the longer distance, is not undue preference. Therefore, where a railway company carried coals from a group of collieries situate at different points along their line, and exacted from all the collieries a uniform set of rates, the owners of the collieries nearest to the point of arrival were not allowed to maintain an action for infringement of sect. 90, of the Railways Clauses Consolidation Act 1845. *Denaby Main Colliery Co. v. Manchester, Sheffield, and Lincolnshire Railway Co.* (1885), 11 App. Cas. 97, 55 L. J. Q. B. 181, 54 L. T. 1. A difference of ten or fifteen miles between the various collieries of the group was not considered to be so unreasonable as to create undue preference.

In determining the question of undue preference attention is paid to the convenience of the public and to the interest and convenience of the railway company with regard to its general traffic. A company may therefore charge for its services in proportion to their necessary cost: *Ransome v. Eastern Counties Railway Co.* (No. 1) (1857), 1 C. B. (N. S.) 437, 26 L. J. C. P. 91; for instance, where it can carry a greater distance at less cost it may charge a proportionately less rate. *Strick v. Swansea Canal Co.* (1864), 16 C. B. (N. S.) 245, 33 L. J. C. P. 240.

10 L. T. 460. It seems that the company is justified in charging a lower rate to a person who guarantees larger quantities and full train loads at regular periods. *Nicholson* v. *Great Western Railway Co.* (No. 1) (1859), 5 C. B. (N. S.) 366, 28 L. J. C. P. 89.

A company cannot justify preference to one customer because he engages to employ other lines of the company for carriage of traffic unconnected with the goods in question. *Baxendale* v. *Great Western Railway Co.* (1859), 5 C. B. (N. S.) 309, 28 L. J. C. P. 69; or because there are considerations collateral to the pecuniary interests of the company, for instance, for introducing a particular kind of merchandise in a particular locality, *Oxlade* v. *North-Eastern Railway Co.* (No. 1) (1857), 1 C. B. (N. S.) 454, 26 L. J. C. P. 129; or because of competition with other lines. But a company may have special rates of charge to a terminus to which traffic can be carried by other modes of carriage with which theirs is in competition. *Foreman* v. *Great Eastern Railway Co.* (1875), 2 Ry. & Ca. Tr. Cas. (Neville & Macnamara), 202. It is not undue preference to give credit to one customer, and refuse it to another. *Goddard* v. *London and South-Western Railway Co.* (1874), 1 Ry. & Ca. Tr. Cas. 308.

An important decision upon the duties of companies to provide "reasonable facilities" under section 2 of the Railway and Canal Traffic Act 1854, and upon the jurisdiction of the railway commissioners to enforce them, is furnished by the case of the *Windsford Local Board* v. *The Cheshire Lines Committee* (1890), 24 Q. B. D. 456, 59 L. J. Q. B. 372, 62 L. T. 268, where the railway company had discontinued passenger traffic on a portion of their line, alleging that they were unable to work such traffic except at a loss, and an application was made by the local board of the district for an order enjoining the company to afford all reasonable facilities for receiving and forwarding the passenger traffic as well as the mineral traffic on a certain branch. The Court of the Railway Commissioners, Wills, J., and Sir Frederick Peel held that they had jurisdiction to entertain the application. They in effect decided that a company has no right to say that they will carry passengers on a portion of their line, and not upon the remainder.

AMERICAN NOTES.

The doctrine of the principal cases prevails in this country, being generally imposed by the railway laws, and especially by the Inter-State Commerce Act of Congress, particularly in respect to discriminations.

In regard to the duty of the railway carrier to supply reasonable facilities for general business, and his lack of power to impose unreasonable conditions, see *ante*, p. 344, *et seq.*

The carrier is undoubtedly bound to carry ordinary goods and animals, excepting such as are dangerous or outside usual transportation. He is not

bound to carry explosives and the like unless he has the proper means. *Parrott* v. *Wells*, 15 Wallace, 524. Nor when the goods are perishable, and he has no means to forward them in the requisite time. *Tierney* v. *N. Y. Cent. &c. R. Co.*, 76 New York, 305. He is not bound to transport a menagerie, *Coup* v. *Wabash, &c. Ry. Co.*, 56 Michigan, 111; 56 Am. Rep. 374; nor a dog, *Honeyman* v. *Oregon, &c. R. Co.*, 13 Oregon, 352; 57 Am. Rep. 20. He is not bound to carry money unless it is his custom. *Farmers' & M. Bank* v. *Champlain T. Co.*, 16 Vermont, 52; 42 Am. Dec. 491. (As to cash letters, *Knox* v. *Rives*, 14 Alabama, 249; 48 Am. Dec. 97.) But he is bound to haul cars of another company. *Peoria, &c. Ry. Co.* v. *Chicago, &c. Ry. Co.*, 109 Illinois, 335; 50 Am. Rep. 605. Nor is he bound to provide in advance for extraordinary occasions nor anticipate an unusual influx of business. *Dawson* v. *Chicago, &c. R. Co.*, 79 Missouri, 296; *Ballentine* v. *No. Mo. R. Co.*, 40 Missouri, 491; 93 Am. Dec. 315; *Peet* v. *Ry. Co.*, 20 Wisconsin, 594; 91 Am. Dec. 446.

As to the obligation to carry passengers, see the leading cases in New York, *Hollister* v. *Nowlen*, 19 Wendell, 234; 32 Am. Dec. 455; *Cole* v. *Goodwin*, 19 Wendell, 251; 32 Am. Dec. 70. Their doctrine as to obligation to receive and transport passengers is universally prevalent in this country.

As to discrimination. He may not make unjust discrimination as to prices or persons. He is bound to carry for a reasonable remuneration, for he is not bound to carry for the same price for all. *Johnson* v. *Pensacola R. Co.*, 16 Florida, 623; 26 Am. Rep. 731; *Ex parte Benson*, 18 South Carolina, 38; 44 Am. Rep. 564. So he may discriminate between large and small quantities as to price. *Concord, &c. R. Co.* v. *Forsaith*, 59 New Hampshire, 122; 47 Am. Rep. 181. (But *contra*: *Louisville, &c. R. Co.* v. *Wilson*, 132 Indiana, 517; 18 Lawyers' Reports Annotated, 105.) And between persons living at a distance and those nearer. *Ragan* v. *Aiken*, 9 Lea (Tennessee), 609; 42 Am. Rep. 684. Reasonableness and impartiality between those similarly situated constitutes the test. Partiality exists only where advantages are equal, and one party is unduly favoured at the expense of another who stands upon an equal footing. *Cleveland, &c. R. Co.* v. *Closser*, 126 Indiana, 348; 22 Am. St. Rep. 593; 9 Lawyers' Reports Annotated, 754; *Kentucky, &c. Bridge Co.* v. *Louisville, &c. R. Co.*, 37 Federal Reporter, 567; 2 Lawyers' Reports Annotated, 289. But a carrier may not favour a large shipper above a small one, *Louisville, &c. R. Co.* v. *Wilson, supra*; nor unequally discriminate in order to secure custom, *State* v. *Cincinnati, &c. R. Co.*, 47 Ohio State, 130; 7 Lawyers' Reports Annotated, 319; nor make a rebate in favour of one. *Fitzgerald* v. *Grand Trunk Ry. Co.*, 63 Vermont, 169; 13 Lawyers' Reports Annotated, 70; *Cook* v. *Chicago, &c. Ry. Co.*, 81 Iowa, 551; 9 Lawyers' Reports Annotated, 764. (But when a rebate is made in consideration of the shipper's erecting on the carrier's land a dock for the use of both, it is a question of fact whether the discrimination is unjust. *Root* v. *Long I. R. Co.*, 111 New York, 300; 11 Am. St. Rep. 643; 4 Lawyers' Reports Annotated, 331.) Consult also *Messenger* v. *Penn. R. Co.*, 36 New Jersey Law, 407; 13 Am. Rep. 457; *Chicago, &c. R. Co.* v. *People*, 67 Illinois, 11; 16 Am. Rep. 599; *McDuffee* v. *Portland, &c. R. Co.*, 52 New Hampshire, 430; 13 Am. Rep. 72; *Hawley* v. *Kansas, &c. Co.*, 48 Kansas, 593.

In *Lough* v. *Outerbridge*, 143 New York, 271; 25 Lawyers' Reports Annotated, 674, it was held that the purpose of a carrier to suppress competition does not make it unlawful to offer low rates when a rival vessel is loading to those only who will not ship anything by the latter; and that special freight rates for transportation by ship which are too low to be profitable, and are offered by the carrier only at particular periods when a rival vessel is loading and on the single condition of the shipper's stipulation not to ship by the rival vessel, cannot be claimed by a shipper who refuses to make such stipulation, but he may be lawfully charged the ordinary reasonable rates for shipment during the same period in which the lower rates are given to those who complied with the condition. The Court said: "There can be no doubt that the carrier could at common law make a discount from its reasonable general rates in favour of a particular customer or class of customers in isolated cases, for special reasons, and upon special conditions, without violating any of the duties or obligations to the public inherent in the employment. If the general rates are reasonable, a deviation from the standard by the carrier in favour of particular customers, for special reasons not applicable to the whole public, does not furnish to parties not similarly situated any just ground for complaint. When the conditions and circumstances are identical, the charges to all shippers for the same service must be equal. These principles are well settled, and whatever may be found to the contrary in the cases cited by the learned counsel for the plaintiff originated in the application of statutory regulations in other States and countries. *Fitchburg R. Co.* v. *Gage*, 12 Gray (Massachusetts), 393; *Sargent* v. *Boston & L. R. Corp.*, 115 Massachusetts, 422; *Mogul S. S. Co.* v. *McGregor*, L. R., 21 Q. B. Div. 544; affirmed L. R., 23 Q. B. Div. 598, and by House of Lords (1892) App. Cas. 25; *Evershed* v. *London & N. W. R. Co.*, L. R., 3 Q. B. Div. 135; *Baxendale* v. *Eastern Counties R. Co.*, 4 C. B. (N. S.) 78; 27 L. J. C. P. 197; *Branley* v. *South Eastern R. Co*, 12 C. B. (N. S.) 74; 31 L. J. C. P. 286.

"Special favours in the form of reduced rates to particular customers may form an element in the inquiry whether, as matter of fact, the standard rates are reasonable or otherwise. If they are extended to such persons at the expense of the general public, the fact must be taken into account in ascertaining whether a given tariff of general prices is or is not reasonable. But as in this case the reasonable nature of the price for which the defendants offered to carry the plaintiffs' goods has been settled by the findings of the trial Court, it will not be profitable to consider further the propriety or effect of such discrimination. The rule of the common law was thus broadly stated by the Supreme Court of Massachusetts in the case of *Fitchburg R. Co.* v. *Gage*, *supra*. Upon that point the Court said: 'The recent English cases, cited by the counsel for the defendants, are chiefly commentaries upon the special legislation of Parliament regulating the transportation of freight on railroads constructed under the authority of the government there, and consequently throw very little light upon questions concerning the general rights and duties of common carriers, and are for that reason not to be regarded as authoritative expositions of the common law upon these subjects. The principle derived from that source is very simple. It requires equal justice to all.

But the equality which is to be observed consists in the restricted right to charge a reasonable compensation, and no more. If the carrier confines himself to this, no wrong can be done. If for special reasons in isolated cases the carrier sees fit to stipulate for the carriage of goods of any class for individuals, for a certain time, or in certain quantities, for a less compensation than what is the usual, necessary, and reasonable rate, he may undoubtedly do so without entitling all parties to the same advantage.'" Citing the *Evershed case.*

In *New England Ex. Co.* v. *Maine Cent. R. Co.*, 57 Maine, 188; 2 Am. Rep. 31, it was held that a railroad company might not give one express company privileges to the exclusion of any other. To the same effect, *Sandford* v. *Catawissa, &c. R. Co.*, 24 Pennsylvania State, 378; 64 Am. Dec. 667; *Chicago, &c. R Co.* v. *People, supra.* But it has been held to the contrary where the favoured company does all the business demanded or offered. *Atlantic Ex. Co.* v. *Wilmington, &c. R. Co.*, 111 North Carolina, 463; 32 Am. St. Rep. 805; 18 Lawyers' Reports Annotated, 393.

The carrier must ordinarily take and carry property in the order in which it is offered: otherwise it constitutes an illegal preference. *Houston, &c. R. Co.* v. *Smith*, 63 Texas, 322.

At common law an action lies against a common carrier for an unreasonable and excessive freight charge exacted, but not for a mere discrimination in favour of another shipper. *Cowden* v. *Pac. Coast S. Co.*, 94 California, 470; 28 Am. St. Rep. 142; *Avinger* v. *S. C. Ry. Co.*, 29 South Carolina, 265; *Root* v *Long Island R. Co., supra.* If the shipper pays such a charge under protest, he may recover it back if he sue for it within a reasonable time. *Peters* v. *R. Co.*, 42 Ohio State, 275; 51 Am. Rep. 914; *Killmer* v. *N. Y. &c. R. Co.*, 100 New York, 395; 53 Am. Rep. 194.

Section IV. — *Railway Companies as Carriers of Passengers.*

No. 10. — HOBBS *v.* LONDON AND SOUTH WESTERN RAILWAY COMPANY.

(1875.)

No. 11. — LE BLANCHE *v.* LONDON AND NORTH WESTERN RAILWAY COMPANY.

(C. A. 1876.)

RULE.

A RAILWAY company, as carriers of passengers, must carry them to their destination; and *primâ facie* must use reasonable care to do so within the time advertised for the

journey. On failure, they are liable for damages measured by the inconvenience and loss which are the natural consequences; but not for extraordinary expenses unreasonably incurred, such as a special train to shorten the consequent delay on a mere pleasure journey.

Hobbs v. London and South Western Railway Company.

L. R., 10 Q. B. 111–125 (s. c. 44 L. J. Q. B. 49; 32 L. T. 352; 23 W. R. 520).

Carrier of Passengers. — Railway Company. — Breach of Contract of Carriage. — Measure of Damages. [111]

The plaintiff, with his wife, and two children of five and seven years old respectively, took tickets on the defendants' railway from Wimbledon to Hampton Court, by the midnight train. They got into the train, but it did not go to Hampton Court, but went along the other branch to Esher, where the party were compelled to get out. It being so late at night the plaintiff was unable to get a conveyance or accommodation at an inn. And the party walked to the plaintiff's house, a distance of between four and five miles, where they arrived at about three in the morning. It was a drizzling night, and the wife caught cold, and was laid up for some time, being unable to assist her husband in his business as before, and expenses were incurred for medical attendance.

In an action to recover damages for the breach of contract, the jury gave £28 damages: viz., £8 for the inconvenience suffered by having to walk home; and £20 for the wife's illness and its consequences: —

Held, as to the £8, that the plaintiff was entitled to damages for the inconvenience suffered in consequence of being obliged to walk home; but as to the £20, that the illness and its consequences were too remote from the breach of contract for it to be given as damages naturally resulting from it.

First count, by Samuel Hobbs and Elizabeth his wife, that the plaintiff Elizabeth became a passenger in one of defendant's *carriages to be by them carried from Wimbledon [*112] to Hampton Court by a train which defendants represented was about to proceed to Hampton Court, and it thereupon became the duty of defendants to carry her thither, but they carried her in another direction, viz. to Esher station, far distant from Hampton Court station, and there left her, whereby the plaintiff Elizabeth was prevented reaching her home for a long time and put to and suffered great exposure, inconvenience, and fatigue, and suffered much in mind and body, and has been unable to

attend to domestic affairs, and business, and to her children. Claim, £300.

Second count, that Samuel Hobbs lost and was deprived of the comfort and services of his wife, and was put to great expense in nursing and medical attendance on his wife by reason of the premises in the first count mentioned. Claim, £100.[1]

Plea: payment of £2 into court.

Replication: damages *ultra*. Issue joined.

At the trial, before KELLY, C. B., at the Kingston spring assizes, 1874, it appeared in evidence that the plaintiff lived at New Hampton. On the 12th of August, he took second-class tickets for himself, his wife, and two children of five and seven years old respectively, at the Wimbledon station on the defendants' railway to Hampton Court station, by the midnight train. They took their places in the train, but it turned out that the train went on the other branch; and the plaintiff's party were therefore obliged to get out at Esher station, which was between four and five miles from the plaintiff's house, and further from it than the Hampton Court station is by two or three miles. The plaintiff was unable to get a conveyance or accommodation at an inn, where he knocked in vain. The party were, therefore, obliged to walk home, where they arrived at about three in the morning. It was a drizzling wet night, and the wife caught cold, and was laid up for some time, being unable to assist her husband in his business as before, and expenses were incurred for medical attendance.

In answer to questions by the Chief Baron, the jury found £8 as damages for the inconvenience suffered by the plaintiffs in being obliged to walk home; and £20 in respect of the [* 113] wife's illness and * its consequences; a verdict accordingly passed for the plaintiffs for £28 beyond the £2 paid into Court, leave being reserved to move to reduce the verdict by the £8 and £20, or either, if the Court should be of opinion that the plaintiffs were not entitled to both or either of those sums.

A rule having been obtained accordingly and argued:

[115] COCKBURN, C. J. We are of opinion that this rule should be made absolute as regards the £20 damages given in respect of the consequences of the wife having caught cold in this walk from Esher to Hampton; but that it should be dis-

[1] The precise form of the two counts appears to have escaped notice.

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charged as regards the £8 in respect to the personal inconvenience suffered by the husband and the wife in consequence of their not being taken to, or put down at their proper place of destination.

The facts are simple. The plaintiffs took tickets to be conveyed from the Wimbledon station of the defendant's railway to Hampton Court. It so happened that the train did not go to Hampton Court, and the plaintiffs were taken on to Esher station, which increased the distance which they would have to go from the railway station to their home by two or three miles.

Damages were asked for upon two grounds: first, for the inconvenience that the husband and wife, with their two children, sustained by having to go this distance, the night happening to be a wet night; in the second place, damages were asked by reason of the wife, from her exposure to the wet on that night, getting a bad cold and being ill in health, the consequence of which was that some expense was incurred in medical attendance upon her. We think these two heads of damage must be kept distinct, and I propose to deal with them as distinct subjects.

With regard to the first, there can be no doubt whatever upon the facts that the plaintiffs were put to personal inconvenience: they had to walk late at night, after twelve o'clock, a considerable distance; the wife suffered fatigue from it, and they had to carry their children, or to get them along with great difficulty, the * children being fatigued and exhausted; and [* 116] there is no doubt that there was personal inconvenience suffered by the party on that occasion, and that inconvenience was the immediate consequence and result of the breach of contract on the part of the defendants. The plaintiffs did their best to diminish the inconvenience to themselves by having recourse to such means as they hoped to find at hand; they tried to get into an inn, which they were unable to do; they tried to get a conveyance; they were informed none was to be had; and they had no alternative but to walk; and therefore it was from no default on their part, and it cannot be doubted that the inconvenience was the immediate and necessary consequence of the breach of the defendant's contract to convey them to Hampton Court. Now inasmuch as there was manifest personal inconvenience, I am at a loss to see why that inconvenience should not be compensated by damages in such an action as this. It has been endeavoured to be argued, upon principle and upon authority, that

this was a kind of damage which could not be supported; and attempts were also made to satisfy us that this supposed inconvenience was more or less imaginary, and would depend upon the strength and constitution of the parties, and various other circumstances; and that it is not to be taken that a walk of so many additional miles would be a thing that a person would dislike or suffer inconvenience from; and that there may be circumstances under which a walk of several miles, so far from being matter of inconvenience, would be just the contrary. All that depends on the actual facts of each individual case; and if the jury are satisfied that in the particular instance personal inconvenience or suffering has been occasioned, and that it has been occasioned as the immediate effect of the breach of the contract, I can see no reasonable principle why that should not be compensated for. The case of *Hamlin* v. *Great Northern Ry. Co.*, 1 H. & N. 408; 26 L. J. Ex. 20, was cited as an authority to show that for personal inconvenience damages ought not to be awarded. That case appears to me to fall far short of any such proposition. It merely seems to amount to this: that where a party, by not being able to get to a place which he would otherwise have arrived at in time to meet persons with whom he had appointments, had sustained [* 117] * pecuniary loss, that is too remote to be made the subject of damages in an action upon a breach of contract. That may be perfectly true, because, as in every one of the instances cited, you would have to go into the question whether there was a loss arising from the breach of contract, before you could assess that loss. And, after all, if the true principle be laid down in *Hadley* v. *Baxendale*, 9 Ex. 341; 23 L. J. Ex. 179 No. 16, *post*, the damage must be something which is in the contemplation of the parties as likely to result from a breach of contract; and it is impossible that a company who undertake to carry a passenger to a place of destination can have in their minds all the circumstances which may result from the passsenger being detained on the journey. As far as the case of *Hamlin* v. *Great Northern Ry. Co.* goes, I am far from saying it was a wrong decision; but it did not decide that personal inconvenience, however serious, was not to be taken into account as a subject-matter of damage in a breach of contract of a carrier to convey a person to a particular destination. If it did, I should not follow that authority; but I do not think it applicable to this case at all. I think there is

no authority that personal inconvenience, where it is sufficiently serious, should not be the subject of damages to be recovered in an action of this kind. Therefore, on the first head, the £8, I think the verdict ought to stand.

With regard to the second head of damage, the case assumes a very different aspect. I see very great difficulty indeed in coming to any other conclusion than that the £20 is not recoverable; and when we are asked to lay down some principle as a guiding rule in all such cases, I quite agree with my Brother BLACKBURN in the infinite difficulty there would be in attempting to lay down any principle or rule which shall cover all such cases; but I think that the nearest approach to anything like a fixed rule is this: That to entitle a person to damages by reason of a breach of contract, the injury for which compensation is asked should be one that may be fairly taken to have been contemplated by the parties as the possible result of the breach of contract. Therefore you must have something immediately flowing out of the breach of contract complained of, something immediately connected with it, and not merely connected with it through a series of causes * intervening between the immediate consequence [* 118] of the breach of contract and the damage or injury complained of. To illustrate that I cannot take a better case than the one now before us: Suppose that a passenger is put out at a wrong station on a wet night and obliged to walk a considerable distance in the rain, catching a violent cold which ends in a fever, and the passenger is laid up for a couple of months, and loses through this illness the offer of an employment which would have brought him a handsome salary. No one, I think, who understood the law, would say that the loss so occasioned is so connected with the breach of contract as that the carrier breaking the contract could be held liable. Here, I think, it cannot be said the catching cold by the plaintiff's wife is the immediate and necessary effect of the breach of contract, or was one which could be fairly said to have been in the contemplation of the parties. As my Brother BLACKBURN points out, so far as the inconvenience of the walk home is concerned, that must be taken to be reasonably within the contemplation of the parties; because, if a carrier engages to put a person down at a given place, and does not put him down there, but puts him down somewhere else, it must be in the contemplation of everybody that the passenger

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put down at the wrong place must get to the place of his destination somehow or other. If there are means of conveyance for getting there, he may take those means and make the company responsible for the expense; but if there are no means, I take it to be law that the carrier must compensate him for the personal inconvenience which the absence of those means has necessitated. That flows out of the breach of contract so immediately that the damage resulting must be admitted to be fair subject-matter of damages. But in this case the wife's cold and its consequences cannot stand upon the same footing as the personal inconvenience arising from the additional distance which the plaintiffs had to go. It is an effect of the breach of contract in a certain sense, but removed one stage; it is not the primary but the secondary consequence of it; and if in such a case the party recovered damages by reason of the cold caught incidentally on that foot journey, it would be necessary, on the principle so applied, to hold that in the two cases which have been put in the course of the discussion, the party aggrieved would be equally [* 119] entitled to recover. And yet the * moment the cases are stated, everybody would agree that, according to our law, the parties are not entitled to recover. I put the case: Suppose in walking home, on a dark night, the plaintiff made a false step and fell and broke a limb, or sustained bodily injury from the fall, everybody would agree that that is too remote, and is not the consequence which, reasonably speaking, might be anticipated to follow from the breach of contract. A person might walk a hundred times, or indeed a great many more times, from Esher to Hampton without falling down and breaking a limb; therefore it could not be contended that that could have been anticipated as the likely and the probable consequence of the breach of contract. Again, the party is entitled to take a carriage to his home. Suppose the carriage overturns or breaks down, and the party sustains bodily injury from either of those causes, it might be said: "If you had put me down at my proper place of destination, where by your contract you engaged to put me down, I should not have had to walk or to go from Esher to Hampton in a carriage, and I should not have met with the accident in the walk or in the carriage." In either of those cases the injury is too remote, and I think that is the case here; it is not the necessary consequence, it is not even the probable consequence of a person being put

down at an improper place, and having to walk home, that he should sustain either personal injury or catch a cold. That cannot be said to be within the contemplation of the parties so as to entitle the plaintiff to recover, and to make the defendants liable to pay damages for the consequences. Therefore, as regards the damages awarded in respect of the wife's cold, the rule must be made absolute to reduce the damages by that amount.

Blackburn, J. I am of the same opinion. I think the rule should be made absolute to reduce the damages to £8 beyond the £2 paid into Court, but should not be made absolute any further. The action is in reality upon a contract; it is commonly said to be founded upon a duty, but it is a duty arising out of a contract. It is a contract by which the railway company had undertaken to carry four persons to Hampton Court, and in fact that contract was broken when they landed the passengers at Esher, instead of * Hampton Court. The contract was to supply [* 120] a conveyance to Hampton Court, and it was not supplied. Where there is a contract to supply a thing and it is not supplied, the damages are the difference between that which ought to have been supplied and that which you have to pay for, if it be equally good; or if the thing is not obtainable, the damages would be the difference between the thing which you ought to have had and the best substitute you can get upon the occasion for the purpose. It was urged, upon the authority of *Hamlin* v. *Great Northern Ry. Co.*, that that did not apply to the present case, and it was contended that, — though, when the plaintiff was at Esher, if he had been able to hire a fly or obtain a carriage and paid money for it, it was admitted he could recover that money, — yet inasmuch as he could get no carriage, and was compelled to walk under penalty of staying where he was all night, he was not entitled to get anything; and *Hamlin* v. *Great Northern Ry. Co.*, was cited as an authority for that. Now, as I have said, what the passenger is entitled to recover is the difference between what he ought to have had and what he did have; and when he is not able to get a conveyance at all, but has to make the journey on foot, I do not see how you can have a better rule than that which the learned Judge gave to the jury here, namely, that the jury were to see what was the inconvenience to the plaintiffs in having to walk, as they could not get a carriage. Taking that view they were certainly entitled to recover for that, and if it had been left

to me, I am not sure whether or not I should have given £8 more than the £2 paid into Court; but that is not the question for us. The question for us is whether the plaintiffs are entitled to recover anything. I am of opinion that they are. In *Hamlin* v. *Great Northern Ry. Co.*, there was no inconvenience at all. The plaintiff was going to Hull; he was obliged to stop at Grimsby for the night, and went on to Hull the next day. What he sought in the action was to recover damages for the loss of his appointments which he had with customers. That was held to be too remote, and it was held he was only entitled to 5*s.*, though I must say I do not know how that amount was arrived at. The inconvenience he did suffer in sleeping at Grimsby in-
[* 121] stead of Hull seems really * to be nothing, and there was no substantial ground on which he could have recovered. I do not understand from the ruling of the Judges in that case, that they held that nothing can be recovered except where there has been money disbursed; if the case decided any such thing, I think the case of *Burton* v. *Pinkerton*, L. R., 2 Ex. 340; 36 L. J. Ex. 137, would be precisely the other way; for there the plaintiff was left at Rio, and all the members of the Court thought he was entitled to something for the inconvenience of being left there; the point on which they differed was whether a jury could take into consideration the claim for damages for being imprisoned there; and the majority of the Court thought they could not. Therefore, on the first head of damages in this case, I do not see that we can cut down the damages below what the jury have found.

Then comes the further question, whether the damages for the illness of the wife are recoverable; I think they are not, because they are too remote. On the principle of what is too remote, it is clear enough that a person is to recover in the case of a breach of contract the damages directly proceeding from that breach of contract, and not too remotely. Although Lord Bacon had, long ago, referred to this question of remoteness, it has been left in very great vagueness as to what constitutes the limitation; and therefore I agree with what my Lord has said to-day, that you make it a little more definite by saying such damages are recoverable as a man when making the contract would contemplate would flow from a breach of it. For my own part, I do not feel that I can go further than that. It is a vague rule, and as Bram-

WELL, B., said, it is something like having to draw a line between night and day; there is a great duration of twilight when it is neither night nor day; but on the question now before the Court, though you cannot draw the precise line, you can say on which side of the line the case is. I do not see the analogy between this case and the case that was suggested, where a railway company made a contract to carry a passenger, and from want of reasonable care they dashed that passenger down and broke his leg, and he recovers damages from them. For such a breach as that, the most direct, immediate consequence is, that he would be lamed. That is the direct consequence of such a breach of contract; but though here the contract * is the same, a con- [* 122] tract to carry the passenger, the nature of the breach is quite different; the nature of the breach is simply that they did not carry the plaintiff to his destination, but left him at Esher. To illustrate this, — suppose you expand the declaration and say: You, the defendants, contracted to carry me safely to Hampton Court, you negligently upset the carriage and dashed me on the ground, whereby I became ill and sick. That is a clear and immediate consequence. The other case is: You contracted to carry me to Hampton Court, you went to Esher, and put me down there, by which I was obliged to get other means of conveyance, for the purpose of getting to Hampton Court; and because I could find no fly or other conveyance, I was obliged, as the only means of getting to Hampton, to walk there, and because it was a cold and wet night, I caught cold, and I became ill. When it is put in that way, there are many causes or stages which there are not in the other.

With regard to the two instances my Lord put, — one, of the passenger, when walking home in the dark, stumbling and breaking his leg, the other, of his hiring a carriage, and the carriage breaking down, — I must say I think they are on the remote side of the line, and further from it than the present case. I do not think it is any one's fault that it cannot be put more definitely; I think it must be left as vague as ever, as to where the line must be drawn; but I think in each case the Court must say whether it is on the one side or the other; and I do not think that the question of remoteness ought ever to be left to a jury; that would be in effect to say that there shall be no such rule as to damages being too remote; and it would be highly dangerous

if it was to be left generally to the jury to say whether the damage was too remote or not.

I think, therefore, the rule ought to be made absolute to reduce the damages to the £8 beyond the £2.

Mellor, J. I am entirely of the same opinion. I quite agree with my Brother Parry, that for the mere inconvenience, such as annoyance and loss of temper, or vexation, or for being disappointed in a particular thing which you have set your mind upon, without real physical inconvenience resulting, you cannot recover damages. That is purely sentimental, and not a case where the word inconvenience, as I here use it, would apply. But [* 123] I must * say, if it is a fact that you arrived at a place where you did not intend to go to, where you are placed, by reason of the breach of contract of the carriers, at a considerable distance from your destination, the case may be otherwise. It is admitted that if there be a carriage you may hire it and ride home and charge the expense to the defendants. The reason why you may hire a carriage and charge the expense to the company is with the view simply of mitigating the inconvenience to which you would otherwise be subject; so that where the inconvenience is real and substantial arising from being obliged to walk home, I cannot see why that should not be capable of being assessed as damages in respect of inconvenience.

With regard to the other point, I confess I should have felt great alarm if we had been driven to say that the damages resulting from the cold caught by the wife upon the occasion in question ought to have been taken into consideration by the jury. I should have felt alarm at the extent to which that might be applied. Therefore I think it is necessary to see whether there is a rule applicable to such a case, so that we can divide the damages by the measure of inconvenience suffered on the one side, and by the fact that they are too remote on the other. Now, what Wilde, B., said, in the case of *Gee* v. *Lancashire and Yorkshire Ry. Co.*, 6 H. & N. 220; 30 L. J. Ex. 11, is, I am disposed to think, as far as it goes, the rule applicable to the present case. He says: "The damage, which as a matter of law must be considered as the measure of damages, is such as arises naturally,"— I would qualify that by adding the words "and directly," and with that qualification I think it is strictly applicable, — "such as arises naturally and directly from the breach of contract, or

such as both parties might reasonably have expected to result from a breach of the contract." In this case it so happened accidentally that the night in question was a wet night, and the inconvenience sustained was greater than it would have been on any other night. That is an accident, and the catching cold is an accident. You might just as well say that, if, in the walk home, the plaintiff's wife had put her foot into a pool of water, and she had neglected when she got home to prevent the common result of that, namely, catching cold, the company are to be liable. To say that what accidentally arises, although *arising from the particular breach of contract or the [*124] particular cause, is always to be recoverable as a measure of damages, would be to lay down a very dangerous rule. My Lord and my Brother BLACKBURN have said that we cannot lay down a rule as applicable to all cases, and WILDE, B., says, when the matter came to be further considered, it would turn out the rule as to the measure of legal damages was not applicable in all cases. There might be circumstances which would take it out of the strict rule laid down in *Hadley* v. *Baxendale*, and leave it as a matter of some uncertainty.

In this case I come to the same conclusion as my Lord and my Brother BLACKBURN, that the rule must be made absolute to reduce the damages to the £8 beyond the £2 paid into Court.

ARCHIBALD, J. I am of the same opinion. I concur in the observations which have been made by my Lord and my learned Brothers, and I would only add, without expressing anything in the form of a rule, that in case of breach of contract, the party breaking the contract must be held liable for the proximate and probable consequences of such breach, that is, such as might have been fairly in the contemplation of the parties at the time the contract was entered into. Therefore, as to the first head of damage, the inconvenience of walking to Hampton, I think there can be no doubt that is such an inconvenience as the parties must have contemplated would arise from the breach of the contract; and that, as it appears to me, is an inconvenience capable of being estimated in a pecuniary way. It is admitted, if there had been means of conveyance and the plaintiffs had availed themselves of those means of conveyance, they would have been entitled to a measure of damages for that expense. I think there is no difficulty in applying to the inconvenience which has been

suffered a pecuniary measure of damages. The case is not one of mere vexation, but it is one of physical inconvenience, which can in a sense be measured by money value, and the parties here had the fair measure of that inconvenience in the damages given by the jury.

With regard to the other head, I agree in the opinion already expressed by my Lord and my learned Brothers, that that [* 125] is too * remote. That does not fall within the same category. With regard to what might be the result of the walk home, the wet night, the condition of health, the state of the plaintiff herself, all those things could not have been in the contemplation of the parties when they made the contract. I think, therefore, that this does fall beyond the line. Without saying anything further, I think it is too remote. The rule must therefore be made absolute to reduce the verdict to £8 beyond the £2. *Rule accordingly.*

Le Blanche v. London & North Western Railway Company.

1 C. P. D. 286–325 (s. c. 45 L. J. C. P. 521; 34 L. T. 667; 24 W. R. 808).

Railway Company. — Unpunctuality. — Measure of Damages.

Plaintiff contracted at Liverpool for a journey to Scarborough *via* Leeds, having taken a ticket expressed to be subject to conditions in the time tables which were (*inter alia*): "Every attention will be paid to ensure punctuality as far as is practicable: but the company do not undertake that the trains shall start or arrive at the time specified in the bills, nor will they be accountable for any loss, inconvenience, or injury which may arise from delays or detention." According to the time bills the train which left Liverpool at 2 o'clock was to arrive at Leeds at 5 o'clock, and a train was to leave Leeds at 5.20 arriving at Scarborough 7.30. The trains between Leeds and Scarborough were not under the control of the contracting company. The train, being delayed at St. Helen's junction and Manchester, arrived at Leeds at 5.27, after the 5.20 train for Scarborough had left. There was another train at 8 P. M., which would arrive at Scarborough 10 P. M. The plaintiff ordered a special train to Scarborough at a cost of £11 10*s.* and arrived there at about 8.45. He brought the action in the County Court to recover the £11 10*s.* The Judge of the County Court gave judgment for the amount claimed. This judgment was affirmed by a Divisional Court of the Common Pleas Division, who held, first, that the facts and documents which formed the contract were the taking and granting of the ticket, the ticket, the time table and the conditions; secondly, that the defendants thereby contracted to make every reasonable effort to ensure punctuality: thirdly, that although a delay of a few minutes would not be evidence of a want of reasonable effort, yet a long

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or unusual delay, such as had occurred at St. Helen's Junction and at Manchester, was evidence calling upon the company to show that it arose in spite of such reasonable effort, and that there was evidence that such delay was the cause of the plaintiff's missing the corresponding train at Leeds; fourthly, that the cost of the special train was recoverable as damages.

On appeal, the judgment of the Court below was, on the first point, affirmed; on the second, affirmed (*dissentiente*, CLEASBY, B.); on the third, affirmed (*dissentiente*, BAGGALLAY, J. A.), and on the fourth, reversed.

Per JAMES, L. J. The contract is to be read as made with regard to that particular train on that particular day; and the question, in determining whether there has been a breach, is, "Were the persons having the control and management and conduct of the train on that day guilty of wilful delay or reckless loitering?"

Appeal from a judgment of the Common Pleas Division [287] affirming a judgment of the Judge of the Bloomsbury County Court, in favour of the plaintiff for £11 10s., being the cost of a special train taken by the plaintiff under the circumstances stated in the judgment of the County Court Judge which was as follows:—

"This is an action by a gentleman who was a passenger [293] on the defendants' railway, the London and North Western Railway, to recover damages for the alleged negligence of the company, in not keeping time. On the 18th of August last, the plaintiff, wishing to go from Liverpool to Scarborough, went to the London and North Western Station at Liverpool and took a first-class ticket there to Scarborough by the train which, according to the company's tables, was to leave Liverpool at 2 in the afternoon and arrive at Scarborough at half-past 7. The train was called the Leeds Express Train. The London and North Western Company issued a through ticket, which is issued by the London and North Western Railway Company, subject to the company's regulations and to the conditions[1] in the time tables of the respective companies over whose lines this ticket is available.

"The whole of the line is not on the London and North Western Railway; but, to Manchester, 31½ miles, it is their own line. There the defendant company run on the Lancashire and Yorkshire, and then on the Manchester, Sheffield, and Lincolnshire, and then again on their own line; then again on the Lancashire and Yorkshire; then again on their own line: and (whether for a short distance on the Midland before arriving at Leeds, I do not

[1] The conditions are fully stated in the judgment of the Court of Appeal, pp. 400 401, *infra*.

know) from Leeds, on the North Eastern Railway, through York, to Scarborough.

"The train started from Liverpool 3 minutes late, and it lost time on its way to Manchester, where it arrived 13 minutes late, viz. 3.18 p. m., instead of 3.5. The proper time to leave Manchester was 3.20; but in fact they did not leave until 3.35, so that 15 minutes were lost there. Something was said about its being 17 minutes, but I cannot find that in the evidence of the guard; the difference is only between 15 minutes and 17 minutes, viz. 2 minutes. Between leaving Manchester and reaching Leeds more time was lost, and the train reached Leeds at 5.27, instead of at 5, or 27 minutes late. From Leeds, the on train was, as I have said, a North Eastern train, and the plaintiff missed that on train. It was to start, according to the time tables issued by the London and North Western Railway Company, at 5.30, and had gone 7 minutes. The plaintiff had therefore to wait until the next train, which started at 5.55, to reach York at 7. If the proper train had not been missed at Leeds, the plaintiff would have reached York at [* 294] 6.5; but in fact he did not arrive there until 7. There * was no train on until 8, by which, if it kept time, he would have reached Scarborough at 10. The plaintiff considered that he was much ill treated by the company, who, having agreed that he should reach Scarborough at 7.35, proposed that he should not reach it until 10; that this was the result of their negligence, not of any circumstances which were beyond their control; and that it was a breach of contract; and he therefore ordered a special train on to Scarborough (where he arrived at 8.30), for which train he paid £11 10*s*. He now sues the London and North Western Railway for damages for breach of their contract, claiming that £11 10*s*. as the damage he has sustained. The grounds of the defence are, — first, that there was no unreasonable delay, — and, secondly, even if there were, having regard to the contract with the plaintiff, the company are not liable.

"I think there was an unreasonable delay. It must be assumed that the time published by the company in their time tables is the time which the company consider to be a reasonable time, that is to say, the time in which, apart from any unusual circumstances, the journey can be well performed. Now, in this case, there were no such unusual circumstances shown; and, on the contrary, there is evidence of time lost on more than one occasion simply by what

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I am obliged to consider to be on the part of the company, and in the words of the condition, 'a want of attention to insure punctuality.' Such was the keeping the doors open at Liverpool to the last moment for passengers, and thus delaying the train and the passengers who were punctual, to enable passengers who were not punctual, but who had come late, to join the train with their luggage. Such also was the delay at St. Helen's Junction, occasioned by the shunting of a goods train belonging to the defendant company at the time this train was due, and which stopped this train at that station. Such was the delay at Ordsall Lane for a local train of the defendants; and such also the delay at Manchester, to put on an extra carriage, in order to take passengers who, had the train not been late, would have gone by the next train, at 3.50. The loss at each of these places was very trifling, but in the aggregate it amounted to 15 minutes in a run of 1 hour and 5 minutes, or nearly one-fourth more than the published time. Probably no one would complain of such a loss of time, if the journey had ended at Manchester: but by this delay, unfortunately, the on train from Leeds was lost, and that loss occasioned a further delay, and then the on train from York was lost, which occasioned still further delay. Thus, this apparently small loss of 15 minutes at Manchester was sufficient to lead to a delay of 2½ hours in reaching Scarborough, viz. arriving at 10, instead of 7.30, or a journey of 8 hours instead of a journey of 5½ hours.

"Now, there is no sufficient explanation given of the delays between Liverpool and Manchester which I have mentioned. The wish to give the greatest possible accommodation to the greater number of the public may have led to a part of the delay; and the pressure of the regular or ordinary traffic, distinguished from anything unusual, may have been such as to have also contributed to the delay: but I hold that these circumstances, if existing, are no sufficient answer to one in the position of the plaintiff. I fear, upon the evidence, that the truth is that, in the published time tables, sufficient time is not allowed for the regular and ordinary traffic; and I am of opinion that in this case proper attention was not paid to insure to the plaintiff punctuality, in other words, that there was negligence on the part of the company and their servants.

* "The second ground is that the company are relieved, [* 295] by reason of the conditions, — that, having regard to

their contract, they are exempt from liability. I stated in the course of the argument that I held that the plaintiff is bound by these conditions, although, as he stated, he in fact knew nothing about them. They are referred to on the company's ticket (*Henderson* v. *Stevenson*, L. R., 2 H. L., Sc. 470), and they bind him. I also held, on the construction of this condition, that the words 'every attention will be paid to insure punctuality,' would cover all the rest, so far, at all events, as the line of the London and North Western Railway Company is concerned. I cannot do better than read, upon the construction of the agreement, my judgment on a former case in which I had to give judgment against the London and North Western Railway Company on the 5th of March, 1874, which was to this effect: 'Apart from authority, I am of opinion that it is not the true construction of the contract that the company can be relieved from the [consequences of the] negligence of their own servants. I think that the contract bound the company to this, that every attention would be paid to insure punctuality as far as practicable; and I think also that that must include every attention on the part of the company's servants; and I read the rule to be, that, subject to every attention being paid by the company and their servants to insure punctuality as far as is practicable, the company do not undertake that the train should arrive at the time stated, and will not be accountable for any loss, inconvenience, or injury which may arise from delays; and that, subject as before, the company do not hold themselves responsible for the arrival of this company's trains in time for the nominally corresponding trains of any other company. It is true that the latter part of the rule is introduced by the word "but": and the argument for the company is, that the true construction of the whole sentence is, that the latter part accompanies the former as a limit to it, or an exception. But I think that less violence is done to the sentence by construing it not to relieve the company from their own negligence, than by construing it to mean that every attention will be paid to insure punctuality, but we do not bind ourselves to it, and we are at liberty to neglect that and pay no attention at all. The company's construction makes the sentence contradictory in itself. I think also the public have a right to say, if a company intends to be protected against their own negligence, they should say so.'

"Now, I have already shown that, in my judgment, there was

negligence on the part of the company in this case; and I hold that the condition affords no defence to that negligence. I have purposely avoided any reference to any delay off the company's own line. The arguments of Mr. Russell and the facts of this case show how grievously inconvenient to the public it would be if that condition, that the company will not be responsible for any delay off their own line, was held to be a legal condition. But, if I were called upon to decide it, I do not at present see my way to holding that the condition is not legal. In the view I take of the facts of this case, however, I am not called upon to decide the point. The delay up to Manchester, which was clearly on their own line, was sufficient to lose the on train, which occasioned the subsequent delay in arriving at York. There must, therefore, be judgment for the plaintiff.

"The question then arises as to the amount of damages, — whether it is to be * nominal damages or more than nomi- [* 296] nal damages; and I am of opinion that the plaintiff is entitled to more than nominal damages, viz. to the £11 10*s.*, the costs of the special train. In contract (not in tort), a man can recover only such money damage as he can prove to have been occasioned by the breach of the contract; whatever annoyance or whatever inconvenience he may have suffered, he cannot in a case of contract recover any damages for that, he is strictly confined to money damages. The plaintiff in this case sustained no money damage by the delay, except it be the cost of the special train. Had he gone on from York by the eight o'clock train, and arrived at Scarborough at ten, instead of half-past seven, he could not have shown any pecuniary damage; but he said, 'I wish to be taken on by a special train, and I am entitled therefore to be paid that expense;' and in principle I think he is. I cannot better state the principle than in the words of Alderson, B., in *Hamlin* v. *Great Northern Ry. Co.*, 1 H. & N. 408; 26 L. J. Ex. at p. 22. That was a case in which there was no on train for the plaintiff, and he was delayed that night at the place; but, in the course of the argument, Alderson, B., said: 'The principle is, that, if the party does not perform his contract, the other may do so for him as near as may be, and charge him for the expense incurred in so doing.' Then, with reference to the particular case before him, he said that the plaintiff might have taken a post-chaise, and charged it. This was in the year 1856, where Alderson, B., lays down

specifically what he considers the principle where a man is suing for breach of contract. That is, in truth, not a novel principle; it is familiar to us all in cases of contract for work and labour. Under the circumstances, I think that principle governs this case. Now, I do not mean to say that it is every trifling delay that would justify a refusal to wait; on the other hand, it is equally obvious that a train might be so delayed as to make it quite justifiable that a passenger should refuse to wait. A passenger might arrive at twelve at noon, and be asked to wait till eleven at night. That would of course be out of the question. It must, therefore, be to a certain extent a question of degree in each case; and I think that the difference in the case between a journey of five and a half hours and a journey of eight hours is a substantial difference, and such as in law (whatever otherwise may be thought of it) to justify the taking a special train; and, if so, the plaintiff is entitled to charge for it. I do not hesitate to say that, on the question of damages, I have had great difficulty in arriving at a judgment. The cases are very bare indeed of authority; and this is a mere *dictum* of ALDERSON, B., which is not to be found, I believe, in the other reports of *Hamlin* v. *Great Northern Ry. Co.* Still it is found in the Law Journal; and it is consistent, as I have said before, with the principle which is quite familiar to us in cases of contract. Therefore, though I freely admit that I have felt great doubt on the matter, I have come to the conclusion that I am bound by the principle enunciated by ALDERSON, B., and therefore I give judgment for the plaintiff for £11 10*s*."

The questions for the opinion of the Court were, — 1. Whether the judgment of the county court Judge in favour of the plaintiff was correct; 2. Whether the plaintiff was entitled to recover the damages claimed or any and what damages other than [*297] nominal *damages; 3. Whether the Judge was right in rejecting the evidence tendered on behalf of the defendants.

The judgment was to be affirmed, reversed, or varied, in accordance with the decision of the Court, the costs to abide the event.

Nov. 22, 1875. Herschell, Q. C. (Webster with him), for the defendants, contended that, under the circumstances, the company were not liable at all, and at all events not to more than nominal damages; that the contract was not an absolute engagement on their part that the train should arrive punctually at its destination,

or in time to meet the corresponding trains throughout the journey, but a mere statement of what the company intended to do, or at the most an engagement that every reasonable effort would be made on their part to insure such a degree of exactitude as is practicable under ordinary circumstances; and that, at all events, the Judge was wrong in holding that the plaintiff was justified in hiring, and entitled to charge the company with the hire of, a special train to save the unimportant delay disclosed in the case. They referred to *Stewart* v. *London and North Western Ry. Co.*, 3 H. & C. 135; 33 L. J. Ex. 199; *Hurst* v. *Great Western Ry. Co.*, 19 C. B. (N. S.) 310; 36 L. J. C. P. 264; *Shand* v. *Peninsula and Oriental Co.*, 3 Moo. P. C. (N. S.) 272; and *Henderson* v. *Stevenson.*

[DENMAN, J. That which the plaintiff relies on as a contract is one of the things which the company call a condition, in which they profess to be contrasting that which they undertake to do with that which they do not undertake. We are not asked to say whether the County Court Judge was wrong in holding that upon the facts proved there was unreasonable delay. That was for him.]

C. Russell, Q. C., and Crump, *contra*, contended that, taking the ticket, the time bills, and the conditions to constitute the contract between the parties, there was no engagement on the part of the company that there should be absolute punctuality through the journey, still a duty was imposed upon them to use reasonable care to complete the several stages of the journey within the times respectively stipulated; and that, whether they had performed their contract in that respect or not, was for the jury or (in this * case) for the County Court Judge, whose [*298] decision on the facts is conclusive, — citing *Prevost* v. *Great Eastern Ry. Co.*, 13 L. T. (N. S.) 20; and *Buckmaster* v. *Great Eastern Ry. Co.*, 23 L. T. (N. S.) 471; and that the damages awarded were such as naturally flowed from the breach of contract, according to the rule laid down in *Hamlin* v. *Great Northern Ry. Co.*, 1 H. & N. 408; 26 L. J. Ex. 20. *Cur. adv. vult.*

Jan. 11. The judgment of the Court (BRETT, DENMAN, and LINDLEY, JJ.) was delivered by

BRETT, J. This was an appeal from a judgment of the County Court Judge sitting at Bloomsbury. The claim was for the cost of a special train from York to Scarborough, which train the plaintiff

had ordered in consequence of his being brought from Liverpool to Leeds too late for the ordinary train from Leeds to Scarborough. The plaintiff took a first-class ticket at the defendants' station in Liverpool by the 2 P. M. train for Scarborough, via Eccles, Staleybridge, Huddersfield, Leeds, and York. The ticket had indorsed on it the words "Issued, etc., subject to the company's regulations and to the conditions in the time tables of the respective companies over whose lines this ticket is available."

The time table of the defendants' company contained the following notices as to the 2 P. M. train, viz.

	P. M.
Leave Liverpool	2. 0
Arrive Manchester	3. 5
Leave ———	3.20
Arrive Leeds	5. 0
Leave ——	5.20
Arrive York	6. 5
Arrive Scarborough	7.30

Certain conditions were set out in the time tables which were the subject of the discussion.

The train, under circumstances stated in evidence, left Liverpool two or three minutes after 2 P. M., left Manchester at 3.35, and arrived at Leeds at 5.27. The ordinary and corre-
[* 299] sponding * train for York had left at 5.20. The plaintiff proceeded to York by the next train, which left Leeds at 5.55, and arrived at York at 7 P. M. The next train then from York to Scarborough would leave at 8 P. M., and was timed to arrive at Scarborough at 10 P. M. The plaintiff thereupon took a special train by which he arrived at Scarborough between 8.30 and 9 P. M.

The County Court Judge came to the conclusion that there was a want of attention to insure punctuality, and an unreasonable delay whilst the train was on the defendant's line, which caused the late arrival at Leeds and the loss of the ordinary train to Scarborough; and, refusing to nonsuit the plaintiff, he held that the plaintiff was justified in taking the special train, and was entitled to charge the cost of it against the defendants.

The conditions before referred to were as follows: —

"1. The arrival time denotes when the trains may be expected;

but the passengers, to insure being booked, should be at the principal stations five minutes earlier and the intermediate stations ten minutes earlier. The doors of the booking-office will be closed punctually at the hours fixed for the departure of the trains; after which no person can be admitted.

"2. Time Bills. — The published time bills of this company are only intended to fix the time at which passengers may be certain to obtain their tickets for any journey from the various stations, it being understood that the trains shall not start before the appointed time. Every attention will be paid to insure punctuality as far as it is practicable; but the directors give notice that the company do not undertake that the trains shall start or arrive at the time specified in the bills; nor will they be accountable for any loss, inconvenience, or injury which may arise from delays or detention. The right to stop the trains at any station on the line, though not marked as a stopping station, is reserved.

"3. The granting of tickets to passengers to places off the company's line is an arrangement made for the convenience of the public; but the company do not hold themselves responsible for any delay, detention, or other loss or injury whatsoever arising off their lines, or from the acts or defaults of other parties, nor for the correctness of the times over the lines of other companies, nor for the arrival of this company's own trains in time for the nominally corresponding train of any other company or party."

It was argued before us on behalf of the defendants, the appellants, that, taking the ticket, the time table, and the conditions together, there was no contract at all as to any time of arrival; that there was no contract to arrive at the times stated in the time table; that there was no contract to make reasonable effort to arrive at the stated times; that, even if negligence were proved, by reason of which the train did not arrive in a reasonable time and damage * were thereby caused, the condi- [*300] tions saved the defendants from any liability; that no question could be raised as to whether the conditions were or were not reasonable, for the Railway and Canal Traffic Act did not apply to contracts for the conveyance of passengers; that there was no evidence of negligence or want of reasonable effort; that, at all events, the plaintiff was not entitled under the circumstances to take and charge the defendants with a special train.

It was argued for the plaintiff, that either there was an express

contract that the defendants would use every attention to insure punctuality as far as practicable, or an implied contract that they would make reasonable efforts that the trains should arrive at the stated times; that there was evidence of negligence on the part of the defendants which caused the delay; and that the plaintiff was reasonably justified in taking the special train, and was therefore justified in charging the cost of it to the defendants.

The questions are, — first, what facts and documents formed the contract, — secondly, what was the contract, — thirdly, was there any evidence of breach of contract, — fourthly, were the damages such as might be legally pronounced.

As to the first, we are of opinion that the facts and documents which formed the contract were the taking and granting the ticket, the ticket, the time tables, and the conditions. If there were no conditions, or if the ticket did not refer to them, it would be necessary to infer the terms of the contract by implication from the fact of granting and receiving a ticket for such a service as carriage by railway; but it is clear, as it seems to us, that the passenger is referred to the conditions to find the modifications of the contract which would be implied without them. It is that reference which makes them part of the contract.

But then, as to the second question, the reference cannot in such case make only the negative or restrictive parts of the conditions binding as parts of the contract; it must equally make the affirmative and explanatory parts of the conditions parts of the contract. The first condition and the first part of the second, taken together, seem to amount to a contract that every person who arrives at a chief station five minutes before, or at an intermediate station ten minutes before, the advertised time [* 301] of departure of a train, * shall receive a ticket to be carried and shall be carried by that train. The second part of the second condition is relied upon by the company, and we think rightly relied upon, to modify the contract which would without it be implied, and to prevent the advertising of the times of arrival and departure from amounting to an absolute contract that the train will arrive or depart exactly at such time. It prevents any liability for any loss, inconvenience, or injury which may arise from delays or detention, however long, considered as mere delay or detention; that is to say, the company does not contract that there will not in fact be delay or detention of the

longest period. For instance, the company does not contract against delay or detention, however long, caused by snow, or accident, or the like. But, as the negative and restrictive part of the condition is part of the contract, so we think is the affirmative and explanatory part. We therefore think that the defendants did by the statement to that effect in the conditions contract that they would pay every attention, that is to say, make every reasonable effort, to insure punctuality as far as practicable. We further think that without the conditions there must be an implied contract that the defendants would use reasonable efforts that trains should both start and arrive at the stated times, and that there is nothing in the conditions to restrict that undertaking. The third condition, in the like manner, negatives an absolute contract that punctuality shall be observed either by the defendants or by the other companies, and negatives any responsibility of the defendants for the defaults as to punctuality of the other companies, as, for example, for even a want of reasonable effort by those companies to insure punctuality; but it does not absolve the defendants from using reasonable efforts on their part to meet the corresponding trains of the other companies.

The next question is, whether there was any evidence of a neglect by the defendants' servants of the contract to make every reasonable effort to insure punctuality, and of such neglect, if any, being a cause of the injury alleged by the plaintiff. Now, we do not think that the mere fact of there being some want of punctuality, either in starting a train from its first or any intermediate station, or in the arrival at any station, would be necessarily any evidence of a want of reasonable effort. A delay of *a few minutes in the original starting may, as [*302] it seems to us, obviously occur though every reasonable effort is made to start the train punctually, and therefore would of itself be no evidence which ought to be acted upon or left to a jury of a want of reasonable effort. If any delay, however short, is to be evidence of a breach of contract, the company is practically bound to an absolute contract to start to the moment, which we have held is not the true construction of their contract. Neither is the mere fact of some unpunctuality in arriving at or leaving an intermediate station evidence by itself of a neglect of a reasonable effort to secure punctuality. But an unusual or long delay would, we think, be evidence calling upon the company to

account for it by showing that it occurred, as, by the bursting of an engine pipe, or collison, or snow or wet preventing friction, or accident, or by a sudden, unexpected, and not to be reasonably expected, pressure of passengers, — something which prevented punctuality, notwithstanding reasonable efforts to secure it were made.

We think that, in this case, the delay of fifteen minutes in starting from Manchester was of itself sufficient to require explanation; that the delay at St. Helen's Junction required explanation; and that these two facts were evidence of negligence, that is to say, of want of reasonable effort to be punctual. We should observe that we need not agree and do not agree with the idea that the defendants ought to have closed the doors at Liverpool before the advertised time, in order to shut out tardy passengers; for, the first condition contains an undertaking that the booking-office will be closed punctually, and the second that the train will not start from any station before the advertised time. But, as we have said, we think there was evidence of negligence on the part of the defendants which caused delay in leaving Manchester; and we further think that there was evidence that the delay in leaving Manchester was a cause of the too late arrival at Leeds, and so of the impossibility of arriving in time at Scarborough. If there was evidence, we have no right to interfere with the conclusion.

As to the damages, we think that the rule attributed to Alderson, B., in *Hamlin* v. *Great Northern Ry. Co.*, is a good expression of the law. We think it may properly be said that, [* 303] if * the party bound to perform a contract does not perform it, the other party may do so for him as reasonably near as may be, and charge him for the reasonable expense incurred in so doing. The same rule is laid down by Blackburn, J., in the case of *Hobbs* v. *London and South Western Ry. Co.*, L. R. 10 Q. B. 111; 44 L. J. Q. B. 49, 52, pp. 381, 387, *ante*, who says: "The general rule is that the damages to be recovered in an action for a breach of contract to supply something are, the difference between that which should have been supplied and the cost of obtaining something equally good, or, if that is not attainable, of the best substitute." We think that in this case there was evidence upon which the County Court Judge might not unreasonably find, and has in effect found, that the plaintiff was not reasonably called

upon to wait at York for the late train, and might reasonably take the special train to Scarborough, being for such a distance at such a price; and therefore we think that the County Court Judge was justified in law in holding that the plaintiff might charge the defendants with the cost of the special train.

We do not say that, in every case of a passenger missing a train in correspondence with that in which he is, though he miss it by the default of the company's servants, he is therefore entitled immediately to take a special train for any distance at any cost, or that a judge or jury would be bound to allow in every case, or justified in allowing in every case, for the cost of a special train. The question must always be whether it was a reasonable thing to do, having regard to all the circumstances. Where to take a special train is a reasonable thing to do, we are of opinion that it is a sufficiently natural result of the breach of contract to bring it within the legal rule.

We are of opinion that the judgment appealed against was substantially correct, and that the appeal must be dismissed, with costs. *Appeal dismissed with costs.*

Feb. 16. Against this judgment the defendants appealed.

Herschell, Q. C., and Webster, for the defendants.

Russell, Q. C., and Crump, for the plaintiff.

The following authorities were cited in addition to those cited * below: *Phillips* v. *Clark*, 2 C. B. (N. S.) 156; [* 304] 26 L. J. C. P. 168; *Grill* v. *General Iron Screw Collier Co.*, L. R. 1 C. P. 600; 35 L. J. C. P. 321, (No. 3 of "Bill of Lading," 4 R. C. p. 680). *Cur. adv. vult*

May 10. The following judgments were delivered: —

Cleasby, B. In this case the plaintiff had taken a railway ticket at the defendants' station at Liverpool for a journey from Liverpool to Scarborough. Some portions of the line belonged to the defendants, but other portions of the line belonged to other companies.

According to the time tables the time for the starting of the train from Liverpool was 2 P. M., and for arrival at Scarborough, 7.30. The time for arrival at Leeds was 5 o'clock, and the train to carry the plaintiff on to Scarborough left Leeds at 5.20. But the train was twenty-seven minutes late at Leeds, arriving at

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5.27, and the train for Scarborough had then left. The plaintiff proceeded by the next train to York, and finding that the next train for Scarborough would arrive at 10 o'clock, he took a special train, by which he arrived at Scarborough between 8.30 and 9 o'clock. The cost of the special train was £11 10s., and the action was brought in the County Court, the plaintiff recovering as damages the £11 10s. expended in completing the journey as before mentioned.

The principal question argued before us was the effect of the conditions referred to in the railway ticket which formed part of the contract of carriage.

These conditions, so far as the present question is concerned, were in these terms: —

"The arrival time denotes when the trains may be expected, but the passengers to insure being booked should be at the principal stations five minutes earlier, and the intermediate stations ten minutes earlier. The doors of the booking-office will be closed punctually at the hours fixed for the departure of the trains, after which no person can be admitted.

"Time Bills. — The published train bills of the company are only intended to fix the time at which passengers may be [* 305] certain to * obtain their tickets for any journey from the various stations, it being understood that the trains shall not start before the appointed time. Every attention will be paid to insure punctuality as far as it is practicable, but the directors give notice that the company do not undertake that the trains shall start or arrive at the time specified in the bills, nor will they be accountable for any loss, inconvenience, or injury which may arise from delays or detention. The right to stop the trains at any station on the line, though not marked as a stopping station, is reserved. The granting of tickets to passengers to places off the company's line is an arrangement made for the convenience of the public; but the company do not hold themselves responsible for any delay, detention, or other loss or injury whatsoever arising off their lines, or from the acts or defaults of other parties, nor for the correctness of the times over the lines of other companies, nor for the arrival of this company's own trains in time for the nominally corresponding train of any other company or party."

It was argued on behalf of the defendants, that the effect of

these conditions was to exempt them from responsibility in respect of the trains not arriving at the time specified. The plaintiff contended that, taking the whole together, they were not absolved from the consequences of delay if it could be attributed to any want of attention on their part to insure punctuality.

It appears to me that the only reasonable construction of these conditions is, that the defendants undertake no responsibility whatever in relation to the arrival of trains at particular times to meet other trains. The language must be considered with reference to the subject-matter to which it relates, viz. arrival of trains, and the defendants may be well understood to say, such are the uncertain exigencies of traffic requiring trains sometimes much heavier than at other times, so uncertain are the times occupied in the letting passengers out with all their luggage, and taking them in (all which is inevitable unless there are to be great disappointments), and so many other causes such as the state of the rails, fogs, very high winds, &c., affect the times of arrival that we do not accept any responsibility for delay beyond the times advertised. The times are advertised, for convenience, at which we expect and have a right to expect from our arrangements that the * trains will arrive, but we do not [* 306] bind ourselves that they shall do so. The words are:

"The directors give notice that the company do not undertake that the trains shall start or arrive at the time specified in the bills, nor will they be accountable for any loss, inconvenience, or injury which may arise from delays or detention." No language can possibly be clearer or more free from ambiguity than this, and it is the language expressly directed to what their responsibility or contract is.

It appears to me that it would be unreasonable to read this clear language of contract as controlled by the vague assurance given before that every attention will be given to insure punctuality so far as it is practicable. No one would think of entering into so indefinite a contract, and for the same reason it ought not to cut down a contract clearly expressed.

Indeed, to hold the language of exemption as only applicable when there had been no want of attention to insure punctuality would practically deprive the defendants of the benefit of it, by compelling them to satisfy the severest test of opinion as to what might possibly have been done to produce a result which practi-

cally cannot be made certain. Their position would be hopeless if they had in every case of delay to make out satisfactorily that every such attention had been paid.

A breakdown might take place on the line, and it might be traced to some negligence of the company's servants in not shunting or signalling properly, and the consequence would be that every passenger in the train which followed would have a cause of action for being delayed beyond the time.

I must say that it appears to me that there is no binding contract as to the particular time of arrival, either as an absolute contract, or a contract that every attention should be paid to insure it, which is all we have to consider in the present case.

The contract of carriage would continue, involving certain obligations on the part of the carriers in carrying it into effect fairly and reasonably both as regards time and other matters, but we are not dealing with the general question, but only with the question whether they are responsible in respect of the times mentioned in the tables not being kept, and for the reasons given I am of opinion that they are not.

[* 307] * This makes it unnecessary to consider the other question discussed before us, viz. whether the expenses of the special train could be properly recovered. But, without saying that in no case whatever could the traveller charge the expense of a special train as part of his damages, I feel justified in expressing my opinion that every person disappointed through some default of the company in catching a particular train would not be entitled, as a matter of law, to reinstate himself as nearly as he could by means of a special train, and if the County Court Judge acted upon the view that in general he would be entitled to do so, I think he would have been wrong, and I can suggest no better guide upon the question of damage than that given in the judgment of Lord Justice MELLISH. For the above reasons it appears to me that the judgment already given should be reversed.

JAMES, L. J. I am of opinion that the company are not entitled to strike out from the contract the words, "But every attention will be given to insure punctuality so far as it is practicable," and to treat this as a mere vague assurance having no legal operation, involving no legal responsibility, but only a responsibility to public opinion, to be enforced by letters to the "Times" or a local journal.

I agree, however, that it is to be read in connection with the very clear stipulations that the company are not to be accountable for any loss, inconvenience, or injury which may arise from delays or detention.

It appears to me that the whole sentence is capable of a reasonable and consistent legal operation.

The contract is to be read as if it were a contract made with regard to that particular train on that particular day, just as if somebody else, not the company, had made for that day arrangements enabling them to take passengers from Liverpool to Scarborough.

The company might reasonably stipulate that it would not be answerable for any delay occasioned by anything on the line, any block at a station, any break down of any other train, or any of the innumerable accidents which do occur, and must occur constantly on every line of traffic. But, at the same time, it might * well promise and undertake that, so far as re- [* 308] garded that particular train, or that particular journey, every attention would be given to insure punctuality.

If we consider the immense extent and complication of a modern railway system and network in England, it would be most unreasonable to put a construction on such a document as the one before us which would enable any passenger delayed anywhere to put the whole traffic arrangements, and the conduct of the whole railway staff, on its trial before a judge or jury. It is quite possible, and not improbable, that the negligence or blunder of officials in London or at Carlisle, of the guard of a goods train, a pointsman, or signalman, might derange the traffic so as to cause a block or delay on a branch line hundreds of miles away. And, to my mind, it is not to be endured that for such a negligence as that the company is to be liable to every passenger everywhere delayed by it.

Again, it appears to me that the company must be at liberty to accept any traffic brought to it, a special train for the Queen or a royal visitor, to accept an army of volunteers or excursionists, although it thereby disabled itself later in the day from keeping the times mentioned in its time tables. But if we read the contract *reddendo singula singulis* as applicable and limited to each particular train for each particular journey, then we can reasonably construe the statement in the conditions as a promise that

the persons having the control and management of that train for that journey, will pay every reasonable attention, so far as it is practicable for them, to insure punctuality, viz. that they will not be guilty of wilful delay or reckless loitering. I am of opinion that there was some evidence before the County Court Judge to justify a conclusion that there was such wilful delay.

In the time tables a margin of fifteen minutes was allowed at Manchester. Now, according to the regulations, every person minded and entitled to go on from Manchester by that train ought to have been with his luggage on the platform, ready to start at 3.20, and it does appear to me, as it did to the County Court Judge, that if proper attention had been then and there paid to insure punctuality, the passengers getting out at Manchester would have been immediately got out, and the passengers getting in would have been got in without a minute's delay, and [* 309] if this had been * done the further delays between Manchester and Leeds would in all probability have been avoided; for we all know that the want of punctuality of a train in the early part of its journey is almost invariably followed by disarrangments and further delays in the further prosecution of its journey. But I am not satisfied that in dealing with that question of fact, viz. whether there was a breach of the contract, the County Court Judge rightly construed the contract or rightly apprehended what would be a breach of it. I am not satisfied that he put the question to himself in this way: Were the persons having the control and management and conduct of the train on that day guilty of wilful delay or reckless loitering?

With respect to the remaining question, whether the plaintiff was entitled to take the special train, I certainly should not myself have arrived at the same conclusion as the County Court Judge. I agree that the general rule is that a person with whom a contract has been broken has a right to fulfil that contract for himself as nearly as may be, but he must not do this unreasonably or oppressively as regards the other party, or extravagantly. I should myself have held it most unreasonable and oppressive for the plaintiff to have taken a special train merely to get in an hour earlier at the terminus of his journey on the seaside. And I think it must be taken that the County Court Judge did consider the dictum of Mr. Baron ALDERSON as establishing it as a rule of law that the plaintiff was, and that every other passenger

for Scarborough by that train would have been, entitled to save himself the discomfort and *ennui* of an hour's detention at York, by taking a special train for Scarborough.

I am of opinion that the matter must go back for a new trial.

Mellish, L. J. This was an appeal from a judgment of the Common Pleas Division, affirming a judgment of the County Court Judge sitting at Bloomsbury, special leave having been given to appeal to us. The action in the County Court was brought by the plaintiff, Mr. Le Blanche, against the London and North Western Railway Company, to recover £11 10*s*., the cost of a special train which the plaintiff engaged to carry him from York to Scarborough, on account of his having arrived too late at York * for the train which leaves York at 6.5 [* 310] for Scarborough, through, as he alleged, the neglect of the defendants in not properly performing their contract with him to convey him from Liverpool to Scarborough. It was held by the Judge of the County Court that the plaintiff was entitled to recover the cost of the special train. The plaintiff, on the 16th of August, 1874, took a first-class ticket at the defendants' station at Liverpool by a train which left Liverpool at 2 P. M., and, according to the time tables, was expected to arrive at Manchester at 3.5, to leave Manchester at 3.20, to arrive at Leeds at 5.0, to leave Leeds at 5.20, to arrive at York at 6.5, and at Scarborough at 7.30. The train was fifteen minutes late when it left Manchester, and twenty-seven minutes late when it arrived at Leeds, and consequently the plaintiff was too late to go on to York by the train which left Leeds at 5.20. The plaintiff left Leeds by the next train, and arrived at York at 7 P. M. The next train which left York for Scarborough started at 8 P. M., and was timed to arrive at Scarborough at 10 P. M. The plaintiff thereupon took a special train from the North Eastern Railway Company and arrived at Scarborough between 8.30 P. M. and 9 P. M. Three questions were argued before us, on which it is necessary that we should give an opinion: — First, was there any contract on the part of the defendants that they would use reasonable exertions to insure punctuality, so that the train might arrive at Leeds in time for the train which was to leave Leeds for York at 5.20? Secondly, if there was, was there any sufficient evidence that the contract had been broken, and that it was through the fault of the defendants that the train arrived so late at Leeds;

and, thirdly, was the plaintiff entitled to recover the cost of the special train? Now, with respect to the first question: the ticket issued to the plaintiff had indorsed upon it the words, "Issued by the London and North Western Railway Company; subject to the company's regulations and to the conditions in the time tables of the respective companies over whose lines this ticket is available," and it was admitted in the argument before us by the counsel on both sides that the conditions annexed to the company's time tables formed part of the contract between the plaintiff and the defendants. These conditions were as follows: —

[His Lordship then read the conditions.]

[* 311] * We have, therefore, to consider what is the true effect of these conditions.

On the part of the plaintiff it was argued that the reference to the time tables in the ticket might, independently of the conditions, make the company absolutely liable for the non-arrival of the trains at the specified times, and that the only effect of the conditions was to free the company from such absolute liability, but that they still remained liable for a non-arrival of this train caused by their own negligence. On the other hand, it was contended, on the part of the defendants, that the effect of the conditions was to free them from all liability in respect of the non-arrival of their trains in proper time, whatever might be the cause which occasioned the delay, and that the words, "Every attention will be paid to insure punctuality as far as practicable," formed no part of the contract, or, if they did form part of the contract, that their meaning was that the company would make proper regulations to insure punctuality, but that nevertheless the company were not to be liable for any neglect on the part of their servants in carrying out those regulations. Now it is to be remembered that the language of the conditions is the language of the company, that the conditions are imposed by them, and that they are seeking to put a construction on the conditions the effect of which will be to free them from a liability which the law unquestionably, in the absence of an express agreement to the contrary, imposes on them, namely, a liability to be answerable for the negligence of their servants. Under these circumstances, I think that the conditions are to be construed, so far as they are ambiguous, against them; that the words, "Every attention will be paid to insure punctuality as far as practicable,"

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must be treated as part of the contract, and as modifying every other statement contained in the conditions.

If the language had been, — " the directors give notice that the company do not undertake that the trains shall start or arrive at the time specified in the bills, nor will they be answerable for any loss, inconvenience, or injury which may arise from delays or detention, but every attention will be paid to insure punctuality as far as practicable," the construction would have been clear, and I do not think it really matters which clause of the sentence comes first.

* I also think that this construction is confirmed by [* 312] comparing the terms in which the company speak of their liability for what may happen on their own line with the terms in which they speak of their liability for what may happen on the lines of other companies.

In the last clause of the conditions they say the company do not hold themselves liable for any delay or detention arising from acts or defaults of other parties.

Why do they not say, in equally plain terms, that the company do not hold themselves liable for any delay or detention arising from their own act or default if that is what they meant?

I also think that there is no valid ground for the distinction contended for by Mr. Herschell between the regulations made by the company and the mode in which those regulations are carried out by the servants of the company. If they are liable at all for negligence in not insuring punctuality, they must be as liable for the negligence of the servants of the company in carrying out the regulations as for the negligence of the directors in not making proper directions. I am, therefore, of opinion that the contract for which the plaintiff contends was sufficiently proved.

I have next to consider whether there was sufficient evidence that the contract was broken, and that by reason of that breach the plaintiff did not arrive at Leeds in time for the train at 5.20.

Both the County Court Judge and the Judges of the Common Pleas Division have elaborately examined the evidence respecting the different acts of neglect imputed to the defendants, and I think it sufficient to say, on this part of the case, that I agree in the conclusion they have arrived at, and the reasons they have given for it.

I think that the fact of the train being a quarter of an hour

late when it left Manchester made it necessary for the defendants to give some explanation respecting the cause of the delay, and that it is impossible to lay down as a matter of law that the County Court Judge was bound to be satisfied with the explanation given by the guard, even assuming that he believed everything the guard said. I think that there was evidence from which he might properly come to the conclusion that it [* 313] was through the neglect of * the company that the train was a quarter of an hour late at Manchester, and that this was the cause of the plaintiff losing his train at Leeds. Lastly, I have to consider whether the plaintiff was entitled to recover as special damages the cost of the special train from York to Scarborough.

Now, I agree that, as a general rule, what is said by ALDERSON, B., in *Hamlin* v. *Great Northern Ry. Co.*, is correct, namely: "The principle is, that if the party does not perform his contract the other may do so for him as near as may be, and charge him for the expense incurred in so doing." I agree also with what is said by the Judges of the Common Pleas Division, that this rule is not an absolute one applicable to all cases, and that the question must always be whether what was done was a reasonable thing to do having regard to all the circumstances. This, however, is a very vague rule, and it is desirable to consider whether any more definite rule can be laid down. Now, one mode of determining what, under the circumstances, was reasonable, is to consider whether the expenditure was one which any person in the position of the plaintiff would have been likely to incur if he had missed the train through his own fault, and not through the fault of the railway company. The rule that what is reasonable under particular circumstances may be discovered by considering what a prudent person, uninsured, would do under the same circumstances, is applicable to many cases besides those which arise under policies of marine insurance.

I think that any expenditure which, according to the ordinary habits of society, a person who is delayed in his journey would naturally incur at his own cost, if he had no company to look to, he ought to be allowed to incur at the cost of the company, if he has been delayed through a breach of contract on the part of the company, but that it is unreasonable to allow a passenger to put the company to an expense to which he could not think of putting

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himself if he had no company to look to. The question, then, in my opinion, which the County Court Judge ought to have considered is, whether, according to the ordinary habits of society, a gentleman in the position of the plaintiff, who was going to Scarborough for the purpose of amusement, and who missed his train at York, * would take a special train from York [* 314] to Scarborough at his own cost, in order that he might arrive at Scarborough an hour or an hour and a half sooner than he would do if he waited at York for the next ordinary train. This question seems to me to admit of but one answer, namely, that no one but a very exceptionally extravagant person would think of taking a special train under such circumstances. I am of opinion, therefore, that the County Court Judge did not act on the proper principle in considering the question of damage; and that unless the parties consent to the damages being reduced to 1*s.*, there ought to be an order for a new trial.

I think each party should pay his own costs of the appeal to the Common Pleas Division, and of the appeal to us.

Baggallay, J. A. The action in this case was brought in the Bloomsbury County Court, to recover from the defendants the sum of £11 10*s.*, being the amount paid by the plaintiff for a special train from York to Scarborough, under the following circumstances. On the afternoon of the 10th of August, 1874, the plaintiff took a through ticket at the defendants' station in Liverpool for the journey from that town to Scarborough; on the ticket was an indorsement in the following terms:—"Issued by the London and North Western Railway Company, subject to the company's regulations and to the conditions in the time tables of the respective companies over whose lines this ticket is available."

The only regulation of the company to which it appears material to refer, other than those included in the time table conditions, is that which prohibits the driver of any train from making up lost time by increase of speed. This appears to have been a regulation of the company, from the evidence of the guard, as stated in the case. The conditions in the time table, so far as they are material for the purposes of the present case, are in the following terms:—

"The arrival time denotes when the trains may be expected, but the passengers, to insure being booked, should be at the principal stations five minutes earlier, and the intermediate stations

ten minutes earlier. The doors of the booking-office will be closed punctually at the hours fixed for the departure of the trains, after which no person can be admitted.

[* 315] * "Time Bills. — The published train bills of the company are only intended to fix the time at which passengers may be certain to obtain their tickets for any journey from the various stations, it being understood that the trains shall not start before the appointed time. Every attention will be paid to insure punctuality as far as is practicable, but the directors give notice that the company do not undertake that the trains shall start or arrive at the time specified in the bills, nor will they be accountable for any loss, inconvenience, or injury which may arise from delays or detention. The right to stop the trains at any station on the line, though not marked as a stopping station, is reserved. The granting of tickets to passengers to places off the company's line is an arrangement made for the convenience of the public; but the company do not hold themselves responsible for any delay, detention, or other loss or injury whatsoever arising off their lines, or from the acts or defaults of other parties, and for the correctness of the times over the lines of other companies, nor for the arrival of this company's own trains in time for the nominally corresponding train of any other company or party."

Before proceeding to a consideration of the purpose and effect of these regulations and conditions, and of the contract by which the defendants became bound by their issuing to the plaintiff a through ticket, it will be convenient, and I think necessary, to examine somewhat minutely the general circumstances of the traffic to which they were made applicable. And, first, it is to be noted that the railway from Liverpool to Scarborough, though continuous, did not belong wholly to the defendants, nor was it worked throughout by the defendants, nor even by continuous trains. From Liverpool to Leeds the line was worked by the defendants, and from Leeds to York and from York to Scarborough by the North Eastern Railway Company; again, the line from Liverpool to Leeds, which was worked throughout by the defendants, did not belong wholly to them, though they had running powers over those portions of the line of which they were not the owners; portions of the line, in fact, belonged to three other companies — the Lancashire and Yorkshire, the Manchester, Sheffield,

and Lincolnshire, and the Midland — and these several portions of the line between Liverpool and Leeds formed parts of * other systems more or less connected with the through [* 316] line. Between Liverpool and Leeds there were no less than seven changes in the ownership of the line. In addition to this, several of the principal stations on the line, including those at Manchester and Staleybridge Junction, belonged to other companies, whose servants regulated the admission into such stations of the defendants' train. It is obvious to how many possible causes of accidental delay a through train passing over the line between Liverpool and Leeds was subject, and it is not immaterial to observe that in so complicated a system a delay of very trifling duration in its origin might, in the result, occasion one of very considerable importance.

The train by which the plaintiff travelled left Liverpool at three minutes after 2 P. M., being three minutes later than the time fixed for its departure as published on the defendants' time bills; its time for arriving at Leeds, as published on the same time bills, was 5 P. M.; and it also appeared, from the same bills, that a train of the North Eastern Company was timed to leave Leeds for York at 5.20 P. M., reaching that city in time for a corresponding train to Scarborough, which would be due at Scarborough at 7.30 P. M.

The train from Liverpool did not, in fact, reach Leeds until 5.27, when the North Eastern Company's 5.20 train had left for York, and the plaintiff was consequently delayed at Leeds until 5.55, when the next train left for York; and on his arrival at York at 7 P. M. there was no train leaving for Scarborough earlier than 8 P. M., and that train would not be due at Scarborough until 10 P. M. The plaintiff thereupon took a special train from York to Scarborough, arriving at Scarborough between half-past 8 and 9 o'clock; for this special train he paid £11 10*s.* to the North Eastern Company, and then commenced the present action against the defendants to recover the amount so paid.

It was admitted by the plaintiff, and by his counsel, that he had not any business or engagement whatever at Scarborough necessitating his arrival there at any particular time, and that he had, in fact, taken the special train for the purpose of raising the question whether a passenger was, under such circumstances, entitled to do so. On the part of the plaintiff it was

[* 317] contended * that, by the acceptance from him of the full fare from Liverpool to Scarborough, and the issue to him of a through ticket, the defendants became bound to make all reasonable efforts to insure the arrival of the train at Scarborough by 7.30 P. M., and rendered themselves liable for its non-arrival there at that time, unless the delay was occasioned by some cause other than the default or negligence of the defendants or their servants; that the delay in arriving at Leeds, which was the substantial cause of the plaintiff's not arriving at Scarborough by the train timed to arrive there at 7.30, was in fact caused by the default or negligence of the defendants or their servants; and that inasmuch as, in consequence of such delay, the plaintiff was unable to proceed to Scarborough by the train due there at 7.30, he was not bound to wait for the next train, which would not arrive there before 10, but was entitled to take a special train and to charge the cost of it to the defendants.

For the defendants, on the other hand, it was contended that this was not the true effect of the contract: that whatever might have been the cause of the non-arrival of the train at Leeds at the time specified in the time bills, the defendants would have been protected by the conditions from liability in respect of such delay, or, at any rate, that they could not have been liable unless the delay had arisen from some wilful default or negligence on their own part, or on that of their servants; and that, inasmuch as there had not, in fact, been any such wilful default or negligence, they were under no liability to the plaintiff; and, further, that in any view of the case, the plaintiff was not justified in taking a special train, and was not entitled to recover the costs of it from the defendants.

The decision of the Judge of the County Court was in favour of the plaintiff, and he ordered payment to him by the defendants of the £11 10*s*., and of the costs of the action, reserving leave to the defendants to move the Court above; on appeal to the Court of Common Pleas, the order of the County Court was affirmed: and against the order so affirmed, the present appeal is brought, leave having been granted by the Court of Common Pleas for that purpose in consideration of the great importance of the case, not only to railway companies, but to the public generally.

[* 318] * Three questions have been raised in the argument before us: first, what was the true purport and effect of

the contract by which the defendants became bound by the issue to the plaintiff of a through ticket from Liverpool to Scarborough; secondly, were the defendants guilty of a breach of such contract; and, thirdly, upon the assumption that they were so guilty, was the plaintiff entitled to take a special train and to charge the cost of it to the defendants. The first question resolves itself into a consideration of the proper construction to be put upon the conditions contained in the time bills.

Now, omitting from present consideration the earlier conditions, which have reference to the booking of passengers and the starting of trains, and which appear to affect the question of breach of contract, rather than that of the construction of the contract, we have in effect to deal with two series of conditions — the one general in their terms, the other limited to contracts of carriage between a station on the defendants' line and a station on another company's line.

In approaching the consideration of the true effect and meaning of these conditions, we must, I think, bear in mind the circumstances under which, and the species of traffic to which, they were intended to be applicable. These I have already pointed out, and it is unnecessary for me further to advert to them.

The first series of conditions commences with the statement that "every attention will be paid to insure punctuality so far as it is practicable," and this statement is followed (amongst other stipulations) by a notice that the company will not undertake that their trains shall start or arrive at the times specified in the time bills, and that the company will not be accountable for any loss, inconvenience or injury which may arise from delays or detention. Now, in construing this first series of conditions, I think it quite immaterial whether the later words are to be regarded as moderating the effect of the earlier undertaking to pay every practicable attention to secure punctuality, or the earlier statement is to be regarded as governing or modifying the absolute terms of the subsequent paragraphs. In either view of the case they must, I think, be construed as a whole; and if so construed, they, in my opinion, so far as they affect the present
* question, amount to this: that the defendants will use [* 319]
every endeavour, consistently with the ordinary and reasonable use and working of the line, to insure punctuality, but that they will not hold themselves responsible for delay in arriv-

ing at any particular station, when that delay has arisen from causes over which they have no control, or which, being incidental to a reasonable working of the line, are practicably unavoidable. Such, for instance, as an unexpected delay in admission into a station under the control of another company, or an unusual accession of passengers or goods, which last-mentioned circumstance must almost of necessity occasion delay in the starting of a train, and consequently in its arrival at its destination, especially when, under the regulations of the company, as in the present case, the doors of the booking-office are not closed until the time fixed for the departure of the train, and the driver of the train is not allowed to make up for lost time by extra speed. These regulations have been made for the convenience and protection of the public, but are such as cannot fail to lead to occasional, or even frequent, delays.

If we pass now to an examination of the second series of conditions we find that they are introduced by the following words: "The granting of tickets to passengers off the company's line is an arrangement made for the convenience of the public;" and that they in terms protect the defendants from responsibility in respect of three several subject-matters, all incidental to a traffic between stations on the line worked by the defendants and stations on lines worked by other companies. These three subject-matters are, 1st, delay, detention, or other loss or injury arising off the lines of the defendants or from the acts or defaults of other parties; 2ndly, the correctness of the times over the lines of the other companies; and, 3rdly, the arrival of the defendants' trains in time for the nominally corresponding trains of other companies. It is with the third only of these subject-matters that we have at present to do.

Now I do not think that the contention or suggestion of the defendants, that the effect of this condition was to free them wholly from responsibility in respect of the non-arrival of their trains in time to meet the corresponding trains of other companies, whatever might be the cause of the delay, can be maintained; to so construe the condition would be, in my
[* 320] opinion, to ignore the * introductory words which indicate that the object of the condition which follows was to protect the defendants from the consequence of an act done for the convenience of their passengers, and not to relieve them from any

liability to which they would have been otherwise subject by reason of their issuing a through ticket to any place off their line. It appears to me that the fair and reasonable interpretation to put upon the conditions is this: that they protect the defendants against being subjected, by reason of their issuing a through ticket to any place off their line, to any additional responsibility beyond what they would have been subject to if they had issued a ticket to the furthest point of their own line, and had left the passenger to take a fresh ticket to his ultimate destination. Such a condition does not appear unreasonable; by issuing a through ticket to his ultimate destination beyond their line the defendants relieve the passenger from the trouble and delay and possible detention which would have been occasioned by his having to take a fresh ticket, and having done this for his convenience, they might fairly claim to be exempted from any additional liability arising out of such act.

If this be the correct construction of the time-table conditions, it will follow that the liability of the defendants in respect of the non-arrival of their train at Leeds in time to meet the corresponding train to York, is the same as it would have been if they had issued to him a ticket to Leeds only, and their train had arrived there at 5.27 instead of at 5, and, as has been pointed out in considering the first series of conditions, the defendants would have been under no liability in respect of such delay if it had been occasioned by causes over which they had no control, or which were incidental to a reasonable working of the line.

It appears to me that neither by the County Court Judge nor by the Court of Common Pleas has sufficient effect been attributed to that which I have ventured to term the second series of conditions, and which, as it appears to me, were intended to secure to the defendants a further protection against liability, in respect of contracts of carriage to places off their own lines, beyond that to which they were entitled under the first series of conditions in respect of contracts of carriage to places on their own lines.

Now, if according to the true effect of the contract the liability * of the defendants to the plaintiff in respect of [*321] delays or detention was limited to that to which they would have been subjected if they had issued a ticket to Leeds only, it becomes immaterial in the present case to consider the cause of the delay in arriving at Leeds, inasmuch as, upon the

assumption of the defendants having been guilty of a breach of their contract, the plaintiff could have only recovered nominal damages, it being admitted that he had not sustained any pecuniary damage or been put to any expense by reason of the delay in arriving at Leeds, other than that occasioned by his taking the special train, in respect of which, as I purpose showing presently, he would not, in my opinion, have been entitled to make any demand upon the defendants.

As, however, some of the members of the Court take a different view from that which I have expressed of the purport and effect of the contract, and are of opinion that according to its true purport and effect the defendants were bound to make all reasonable efforts to insure the arrival of the train at Scarborough by 7.30 P. M., I think it right to express my opinion upon the other two questions which have been raised in the course of the argument, viz. whether the defendants have been guilty of a breach of such contract, and if so, whether the plaintiff was justified in taking a special train and could charge the cost of it to the defendants. Now the question of breach is one entirely depending upon the evidence in the case, and I am of opinion that unless the County Court Judge, in dealing with the evidence, had acted upon any wrong view of the law equivalent to a misdirection of the jury, had the case been tried by a jury, his decision in this respect ought not to be interfered with. From the statements in the case I gather that it was established to the satisfaction of the County Court Judge that there was unreasonable delay; that there were no unusual circumstances justifying or excusing such delay; that in more than one instance delay was occasioned by a want of attention to insure punctuality, and that upon the whole there was negligence on the part of the defendants. If these general views had not been modified by anything else appearing upon the judgment of the County Court Judge, they would have been sufficient to support his decision that the defendants had committed a breach of their contract, and with such decision I should [* 322] not have thought it right to interfere; but * it appears from the case that when the Judge expressed his opinion that the delay had been occasioned by a want of attention on the part of the defendants to insure punctuality, he proceeded to mention, as an instance of such want of punctuality, the keeping the doors open to the last moment at Liverpool. Now it is quite true that

if the passenger is allowed to book up to the time fixed for the departure of the train, the train cannot start punctually, and delay must be occasioned; but it appears to have escaped the notice of the learned Judge that this practice formed the subject of one of the conditions by which the plaintiff was bound, and I am unable to see how this can be regarded as a want of attention on the part of the defendants or their servants to insure punctuality. It is impossible to determine how much of the subsequent delays were occasioned by the first delay at Liverpool. Under these circumstances, I do not think that the finding of the Judge as to the question of breach should be regarded as conclusive; and the more so as, in my opinion, no one of the causes of delay mentioned in the case can be fairly considered as having arisen otherwise than from causes beyond the control of the defendants, or which were incidental to the reasonable working of their railways. But, assuming the County Court Judge to have been right in considering that the defendants had been guilty of a breach of the contract of carriage entered into by them, the question remains whether the plaintiff was justified in taking the special train and charging the cost of it to the defendants. Upon this branch of the case certain dicta of Baron ALDERSON, in the case of *Hamlin* v. *Great Northern Ry. Co.*, have been much relied upon on the plaintiff's behalf, and these dicta apparently formed the chief grounds of the decision of the County Court Judge. In that case a tradesman had taken a ticket from London to Hull, and on his arriving at Grimsby there was no train by which he could proceed that night to Hull, as, according to the published time-tables of the company, there ought to have been. He accordingly slept at Grimsby, and in the morning paid 1s. 4d. for his fare to Hull. In consequence of the delay he failed to keep appointments with his customers, and, being detained for several days, was put to considerable expense. It was held that though he would have been entitled to have * performed the contract at the [* 323] expense of the company, yet, as he had not done so, he was not entitled to recover anything more than nominal damages in addition to the 1*s.* 4*d.* In my opinion, the decision in the case of *Hamlin* v. *Great Northern Ry. Co.*, 1 H. & N. 408; 26 L. J. Ex. 20, at p. 22, affords no support to the plaintiff's argument; but in the report in the Law Journal Baron ALDERSON is stated to have made the following observations in the course

of the argument: "The plaintiff might have taken a post-chaise, and charged it;" and again, "The principle is, that if the party does not perform his contract, the other may do so for him, as near as may be, and charge him for the expense of so doing."

Now I think that these observations of Baron ALDERSON, which do not appear in the report of the case in Hurlstone & Norman, must be considered as having been made with reference to the particular case then before the Court, and not as intended to lay down an absolute principle applicable to all cases, however different in their circumstances. Having regard to the circumstances of that case, as detailed in the reports, it would have been a very reasonable course for the plaintiff to have pursued to have taken a post-chaise from Grimsby to Hull, so as to secure his arrival there that night, which he could not otherwise have done. But I cannot think that the learned Baron would have considered the principle which he then enunciated as having application to a case like the present. The view taken by the Court of Common Pleas in the present case of the true meaning and effect of the dicta of Baron ALDERSON, differs from that adopted and acted upon by the County Court Judge, though it led the Court to the same conclusion. Mr. Justice BRETT, in delivering the judgment of the Court, is reported to have said: "We think that the rule attributed to Mr. Baron ALDERSON in *Hamlin* v. *Great Northern Ry. Co.*, is a good expression of the law. We think it may properly be said that if the party bound to perform a contract does not perform it, the other party may do so for him as reasonably near as may be, and charge him for the reasonable expense incurred in so doing."

This appears to me to be a more correct enunciation of the principle applicable to such cases than the particular words attributed to Baron ALDERSON.

[* 324] * The question, then, in the present case is, whether the taking a special train was a reasonable thing for the plaintiff to do under the circumstances. Now it appears to me that the course pursued by the plaintiff was most unreasonable and oppressive, bearing in mind the fact that he had not any business or other engagement at Scarborough necessitating his arrival there at any particular time, and that he admittedly took the special train for the purpose only of testing whether he could charge the expense of it upon the company.

No. 11. — Le Blanche v. London & North Western Ry. Co., 1 C. P. D. 324, 325.

I quite concur in the view upon which the Court of Common Pleas appears to have proceeded, that *primâ facie* the question whether the course pursued by the plaintiff in the present case was reasonable was one for the decision of the County Court Judge, and if he had acted upon the principle as enunciated by the Court of Common Pleas, I should have felt that his decision ought not to be interfered with; but it is clear from the statement of his judgment in the case, that the County Court Judge considered the principle enunciated by Baron ALDERSON as absolute and applicable to all cases, and that it was binding upon him in the present case; and that he did not exercise his judgment, as in my opinion he ought to have done, for the purpose of determining whether the course pursued by the plaintiff was reasonable or not.

For these reasons I am of opinion that, even if the true effect of the contract by which the defendants were bound was, that they would make all reasonable efforts to ensure the arrival of the train at Scarborough by 7.30, and if the defendants can properly be considered as having been guilty of a breach of such contract, yet that the assessment of damages, as made by the County Court Judge, ought not to stand, and that there should be a new trial.

I have only to add that if the interpretation which I think should be put upon the contract is the correct one, and if the liability of the defendants in respect of non-arrival of the train at Scarborough is limited to the liability to which they would have been subjected if the plaintiff had taken a ticket to Leeds only, intending to proceed by the 5.20 train to York, it appears to me perfectly clear that he would not have been entitled, whether his business was urgent or not, to take a special train, and to charge the defendants with the cost of it.

* The principle enunciated by Baron ALDERSON in *Hamlin* v. *Great Northern Ry. Co.*, has no application to such a [* 325] case as that which we are now considering; it has application only to cases in which the act is done and the expense incurred to enable the contract to be performed, and not to cases in which damages consequential upon the breach are claimed. If this case is sent back to the County Court Judge for a new trial, or if similar cases should hereafter arise, I think the rule suggested by Lord Justice MELLISH would prove a safe guide for determining

what steps may with propriety be taken by a railway passenger for securing the performance, as near as may be, of the contract of carriage entered into with him by a railway company.

Mellor, J. I have had the advantage of reading the judgments prepared by the other members of the Court, and, inasmuch as I agree entirely with the view of the facts of this case as expressed by Lord Justice Mellish in the judgment prepared by him, I think it unnecessary to write or deliver a separate opinion; but I think that the judgment of the Common Pleas is erroneous in so far that it dismissed the appeal of the defendants, and with costs.

I think that a new trial ought to have been directed as to the mode upon which the damages were assessed. It appears that there must be a new trial, as this Court has no power to reduce the damages to 1*s.* unless the petitioner will consent to their being reduced, and I think that in such case there should be no costs on either side.

The judgment of the Common Pleas Division was accordingly reversed so far as relates to the question of damages; and it was directed that each party should pay his own costs of the appeal to the Common Pleas Division, and of the appeal to the Court of Appeal.

ENGLISH NOTES.

In *Denton* v. *Great Northern Railway Co.* (1856), 5 El. & Bl. 860, 25 L. J. Q. B. 129, it was held that the publication by the defendant company in their time-table of a train on another line was a promise by the defendants to a person travelling by their line and intending to go on, that there was such a train as advertised. In *Hawcroft* v. *Great Northern Railway Co.* (1852), 21 L. J. Q. B. 178, the plaintiff bought a ticket which read: "Barnsley to London and back, Excursion ticket. To return by the trains advertised for that purpose on any day not beyond 14 days from the date hereof." The plaintiff presented himself on a Saturday within the 14 days at the London station in time for the morning return train. He was crowded out, and the defendants refused to let him proceed by an ordinary train. He had to wait till the evening return train, which took him to Doncaster, from which there was no other service to Barnsley on that day. The plaintiff hired a carriage from Doncaster to Barnsley, and was held entitled to recover the expenses incurred. In *Buckmaster* v. *Great Eastern Railway Co.* (1870), 23 L. T. 471, the plaintiff recovered the cost of a special train and damages for loss of market under the following conditions: He was a

miller, and held a season ticket between Framlingham and London, and used to go to the Mark Lane Corn Market twice a week by a train which departed at 6.45 A. M., and reached London at 10.40, in time for him to catch the market at 11. On the occasion in question the train, through negligence of the company's servants, was not ready to leave Framlingham anywhere near the advertised time. He obtained a special train, but nevertheless missed the market. In *Fitzgerald* v. *Midland Railway Co.* (1876), 34 L. T. 771, it was held that where a passenger fails to catch a train on the line of a company by reason of the ordinary train being delayed through no fault of the company, he is not entitled to have a special. In that case flood was the cause of the delay. In *Thompson* v. *Midland Railway Co.* (1875), 34 L. T. 34, a similar decision was given where the delay arose from the negligence of other companies.

In 1885, in the case of *McCartan* v. *North-Eastern Railway Co.* (1885), 54 L. J. Q. B. 443, a Divisional Court of the Queen's Bench Division, reversing the judgment of the County Court Judge, gave a decision which appears to conflict with the opinion of the majority of the Court of Appeal in the principal case (No. 10), *Le Blanche* v. *London and North Western Railway Co.* The plaintiff had taken tickets for himself and his family at the defendant's station at Durham by the 2.11 P. M. train for "Belfast *viâ Leeds*, &c.," and the ticket further stated that it was "issued subject to regulations in time-table." The time-table contained a page headed "Through communication between the North Eastern Line and Ireland, Belfast *viâ* Leeds and Barrow," from which it appeared that the 2.11 P. M. train should arrive at Leeds at 4.45, and leave there at 5.10 by the Midland Company's line. The train by which the plaintiff travelled arrived at Leeds 37 minutes late, and the Midland Company's train having left at the proper time, he lost it, and was obliged to put up with his family at an hotel at Leeds. The plaintiff brought his action to recover the hotel expenses. The conditions in the defendant's time-table comprised the following: "The hours stated in these time-tables are appointed as those at which it is intended, as far as circumstances will permit, the passenger trains should arrive at and depart from the several stations; but their departure or arrival at the times stated, or the arrival of any train passing over any portion of the company's lines in time for any nominally corresponding train on any other portion of their lines, is not guaranteed; nor will the company, under any circumstances, be held responsible for delay or detention, however occasioned, or any consequences arising therefrom. The issuing of tickets to passengers to places off this company's lines is an arrangement made for the greater convenience of the public; but the company will not be held responsible

for the non-arrival of this company's own trains in time for any nominally corresponding train on the lines of other companies, nor for any delay, detention, or other loss or injury whatsoever which may arise therefrom, or off their lines."

The County Court Judge gave judgment for the plaintiff, holding that there was an implied contract that the defendants would use reasonable efforts to insure punctuality, and that the defendants had failed to show that the delay arose from no want of reasonable efforts. The Divisional Court reversed this judgment on the ground that the conditions formed part of the contract, and the true construction of the conditions was that the defendants refused to guarantee the punctuality of their trains according to the times mentioned in the tables, from whatever cause the want of punctuality might arise. They distinguished the case of *Le Blanche* v. *London and North Western Railway Co.* (No. 10, *supra*), 1 C. P. D. 286, 45 L. J. C. P. 521, chiefly on the ground that there the company had expressly agreed that "every attention shall be used to insure punctuality," and that there was no such express agreement in the case in point, and that the negative conditions were more explicit. The question really is whether in the case of a privileged company the former duty is not implied, and whether, if they meant to negative liability for negligence, they ought not to have done so still more explicitly. In the case of *Woodgate* v. *Great Western Railway Co.* (1884), 51 L. T. 826, 33 W. R. 428, referred to in the judgment in *McCartan* v. *North Eastern Railway Co.* (1885), 54 L. J. Q. B. 443, the condition referred to in the ticket was that the company would not be accountable for injury which might arise from delays unless in consequence of the wilful misconduct of the company's servants. This was held to be explicit enough, and to exonerate the company from a delay on Christmas Eve of about 4 hours caused by fog and excessive traffic on the line.

AMERICAN NOTES.

The Rule states the prevailing American doctrine. In a leading New York case, *Williams* v. *Vanderbilt*, 28 New York, 217; 84 Am. Dec. 333, it was adjudged that the damages might include the value of time lost, and expenses incurred, embracing those of sickness arising from detention in an unhealthful climate (Isthmus of Panama). To the same effect, *Van Buskirk* v. *Roberts*, 31 New York, 661.

In *Cincinnati, &c. R. Co.* v. *Eaton*, 94 Indiana, 474; 48 Am. Rep. 179, where the passenger was carried past her destination, it was held competent to show that she was forced to walk three hours over dusty roads, got wet in crossing a creek, was chased by dogs and otherwise frightened, and that the weather was sultry, by means of which she was made sick. Citing the *Hobbs Case, ante*. In *International, &c. Ry. Co.* v. *Terry*, 62 Texas, 380; 50 Am.

Rep. 529, the company carried a passenger beyond his station and put him off at a water-tank, in inclement weather, by reason of which he contracted pneumonia. He recovered for consequent pain, expense, and business detriment. "Much attention has been given to the case of Hobbs," &c.

In *Brown* v. *Chicago, &c. R. Co.*, 54 Wisconsin, 342; 11 Am. Rep. 41, a pregnant woman was carelessly directed by the brakeman to leave the train three miles short of her destination. The walk brought on a miscarriage, and the defendant was held liable therefor.

In *Murdock* v. *B. & A. R. Co.*, 133 Massachusetts, 15; 43 Am. Rep. 480, where the conductor wrongfully refused a ticket, and arrested the plaintiff for evading his fare, and delivered him to officers at Pittsfield, it was held that his detention over night in a cell, and the discomforts and indignities therefrom and from the authorities at Pittsfield, and a cold which he took by reason of the dampness of the cell, were not proper items of damage. Citing the *Hobbs' case, ante*.

The circumstances in *Indianapolis, &c. Ry Co.* v. *Birney*, 71 Illinois, 391, were very similar to those in the *Hobbs' case*, except that in the former the plaintiff might have taken another train a few hours later, or a horse and carriage, and the opinion in the *Illinois case* is based on the ground that the exposure was voluntary and unnecessary. See *Georgia, &c. R. Co.* v. *Eskew*, 86 Georgia, 641; 22 Am. St. Rep. 490.

In *Francis* v. *St. Louis T. Co.*, 5 Missouri Appeals, 7, a passenger carrier contracted to convey a young lady from a station to her house in a city, but set her down a mile from her residence, on a sidewalk of a frequented street, along which ran tram cars going within a square of her house. The day was cold but dry; the woman was delicate but not ill. Being warmly clad, she walked home with a friend, and in so doing took a cold which permanently injured her. Held too remote to warrant a recovery.

In *Houston, &c. Ry. Co.* v. *Hill*, 63 Texas, 381; 51 Am. Rep. 642, the company contracted with the plaintiff to convey excursionists to a certain place to attend a public entertainment. On a breach of the contract, it was held that plaintiff might recover the profits which he would have realized on sales of tickets actually made, and the difference in expense of the transportation of those whom he had thus agreed to take and did take on the faith of the contract, but nothing for profits of conjectural sales.

In *Georgia Railroad* v. *Hayden*, 71 Georgia, 518; 51 Am. Rep. 274, by a collision the plaintiff, a theatrical manager, who was a passenger with his troupe, was prevented from reaching his destination in time to fulfil an advertised engagement, for which tickets had been sold, and he had to refund the money. Held that he could not recover that amount. "Damages which depend upon the particular character or business of one of the parties cannot be recovered unless known to the other party at the time of entering into the contract."

The loss of a job by delay at a station at which a passenger was wrongfully put off is too remote to be considered. *Carsten* v. *Northern Pac. R. Co.*, 41 Minnesota, 454; 9 Lawyers' Reports Annotated, 688.

Damages for refusal to allow the plaintiff to take a train which he was

entitled to take, include the amount paid for another ticket, loss of time, necessary hotel expenses, and other actual inconveniencies. *Northern C. R. Co.* v. *O'Conner*, 76 Maryland, 207; 16 Lawyers' Reports Annotated, 449.

In an action upon a guaranty of a railroad company to transport an opera troupe to a certain destination by a specified time, the loss from failure to arrive in season to give performances which the company knew the troupe were going to such destination to give, is recoverable; but not so of loss from the breaking up of the troupe through failure to pay the performers owing to the want of the expected receipts from such advertised performances. *Foster* v. *Cleveland, &c. R. Co.*, 56 Fed. Rep. 434.

See *Louisville, &c. R. Co.* v. *Ballard*, 88 Kentucky, 159; 2 Lawyers' Reports Annotated, 694; *Chattanooga, &c. Ry. Co.* v. *Lyon*, 89 Georgia, 16; 15 Lawyers' Reports Annotated, 857, where plaintiff, a travelling salesman, received as compensation a certain salary, his railroad expenses, and a certain percentage of the amount of his sales, such percentage is not "profits" in the sense of that word as used in the decisions discussing the right to recover profits as such in actions for breach of contract; and in an action for damages sustained from having received personal injuries, plaintiff may recover such percentage, and, in order to lay a foundation for such recovery, may show the extent and amount of his ordinary business. *Rio Grande Western Ry. Co.* v. *Rubenstein*, [Colorado Supr. Ct.], 38 Pac. Rep. 76.

Judge Thompson says of the *Hobbs' case* (Carriers of Passengers, 566), "The rule seems to have been applied with unnecessary rigor." Mr. Lawson cites it (Contracts, § 460).

No. 12. — BLAKE *v.* GREAT WESTERN RAILWAY COMPANY.

(Ex. Ch. 1862.)

No. 13. — READHEAD *v.* MIDLAND RAILWAY COMPANY

(Ex. Ch. 1869.)

RULE.

The contract of a railway company, as carriers of passengers, is to use due (extending to a high degree of) care, including the duty of exercising vigilance to see that whatever is required for the safe conveyance of their passengers is in fit and proper order. The duty applies to the construction and maintenance as well of the line as of the carriages; and, in the case where the company contracts to carry a passenger over a line other than their own, extends

to that other line. But it does not amount to a warranty of safe carriage, nor does it make the company liable for damage by an occurrence which could not be prevented by the use of skill and foresight.

Blake v. Great Western Railway Company.

31 L. J. Ex. 346-348; (s. c. 7 H. & N. 987; 8 Jur. N. S. 1013; 10 W. R. 388).

Railway Company. — Carrier of Passengers. — Duty of Care as to Safety of Line.

By arrangement between the Great Western Railway Company and [346] the South Wales Railway Company, whose lines of rails were in connection, each company was to work both the lines, and the fares were to be divided between them. The plaintiff, wishing to go from London to Milford on the South Wales line, took a railway ticket at the Paddington Station of the Great Western Railway Company, paid his fare and became a passenger to be conveyed by that company to Milford. After the train had passed from the Great Western Railway on to the South Wales Railway it came (without any negligence on the part of those who managed the train) into collision with a locomotive engine left on the line by the negligence of some servants of the South Wales Company, and the plaintiff was injured.

Held, that the Great Western Railway Company were liable to the plaintiff for the injury; for a railway company impliedly contracts with a passenger to use due and reasonable care in keeping its line in a proper state for traffic, and by the arrangement between the companies the South Wales line became the line of the Great Western Railway Company in respect of their obligation to passengers.

Error was brought, by the defendants on a bill of exceptions to the ruling of MARTIN, B.

The action was for an injury to the plaintiff by reason of the defendants' negligence, and arose from the following circumstances. On the 2nd of December, 1859, the plaintiff, wishing to go from London to Milford, in Pembrokeshire, purchased a railway ticket at Paddington, the London terminus of the defendants' railway, of the defendants' servants, paid his fare and became a passenger to be conveyed by the defendants from Paddington to Milford. The line of railway of the defendants terminated a short distance beyond Gloucester. The line for the rest of the distance to Milford belonged to the South Wales Railway Company. By an arrangement between the companies the whole lines were worked by both of them, and the fares paid by the passengers were divided between them. After the train in

which the plaintiff was had passed from the defendants' own line on to the line of the South Wales Railway Company, the train ran against a locomotive engine left on the line by the negligence of some servants of the South Wales Railway Company, and the plaintiff was injured by the concussion. There was no negligence proved on the part of those engaged in driving the train.

The learned Baron told the jury that if the engine had been left on the line by the negligence of the servants of the South Wales Railway Company, that did not relieve the defendants from responsibility, but that the defendants were responsible for their negligence.

Bovill, for the plaintiffs in error, the defendants below. — The defendants are not liable for the negligence of the ser-
[* 347] vants of the South Wales Railway Company. There * was no negligence on the part of the defendants' servants. The servants of the South Wales line are mere strangers to the defendants. The defendants could not be liable at law for the act of a stranger who caused an accident on their own line, if there was no negligence on the part of their own servants — *Latch* v. *the Rumner Railway Company*, 27 L. J. Ex. 155. This is not the case of the carriage of goods. The liability of a carrier for the carriage of passengers is very different from that for the carriage of goods. There is no engagement to carry a passenger securely from place to place. A railway is a public highway, and the defendants are entitled by law to use the South Wales line. They do not by that user render themselves responsible for the conduct of the South Wales Company. The defendants have no control over the servants of that company. The servants who did the wrong and left the engine were not acting in furtherance of any engagement of that company with the defendants. They were occupied in some business with which the defendants had no concern. In old times a stage-coach proprietor was not answerable for the act of a stranger, only for his own negligence or that of his servants — *Aston* v. *Heaven*, 2 Esp. 533; 5 R. R. 750, and *Crofts* v. *Waterhouse*, 3 Bing. 319. If a farmer had engaged with a stage-coach proprietor to horse the coach for a stage, and the farmer's carter stood with his cart across the road, so that by the carter's negligence a collision took place between the coach and the cart, the coach proprietor could not have been made liable merely because he had contracted with the farmer respecting

horsing the coach. The stat. 8 & 9 Vict. c. 20, s. 89, says, that railway companies are not to be more liable than stage-coach proprietors or common carriers are by law. The defendants by selling the ticket to the plaintiff only contracted, as far as they and their servants were concerned, that they would use due and reasonable care to carry the plaintiff safely to his journey's end — *Ross* v. *Hill*, 2 C. B. 877; 15 L. J. C. P. 182. The obligation which Parliament has imposed on a company to maintain its own line cannot be transferred and thrown upon another company by agreement between them. The two companies did not become partners by the arrangement between them. The defendants do not employ the South Wales Company to keep their line clear. That duty is imposed on the South Wales Company by law. Probably the plaintiff might maintain an action against the South Wales Company.

Parry, Serj., for the plaintiff, was not called upon.

COCKBURN, C. J. I am of opinion that the direction given to the jury was right, and that our judgment ought to be for the plaintiff. It has been settled, by the authority of several cases, that when a railway company enters into a contract for the conveyance of goods extending not merely to its own line, but over the whole or some portion of another line with which it is in connection, the company so contracting is liable, not only for the loss of goods upon its own line, but upon the other line also; and I think that that principle obtains in the case of passengers as well. And if a railway company choose to contract to convey a passenger not only over its own line, but over some other line also, I think the company so contracting incurs all the responsibilities and liabilities which would have attached to it if the contract had been confined to its own line exclusively. Here it appears that by an arrangement between the Great Western and South Wales Railway Companies, the Great Western Railway Company are enabled to convey passengers not only over their own line, but over the South Wales line also. Under these circumstances, I think that the defendants are responsible to the plaintiff for the injury which has resulted to the full extent to which they would have been liable, if the collision had happened upon their own line. That being so, the question remains how far the company are bound to use reasonable care for the maintaining the passage over their own line in a condition fit for

traffic. Now, I think that there can be no doubt that a railway company contracts that reasonable care shall be used by it to keep and maintain the railway in a proper condition. The [* 348] case is not like that of stage-coach * proprietors before the construction of railways, for the road was not in the hands of the stage-coach proprietors, nor under their control, and they could not be held to have guaranteed that anything should be done to the road to put it into a proper condition. With railway companies the case is different. I think that railway companies are bound to maintain their line in a proper condition, and to use due and reasonable care so to keep it. It must, in my opinion, be taken to be part of the contract with the passenger, that the company shall use all reasonable care for that purpose. If that be the undertaking of the company with a passenger along their own line, and if by means of some arrangement with another railway company it contracts to carry passengers over the line of such other company, the same obligation attaches as to the whole line; and for that purpose it makes the company over whose line it undertakes to carry its subordinate agent, and engages that that other company, or some one on its behalf, shall keep the line of the latter company in a proper condition. It would be inconsistent with public convenience and public safety to put any other construction on the contract than this, that the Great Western Railway Company should be primarily liable to the plaintiff, and should take their remedy against the South Wales Company, the servants of the latter, by their negligence, having been the immediate cause of the accident.

Wightman, J. I agree in this decision, but with some hesitation.

Crompton, J. I am of the same opinion. By giving the ticket to the passenger to travel over their own line and that of another company, the defendants took upon themselves all the responsibility which is imposed on a railway carrier with reference to the carriage of passengers. I say carriage of passengers, for Mr. Bovill has properly pointed out the distinction between the liability of carriers as to goods and as to passengers. Sometimes a company will become responsible for only part of the way in a long journey. Though they take the fare for the whole way, they say that they will be responsible only for what happens on their own line. But here the defendants have made an arrangement with the South

Wales Company for the carriage of passengers along the two lines together, and for having the fares and tolls divided between them. The South Wales Company thereby have become sub-contractors to the Great Western Railway Company. Under these circumstances, I think that the defendants are liable for the negligence of the South Wales Company, but have a remedy over against the latter.

Byles, J. I am of the same opinion. It is not necessary to decide the general question as to the liability of one railway company running over another company's line, for it is found that there is an arrangement between the defendants' company and the South Wales Company, under which the lines are worked by both companies, and the gross earnings are to be divided between them. This seems to me to show that for the purposes of this action the whole South Wales line was the line of the Great Western Railway Company, and that the contract of the defendants with the plaintiff for the exercise of due care extends to the machinery, locomotives and line of the South Wales Company. But I would go further and say, if it were necessary so to do, that without the existence of this arrangement with the South Wales Company, according to the terms of the contract between the defendants and the plaintiff for the carriage of the plaintiff from London to Milford, the defendants engaged to use reasonable care to maintain the whole line between those places in a proper condition and were responsible to the plaintiff for the injury. I entertain no doubt but that the direction was right.

Keating, J. I concur in the opinion that the direction was correct.

Mellor, J. I think that the effect of the arrangement was to make the whole line the line of the defendants, and that their responsibility was the same throughout the whole line. I do not say what the effect would be if the defendants had been running over the South Wales line on payment of tolls. But I do not dissent from what my Brother Byles has said on this point.

Judgment affirmed.

Readhead v. Midland Railway Company.

L. R., 2 Q. B. 412–441; 4 Q. B. 379–393 (s. c. 36 L. J. Q. B. 181; 38 L. J. Q. B. 169).

Railway Company. — Carrier of Passengers. — Duty of Care as to Condition of Carriages.

The contract of a carrier of passengers for hire (whether a Railway Company or otherwise) is to take due care, including the use of skill and foresight, to carry the passenger safely, and the carrier is therefore responsible to exercise due care that the carriage is fit for the purpose; but it does not include warranty that the carriage shall be in all respects fit for the purpose. The carrier is therefore not responsible for an accident owing to a latent defect in the tire which was not attributable to any fault on the part of the manufacturer, and could not have been detected previously to the breaking.

This was an action for damages against a railway company by a passenger for personal injury caused by the breaking of the tire of a wheel in the carriage in which the plaintiff was carried. The effect of the evidence appears from the statement of the special case agreed to before the Exchequer Chamber as hereinafter mentioned.

The Court of Queen's Bench (Blackburn, J., dissenting) held the defendants not liable, as there was no warranty by a carrier of passengers that the carriage should be absolutely road-worthy, and the defendants had used all diligence in providing a safe carriage, and examining it before starting and in the course of the journey. This view is maintained by the higher authority of the Exchequer Chamber; but as the dissenting judgment of Blackburn, J., contains a forcible statement of the argument on the other side, it may be useful, and is certainly interesting, to reproduce it.

[431] Blackburn, J. This was an action brought by a passenger on the defendants' railway, to recover damages for an injury he had received, owing to the breaking down of the carriage in which he was travelling.

On the trial, before my Brother Lush, it appeared that the carriage was one belonging to the London and North Western Railway Company, which had been for some time in use by them, and had come into the possession of the defendants in the ordinary course of traffic, and was (according to the ordinary arrangements between the different railway companies) used by the defendants till they could return it.

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Evidence was given that, when the carriage was put into the train by the defendants, it was, to all outward appearance, reasonably sufficient for the journey, the tire of the wheel being of proper thickness, and apparently of sufficient strength; but that, in fact, there had been an air bubble in the welding, which * rendered the tire much weaker than it appeared; [* 432] so that, in fact, it was not reasonably fit for the journey; and that the breaking of this tire occasioned the accident. Evidence was given that this defect was one which could not be detected by inspection, nor by any of the usual tests, as it would ring to the hammer as if perfectly welded; and that there was no neglect on the part of the defendants or their servants, who took every reasonable precaution in examining the carriage.

My Brother Lush left the case to the jury, telling them that, if the accident was occasioned by any neglect on the part of the defendants, they should find for the plaintiff; but that if it was occasioned by a latent defect in the wheel — such that no care or skill on the part of the defendants could detect it — the verdict should be for the defendants. The jury found for the defendants; and it is not disputed that, if the direction was right, their verdict was justified by the evidence.

A rule *nisi* was obtained for a new trial, on the ground of misdirection, as it was contended that the defendants, as carriers of passengers, were bound at their peril to supply a carriage that really was reasonably fit for the journey, and that it was not enough that they made every reasonable effort to secure that it was so; in other words, that the obligation of the carrier to the passenger was equivalent to a warranty of the reasonable sufficiency of the vehicle he supplies. Cause was shown in the sittings after Trinity Term, 1866, before my Brothers Mellor, Lush, and myself, when the Court took time to consider.

This is a question of very great nicety and importance, but, after some consideration and doubt, I have come to the conclusion that, on the balance of English authority, and, I think, upon the whole, in principle and by analogy to other cases, there is a duty on the carrier to the extent that he is bound at his peril to supply a vehicle in fact reasonably sufficient for the purpose; and is responsible for the consequences of his failure to do so, though occasioned by a latent defect; and, therefore, that the direction was wrong, and that there should be a new trial.

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I have come to this conclusion with much doubt and hesitation, and (as my two Brothers are of a different opinion) I need not say that I am very far from being confident that I [*433] am not wrong; but *still I think it best to state the reasons why I differ from them. I quite agree that the carrier of passengers is not, like the carrier of goods, an insurer, who undertakes to carry safely, at all events, unless prevented by excepted perils. The carrier has not the control of the human beings whom he carries to the same extent as he has the control of goods, and therefore it would be unjust to impose on him the same responsibility for their safe conveyance. In order, therefore, to render the carrier of passengers liable for an accident, it is necessary to allege and prove that the accident arose from some neglect of duty on the carrier's part; but, if the obligation on the part of the carrier to provide a vehicle reasonably fit for the journey is absolute, a failure on his part to fulfil that obligation is quite enough to make him liable for all the consequences. And I own I see nothing to diminish the obligation to provide a reasonably safe vehicle in the fact that it is to be provided for the safety of life and limb, and not merely of property.

The carrier supplies and selects the carriage for the purpose of conveying the passenger, who is obliged to trust entirely to the carrier; the passenger having no means of examining the carriage, and no voice in the selection of it. Now, it has been decided that one who contracts to supply articles for a particular purpose, does impliedly warrant that the articles he supplies are fit for that purpose: *Brown* v. *Edgington*, 2 M. & G. 279, 293; 10 L. J. C. P. 66. The principle of that case, as I understand it, is that expressed by MAULE, J., who says that the defendant having accepted an order for a rope for a particular purpose, which rope he was to select and procure, did undertake to furnish one fit for that purpose; and was therefore liable as on a breach of his contract if he furnished one unfit for that purpose, though that unfitness arose from a latent defect; and this principle would seem to apply to the carrier of passengers who supplies a vehicle. On the same principle, I think, it is that a shipowner warrants to the person who ships goods, that his vessel is seaworthy. Lord TENTERDEN, in Abbott on Shipping, 5th ed. p. 218; 10th ed., by Shee, p. 254, states the law thus: "The first duty is to provide a vessel tight and staunch, and furnished with all tackle and

apparel necessary for the intended voyage. For if the merchant suffer loss or damage by reason of * any insuffi- [* 434] ciency of these particulars at the outset of the voyage, he will be entitled to a recompense. . . . An insufficiency in the furniture of the ship cannot easily be unknown to the master or owners; but in the body of the vessel there may be latent defects unknown to both. The French ordinance directs that if the merchant can prove that the vessel at the time of sailing was incapable of performing the voyage, the master shall lose his freight, and pay the merchant his damages and interest. Ord. de la Marine, liv. iii. tit. 3, art. 12. Valin, in his commentary on this article, cites an observation of Weytsen, Traité des Avaries, p. 10: 'That the punishment in this case ought not to be thought too severe, because the master by the nature of the contract of affreightment is necessarily held to warrant that the ship is good, and perfectly in a condition to perform the voyage in question, under the penalty of all expenses, damages, and interest.' And he himself adds that this is so, although before its departure the ship may have been visited, according to the practice in France, and reported sufficient; because on the visit the exterior parts only of the vessel are surveyed, so that secret faults cannot be discovered, 'for which by consequence,' says he, 'the owner or master remains always responsible, and this more justly, because he cannot be ignorant of the bad state of the ship; but even if he be ignorant, he must still answer, being necessarily bound to furnish a ship good and capable of the voyage.'" Lord TENTERDEN then notices the opinion of Pothier, Traité de Charte-partie, num. 30, that in such a case the owner should not be answerable for damages occasioned by a defect which they did not, nor could know, though he agreed that they shall lose their freight; and Lord TENTERDEN observes in a note, that this opinion of Pothier is not quite consistent with his own principles laid down in the Traité de Louage, Part. ii. ch. i. s. 4, par. 2. However this may be in the old French law, or the civil law, it is, I think, clear that, according to English law, either there is a breach of warranty, in which case the owner is responsible for all the consequences, or there is not, in which case there is no ground for depriving him of his freight. And I think that there is ample authority, in addition to what I have cited from Abbott on Shipping, for saying that by * English law such [* 435] a warranty is implied where the carriage is by water.

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In *Lyon* v. *Mells*, 5 East, 428, 437; 7 R. R. 726, 734, *ante*, pp. 266, 269, Lord Ellenborough, in delivering the considered judgment of the Court, says: "In every contract for the carriage of goods between a person holding himself forth as the owner of a lighter or vessel ready to carry goods for hire, and the person putting goods on board, or employing his vessel or lighter for that purpose, it is a term of the contract on the part of the carrier or lighterman, implied by law, that his vessel is tight and fit for the purpose or employment for which he offers and holds it forth to the public; it is the very foundation and immediate substratum of the contract that it is so: the law presumes a promise to that effect on the part of the carrier without any actual proof; and every reason of sound policy and public convenience requires it should be so. The declaration here states such a promise to have been made by the defendant; and it is proved by proving the nature of his employment, or, in other words, the law in such a case without proof implies it."

In *Gibson* v. *Small*, 4 H. L. C. at p. 404, in explaining the reason why in a voyage policy of insurance there was an implied condition that the ship was seaworthy, as much when the insurance is on goods as when on the vessel, Parke, B., says: The shipowner "contracts with every shipper of goods that he will do so" (*i. e.* make the ship seaworthy.) "The shipper of goods has a right to expect a seaworthy ship, and may sue the shipowner if it is not. Hence, the usual course being that the assured can and may secure the seaworthiness of the ship, either directly if he is the owner or indirectly if he is the shipper, it is by no means unreasonable to imply such a contract in a policy on a ship on a voyage, and so the law most clearly has implied it." It appears from this that this most learned Judge thought it clear that the undertaking of the shipowner to the shipper of goods, as to seaworthiness, is co-extensive with the undertaking of the goods owner to his insurer.

I am certainly not aware of any case in which the question has arisen, whether there is a similar warranty between a shipowner and a passenger; but it seems to me that every reason that can be urged in favour of the warranty applies as much to the [* 436] one case as * to the other. The passenger trusts to the shipowner to select a proper ship as much as the shipper of goods does; and all those circumstances exist which induced

Valin (in the passage cited in Abbott on Shipping) to say that the shipowner, from the nature of his contract, was "necessarily bound to furnish a ship good and sufficient for the voyage;" or, as Lord ELLENBOROUGH says, in *Lyon* v. *Mells*, that his promise to do so is proved by proving the nature of his employment. Indeed, in the very probable case of a person shipping merchandise by the same vessel in which he himself takes his passage, it would seem rather extraordinary if the law were to hold that, as far as the goods were concerned, there was an implied undertaking to furnish a seaworthy ship, but as regarded the personal safety of the passenger there was none. It is true that the carrier of goods is an insurer, except against certain excepted perils, and that the carrier of passengers is not; but the question, whether the carrier of goods is bound at his peril to supply a seaworthy vessel, can only arise where the immediate cause of the loss is an excepted peril, or where for some other reason the contract to insure does not apply.

Assuming, then, that there is such a warranty implied where the carriage is to be by water, is there any difference where the cariage is by land?

The principle which I understand to be laid down in *Brown* v. *Edgington*, is this, that where one party to a contract engages to select and supply an article for a particular purpose, and the other party has nothing to do with the selection, but relies entirdy upon the party who supplies it, it is to be taken as part of the contract implied by law, that the supply warrants the reasonble sufficiency of the article for that purpose, and I think *Lyon* v. *Mells* lays down a very similar principle as generally applicalle, though the particular instance was that of a lighterman. I this principle be a general one, it applies equally to the case of the shipowner supplying a ship and the carrier by land supplying a vehicle, whether it is supplied for the carriage of goods or passengers. In *Brass* v. *Maitland*, 6 E. & B. 470; 26 L. J. Q.B. 49, this principle was much discussed. I think the effect of the reasoning of the judgment of Lord
* CAMPBELL and WIGHTMAN, J., shows that, in their [*437] opinion, this is a general principle of law; whilst the effect of the judgment of CROMPTON, J., is such as to show that he did not think the principle general, and was not inclined to carry it further than the decisions had already gone. My respect

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for his opinion is very great, and if ever the question whether there is such a general principle of law should come before me in a Court of error, I should endeavor to consider it carefully as an open question, without being too much biased by my present impression in favour of it; but sitting here in the same Court in which that case was decided, I am bound to consider the decision of the majority right, and to act upon it so far as it bears on the present question.

The authorities on the very point now before us are not numerous. In *Israel* v. *Clark*, 4 Esp. 259, Lord ELLENBOROUGH is reported to have said that the carriers of passengers by land "were bound by law to provide a sufficient carriage for the safe conveyance of the public who had occasion to travel by them; at all events he would expect a clear landworthiness in the carriage itself to be established." This seems to show that, in his opinion, the doctrine which in *Lyon* v. *Mells* was laid down as to the persons furnishing lighters for the conveyance of goods, was applicable to those furnishing carriages by land for the conveyance of passengers, and that they were bound at their peril to provide vehicles in fact reasonably sufficient for the purpose. And in *Bremner* v. *Williams*, 1 C. & P. 414, BEST, C. J., is reported to have ruled the same way. These are, it is true, only *Nisi Prius* decisions, and neither reporter has such a character for intelligence and accuracy as to make it at all certain that the facts are correctly stated, or that the opinion of the Judge was rightly understood.

On the other hand, in *Christie* v. *Griggs*, 2 Camp. at p. 81; 11 R. R. 667, MANSFIELD, C. J., told the jury that "if the axletree was sound, as far as human eye could discover, the defendant was not liable. There was a difference between a contract to carry goods and a contract to carry passengers. For the goods the carrier was answerable, at all events. But he did not warrant the safety of the passengers. His undertaking as to them [*438] went no further than this, that as far as human *care and foresight could go, he would provide for their safe conveyance. Therefore if the breaking down of the carriage was purely accidental, the plaintiff had no remedy for the misfortune he had encountered." We may depend on the accuracy of this reporter. MANSFIELD, C. J., here does not very accurately distinguish between the possible view of the case, that the misfor-

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time might have arisen, though the vehicle was reasonably fit for the journey and so be purely accidental, and the possible view that the accident and the circumstances attending it showed that the coach could not in fact be reasonably fit for the journey; but, on the whole, I think it must be taken, that he thought there was no warranty, such as would make the coach proprietor liable for a latent defect in the coach; but this was only an opinion at *Nisi Prius*.

In *Sharp* v. *Grey*, 9 Bing. 457; 2 L. J. (N. S.) C. P. 45, TINDAL, C. J., is stated in the report in Bingham [1] to have directed the jury to consider whether there had been on the part of the defendant that degree of vigilance which was required by his engagement to carry the plaintiff safely; which leaves it in doubt whether he told the jury that the defendant was bound at his peril to provide a fit vehicle, a failure to fulfil which duty would be properly described in the declaration as negligence, and left it to them to say if it was in fact reasonably fit; or whether he left it to the jury to say whether the defendant had not neglected some reasonably practicable means of ascertaining its fitness; but the counsel, in moving for a new trial, treat it as a direction that the defendant would be responsible, though he had conducted his business with all the caution that could be
* reasonably required; and the Judges, in refusing the [* 439] rule, all appear to have so understood the ruling, and to hold it right.

I have already said that on the balance of reasoning I am inclined to think that such ought to be the law; but at present, sitting in a Court of co-ordinate jurisdiction with the Common Pleas, I think it enough that the decision is in point.

In an American case, *Ingalls* v. *Bills*, 9 Metcalf, 1, given at

[1] The case is also reported in 2 Moore & Scott, 620, with some material differences, and in 2 L. J. C. P. 45, with so strong a similarity as to amount to identity with the report in 9 Bingham, the marginal note, statement of facts, as well as the judgments of PARK and ALDERSON, JJ., being almost *totidem verbis*. It is, however, remarkable that the judgments of GASELEE and BOSANQUET, JJ., are omitted. In the report in 2 Moore & Scott the cause of action is said to have been laid as negligence in not providing a safe carriage; and the Chief Justice's direction to the jury is, "that the defendant was bound to provide a *safe* conveyance for the passengers he contracted to carry; and he left it to the jury to say whether or not the defendant had observed that extreme degree of care and diligence in the examination of his coach which the safety of his passengers required that he should observe." The judgments also differ considerably from the report in 9 Bing.

length in the editor's note to Story on Bailments, s. 592, 7th ed. p. 565, the Court, after considering the English cases, came to a conclusion opposite to that which I have come to, expressly stating that they do not agree with the opinion of the Court of Common Pleas in *Sharp* v. *Grey*, if it is understood as I think it must be. It will be very fit, if the case at bar is taken into a Court of error, that the reasoning of the American Court should be carefully and respectfully considered; and if it appear to the Court of error satisfactory, they may act upon it, and overrule the case of *Sharp* v. *Grey*. But it is clear that we, in the Court of Queen's Bench, cannot treat the American decision as an authority, to be placed on the same footing as the decision of the Court of Common Pleas.

The judgment of this case has been delayed until the argument in a case of *Hando* v. *London, Chatham, and Dover Railway Company* was heard, as it was anticipated that a similar point might arise in that case; but it was not necessary to decide it.[1]

[1] *Hando* v. *London, Chatham, and Dover Railway Company*, Q. B. May 6, 1867, was an action by a wife to recover damages for the death of her husband. The deceased was killed by an accident which occurred while he was travelling in a carriage on the defendants' railway. The engine and train ran off the rails, and after the accident a spring of the engine was found broken, the fracture being quite fresh. Unless this breaking caused the engine to leave the rails, there was no evidence of the cause of the accident. The engine had been carefully examined before starting. At the time of the accident, the deceased was a workman at gasworks which the defendants were empowered by Act of Parliament to keep up for their own use, and they had works at Battersea and Dover. The deceased was in the regular employ of the defendants, and it was part of his ordinary duty to go from one set of works to the other, as occasion required, about once a fortnight; he travelled by the defendants' railway free, and received 1s. for his extra expenses. He was so travelling on the occasion of his death.

Cockburn, C. J., before whom the cause was tried, directed a verdict for the defendants, and a rule having been obtained, pursuant to leave reserved, to enter it for the plaintiff.

Pollock, Q. C., showed cause, and maintained, first, that, as there was no negligence shown, but the contrary, the defendants were not liable: for that carriers of passengers did not warrant the safety of their passengers; and he cited most of the cases noticed in the judgments in the principal case; secondly, that even if the defendants would have been liable had the deceased been an ordinary passenger, the relation of master and servant existed between him and the defendants, and the injury occurred in the ordinary course of his duty.

Powell, Q. C., and Prentice, Q. C., in support of the rule, were heard on the latter point only.

The Court (Cockburn, C. J., Blackburn, Mellon, and Lush, JJ.) were clearly of opinion that the case was not distinguishable from *Morgan* v. *Vale of Neath Railway Company*, L. R. 1 Q. B. 149, 33 L. J. Q. B. 260; *Feltham* v. *England*, L. R., 2 Q. B. 33, 36 L. J. Q. B. 14; and *Tunney* v. *Midland Railway Company*, L. R., 1 C. P. 291, and discharged the rule.

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* I think that the Irish case of *Burns* v. *Cork and Bandon Railway Company*, 13 Irish Com. L. R. 543, really [* 440] throws no light upon the point before us. In that case, a plea was pleaded which was clearly intended to raise the very point before us, and which I own I should myself have thought did raise it. The Irish Court of Exchequer, in giving judgment against the plea, say that, if there is a warranty, the plea was clearly bad; and that even if there was only a duty to take every care, the plea did not sufficiently show the fulfilment of that duty, and was therefore bad. Probably the Court were not agreed on the question, and intended to avoid expressing any opinion on it, though I should rather conjecture, from the language used, that the learned Judge who wrote the judgment inclined to the opinion that there was a warranty.

I have only to add that I do not think that the duty to supply a seaworthy ship or a sufficient vehicle by land is equivalent to a duty to provide one perfect, and such as never can, without some extraordinary peril, break down, which would have the effect of making the carrier an insurer against all losses arising from any failure in the vehicle which cannot be shown to arise from some unusual accident.

I had occasion, in the case of *Burges* v. *Wickham*, 3 B. & S. 669, 693; 33 L. J. Q. B. 17, 26, to consider what was the meaning of the term "seaworthy," as applied to a ship; and I see no reason to change the opinion which I then * ex- [* 441] pressed, that it meant no more than that degree of fitness which it would be usual and prudent to require at the commencement of the adventure; and, applying a similar principle to a land journey, I agree with what I understand to have been the direction of Erle, C. J.; in *Ford* v. *London and South Western Railway Co.*, 2 F. & F. 730, that the railway company are not bound to have a carriage made in the best of all possible ways, but sufficiently fulfilled their duty by providing a carriage such as was found in practical use to be sufficient. In other words, I understand the obligation to be, to furnish not a perfect vehicle, but one reasonably sufficient. But in the present case the carriage was not such as to be reasonably sufficient. Had the parties who sent it out known of the existence of this defect in the tire, there would have been strong ground for accusing them of manslaughter, if death had ensued. They did not know it, and

could not discover it until the tire broke; and they are therefore free from all moral blame or criminal responsibility. The question, therefore, is distinctly raised, whether the obligation of the carrier of passengers to the passenger is merely to take every precaution to procure a vehicle reasonably sufficient for the service, whether by sea or by land, in which case the direction was right; or whether it is, as I think, an absolute obligation, at his peril, to supply one, or be responsible for any damage resulting from a defect.

Taking the view of the law which I do, I think the rule for a new trial ought to be made absolute, but the majority of the Court being of a different opinion, it must be discharged.

[379] The defendants appealed from the decision of the Court of Queen's Bench to the Court of Exchequer Chamber; and, [380] on the case coming on there for argument, it was agreed between the parties to take the judgment of the Court on a special case without pleadings, stated pursuant to the Common Law Procedure Act, 1852. The case stated as follows:—

The action was brought by the plaintiff to recover damages from the defendants, for injuries sustained by him whilst travelling as a passenger by railway from Nottingham to South Shields, in consequence of negligence alleged to have been committed by the defendants. The plaintiff took a second-class ticket, and the carriage in which he was travelling got off the line and was upset, and the plaintiff received injuries therefrom. The cause of the carriage getting off the line and upsetting was the breaking of the tire of one of the wheels, and such breaking arose from a latent defect in the tire which was not attributed to any fault on the part of the manufacturer, and could not be detected previously to the breaking of the tire.

The question for the opinion of the Court was, whether the plaintiff was entitled to recover in the action.

The Court of Queen's Bench gave judgment for the defendants.

Nov. 26, 1868. Manisty, Q. C. (Crompton with him), for the plaintiff.

Kemplay (Aspinall, Q. C., with him), for the defendants.

The arguments are fully noticed in the judgment. In addition to the cases noticed in the judgment the following authorities were cited: *Brown* v. *Edgington*, 2 M. & G. 279; 10 L. J. C.

P. 66; *Jones* v. *Bright*, 5 Bing. 533; *Shepherd* v. *Pybus*, 3 M. & G. 868; *Jones* v. *Just*, L. R., 3 Q. B. 197; 37 L. J. Q. B. 89; *Lewis* v. *Peake*, 7 Taunt. 153; 17 R. R. 475; *Burges* v. *Wickham*, 3 B. & S. 669; 33 L. J. Q. B. 17; *Buxton* v. *North Eastern Railway Company*, L. R., 3 Q. B. 549; 37 L. J. Q. B. 258; *Amies* v. *Stevens*, 1 Str. 128; *Bluett* v. *Osborne*, 1 Stark. 384; 18 R. R. 785; *Birkett* v. *Whitehaven Junction Railway Company*, 4 H. & N. 730; 28 L. J. Ex. 348; *McPadden* v. *New York Railway*, 47 Barbour, 247; * *Warner* v. *Erie Railway Company*, 49 Barbour, [* 381] 558; *Bowen* v. *New York Central Railroad Company*, 4 Smith, 408. *Cur. adv. vult.*

May 10. The judgment of the Court (Kelly, C. B., Byles, Keating, and M. Smith, JJ., Channell and Bramwell, BB.) was delivered by

Montague Smith, J. In this case the plaintiff, a passenger for hire on the defendants' railway, suffered an injury in consequence of the carriage in which he travelled getting off the line and upsetting; the accident was caused by the breaking of the tire of one of the wheels of the carriage owing to "a latent defect in the tire which was not attributable to any fault on the part of the manufacturer, and could not be detected previously to the breaking."

Does an action lie against the company under these circumstances?

This question involves the consideration of the true nature of the contract made between a passenger and a general carrier of passengers for hire. It is obvious, that for the plaintiff on this state of facts to succeed in this action, he must establish either that there is a warranty, by way of insurance on the part of the carrier to convey the passenger safely to his journey's end, or, as the learned counsel mainly insisted, a warranty that the carriage in which he travels shall be in all respects perfect for its purpose, that is to say, free from all defects likely to cause peril, although those defects were such that no skill, care, or foresight could have detected their existence.

We are of opinion, after consideration of the authorities, that there is no such contract either of general or limited warranty and insurance entered into by the carrier of passengers, and that the contract of such a carrier and the obligation undertaken by

him are to take due care (including in that term the use of skill and foresight) to carry a passenger safely. It of course follows that the absence of such care, in other words negligence, would alone be a breach of this contract, and as the facts of this case do not disclose such a breach, and on the contrary negative any want of skill, care or foresight, we think the plaintiff has [* 382] failed to sustain his action * and that the judgment of the Court below in favour of the defendant ought to be affirmed.

The law of England has, from the earliest times, established a broad distinction between the liabilities of common carriers of goods and of passengers. Indeed the responsibility of the carrier to redeliver the goods in a sound state can attach only in the case of goods. This responsibility (like the analogous one of innkeepers) has been so long fixed, and is so universally known, that carriers of goods undertake to carry on contracts well understood to comprehend this implied liability. If it had not been the custom of the realm or the common law declared long ago that carriers of goods should be so liable, it would not have been competent for the Judges in the present day to have imported such a liability into their contracts on reasons of supposed convenience. But this is, as it seems to us, what we are asked by the plaintiffs to do in the case of carriers of passengers.

The liability of the common carrier of goods attached upon a particular bailment of the goods to him in his capacity of common carrier, and the rules which govern the rights of bailors or bailees of things, are of course applicable only to things capable of bailment. The law and the reasons for it in the case of bailments to carriers are found in the great judgment of Holt, C. J., in *Coggs* v. *Bernard*, 1 Sm. L. C., 5th ed. 171 ; p. 257, *ante*, and are thus stated : "As to the fifth sort of bailment, viz., a delivery to carry or otherwise manage for a reward to be paid to one that exercises a public employment or a delivery to a private person. First, if it be to a person of the first sort and he is to have a reward, he is bound to answer for the goods at all events, and this is the case of the common carrier, common hoyman, master of a ship, &c., which master of a ship was first adjudged, 26 Car. II. in the case of *Mors* v. *Slue*, Sir T. Raym. 220 ; 1 Vent. 190 238 ; p. 244, *ante*. The law charges this person thus entrusted to carry goods against all events but acts of Gods and of the enemies of the king. For

though the force be never so great, as if an irresistible multitude of people should rob him, nevertheless he is chargeable. And this is a politic establishment contrived by the policy of the law for the safety of all persons, the necessity of whose affairs oblige them to trust these sorts of persons that they may be safe in their ways of dealing; for else these carriers might * have [* 383] an opportunity of undoing all persons that had any dealings with them by combining with thieves, &c., and yet doing it in such a clandestine manner as would not be possible to be discovered. And this is the reason the law is founded upon in that point." The same law is found in numerous text-books (some of which are referred to in the judgments of my brothers MELLOR and LUSH in their judgments below), L. R., 2 Q. B. at pp. 416, 421, and has been acted on for centuries in the case of carriers of goods.

The Court is now asked to declare the same law to be applicable to contracts to carry passengers. The learned counsel for the plaintiff felt the difficulty of the attempt to apply the entire liability of the carrier of goods to the carrier of passengers, but he contended for and mainly relied on the proposition that there was at least a warranty that the carriage in which the passenger travelled was roadworthy, and that the liability of the carriers of goods in this respect ought to be imported into the contract with the passenger.

But, first, it is extremely doubtful whether such warranty can be predicated to exist in the contract of a common carrier of goods. His obligation is to carry and redeliver the goods in safety whatever happens; in the words of Lord HOLT, "he is bound to answer for the goods at all events." Again, "The law charges this person thus entrusted to carry goods against all events but acts of God and of the enemies of the king:" and this broad obligation renders it unnecessary to import into the contract a special warranty of the roadworthiness of the vehicle, for if the goods are safely carried and redelivered it would be immaterial whether the carriage was roadworthy or not, and if the goods are lost or damaged the carrier is liable on his broad obligation to be answerable "at all events;" and it is unnecessary to inquire how that loss or damage arose.

But, however that may be, it is difficult to see upon what principle the contract of the carrier of goods, which on the hypothesis does not apply in its entirety to carriers of passengers, is to be

dissected and a particular part of it severed and attached to what, on the hypothesis, is another and different contract. It was contended that the reason which made it the policy of the law to impose the wider obligation on the carriers of goods applied [* 384] with equal force * to impose the limited warranty of the soundness of the carriage in favour of the passenger. The reason suggested was, as we understood it, that a passenger when placed in a carriage was as helpless as a bale of goods, and therefore entitled to have for his personal safety a warranty that the carriage was sound, but this is not the reason or anything like the reason given by Lord Holt for the liability of the carrier of goods. The argument founded on this reason, however, would obviously carry the liability of the carrier far beyond the limited warranty of the roadworthiness of the carriage in which the passenger happened to travel. His safety is no doubt dependent on the soundness of the carriage in which he travels, but in the case of a passenger on a railway it is no less dependent on the roadworthiness of the other carriages in the same train and of the engine drawing them, on the soundness of the rails, of the points, of the signals, of the masonry, in fact of all the different parts of the system employed and used in his transport, and he is equally helpless as regards them all.

If then there is force in the above reason, why stop short at the carriage in which the passenger happens to travel? It surely has equal force as to all these things, and, if so, it must follow as a consequence of the argument that there is a warranty that all these things should be and remain absolutely sound and free from defects. This, which appears to be the necessary consequence of the argument, although Mr. Manisty disclaimed the desire to press it so far, tries the value of it. But surely, if the law really be as it is now contended to be, it would have been so declared long ago. No actions have been more frequent of late years than those against railway companies in respect of injuries sustained by passengers. Some of these injuries have been caused by accidents arising from defects or unsoundness in the rolling stock, others from defects in the permanent works. Long inquiries have taken place as to the causes of these defects and whether they were due to want of care and skill, and these inquiries would have been altogether immaterial if warranties of the kind now contended for formed part of the contract.

No. 13. — Readhead v. Midland Ry. Co., L. R., 4 Q. B. 384, 385.

An obligation to use all due and proper care is founded on reasons obvious to all, but to impose on the carrier the burden of a warranty that everything he necessarily uses is absolutely free
* from defects likely to cause peril, when from the nature [* 385]
of things defects must exist which no skill can detect,
and the effects of which no care or foresight can avert, would be to compel a man, by implication of law and not by his own will, to promise the performance of an impossible thing, and would be directly opposed to the maxims of law, *Lex non cogit ad impossibilia ; Nemo tenetur ad impossibilia.*

If the principle of implying a warranty is to prevail in the present case, there seems to be no good reason why it should not be equally applied to a variety of other cases, as for instance to the managers of theatres and other places of public resort, who provide seats or other accommodation for the public. Why are they not to be equally held to insure by implied warranty the soundness of the structures to which they invite the public? But we apprehend it to be clear that such persons do no more than undertake to use due care that their buildings shall be in a fit state. Thus, a staircase in the Polytechnic Institution fell and injured several persons attending a public exhibition there. Two actions were brought by separate plaintiffs who had paid money for the use of this staircase. The first was tried before WIGHTMAN, J., the second before ERLE, C. J. No one seems to have supposed there was any warranty of the soundness of the staircase ; yet the persons using it were as helpless to detect or prevent the accident as the traveller. Both learned Judges put the liability entirely on the question whether there was the want of due care in maintaining the staircase, and ERLE, C. J., told the jury the defendants would not be liable for latent defects. *Brazier* v. *Polytechnic Institution*, 1 F. & F. 507 ; *Pike* v. *Same*, 1 F. & F. 712. So, in stating the liability of a canal company, who made the canal for profit and allowed the public to use the canal on payment of tolls, TINDAL, C. J., in delivering the judgment of the Court of Exchequer Chamber says, "The common law in such a case imposes a duty upon the proprietors, not perhaps to repair the canal, or absolutely to free it from obstructions, but to take reasonable care, so long as they keep it open for the public use of all who may choose to navigate it, that they may navigate without danger to their lives or property." *Lancaster Canal Company* v. *Parnaby*,

11 A. & E. at p. 243. The liability in that case was not [* 386] put in * any degree upon a warranty that the canal should be free from perilous defects, but upon the rational obligation to use due care that it should be so.

The common law with regard to carriers of goods and innkeepers stands, as I have said, on its own special grounds. But it has been found so stringent, not to say unjust, in the liabilities it imposed on persons carrying on those trades, that the Legislature has found it necessary in both cases to modify its stringency.

It will now be necessary to examine the leading authorities cited during the argument.

The counsel for the plaintiff, in the first place, referred to some of the cases in which it has been held that in contracts for the supply of goods for a particular purpose, there is an implied warranty that the goods supplied shall be reasonably fit for that purpose: *Bigge* v. *Parkinson*, 7 H. & N. 955; 31 L. J. Ex. 301, is a case of that class. But the agreement to sell and supply goods for a price which may be assumed to represent their value is a contract of a different nature from a contract to carry, and has essentially different incidents attaching to it. Indeed, the learned counsel did not cite these cases as directly governing the present. Even in the cases of contracts to supply goods it may be a question, on which it is not now necessary to express an opinion, how far and to what extent the vendor would be liable to the vendee in the case of a latent defect of the kind existing in the present case, which no skill or care could prevent or detect, that is to say, where an article is supplied which has been manufactured and tested in the best and most careful manner, so as to be turned out as perfect as in the nature of things it could be. It is clear that if the manufacturer is liable for such an inevitable and undiscoverable defect, he can never sell what he makes without the risk of an action attaching itself to every contract he enters into — without in fact becoming an insurer, unless he expressly limits his liability.

In cases of express warranties the compact of the parties is to be gathered from the words they use in making them. When warranties are expressly made, the parties themselves may guard against excessive liability by any exceptions they please, and in those implied by law the law itself must take care to keep [* 387] them within the * boundaries of reason and justice, so as not to impose impracticable obligations.

It is now proposed to consider the authorities relied on as having a direct bearing on the question before us. The case which the plaintiff's counsel relied on as the strongest in his favour is *Sharp* v. *Grey*, 9 Bing. 457. But that case when examined furnishes no sufficient authority for the extensive liability which the plaintiff seeks to impose on the defendants. There the plaintiff was injured by an accident caused by the breaking of the axletree of a stage-coach. The defect might have been discovered if a certain examination had taken place, and it was made a question of fact at the trial whether it would have been prudent or not to make that examination. TINDAL, C. J., at p. 458, who tried the cause, is reported to have directed the jury to consider "whether there had been on the part of the defendant that degree of vigilance which was required by his engagement to carry the plaintiff safely." Now, if the learned Chief Justice had supposed there was an absolute warranty of roadworthiness, this direction could not have been given, as it would have been an utterly immaterial consideration. The jury found, on this direction, for the plaintiff; and a motion was made in the absence of TINDAL, C. J., for a new trial. Two of the learned Judges (GASELEE and BOSANQUET, JJ.), in refusing the rule, are certainly reported to have used expressions which seem to indicate that they thought the defendant bound to supply a roadworthy vehicle. PARK, J., uses language which, as reported, is ambiguous. But the judgment of ALDERSON, J., is distinctly opposed to the notion of a warranty against latent and undiscoverable defects. He says, "A coach proprietor is liable for all defects in his vehicle which can be seen at the time of construction, as well as for such as may exist afterwards and be discovered by investigation." We have referred somewhat fully to this case, because it was put forward as the strongest authority in support of the plaintiff's claim which can be found in the English courts, and because it was relied on by the Judges of the court of appeal in New York in a decision which will be afterwards referred to. But the case when examined furnishes no sufficient authority for the unlimited warranty now contended for. The facts do not raise the point for decision, and * the authority of [* 388] TINDAL, C. J., and ALDERSON, J., is against the plaintiff.

The *dictum* of BEST, C. J., in *Bremner* v. *Williams*, 1 C. & P. 414–416, was not necessary to the decision of the case. The ruling of Lord ELLENBOROUGH in *Israel* v. *Clark*, 4 Esp. 259, was also

relied on. Of these two last authorities BLACKBURN, J., in his judgment below, L. R., 2 Q. B. 437, p. 442, *ante*, said, "These are, it is true, only *nisi prius* decisions, and neither reporter has such a character for intelligence and accuracy as to make it at all certain that the facts are correctly stated, or that the opinion of the Judge was rightly understood." We find, also, that BEST, C. J., makes observations in the opposite sense in the case of *Crofts* v. *Waterhouse*, 3 Bing. 319. These are really the only English authorities which afford any support at all to the plaintiff's view, for the interpretation reported to have been given by CRESSWELL, J., in *Benett* v. *Peninsular and Oriental Steam Packet Company*, 6 C. B. at p. 782, of the case of *Sharp* v. *Grey*, 9 Bing. 457, 2 L. J. (N. S.) C. P. 45, was only an observation made during an argument, when it was cited as incidentally bearing on the question then before the Court, and cannot be relied on as an authority.

On the other hand, there is not only the plain distinction between the liabilities of carriers of goods and of passengers, constantly referred to by text-writers and Judges as well known and settled law, but numerous cases have been decided on grounds entirely at variance with the supposition that there existed contemporaneously with them the liability by way of warranty. In *Aston* v. *Heaven*, 2 Esp. 533, 5 R. R. 750, which was the case of an injury to a passenger, EYRE, C. J., after carefully pointing out the law as to the liability of carriers of goods to make good all losses except those happening from the act of God or the king's enemies, and the reasons for it, says, "I am of opinion the cases of losses of goods by carriers and the present are totally unlike." Again, "There is no such rule in the case of the carriage of persons; this action stands on the ground of negligence alone." In *Christie* v. *Griggs*, 2 Camp. 79, 11 R. R. 666, Sir James MANSFIELD [*389] says, "There is a difference between a *contract to carry goods and a contract to carry passengers. For the goods the carrier was liable at all events, but he did not warrant the safety of the passengers. His undertaking as to them went no further than this, that as far as human care and foresight could go he would provide for their safe conveyance." In *Crofts* v. *Waterhouse* the observations attributable to BEST, C. J., clearly show that he did not think there was any warranty on the part of the carrier of passengers, and PARK, J., in the same case, says, "A carrier of goods is liable at all events; . . . a carrier of passengers is only liable for negligence."

No. 13. – Readhead v. Midland Ry. Co., L. R., 4 Q. B. 389, 390.

But besides the observations of individual Judges to show what has hitherto been understood to be the law, there is the series of important cases involving costly and protracted trials, in which, by common consent, the liability of carriers of passengers has been based upon the duty to take due care, and not upon a warranty.

In *Grote* v. *Chester and Holyhead Railway Company*, 2 Ex. 251, where the accident arose from the breaking down of one of the bridges of the railway, the case turned on what would or would not be negligence for which the company were answerable. PARKE, B., said 2 Ex. at p. 254: "It seems to me the company would still be liable for the accident unless he [the engineer] also used due and reasonable care and employed proper materials in the work." There is no trace in the report that it ever occurred to the Court to suppose there was any warranty of the safety of the bridge.

In a case tried before ERLE, C. J., *Ford* v. *London and South Western Railway Company*, 2 F. & F. 730, 732, the plaintiff was injured by the tender of the train being thrown off the line, and one of the causes was alleged to be the defective tyre of one of the wheels of the tender. ERLE, C. J., in his direction told the jury, "The action is grounded on negligence. Negligence is not to be defined, because it involves some inquiry as to the degree of care required, and that is the degree which the jury think is reasonably to be required from the parties, considering all the circumstances. The railway company is bound to take reasonable care to use the best precautions in known practical use for securing the safety of their passengers." There the defect was in the tyre of a wheel of the tender of the *train by which the plaintiff [*390] travelled. And no suggestion that a warranty of its soundness existed was made throughout the case.

But a case still more directly bearing upon the present point was tried before COCKBURN, C. J., *Stokes* v. *Eastern Counties Railway Company*, 2 F. & F. 691. There the accident happened in consequence of the breaking of the tyre of the near wheel of the engine. The tyre broke from a latent flaw in the welding. The trial lasted six days, and the questions mainly were whether the flaw was not visible, and whether by the exercise of care it might not have been detected. The LORD CHIEF JUSTICE commences a full direction to the jury by saying, 2 F. & F. at p. 693: "The question is, whether the breaking of the tyre resulted from any negligence in the defendants, or their servants, for which they are

responsible." The latent defect in the tyre was admitted to be the cause of the accident; but the jury having found, in answer to specific questions, that there was no evidence that the tyre was negligently welded, and that the defect had not become visible, and having in other respects negatived negligence, the verdict was entered for the defendants. The facts of that case appear to be exactly like the present, except that in this case the defective tyre was in the wheel of the carriage, and there in the wheel of the engine. But for the reasons already given, it can never be that a warranty can exist as to the carriage, but not as to the engine drawing it. Thus, then, it is plain a trial of six days took place on issues which were utterly immaterial if a warranty ought to have been implied, and there the learned Chief Justice, and the parties themselves, seem to have been utterly unconscious of the contract which was really existing, if the plaintiff in this case is right; for the warranty, as an obligation implied by law, must have existed at the time of these trials, if it exists now; and surely it is strong to show that no such rule does form part of a common law that it was not then recognized and declared.

The learned counsel for the plaintiff insisted that a carrier by sea is bound to have his ship seaworthy. Undoubtedly, the carrier of goods by sea, like the carrier of goods by land, is bound to carry safely, and is responsible for all losses, however caused, whether by the unseaworthiness of the ship or otherwise, and it [* 391] does not appear * to be material to inquire when he is subject to this large obligation, whether he is also subject to a less one. In the case of *Lyon* v. *Mells*, 5 East, 428, 7 R. R. 726, p. 266, *ante*, it was no doubt stated by the Court that the carrier of goods is bound to have a seaworthy ship, but this only as part of his general liability. It is well to observe that Holroyd, who argued for the plaintiff, and Gaselee for the defendant, both state the liability of the carrier in all its breadth, viz., a liability for all losses however happening, except by the act of God or the King's enemies. This case therefore falls within the class of decisions relating to the liability of the carriers of goods. No case has been found where an absolute warranty of the seaworthiness of the ship in the case of passengers has arisen, and it affords a strong ground for presuming that no such liability exists, that in this maritime nation no passenger has ever founded an action on it.

The case of *Burns* v. *Cork and Bandon Railway Company*, 13

Ir. Com. L. R. 543, in the Irish Court of Common Pleas, certainly does not support the plaintiff's view of the law. The Court say there, the averments in the defendant's plea are all consistent with gross and culpable negligence, and on that ground give judgment for the plaintiff. The judgment plainly shows that the Court do not mean to declare that there is an absolute undertaking that the vehicle shall be free from defects. The language is, "free from defects as far as human care and foresight can provide, and perfectly roadworthy." The Court refer with approbation to the language of Sir James MANSFIELD, and ALDERSON, J., which helps to explain that they were disposed to adopt the views of those learned Judges, and to place the liability, not on a warranty, but on the obligation to exercise care and foresight.

It now remains to consider the American decisions on the subject. They have not been uniform. The judgment of Mr. Justice HUBBARD in *Ingalls* v. *Bills*, 9 Metcalf, 1–15, cited at length by my Brother MELLOR in his judgment below, L. R., 2 Q. B. at p. 430, is opposed to the notion of a warranty.

Decisions however were cited before us by Mr. Manisty from the Courts of the State of New York, having a contrary tendency, to show us that in that State the law had been declared in favour of *annexing a warranty to the contract. The [* 392] most important of these cases is *Alden* v. *New York Central Railway Company*, 12 Smith, 102, in the Court of Appeal of the State of New York. That was the case of an accident caused by a defect in an axletree, and the reasons given by GOULD, J., for the decision are not satisfactory to our minds. The learned Judge seems to assume that there was no negligence shown on the part of the company. He cites the case of *Sharp* v. *Grey*, 9 Bing. 457, in the Court of Common Pleas here, and he interprets that case to determine that the carrier warrants the roadworthiness of his coach. But if the view of the case of *Sharp* v. *Grey* taken in the early part of this judgment is correct, the learned Judge gave too great weight to it. GOULD, J., then, after having given the rule as he supposed it to be laid down in *Sharp* v. *Grey*, observes, 12 Smith, at p. 104, "And though this may seem a hard rule it is probably the best that can be laid down, since it is plain and easy of application, and when once established is distinct notice to all parties of their duties and liabilities." With deference to the learned Judge, those reasons founded on the convenience of the

arrangement are scarcely sufficient to warrant the introduction of onerous obligations into the contracts of parties, and the terms in which the judgment is given rather lead to the conclusion that the learned Judge was conscious that he was annexing to the contract of the carrier of passengers what had not hitherto been understood to form part of it. The English Courts are desirous to treat the American decisions with great respect, but as their authority here must mainly depend on the reasons on which they are founded, we have felt bound to examine the reasons on which this decision was based, with the result which has been already stated.

Warranties implied by law are for the most part founded on the presumed intention of the parties, and ought certainly to be founded on reason, and with a just regard to the interests of the party who is supposed to give the warranty, as well as of the party to whom it is supposed to be given.

We have already gone fully into the reasons for holding that in our opinion the warranty contended for in this case is not so founded.

On the other hand, it seems to be perfectly reasonable [*393] and just * to hold that the obligation well known to the law, and which because of its reasonableness and accordance with what men perceive to be fair and right, have been found applicable to an infinite variety of cases in the business of life, viz. the obligation to take due care, should be attached to this contract. We do not attempt to define, nor is it necessary to do so, all the liabilities which the obligation to take due care imposes on the carriers of passengers. Nor is it necessary, inasmuch as the case negatives any fault on the part of the manufacturer, to determine to what extent and under what circumstances they may be liable for the want of care on the part of those they employ to construct works, or to make or furnish the carriages and other things they use. See on this point *Grote* v. *Chester and Holyhead Railway Company*, 2 Ex. 251. "Due care" however undoubtedly means, having reference to the nature of the contract to carry, a high degree of care, and casts on carriers the duty of exercising all vigilance to see that whatever is required for the safe conveyance of their passengers is in fit and proper order. But the duty to take due care, however widely construed or however rigorously enforced, will not, as the present action seeks to do, subject the

defendants to the plain injustice of being compelled by the law to make reparation for a disaster arising from a latent defect in the machinery which they are obliged to use, which no human skill or care could either have prevented or detected.

In the result we come to the conclusion that the case of the plaintiff, so far as it relies on authority, fails in precedent; and so far as it rests on principle, fails in reason. Consequently the judgment of the Court of Queen's Bench in favour of the defendants will be affirmed. *Judgment affirmed.*

ENGLISH NOTES.

The rule in *Blake* v. *Great Western Railway Co.* was followed in *Thomas* v. *Rhymney Railway Co.* (1871), L. R., 6 Q. B. 266, 40 L. J. Q. B. 89, 24 L. T. 145, where the contracting company were held liable for an accident occurring through their train running into a train of another company on a part of the line over which the carrying company had only running powers, although the accident was owing to the negligence of the other company not having tail lights on their train. But in *Wright* v. *Midland Railway Co.* (1873), L. R., 8 Ex. 137, 42 L. J. Ex. 89, 29 L. T. 436, the carrying company were held not responsible for an accident occurring from a train of another company having by pure negligence on the part of the other company (which had running powers over their lines) run into their train.

In *Richardson* v. *Great Eastern Railway Co.* (1876), 1 C. P. D. 342, 35 L. T. 351, a foreign truck loaded with coal, belonging to a waggon company, came on to the defendant's line at Peterborough, and there underwent the usual examination. Defects in one of the springs and in the woodworks were discovered and repaired, and the truck was sent by the defendants to its destination. On the way an accident by which the plaintiff was injured happened through the existence of a crack in one of the axles of the truck. A minute examination of the truck would have disclosed the defect in the axle, but owing to the exigencies of the traffic it was not practicable at the time when the "usual" examination took place to make a minute examination. The company was held not liable.

A company is responsible for safe carriage on acceptance of a person as a passenger, even though he is allowed to travel gratis, or even though the ticket was bought by a third person. In *Austin* v. *Great Western Railway Co.* (1867), L. R., 2 Q. B. 442, 36 L. J. Q. B. 201, a child over three years old, and for whom a fare ought to have been paid, was held entitled to recover damages for injuries sustained while travelling on the company's line, though the person in charge did not pay its fare. So in *Great Northern Ry. Co.* v. *Harrison* (1854), 10 Ex.

376, and in a Scotch case, *Hamilton* v. *Caledonian Ry. Co.* (1857), 19 Dunlop (Court of Session, 2nd series), 457, persons lawfully travelling, though not provided with tickets for the journey, were held entitled to recover. But the case would probably be different with a person fraudulently travelling without a ticket in order to evade the fare. And where a person is travelling in charge of stock with a free pass on the express condition that he travels "at his own risk," the condition has been held good, and comprises all the incidents of the journey, including his getting off the premises after leaving the train. *McCawley* v. *Furniss Railway Co* (1872), L. R., 8 Q. B. 57, 42 L. J. Q. B. 4; *Gallin* v. *London and North Western Ry. Co.* (1875), L. R., 10 Q. B. 212, 44 L. J. Q. B. 89, 32 L. T. 550.

The invitation-to-alight group of cases are merely illustrations of the same principle. If the servants of the company ask passengers to alight on arrival of a train at a station, the company is liable for injuries sustained in alighting owing to defective accommodation at the place. What amounts to such invitation is a question of circumstances. Mere stoppage of the train and calling out the name of the station is not such an invitation. *Lewis* v. *London, Chatham, and Dover Railway Co.* (1874), L. R., 9 Q. B. 66, 43 L. J. Q. B. 8, 29 L. T. 397. These coupled with lengthened stoppage is invitation. *Bridges* v. *North London Railway Co.* (1874), L. R., 7 H. L. 213, 43 L. J. Q. B. 151, 30 L. T. 844; *Robson* v. *North Eastern Railway Co.* (1877), 2 Q. B. D. 85, 46 L. J. Q. B. 50, 35 L. T. 535. Long stoppage alone may amount to invitation to alight. *Rose* v. *North Eastern Railway Co.* (C. A. 1877), 2 Ex. D. 248, 46 L. J. Ex. 374, 35 L. T. 693.

In *Foulkes* v. *Metropolitan District Railway Co.* (C. A. 1880), 5 C. P. D. 157, 49 L. J. C. P. 361, 42 L. T. 345, the plaintiff had contracted with the Metropolitan District Railway Co. for carriage from A. to B. and back with the M. Co. The N. Co. had running powers over the same line, and the plaintiff was conveyed in their train. On arrival at A., a station of the M. Co., he was injured through the platform being unsuited to the carriages, and was permitted to recover damages from the N. Co., though the contract was not made with them. This was a case of pure negligence incidental to the contract of carriage, and may be contrasted with those in which the negligence (if any) has been held too remote a cause, such as the case of *Jackson* v. *Metropolitan Railway Co.* (appealed s. n. *Metropolitan Railway Co.* v. *Jackson*), 1877, 3 App. Cas. 193, 47 L. J. Q. B. 303, 37 L. T. 679, where the negligence of the company in permitting an uncontrolled crowd to get into a carriage at one station was, if a cause at all, too remote to be made an actionable ground for damage to the plaintiff's thumb which was crushed in the door, owing to a scrimmage at the next station.

AMERICAN NOTES.

The Rule states the universal American law on this topic. So far as insurance is concerned, the carrier is held to the highest degree of vigilance and care in this respect, but he is not an insurer of the safety of his carriages or roadbed. Edwards (Bailments, § 710), sums the matter up in one paragraph, which is practically sufficient, as follows: —

"The law requires passenger carriers to provide and use coaches and other vehicles that are safe and sufficient for the journey or business in which they are employed. *McPadden* v. *N. Y. Cent. R. Co.*, 44 New York, 478, citing the *Readhead case*. It requires them to examine their conveyances previous to the commencement of each trip or journey, and to prepare them carefully for the road. *Ware* v. *Gay*, 11 Pickering (Massachusetts), 106; *Ingalls* v. *Bills*, 9 Metcalf (Massachusetts), 1; 43 Am. Dec. 346. Railroad companies are under the same obligation to provide safe and secure cars, with engines and machinery in good order. They are common carriers of passengers, and they are held to the same standard or degree of diligence as carriers by other and older modes of conveyance, with this qualification; that the foresight and vigilance required by the rule must cover the roadway and rails, engines, cars, couplings, and other appliances used in the business. *Brown* v. *N. Y. Cent. R. Co.*, 34 New York, 404; *McElroy* v. *Nashua, &c. R. Corp.*, 4 Cushing (Massachusetts), 400; 50 Am. Dec. 791; *Virginia C. R. Co.* v. *Sanger*, 15 Grattan (Virginia), 230. They do not actually guarantee the safety of the roads and bridges used by them. *Toledo, &c. R. Co.* v. *Conroy*, 61 Illinois, 162; but they are answerable for the use of the highest skill and diligence in constructing them and in keeping them in a safe and suitable condition. *McElroy* v. *Nashua, &c. R. Corp. supra*; *Virginia, &c. R. Co.* v. *Sawyer*, *supra*; *Brown* v. *N. Y. Cent. R. Co.*, *supra*. They do not warrant the absolute safety, soundness, and construction of the cars and engines used by them; citing the *Readhead case*. *McPadden* v. *N. Y. Cent. R. Co.*, *supra*; *Carroll* v. *Staten I. R. Co.*, 58 New York, 126 (citing the *Readhead case*); but they are bound to the use of the greatest skill and vigilance in their construction, and are liable for any discoverable defects in the material or in the manufacture of them. *Hegeman* v. *Western R. Corp.*, 13 N. Y. 9; 64 Am. Dec. 517; *Steinweg* v. *Erie Ry. Co.*, 47 New York, 123; 3 Am. Rep. 673; *Caldwell* v. *N. J. St. Co.*, 47 New York, 282; they cannot escape liability by showing that they were made by a skilful workman. *Sharp* v. *Grey*, 9 Bing. 457; *Francis* v. *Cockrell*, L. R., 5 Q. B. 584. They must answer for the proper construction and sufficiency of their cars and engines when they purchase them, to the same extent as when they furnish the materials and manufacture these conveyances for their own use. *Meier* v. *Penn. R. Co.*, 64 Pennsylvania State, 225; 3 Am. Rep. 581; *Caldwell* v. *N. J. St. Co.*, *supra*; *Hegeman* v. *Western R. Corp.*, *supra*. The rule of diligence covers all the means by which the business of conveying passengers is carried on; it requires that the railway carrier shall use the utmost vigilance aided by the highest skill, to construct and perfect its road and track, and to keep them in a safe condition; and to equip it with cars and engines adequate and sufficient for the safe conveyance of its passengers;

audit requires that the carrier shall, in the performance of this duty, use every and all means which existing science furnishes or discloses, to guard against or to remedy defects in the construction or management of its cars and other appliances so as to insure the safety of passengers." Citing the same cases above.

The foregoing doctrine is adhered to by all the Courts down to the present time. The carrier is not an insurer of his vehicles and appliances, nor of the passengers' safety, but the measure of his duty is not to be determined by what a reasonable and prudent person would ordinarily do in the circumstances, but he is held to the highest degree of practicable care, foresight, and vigilance. *Railroad Co.* v. *Roy*, 102 United States, 456; *Palmer* v. *Penn. Co.*, 111 New York, 488; 2 Lawyers' Reports Annotated, 252; *Libby* v. *Maine Cent. R. Co.*, 85 Maine, 34; 20 Lawyers' Reports Annotated, 812; *Spellman* v. *Lincoln Rapid T. Co.*, 36 Nebraska, 890; 20 Lawyers' Reports Annotated, 316; *Louisville, &c. R. Co.* v. *Snyder*, 117 Indiana, 435; 3 Lawyers' Reports Annotated, 434; 10 Am. St. Rep. 60; *Dodge* v. *Boston, &c. S. Co.*, 148 Massachusetts, 207; 2 Lawyers' Reports Annotated, 83; 12 Am. St. Rep. 541; *Treadwell* v. *Whittier*, 80 California, 574; 5 Lawyers' Reports Annotated, 498; 13 Am. St. Rep. 175; *Louisville, &c. R. Co.* v. *Lucas*, 119 Indiana, 583; 6 Lawyers' Reports Annotated, 193; and notes and references; *Burt* v. *Douglas Co. St. Ry. Co.*, 83 Wisconsin, 229; 18 Lawyers' Reports Annotated, 479 (imperfectly insulated handrail on electric car); *Stockton* v. *Frey*, 4 Gill (Maryland), 406; 45 Am. Dec. 138; *Farish & Co.* v. *Reigle*, 11 Grattan (Virginia), 697; 62 Am. Dec. 666.

The case of *Alden* v. *N. Y. Cent. R. Co.*, 26 New York, 102; 82 Am. Dec. 401, which held the carrier liable as an insurer for the absolute safety of his vehicles, is overruled and discredited by the later New York cases and has nowhere been followed See note 82 Am. Dec. 404.

The American cases, however, hold the carrier to a stricter responsibility for the safety of his vehicles than the English Courts, making him liable for defects in the manufactures discoverable by any known test. It was held in *Grand Rapids, &c. R. Co.* v. *Huntley*, 38 Michigan, 537; 31 Am. Rep. 321, that if the carrier purchases vehicles from reputable manufacturers, giving such examination as is practicable and usual among prudent carriers using similar vehicles, he is not responsible for defects not discoverable upon such examination, although they might have been discovered in the manufacturing. Citing *Richardson* v. *Gt. East. Ry. Co.*, 1 C. P. Div. 342; and the *Readhead case*, with approval, observing of the latter: "The New York cases which were relied on upon the argument of the present case were considered in the light of a large number of decisions, and disapproved, as we think, correctly. They entirely ignore the true ground of responsibility as depending on the actual negligence of the carriers. There is no such thing as implied negligence when there is none in fact." In a note to this case (31 Am. Rep. 324), the present editor disapproves it, quoting and approving Hutchinson on Carriers, § 512: "Notwithstanding what may be said in some of the cases, the better opinion and the decided weight of authority is in favour of the position that so far as the passenger is concerned, the carrier is responsible for the negligence of the

manufacturer," and adds: "So far as we know, the contrary doctrine is asserted only in the Michigan and Tennessee cases, and in the *Richardson case*," citing *Nashville, &c. R. Co.* v. *Jones*, 9 Heiskell (Tennessee), 27. "The Courts are unquestionably in error in saying that the *Hegeman case* is generally denied in the American States. It is only the *Alden case* that is so denied. It seems to us there is no escape from the reasoning in *Francis* v. *Cockrell*, L. R., 5 Q. B. 184. The passenger cannot look to the manufacturer; the carrier can; therefore the passenger can look to the carrier. Any other rule would leave the passenger remediless." Thompson on Carriers of Passengers, says (p. 221): "The negligence of the manufacturer of a railway coach is to be imputed to the carrier." See note, 61 Am. Dec. 525.

The duty does not extend to keeping the deck of a boat or the platform of a car free from ice. *Fearn* v. *West J. F. Co*, 143 Pennsylvania State, 122; 13 Lawyers' Reports Annotated, 366; *Palmer* v. *Penn. Co.*, *supra*.

The carrier is not bound to adopt precautions known to science, unless they are in practical use. *Steinweg* v. *Erie Ry. Co.*, 43 New York, 123; 3 Am. Rep. 673; *New O. &c. R. Co.* v. *Faler*, 58 Mississippi, 911. Nor if the price is excessive and they are not necessary. *Le Barron* v. *E. B. F. Co.*, 11 Allen (Massachusetts), 312; *Natchez, &c. R. Co.* v. *McNeil*, 61 Mississippi, 434.

The statement of the Rule as to connecting carriers is supported as to damage by delay, &c., by *Carter* v. *Peck*, 4 Sneed (Tennessee), 203; 67 Am. Dec. 604, and cases in note, 59 Am. Dec. 450, and it prevails here as to goods. But the cases distinguish between passengers and goods, saying "passengers take care of themselves."

As to personal injuries it has been held in a number of cases that the carrier is not liable for an injury to the person upon the line of another connecting carrier over which he has sold a ticket, unless he has control of it or there is some partnership or common interest between the companies. *Sprague* v. *Smith*, 29 Vermont, 421; 70 Am. Dec. 424; *Nashville, &c. R. Co.* v. *Sprayberry*, 8 Baxter (Tennessee), 341; 35 Am. Rep. 705; *Hood* v. *N. Y. &c. R. Co.*, 22 Connecticut, 1; *Champion* v. *Bostwick*, 18 Wendell (New York), 175; 31 Am. Dec. 376; Hutchinson on Carriers, 464; 2 Redfield on Railways, 313; *Atchison, &c. R. Co.* v. *Cochran*, 43 Kansas, 225; 7 Lawyers' Reports Annotated, 411; 19 Am. St. Rep. 129.

Other cases deny any difference between freight and passengers as to the carriers' liability for negligence of a connecting carrier. *Harris* v. *Howe*, 74 Texas, 534; 15 Am. St. Rep. 862 (*obiter*); and where there was no change of cars the carrier was held liable for personal injury on a connecting road. *Chollette* v. *Omaha, &c. R. Co.*, 26 Nebraska, 159; 4 Lawyers' Reports Annotated, 135. And so in the case of a special excursion train to a point beyond the carrier's route. *Washington* v. *Raleigh, &c. R. Co.*, 101 North Carolina, 239; 1 Lawyers' Reports Annotated, 830.

If the carrier's trains run over the line of another the former is liable. Hutchinson on Carriers, § 514; *Blake* v. *Great W. Ry.*, 7 H. & N. 987; *ante*, p. 431; *Sprague* v. *Smith*, *supra*: *Candee* v. *Penn. R. Co.*, 21 Wisconsin, 582; 94 Am. Dec. 566; *Toledo, &c. R. Co.* v. *Rumbold*, 40 Illinois, 143; *Wyman* v. *Railroad*, 46 Maine, 162; *Nelson* v. *Railroad*, 26 Vermont, 717; *Schopman* v.

Railroad, 9 Cushing (Massachusetts), 24; 55 Am. Dec. 41. But not where the cars are run and the motive power and management are furnished by the other road. *Smith* v. *St. Louis, &c. Ry. Co.*, 85 Mo. 418; 55 Am. Rep. 380.

The question of liability beyond his own line seems to be one of contract. If the carrier contracts to carry the passenger to a certain destination, he is responsible for his safety throughout the whole distance, "whether the franchise and the means of conveyance, where the injury or loss occurs, be owned or controlled by him or some other carrier." Thompson on Carriers of Passengers, 423; *Quimby* v. *Vanderbilt*, 17 New York, 306; 72 Am. Dec. 469. But contrary to the English rule, such a contract is not implied merely from selling a through ticket, and the carrier may by special contract limit his liability to his own line. See note, 72 Am. Dec. 230; *Harris* v. *Howe*, 94 Texas, 534; 5 Lawyers' Reports Annotated, 777; 15 Am. St. Rep. 862; *Kessler* v. *N. Y. &c. R. Co.*, 61 New York, 538.

No. 14. — BERGHEIM *v.* GREAT EASTERN RAILWAY COMPANY.

(C. A. 1878.)

No. 15. — GREAT WESTERN RAILWAY COMPANY *v.* BUNCH.

(BUNCH *v.* GREAT WESTERN RAILWAY COMPANY.)

(H. L. 1888.)

RULE.

RAILWAY companies are common carriers in respect of the personal luggage of a passenger accepted and received by them for the purposes of transit. Where luggage is placed in a carriage under the personal charge of the passenger they are still responsible for negligence.

Bergheim v. Great Eastern Railway Company.

3 C. P. D. 221–227 (s. c. 47 L. J. C. P. 318; 38 L. T. 160; 26 W. R. 301).

Carrier. — Railway Company. — Passengers' Luggage.

A railway company are not insurers in respect of luggage placed at a passenger's request in the same compartment in which he intends to travel; and they will not be liable to compensate him if luggage so placed is lost or stolen without any negligence on their part.

(It is to be observed that the generality of the principle here stated is modified by the reasons of the House of Lords in the next following case. — R. C.)

No. 14. — Bergheim v. Great Eastern Ry. Co., 3 C. P. D. 221, 222.

Action against the defendants, as carriers, for loss of a [221] dressing-bag.

At the trial before MANISTY, J., during the Trinity Sittings, 1877, the following facts were proved: the plaintiff and his wife came to a station of the defendants for the purpose of being carried as passengers with their luggage to Yarmouth. After taking tickets for the journey, the plaintiff went on to the platform, by the side of which the train was standing, and there saw one of the porters employed by the defendants, named Bishop. As the train was not to start for a few minutes, the plaintiff asked Bishop to take charge of the luggage, to put it into a compartment, and to look after it, while the plaintiff went to the refreshment-room. Bishop replied it would be all right, and he would look after the luggage. Bishop put the plaintiff's luggage, including the dressing-bag, into a first-class compartment, and placed it upon the seats: he turned the key of the door of the compartment. The plaintiff and his wife then went to the refreshment-room; they returned to the train shortly before the time appointed for starting. Bishop said it was all right, and the door of the compartment being still locked he unlocked it for the plaintiff and his wife: they entered the compartment and found that the bag was missing. The bag was not recovered.

The jury, in answer to questions put by the Judge, found that the compartment and not the luggage-van was the proper place to put the bag, having regard to the common usage at the defendants' station; that Bishop was acting within the scope of *his employment by the defendants, and that he took [*222] charge of the bag as their servant and not as the plaintiff's; that there was no negligence on the part of either the defendants or their servants which conduced to the loss of the bag; that the plaintiff was not guilty of negligence which conduced to the loss of the bag; that the bag was stolen, but there was no evidence to show by whom it was stolen.

The learned Judge directed the judgment to be entered for the defendants. The plaintiff appealed.

1877. Nov. 21, 22. Grantham, Q. C., and R. E. Webster, for the plaintiff.

Metcalfe, Q. C., and Lindsell, for the defendants.

The arguments are sufficiently stated in the judgment. In addition to the authorities mentioned in the judgment the follow-

ing were cited: *Macrow* v. *Great Western Ry. Co.*, L. R., 6 Q. B. 612, 40 L. J. Q. B. 300; *Gatliffe* v. *Bourne*, 4 Bing. N. C. 314; in error, 3 Man. & G. 643; *Middleton* v. *Fowler*, 1 Salk. 282; *Upshare* v. *Aidee*, Comyns, 25. *Cur. adv. vult.*

Jan. 14. The judgment of the Court (Bramwell, Brett, and Cotton, L. JJ.) was delivered by

Cotton, L. J. In this case the facts are as follows: [The learned Judge stated them as above.] It has been found that neither the company nor the plaintiff was guilty of negligence. The company, therefore, cannot be held liable unless they are to be held to have undertaken the liability of common carriers in respect of the bag the loss of which is the cause of complaint in this action.

The liability of a common carrier is, as compared with that of other bailees, exceptional. He is answerable for the loss of goods intrusted to him as such, though the loss be in no way caused by any default on his part. He is considered as having contracted to insure the safe delivery of, that is to say, as having contracted to carry and deliver safely and securely (the act of God and of the Queen's enemies alone excepted), the goods of which [* 223] he, as * common carrier, is bailee. The reason why the law implied that this is his contract, was that the carrier had by himself or his servants during the bailment, at times and in places where he could not even be supervised, the exclusive control and care of the goods intrusted to him by the owner; and consequently, to prevent fraud, the law imposed on those who contracted to carry goods as common carriers the obligation also to undertake to insure their safety. The rule and the reason for it are thus stated by Lord Chief Justice Holt in *Coggs* v. *Bernard*, 2 Ld. Raym. 918, p. 257, *ante*. "The law charges this person thus intrusted to carry goods against all events but acts of God and of the enemies of the King. For though the force be never so great, as if an irresistible multitude of people should rob him, nevertheless he is chargeable. And this is a politic establishment contrived by the policy of the law for the safety of all persons, the necessity of whose affairs obliges them to trust these sorts of persons, that they may be safe in their ways of dealing; for else these carriers might have an opportunity of undoing all persons that had any dealings with them, by combining with thieves, &c., and yet

No. 14. — Bergheim v. Great Eastern Ry. Co., 3 C. P. D. 223, 224.

doing it in such a clandestine manner as would not be possible to be discovered. And this is the reason the law is founded upon in that point." This, though apparently a stringent rule, was founded on good sense. But if this implication had been applied to goods, of which in consequence of the act of the owner the carrier had not during their carriage the exclusive or absolute control or care, it would, in our opinion, have been unreasonable. So to apply it would have been to extend a contract of insurance, which the law had originally implied, because the carrier had the exclusive, or, at least, absolute control and care of the goods, to goods as to which his position was entirely different. When the reason for raising an implied contract does not exist, the implication ought not to be made, and in none of the earlier cases, which dealt with and established the common carrier's liability, was a contract of insurance implied in respect of goods over which he had not absolute control. In our opinion, as regards goods in such position, no such contract ought to be implied.

The next question, then, is whether it can be said that goods * which at the request of a passenger are put into the [* 224] carriage in which he travels, are under the control and care of the company to such an extent that a contract of insurance on the part of the company can be implied. They are put into that carriage, because they may be required by the passenger during the journey, or because he wishes to take special care of them and to have them under his eye, or because he desires to take them away with him as soon as the train stops. At all events, they are put in that carriage at the request or with the consent of the passenger, in order that, or in such a manner that, he has some control over them during the transit. While the train is in motion, the company can exercise no control whatever over the goods as distinct from the control they have over the train. There may be in the same carriage with the owner of the goods other persons, who by reason of the passenger's own negligence may be tempted or enabled to injure or destroy the goods, or deprive the owner of them. If the company are, in respect of the goods, liable as common carriers, though this loss may happen by no default of the company, but by reason of the passenger's own negligence, they must nevertheless make good the loss, or at least must do so unless they can fulfil the difficult burden of proof that the negligence of the passenger occasioned the loss. This would not, in our opinion, be reasonable.

But it was urged that, at least when the owner is reasonably absent from his carriage at stations during the journey, the company must be liable, and that the contract of the company may be considered as a contract of insurance, with an exception that while the train is in motion and the owner in the carriage with some charge of the goods, there should be a different liability. But this would be implying a new form of contract, entirely different from the contract of insurance implied in the case of a common carrier.

Again, it is said that the company have been held to be common carriers of passengers' luggage, which is put into the van or other place appropriated for the purpose, and from this it is argued that, the company, being common carriers of passengers' luggage in a passenger train, are so of all such luggage carried in the train.

But the real question is, whether, as regards the particular [* 225] goods, * there is an implied contract of insurance. This must depend on the circumstances under which these goods are received, and though the company are common carriers of goods, and do receive some passenger's luggage carried by a passenger train under circumstances from which a contract of insurance can be implied, it does not follow that this is the case as regards articles which, though carried by the same train, are received and carried under different circumstances. As regards that portion of a passenger's luggage which is, at his request or with his consent, placed in the same carriage in which he is to travel, we think, for the reasons given above, that there is no sufficient ground laid upon which a Court can properly make a presumption that the company carry them under a liability or implied contract to carry them safely at all hazards, the act of God and of the Queen's enemies alone excepted.

But then it is urged that, if the company are not liable to the extent insisted on, they are not in any way liable for the luggage of a passenger placed at his request and with their assent in the carriage in which he is to travel, and that such an entire absence of liability is unreasonable, and therefore that the only reasonable conclusion is to imply a common carrier's liability. But, in our opinion, it cannot properly be said that the company, if not liable as common carriers, incur no liability; the company undertake to carry the passenger; they equally undertake to carry his luggage or goods, which with their consent are placed with him in the

carriage in which he is; and they are not gratuitous bailees of those goods, as they receive them into their carriages in consideration of the passenger paying his fare. The company therefore must, according to ordinary principles, be held liable in respect of those goods, as bailees for hire and contractors to carry, and therefore liable for loss or injury caused by negligence, but not otherwise; the company have, in fact, the same liability with respect to the carriage of those goods as they have with respect to the carriage of the passenger himself.

This is our view on principle; it remains for us to consider the decisions bearing on this question.

Cohen v. *South Eastern Ry. Co.*, 2 Ex. D. 253, 46 L. J. Ex. 417, is the only case cited which *came before a [*226] Court of error. The question in that case was not as to luggage carried by the passenger in the carriage with him, and all that the Court decided was that the company were liable for the loss of passenger's luggage carried in the same train, but not in the same carriage with him, when occasioned by the negligence of the servants of the company.

The plaintiff also relied on *Robinson* v. *Dunmore*, 2 Bos. & P. 416, 5 R. R. 635. The decision in that case is not in point, for the defendant had expressly contracted that the goods should be safely carried, and the Court held that he was not relieved from this contract by the plaintiff sending his servant with the defendant. It is true that Mr. Justice Chambre, in giving judgment, stated that it had been held that a coach proprietor is liable as a common carrier for a passenger's luggage, though placed under the eye of the passenger. But in such a case it is obvious that the servants of the coach proprietor did, although the passenger was on the coach, retain an absolute control over the goods in question, just as much as if the passenger had not been there.

The cases of *Le Conteur* v. *London and South Western Ry. Co.*, L. R., 1 Q. B. 54, 35 L. J. Q. B. 40; *Butcher* v. *London and South Western Ry. Co.*, 16 C. B. 13; 24 L. J. C. P. 137; *Richards* v. *London, Brighton, and South Coast Ry. Co.*, 7 C. B. 839; 18 L. J. C. P. 251, may with more reason be relied on for the plaintiff. These were all cases where the claim against the company was for the loss of articles placed by or at the wish of a passenger in the carriage in which he travelled or intended to travel. In the first case, though Judges to whose opinion great weight is due,

expressed themselves in terms which favour the contention that the company is liable, the decision was on other grounds in favour of the company, and the opinion expressed by the Judges may be explained as suggested by Mr. Justice WILLES in *Talley* v. *Great Western Ry. Co.*, L. R., 6 C. P. 44, at p. 49, 40 L. J. C. P. 9, at p. 12. In the other cases of *Butcher* v. *London and South Western Ry. Co.*, and *Richards* v. *London, Brighton, and South Coast Ry. Co.*, the judgments were against the defendants, and were certainly, as it would seem, based on the view that the company were liable as common carriers. In *Butcher* v. *London and South* [*227] *Western Ry.* * *Co.*, however, there was some evidence of negligence on the part of the company. And none of the cases were before a Court of Error. Moreover, in a later case of *Talley* v. *Great Western Ry. Co.*, the Court of Common Pleas decided that the company was not liable for the loss of a portmanteau placed at the passenger's request in the same carriage with him. In that case the jury had found the plaintiff guilty of negligence, but it was apparently only neglecting to get back into the carriage in which his portmanteau had been placed. In that case Mr. Justice WILLES, who delivered the judgment of the Court, pointed out the distinctions of fact which exist between luggage carried in the ordinary luggage van under the immediate and exclusive control of the company, and articles placed by a passenger, or at his request, in the carriage wherein he is to travel, and showed that his opinion was that the company are not liable as absolute insurers of articles so placed, but are only liable in the event of negligence of some part of the duty which pertained to them.

Under these circumstances, we are of opinion that this Court is not bound by the authorities to decide that the company are liable, if in the opinion of the Court the company cannot on principle be held to have undertaken the liability of common carriers in respect of the plaintiff's bag, that is, to have contracted to become insurers of it.

For the reasons above stated, we are of opinion that they did not so contract, and that the judgment in favour of the company should be affirmed. *Judgment affirmed.*

Great Western Railway Company v. Bunch.

13 App. Cas. 31–60 (s. c. 57 L. J. Q. B. 361; 58 L. T. 128; 36 W. R. 785).

Carrier. — Railway Company. — Passengers' Luggage.

The female respondent arrived at the Paddington Station of the appel- [31] lants' railway at 4.20 P. M. on Christmas Eve with a bag and two other articles of luggage, in order to travel by the 5 P. M. train. A porter labelled the two articles and took all the luggage to the platform, the train not then being at the platform. The female respondent told the porter she wished the bag to be put into a carriage with her, and asked if it would be safe to leave it with him. He replied that it would be quite safe and that he would take care of the luggage and put it into the train. She then went to meet her husband and get her ticket. Ten minutes after she had left the luggage she and her husband returned together to the platform and found that the two labelled articles had been put into the van of the train, but that the porter and the bag had disappeared. In an action in the county court against the railway company for the loss of the bag the Judge found that the time when the luggage was entrusted to the porter was a reasonable and proper time before the departure of the train, and that the porter was guilty of negligence in not being in readiness to put the bag into the carriage when the female respondent returned, and held the company liable: —

Held, by Lord HALSBURY, L. C., and Lords WATSON, HERSCHELL, and MACNAGHTEN (Lord BRAMWELL dissenting), that there was evidence upon which the County Court Judge might reasonably find, first, that the bag was in the custody of the railway company for the purposes of present and not of future transit from the time when it was delivered to their porter until its disappearance, and secondly that its loss was due to their negligence: —

Semble, by Lord HALSBURY, L. C., and Lords WATSON, HERSCHELL and MACNAGHTEN (Lord BRAMWELL dissenting), that a railway company accepting passengers' luggage to be carried in a carriage with the passenger, enter into a contract as common carriers, subject to this modification, that in respect of his interference with their exclusive control of his luggage, the company are not liable for any loss or injury occurring during its transit, to which the act or default of the passenger has been contributory.

The reasoning in *Bergheim* v. *Great Eastern Railway Company* (3 C. P. D. 221, *supra*, p. 461) disapproved.

Appeal from a decision of the Court of Appeal (17 Q. B. D. 215; 55 L. J. Q. B. 427).

* In an action brought by the respondents against the [* 32] appellants in the Marylebone County Court to recover damages for the loss of a bag and its contents, the following evidence was given: —

No. 15. — Great Western Ry Co. v. Bunch, 13 App. Cas. 32, 33.

On the 24th of December, 1884, the respondent, Mrs. Bunch, arrived at the Great Western Railway Station, Paddington, at 4.20 P. M. with a portmanteau and hamper, and also a Gladstone bag belonging to her husband, the other respondent, for the purpose of travelling to Bath by the 5 P. M. train. A porter came forward and put all the luggage on a trolley, labelled the portmanteau and hamper, and wheeled the trolley on to the platform. Mrs. Bunch told the porter that she wished the bag to be put into a carriage with her, and asked him if it would be safe to leave it with him. The porter replied that it would be quite safe, and that he would take care of the luggage and put it into the train. Mrs. Bunch then left the porter standing by the luggage on the platform, and went to the front of the station to meet her husband and get her ticket, and found that he had just arrived from the Moorgate Street Station, where he had taken a through ticket for himself to Bath, and that on his arrival at the Paddington Station he had also taken there a ticket for her to Bath. Ten minutes after Mrs. Bunch had left her luggage with the porter on the trolley, she and her husband returned together to the place where she had left the trolley, and found that it had been taken away, and that the portmanteau and hamper had been put into the van, but that neither the bag nor the porter were forthcoming. There was a great crowd, it being Christmas Eve.

Similar tickets to those taken by the plaintiffs were put in, and purported to be "issued subject to the conditions stated on the company's time bills;" and a copy of the "time bills" was also put in, containing certain "general notices and regulations," which it was contended were the "conditions" referred to by the tickets; and likewise a copy of a printed notice, in large characters, which was affixed in the labelling vestibule. Amongst the general notices and regulations contained in the time bills were the following: —

"LUGGAGE. — The company will not in any case be liable for luggage taken with the passengers into the carriages, but only when it is properly labelled and placed in a luggage van. The [* 33] * company will not be responsible for the luggage not labelled, or improperly labelled."

The material parts of the notice affixed in the labelling vestibule were as follows: —

"Passengers are required to see their luggage duly labelled,

as until so labelled it will not be put into the trains, nor will the company assume or incur any responsibility whatever in respect thereof."

"The company's servants have strict orders not to take charge of any luggage or parcels, and if passengers are desirous of leaving them under the charge of the company they must themselves take or see them taken to and deposited in the cloak-room."

The County Court Judge found that the time when the luggage was entrusted to the porter was a reasonable and proper time before the departure of the train, and that the porter was guilty of great negligence in not being in readiness to put the bag into the carriage with Mrs. Bunch on her return, as promised; and he gave judgment for the plaintiff, Mr. Bunch, for £18, and non-suited the female plaintiff.

The defendants having obtained a rule in the Queen's Bench Division calling on the plaintiffs to show cause why judgment should not be entered for the defendants or a new trial had, DAY and A. L. SMITH, JJ., differed, DAY, J., giving judgment for the defendants, and A. L. SMITH, J., (who was of opinion that the defendants were liable) withdrawing his judgment. The rule was accordingly made absolute to enter judgment for the defendants.

The Court of Appeal (Lord ESHER, M. R., and LINDLEY, L. J., LOPES, L. J., dissenting) reversed the decision of the Queen's Bench Division and restored the judgment in favour of the plaintiff, Mr. Bunch. 17 Q. B. D. 215; 55 L. J. Q. B. 427. Against this decision the defendants now appealed.

During the argument in this House it was agreed between the learned counsel that it was to be taken as a fact that the train was not at the platform when Mrs. Bunch arrived there with the porter and the luggage.

* 1887. Nov. 24, 25, 29. Sir H. James, Q. C. and R. S. [* 34] Wright for the appellants: —

It is admitted that a railway company are common carriers of luggage labelled and carried in the van. But of luggage which the passenger carries with him in the carriage, they are not common carriers, for the passenger takes it out of their control. It was so decided in *Bergheim* v. *Great Eastern Railway Company*, 3 C. P. D. 221, p. 464, *ante*, and the principle of that decision covers this case. If the company are not insurers of the luggage while it is in the passenger's carriage, neither can they be while it is on its way from the cab to the carriage.

No. 15. — Great Western Ry. Co. v. Bunch, 13 App. Cas. 34, 35.

Upon the facts of the present case the appellants submit three propositions: First, the proper inference from the facts is that the bag was handed to the porter, not for transit, but to take charge of it for the passenger, and there is no evidence that the company authorize their porters to take charge of hand-luggage for passengers. Such a supposition is inconsistent with the complete control which a passenger retains over such luggage. The company, no doubt, provide porters and permit them to carry hand-luggage from the cab to the train, but that is for the passengers' convenience, and the company are not bailees of such luggage. It is agreed between the appellants' and respondents' counsel that when the bag was given to the porter the train was not drawn up at the platform. The porter therefore could not place it in the train. What ought he to have done with it? If each porter is to watch over each bag handed to him, the company must keep thousands of porters for no extra remuneration. On these terms the company could not carry on its business. The County Court Judge thought that the facts here were on all fours with those in *Lovell* v. *London, Chatham and Dover Railway Company*, 45 L. J. Q. B. 476. There the passenger went away only to get her ticket. Here she went to meet her husband, for her own convenience, and for an unreasonable time having regard to the duties of porters. It is manifest from her asking the porter as to the safety of the bag that she knew it was left at her own risk.

But, secondly, even if this bag was received by the porter for transit, the company merely permit the porters to assist the [* 35] * passengers, and are not liable as insurers, nor except in case of negligence. And here there was no sufficient evidence of such negligence as would amount to a breach of contract. The plaintiff must show negligence *dans locum injuriæ*. Mere non-production of the bag is no evidence of negligence, or of liability when the company are not insurers. The defendants are not bound to prove a negative; the onus is on the plaintiff to give positive evidence of negligence: that the loss was caused by the want of some precaution which the defendants ought to have taken. *Daniel* v. *Metropolitan Railway Company*, L. R., 3 C. P. 216, 591; 5 H. L. 45; 37 L. J. C. P. 146, 280; 40 L. J. C. P. 121.

Lastly, the special conditions which were incorporated in the contract by the notice on the ticket exonerate the defendants from liability, and that whether the passenger saw the notice or not.

Watkins v. *Rymill*, 10 Q. B. D. 178; 52 L. J. Q. B. 121, explaining *Henderson* v. *Stevenson*, L. R., 2 H. L., Sc. 470. [They also cited *Stewart* v. *London and North Western Railway Company*, 3 H. & C. 135, 139; 33 L. J. Ex. 199, per POLLOCK, C. B., and discussed the cases cited before the Court of Appeal and in the judgments of that Court.]

C. C. Scott, for the respondents: —

The company are and hold themselves out as common carriers of passengers' luggage except so far as the passenger resumes control over it in the carriage in which he takes it with him. The point in the present case is decided by *Richards* v. *London, Brighton and South Coast Railway Company*, 7 C. B. 839, 858; 18 L. J. C. P. 251. There the inducement that the company were common carriers of the dressing-case was traversed, and the Court held that they were common carriers of it. Here there was one bailment to the company of all three articles of luggage, and there was no determination of the bailment. The porter in receiving these things was certainly acting as the company's servant. He was not the passenger's servant. But if the company were not insurers they are liable for negligence, and there was negligence in the porter in not keeping a watch on the bag; and the County Court Judge so found. It is impossible to say that there is not evidence on which a jury might find for the plaintiffs, and if so that is enough for this *appeal, for the inferences of fact [* 36] drawn by the County Court Judge are conclusive upon these proceedings. As for the special conditions, they do not avail the company, as there was no signed contract: *Peck* v. *North Staffordshire Railway Company*, 10 H. L. C. 473, *ante*, p. 286. Moreover, the notices and conditions apply only to luggage brought for deposit. And they cannot be looked at upon the question of the porter's authority. [He also discussed *Great Western Railway Company* v. *Goodman*, 12 C. B. 313; 21 L. J. C. P. 197; *Macrow* v. *Great Western Railway Company*, L. R., 6 Q. B. 612; 40 L. J. Q. B. 300; and the cases cited in the Court of Appeal.]

R. S. Wright replied.

The House took time for consideration.

1888. Feb. 24. Lord HALSBURY, L. C.: —

My Lords, the form in which this question arises for your Lordships' decision is one which precludes any consideration of the propriety or impropriety of the decision of the learned County

Court Judge as to any question of fact as to which there was legal evidence before him. I must observe that both the learned Judges in the Divisional Court appear to me to have treated questions so conclusively found, as nevertheless open to review. It is, perhaps, not surprising that when questions arise upon what either are, or are assumed to be, matters of daily experience, even a Judge is tempted to import his own knowledge, and so give a colour to facts which he ought to treat as finally and conclusively decided by the tribunal to whom they have been remitted.

Now, in this case the facts have not been specifically found; but the learned Judge has found a verdict for the plaintiff, and has stated that finding together with the evidence. If therefore it is possible to find a verdict for the plaintiff upon that evidence, the plaintiff is entitled to maintain his verdict. It seems to me that the two contentions which have been in debate before your Lordships would resolve themselves into a question of fact, upon which there might be a difference of opinion if the facts

[*37] * were here open to review. Your Lordships, in the first place, have to ascertain, not from any written instrument nor from any express words of contract, what were the contract relations between the plaintiffs and the defendants. I confess I should have been better satisfied if some evidence directed to what was the practice of the particular railway company had been before us; but in this, as in other parts of the case, I must content myself with saying, that if there was enough to enable the learned Judge to infer what was the practice, and from thence to infer what was the contract, I am not at liberty to review his decision.

There are, of course, some facts which both sides have assumed to be proved, and with respect to which it would be mere pedantry to suggest that they were not formally proved. That the defendants, for instance, were a railway company carrying on the business of common carriers for hire; that the premises upon which the plaintiffs' luggage was deposited were premises belonging to and in the exclusive control of the defendant company; that the arrangement of the trains, the bringing of them to the platform, the arrangements by which the luggage, whether hand-luggage or van-luggage, was to be distributed, were all under the superintendence and direction of the defendant company, are matters as to which no formal evidence is to be found in the report of the County Court Judge, but are also matters as to which no one has or can

suggest any real doubt. I do not think that any of your Lordships entertain any doubt that if the plaintiffs' luggage were entrusted to the porter for deposit and custody as distinguished from the physical handing over for the purpose of transit, the defendants would not be liable. The question really in debate is somewhat obscured by the existence of the cloak-room system; and that system, I think, is expressly guarded by the company not permitting any of their servants undertaking the guardianship of any property whatsoever, except under the circumstances and upon the conditions which the company prescribe; but I think the same question would arise and should be decided upon precisely the same principles if the company had no cloak-room system, and gave no authority to their servants to receive luggage at all, except as incidentally to their contract of carriage.

*It is worthy of remark that DAY, J., and LOPES, L. J., [*38] upon an assumed state of facts at which I think the County Court Judge was at liberty to arrive, lay down the law very much as I should agree it ought to be laid down. DAY, J., says: "If a passenger requires him (the porter) to delay a reasonable time, while, for instance, the passenger takes a ticket, he (the porter) is responsible during all reasonable time that should elapse between the arrival at the station and the arrival on the platform of the passenger, taking the ticket being allowed for and the little journey to the platform; during all that time he is the agent of the company as bailees of the luggage which is entrusted to him; he is acting in the ordinary discharge of his duty;" and LOPES, L. J., says: "I do not think it is part of the employment of an ordinary porter to take charge of luggage beyond the time usually or reasonably, I should say reasonably, necessary for this transit," the words of the Lord Justice "this transit" referring to the transit of the goods from the cab or outside of the station.

The admissions of counsel have rendered it unnecessary to rely upon mere inference in this case, as to the question of whether the train had been drawn up to the platform or not; and we must now accept it as a fact that neither the van nor the carriages for the passengers were in a position to enable the hand-luggage or the van-luggage to be placed where they were intended to be deposited for the purposes of the journey.

My Lords, if I were myself to be drawing inferences as to the reasonableness in point of time of the period of the plaintiff's

arrival before the departure of the train by which she intended to travel, I am not certain how I should decide that question; on the one hand, forty minutes seem a long time before the departure of the train, and to call upon the servants of the company to take charge of luggage for the purpose of the journey; on the other hand, the fact that it was Christmas Eve; that the railway company were, within a very short time of the arrival of the plaintiff, issuing tickets for that journey; and that the porters were receiving without objection or demur van-luggage, with respect to which it is not denied that they were, in so doing, acting in pursuance of the authority conferred on them by their employers, are all circumstances from which, I think, it might be inferred [* 39] * that the time was not too long; but, in truth, my Lords, I am not entitled to speculate upon the matter; this is essentially a question of fact, and the learned Judge has, in this instance, specifically found that the time of the entrusting the luggage to the porter was a reasonable and proper time before the departure of the train. It seems difficult to say that, with the evidence before him to which I have adverted, it was not open to him to arrive at that conclusion.

Now, my Lords, while I entirely agree that the duty of the porter, as disclosed by the evidence, is either to take the luggage to the cloak-room if entrusted to him for the purposes of deposit, or to the train if for the purposes of the journey, I am at a loss to understand how the circumstance that the train is not at the platform can affect the liability of the company. Assume that the company are receiving luggage for the purposes of the journey, and that they do so receive luggage for the purposes of the journey, the presence or absence of the train at the platform is a matter within the control of the company, and not of the passenger, and I cannot understand what evidence there is in this case from which it could be reasonably inferred that the porter would be acting within the scope of his authority in receiving the plaintiff's luggage if the train were at the platform, and beyond it if the train had not come up. Doubtless a company might make a regulation if they thought fit: "We will not receive luggage for a train forty minutes before it starts;" they might say, "We will not receive luggage to be put on a train which has not yet arrived at the platform." I should very much doubt whether any railway company has any uniform practice as to the period of time which

they allow to elapse between the arrival of the train at the platform and its departure. It is enough, however, to say, that in this case no evidence of any such practice was given.

If a possible inference to be derived from the facts as proved, is, that what the porter did in this case was the ordinary practice of the company, then I should say, it would follow that the mode in which the company carried on its business was, to accept the passengers' luggage at the entrance of the station, and to take it to its intended destination, whether van or passenger carriage, at * the option of the passenger, and that during the [*40] period of what LOPES, L. J., describes as "this short transit" it would be in the custody of the company for the purposes of, and as part of, the journey. If the train were at the platform, it would, I suppose, in ordinary course, be distributed, some to the van and some to the passenger carriage, as directed; but, once the porter has received and accepted it as luggage to be received and forwarded by the train about to start, it seems to me impossible to contend, and I do not understand LOPES, L. J., or DAY, J., to contend, that it is not in the custody of the company for the purposes of the journey. If the porter refused to take charge of the luggage, the company might be liable for refusing to carry according to their professed mode of carriage, but might not be liable for loss of goods which they refused to carry; but whether the porter would be doing his duty in refusing to take charge of the luggage, during the short transit, or acting in pursuance of his masters' orders, is the very question in debate. If one assumes that it was contrary to his duty, of course the company would not be liable; if it was his duty, the company would be liable.

But why am I to assume, upon the facts here put in proof, that the porter was acting contrary to his duty, and in hopes of personal gain to himself, undertaking a course of business not imposed upon him by the orders of the railway company? I confess, for myself, I should draw the same inference that was drawn by the County Court Judge; but what the defendants, in order to succeed, must establish, is, that the County Court Judge could not by law have drawn such an inference. It is suggested that Mrs. Bunch's phrase, in asking the porter whether her bag would be safe, exhibited a consciousness that she was asking a favour, and not insisting on her rights as a passenger. I admit that the word "it," grammatically, as the evidence is reported to

us, appears to refer to the bag, but I think what Mrs. Bunch meant was the luggage, both van and hand-luggage, upon the trolley. But, whatever Mrs. Bunch meant, I think she might have asked with equal force whether the train would arrive safely at its destination; and I do not think either her question or the porter's reply would have affected the contract relations of the parties. The truth is, that in the conduct of business more [* 41] contracts are * made by the understood course of business than are ever reduced into writing, or even into spoken words at all; and I think that, when people hold themselves out as carriers, and receive luggage at a place regularly appointed to receive luggage for the purposes of a journey, they must be understood to receive it as carriers unless they give notice to the persons from whom they receive it that they receive it in some other capacity. It may be said that I ought not to disregard the existence of the cloak-room system, and that the receipt by the company's servants is susceptible of two interpretations. I admit that this is so; but in this case Mrs. Bunch at once informed the porter that the portmanteau and the hamper, as well as the Gladstone bag, were to be put into the train; and I agree with LINDLEY, L. J., that the company's notices and directions to their servants are intended to apply, and upon their true construction do apply, to luggage received for purposes of deposit, and not for purposes of transit, and it is upon this part of the case that I think the finding of the learned Judge is conclusive against the defendants when he finds that the time of entrusting the luggage to the porter was a reasonable and proper time before the departure of the train. Once that proposition is accepted as conclusively found, it seems to me that the law that would be laid down by the minority of the Court of Appeal would amount to this: that a passenger bringing his luggage for carriage, a reasonable and proper time before the departure of the train by which the luggage is to be carried, can enforce no liability upon the company in respect of his luggage except it is placed in the cloak-room as a preliminary to the transit, and a receipt given for the same. And even this inadequately represents the difficulty of the contention, since it is obvious, from the notices put in evidence, that the cloak-room tickets and receipts import that the passenger who has deposited his luggage in the cloak-room is expected to get it out again from that same cloak-room, and if he wishes to travel must again com-

mit it to the custody of the company after he has so taken it out. It would seem, therefore to involve this proposition, that for parcels carried in the passenger carriages the railway company never can be liable at all.

I do not know that it is absolutely necessary in this case * to determine what is the exact contract between the com- [*42] pany and the passengers, since the learned Judge has found negligence against the company, and I do not understand that there is any difference of opinion among us, that if there was any contract to take care of the bag there is sufficient evidence of negligence. But I must express my opinion that the views expressed by Lord TRURO, JERVIS, C. J., WILLIAMS, J., CROWDER, J., WILLES, J., KEATING, J., and MONTAGUE SMITH, J., do not appear to have had sufficient weight given to them — see *Richards* v. *London, Brighton and South Coast Railway Company*; *Talley* v. *Great Western Railway Company*, L. R., 6 C. P. 44; 40 L. J. C. P. 9; *Butcher* v. *London and South Western Railway Company*, 16 C. B. 13; 24 L. J. C. P. 137 — by the judgment in the Court of Appeal in *Bergheim* v. *Great Eastern Railway Company*, 3 C. P. D. 221; 47 L. J. Q. B. 318, *ante*, p. 464. All these learned Judges appear to me to adopt the view that a railway company in accepting a passenger's luggage for carriage in a passenger train, and in the carriage with the passenger himself, do enter into a contract as common carriers, modified only to the extent that if loss happens by reason of want of care of the passenger himself who has taken within his own immediate control the goods which are lost, their contract as insurers does not apply to loss occasioned by the passenger's own default.

In *Bergheim* v. *Great Eastern Railway Company* the Court of Appeal, commenting upon the case of *Talley* v. *Great Western Railway Company*, do not, I think, quite accurately represent the judgment of the Court of Common Pleas. In *Talley* v. *Great Western Railway Company* that judgment expressly assumes the general liability of the company as common carriers, but that the general liability was modified by the implied condition that the passenger should use reasonable care, the fact being that the loss was caused by his neglect to do so, and would not have happened without such negligence. The negligence in question was leaving his portmanteau in a carriage unprotected by his presence; it was found at the end of a journey cut open and its contents rifled in a carriage

which he had originally travelled in as far as Swindon, but which he had negligently omitted to re-enter upon leaving the [*43] refreshment-room at that station. It is *obvious that if the Court were right that the general liability of the company was modified by the undertaking of the passenger to look after his own luggage while it was in the passenger carriage, he had omitted that duty. But suppose the loss had happened by reason of some circumstance which would have been no breach of that modifying stipulation, could it have been contended that the company were not responsible as common carriers because they were carrying for hire in one part of the train and not in another? If the view thus assumed is the correct view of the law, and I think it is, the moment the porters received Mrs. Bunch's luggage, whether van or hand luggage, they received, for carriage to Bath, all the luggage of the passenger; they received the van-luggage to be put into the van; they received the hand-luggage to be put into the passenger carriage; and I think the learned Judge was entitled to infer that their practice, and therefore their contract, in receiving hand-luggage, was to put it into the passenger carriage, or if the railway company did not then bring up the train to the platform, to take care of it until the carriage was drawn up and in a position to receive the hand-luggage, which, in my view, the porter, as the agent of the railway company, had accepted and received for that purpose.

For these reasons, I am of opinion that the judgment of the Court of Appeal was right, and I move your Lordships that that judgment be affirmed, and that this appeal be dismissed with costs.

Lord WATSON: —

My Lords, this appeal brings up for consideration the decision of a County Court Judge, which the higher Courts and this House have no jurisdiction to review, except in so far as it involves principles of law. It is impeached upon this ground, mainly, that there was no evidence before the learned Judge from which it could be reasonably inferred that, at the time when it disappeared, the respondent's Gladstone bag had been delivered to, and was in the possession of, the appellant company for the purpose of carriage. The evidence, it is said, points to, and only warrants, the conclusion that the bag was in the custody of a railway porter as bailee for the respondents.

* In *Butcher* v. *London and South Western Railway Company* [*44] JERVIS, C. J., observed, in reference to luggage which had been conveyed in the same carriage with its owner, "that, though not in express terms engrafted into it, it is a part of the contract of a railway company with its passengers that their luggage shall be delivered at the end of the journey, by the porters or servants of the company, into the carriages or other means of conveyance of the passengers from the station." What was thus said of the termination applies equally to the commencement of a railway journey. In the ordinary course of business a passenger's luggage is received at the entrance to the station by the servants of the company, and is by them conveyed either to the van or to the carriage in which he intends to travel. I do not mean to say that railway companies are under any statutory or other obligation to provide that accommodation; but they find it for their interest to do so; and, in taking charge of luggage for these purposes, their servants act within the scope of their implied authority. Their duty is, according to prevailing usage, limited to the transport of passengers' luggage from the vehicle which brings it to the station to a train which is about to start, and does not extend to their taking charge of luggage which cannot, in any reasonable sense, be considered as in actual course of transit. It may be that railway porters do sometimes undertake the charge of luggage which is merely intended for future transit; when they do so, they exceed the limits of their implied authority, and, in that case, their possession cannot be regarded as the possession of their employers.

If the respondents had gone to Paddington station at noon of the 24th of December, 1884, and had then left their Gladstone bag with a porter in order that it might accompany them on their journey to Bath by the 5 P. M. train, I should have had no hesitation in holding that the appellant company had not become responsible for its safe custody during the interval. In that case, it would have been in accordance with well-known practice, and therefore an implied term of the subsequent contract between the parties, that the company were not to be liable, unless the luggage was duly deposited in the office provided for that purpose. * On the [*45] other hand, if the respondents had arrived at the station at 4.55 P. M., I entertain as little doubt that the delivery of their Gladstone bag to a porter, for the purpose of its being conveyed to the carriage in which they were about to travel, would have made the possession of their porter that of the appellant company.

No. 15. — Great Western Ry. Co. v. Bunch, 13 App. Cas. 45, 46.

Whether passengers' luggage, delivered to a railway porter, is in his possession for present, or merely with a view to future transit is necessarily a question of degree, depending upon the circumstances of the case. Railway companies, as a matter of fact, frequently provide for the travelling public, not only booking offices, but refreshment rooms, and other conveniences; and passengers who merely avail themselves of such accommodation as incidental to their use of the railway, cannot be held to have temporarily ceased to prosecute their journey. It is impossible to fix any precise limit of time prior to the starting of a particular train, within which the company are to be liable for passengers' luggage delivered to their servants for conveyance by it, and beyond which they are not to be liable. In my opinion the company are responsible for luggage delivered to, and in the custody of, their servants, for the purpose of transit, whenever it can be reasonably predicated of the passenger to whom it belongs that he is actually prosecuting his journey by rail, and is not merely waiting in order to begin its prosecution at some future time.

In the present case, the evidence shows that the female respondent arrived at Paddington station forty minutes before the train by which she and her husband travelled was timed to start. She gave her luggage into the charge of one of the appellant company's porters, saw part of it labelled, and directed the porter to place the Gladstone bag, which was not labelled, in the same compartment with herself. The respondent then left the platform, and went to the booking office, for the purpose apparently either of taking her ticket, or of seeing that her husband procured it for her. She there met her husband, who had taken a ticket, and on their return to the platform, about ten minutes after her arrival, they found that the labelled luggage had been placed in the van, and that the [* 46] porter and the Gladstone bag had both disappeared. * In these circumstances, I think the County Court Judge might reasonably come to the conclusion that the bag continued to be in the custody and possession of the appellants for the purposes of present and not of future transit from the time when it was delivered to their porter until its disappearance.

In the argument for the appellants considerable stress was laid upon the fact that at the time when Mrs. Bunch left her luggage upon the platform the five o'clock train had not come alongside it. That circumstance does not seem to me to be very material,

because a passenger can have no personal knowledge of it until he reaches the platform. What appears to me to be matter of more consequence in the present case is, that it was Christmas Eve; that there was a great crowd of passengers intending to travel by the train in question; and that the servants of the company, as might have been anticipated, were, at the time when Mrs. Bunch arrived at the station, inviting passengers to take tickets, and receiving their luggage for the purpose of its being put in the train. I attach no importance to the question put by Mrs. Bunch to the porter, or to his assurance, in reply, that her luggage would be quite safe, and that he would put it in the train. A conversation of that kind could not alter the contractual relations between her and the company.

On the assumption that the appellant company did become responsible for the safe keeping of the bag in question, it was argued on their behalf that there was no evidence before the County Court Judge to justify the inference that its loss was due to their negligence. Upon that point I am of opinion that the evidence was sufficient to sustain the inference, but I am by no means satisfied that, in order to entitle them to judgment, the respondents were bound to prove that the appellants had been negligent. That depends upon the nature of a railway company's contract liability for hand-luggage, including in that term heavier articles, such as are commonly put in the van, when these are placed, or intended to be placed, with the assent of the company's servants, in the carriage in which their owner intends to travel, as well as lighter articles which are generally, if not invariably, carried beside him.

It does not admit of question that passenger's luggage, duly *delivered to the company's servants for carriage in [*47] the railway van, remains during its transit at the risk of the company as common carriers; but it has always been held that it would be unreasonable and unjust to make the company liable as insurers, in cases where the passenger has assumed, in whole or in part, the custody and control of his own luggage. Whilst they have been in agreement to that extent, eminent Judges have differed as to the nature of the contract under which hand-luggage is carried, some being of opinion that it is, from first to last, a contract to carry such luggage on the same terms as its owner; that is to say, with ordinary care; others being of opinion that it is throughout a contract of common carriage, modified by the personal inter-

ference of the passenger. Whichever of these views be accepted, it is manifest that, in many instances, the resulting liability of the company will be precisely the same, but according to the second of them, the full responsibility of the company may revive on occasions when, from causes incidental to his journey, the interference of the passenger ceases for a time, and his hand-luggage is committed to the exclusive charge of their servants.

At present the ruling authority upon this point is *Bergheim* v. *Great Eastern Railway Company*, where it appears to have been decided by the Court of Appeal, consisting of the noble and learned Lord opposite (Lord BRAMWELL), the present MASTER OF THE ROLLS, and COTTON, L. J., that the contract of the company, with respect to hand-luggage, is merely to carry with ordinary care. COTTON, L. J., who delivered the judgment of the Court, said: "The company, therefore, must, according to ordinary principles be held liable in respect of those goods as bailees for hire and contractors to carry, and, therefore, liable for loss or injury caused by negligence, but not otherwise; the company have, in fact, the same liability with respect to the carriage of those goods as they have with respect to the carriage of the passenger himself. This is our view on principle." The observations thus quoted were directed to the special case of a passenger's luggage which had been placed, at his request, and with the assent of the company, in the carriage in which he was to travel; and the [* 48] learned *Judge possibly did not intend to extend the principle to luggage in the exclusive custody of the company's servants, for conveyance to or from the carriage. However that may be, I prefer the principle which appears to me to have been adopted in *Richards* v. *London, Brighton and South Coast Railway Company*, and *Butcher* v. *London and South Western Railway Company*. I think the contract ought to be regarded as one of common carriage, subject to this modification, that in respect of his interference with their exclusive control of his luggage, the company are not liable for any loss or injury occurring during its transit, to which the act or default of the passenger has been contributory.

I am, therefore, of opinion that the order of the Court of Appeal ought to be affirmed with costs.

Lord BRAMWELL: —

My Lords, it is the custom for English railway companies, at

all events for the appellants, to have porters at the entrance of their railways to receive the luggage of passengers and convey it to the van or carriage in which it is to be carried. Whether this is a duty imposed on the companies, or a voluntary act on their part, is immaterial. It is a duty they undertake, at least this company does, and must, like other duties, be performed with skill, and without negligence.

What is this duty? I have said, to carry the passenger's luggage to the van or carriage in which it is to be carried. We all know that large packages are taken to the luggage van; smaller packages (often much too large for the comfort of other travellers), are, if requested by the passenger, taken to the carriage in which the passenger is to be carried, either that he may make use of it, or take personal care of it, or, more frequently, that he may hasten away with it without waiting for it to be given out of the luggage van. There is no further duty, or professed duty, that I know of.

If the passenger arrives before the train is at the platform, whether of a terminal station or not, the porter may certainly refuse to do more than take the luggage on to the platform, and leave it there in charge of the passenger. Of course, if the
* passenger wants to get his ticket, and says so, the porter [*49]
must take the luggage on to the platform and wait and see
to it till the passenger has got his ticket and comes to see to it himself.

If there is any duty beyond this, it is more than I know of or ever heard of; I mean any ordinary duty. There can be no duty on the company, or the porter, when the train is not at the platform, to take care of the luggage till it comes. If there is an obligation to do this for five minutes, there is an obligation to do it for as many hours. Every one knows it is not so; every one knows that a cloak-room is provided for the custody of luggage that the passenger wants to have taken care of till it can be put in the carriage in which it is to be carried. If this is true of luggage to be carried in the luggage carriage, and that is not there, it is equally true of luggage to be carried in the passenger carriage when the passenger is not there. If the luggage carriage is not there, the porter is not bound to take charge of the luggage till it comes. Of course, if he says nothing but takes it, and it is labelled for its destination and left in his charge, the passenger may well suppose, and has a right to suppose, that the company has taken

charge of it for the journey. The passenger cannot tell whether the luggage carriage is there, or if not, whether the company is not content to take it to a place where it will be in readiness for the train when it comes, and be taken care of meanwhile.

So with respect to an article to be put in the passenger carriage, if the passenger should suppose a train he meant to go by was at the platform, and walked to it, and the porter said nothing, I should say that the passenger would have a right to suppose that the company had taken charge of the parcel, and was taking it to his intended carriage. But, if the porter said of luggage intended for the luggage carriage, "That carriage is not here, you must look after your luggage yourself," and the passenger does not look after it, there would be no pretence for saying the company was liable. The same thing is true of luggage to be put in the passenger carriage. It must be remembered that luggage to go in the passenger carriage is to go in the same carriage as its owner, the passenger. Suppose a train at the platform, the passenger [* 50] says, "I want this in the carriage * with me," the porter proceeds with the parcel to the train, the passenger goes somewhere else, not for a minute or so, but for some sensible time, five or ten minutes, perhaps half an hour. Would he have a right to complain if his parcel was placed near the train the passenger said he was going by, or taken to the lost luggage room? I say No. If he would, on what ground? He must know that by not following and taking his seat he was attempting to impose a burthen on the company's servant which he had no right to impose. Mrs. Bunch knew that. She did not say, "You must take care of this," or "I want to go and meet my husband," but asks whether the bag will be safe. It will be said that it is not to be expected that she would speak with the precision of a lawyer, or know the law. I agree, but I say that treating this practically, she knew — everybody knows — that she was asking for a favour — for something to which she had no right. Does any one believe that if the porter had said, "I can take your luggage to the luggage carriage and it will be taken care of, but you must take care of what is to go with you till you have taken your place," — I say if he had said this, as he ought to have done, would any one believe she would have had any right to complain or have been surprised? Always let it be remembered that she knew it was necessary to get some promise or engagement from the porter other

and more than the ordinary engagement of a porter when he takes luggage.

Now a word as to what he said. Of course, it was not a promise or contract by him for himself or the appellants. Certainly there was no consideration for it. All it amounted to was a statement of intention, — a holding out of an expectation. "Will it be safe?" "Oh, yes; I will look after it." All that this means is, It will be safe, for I shall look after it. I say, then, that what the porter said did not impose a duty on the appellants which did not otherwise exist, that no duty existed in the appellants other than to carry the bag to the carriage in which she took her place if she took it forthwith; that if she did not take her place so that the porter could not give the parcel into her charge there, she left it in the care of the porter at her own risk. I say she knew this, as is shown by her question to the porter and by her acceptance of his statement.

*A word on the judgment below. Lord ESHER says: [*51] "Now comes the case of luggage which is not to go into the van. The porters take possession of such luggage at the same time that they take possession of the other, and they take it on to the platform or to the carriage. During the whole of that time it is in process of conveyance to the place to which the passenger is going, and is in possession of a servant of the railway company." Be it so, but that is just what this bag was not. There was a time during which it was not in process of conveyance, a time during which it was stationary, during which the porter had said he would guard it. Lord ESHER says: "The question is whether there was evidence upon which the County Court Judge might reasonably find for the plaintiffs." Evidence of what? Evidence of some fact on which he might reasonably so find? What fact? We know all the facts. LINDLEY, L. J., says: "It seems to me a simple case of transit, not of entrusting to the porter in any sense than that in which everything put into his hands is entrusted to him. It is very true there was some short time during which it would not be necessary for him actually to keep walking or rolling his trolley. There was a short delay, but a delay so short as to make it utterly unreasonable to suppose that this ought to be held to be beyond the scope of his duty. It is not essential to say more than this, that the porter was acting within the scope of his employment in taking the luggage in the

way he did from the cab to the train." Now, that is precisely what he did not do. He did not take it from the cab to the train. He put it down and said he would guard it, and did not. As to the time being short, it was to be as long as the lady was away, and might have been forty minutes, or more, if the plaintiff had not arrived. I agree with LOPES, L. J., 17 Q. B. D. 229; 55 L. J. Q. B. 434: "It was not part of the employment of a porter to take charge of luggage except during that transit, *i. e.*, from the cab to the train." I mean by that, during the time which is fairly and reasonably necessary for that transit.

I make no remark on other authorities beyond this, that they show a generous struggle on the one hand to make powerful companies liable to individuals, and, on the other hand, an effort [* 52] * for law and justice. Sometimes one succeeds, sometimes the other, and the cases conflict accordingly.

I have not used a technical expression, not a word about bailments, &c. I have used plain and practical language. The appellants were under no duty to take care of the bag while Mrs. Bunch went to look for her husband: the porter could, and ought to, have refused to do so. Had he done so Mrs. Bunch would have had no cause of complaint. By doing as he did he could impose no duty on the defendants which did not otherwise exist. Before the respondent can complain of negligence he must make out a duty of care — he has not done so. Not that I am sure it is a question of negligence. The sum in dispute is small, but I believe the question is of considerable importance. If the appellants are liable in this case, I do not know how they can avoid it in similar cases. It is certain that the porter exceeded his duty if he made the defendants liable, and I suppose other porters, from good nature or the hope of a tip, will do the same again, though expressly forbidden as this man was. The result of what took place is that the defendants are held liable for not taking care of the bag during the time it did not suit Mrs. Bunch to do so.

I cannot pretend to a doubt on the case. Nor can I understand the repeated expression that the County Court Judge might find as he did, an expression that imports he might have found otherwise. How can that be when the actual facts are not in dispute, nor the conclusions to be drawn from them? I hold that the judgment is wrong and should be reversed.

No. 15. — Great Western Ry. Co. v. Bunch, 13 App. Cas. 52, 53.

Lord HERSCHELL :—

My Lords, no appeal lies in this case from any conclusion of fact arrived at by the County Court Judge. It is only if he has erred in law that his judgment can be questioned. The single point, therefore, which has to be determined is, as it seems to me, whether there was any evidence to warrant the conclusion that the plaintiff's luggage was lost owing to a breach of obligation on the part of the defendants. It is not necessary for me to state the facts. They have been fully brought before the House by those of your Lordships who have preceded me. I will only *say that I do not think that the question put to the [* 53] porter by Mrs. Bunch, or the answer given by him, really affects the case. If the company were under an obligation towards the plaintiff in respect of the bag, I cannot think that this question and answer diminished or destroyed it. If they were not under any such obligation, I do not think it was imposed upon them by the statement of the porter.

I concur entirely in the opinions which have been expressed by the noble and learned Lord upon the woolsack and the noble and learned Lord on my right (Lord WATSON), and think it necessary to add but little.

Although there was a difference of opinion amongst the Judges in the Court below, and your Lordships do not all take the same view, I think the difference is confined within somewhat narrow limits. I believe that all the Judges who have dealt with the case and all your Lordships are agreed, that if luggage is brought to a railway station and handed to a porter so long before the time appointed for the starting of the train, that it cannot be reasonably said to be entrusted to him for the purpose of its transit with the passenger to his destination, but must be considered as so entrusted for the purpose of being taken care of until the time for the departure of the passenger arrives, the porter is not the servant or agent of the company to undertake the custody and care of the luggage, and the company would not be liable for its loss. Railway companies have provided cloak-rooms or left-luggage offices, which are the proper receptacles for luggage brought to the station under such circumstances.

On the other hand, I do not understand my noble and learned friend (Lord BRAMWELL), who differs from the majority of your Lordships, to doubt that the porter who receives a passenger's

luggage at the entrance of the station for the purpose of conveying it to the train, does so as the servant of the company, and that they are liable as well for the luggage which the passenger intends to take with him in the carriage as that destined for the van, in case it is lost during its transit to either carriage or van owing to the porter's negligence. And I understand him further to entertain the view that though the traveller does not proceed direct to the train with his luggage, but stops for the purpose of [* 54] * taking his ticket, the company are nevertheless liable during the time so occupied.

Now, I do not think it can be laid down that procuring a ticket is the only act incidental to the journey for which the passenger may pause on his way to the train without the company being free from liability in case the luggage is lost in the mean time; would not the case be the same if he waited to meet a person who had promised to take his ticket for him, provided always he has not come unreasonably early, and does not wait an unreasonable time? Does, then, the fact that the train by which the passenger is to depart is not at the platform when he arrives at the station make any difference? It may, no doubt, be an element in determining whether the passenger has arrived so early that the transit to his destination cannot properly be said to have commenced. But I do not think it is conclusive of the point, or that the obligation of the company is necessarily different from what it would be if the train were alongside the platform.

It is a matter of common knowledge that the practice of different railway companies, and indeed of the same company at different times, varies greatly as to the length of the period prior to the departure of the train during which it is drawn up at the platform. Sometimes after being at the platform the train is shunted out of the station, and only returns immediately before its departure. Under these circumstances it is impossible even for a passenger who arrives very shortly before the time fixed for the departure of the train to know, when he alights at the station and entrusts his luggage to a porter, whether the train is at the platform or not. The question whether the luggage can fairly be said to be in the custody of the company's servant for the purpose of transit, or of what I may term warehousing, will not, I think, be generally difficult of solution, though as it is not possible to lay down any strict line of demarcation, there will always be cases on the border where opin-

ions may differ as to the proper conclusion to be drawn. In the present case Mrs. Bunch arrived forty minutes before the time of departure. She was about ten minutes waiting for her husband, who was to take her ticket. On the other hand, it was Christmas eve, when the trains are *notoriously crowded, [* 55] and prudence dictates an earlier arrival than usual. We have not to determine what would be our view of these facts. I concur with those of my noble and learned friends who think that the County Court Judge was warranted in point of law in arriving at the conclusion which he did with respect to them.

I have only to add that although it is not necessary in this case to determine what is the nature of the duty devolving upon a railway company in respect of luggage carried, or intended to be carried, in the same carriage with the passenger, I am disposed to agree with my noble and learned friends in preferring the view of this duty to be derived from the cases of *Richards* v. *London, Brighton, and South Coast Railway Company*, and *Butcher* v. *London and South Western Railway Company*, to that enunciated in the judgment of the Court of Appeal in *Bergheim* v. *Great Eastern Railway Company*.

Lord MACNAGHTEN : —

My Lords, I concur in the motion which has been proposed.

Everybody who travels by railway knows that, as a general rule, persons arriving at a station with luggage are met at the entrance of the station by railway porters ready to receive their luggage, to take it to the platform, and to put it into the train. Everybody too knows that, while in ordinary course the heavier articles of luggage are labelled and placed in a van under the sole control and custody of the railway company, it is the common practice for passengers to take the lighter articles of luggage, or "hand-luggage," as it is called, in the carriage with them. This practice is recognised by railway companies, who provide suitable receptacles for hand-luggage in passenger carriages. And it is a practice as much for the convenience of railway companies as it is for the convenience of passengers.

It was contended by the appellants that in receiving a passenger's luggage, railway porters, though in the service of the company and forbidden to accept any payment from the public, must be taken to be acting on behalf of the passenger, and as his *agents, and that this relation continues as regards van- [* 56]

luggage until it is labeled for the journey, and as regards hand-luggage until it is placed in the carriage in which the passenger intends to travel. Further, it was contended that the contract as regards van-luggage is altogether distinct and different from the contract as regards hand-luggage; that, in fact, there are two separate contracts, and that whatever may be the case as regards van-luggage, railway companies come under no liability of any sort as regards hand-luggage until it is placed in the passenger's carriage.

I cannot think this view correct. The services rendered by railway porters in receiving passengers' luggage, in taking it to the platform, and putting it into the train, are part of the ordinary facilities for passenger traffic which the public nowadays expects from railway companies, and which railway companies for the most part hold themselves out as ready and willing to afford. These services are covered by the fare which the passenger pays for his journey. They are offered in view of the contract which a person who presents himself with luggage at a railway station presumably either has made or is about to make. The contract, as the case may be, runs from, or relates back to, the commencement of the journey; and the journey must, I think, be taken to commence, as regards passengers' luggage, at the time when the luggage is received by the company's servants for the purpose of the journey. Thenceforward the work done in taking the luggage to the platform, in putting it into the train, in conveying it to its destination, and there delivering it, must, I think, be regarded under ordinary circumstances as one continuous operation to be performed under the contract. The contract is the ordinary contract of common carriers, — a contract to carry securely. The contract, no doubt, becomes modified as regards that part of the luggage which is put into the passenger's carriage. At the passenger's request, or at his instance, the company dispense with precautions which they think necessary for the safety of the goods they have undertaken to carry, and so the passenger relieves the company from some of the risks which otherwise would fall upon them. But, for all that, the contract is one contract, and in ordinary course, except so far [*57] as it may be modified by the *acts or conduct of the passenger, it remains in force during the continuance of the journey from its commencement to its end. If the reasoning in *Bergheim* v. *Great Eastern Railway Company* seems to lead to a different conclusion, with all deference I am unable to concur in it.

I prefer the view expressed by WILLES, J., in *Talley* v. *Great Western Railway Company.*

Your Lordships are familiar with the evidence in the case, and I do not propose to repeat it. It is enough to say that on the 24th of December, 1884 at 4.20 P. M. Mrs. Bunch came to Paddington with a Gladstone bag and some other luggage, meaning to travel with her husband by the 5 P. M. train to Bath, that on her arrival at the station the luggage was received by a porter in the employment of the company, and taken by him to the platform for the purpose of the journey, and that the Gladstone bag was last seen on the platform with the same porter a few minutes afterwards. From that time all trace of the bag is lost. The porter and the bag both vanish from the scene. It was suggested by the learned counsel for the appellants, by way of explanation, that the porter was possibly one of a number of men picked up by the company for the day to meet the pressure of Christmas traffic. But I may observe, in passing, that so far as the public was concerned, there was apparently nothing to distinguish the casual helper, of whom little if anything was known, from the regular and trusted servants of the company.

On these bare facts standing alone it seems to me that there would be evidence upon which the County Court Judge might reasonably find for the plaintiff, even if the company were not under the liability of common carriers as regards the lost bag.

But then it was contended with much earnestness that it ought to have been inferred from the circumstances of the case and from Mrs. Bunch's conduct that at the time of the loss the bag was not in the custody of the company for the purpose of the journey. It was said that Mrs. Bunch came to the station too soon, — that she came before the train was drawn up, — that she broke the journey, if the journey is to be taken as having begun, — and left the bag in the charge of a porter who was then not acting as the servant of the company within the scope of his authority as such, but *acting as her agent in his individual capacity, [*58] and that if this was not what she meant, it was an attempt on her part to saddle the company with a liability which they were not bound to undertake.

It seems to me that there is no substance in any of these objections. Mrs. Bunch, no doubt, came to the station somewhat early. But the one thing railway companies try to impress on the public

is to come in good time. And considering the crowd likely to be attracted by cheap fares during the Christmas holidays, and the special bustle and throng on Christmas eve, it does not seem to me that Mrs. Bunch came so unreasonably early as to relieve the company who received the luggage from the ordinary obligations flowing from that receipt. It is impossible to define within the extreme limits on both sides the proper time for arrival. Everything must depend upon the circumstances of the particular case. But among those circumstances, the least important, as it seems to me, is the time when the train is drawn up at the departure platform. That is, as everybody knows, a very variable time. And it is a matter over which the passenger has no control, and of which he can have no notice before he comes to the station.

Then I think there is nothing in the conversation which took place between Mrs. Bunch and the porter. Mrs. Bunch's question was a very natural one. The answer she received was just what might have been expected. Nine women out of ten parting with a travelling bag on which they set any store would ask the same question. In ninety-nine times out of a hundred the same answer would be returned. I do not think that this conversation altered the relation between the parties in the least degree. It seems to me almost absurd to treat it as a solemn negotiation by which the lady abdicated such rights as she possessed against the Great Western Railway Company, and constituted this ephemeral and evanescent porter in his individual capacity the sole custodian of her Gladstone bag.

Nor can it, I think, be said that Mrs. Bunch broke the journey by leaving the platform to meet her husband and get her ticket. To take a ticket is a necessary incident of a railway journey. It is, at least, a very common incident in railway travelling for persons who intend to travel in company, whether they be members [*59] of *the same family or not, to meet by appointment in the railway station from which they mean to start, and it is certainly not unusual in such a case for the purchase of tickets to be deferred until the meeting takes place.

It may be that a passenger who has delivered his luggage to a porter at the entrance of the station, though the delivery is in proper time for the intended journey, is not entitled as of right and under all circumstances to consider the company responsible for the safe keeping of his luggage before it is put into the train. A pas-

senger knows that he is not the only person to be attended to, and it might not be unreasonable to hold that there is an implied agreement on his part that he will be ready to resume possession of his luggage if the exigencies of the traffic require that it should be handed back to him in the interval before the time comes to put it into the train. No such question, however, arises here. The lost bag was not left unguarded owing to the exigencies of traffic, or neglected by the porter who took it in consequence of the pressure of conflicting duties. But I desire to say that, for my part, I am not satisfied that a passenger's luggage which has been received by the company's servants, and taken to the platform, lies there at the risk of the passenger, if he is not ready forthwith, or the moment he has got his ticket, to step into the train.

It was said that if everybody acted as Mrs. Bunch acted in this case, railway companies would require an army of porters, and that it would be almost impossible for them to carry on their business. I quite agree; but I am not much impressed by that observation. I apprehend that if all travellers acted precisely alike, if everybody arrived at a station for a particular journey at precisely the same moment, though the time of arrival were the fittest that could be imagined, there would be no little confusion, and perhaps some consternation, among the railway officials. Whatever may be the result of your Lordships' judgment, there is no fear that it will have the effect of making everybody act alike. Some passengers will still give more trouble at the stations than others, but no one will give any more trouble for it. Things will go on just as usual. The fidgety and the nervous will still come too soon; the unready and the unpunctual will still put off * their chance [* 60] of arrival till the last moment, and the prudent may have their calculations upset by the many accidents and hindrances that may be met with on the way to the station. And it is just because of the irregularity of individuals that the stream of traffic is regular and easily managed.

In the result, therefore, I am of opinion that the majority of the Court of Appeal were right in the view they took. The nature of the case requires that a broad view should be taken. The contract between the company and the passenger is not a contract in writing, defining with mathematical accuracy the precise limits of the incidental services which the company are prepared to render, and punishing every transgression, every attempt on the part of the

passenger to exact more than his just measure of attention, with the loss of that security which belongs to a contract by common carriers. Railway companies do their best to adapt the conduct of their business to the habits of the travelling public, who resent nothing so much as petty and vexatious regulations; and so the contract becomes moulded in matters incidental to its main purpose by that which is, and is known to be, the ordinary and every-day practice of railway companies. A narrow, technical, and jealous view of the rights of individual passengers might, perhaps, enable railway companies to escape liability in some few cases: I much doubt whether it would tend to their advantage in the long run.

Order appealed from affirmed, and appeal dismissed with costs.

Lords' Journals, 24th February, 1888.

ENGLISH NOTES.

The duty to carry passengers' luggage free of charge and as insurers is recognised by the definition of "traffic" in the Railway and Canal Traffic Act 1854 (17 & 18 Vict. c. 31, sections 1 & 2). Railway companies cannot refuse to take charge of personal luggage in order to avoid their liability as insurers. *Munster* v. *South Eastern Railway Co.* (1858), 4 C. B. (N. S.) 676, 27 L. J. C. P. 308. They are, however, not precluded from making special stipulations with regard to the carriage of luggage by cheap excursion trains. *Rumsey* v. *North Eastern Railway Co.* (1863), 14 C. B. (N. S.) 641, 32 L. J. C. P. 244, 8 L. T. 666.

Personal luggage includes everything taken by a passenger either with reference to the immediate necessities or to the ultimate purposes of the journey; but not articles of merchandise carried by him for hire or profit. The following have been held to be outside the description of personal luggage: Bed linen and blankets intended, not for the use of the traveller on the journey, but for the use of his household when permanently settled, *Macrow* v. *Great Western Railway Co.* (1871), L. R., 6 Q. B. 612, 40 L. J. Q. B. 300, 24 L. T. 618; documents, bank notes, and title deeds, *Phelps* v. *London and North Western Railway Co.* (1865), 19 C. B. (N. S.) 321, 34 L. J. C. P. 259, 12 L. T. 496; toys meant for presents, but of such a size and shape as cannot be reasonably carried as luggage, *e. g.*, a "spring-horse" (an improved rocking-horse), *Hudston* v. *Midland Railway Co.* (1869), L. R., 4 Q. B. 366, 38 L. J. Q. B. 213, 20 L. T. 526.

"Under the term 'luggage' may be comprised his clothing and

everything required for his personal convenience, and perhaps even a small present, had he had such with him, or a book on the journey might also be included in that term." *Per* PARKE, B., in *Shepherd* v. *Great Northern Railway Co.* (1852), 8 Ex. 30, 21 L. J. Ex. 286.

Personal luggage "would include not only articles of apparel, whether for use or ornament, — leaving the carrier to the protection of the Carriers' Act, to which he is undoubtedly entitled in respect of passengers' luggage, for which he is liable as a carrier of goods, — but also the gun-case or the fishing apparatus of the sportsman, the easel of the artist on a sketching tour, or the books of the student, and other articles of an analogous character, the use of which is personal to the traveller, and the taking of which has arisen from the fact of his journeying." *Per* COCKBURN, C. J., in *Macrow* v. *Great Western Railway Co.* (1871), L. R., 6 Q. B. 612, at p. 662, 40 L. J. Q. B. 300, at p. 304.

A railway company may, however, be fixed with liability as a common carrier in respect of luggage other than strictly personal, or in respect of more than the regulation quantity of personal luggage, by consenting to or by not dissenting from the conveyance of it with the passenger, provided they had an opportunity of acquainting themselves with the contents thereof. *Shepherd* v. *Great Northern Railway Co.*, *supra*.

The liability as common carriers in respect of the personal luggage of a passenger commences with its acceptance for carriage. In *Lovell* v. *London, Chatham, and Dover Railway Co.* (1876), 45 L. J. Q. B. 476, 34 L. T. 127, the company was held liable under the circumstances narrated by LUSH, J., in effect as follows: A passenger arrives at the station just before the time when she expects her train to start. She was, however, mistaken in the hour of the departure of the train. A porter comes up to the cab, "Am I in time for the 2.50 train?" she asks. "There is no such train," he replies; "but there is one at 3.13." "Can I get my ticket?" she inquires. "Yes, in a few minutes," is the answer; and then while she goes to take the ticket the porter takes her luggage away to label it. The luggage was lost. In *Agrell* v. *London and North Western Railway Co.* (Ex. Ch. 1876), 34 L. T. 134, *n.*, the passenger was not allowed to recover damages for loss of luggage intrusted to a porter, but without any instructions as to its destination. The porter left it on the platform, and the passenger labelled his own luggage. This case was referred to in *Lovell* v. *London, Chatham, and Dover Railway Co.*, *supra*, on which BLACKBURN, J., observed: "This is very different, as the luggage here was given to the porter to label it for a particular journey to a particular place." In *Welch* v. *London and North Western Railway Co.* (1885),

34 W. R. 166, an intending passenger, having missed his train, requested the porter to take charge of his luggage until the next train timed to start about an hour afterwards. The luggage was lost, but it was held that the company was not liable. For, *per* Day, J., the porter was not the agent authorized by the company to enter into any contract to take charge of the goods; and, *per* A. L. Smith, J., the plaintiff deposited the luggage with the porter for the purpose of warehousing and taking care of it, and not for the purpose of transit at all.

The liability as common carriers continues till delivery of the goods to the passenger on arrival. If the passenger fails to take delivery within a reasonable time after arrival, or leaves the luggage in charge of a porter, the company ceases to be liable as insurers. *Richards* v. *London, Brighton, and South Coast Railway Co.* (1849), 7 C. B. 839, 18 L. J. C. P. 251; *Butcher* v. *London and South Western Railway Co.* (1855), 16 C. B. 13, 24 L. J. C. P. 137; *Patscheider* v. *Great Western Railway Co.* (1878). 3 Ex. D. 153, 38 L. T. 149; *Hodgkinson* v. *London and North Western Railway Co.* (1886), 14 Q. B. D. 228, 32 W. R. 662; *Firth* v. *North Eastern Railway Co.* (1888), 36 W. R. 467.

When a passenger takes sole charge of his luggage the company is not liable in absence of negligence. *Talley* v. *Great Western Railway Co.* (1871), L. R., 6 C. P. 44, 40 L. J. C. P. 9, 23 L. T. 413.

The liability is towards the passenger only. A third party whose property is lost while being carried as a passenger's luggage cannot maintain an action against the company. *Becher* v. *Great Eastern Railway Co.* (1870), L. R., 5 Q. B. 241, 39 L. J. Q. B. 122, 22 L. T. 299.

AMERICAN NOTES.

As to the first branch of the Rule, it is familiar and well-settled law in this country, and no exceptions are made to it, although some construction has arisen upon the term "personal luggage." See notes, 8 Am. Rep. 302; 34 ibid. 379.

On the second branch, where a passenger kept possession of his coat and left it in the coach and it was stolen, the company was held not liable. *Tower* v. *Utica, &c. R. Co.*, 7 Hill (New York). 47; 42 Am. Dec. 36. So as to a coat retained by the passenger. *Palace Steamboat C.* v. *Vanderpool*, 16 B. Monroe (Kentucky), 302. So as to jewelry left by a woman in her satchel in her stateroom on going to meals and stolen. *The R. E. Lee*, 2 Abbott (United States), 49; and a watch from the passenger's coat, or from under his pillow in a stateroom. *Clark* v. *Burns*, 118 Massachusetts, 275; 19 Am. Rep. 456. But not so of a satchel containing wearing apparel left in a locked stateroom and stolen. *Macklin* v. *N. J. St. Co.*, 7 Abbott Practice Reports,

N. S. (New York), 229: and of an overcoat thus left. *Gore* v. *Norwich, &c. T. Co*, 2 Daly (New York Superior Ct.), 254. Where a passenger on a steamer put his trunk under his bed and fastened it to it with ropes, and it was stolen, the carrier was held not liable. *Cohen* v. *Frost*, 2 Duer (New York Superior Ct.), 335. And so where an intending passenger put his trunk in the usual place, but without notice thereof or of his intention to become a passenger. *Wright* v. *Caldwell*, 3 Michigan, 51.

But the carrier is liable for negligence, even in cases where the passenger assumes the care. *Kinsley* v. *Lake Shore, &c. R. Co.*, 125 Massachusetts, 54; 28 Am. Rep. 200 (luggage in a sleeping car); *Morris* v. *Third Ave. R. Co.*, 23 Howard Practice Reports, 345 (New York); *Am. St. Co.* v. *Bryan*, 83 Pennsylvania State, 446; *Pullman Palace Car Co.* v. *Pollock*, 69 Texas, 120; 5 Am. St. Rep. 31, and note, 34.

In *McKee* v. *Owen*, 15 Michigan, 115, the Supreme Court were equally divided in opinion as to the liability of the steamboat carrier, where a woman on going to bed at night rolled up her money in her gown and laid it in the upper berth, and it was stolen through a broken window. But ordinarily money on the person is held not to be luggage or baggage for which the carrier is even responsible. *Illinois Cent. R. Co.* v. *Handy*, 63 Mississippi, 609; 56 Am. Rep. 846; *First Nat. Bk.* v. *Marietta, &c. R. Co.*, 20 Ohio State, 259; 5 Am. Rep. 655. In *Adams* v. *N. J. St. Co.*, 9 Miscellaneous Rep. (New York Com. Pl.), 25, the carrier was held liable, without negligence, for loss of the passenger's money, to a reasonable amount for expenses, retained in his stateroom.

If the passenger fails to deposit his luggage in a room designated by the carrier, to his knowledge, the carrier will not be liable except for negligence. *Gleason* v. *Goodrich Trans. Co.*, 32 Wisconsin, 85; 14 Am. Rep. 716.

The *Bergheim case* is reported in 30 Moak's English Reports, 117, with note. The English cases of *Talley* v. *Great Western Ry. Co.*, L. R., 6 C. P. 44, and *Glover* v. *London and South Western Ry. Co.*, L. R., 3 Q. B. 24, are considerably cited in this country.

Hutchinson says (Carriers, § 700): "It may be concluded that the ordinary baggage of passengers by ships and steamboats may be taken by them into the staterooms which are assigned to them, without relieving the carrier from any of his responsibility for its safety, as a common carrier, in the absence of negligence on the part of the passenger contributing to its loss, unless forbidden by a regulation of the vessel, or otherwise specially prohibited, or unless it appear as a matter of fact that the passenger has taken it into his charge *animo custodiendi*, to the exclusion of the carrier, the assignment to the room being generally 'a designation of the place in which the traveller may put his ordinary baggage,' without excluding the custody of the carrier. But that if passengers by land vehicles, such as railway trains, retain in their custody any part of their baggage, to the exclusion of the carrier's control over it, the latter can be held liable for its loss only when it has been occasioned by his negligence; and if the passenger fails to take such reasonable care of it as would be expected of a prudent person, and it is in consequence lost, the loss must be borne by him, and not by the carrier, as was held in the above case of *Talley* v. *Great Western Railway Co.*," L. R., 6 C. P. 44.

See an exhaustive review by John D. Lawson in 10 Central Law Journal, 444.

No. 16. — Hadley v. Baxendale. 9 Exch. 341-344. — Rule.

Section V. — *Measure of Damages for Breach of Contract.*

No. 16. — HADLEY *v.* BAXENDALE.
(1854.)

No. 17. — HORNE *v.* MIDLAND RAILWAY COMPANY.
(Ex. Ch. 1873.)

RULE.

The amount of damages recoverable from a carrier is such as would naturally result from the breach of the contract, whether as the ordinary consequence of such a breach, or as a consequence which may, under the circumstances, be presumed to have been in the contemplation of both parties at the time they made the contract as the probable result of the breach of it.

Hadley v. Baxendale.

9 Exch. 341-356 (s. c. 23 L. J. Ex. 179; 1 Jur. N. S. 358).

[341] *Carrier. — Breach of Contract. — Notice of Special Circumstances. — Measure of Damages.*

Plaintiffs, the owners of a flour mill, sent a broken iron shaft to an office of the defendants, who were common carriers, to be conveyed by them, and the defendants' clerk, who attended at the office, was told that the mill was stopped, that the shaft must be delivered immediately, and that a special entry, if necessary, must be made to hasten its delivery. The delivery of the broken shaft to the consignee, to whom it had been sent by the plaintiffs as a pattern, by which to make a new shaft, was delayed for an unreasonable time; in consequence of which, the plaintiffs did not receive the new shaft for some days after the time they ought to have received it, and they were consequently unable to work their mill from want of the new shaft, and thereby incurred a loss of profits: —

Held, that the information communicated to the defendants as above was not sufficient to fix them with liability for the loss of profits claimed as special damages in an action against the defendants as common carriers.

Action for breach of contract by a carrier, claiming special damage for delay in delivery.

Plea, payment into Court of £25.

[344] At the trial before Crompton, J., at the last Gloucester Assizes, it appeared that the plaintiffs carried on an exten-

sive business as millers at Gloucester; and that, on the 11th of May, their mill was stopped by a breakage of the crank shaft by which the mill was worked. The steam-engine was manufactured by Messrs. Joyce & Co., the engineers, at Greenwich, and it became necessary to send the shaft as a pattern for a new one to Greenwich. The fracture was discovered on the 12th, and on the 13th the plaintiffs sent one of their servants to the office of the defendants, who are the well-known carriers trading under the name of Pickford & Co., for the purpose of having the shaft carried to Greenwich. The plaintiffs' servant told the clerk that the mill was stopped, and that the shaft must be sent immediately; and in answer to the inquiry when the shaft would be taken, the answer was, that if it was sent up by twelve o'clock any day, it would be delivered at Greenwich on the following day. On the following day the shaft was taken to the defendants, before noon, for the purpose of being conveyed to Greenwich, and the sum of £2 4*s.* was paid for its carriage for the whole distance; at the same time the defendants' clerk was told that a special entry, if required, should be made to hasten its delivery. The delivery of the shaft at Greenwich was delayed by some neglect; and the consequence was, that the plaintiffs did not receive the new shaft for several days after they would otherwise have done, and the working of their mill was thereby delayed, and they thereby lost the profits they would otherwise have received.

On the part of the defendants, it was objected that these damages were too remote, and that the defendants were not liable with respect to them. The learned Judge * left the case generally to the jury, who found a verdict with £25 damages beyond the amount paid into Court. [* 345]

Whateley, in last Michaelmas Term, obtained a rule *nisi* for a new trial, on the ground of misdirection.

The rule having been argued, the Court took time for consideration.

The judgment of the Court was now delivered by [353]

Alderson, B. We think that there ought to be a new trial in this case; but, in so doing, we deem it to be expedient * and necessary to state explicitly the rule which the Judge, at the next trial, ought, in our opinion, to direct the jury to be governed by when they estimate the damages. [* 354]

It is, indeed, of the last importance that we should do this; for,

if the jury are left without any definite rule to guide them, it will, in such cases as these, manifestly lead to the greatest injustice. The Courts have done this on several occasions; and in *Blake* v. *Midland Railway Company*, 18 Q. B. 93; 21 L. J. Q. B. 237, the Court granted a new trial on this very ground, that the rule had not been definitely laid down to the jury by the learned Judge at *Nisi Prius*.

"There are certain established rules," this Court says, in *Alder* v. *Keighley*, 15 M. & W. 117; 15 L. J. Ex. 100; "according to which the jury ought to find." And the Court, in that case, adds: "And here there is a clear rule, that the amount which would have been received if the contract had been kept, is the measure of damages if the contract is broken."

Now we think the proper rule in such a case as the present is this: Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, *i. e.*, according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it. Now, if the special circumstances under which the contract was actually made were communicated by the plaintiffs to the defendants, and thus known to both parties, the damages resulting from the breach of such a contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a [*355] *breach of contract under these special circumstances so known and communicated. But, on the other hand, if these special circumstances were wholly unknown to the party breaking the contract, he, at the most, could only be supposed to have had in his contemplation the amount of injury which would arise generally, and in the great multitude of cases not affected by any special circumstances, from such a breach of contract. For, had the special circumstances been known, the parties might have specially provided for the breach of contract by special terms as to the damages in that case; and of this advantage it would be very unjust to deprive them. Now the above principles are those by which we think the jury ought to be guided in estimating the damages arising out of any breach of contract. It is said, that

other cases, such as breaches of contract in the non-payment of money, or in the not making a good title to land, are to be treated as exceptions from this, and as governed by a conventional rule. But as, in such cases, both parties must be supposed to be cognisant of that well-known rule, these cases may, we think, be more properly classed under the rule above enunciated as to cases under known special circumstances, because there both parties may reasonably be presumed to contemplate the estimation of the amount of damages according to the conventional rule. Now, in the present case if we are to apply the principles above laid down, we find that the only circumstances here communicated by the plaintiffs to the defendants at the time the contract was made, were, that the article to be carried was the broken shaft of a mill, and that the plaintiffs were the millers of that mill. But how do these circumstances show reasonably that the profits of the mill must be stopped by an unreasonable delay in the delivery of the broken shaft by the carrier to the third person? Suppose the plaintiffs had another shaft in their possession put up or putting up at the time, and that they only wished to * send back the [* 356] broken shaft to the engineer who made it; it is clear that this would be quite consistent with the above circumstances, and yet the unreasonable delay in the delivery would have no effect upon the intermediate profits of the mill. Or, again, suppose that at the time of the delivery to the carrier, the machinery of the mill had been in other respects defective, then, also, the same results would follow. Here it is true that the shaft was actually sent back to serve as a model for a new one, and that the want of a new one was the only cause of the stoppage of the mill, and that the loss of profits really arose from not sending down the new shaft in proper time, and that this arose from the delay in delivering the broken one to serve as a model. But it is obvious that, in the great multitude of cases of millers sending off broken shafts to third persons by a carrier under ordinary circumstances, such consequences would not, in all probability, have occurred; and these special circumstances were here never communicated by the plaintiffs to the defendants. It follows, therefore, that the loss of profits here cannot reasonably be considered such a consequence of the breach of contract as could have been fairly and reasonably contemplated by both the parties when they made this contract. For such loss would neither have flowed naturally from the breach of

this contract in the great multitude of such cases occurring under ordinary circumstances, nor were the special circumstances, which, perhaps, would have made it a reasonable and natural consequence of such breach of contract, communicated to or known by the defendants. The Judge ought, therefore, to have told the jury that, upon the facts then before them, they ought not to take the loss of profits into consideration at all in estimating the damages. There must therefore be a new trial in this case. *Rule absolute.*

Horne v. Midland Railway Company.

L. R., 8 C. P. 131–148 (s. c. 42 L. J. C. P. 59; 28 L. T. 312; 21 W. R. 481).

Carrier. — Breach of Contract. — Notice of Special Circumstances. — Measure of Damages.

[131] The plaintiffs, being shoe manufacturers at Kettering, were under a contract to supply a quantity of military shoes to a firm in London for the use of the French army at 4*s.* per pair, an unusually high price. The shoes were to be delivered by the 3rd of February, 1871, and the plaintiffs accordingly sent them to the defendants' station at Kettering for carriage to London in time to be delivered there in the usual course in the evening of that day, when they would have been accepted and paid for by the consignees. Notice was given to the station-master (which for the purposes of the case was assumed to be notice to the company) at the time, that the plaintiffs were under a contract to deliver the shoes by the 3rd, and that unless they were so delivered they would be thrown on their hands; but he was not informed that there was anything exceptional in the character of the contract. The shoes were not delivered in London till the 4th of February, and were consequently not accepted by the consignees, and the plaintiffs were obliged to sell them at 2*s.* 9*d.* a pair, which, in consequence of the cessation of the French war, was, apart from the previously-mentioned contract, the best price that could have been obtained for them, even if they had been delivered on the evening of the 3rd of February, instead of the morning of the 4th.

In an action against the defendants for the delay in delivering the shoes, they paid into Court a sufficient sum to cover any ordinary loss occasioned thereby, but the plaintiffs further claimed the sum of £267 3*s.* 9*d.*, the difference between the price at which they had contracted to sell the shoes and the price which they ultimately fetched.

Held (per Kelly, C. B., Blackburn, J., Mellor, J., Martin, B., and Cleasby, B.: Lush, J., and Pigott, B., dissenting), that the plaintiffs were not entitled to recover the latter sum, the damage not being such as might reasonably be considered as arising naturally from the defendants' breach of contract, or such as might be reasonably supposed to have been in the contemplation of both parties at the time when they made the contract.

Per Kelly, C. B., Blackburn, J., and Mellor, J., and Cleasby, B., the notice given to the defendants was not such that they could reasonably be

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supposed to have had in their contemplation, at the time of entering into the contract for the carriage of the shoes, damages of such an exceptional nature as those claimed.

Per MARTIN, B., and, *semble*, per BLACKBURN, J., and LUSH, J., a mere notice as such could not have the effect of rendering the defendants liable to more than ordinary damages; but it must in order to do so be given under such circumstances as to make it a term of the contract that the defendants will be liable for such damages if the contract be broken.

Per LUSH, J., and PIGOTT, B., the notice given to the defendants was sufficient to put them upon inquiry as to the nature of the contract which the plaintiffs were under, and if they chose to accept the goods for carriage without further inquiry, they took the risk of what the contract might turn out to be, and were liable to the plaintiffs for the loss actually occasioned.

ERROR from the judgment of the Court of Common Pleas upon the following special case (L. R., 7 C. P. 583).

1. The plaintiffs are wholesale boot and shoe manufacturers at Kettering, in Northamptonshire. [583]

2. In January and February, 1871, the plaintiffs were under a contract with Messrs. Hickson & Sons, of West Smithfield, to supply them with 20,000 pairs of military shoes, at 4s. per pair. The last day for delivery was the 3rd of February, 1871; and all that were not so delivered would be thrown on the plaintiffs' hands.

3. The plaintiffs from time to time during the month of January delivered to Hickson & Sons, under their contract, shoes amounting in the aggregate to many thousands of pairs; and these were accepted by Hickson & Sons; but 4595 pairs which were * delivered by the plaintiffs to the defendants at Kettering, consigned to Hickson & Sons in London, and were not tendered by the defendants to Hickson & Sons till the 4th of February, were rejected by Hickson & Sons, and thrown on the plaintiffs' hands, and were sold by them at a loss. [* 584]

4. This action was brought to recover damages from the defendants for the loss so sustained by the plaintiffs. The defendants paid £20 into Court.

5. The 4595 pairs of shoes (hereinafter called "the goods") were delivered to the defendants at Kettering, consigned to Hickson & Sons, in time to have been delivered in London to the consignees in the evening of February the 3rd, when they would have been accepted by the consignees; but they were not tendered by the defendants to the consignees till the morning of the 4th, when the consignees refused them.

6. Notice was given by the plaintiffs to the defendants' station-master at Kettering, at the time when the goods were delivered to him, that the plaintiffs were under a contract to deliver by the evening of the 3rd of February; and it was to be taken, for the purposes of this case, that notice was at the same time given by the plaintiffs to the defendants, through their station-master, that the goods would be thrown upon the plaintiffs' hands if they were not so delivered by the said 3rd of February.

7. The goods, if received on the 3rd of February, would have been paid for by the consignees at the rate of 4*s.* a pair.

8. After the refusal of the consignees to accept the goods, the plaintiffs used their utmost endeavours to sell them at a good price, but could only get 2*s.* 9*d.* per pair for them, at which price they sold them.

9. The goods were in fact required by Hickson & Sons for a contract with a French house for supply to the French army; but, except as aforesaid, no notice of this fact, nor any information as to the extent or probable extent of damage in case of a breach of contract by the plaintiffs, was given to the defendants.

10. In consequence of the cessation of the war between France and Prussia, Hickson & Sons, except for the circumstance that they had the contract in question with the French house, could not have sold the goods at any better price than that actually
[* 585] * obtained, if they had received them on the evening of the 3rd of February instead of the morning of the 4th.

11. The plaintiffs claim to recover from the defendants as damages in this action the difference between 4*s.* per pair, the contract price, and 2*s.* 9*d.*, the price of actual sale. The defendants dispute that this is the proper measure of damages, and say that the plaintiffs are not entitled to recover damages in this action in respect of the loss sustained by reason of the goods having been sold at 2*s.* 9*d.* per pair instead of at the contract price of 4*s.* per pair.

12. It was agreed that the Court should be at liberty to draw any inference or to find any facts which, in the opinion of the Court, a jury ought to have drawn or found.

If the plaintiffs were entitled to the difference between the contract price and the price of actual sale, the damages were £267 3*s.* 9*d.* above the amount paid into Court. If they were not entitled to damages in respect of the price of actual sale, the £20 paid into Court was sufficient to cover the incidental expenses of

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sale and delivery to the ultimate purchaser, of attempts at re-sale, and any ordinary or general damages to which they were entitled. But, if the Court laid down any principle for assessing damages under which the plaintiffs might conceive that they were entitled to more than £20, then the damages were to be referred.

* Field, Q. C. (Lumley Smith with him), for the plain- [* 132] tiffs. *Primâ facie* the measure of damages is the amount of damage actually sustained. This rule is subject to the limitation that if the damages are exceptional, and such as the parties cannot be reasonably supposed to have contemplated when they entered into the contract, they cannot be recovered. In the present case the defendants must be taken to have contemplated the possibility of these damages occurring. Notice was given to their servant that the plaintiffs had a contract, and also that it was a profitable one, or else the shoes would be likely to be thrown on their hands. This was sufficient to put the person receiving the goods on inquiry as to what the nature of the contract was; and no such inquiry having been made, the defendants must be looked upon as having taken the risk of what it might turn out to be, and cannot now say that they did not contemplate the damages. In *France* v. *Gaudet*, L. R., 6 Q. B. 199 ; 40 L. J. Q. B. 121, in a case of trover, it was held that the plaintiff could recover the amount of the price at which he had resold the champagne, which was converted.

[Mellor, J. That case was peculiar. Champagne of a similar quality was said not to be procurable in the market. There was, therefore, no other test of the value of the goods.]

The value of the goods is the value that they have to the individual, and that is what he is entitled to recover. *Wilson* v. *The Lancashire and Yorkshire Ry. Co.*, 9 C. B. (N. S.) 632 ; 30 L. J. C. P. 232. The case falls within the principles laid down in *Riley* v. *Horne*, 5 Bing. 217, at p. 222. If the carrier does not choose to inquire as to the value of the goods, he takes the chance of what they may turn out to be. So here the goods had a certain value to the plaintiff by reason of the contract he had; the defendants are told that there is such a contract, and they do not choose to inquire what it is.

[Blackburn, J. It is clear the plaintiff gave notice that it was important that the goods should be delivered on the 3rd, but he gave no notice of the extraordinary nature of the contract. There is

a substantial consideration involved; if the carrier has notice of an extraordinary risk he may perhaps charge a higher rate of carriage to cover it. The real meaning of the limitation as to damages is that the defendant shall not be bound to pay more [* 133] * than he received a reasonable consideration for undertaking the risk of at the time of making the contract.]

Surely it cannot be necessary for a man to go with his contract in his hand, or to say, "I have contracted at such a price." It is sufficient if notice is given that the case is of an exceptional nature. Substantially, this notice amounted to an intimation that an important contract, of a highly beneficial character, was at stake.

[MARTIN, B. Must not there be what amounts to a contract to be responsible for the exceptional damages?]

In the case of *Hadley* v. *Baxendale*, 9 Ex. 341; 23 L. J. Ex. 179, p. 592, *ante*, it is stated that, "if the special circumstances under which the contract was actually made were communicated by the plaintiff to the defendants, and thus known to both parties, the damages resulting from such breach of contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances so known and communicated." It is not put as depending on a contract.

[BLACKBURN, J. In *Hadley* v. *Baxendale*, there was really no affirmative decision that a mere notice as such would be sufficient, because it was held that there was not a sufficient notice in that case. I know of no affirmative decision based on the *dictum* so thrown out in *Hadley* v. *Baxendale*.]

The notice here given may be treated as evidence of a contract. [He also cited *Gee* v. *Lancashire and Yorkshire Ry. Co.*, 6 H. & N. 211; 30 L. J. Ex. 11.]

H. James, Q. C. (Sturge with him). The inference to be drawn from the case is, that the market value of the goods on the day when they were brought to the defendants' station was the same as when they were ultimately sold. There is nothing to show any diminution in value during that period. Admitting that the contract of the company was a contract to carry and deliver by the 3rd of February and was broken, the question is, what are the damages? The damages are those for which the defendants have contracted to be responsible; and *primâ facie* the contract is to be responsible for any diminution in the ordinary market

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value of the goods between the day on which they ought to have been delivered and the day on which they actually were *delivered, and no such diminution is shown here. [*134] If it be sought to impose a further liability on the defendants, it is necessary to prove knowledge of the special facts imparted to them under such circumstances, as that a term was engrafted into the contract that they should be liable for the special damage; see per WILLES, J., in *British Columbia Saw Mills Co.* v. *Nettleship*, L. R., 3 C. P. 508; 37 L. J. C. P. 235. Then, was any such term engrafted into the contract here? All the defendants were told was, that there was a contract; nothing was said as to the exceptional nature of that contract, and the unnaturally high price at which the shoes were sold arising out of the peculiar circumstances of the case. The value of the shoes must be considered for the purpose of estimating the damages as the value contemplated by both parties, not that which is known to the one only, and not communicated by him to the other. The burden of inquiry is not thrown on the carrier in such a case; it is for the party who seeks to fix him with the consequences of knowledge to communicate the circumstances to him. If mere notice is not sufficient as such, then there is no evidence here of a contract to be liable for the special damage. The mere receipt of the goods by the carrier after such a notice as was given here does not amount to such a contract. The company, as common carriers, are bound to carry the goods. Assume, for the purpose of argument, that the carrier would not be bound to carry if the consignor insisted on his undertaking an exceptional liability, or might be entitled to insist on an increased rate in consideration of his contracting to bear such liability; still in order to raise an inference that the carrier has contracted to bear such liability the consignor must have acquainted him with the nature of it.

[LUSH, J. If your argument be correct the doctrine suggested in *Hadley* v. *Baxendale*, as to the effect of notice, is wrong.

MARTIN, B. If a contracting party on receiving notice of the extraordinary liability sought to be cast on him refused to undertake it, clearly he would not be liable. Does not this show that the right to exceptional damages depends on contract and not on mere notice?]

Assuming that notice might be sufficient, then the notice here was insufficient to bring the case within the doctrine in *Hadley*

*135] * v. *Bavendale.* [He also cited *Cory* v. *Thames Ironworks Co.*, L. R., 3 Q. B. 181; 37 L. J. Q. B. 68; *Smeed* v. *Ford*, 1 E. & E. 602; 28 L. J. Q. B. 178; *Great Western Ry. Co.* v. *Redmayne*, L. R., 1 C. P. 329; 35 L. J. C. P. 123.]

Field, Q. C., in reply, cited *Peninsular, &c. Co.* v. *Shand*, 3 Moo. P. C. (N. S.) at p. 293; *Great Northern Ry. Co.* v. *Behrens*, 7 H. & N. 950; 31 L. J. Ex. 299.

Kelly, C. B. I am of opinion that the judgment of the Court below must be affirmed. The rules by which this case must be determined are the creatures of authority, and we have not so much to consider in determining it what might be just or unjust, reasonable or unreasonable, under the circumstances of the case, in the absence of previous decisions, as to consider the cases that have been decided on the subject and deduce from them the general principles that must govern our judgment. It must, in the first place, be noticed that this is the case of a railway company, though it does not seem to have occurred to the Court below, or to the counsel in arguing the case there, that there was any material difference between the case of a railway company and that of any ordinary person who had contracted for the delivery of goods. It therefore becomes incumbent upon us to consider what is the nature of the ordinary contract between the consignor of goods and the carrier, and what is the obligation imposed upon a railway company in respect of the carriage of goods of an ordinary character such as those in the present case.

It is necessary, however, in the first place, to deal with certain facts that were made the subject of discussion during the argument. Questions were raised with respect to the market price of the shoes at the time of the making the contract for the sale of them, at the time of their delivery to the company, and at the time when they ought to have been delivered to the consignees. I see, however, nothing whatever stated in this case to show that the market price of the shoes at any time which it will be material for us to consider was more than the sum for which they ultimately sold, viz., 2*s.* 9*d.* a pair. We are not even told when the contract for the supply of the shoes was entered into, it is only stated in the case that the plaintiffs were in January and [*136] February, *1871, under contract to deliver a quantity of shoes. Then, with regard to the other periods referred to, there are no materials whatever laid before us from which we can

gather what the market price was other than the fact that on the day when they were disposed of they sold for 2*s.* 9*d.* a pair. It seems to me, therefore, that we must assume that the only market price put before us, viz., 2*s.* 9*d.* a pair, was the market price at the other periods in question. That being so, the plaintiffs deliver the shoes to the defendants to be conveyed by them to London, and there delivered on the 3rd of February, and they intimate to the defendants' servant that it is important that the shoes should be delivered on the 3rd, inasmuch as they are under contract to deliver them, and they will be thrown on their hands if not delivered. It is contended by the defendants that, under these circumstances, the plaintiffs can only recover damages calculated according to the ordinary value of the goods. A question of very great importance has been raised in the course of the argument, to which it is proper to refer, though, for reasons I shall presently state, I do not think it will ultimately become necessary to decide it, — that is to say, the question what the position of a railway company is when goods are entrusted to it for carriage with an intimation of the consequences of non-delivery, such as it was argued on behalf of the plaintiffs existed in the present case. The goods with which we have to deal are not the subject of any express statutory enactment; the case with respect to them depends on the common law taken in connection with the Acts relating to the defendants' railway company. Now, it is clear, in the first place, that a railway company is bound, in general, to accept goods such as these, and to carry them as directed to the place of delivery, and there deliver them. But now suppose that an intimation is made to the railway company, such as Mr. Field contended this amounted to, not merely that if the goods are not delivered by a certain date they will be thrown on the consignor's hands, but in express terms stating that they have entered into such and such a contract and will lose so many pounds if they cannot fulfil it, what is then the position of the company? Are they the less bound to receive the goods? I apprehend not. If, then, they are bound to receive, and do so without more, what is the effect * of the notice? Can it [* 137] be to impose upon them a liability to damages of any amount, however large, in respect of goods which they have no option but to receive? I cannot find any authority for the proposition that the notice without more could have any such effect.

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It does not appear to me that the railway company has any power, such as was suggested, to decline to receive the goods after such a notice, unless an extraordinary rate of carriage be paid. Of course they may enter into a contract, if they will, to pay any amount of damages for non-performance of their contract in consideration of an increased rate of carriage, if the consignors be willing to pay it; but in the absence of any such contract expressly entered into, there being no power on the part of the company to refuse to accept the goods, or to compel payment of an extraordinary rate of carriage by the consignor, it does not appear to me any contract to be liable to more than the ordinary amount of damages can be implied from mere receipt of the goods after such a notice as before mentioned.

For these reasons, even if the notice given in the present case could be taken as having the effect contended for by Mr. Field, I do not think, in the absence of any expressed or implied contract by the company to be liable to these damages, that there could be any such liability imposed upon them. But however this may be, and even assuming that there might be such a notice as would render the company liable to the exceptional damages claimed by the plaintiffs, I am clearly of opinion that the intimation given to the company in this case does not amount to such a notice. It certainly gave the defendants notice of what might probably be assumed to be the case without express notice, viz., that the plaintiffs being under contract to deliver the shoes, would have them thrown on their hands if not delivered in due time, but it gave the defendants no notice of the exceptional nature of the contract and the unusual loss that would result from a breach of it. That being so, the case comes within the principle clearly to be deduced from all the authorities (not excepting the case of *Hadley* v. *Baxendale* itself, whatever view may be taken of the *dictum* in that case with respect to the effect of notice), viz., that the damages for a breach of contract must be such as may fairly and reasonably [*138] be *considered as arising naturally, *i. e.*, according to the usual course of things, from such breach of contract itself, or such as may be reasonably supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it. The effect of the notice here is, that the company must be taken to have contemplated that the plaintiffs were under a contract to deliver the shoes, and

would be liable to lose the benefit of such contract, or to an action for breach of it, if they failed to deliver under it. The loss they would in the usual course of things sustain or the damages they would have to pay on such a contract would depend upon the rise or fall of the market price. We are not told when the contract for the sale of the shoes was made, nor what was the market price at that time. It appears to me, therefore, that the only damage we can consider is the difference between the market price at the time when the goods ought to have been delivered and the market price at the time when they were delivered. There is no evidence before us to show that the market value of the shoes at the time when they were delivered to the defendants or at the time when they ought to have been delivered to the consignees, differed from their value at the time when they were ultimately sold. So far as appears from the case, it seems to me that it must be taken that the market price was the same at all those periods. Under those circumstances, in the absence of any notice to the defendants of the exceptional nature of the contract into which the plaintiffs had entered, I think the plaintiffs are only entitled to nominal damages, unless, perhaps, in respect of expenses, if any, that were incurred, which would be amply covered by the amount paid into court. It appears to me that very serious consequences might result from making a railway company liable upon a mere notice that the consignor is under contract to deliver, such as that in the present case, for an indefinite amount of damages arising out of a contract of a highly exceptional nature, entered into under very special circumstances.

Martin, B. After feeling considerable doubt in the course of the argument, I have at length arrived at the same conclusion as the Lord Chief Baron. The case is, no doubt, one of some hardship to the plaintiffs, for they have unquestionably lost a large sum in consequence of the non-performance by the defendants of * their contract. But upon the best consideration [* 139] I have been able to give to the case, and looking to what is on the whole the best general rule to lay down in such cases, I am of opinion that the plaintiffs are not entitled to recover the extraordinary damages which they claim. It appears to me that one mode of testing the amount of the defendants' liability would be this: Suppose the goods, instead of merely being delayed in delivery, had been burnt while in defendants' custody. Would

the plaintiffs have been entitled to recover for them at the rate of 4s. a pair, or only their value at the time when they were burnt? It strikes me that they could only recover their value when burnt, and not their value calculated according to the price at which they were sold some time before, when the market was higher. The case of *France* v. *Gaudet*, which was cited in argument, was between vendor and purchaser, and, it appears to me, involved different considerations. I think these questions of damages must necessarily be considered very much upon the particular circumstances of each individual case. With regard to the present case another test may be suggested. If some other person had delivered a similar quantity of shoes to the defendants for carriage on the same day as the plaintiffs, not being under contract to deliver them, it is admitted he could only recover £20. How can it be, in the absence of an express contract to that effect, that by reason of a mere communication to the defendants that the goods would be thrown on the plaintiffs' hands if not delivered in time, so widely different a liability can arise upon contracts for which the amount of the consideration was the same, and in all other respects precisely similar? There is also another consideration which arises with respect to the case of a carrier, such as this is, showing the great importance of, as far as possible, keeping to a uniform rule with regard to damages in such cases. If such a notice as this were to be held sufficient to impose this exceptional liability on carriers, they would be laid open to imposition without end. There would be constant attempts to set up against them special circumstances, of which they would be alleged to have had notice, to enhance the damages. It seems to me that it would be very dangerous to impose any liability [* 140] on a carrier to damages * beyond the ordinary and natural consequences of his breach of duty, in the absence of something equivalent to a contract on his part to be liable to such damages.

Blackburn, J. I am also of opinion that the judgment should be affirmed. Various questions have arisen in the course of the case as to which it is not necessary to come to any absolute decision; and I do not wish, sitting in a Court of Error, in any opinion I may express upon such questions to be taken to have given any absolute decision upon them. No doubt, *primâ facie*, the damages which actually result from a breach of contract are

recoverable, provided that they are such as may fairly and reasonably be considered as arising directly and naturally, that is to say, in the ordinary course of things, from such breach of contract. The amount of them may be unexpectedly large, but still the defendants must pay. If a man contracts to carry a chattel and loses it, he must pay the value, though he may discover that it was more valuable than he had supposed. But when the damages sought to be recovered are not those which in the ordinary course of things would naturally arise, but are of an exceptional nature, arising from special and peculiar circumstances, it is clear that in the absence of any notice to the defendant of any such circumstances such damages cannot be recovered. It is said that there was a notice in the present case. Here arises, with relation to the doctrine of notice, one of those questions to which I have adverted, and on which in what I may now say I do not wish to be considered as expressing a final opinion. It is clear that if the notice be such, and given under such circumstances, as to amount to evidence of an actual contract to bear the exceptional loss arising from the breach of contract, then such contract, if found to exist, would be binding; but here, as it seems to me, it is quite clear that there was no such special contract. The plaintiffs delivered the goods to the superintendent at the railway station to be carried by the railway in time to be delivered by the company on the 3rd of February, and gave him notice of the fact that if they did not arrive by that date loss would be occasioned to them. The company would be bound to deliver in a reasonable time, and this notice would amount to a notice to the company that the
* reasonable time within which they would then be ex- [* 141]
pected to deliver, under the circumstances of the case, was by the 3rd of February; but I cannot see how it would alter the ordinary contract of the company into a contract to deliver by the 3rd of February, or to pay 1*s.* 3*d.* damages per pair for the shoes. I doubt whether it would have been within the authority of the station master to make any such contract. Then if there was no special contract, what was the effect of the notice? In the case of *Hadley* v. *Baxendale* it was intimated that, apart from all question of a special contract with regard to amount of damages, if there were a special notice of the circumstances the plaintiff might recover the exceptional damages. This doctrine has been adverted to in several subsequent decisions with more or

less assent, but they appear to have all been cases in which it was held that the doctrine did not apply because there was no special notice. It does not appear that there has been any case in which it has been affirmatively held that in consequence of such a notice the plaintiff could recover exceptional damages. The counsel for the plaintiffs could not refer to any such case, and I know of none. If it were necessary to decide the point, I should be much disposed to agree with what my Brother MARTIN has suggested, viz., that in order that the notice may have any effect, it must be given under such circumstances, as that an actual contract arises on the part of the defendant to bear the exceptional loss. Before, however, deciding the point, I should have wished to take time to consider; but it is not necessary to do so, for even assuming that the law is the contrary of that which I incline to think it to be, to my mind it is clear that there was no such notice in the present case as to raise the question. There was, no doubt, a full intimation to the defendants that the time by which the goods were delivered was of consequence, that the reasonable time which the company had to deliver in must not be protracted beyond the 3rd of February, and I think it may fairly be said that there was an intimation to the defendants that the contract under which the plaintiffs had to deliver was a profitable one; but I cannot see, giving the notice its widest construction, that it amounted to a notice that the plaintiffs would suffer such an exceptional [* 142] loss as * they did by non-delivery of the shoes. So that I think it is not necessary to decide whether the *dictum* in *Hadley* v. *Baxendale* is well founded, though I do not wish to disguise my present impressions on the subject.

MELLOR, J. I am of the same opinion. The contract entered into with the railway company by the plaintiffs was, as it appears to me, of the ordinary character, and there was a notice given that the goods were to be delivered by the 3rd of February, or they would be thrown on the consignors' hands. It does not seem to me that this notice, giving it its utmost effect, brings the case within the *dictum* in *Hadley* v. *Baxendale*. It was a notice, no doubt, that it was important that the goods should be delivered by the 3rd of February, but it was no notice of the exceptional circumstances of the case, and the exceptional price which was to be given for the shoes. There was, it is true, a notice that the consignor was under contract to deliver the shoes, but nothing was

told to the carrier as to the special nature of the contract. Under these circumstances it appears to me all that we can look to in estimating the damages is the market price when the shoes were delivered to the carrier, and the time when the contract was broken. What we are told as to that is, that in consequence of the cessation of the war between France and Prussia, Hickson & Sons, except for the circumstance that they had the contract in question with the French house, could not have sold the goods at any better price than that actually obtained if they had received them on the evening of the 3rd of February instead of the morning of the 4th. Under these circumstances, it seems to me, we must infer that the market value was the same on the 3rd as on the 4th, and so no special damages are recoverable. The sum of £20, therefore, which was paid into Court, was amply sufficient.

PIGOTT, B. I regret to be obliged to differ from the opinions expressed by my LORD CHIEF BARON and my Brothers MARTIN, BLACKBURN, and MELLOR. I think the plaintiffs are entitled to recover the damages which they claim. The question which we have to decide is, upon what principle damages are to be assessed for * breach of a contract to carry and deliver [* 143] entered into by a railway company with a special notice to them of the consequences of breach of contract on their part. I agree that if the company are to be liable for extraordinary damages by reason of the notice given to them, it must be because they are at liberty to decline to carry the goods at an extraordinary risk, unless it be that they have a right to charge an extraordinary rate of carriage in consideration of incurring such risk. The company cannot, I should suppose, as carriers, go beyond the highest rate permitted by their Acts of Parliament in any case, and probably that rate would not be an adequate remuneration to cover the increased risk. The alternative is, that they may decline to carry goods which are not tendered to them for carriage upon the ordinary liability of common carriers, unless the consignors will enter into a special contract in relation to such goods. It follows, to my mind, that if they do not refuse the goods or make any special stipulations with regard to them, but accept the goods with notice of what the consequences will be if they are not delivered by a certain time without objection, there is evidence from which we may infer that they have contracted on the special terms that they will be liable for those consequences. The whole

case, therefore, seems to me to resolve itself into the question, what was the contract between these parties? The notice given by the plaintiffs is to the effect that they are under contract to deliver the goods on the 3rd of February, and that if they do not deliver by that time the goods will be thrown on their hands. It seems to me this notice imports that the contract under which the plaintiffs were bound to deliver was a valuable contract to them, by performance of which they would reap profits, and by breach of which they would sustain loss. The defendants receive the goods under this notice, and they do break their contract, and the plaintiffs, as a consequence of such breach, incur loss to the extent of 1*s.* 3*d.* per pair upon the shoes. Such loss being actually the result of the defendants' breach of contract, why are the plaintiffs not to recover it? It can only be by reason of some artificial rule established by the decisions, or some ground of public policy, that makes the measure of the damages which may be recovered less than that which is actually sustained. I agree that the true rule is that which has been laid down, viz., that the damages [*144] must be *such as naturally, *i. e.*, in the ordinary course of things, flow from the breach, or such as may reasonably be supposed to have been in the contemplation of the parties. Why are not the damages in this case of the latter character? It does not seem to me to be shown that there was anything exceptional in the nature of the contract entered into for sale of the shoes. There was nothing exceptional in the price that I can see. The price was not greater than would have been given at the time the contract was made to any other person than the plaintiffs. It was the ordinary price which would have been paid at that time by reason of the circumstance that shoes were then in great demand in consequence of the French war. When the time came for delivery the price had fallen to 2*s.* 9*d.*, because the war was about to cease and the demand was smaller. What is there more in this than that the market had fluctuated and fallen between the time when the contract was made and the time for delivery? It is said that the defendants would not contemplate so large a loss from the notice that they received. If this notice be not sufficient it must be necessary in such a case to communicate the exact details of the contract. I cannot think this is so. If the carrier is told that the consignor is under contract to deliver by a certain day, or else he will lose the benefit of the contract, and accepts

the goods without further inquiry, does he not take the risk of what the loss on the contract may turn out to be? The consignor has put him on his guard, and if he omits to inquire further, he has only himself to blame. I agree with my Brother MARTIN, that these cases as to damages must necessarily often stand very much on their individual circumstances, but it seems to me that the present case is within the doctrine laid down in *Hadley* v. *Baxendale* and the cases that have followed it, and that these damages are such as may reasonably be considered as having been within the contemplation of the parties at the time they made the contract as the probable result of a breach of it. I therefore think the judgment of the Court below should be reversed.

LUSH, J. I also think the judgment of the Court below should be reversed. I agree that the liability of the carrier under ordinary circumstances is to pay such damages as are the [*145] natural and ordinary consequences of the breach of his contract, or such as may be reasonably supposed to have been in the contemplation of the parties. I think that the duty of the carrier is co-extensive with such liability. He is not at liberty to refuse to carry on the ordinary terms, but if it is sought to impose upon him a liability of an extraordinary nature arising out of peculiar circumstances, then I think he is entitled to decline to carry, unless he be paid a higher rate of carriage. Though there is no decision to that effect, the conclusion seems to me plainly deducible from the judgment in *Riley* v. *Horne*, 5 Bing. 217, which was a considered judgment of the Court of Common Pleas, delivered by BEST, C. J. The law is thus laid down at p. 220 of the report: "As the law makes the carrier an insurer, and as the goods he carries may be injured or destroyed by many accidents against which no care on the part of the carrier can protect them, he is as much entitled to be paid a premium for his insurance of their delivery at the place of destination as for the labour and expense of carrying them there. Indeed, besides the risk that he runs, his attention becomes more anxious and his journey is more expensive in proportion to the value of his load. If he has things of great value contained in such small packages as to be objects of theft or embezzlement, a stronger and more vigilant guard is required than when he carries articles not easily removed and which offer less temptation to dishonesty."

It appears to me plainly to follow from this exposition of the law

that if it is sought to fix a carrier with any extraordinary liability he may decline to carry unless a higher rate of remuneration be paid to him. It seems to have been accepted as the law from the case of *Hadley* v. *Baxendale* downwards, that where notice is given to the carrier of the special circumstances, and he consents nevertheless to carry the goods without objection, he may be liable for the extraordinary damages arising out of such circumstances. I agree, however, with the suggestion that the notice in such cases can have no effect except so far as it leads to the inference that a term has been imported into the contract making the defendant liable for the extraordinary damages. As WILLES, J., says in *British Columbia Saw Mills Co.* v. *Nettleship*, L. R., 3 C. P. 499, at p. 509, "the [* 146] * knowledge must be brought home to the party sought to be charged under such circumstances that he must know that the person he contracts with reasonably believes that he accepts the contract with the special condition attached to it." I think if the person delivering the shoes had said to the station-master that he was under contract to deliver the shoes by the 3rd of February, and would gain so much if he performed his contract and lose so much if he did not, and the station-master had without objection consented to receive the shoes, the company would have been liable. No question is now raised as to the authority of the station-master, and it must therefore be taken that for this purpose he represents the company. I have no doubt that what did pass on the delivery of the goods was equivalent to a distinct acceptance of the shoes by the company to be carried on the terms that the company were to be liable for the consequent loss to the plaintiffs if the shoes were not delivered.

To my mind the statement made to the station-master must have conveyed to his mind the impression that the plaintiffs were under a profitable contract to deliver the shoes by the 3rd of February and would lose the benefit of such contract if the shoes were not so delivered. It was not specified how much the plaintiffs would lose, but I do not think that was necessary. The rule seems to apply which was laid down by BEST, C. J., in *Riley* v. *Horne*, to the effect that if the carrier choose to make no inquiry as to the nature of the goods he is responsible to the full value in case of loss, and cannot afterwards complain that he was not informed of such value. It seems to me by analogy that the intimation here given to the station-master was sufficient to throw upon him the duty of inquir-

ing what the consequences would be if the shoes were not delivered, and if he did not do so, but received the goods without objection, the company is in the same position as if the whole details of the contract were communicated to them.

Cleasby, B. I agree with the conclusion arrived at by the Lord Chief Baron and those members of the Court who concurred with him. I offer no opinion on the question how far a notice might be sufficient to fix the defendants with exceptional damages considered merely as a notice, and not as amounting to evidence of a * contract to be liable for such damages, though [* 147] I do not wish to be understood as differing from the opinion expressed by Willes, J., in the *British Columbia Saw Mills Co.* v. *Nettleship* on that point; nor do I express any opinion on the question how far a railway company may be placed in a different position from any other persons in such a case as the present. The safest course in this case appears to me to be to affirm the decision of the Court below on the ground on which it was given, if that ground was sufficient. I rest my judgment on the ground that, even if a mere notice could be sufficient, the notice here is not of such a nature as to affect the defendants with knowledge of the exceptional terms of the plaintiffs' contract for the supply of the shoes. The case states that the plaintiffs were under contract for sale of the shoes, but it does not say when such contract was made; but as it is stated to have been subsisting in January, it was probably made some time before. It appears that if the shoes were not delivered by the 3rd of February the purchasers were entitled to refuse to accept them, so that the last day for delivering under the contract must have been the 3rd of February; but it does not appear that they might not have been delivered before. So that it comes to this: that the plaintiffs are really seeking to make the defendants responsible for loss which was in great measure caused by their driving off delivery to the last day on which it could be made under the contract. I must say I think the materials on which they seek to do so are wholly insufficient. No intimation was given to the defendants as to the peculiar nature of the contract or the exceptional price at which the shoes were sold, so as to give them any opportunity of contracting with reference to the precise liability which they were to incur. The only way in which the case can be put on behalf of the plaintiffs is the way in which it was put by my Brother Lush, namely, that enough was said to

put the defendants on inquiry as to the details of the contract, and that by not inquiring they dispensed with any further notice as to its terms. I cannot agree in that view of the case. I should hesitate to regard the station-master as a person intrusted with a discretion as to making such inquiries, though I do not base my judgment on that ground. I do not think enough was told [* 148] to the station-master * to put him on inquiry. There was nothing to indicate to him the probability of the contract being of so exceptional a character, and the consequences of breaking it so unusually large. *Judgment affirmed.*

ENGLISH NOTES.

The principal cases enunciate a general rule of the law of contracts, which will be found further treated under Nos. 58 & 59 of "Contract." For an unreasonable delay in the delivery of the goods the measure of damages is, as a rule, to be based upon the market value of the goods at the place and time at which they ought to have been delivered; if there is no market, a reasonable profit beyond the cost price and cost of carriage may be allowed. In *Wilson* v. *Lancashire and Yorkshire Railway Co.* (1861), 9 C. B. (N. S.) 632, 30 L. J. C. P. 232, cited p. 509, *supra*, WILLES, J., said: "The damage in respect of the goods being depreciated in value in consequence of their arrival at a time when they were less in demand and less capable of being applied usefully by the plaintiff is the ordinary, natural, and immediate consequence of the delay, for which the carrier is answerable." So it was held in *Collard* v. *South Eastern Railway Co.* (1861), 7 H. & N. 79, 30 L. J. Ex. 393, 4 L. T. 410, that the plaintiff could recover damages for a fall in the market price during the interval of delay. In *The Parana* (1877), 2 P. D. 118, 45 L. J. P. D. & A. 108, 36 L. T. 388, the Court allowed compensation for the difference between the market price when the goods ought to have been and when they were delivered.

If the carrier has notice, brought home to him, of the particular purpose for which goods are sent, he will, in the absence of an express agreement, be liable for the loss incurred by reason of the failure of the purpose from delay. For instance, where perishable goods sent for a particular market miss it, *Bates* v. *Cameron & Co.* (1855) Court of Session, 2nd series, Vol. 18, p. 188; and see *Finlay* v. *N. B. Ry. Co.* (1870), Court of Session Cases, 3rd series, Vol. 8, p. 959, *per* LORD PRESIDENT, at p. 970: or if the goods sent for a show or exhibition arrive too late for it. *Jameson* v. *Midland Railway Co.* (1884), 50 L. T. 426; *Simpson* v. *London and North-Western Railway Co.* (1876), 1 Q. B. D. 274, 45 L. J. Q. B. 182, 33 L. T. 805.

In *Woodger* v. *Great Western Railway Co.* (1867), L. R., 2 C. P. 318, 36 L. J. C. P. 177, 15 L. T. 579, a commercial traveller claimed to recover hotel expenses incurred on account of delay in the delivery of his parcels. But the contents and purposes of the parcels had not been brought to the knowledge of the company, and on this ground his claim failed. In *Redmayne* v. *Great Western Railway Co.* (1866), L. R., 1 C. P. 329, 35 L. J. C. P. 123, goods consigned from Manchester to a commercial traveller at Cardiff were delayed in delivery, with the result that the traveller left Cardiff without having an opportunity of showing them. The expected profits were not allowed to be recovered.

Where goods are lost or rendered valueless, the owner is entitled to recover their value, such value being, in the case of merchandise, the market value of the goods at the place to which they were consigned and at the time they ought to have reached their destination. *Rice* v. *Baxendale* (1861), 7 H. & N. 96, 30 L. J. Ex. 371; *Brandt* v. *Bowlby* (1831), 2 B. & Ad. 932.

In case of injury to a passenger, the jury in assessing damages may take into consideration, in addition to the pain and suffering, the expenses for medical and other necessary attendance, and the loss of business. *Phillips* v. *London and South Western Railway Co.* (1879), 5 C. P. D. 280, 49 L. J. C. P. 233, 42 L. T. 6. The company is not entitled to have the amount of damages reduced by the sum which the passenger has recovered in an assurance policy against accidents. *Bradburn* v. *Great Western Railway Co.* (1875), L. R., 10 Ex. 1, 44 L. J. Ex. 9, 31 L. T. 464.

AMERICAN NOTES.

The case of *Hadley* v. *Baxendale* is universally cited and followed in this country in the reports and text-books. It is reported in 1 Moak's English Cases, 369; 3 ibid. 390. See *ante*, Nos. 10 and 11, and notes, p. 428, as to damages in cases of contracts to carry passengers.

That contingent profits from possible sales or employment of goods cannot enter into the recovery, although the carrier was informed at the time of shipment that the object of the agreement was to make such sales is held in *Harvey* v. *Conn. &c. R. Co.*, 124 Massachusetts, 421; 26 Am. Rep. 673; and to this effect, *Ward's, &c. Co.* v. *Elkins*, 34 Michigan, 439; 22 Am. Rep. 544; *Ward* v. *N. Y. Cent. R. Co.*, 47 New York, 29; 7 Am. Rep. 405; *Brock* v. *Gale*, 14 Florida, 523; 14 Am. Rep. 356 (loss of tools of a dentist passenger); *Mather* v. *Am. Ex. Co.*, 138 Massachusetts, 55; 52 Am. Rep. 258 (loss of architect's plans entailing delay).

But in *Deming* v. *Grand T. Ry. Co.*, 48 New Hampshire, 455; 2 Am. Rep. 267, where the carrier was informed that the goods could be sold if forwarded at once, and he delayed, he was held for depreciation and loss of chance to

sell. And similarly as to loss of use of machinery during its detention. *Priestly* v. *North. Ind., &c. R. Co.*, 26 Illinois, 205; 79 Am. Dec. 369. In the last case it was held that under proper notice, averments, and proof special damages even beyond this might be recovered. Of this Redfield says (Carriers, § 32): "The difference between the last case and some of the preceding" English, "in regard to the rule of damages, seems to be one of policy between the views of the English and American Courts, in the one case, to enable the owner to realize speculative damages, and in the other to deny all but what is the most obvious actual damages."

Mr. Hutchinson favours the view that the measure of damages may be enhanced so as to cover contingent profits where the carrier agrees to transport within a given time or for a stated purpose. (Carriers, § 772.) Citing *Vicksburg, &c. R. Co.* v. *Ragsdale*, 46 Mississippi, 458, where the Court did "not deny the proposition that when the carrier is notified of the expected profits and contracts in view of them, so that they enter into the contract, he may be liable." But the Court in that case held that they must "be so definite and certain that they can be ascertained reasonably by calculation." The editor of Am. & Eng. Ency. of Law (Carriers, p. 908) states that "The loss of mere speculative profits, in consequence of the delay of the carrier, or his failure to deliver the goods, is not an element of damage. The recovery is limited to compensation for loss of profits on existing contracts." Citing *Ingledew* v. *North. R. Co.*, 7 Gray (Massachusetts), 86 (loss of time); *Penn. R. Co.* v. *Titusville &c. P. R. Co.*, 71 Pennsylvania St. 350 (increased expense of laying plank).

As to delay of passengers, see *ante*, Nos. 10, 11, p. 000.

When a carrier negligently allows mules to escape, the expense of searching for them is recoverable. *North Mo. R. Co.* v. *Akers*, 4 Kansas, 388; 96 Am. Dec. 183.

Ordinarily counsel fees are not recoverable. *Richmond, &c. R. Co.* v. *Benson*, 86 Georgia, 203; 22 Am. St. Rep. 446.

The ordinary measure of damages is the value of the goods at the place of delivery, in case of loss, and the depreciation in case of damages; but in the case of a family portrait its value to the owner is the standard. *Green* v. *Boston, &c. R. Co.*, 128 Massachusetts, 221; 35 Am. Rep. 370. See *Ward* v. *N. Y. Cent. R. Co.*, 47 New York, 29; 7 Am. Rep. 405; *Ayres* v. *Chicago, &c. Ry. Co.*, 71 Wisconsin, 372; 5 Am. St. Rep. 226. As to mares with foal, see *Missouri Pac. R. Co.* v. *Fagan*, 72 Texas, 127; 13 Am. St. Rep. 776; 2 Lawyers' Reports Annotated 75.

CERTIORARI.

No. 1. — ANONYMOUS (OR REX *v.* SAUNDERS OR SANDERS).

(K. B. 1670.)

No. 2. — REX *v.* INHABITANTS OF SETON.

(K. B. 1797.)

RULE.

CERTIORARI is the proper process by which summary proceedings before magistrates may be questioned after conviction, but where a judgment has been given on an indictment, the record can only be removed by writ of error.

Anonymous.

1 Ventr. 33 (s. c. *nom.* REX *v.* SAUNDERS or SANDERS; 1 Saund. 262; 1 Siderf. 419; 2 Keb. 521).

Summary Conviction. — Certiorari.

A conviction was certified of one, for carrying of a gun, [33] not being qualified according to the statute, where the words in the statute are, "Upon due examination and proof before a justice of the peace."

The Court resolved, that that was not intended by the jury, but by witnesses; and no writ of error lies upon such conviction.

And an exception was taken, because it was before such an one, justice of the peace, without adding "*Nec non ad diversas felonias transgressiones &c. audiend' assign'.*" And the Court agreed so it ought to be in returns upon *certiorari's* to remove indictments taken at sessions. But otherwise of convictions of this nature, for 'tis known to the Court, that the statute gives them authority in this case.

No. 2. — Rex v. Inhabitants of Seton, 7 T. R. 373, 374.

Rex. v. Inhabitants of Seton.

7 T. R. 373–374 (s. c. 4 R. R. 466).

Indictment. — Judgment. — Certiorari. — Writ of Error.

The Court quashed a *certiorari*, which was issued before but not served until after judgment upon an indictment for a misdemeanour. After judgment the record can only be removed by a writ of error.

[373] The defendants, the inhabitants of the township of Seton, were indicted for not repairing a road, and after verdict and judgment at the Quarter Sessions, a *certiorari* was served to remove the record here.

Chambre on a former day in this term moved to quash the *certiorari quia improvide emanavit*, observing that the party who now wished to remove the record could only do so by writ of error.

Law now showed cause against that rule, and insisted that all the proceedings below were stayed by the issuing of the *certiorari*, which was before verdict in this case. In 2 Ld. Raym. 1305, Powell, J., said, "A writ of *certiorari* removes any order or conviction, though they be made or taken after the *testè* of the writ, so they be taken before the return;" and in that case the inquisition taken after the *testè*, but before the return of the *certiorari*, was quashed by this Court for defects appearing on the inquisition.

Lord Kenyon, C. J. In the case of summary proceedings, orders and convictions before magistrates, the proceedings may be removed by *certiorari* after judgment, because such proceedings can only be removed by *certiorari:* but where a judgment has been given on an indictment, the record must be removed [*374] by * writ of error. If any fraud or misconduct had been imputed to the magistrates in proceeding notwithstanding the issuing of the *certiorari*, that might have been a ground for a criminal proceeding against them; and I believe there are instances in which a criminal information has been granted against magistrates acting in Sessions. In this case if the party who sued out the *certiorari* wish to object to the proceedings, he must remove the record by writ of error: but this writ must be quashed.

Per Curiam, *Rule absolute.*

ENGLISH NOTES.

"Where a new offence is created and directed to be tried in an inferior Court, established according to the course of the common law, such inferior Court tries the offence as a common-law Court; subject to be removed by writs of error, *habeas corpus*, *certiorari*, and to all the consequences of common-law proceedings." *Per* Lord MANSFIELD in *Hartley* v. *Hooker* (1777), Cowp. at p. 524; *Rex* v. *Wadley* (1816), 4 M. & S. 508, 16 R. R. 524. A similar rule applies with respect to the removal by *certiorari* proceedings in civil cases, of which a well-known example is afforded by the issue of the writ, where there has been an excess of the extended jurisdiction of sheriffs and similar officers to assess compensation under the Lands Clauses Consolidation Act 1845 (8 & 9 Vict. c. 18). *Re Penny and South Eastern Railway Co.* (1857), 7 El. & Bl. 660, 26 L. J. Q. B. 225. "If a new offence is created by statute, and a special jurisdiction out of the course of the common law is prescribed, it must be followed." *Per* Lord MANSFIELD in *Hartley* v. *Hooker* (*supra cit.*), *Phorbe's Case* (1682), Sir T. Raym. 433. And this principle was recognized by the Courts of Queen's Bench and Exchequer as applicable to civil actions under the new County Courts Acts, in *Berkeley* v. *Elderkin* (1853), 1 El. & Bl. 805, 22 L. J. Q. B. 281, and *Moreton* v. *Holt* (1855), 10 Ex. 707, 24 L. J. Ex. 169.

Certiorari is not of course, *In re Mansergh* (1861), 1 B. & S. 400, 30 L. J. Q. B. 296; *Reg.* v. *Justices of Surrey* (1870), L. R. 5 Q. B. 466, 39 L. J. M. C. 145; except in the case of the Crown, *Rex* v. *Eaton* (1787), 2 T. R. 89, 1 R. R. 436, or the Attorney-General in his official capacity, *In re Lord Listowel's Fishery* (1875), 9 Ir. R. C. L. 46; and is strictly applicable to judicial acts. *Rex* v. *Lloyd* (1783), Cald. 309. The Court will consider the conduct of the applicant. *Reg.* v. *South Holland Drainage Committee* (1838), 8 Ad. & El. 429, 1 P. & D. 79.

The cases divide themselves conveniently into two classes: (1) Those in which the proceedings are of record; (2) Those in which the proceedings are of an informal character.

The latter part of the rule is recognized in the later case of *Rex* v. *Inhabitants of Pennegoes* (1822), 1 Barn. & Cres. 142, 2 D. & R. 202. A similar rule prevails in civil cases. *Fox* v. *Veal* (1841), 8 M. & W. 126, 10 L. J. Ex. 273; *Kemp* v. *Balne* (1844) 1 D. & L. P. C. 885, 13 L. J. Q. B. 149.

After verdict and before judgment the Court will, in its discretion, refuse a *certiorari* and award a *procedendo*, *Reg.* v. *Potter* (1704), 2 Ld. Raym. 937; *Rex* v. *Jackson* (1795), 6 T. R. 145, 3 R. R. 138, although it is alleged that the Judge has misconceived a point of law. *Reg.* v. *Christian* (1842), 12 L. J. M. C. 26.

The Court will not, as of course, remove an indictment, because a difficult point of law will arise. *Reg.* v. *Morton* (1842), 1 Dowl. (N. S.) 543; *Clark* v. *Wellington* (1843), 7 Jur. 44; but has done so. *Rex* v. *Wartnaby* (1835), 2 Ad. & El. 435. Some specific difficulty in point of law must be shown. *Rex* v. *Joule* (1836), 5 Ad. & El. 539; *Reg.* v. *Hodges* (1845), 9 Jur. 665. An application is frequently made and a writ awarded on the ground that a fair and impartial trial cannot be had in the Court before which the prisoner stands indicted. So a writ was awarded for removal into the Queen's Bench of the trial in the celebrated poisoning case at Rugeley. *Rex* v. *Palmer* (1856), 5 El. & Bl. 1024. There was a precedent for this in *Reg.* v. *Lever* (1838), 1 Willm. Woll. & Hodg. 35, and the same course was followed in Ireland in *Reg.* v. *Bell* (1859), 8 Cox C. C. 287. An allegation of bias on the part of the Judge is not enough. *Rex* v. *Fellowes* (1837), 4 Dowl. 607, 1 H. & W. 648; *Rex* v. *Jacobs* (1839), 3 Jur. 999; but the writ will go if the Judge is interested in the subject-matter of the dispute. *Rex* v. *Jones* (1836), 2 Harr. & Woll. 293; *In re Hopkins* (1858), El. Bl. & El. 100; *Reg.* v. *Hammond*, (1863), 9 L. T. 423, 12 W. R. 208. The prosecutor is entitled to a *certiorari*, if a fair trial cannot be had. *Reban* v. *Trevor* (1840), 4 Jur. 292; *Reg.* v. *Grover* (1840), 8 Dowl. 325; *Garbett* v. *Ouseley* (1842), 6 Jur. 193. In cases of felony, the Court will only under exceptional circumstances order a removal by *certiorari*. *Reg.* v. *Reynolds* (1865), 12 L. T. 580, 13 W. R. 925. A remedy in the nature of a writ of *certiorari* for removal of a trial into the Central Criminal Court is provided by the Central Criminal Courts Act 1856 (19 & 20 Vict. c. 16). It was on a writ obtained under this Act (commonly called *Palmer's* Act) that Palmer was eventually tried and convicted at the Central Criminal Court.

In civil cases the writ will not necessarily issue, by reason of nice questions of law and fact, *Solomon* v. *London, Chatham, and Dover Railway Co.* (1861), 10 W. R. 59; nor that the decision in one case will govern other cases of a similar nature. *Staples* v. *Accidental Death Ins. Co.* (1861), 10 W. R. 59.

All material facts relative to the state of a civil action must be brought before the Judge. *Parker* v. *Bristol & Exeter Railway Co.* (1851), 6 Ex. 184, 20 L. J. Ex. 112.

In *Banks* v. *Hollingsworth* (C. A. 1893), 1893, 1 Q. B. 442, 62 L. J. Q. B. 239, 68 L. T. 447, the Court had to consider the effect of a statutory provision to the effect that proceedings before an inferior tribunal might be removed, "in cases which shall appear . . . fit to be tried" in the Superior Court. It was held that the words must be read as extending only to cases which ought to be tried in the Superior Court, or which were more fit to be tried there than before the inferior tribunal.

The power of the Court to grant a *certiorari* to remove a conviction before a justice of the peace is discretionary. *Rex* v. *Bass* (1793), 5 T. R. 251.

It may be stated generally that the Court will not enter into matters of evidence, *Rex* v. *Liston* (1793), 5 T. R. 338; *Anonymous* (1830), 1 B. & Ad. 382, and will not grant a *certiorari*, where the magistrates had jurisdiction, upon an allegation that they convicted without evidence. *Ex parte Blewitt* (1867), 14 L. T. 598. Excess of jurisdiction may be shown by affidavit. *Re Penny and South Eastern Railway Co.* (1857), 7 El. & Bl. 660, 26 L. J. Q. B. 225. So, too, may want of jurisdiction. *Reg.* v. *Farmer* (C. A. 1891), 1892, 1 Q. B. 637, 61 L. J. M. C. 55, 65 L. T. 736. So, too, may interest. *Reg.* v. *Commissioners of Cheltenham* (1841), 1 Q. B. 467, 10 L. J. M. C. 99; *Reg.* v. *Aberdare Canal Co.* (1850), 14 Q. B. 854, 19 L. J. Q. B. 251. The Court also admits evidence to show fraud. *Reg.* v. *Gilliard* (1848), 17 L. J. M. C. 153.

Interest in the subject-matter of a dispute is a sufficient ground for granting a *certiorari*. *Reg.* v. *Commissioners of Cheltenham* (1841), 1 Q. B. 467, 10 L. J. M. C. 99; *Reg.* v. *Aberdare Canal Co.* (1850), 14 Q. B. 854, 19 L. J. Q. B. 251; *Reg.* v. *Hammond* (1863), 12 W. R. 208. But a party cannot apply for a *certiorari* on this ground, if he has expressly or impliedly assented to interested magistrates adjudicating upon his case. *Reg.* v. *Commissioners of Cheltenham, supra; Reg.* v. *Aberdare Canal Co., supra.*

In *Ex parte Austin* (1880), 50 L. J. M. C. 8, 44 L. T. 102, the Justices had convicted for an offence unknown to the law, and had returned the conviction to the clerk of the peace. In showing cause against a rule for a *certiorari* the justices returned a corrected record of the conviction showing the conviction to have been properly made; but the Court refused to allow this, and the conviction was accordingly quashed.

The Court has no jurisdiction to issue the writ to the Central Criminal Court to quash a conviction there. *Reg.* v. *Boaler* (1892), 67 L. T. 354.

In certain cases there is a statutory limit of time within which a *certiorari* must be applied for. *Rex* v. *Boughey* (1791), 4 T. R. 281; *Rex* v. *Justices of Sussex* (1813), 1 M. & S. 631; *Rex* v. *Justices of Sussex* (1813) 1 M. & S. 734; *Reg.* v. *Justices of Anglesey* (1846), 1 Bail Ct. Rep. 76, 10 Jur. 816; *Prim* v. *Smith* (C. A. 1888), 20 Q. B. D. 643, 57 L. J. Q. B. 336, 58 L. T. 606; *Price* v. *Shaw* (1888), 59 L. T. 480.

AMERICAN NOTES.

The mode of appeal in criminal cases in this country is generally prescribed by statute, and the distinction between the common-law offices of *certiorari* and writ of error is recognized. In *Lynes* v. *State*, 5 Porter (Alabama), 236; 30 Am. Dec. 557, it was held that where the Legislature has omitted to prescribe the mode of criminal appeals, the Supreme Court may bring up such cases by the common-law writ of error. But *certiorari* is allowed after writ of error to bring up the true record or correct the record. *State* v. *Tingler*, 32 West Virginia, 546; 25 Am. St. Rep. 830; *State* v. *Reid*, 1 Devereux & Battle Law (Nor. Carolina), 377; 28 Am. Dec. 572.

The principal cases are cited by Mr. Bishop (Crim. Proc. §§ 1197, 1205), with approval, adding: "But see *Reg.* v. *Bethell*, 6 Mod. 17." He says: "But it is best not to attempt an enumeration of the uses of this writ. It is often an accompaniment of a *habeas corpus* writ, or of a writ of error." Citing *State* v. *Shelton*, 3 Stewart (Alabama), 343.

One may be excused from rushing in where Mr. Bishop fears to tread.

No. 3. — REX *v.* JUKES.

(K. B. 1800.)

RULE.

If a statute, authorising a summary conviction before a magistrate, gives an appeal to the sessions, who are directed to hear and finally determine the matter, this does not take away the *certiorari*, even after such an appeal made and determined.

Rex v. Jukes.

8 T. R. 542-545 (s. c. 5 R. R. 445).

Certiorari. — Summary Conviction. — Appeal.

[542] A summary conviction for any offence created by statute, must negative every exception contained in the clause creating the offence: and a defect in omitting to do so, is not aided by a proviso in the statute, That "no conviction for any offence in the Act shall be set aside for want of form, or through the mistake of any fact, circumstance, or other matter, provided the material fact alleged were proved;" for this in effect requires all material facts to be alleged; and it is a material fact that the defendant did not come within any exception in the enacting clause.

If a statute, authorising a summary conviction before a magistrate, give an appeal to the sessions, who are directed to hear and finally determine the matter, this does not take away the *certiorari*, even after such an appeal made and determined.

No. 3. — Rex v. Jukes, 8 T. R. 542, 543.

This was a conviction against the defendants on the Stat. 36 Geo. III., c. 60, ss. 3 and 4,[1] in the following form: —

* "Be it remembered, That on, &c. R. Thursfield, of, &c. [* 543] came before us, &c. and informed us, That J. Jukes, &c. on, &c. did unlawfully and fraudulently put and place for sale, and cause to be put and placed for sale, in and upon certain cards and papers, divers metal buttons; to wit, 1780 dozen of metal buttons, the said metal buttons and each of them having marked or stamped on the underside thereof certain words, indicating the quality thereof, to wit, on 942 dozen, part thereof, the words 'double gilt,' and on 838 dozen, other part thereof, the words 'treble gilt,' the said buttons so respectively marked 'double gilt,' or any of them not being double gilt, within the true intent and meaning of the statute in such case made and provided; and the said buttons so marked 'treble gilt,' or any of them not being treble gilt within the true intent and meaning of the statute in such case made and provided; contrary to the form of the statute," &c.

When this case was called on —

Lord KENYON, C. J., observed, That this conviction could not be supported, because the information did not negative the exception

[1] By s. 3, no person shall mark or caused to be marked, &c. in or upon any part of any metal button any word, &c. indicating the quality thereof, except the words "gilt" or "plated," respectively; and no person shall place or pack, or cause to be packed, &c. for sale, in or upon any card (except the pattern card, or pattern cards) or paper, &c. or expose to sale, or cause to be sold or exposed to sale, any metal buttons having any word, &c. indicating the quality thereof, other than and except the words "gilt" or "plated" respectively marked, &c. in or upon any part thereof, upon pain of forfeiting, in every such case, such buttons, together with £5 for any quantity exceeding one dozen and not exceeding 12 dozen, and for any quantity exceeding 12 dozen at the rate of £1 for every 12 dozen, to be levied, &c.

Sect. 4 provides, That nothing in the Act shall extend to inflict any penalty, &c. upon any person who shall mark or cause to be marked, &c. the words "double gilt" in or upon any metal buttons, or pack or cause to be packed, &c. for sale in or upon any card (except the pattern card) or paper, &c. or expose to sale or cause to be sold or exposed to sale, any metal buttons having the words, "double gilt" marked, &c. in or upon any part thereof; provided continually from the time of gilding thereof, gold shall remain equally spread upon the upper surface of the said buttons, exclusive of the edges in the proportion, &c. therein specified. The clause also contains a similar provision as to buttons having the words "treble gilt" upon them.

Sect. 9 provides for an appeal to the quarter sessions, and empowers the sessions to "hear and finally determine" the matter.

Sect. 11 enacts "That no conviction, made upon any offence in this Act mentioned, shall be set aside in or by any Court for want of form, or through the mistake of any fact, circumstance, or other matter whatsoever, provided the material facts alleged in such conviction, and upon which the same shall be grounded, be proved to the satisfaction of the said Court; any law, statute, or custom to the contrary notwithstanding."

introduced in the clause enacting the offence, viz., that the buttons had been exposed to sale in this instance upon the pattern cards. In like manner as in convictions on the game laws, it had always been deemed necessary to negative in the information the defendants' qualifications to kill game: that the only cases where this was not necessary to be done were, where the exception was introduced in a subsequent clause; and there it must come by way of defence on the part of the defendant.

Burton Morice, in support of the conviction, admitted that the current of authorities tended to establish that distinction, but referred to *R.* v. *Theed*, 1 Str. 608, where to a conviction for obstructing an excise-officer in coming to weigh candles, by virtue of the Stat. 8 Ann. c. 9, s. 10 (which gives the officer [* 544] * power to enter by day or night; but if by night, then it is required to be in the presence of a constable) it was objected, that it did not state whether the entry were by day or night; and *non constat* but that it might have been by night without a constable; and then the defendant might lawfully obstruct him.

Lord Kenyon, C. J. That case may, upon examination, be found to be distinguishable from those which I have before referred to; but, at all events, the weight of authorities, as applicable to this case, is the other way; and the point has been repeatedly settled in later determinations.

B. Morice then relied on the 11th section [1] of the Act in question; by which, it is only made necessary to set out such material facts as constitute the offence charged; saying, That this was a mere formal objection, and if available at all, was matter of defence for the defendant on the hearing; That it would not be necessary, in an indictment on a statute, to negative that the defendant is within any of the provisos therein, which are matter of defence to the charge, 2 Hawk. c. 25, s. 113; and that greater form was not necessary under the 11th section than would be necessary in an indictment at common law.

Lord Kenyon, C. J. This is not an objection of form but of substance; and the reason is well given by Hawkins, 2 Hawk. c. 25, s. 113, why a conviction should negative all exceptions in the enacting clause, because the party cannot plead to such a conviction, and can have no remedy against it, but from an exception to

[1] *Vide* this section set forth in note p. 533, *supra*

some defect appearing on the face of it; and all the proceedings are in a summary manner. Therefore, the conviction itself should show that the party accused had not the defence which the Act gives to him, if true. Even by the saving clause, all material facts necessary to constitute the offence must be stated: this then is a material fact, That the buttons exposed to sale were not on pattern cards. The good sense of the thing is in support of what is said by Hawkins; for being a summary proceeding and conclusive on the defendant, it ought to have the greatest certainty on the face of it.

B. Morice then objected: that the defendant having elected to appeal to the sessions, the *certiorari* was in effect taken away by the Act, because it is said that the determination of the session should be final; but

Lord KENYON, C. J., said, That would be against all authority; for the *certiorari*, being a beneficial writ for the subject, could *not be taken away without express words; and he [*545] thought it was much to be lamented in a variety of cases that it was taken away at all.

PER CURIAM, *Conviction quashed.*

ENGLISH NOTES.

A *certiorari* can only be taken away by express negative words. *Rex* v. *Reeve* (1760), 1 W. Bl. 231, 2 Burr. 1040. So, too, a *certiorari* always lies to remove proceedings under a penal statute, unless expressly taken away. *Rex* v. *Justices of Cashiobury* (1823), 3 D. & R. 35. But an appeal against a conviction on a penal statute never lies, unless expressly given, S. C.

The Court is very loth to infer that the Legislature intended to take away the right to a *certiorari*. Thus where a statute, which created an offence, gave an appeal to the Sessions, and took away the right to a *certiorari* as to all proceedings, and by a subsequent statute further powers were given to punish the offender, the Court refused to read into the later statute the clause taking away the right to a *certiorari*. *Rex* v. *Terret* (1788), 2 T. R. 735. Again, where an earlier statute contained a power to remove proceedings by *certiorari*, the Court refused to construe the provisions of a later Act as taking away the *certiorari* under the earlier statute. *Brookman* v. *Wenham* (1851), 20 L. J. Q. B. 278. The right may be taken away by express provision. *Reg.* v. *Chantrell* (1870), L. R., 10 Q. B. 587, 44 L. J. M. C. 94, or by necessary implication. *Rex* v. *Justices of Yorkshire* (1831), 3 Nev. &

M. 802. A statute taking away the right to a *certiorari* does not deprive the Superior Court of the power to issue the writ where there is a manifest absence of jurisdiction. *Ex parte Bradlaugh* (1878), No. 4, *post* (3 Q. B. D. 509, 47 L. J. M. C. 105, 38 L. T. 680).

As an instance of a case in which the right to a *certiorari* has been effectually taken away in civil proceedings may be cited the Employers' Liability Act 1880 (43 & 44 Vict. c. 42). *Reg.* v. *Judge of City of London Court* (C. A. 1885), 14 Q. B. D. 905, 58 L. J. Q. B. 330, 56 L. T. 537. Where, however, it appeared that upon the true construction of a statute that it was not intended to confer exclusive jurisdiction on an inferior tribunal, a *certiorari* was allowed to issue. *In re Royal Liver Friendly Society* (1887), 35 Ch. D. 332, 56 L. J. Ch. 821, 56 L. T. 817.

Although the right to a *certiorari* exists, the Court will, in its discretion, refuse to allow it to issue, where the object of the Legislature was to provide a particular tribunal for the determination of particular questions. *Munday* v. *Thames Ironworks and Shipping Co.* (1882), 10 Q. B. D. 59, 52 L. J. Q. B. 119, 47 L. T. 351. The Court in that case held that it was the object of the Legislature in passing the Employers' Liability Act 1880 (43 & 44 Vict. c. 42), to provide less costly and more speedy remedies as between masters and servants, and refused a *certiorari* to remove County Court proceedings, although it appeared that the servant had given a defective notice under the Act.

No. 4. — Ex parte BRADLAUGH.

(Q. B. D. 1878.)

RULE.

A clause in an Act of Parliament taking away the right of *certiorari* in a certain class of cases does not apply to an objection, appearing on the face of the order of the inferior tribunal, that they have acted outside their jurisdiction.

Ex parte Bradlaugh.

3 Q. B. D. 509-513 (s. c. 47 L. J. M. C. 105; 38 L. T. 680; 26 W. R. 758).

[509] *Inferior Court. — Absence of Jurisdiction. — Certiorari.*

A section in an Act of Parliament taking away the *certiorari, held* not to apply in the case of a total absence of jurisdiction.

An order by a magistrate for the destruction of obscene books under 20 & 21 Vict. c. 83, s. 1, is bad if it merely states that the magistrate was satisfied that the books were obscene, but not that he was satisfied that the publication of them would be a misdemeanour, and proper to be prosecuted as such.

No. 4. — Ex parte Bradlaugh, 3 Q. B. D. 509, 510.

In this case the applicant in person had obtained a rule *nisi* for a *certiorari* to bring up an order of a metropolitan magistrate, under 20 & 21 Vict. c. 83, for the destruction of certain books of which the applicant claimed to be the owner, as obscene publications, on the ground that the order did not show any jurisdiction on the face of it, because it did not state that the magistrate was satisfied that the publication of the books would be a misdemeanour, and proper to be prosecuted as such.

The order was in substance as follows: It recited that complaint had been made by John Green to Mr. Flowers, one of the metropolitan police magistrates, sitting at Bow Street, within the metropolitan police district, that he had reason to believe that certain obscene books were kept by Edward Truelove, at his shop, No. 256 Holborn, in the county of Middlesex, within the metropolitan * police district, for the purpose of sale or of being [* 510] otherwise published for the purposes of gain; that the magistrate, being satisfied that the belief of the said John Green was well founded, and that the publication of the books was a misdemeanour, proper to be prosecuted as such, thereon issued his warrant pursuant to 20 & 21 Vict. c. 83, for the seizure of the books under that statute; that certain books being copies of a work called the Fruits of Philosophy, kept for the purpose of sale, or of being otherwise published for the purpose of gain, had been seized and brought before Sir J. T. Ingham, one of the metropolitan police magistrates, sitting at Bow Street; that he had issued a summons to the said Edward Truelove, as occupier of the said shop, to appear and show cause why the books should not be destroyed, and that the applicant appeared before Mr. Vaughan at the hearing, and claimed to be the owner of the books. The order then proceeded to state that the magistrate having examined the said books and duly considered the premises, and being satisfied that the said books so seized were obscene, did order their destruction.[1]

[1] 2 & 3 Vict. c. 71 (an Act for Regulating the Police Courts in the Metropolis), s. 49, enacts that no information, conviction, or other proceeding before or by any of the said magistrates, shall be quashed or set aside, or adjudged void or insufficient for want of form, or be removed by *certiorari* into Her Majesty's Court of Queen's Bench.

20 & 21 Vict. c. 83, s. 1, provides that "it shall be lawful for any metropolitan police magistrate or other stipendiary magistrate, or for any two justices of the peace, upon complaint made before him or them, on oath, that the complainant has reason to believe, and does believe, that any obscene books, &c., are kept in any house, shop, &c., within the limits of the

[* 511] * Besley and Tickell showed cause. The *certiorari* is taken away by the Act regulating the police courts in the metropolis, 2 & 3 Vict. c. 71, s. 49.

By 12 & 13 Vict. c. 45, s. 7, the order may be amended by the Court on the return of the *certiorari*, if sufficient grounds were in evidence before the magistrate upon which it might have been correctly drawn up in the first instance. The defect in the order is pure matter of form. The magistrate finds that the books were obscene, and obviously it was meant by implication that they were the species of obscene books that were the proper subject of a prosecution for misdemeanour. Every reasonable intendment is to be made in favour of an order of justices. *Rex* v. *Clayton*, 3 East, 57.

It is not unreasonable to construe this order as stating inferentially that the magistrate was satisfied of the existence of the requisites of jurisdiction. It states that the magistrate who issued the warrant of search was satisfied that the books were obscene, and the fit subject of a prosecution for misdemeanour, and upon such books being produced before the magistrate who makes the order, he finds that they are obscene, and orders their destruction. By reasonable intendment that must mean that he acts upon a similar opinion to that of the first magistrate. His finding must be coupled with the previous recital.

The applicant, who appeared in person, was not called upon to support the rule.

jurisdiction of any such magistrate or justices, for the purpose of sale or distribution, &c., or being otherwise published for the purposes of gain, &c., &c., and upon such magistrate or justices being also satisfied that any of such articles so kept for any of the purposes aforesaid are of such a character and description that the publication of them would be a misdemeanour, and proper to be prosecuted as such;" to issue a warrant to search such house, shop, &c., and seize all such books, &c., as aforesaid, found in any such house, shop, &c., and to carry all the articles so seized before the magistrate or justices issuing the warrant, or some other magistrate or justices exercising the same jurisdiction. The section goes on to provide that such magistrate or justices shall thereupon issue a summons calling upon the occupier of the house, shop, &c., to appear within seven days to show cause why the articles seized should not be destroyed; "and if such occupier, or some other person claiming to be the owner of the said articles shall not appear within the time aforesaid, or shall appear, and the magistrate or justices shall be satisfied that such articles, or any of them, are of the character stated in the warrant, and that such or any of them have been kept for any of the purposes aforesaid, it shall be lawful for the said magistrate or justices, and he or they are hereby required to order the articles so seized, except such of them as he or they may consider necessary to be preserved as evidence in some further proceedings, to be destroyed at the expiration of the time hereinafter allowed for lodging an appeal, unless notice of appeal as hereinafter mentioned be given."

No. 4. — Ex parte Bradlaugh, 3 Q. B. D. 511, 512.

Cockburn, C. J. The Act of Parliament makes the magistrate's jurisdiction dependent upon two conditions: first, that the publication must be obscene, and, secondly, that it must, in the magistrate's judgment, be such as is a misdemeanour and proper to be prosecuted as such. It is not enough that it should be obscene. If the Legislature had intended that it should be subject to destruction * merely on the ground of its being obscene, [* 512] there would have been no meaning in inserting the additional provision as to its being a proper subject for prosecution as a misdemeanour. The insertion of the provision shows that the intention was that the enactment should not take effect when the additional element of fitness for prosecution was wanting. The order now before us is defective in that it omits an essential element of jurisdiction, viz., the statement that the magistrate was of opinion that these books were the proper subject of a prosecution for misdemeanour. The procedure prescribed by the section is as follows: If a complaint is made stating that the complainant believes that an obscene publication is kept for the purposes of sale, and the magistrate is satisfied that such publication amounts to a misdemeanour proper to be prosecuted, then, and then only, he is to issue a warrant for the seizure of such publication. When the seizure has taken place a summons is to be issued to the party who occupies the premises where the publication has been seized, in order that he may show cause against its destruction. When the matter comes before the magistrate upon the summons he must also be satisfied, on the production before him of the publication, that it is of the character described in the warrant; that is to say, not only that it is obscene, but also that it amounts to a misdemeanour proper to be prosecuted. It is, therefore, essential to his jurisdiction that he should be so satisfied. Here the magistrate who issued the warrant is stated to have been satisfied that the books were not only obscene, but that they also formed the proper subject of a prosecution for misdemeanour, and therefore the warrant is correct in point of form; but when we come to the order for their destruction, that omits to state that they were the proper subject of a prosecution for misdemeanour, but finds merely that they were obscene. The order, therefore, does not state the existence of matter that is essential to the jurisdiction. It was contended that the *certiorari* is taken away by 2 & 3 Vict. c. 71, s. 49. I entertain very serious doubts whether that provision does not apply only to

matters in respect of which jurisdiction is given by that statute, and not to matters in which jurisdiction is given by subsequent statutes; but it is not necessary to deal with that point. This is an objection founded upon an absence of jurisdiction [* 513] * appearing on the face of the order; and I am clearly of opinion that the section does not apply, when the application for the *certiorari* is on the ground that the inferior tribunal has exceeded the limits of its jurisdiction. It may possibly be that when this order is brought before us on *certiorari*, the 7th section of 12 & 13 Vict. c. 45, may enable us, if satisfied that the necessary ingredients of jurisdiction existed, to cure the defect; but it is unnecessary to pronounce any opinion on that now. At present the only question is whether the writ is to issue. I am of opinion, for the reasons I have stated, that the rule should be absolute for a *certiorari*.

Mellor, J. I am of the same opinion. It is well established that the provision taking away the *certiorari* does not apply where there was an absence of jurisdiction. The consequence of holding otherwise would be that a metropolitan magistrate could make any order he pleased without question. The Act provides that if a magistrate is satisfied that the book is obscene and the fit subject of a prosecution for misdemeanour, he may issue a warrant for its seizure, but that is only preliminary to the order for its destruction; and in order that it may be legally destroyed, the magistrate before whom it is produced, before ordering its destruction must, upon its production before him, form an entirely distinct and independent judgment that it is not only obscene, but the proper subject of a prosecution for misdemeanour. He is not to take it for granted that such is the case on the strength of the judgment of the magistrate who issued the warrant. The order omits to state that the magistrate who made it was satisfied that the books ordered to be destroyed were the proper subject of a prosecution, and therefore the order on the face of it shows an absence of jurisdiction.

Rule absolute.

ENGLISH NOTES.

The effect of a provision taking away a *certiorari* was considered by the Privy Council in *The Colonial Bank* v. *Willan* (P. C. 1874), L. R., 5 P. C. 417. The judgment was delivered by Sir James Colvile.

Upon a careful review of the decided cases, their Lordships held that the following principles were to be deduced from the authorities: —

1. Notwithstanding a clause in a statute taking away the right to a *certiorari*, the Court will allow the writ to issue, but will not quash the order removed, except upon the ground either of a manifest defect of jurisdiction in the tribunal that made it or a manifest fraud in the party procuring it. For this proposition they relied on *Reg.* v. *St. Olave* (1857), 8 El. & Bl. 529.

2. An adjudication by a Judge having jurisdiction over the subject-matter is, if no defects appear on the face of it, to be taken as conclusive of the facts stated therein; and the Court will not on *certiorari* quash the adjudication on the ground that any such fact, however essential, has been erroneously found. As supporting this conclusion, they relied upon *Reg.* v. *Bolton* (1841), 1 Q. B. 66, 10 L. J. Q. B. 95, and *Reg.* v. *St. Olave*, *supra*. They distinguished *Reg.* v. *Commissioners of Cheltenham* (1841), 1 Q. B. 467, 10 L. J. M. C. 99, and *Reg.* v. *Recorder of Cambridge* (1857), 8 El. & Bl. 637, 27 L. J. M. C. 160, on the ground that the persons adjudicating were interested in the subject-matter of the dispute. They also pointed out that in *Reg.* v. *Arkwright* (1850), 14 Q. B. 710, 18 L. J. Q. B. 26, certain notices, which were a condition precedent to the exercise of the jurisdiction, had not been given. With the last-mentioned case may be compared *Reg.* v. *Farmer* (C. A. 1891), 1892, 1 Q. B. 637, 61 L. J. M. C. 55, 65 L. T. 736, in which the Court held that a bastardy summons had not been properly served, and that accordingly the magistrates had no jurisdiction.

3. Where the Judge of an inferior Court, having legitimately commenced the inquiry, is met by some fact which, if established, would oust his jurisdiction, and place the subject-matter of the inquiry beyond it. The general rule in such a case is that stated by Coleridge, J., in delivering the judgment of the Exchequer Chamber in *Bunbury* v. *Fuller* (1853), 9 Ex. 111, 23 L. J. Ex. 29, 35: "It is a general rule that no Court of limited jurisdiction can give itself jurisdiction by a wrong decision on a point collateral to the merits of the case upon which the limit to its jurisdiction depends; and however its decision may be final on all particulars making up together that subject-matter which, if true, is within its jurisdiction, and however necessary in many cases it may be for it to make a preliminary inquiry whether some collateral matter be or be not within the limits, yet upon this preliminary question its decision must always be open to inquiry in the Supreme Court." This principle has been acted upon in *Thompson* v. *Ingham* (1850), 14 Q. B. 710 (prohibition); *Pease* v. *Chaytor* (1863), 3 B. & S. 620, 32 L. J. M. C. 121, 8 L. T. 613 (trespass), and *Reg.* v. *Stimpson* (1863), 4 B. & S. 301, 32 L. J. M. C. 208, 8 L. T. 536 (*certiorari*).

Evidence is admissible to show excess or want of jurisdiction, *In re Penny and South Eastern Railway Co.* (1857). 7 El. & Bl. 660, 26 L. J. Q. B. 225; *Reg.* v. *Farmer* (C. A. 1891), 1892, 1 Q. B. 631, 61 L. J. M. C. 55, 65 L. T. 736; or fraud, *Reg.* v. *Gilliard* (1848), 17 L. J. M. C. 153.

Where proceedings are a nullity, by reason of want of jurisdiction, the Court has refused to allow a *certiorari* to issue, where it was apparent that no injury could happen to any one. *In re Davis* (1838), 8 Ad. & El. 936. In that case the coroner's clerk had held an inquest upon a dead body, and had signed the inquisitions as coroner, but the Court, in its discretion, refused to grant a rule. In the case where the application is on the part of the Crown, however, a different rule obtains, — the Crown having an interest in the general administration of justice. *In re Culley* (1833), 5 B. & Ad. 230 (see notes to No. 5, *post*).

In certain cases where *certiorari* has been expressly taken away, the statute makes provision for the stating of a case for the opinion of the High Court. The effect of such a provision was considered in *The Overseers of Walsall* v. *London and North Western Railway Co.* (H. L. 1878), 4 App. Cas. 30, 48 L. J. Q. B. 65, 39 L. T. 453. The Court will not go into any objections arising on the face of the order itself, unless raised by the case. *Reg.* v. *Inhabitants of Hartpury* (1847), 16 L. J. M. C. 105; — even where the order is bad on the face of it, *Reg.* v. *Thomas* (1857), 7 El. & Bl. 399. But it is open to the party desiring to take objections to an order of Sessions to move in open court and state grounds not raised by the special case. *Reg.* v. *Inhabitants of Heyop* (1846), 8 Q. B. 547, 15 L. J. M. C. 70. Questions of jurisdiction may be raised by the special case, and the order quashed on that ground. *Reg.* v. *Dickenson* (1857), 7 El. & Bl. 831, 26 L. J. M. C. 204.

No. 5. — REX *v.* DAVIES.

(K. B. 1794.)

RULE.

The general words of a statute which enacts that an indictment shall not be removed by *certiorari*, do not restrain the Crown from removing the indictment by *certiorari*; unless it appears on the face of the Act that the Crown should be bound by it.

No. 5. — Rex v. Davies, 5 T. R. 626.

Rex v. Davies.

5 T. R. 626-629 (s. c. 2 R. R. 683).

Certiorari. — Act of Parliament. — Crown.

The general words of the stat. 25 Geo. II., c. 36, s. 10, that no in- [626]
dictment for keeping a disorderly house shall be removed by *certiorari*, do not restrain the Crown from removing the indictment by *certiorari*; there being nothing in the Act to show that the Legislature intended that the Crown should be bound by it.

An indictment, which was found against the defendants at the last Assizes for the County of Surrey, for keeping a disorderly house, was removed here by *certiorari* by the prosecutor. The defendants then obtained a rule, calling on the prosecutor to show cause why the *certiorari* should not be set aside *quia improvidè emanarit*, on the stat. 25 Geo. II., c. 36, s. 10, which enacts that no indictment, which shall be preferred against any person for keeping a disorderly house, etc., shall be removed by any writ of *certiorari* into any other Court, but such indictment shall be heard, tried, and finally determined at the same General or Quarter Sessions or Assizes where such indictment shall have been preferred, etc.

Bailey now showed cause against that rule. The rule, that has uniformly prevailed, in construing Acts of Parliament which take away the *certiorari*, is this, that wherever it appears in the Act to have been the intention of the Legislature to restrain the defendant only, the words of the statute, though general, are confined in their construction merely to restrain the defendant, and do not extend to the Crown, or take away the right of the prosecutor to remove the indictment. In the *King* v. *The Inhabitants of Bodenham*, Cowp. 78, where a similar application was made on the Highway Act (13 Geo. III., c. 78), which says, "that no indictment shall be removed by *certiorari* until such indictment be traversed, and judgment given therein," the Court said, that the words of that statute manifestly showed, that it was not the intention of the Legislature to take away the *certiorari* prayed for at the instance of the Crown, but that the Act was merely calculated to prevent defendants bringing a *certiorari* for delay. So, here the same intention of the Legislature to restrain defendants only may be collected from the title of the Act, which is "For the better

preventing thefts and robberies, and for regulating places
[* 627] of public entertainment, and punishing persons for * keeping disorderly houses." The object of the Act then was, the more effectual punishment of those defendants; but, if the right of the prosecutor to remove the indictment by *certiorari* were taken away, it might be the means of protracting the punishment of those persons; because, if the prosecutor remove the indictment immediately after it is found below, as was the case here, he may accelerate the trial by compelling the defendant to plead in the next term, and go to trial at the following Assizes. In the Act, 30 Geo. II., c. 24, for more effectually punishing persons for obtaining money by false pretences, the clause, sect. 20, taking away the *certiorari* is full as general as the present, namely, that no *certiorari* shall be granted to remove any indictment, conviction, or other proceedings had thereon in pursuance of the Act; and yet that has been held not to take away the right of the prosecutor to remove the indictment by *certiorari*. In *R.* v. *W. H. Mitford*, E. 17 Geo. III., B. R., a rule for a *certiorari* to remove an indictment on that statute was granted, no cause being shown against it; but, the very circumstance of its not being opposed, shows the opinion of the profession upon the subject. And in a subsequent case, *R.* v. *Vaux*, 19 Dec. 1782, an application was made to Lord MANSFIELD at Chambers to supersede a *certiorari*, which had issued to remove an indictment on the 30 Geo. II., but his Lordship refused to set it aside. Besides, it appears to have been the practice of the Crown-office to grant writs of *certiorari* on this Act of Parliament at the instance of the prosecutors; there being twenty-four different cases between Michaelmas term 5 Geo. III., and Michaelmas term 28 Geo. III., in which the writ has issued to remove indictments on this statute.

Palmer and Shepherd, in support of the rule. This application is founded on the words of the statute, which in the most explicit terms prohibits the issuing of the *certiorari;* and there are no words either in the title or in the body of the Act to show that it should be confined merely to defendants, as was the case in the Highway Act. The determination in *R.* v. *Bodenham* was warranted by the words of the statute: it was evident from the Act itself, which said, "that no indictment should be removed until the indictment was traversed and judgment given thereon," that

No. 5. — Rex v. Davies, 5 T. R. 627, 628.

it was intended to be confined to defendants only, as those words are not applicable to the Crown; and there are other parts of the Highway Act to show that it was meant only to restrain *defendants. But this Act contains no such words. [*628] Those in the clause taking away the *certiorari* are general, without distinguishing between the Crown and the defendant; and the title of the Act conveys no such intention in the Legislature as is contended for; it being merely a description of the Act, and the removing of the indictment by *certiorari* having nothing to do with the more effectual punishment of the offender. With regard to the cases alluded to on the Statute 30 Geo. II., it is to be remarked that the Act has never received that construction from the Court. The first case passed without any opposition, or even discussion; and in the other, Lord MANSFIELD refused to interfere out of Court, merely as a matter of discretion. And the instances in which the writ has issued to remove indictments under this Act are only silent instances, not one of them appearing ever to have been canvassed. At any rate the application for a *certiorari* is to the discretion of the Court, and after the prosecutor has compelled the defendants to incur an expense below, they will not permit him to remove the indictment here: this indictment was found at the Assizes, and on an application by the prosecutor there it was ordered, that forty-eight hours' notice of bail should be given before bail could be taken; the defendants complied with that order, and put in bail below.[1] In *R.* v. *Gwynne*, 2 Burr. 749, a *procedendo* was granted to the Quarter Sessions, because the *certiorari* was not issued until after the defendants had confessed the assault below.

BULLER, J.[2] I do not see what purpose the issuing of this *certiorari* can answer; because, as the indictment was preferred at the Assizes, the place of trial is the same, with this difference only, that it will now be tried on the civil, instead of the criminal, side of the hall. But the question here is, Whether or not we are warranted in saying, that the Crown is precluded by this Act of Parliament from removing the indictment by *certiorari?* The general rule is, that where the *certiorari* is taken away by Act of Parliament the Crown is not included in the restriction, unless there be some words in the Act to show that the Legislature so

[1] This appeared in the affidavits.

[2] Lord KENYON being gone to the Guildhall Sittings.

intended it. There are no such words in this Act; but, on the contrary, the Act is made against persons keeping disorderly houses; the 8th and 9th sections were inserted to guard against "the many subtle and crafty contrivances of persons keep-
[* 629] ing * disorderly houses," etc., and the object of the 10th section, which takes away the *certiorari*, was to prevent any delays that might be attempted to be made by those persons. The whole scope of the Act was to render the punishment of such offenders more effectual. And as there are no words in the Act to extend this restriction, respecting the *certiorari*, to the case of the Crown, the general rule applies that the prosecutor is entitled to a *certiorari*. Though, perhaps, the prosecutor would have acted more discretely by suffering the indictment to remain in the Court where it was found, I cannot say from any authority, that he has precluded himself from removing the record by any step which he took below; for that would equally apply to all prosecutions where bail had been put in below; but that is not even contended for.

Grose, J. We cannot break in upon the general rule, which has been so long established, that the Crown is not bound by the general words of a statute taking away the *certiorari*, unless it appear upon the face of the Act of Parliament, that the Legislature intended that the Crown should be bound. The observations made by my brother Buller on this Statute are very strong to show that the Legislature did not intend to restrain the Crown in this case. Therefore the rule must be discharged.

Rule discharged.

ENGLISH NOTES.

The Crown has an interest in the general administration of justice, and need show no other interest in the subject-matter. *In re Culley* (1833), 5 B. & Ad. 230, 2 N. & M. 61. A *certiorari* is granted as of course on the application of the Crown, *Rex* v. *Eaton* (1787), 2 T. R. 89, 1 R. R. 436; and the rule in that case is made absolute in the first instance. *In re Culley, supra.* The writ also issues as of course on the application of the Attorney-General. *In re Lord Listowel's Fishery* (1875), 9 Ir. R. C. L. 46.

The principle recognised in the ruling case has been followed in *Rex* v. *Allen* (1812), 15 East, 333, and *Rex* v. ——— (1815), 2 Chit. 136. A similar principle is applicable to civil proceedings. *Montjoy* v. *Wood* (1856), 2 Jur. N. S. 452. Where a private prosecutor sues *pro rege*, a

similar rule obtains. *Rex* v. *Inhabitants of Cumberland* (1795), 6 T. R. 194, 3 R. R. 149; s. c. H. L. *nom. Inhabitants of Cumberland* v. *Rex* (1803), 3 Bos. & P. 354, 7 R. R. 792; *Rex* v. *Boultbee* (1836), 4 Ad. & E. 498, 6 N. & M. 26, 5 L. J. M. C. 57.

AMERICAN NOTES.

In this country the States and the Federal government are not bound by a general statutory provision whereby any of their rights, prerogatives, titles, or interests will be impaired, unless by express words or irresistible implication. Bishop's Statutory Crimes, § 103; *Warren R. Co.* v. *State*, 29 New Jersey Law, 353; *Bennett* v. *McWhorter*, 2 West Virginia, 441; *Dollar Sav. Bk.* v. *U. S.*, 19 Wallace (U. S. Sup. Ct.), 277; *People* v. *Rossiter*, 4 Cowen (New York), 379; *Commonwealth* v. *Hutchinson*, 10 Pennsylvania State, 456; *Commonwealth* v. *Baldwin*, 1 Watts (Pennsylvania), 54; 26 Am. Dec. 33; *State* v. *Bank of Maryland*, 6 Gill & Johnson (Maryland), 216; 26 Am. Dec. 516; *Doe* v. *Deavors*, 11 Georgia, 79; *State* v. *Garland*, 7 Iredell (Nor. Carolina), 50; *Cole* v. *White*, 32 Arkansas, 45; *Josselyn* v. *Stone*, 28 Mississippi, 753; *State* v. *Kinne*, 41 New Hampshire, 241; *U. S.* v. *Knight*, 14 Peters (U. S. Sup. Ct.), 315.

CHAMPERTY. See Contract, Nos. 36 & 37, R. C. Vol. VI.

CHARITABLE TRUST.

No. 1. — MORICE *v.* THE BISHOP OF DURHAM.

(1805.)

No. 2. — MILLER *v.* ROWAN.

(H. L. Appeal from Scotland, 1837.)

RULE.

A bequest in trust for such objects of benevolence and liberality as the trustee in his own discretion shall most approve, is so far effectual that it creates a trust; but the object fails by reason of indefiniteness, and the trust is for the next of kin.

But a direction to trustees to apply money to such charitable and benevolent purposes as they think proper is not void for uncertainty; and will, if necessary, be carried out by the Court.

Morice v. The Bishop of Durham.

9 Ves. 399-406; 10 Ves. 521-543 (s. c. 7 R. R. 232).

Charitable Trust. — Failure for Indefiniteness of Object. — Resulting Trust.

[399] Bequest, in trust for such objects of benevolence and liberality as the trustee in his own discretion shall most approve, cannot be supported as a charitable legacy, and is therefore a trust for the next of kin.

Although, where a charitable purpose is expressed, however general, the bequest shall not fail for the uncertainty of the object; but the particular mode of application will be directed by the King in some cases; in others by the Court.

Ann Cracherode by her will, dated the 16th of April, 1801, and duly executed to pass real estate, after giving several legacies to her next of kin and others, some of which she directed to be paid out of the produce of her real estate, directed to be sold, bequeathed all her personal estate to the Bishop of Durham, his executors, &c., upon trust to pay her debts and legacies, &c.; and to dispose of the ultimate residue to such objects of benevolence and liberality as the Bishop of Durham in his [*400] own discretion shall most * approve of; and she appointed the Bishop her sole executor.

The bill was filed by the next of kin, to have the will established, except as to the residuary bequest, and that such bequest may be declared void. The Attorney-General was made a defendant. The Bishop by his answer expressly disclaimed any beneficial interest in himself personally.

Mr. Romilly and Mr. Bell for the plaintiffs.

This is admitted to be a trust; and if it is expressed in terms so vague and indefinite that no Court can say what it is, or carry it into execution, it must fail entirely; and then, being a trust, and the object not appearing, it must be a trust for the next of kin. The only question then is, whether under these words the Bishop can be considered a trustee for charity. Can these words "benevolence and liberality" be taken to mean charity? That might

possibly come within the former word; but the latter cannot be used in that sense, not even importing anything of a public nature from which the public is to derive any benefit, and if it did it would not be within the description of a trust such as a Court of equity can carry into execution. The senses of this word are various Formerly exhibitions or combats by wild beasts and gladiators were considered objects of liberality. At present a public exhibition of pictures may be so considered; and such an application may be properly made in opposition to a gift to an hospital, which would be properly termed charitable. So assisting persons deprived, not of the necessities, but of the comforts, of life, may come within the description of liberality. There is no instance of executing a trust in any degree resembling this, and very few having any resemblance to it have occurred.

* In the case (*Brown* v. *Yeall*, 7 Ves. 50; 6 R. R. 78 n., [*401] in the note to *Moggridge* v. *Thackwell*) upon Mr. Bradley's will there was much to be said in favour of that disposition. The object was much more clearly described than by these vague words. That object was of a nature always considered charitable, — the advancement of religion and the purpose of instruction. Yet Lord THURLOW considered that so uncertain and indefinite that it was impossible for the Court to carry it into execution. In the *Attorney-General* v. *Whorwood*, 1 Ves. Sen. 534, the description was of a similar nature, — to act hospitably, &c. The whole was considered void; and Lord REDESDALE says in the note (4 Ves. 434) to *Corbyn* v. *French*, 4 Ves. 418; 4 R. R. 254, that the next of kin obtained a transfer of all the funds. If part is for a charitable purpose, as may be contended in this case under the word "benevolence," yet part being for an object that cannot possibly answer that description, as in this instance under the word "liberality," the whole must fail. In *Townley* v. *Bedwell*, 6 Ves. 194, though certainly the decision went partly upon the circumstance that the subject was land, and therefore within the statute of Mortmain, 9 Geo. II. c. 36, the LORD CHANCELLOR'S opinion seems to be, that the purpose was such as this Court would not carry into execution.

Mr. Richards, Mr. Stanley, and Mr. Martin, for the defendant, the Bishop of Durham; Mr. Mitford, for the Attorney-General.

The single question is, for whom the Bishop is a trustee. Charity, as the LORD CHANCELLOR has observed, is a legatee of a very peculiar nature. The instant that it appears a legacy is intended

[*402] for charity, the Court *attaches its rule upon it; and carries that purpose into effect, though the particular design cannot be ascertained, as if the instrument does not exist or cannot be found. With reference to the argument for the plaintiffs as to public exhibitions, Lord Chief Justice WILMOT, who enters very minutely into the origin of the law upon this subject (*The Attorney-General* v. *Lady Downing*, Wilm. 1; see pages 32, 33), says, if the legacy is for a public exhibition which is not permitted, it shall go to another, such as the law sanctions, quoting a passage from the Digest, and concluding that, where it cannot be carried into execution in the particular mode it is for the honour of the testator; and though it is said to be a pillar of vanity, yet such an object has been permitted, and must be carried into execution. Nothing could be more vague than the object in *Frier* v. *Peacock*, Finch, 245; more fully stated under the title of *The Attorney-General* v. *Matthews*, 2 Lev. 167, — the poor in general. How could that be executed? Were all the poor in the kingdom to partake of the bounty? It was impossible to execute it precisely according to the intention; yet the Court considered it devoted to charity, and applied it to the maintenance of forty poor boys in Christ's Hospital. According to all the cases, with one or two exceptions, the Court or the Crown must effect the purpose by some particular mode. The object in *Moggridge* v. *Thackwell*, 3 Bro. C. C. 517; 1 Ves. Jr. 464; 7 Ves. 36; 13 Ves. 416; 2 R. R. 140; 6 R. R. 76, was as loose as can be described. It is very difficult to define to the satisfaction of any one what is an object of charity. A clergyman of £500 a year, with a large family, brought up at great expense, looking forward to considerable expectations, provided he gets assistance, may be more an object than a curate with only £50 a year. These are subjects upon which different opinions [*403] will be held. Under the *disposition of Mrs. Cann, Vaston might have selected clergymen with considerable incomes, excluding others in circumstances of less affluence. The word "charity" is frequently applied to the exercise of benevolence. In that sense a person who has been in a state of opulence and is reduced to a situation in which it is of great importance to him to have assistance, is an object. It is sufficient that he is an object of benevolence, and not necessary that he should be a mendicant. Under these words "benevolence and liberality" the testatrix could not mean to exclude charitable objects. Her object,

whether expressed by the terms "charity, benevolence, liberality," is the same. These words are capable of a variety of application, from common alms to the meritorious objects of assisting a youth going to school or college, supporting a sinking family, &c.

The conclusion is that, if no precise object is pointed out, or the object as pointed out cannot be executed, it must be executed in some other way. As to that the case is premature. Such a bequest is a personal trust reposed in the party, who is to exercise his discretion, subject to be called upon for an account, and the Court is not to interfere. In *Moggridge* v. *Thackwell* the Court could not have interfered if Vaston had lived, unless there was misapplication or abuse, a personal trust being reposed in him. In *Brown* v. *Yeall*, the case upon Mr. Bradley's will, an accumulation for seventy years was directed; and the trust was so different from this that there can be no analogy. The bequest for the increase of the salary of a bishop in America, whenever such an institution shall take place, and many others in Viner, under the title "Charity" in which the term "charity" is not used, show that word is not necessary.

*Mr. Romilly, in reply: — [*404]

It is admitted that where the object is charity the uncertainty and indefinite nature of it is no objection; for then the Crown or this Court must decide from the peculiar nature of legacies to charity, and whether the expression is "pious" or "charitable," the meaning is considered the same. But the objection to this disposition is that it is not a charity. The passage cited (7 Ves. 73) from Freeman by the Lord Chancellor in *Moggridge* v. *Thackwell*, shows the distinction: that, if a man bequeaths money to such charitable uses as he shall direct by a codicil or note in writing, and he leaves no direction, the Court of Chancery shall dispose of it to such charitable uses as the Court shall think fit. *Cook* v. *Duckenfield*, 2 Atk. 562, 567, supports the same distinction. Is this trustee bound to apply this fund in charity, and would it be a breach of trust not to do so, but to apply it to any other object of liberality? It is extraordinary, if this testatrix meant charity, that she did not say so, and how she could avoid a word so likely to occur.

The Master of the Rolls: —

March 26. The only question is, whether the trust, upon which

the residue of the personal estate is bequeathed, be a trust for charitable purposes. That it is upon some trust, and not for the personal benefit of the bishop (*Gibbs* v. *Rumsey*, 2 Ves. & B. 294; 13 R. R. 88), is clear from the words of the will, and is admitted by his Lordship, who expressly disclaims any beneficial interest. That it is a trust, unless it be of a charitable nature, too indefinite to be executed by this Court, has not been, and cannot be, denied. There can be no trust over the exercise of which this Court will [*405] not *assume a control; for an uncontrollable power of disposition would be ownership, and not trust. If there be a clear trust, but for uncertain objects, the property that is the subject of the trust is undisposed of, and the benefit of such trust must result to those to whom the law gives the ownership in default of disposition by the former owner. But this doctrine does not hold good with regard to trusts for charity. Every other trust must have a definite object. There must be somebody in whose favour the Court can decree performance. But it is now settled, upon authority, which it is too late to controvert, that, where a charitable purpose is expressed, however general, the bequest shall not fail on account of the uncertainty of the object; but the particular mode of application will be directed by the King in some cases, in others by this Court.

Then is this a trust for charity? Do purposes of liberality and benevolence mean the same as objects of charity? That word in its widest sense denotes all the good affections men ought to bear towards each other; in its most restricted and common sense, relief of the poor. In neither of these senses is it employed in this Court. Here its signification is derived chiefly from the Statute of Elizabeth.[1] Those purposes are considered charitable, which that Statute enumerates or which by analogies are deemed within its spirit and intendment; and to some such purpose every bequest to charity generally shall be applied. But it is clear, liberality and benevolence can find numberless objects, not included in that Statute in the largest construction of it. The use of the word

[1] Stat. 43 Eliz. c. 4. This Act is formally repealed by 51 & 52 Vict. c. 43, s. 13; but this is subject to the express enactment that references to charities within the purview, etc. of the Act shall be construed as references to charities within the purview, etc. of the preamble. The saving clause is not very clearly expressed; but at all events the formal repeal of the Act would not affect a rule, which, though originally founded on the Act, has become a settled rule for the construction of testamentary instruments. R. C.

"charitable" seems to have been purposely avoided in this will, in order to leave the bishop the most unrestrained discretion. Supposing, the uncertainty * of the trust no objec- [*406] tion to its validity, could it be contended to be an abuse of the trust to employ this fund upon objects which all mankind would allow to be objects of liberality and benevolence; though not to be said, in the language of this Court, to be objects also of charity? By what rule of construction could it be said, all objects of liberality and benevolence are excluded, which do not fall within the Statute of Elizabeth? The question is not whether he may not apply it upon purposes strictly charitable, but whether he is bound so to apply it? I am not aware of any case, in which the bequest has been held charitable, where the testator has not either used that word, to denote his general purpose, or specified some particular purpose, which this Court has determined to be charitable in its nature. All the cases upon that subject are to be found in the report of *Moggridge* v. *Thackwell*.

Brown v. *Yeall* I should have thought a much more doubtful case. There was ground for contending, that the particular purpose specified was charitable in itself, according to the decisions of this Court; and it was described by the testator as a charitable design. But here there is no specific purpose pointed out, to which the residue is to be applied; the words "charity" and "charitable" do not occur; the words used are not synonymous; the trusts may be completely executed without bestowing any part of this residue upon purposes strictly charitable. The residue therefore cannot be said to be given to charitable purposes; and, as the trust is too indefinite to be disposed of to any other purpose, it follows that the residue remains undisposed of; and must be distributed among the next of kin of the testatrix.

The Bishop of Durham appealed from the decree [10 Ves. 522] of the Master of the Rolls.

Mr. Richards and Mr. Martin, in support of the appeal.

The whole interest in this property is given to the Bishop of Durham, as a legatee; not merely by the appointment of him as executor. The question may be considered in two points of view; either of which will sustain this disposition, at least as against the next of kin: 1st, as a good bequest to charity; if not, 2dly, the Bishop has a right fairly to avail himself of it, to carry into execution the liberal and benevolent intention of the testatrix by

a disposition among such objects as he may think answer the description; disclaiming the application of any part of the property to his own use. . . .

[525] The Attorney-General and Mr. Mitford, against the decree.

The Attorney-General stated, that he appeared officially for those whose interests the Attorney-General ought to support; and should have felt himself bound to appeal, if the other defendant had not appealed; considering this a question of so much doubt, that the first decision, at the Rolls, ought not to bind it.

This is a disposition substantially to charity; and, if so, there is no such uncertainty as will defeat it. The only question [*526] could be, whether the execution should * be in this Court, or by the King's Sign Manual; but clearly, if it can be brought up to a design of charity, the uncertainty of the particular object will not defeat the general purpose. It is not necessary to make use of the word "charity," or to point out some specific object, falling within the range of that word. Any other words, enabling the Court with a sufficient degree of certainty to collect the intention, are equivalent. . . . At least under the word "benevolence" the bequest must avail to some extent; and [*527] upon the principle of *The Attorney-General* v. * *Doyley*,[1] 4 Vin. 485; 2 Eq. Ca. Ab. 194, there being two objects, half ought to be given to one, and half to the other.

Mr. Romilly, Mr. Bell, and Mr. Wingfield, for the plaintiffs, the next of kin, in support of the decree.

This residue is given to the Bishop of Durham upon a trust so vague and indefinite that it cannot be executed; and therefore there is a resulting trust for the next of kin. The first question whether this is a trust was at the Rolls taken to be clear.

The Lord Chancellor: —

If a testator expressly says, he gives upon trust, and says no more, it has been long established, that the next of kin will take. Then, if he proceeds to express the trust, but does not sufficiently express it, or expresses a trust that cannot be executed, it is exactly the same as if he had said, he gave upon trust, and stopped there; as in *The Bishop of Cloyne* v. *Young*, 2 Ves. Sen. 91. There is no difficulty upon that. In *Pierson* v. *Garnett*, 2 Bro. C. C. 38, 226, and the other cases of that sort, the question

[1] Stated from the Register's Book, 7 Ves. 58, note.

was, whether the testator had said he gave upon trust; and the decision was, that he had, as the object and subject were sufficiently described; but, if he had used the word "trust," there could be no doubt the Court must have held that he meant trust.

Counsel for the plaintiffs proceeded to argue that if the bequest is in trust for charity, it is no objection that the charity
* is not particularly defined; neither is it necessary that [* 528] the testator should use the word "charity." The question always is, whether he has given to a charity; and therefore in this case it must be, what is the meaning in a Court of Justice of these two words; which, as there is no decision upon it, is a question rather of philology than of law. They proceeded to quote from Dr. Johnson, Cicero, and Dr. Paley, passages illustrating the meaning of "charity" and "liberality."

In *Brown* v. *Yeall*, 7 Ves. 50, n.; 6 R. R., 78, n., the [533] object was held so vague that it could not be executed: not that the distribution of such books as were in the view of that testator was a vague object; but the mode was not pointed out. It was thrown entirely upon the Court of Chancery to say, who were the persons, what the books, and what the manner of distribution. Though the general object was pointed out, yet its nature was vague and uncertain. No case has yet overturned that decision; and it goes infinitely beyond this case; the object in Mr. Bradley's will being much more specific. The object in *Townley* v. *Bedwell*, 6 Ves. 194, independent of the objection upon the Statute of Mortmain, would have been good, but for its vagueness and uncertainty; which was the principal ground. In *Gwynn* v. *Cardon*, in the Court of Exchequer a few years ago, a sum of money was given by will to be employed in giving prizes by the President of the Royal Academy for the best examples of the Fine Arts, Sculpture and Painting, or one of them; but it was expressed in so vague a way that the Court held, it could not be executed, and was void. *The Attorney-General* v. *Whorwood*, 1 Ves. Sen. 534, after the decision by Lord HARDWICKE, came, as Lord REDESDALE states in the note, 4 Ves. 434, to *Corbyn* v. *French*, before Lord NORTHINGTON; who thought the disposition not good as a charitable bequest, and declared the whole void; though clearly many of the objects were charitable. That case therefore proves that this cannot be divided; if liberality cannot be construed

charity; for the Court cannot ascertain how much goes to one object, and how much to the other. The word "benevolence" certainly may be used with a view to charity; but the other word seems intended to explain that, and to prevent misappre-
[* 534] hension; showing, * charity was not intended, but something in a more enlarged sense.

The Lord Chancellor: —

In *Brown* v. *Yeall* Lord Thurlow did not explain himself fully. The words were loose enough; and, I remember, Lord Thurlow said in the course of the argument, he did not know what books had a tendency to promote the happiness of mankind. But, the testator having looked to virtue and religion, and connected them with the description of his purpose, as a charitable purpose, and left the execution to this Court, I should question, whether he should not have been understood to intend upon the whole such purpose as in the meaning of this Court would be charitable. As to *The Attorney-General* v. *Whorwood*, the charity was wholly disappointed; as every part was connected; as in the instance of a bequest to educate children, if one part of the purpose is first to build a school. *Grieves* v. *Case*, 1 Ves. Jr. 548; and the note, 554.

Mr. Richards, in reply: —

There is nothing in the word "liberality" inconsistent with charity; and "benevolence" has the same meaning. That species of bounty, not, strictly speaking, charity, bestowed upon a person with a considerable income apparently, but a large family, and from circumstances not equal to bring up that family according to the rank he fills in life, is more properly charity than mere bounty to the poor. As to the terms, used in Mr. Bradley's Will, *Brown* v. *Yeall*, 7 Ves. 50 n.; 6 R. R. 78 n., many misguided people have lately thought books of the most mischievous tendency conducive to the happiness of mankind. . . .

[535] The Lord Chancellor: —

This with the single exception of *Brown* v. *Yeall*, 7 Ves. 50 n., is a new case. The questions are, 1st, Whether a trust was intended to be created at all? 2dly, Whether it was effectually created? 3dly, If ineffectually created, whether the defendant, the Bishop of Durham, can, according to the decisions, and upon the authority of those decisions, take this property for his own use and benefit. As to the last, I understand, a doubt has been raised in

the discussion of some question, bearing analogy to this, in another Court; how far it is competent to a testator to give to his friend his personal estate, to apply it to such purposes of bounty, not arising to trust, as the testator himself would have been likely to apply it to. That question, as far as this Court has to do with it, depends altogether upon this; if the testator meant to create a trust, and not to make an absolute gift, but the trust is ineffectually created, is not expressed at all, or fails, the next of kin take. On the other hand, if the party is to take himself, it must be upon this ground, according to the authorities; that the testator did not mean to create a trust, but intended a gift to that person for his own use and benefit; for if he was intended to have it entirely in his own power and * discretion, whether to make the appli- [* 536] cation or not, it is absolutely given; and it is the effect of his own will, and not the obligation imposed by the testament; the one inclining, the other compelling him, to execute the purpose. But if he cannot or was not intended to be compelled, the question is not then upon a trust that has failed, or the intent to create a trust; but the will must be read, as if no such intention was expressed, or to be discovered in it. *Paice* v. *The Archbishop of Canterbury*, 14 Ves. 370.

Pierson v. *Garnett*, 2 Bro. C. C. 38, 226, and the other cases of that class, do not bear upon this in any degree; for the question, whether a trust was intended, arose from two or three circumstances; which must all concur, where there is no express trust. *Primâ facie* an absolute interest was given; and the question was, whether precatory, not mandatory, words imposed a trust upon that person; and the Court has said, before those words of request or accommodation create a trust, it must be shown that the object and the subject are certain; and it is not immaterial to this case, that it must be shown that the objects are certain. If neither the objects nor the subject are certain, then the recommendation or request does not create a trust; for of necessity the alleged trustee is to execute the trust; and the property being so uncertain and indefinite, it may be conceived, the testator meant to leave it entirely to the will and pleasure of the legatee, whether he would take upon himself that which is technically called a trust. Wherever the subject, to be administered as trust-property, and the objects, for whose benefit it is to be administered, are to be found in a will, not expressly creating trust, the indefinite nature and

quantum of the subject, and the indefinite nature of the objects are always used by the Court as evidence that the mind of the testator was not to create a trust; and the difficulty that [*537] would be *imposed upon the Court to say, what should be so applied, or to what objects, has been the foundation of the argument that no trust was intended.

But the principle of those cases has never been held in this Court applicable to a case where the testator himself has expressly said he gives his property upon trust. If he gives upon trust, hereafter to be declared, it might perhaps originally have been as well to have held, that, if he did not declare any trust, the person to whom the property was given should take it. If he says, he gives in trust, and stops there, meaning to make a codicil or an addition to his will, or, where he gives upon trusts which fail, or are ineffectually expressed, in all those cases the Court has said, if upon the face of the will there is declaration plain, that the person to whom the property is given is to take it in trust; and, though the trust is not declared, or is ineffectually declared, or becomes incapable of taking effect, the party taking shall be a trustee; if not for those who were to take by the will, for those who take under the disposition of the law. It is impossible therefore to contend, that, if this is a trust ineffectually expressed, the Bishop of Durham can hold for his own benefit. I do not advert to what appears upon the record of his intention to the contrary, and his disposition to make the application; for I must look only to the will, without any bias from the nature of the disposition or the temper and quality of the person, who is to execute the trust.

The next consideration is, whether this is a trust effectually declared; and, if not as to the whole, as to part. I put it so; as it is said, if the word "benevolence" means charity, and "liberality," means something different from that idea, which in a Court [*538] of *justice we are obliged to apply to that word "charity," (and, I admit, we are obliged to apply to it many senses not falling within its ordinary signification) there is a ground for an application in this case partially, if it cannot be wholly, to charity. It does not seem to me upon the authorities, particularly *The Attorney-General* v. *Whorwood*, 1 Ves. Sen. 534, that the argument for a proportionate division, or a division of some sort would be displaced. I take the result of that case to be, that the substratum of that charity failed; and all those partial dispositions

that would have been good charity, if not connected with that, failed together with it. It has been decided upon that principle, that, though money may be given to an infirmary or a school, yet, if that bequest is connected with a purpose of building an infirmary or school, and the money is then to be laid out upon it, so built, the purpose, which is the foundation, failing, the superstructure must fail with it. *The Attorney-General* v. *Doyley*, 4 Vin. 485, 2 Eq. Ca. Ab. 194, is almost the only case that has been cited for a proportional division. The testator expressly directed the trustees to dispose of his estate to such of his relations, of his mother's side, who were most deserving, and in such manner and proportions as they should think fit to such charitable use as they should think most proper and convenient; and the Court, which has taken strong liberties upon this subject of charity, though the manner and proportion were left to certain individuals, held, that equality is equity, and there should be an equal division; but it is expressly declared, that those who took were persons who could take under a bequest to charitable uses; and there was no difficulty in that case in saying, those * words must be construed according to [*539] the habit and allowed authorities of the Court.

The only case, decided upon any principle, that can govern this, is *Brown* v. *Yeall*, 7 Ves. 50 n; 6 R. R. 78 n; which applies strongly. I do not trust myself with the question, whether the principle was well applied in that instance; but the decision furnishes a principle, which the Court must endeavour well to apply in cases that occur; I do not hesitate to say, I entertain doubt, not of the principle upon which that case was decided, but whether it was well applied in that instance. Mr. Bradley was a very able lawyer; yet he mistook his way; as Serjeant Aspinall had not long before. Mr. Bradley gave a great portion of his fortune, to accumulate for many years, and meaning that it should be disposed of to charitable purposes, constituted a fund; expressly stating, that his purpose was a charitable purpose; and confirming that by directing that charitable purpose to be carried on, as to the mode of executing it, by that Court which according to the constitution of the country ordinarily administers property given to charitable uses. In his opinion therefore, independent of particular authority, there was a principle, suggested by all other cases of trust, that if a trust was declared in such terms that this Court could not execute it, that trust was ill-declared, and must fail, for the benefit of the next of

kin. The principle, upon which that trust was ill-declared, is this. As it is a maxim, that the execution of a trust shall be under the control of the Court, it must be of such a nature that it can be under that control; so that the administration of it can be reviewed by the Court; or, if the trustee dies, the Court itself can execute the trust: a trust therefore, which, in case of mal-admin-
[* 540] istration * could be reformed; and a due administration directed; and then, unless the subject and the objects can be ascertained, upon principles familiar in other cases, it must be decided, that the Court can neither reform mal-administration, nor direct a due administration. That is the principle of that case. Upon the question, whether that principle was well applied in that instance, different minds will reason differently. I should have been disposed to say, that, where such a purpose was expressed, it was not a strained construction to hold, that the happiness of mankind intended was that which was to be promoted by the circulation of religious and virtuous learning: and, the testator having stated that to be the charitable purpose, which unquestionably was so, the distribution of books for the promotion of religion, the Court might have so understood him; and the testator having not only called it a charitable purpose, but delegated the execution to this Court, ought to be taken to have meant that.

Upon these grounds, in a subsequent case, *The Attorney-General* v. *Stepney*, 10 Ves. 22; 7 R. R. 325, as to the Welch charities, it appeared to me too much, considering the Society in this country for the Propagation of the Gospel, &c., to say, a trust for the circulation of Bibles, prayer-books, and other religious books, was not good. Then, looking back to the history of the law upon this subject, I say, with the MASTER OF THE ROLLS, p. 553, *ante* (9 Ves. 406), that a case has not been yet decided, in which the Court has executed a charitable purpose, unless the will contains a description of that which the law acknowledges to be a charitable purpose, or devotes the property to purposes of charity in general.
[* 541] Upon * those cases, in which the will devotes the property to charitable purposes, described, observation is unnecessary. With reference to those, in which the Court takes upon itself to say, it is a disposition to charity, where in some the mode is left to individuals, in others individuals cannot select either the mode or the objects but it falls upon the king, as *parens patriæ*, to apply the property, it is enough at this day to say, the Court by

long habitual construction of those general words has fixed the sense; and, where there is a gift to charity, in general, whether it is to be executed by individuals, selected by the testator himself, or the king, as *parens patriæ*, is to execute it (and I allude to the case in Levinz, *The Attorney-General* v. *Matthews*, 2 Lev. 167), it is the duty of such trustees, on the one hand, and of the Crown, upon the other, to apply the money to charity, in the sense which the determinations have affixed to that word in this Court; viz., either such charitable purposes as are expressed in the statute, Stat. 43 Eliz. c. 4, or to purposes having analogy to those. I believe, the expression "charitable purposes," as used in this Court, has been applied to many Acts described in that statute, and analogous to those, not because they can with propriety be called charitable, but as that denomination is by the statute given to all the purposes described.

The question then is entirely, whether this is according to the intention a gift to purposes of charity in general, as understood in this Court; such, that this Court would have held the Bishop bound, and would have compelled him, to apply the surplus to such charitable purposes as can be answered only in obedience to decrees, where the gift is to charity in general; or * is it, [*542] or may it be according to the intention, to such purposes, going beyond those, partially, or altogether, which the Court understands by "charitable purposes;" and, if that is the intention, is the gift too indefinite to create an effectual trust to be here executed? The argument has not denied, nor is it necessary, in order to support this decree, that the person, created the trustee, might give the property to such charitable uses, as this Court holds charitable uses within the ordinary meaning. It is not contended, and it is not necessary, to support this decree, to contend, that the trustee might not consistently with the intention, have devoted every shilling to uses, in that sense charitable, and of course a part of the property. But the true question is, whether, if upon the one hand he might have devoted the whole to purposes in this sense charitable, he might not equally according to the intention have devoted the whole to purposes benevolent and liberal, and yet not within the meaning of charitable purposes, as this Court construes those words; and, if according to the intention it was competent to him to do so, I do not apprehend, that under any authority upon such words the Court could have charged him with mal-administra-

tion, if he had applied the whole to purposes which according to the meaning of the testator are benevolent and liberal; though not acts of that species of benevolence and liberality which this Court in the construction of a will calls charitable acts.

The question therefore resolves itself entirely into that; for I agree, there is no magic in words; and if the real meaning of these words is charity or charitable purposes, according to the technical sense in which those words are used in this Court, all the consequences follow: if on the other hand the intention was to [* 543] describe * anything beyond that, then the testator meant to repose in the Bishop a discretion, not to apply the property for his own benefit, but that would enable him to apply it to purposes more indefinite than those, to which we must look; considering them purposes, creating a trust; for, if there is as much of indefinite nature in the purposes intended to be expressed, as in the cases to which I first alluded, where the objects are too uncertain to make recommendation amount to trust, by analogy, the trust is as ineffectual: the only difference being, that in the one case no trust is declared; and the recommendation fails; the objects being too indefinite: in the other, the testator has expressly said, it is a trust; and the trustee consequently takes, not for his own benefit, but for purposes not sufficiently defined to be controlled and managed by this Court. Upon these words much criticism may be used. But the question is, whether, according to the ordinary sense, not the sense of the passages and authors alluded to, treating upon the great and extensive sense of the word "charity," in the Christian religion, this testatrix meant by these words to confine the defendant to such acts of charity or charitable purposes as this Court would have enforced by decree, and reference to a master. I do not think that was the intention; and, if not, the intention is too indefinite to create a trust. But it was the intention to create a trust; and the object being too indefinite, has failed. The consequence of law is, that the Bishop takes the property upon trust to dispose of it as the law will dispose of it; not for his own benefit, or any purpose this Court can effectuate. I think, therefore, this decree is right.

The decree was affirmed.

No. 2. — Miller v. Rowan, 5 Cl. & Fin. 99, 100.

Miller v. Rowan.

5 Cl. & Fin. 99–111.

Charitable Trust. — Charitable and Benevolent Purposes. [99]

A. B. by his testamentary trust deed, gave all his estate to trustees, and directed them to put out on security £2000 and pay the interest to M. for her life, the said sum itself payable to the trustees on her death; and he directed them to apply the residue of his estate to such benevolent and charitable purposes as they should think proper; and if the same should amount to £600 or upwards he recommended his trustees to vest the same in themselves, and apply the proceeds in yearly payments to faithful domestic servants settled in Glasgow. And if the residue should not amount to £600 he authorized his trustees to distribute the same to such charitable and benevolent purposes as they should think proper. The residue was found to amount to £12,000.

Held, first, that the reversion of the £2000 did not go to the trustees beneficially, but became part of the general estate: and, secondly, that the trust purpose of the bequest of the residue was not void for uncertainty.

James Black, surgeon, residing in Glasgow, on the 31st of May, 1827, executed a trust disposition and settlement, by which he gave his whole * heritable and moveable, real and per- [* 100] sonal estate of whatever kind, and wherever situated, to J. Maxwell, G. Rowan, and J. Miller, and to such of them as should accept thereof, and to the survivor and survivors of the acceptors, and to such person or persons as might be assumed by them, or to the survivors or survivor, to supply the deficiency of such as might die or decline to act, and which they were thereby empowered to do when they should see proper, the major number alive and accepting at the time being always a *quorum*, as trustees or trustee for the ends, uses, and purposes after specified; viz., in the first place, to pay just debts, &c.; in the second place, to pay certain sums to persons there named; in the third place, he appointed his trustees to lend out the sum of £2000 sterling on security, taking the interest of the said sum payable to Mary Maxwell, his cousin, half-yearly during her life, and the said principal sum itself payable to his said trustees, or their foresaids, at her death. After directing payment of several specific pecuniary legacies to different relatives by name for their own benefits respectively, and to the directors of several public institutions, for behoof of such institutions respectively, the disponer proceeded thus: "And lastly, my said trustees shall apply the rest and residue of my estate and

effects to such benevolent and charitable purposes as they think proper; and if the same shall amount to £600 sterling or upwards, I recommend to my said trustees, and their foresaids, to execute a deed vesting the same in themselves, and apply the annual proceeds thereof, after deducting expenses, in yearly payments to faithful domestic servants settled in Glasgow or the neighbourhood, who can produce testimonials of good character and morals from their masters and mistresses after ten years' [*101] *service; no person to be entitled to more than £10 sterling yearly, but as much less as my said trustees shall think proper; and if the free residue of my estate shall not amount to the sum of £600 sterling, I authorize my said trustees to distribute the same to such charitable or benevolent purposes as they may think proper. And I hereby appoint my said trustees, and their foresaids, to be my only executors," &c.

Mr. Black died in October, 1834, and Mr. Rowan and Mr. Miller, who alone survived him, accepted the office of trustees. They found the trust property so left to amount to nearly £20,000, leaving after deducting the sums appointed to specific legacies, a residue of £12,000. In the administration of the trusts two questions arose, first, as to the said sum of £2000, whether Mr. Black intended that sum, after Mary Maxwell's death, to vest in the trustees beneficially and individually, or to become part of the residue; and secondly, whether the direction as to the residue for charitable purposes was not void for uncertainty. The trustees, for the purpose of obtaining the opinion of the Court of Session on these questions, instituted a process of multiplepoinding against the next of kin and other parties claiming an interest.

The Lord Ordinary (Jeffrey) pronounced the following interlocutor: Finds, first, that the fee of the sum of £2000, directed to be life-rented by Mary Maxwell, belongs to and is vested in the trustees, not as individuals, or for their own personal benefit, but as such trustees only, and must accordingly form a part of the residue of his (Mr. Black's) estate, to be disposed of as such residue is by his trust-deed directed to be disposed of, after the determination of the said life-rent, and the payment of all the special legacies and provisions. Finds, secondly, that the destina- [*102] tion *of the whole of the said residue contained in and expressed by the last provision or declaration of the said trust-deed is not void, either for uncertainty, or as having been

made through error or ignorance on the part of the truster; that the trustees are therefore bound to carry it into effect, and to administer and apply the said residue in conformity to the said destination, and that the next of kin of the truster have no title or interest in the matter so long as the trustees shall duly administer as aforesaid, &c.[1]

From this second finding of the above interlocutor, * to [*103] which generally the Lords of the Second Division adhered, the next of kin of Mr. Black appealed to this House.

Mr. Knight and Mr. Miller, for the appellants.

In the interpretation of the clause respecting the residue, which was very obscurely worded, regard should be had to the other parts of the deed, and to the whole context. A bequest "for charitable and benevolent purposes as the trustees should think proper" was too indefinite and uncertain to be imperative on them. All the other bequests for the various existing charitable institutions mentioned in the deed were bequests of specific sums to be specifically applied. They were not left to the discretion of the trustees; whereas the words of bequest of the residue amounted only to a mere recommendation, imposing no obligation on the trustees to

[1] The Lord Ordinary added his reasons for the above interlocutor in a note, from which the subjoined is an extract: The first point turns wholly on a *questio voluntatis;* and it seems to the Lord Ordinary impossible to suppose that the truster really intended to give £2000 to any individuals who might happen to be vested with the character of his trustees at the death of Mary Maxwell. There is a full power in the deed to assume additional trustees at pleasure, and an instruction to fill up the places of those who might die or be disqualified, while the direction upon which this claim of the existing trustees is exclusively vested, is merely that they shall vest the £2000 in such a way, as that the interest shall be payable to Mary Maxwell during her life, and the principal to the said trustees and their foresaids (that is, their successors in office) at her death. The Lord Ordinary cannot entertain a doubt that it was to be so payable to them as trustees, and that if not otherwise appropriated by new codicils or legacies of the truster, it must revert and fall back into the general mass of the trust estate.

As to the objection of uncertainty or substantial delegation of the inalienable right of testing to third parties, the Lord Ordinary thinks that it has been set at rest by the recent cases of *Hill* v. *Burns*, 2 Wils. & S. 80, and *Crichton* v. *Grierson*, 3 Wils. & S. 329, two cases confirmed by judgments of affirmance in the House of Lords. In *Crichton's case* the destination of the residue was quite as vague and indefinite as it would have been in this case, if the sum had fallen short of £600, but as it greatly exceeds that sum, the Lord Ordinary conceives that the recommendation to apply it for behoof of meritorious servants in Glasgow, is to be regarded as a specific instruction or expression of will on the part of the truster, and in that view it is infinitely more precise than anything that occurred either in *Crichton's* or *Hill's case*, or indeed in any of the earlier cases; and on a point thus settled by authority, it would be idle to go into any general argument on the grounds and reasons of the decisions.

take it from the next of kin. Words of recommendation were never held in the law of Scotland to raise a trust, and in England the doctrine of implying trusts from words of desire and recommendation, formerly carried to a length hardly consistent with sound policy, Pow. on Dev. by Jarm. n. 357, has been greatly restricted in the more recent cases. In *Sale* v. *Moore*, 1 Sim. 534, the Vice-Chancellor (Sir Anthony Hart) well observed, that "the first case that construed words of recommendation into a command made a will for the testator; the current of decisions has, of late years, been against converting the legatee into a trustee;" and accordingly, in that case that learned Judge held that a gift of a residue to the testator's wife, he "recommending to her, [* 104] and not doubting that she would consider * his near relations," was not subject to any trust, but the wife took the residue absolutely (1 Sim. 540). And in another recent case, ultimately decided in this House, *Meredith* v. *Heneage*, 1 Sim. 542, on the authority of which it would seem the decision in *Sale* v. *Moore* proceeded, their Lordships held that a gift of real and personal estate to the testator's wife, "in full confidence, and with the firmest persuasion that in her future disposition and distribution thereof she would distinguish the heirs of his late father by devising and bequeathing the whole of his said estate to such of them as she might think best deserving of the preference," was an absolute gift to the wife, not subject to any trust for the heirs of the testator.

In *Morice* v. *The Bishop of Durham*, 9 Ves. 399, 10 Ves. 522, 7 R. R. 232, p. 458, *ante*, a bequest in trust for such objects of benevolence and liberality as the trustee in his discretion should approve, was held not sustainable as a charitable legacy, but was a trust for next of kin. In *Ellis* v. *Selby*, 7 Sim. 352, a very recent case, a direction by a testator to trustees, to apply his funded property "to such charitable or other purposes as they should think fit," was held by the Vice-Chancellor to be void for uncertainty, and that decision was affirmed by the Lord Chancellor, 1 Myl. & C. 286; and the fund so given fell into the residue: and to the same effect was another case, still more recent, decided by one of their Lordships at the Rolls: *Williams* v. *Kershaw*, 5 Cl. & Fin. 111.

The Scotch cases of *Hill* v. *Burns*, and *Crichton* v. *Grierson*, referred to in the Lord Ordinary's judgment were not strictly

applicable to the present case, the bequest in those cases being to established institutions, * having perfect [* 105] machinery for managing them, or to such persons and charities as could be easily pointed out. The testator, in this case, did not provide any permanent machinery for the administration of his intended charity. There is no person or body of persons in existence, that could enforce the trustees to apply this fund for their benefit, and, under those general words, the bequest failed for uncertainty. At all events, if this should be held to be a trust which ought to be enforced, only £600 of the residue could be applied to it, that being the utmost that the disponer appointed for the charity.

Sir William Follett and Mr. Austin, for the respondents, relied on the cases of *Hill* v. *Burns*, and *Crichton* v. *Grierson*, referred to in the Lord Ordinary's judgment, and on the case of *Murdoch* v. *The Magistrates of Glasgow*, 6 Shaw & D. 186. The words of bequest did not limit the sum to £600, but if the same should amount to £600 *or upwards*, the testator recommended the trustees and their *foresaids*, that is, their successors and survivors, to vest the same by deed in themselves, and apply the proceeds in yearly payments, to faithful domestic servants in Glasgow, etc. The residue having exceeded £600 it was not necessary to consider the words of recommendation of the application of the residue if it should fall under £600. The trust was completely established, and the trustees were constituted by the very words, proper instruments for its administration. The English cases referred to were not at all inconsistent with the trust in this case, and in two of them, *Meredith* v. *Heneage*, and *Ellis* v. *Selby*, it ought to have been mentioned that the words * "unfettered and [* 106] unlimited," accompanied the gift to the testator's widow, in the former, and the words "without being accountable to any person," were added to the direction to the trustees in the latter case.

Lord Brougham, after stating that the questions for consideration arose on a trust disposition and settlement, being in the nature of an instrument *mortis causâ*, to operate subsequently to the disponer's death, and after reading those parts of the instrument respecting the bequest of £2000, and of the residue as above cited, proceeded as follows: —

Upon the first part it has been contended that the sum of

£2000, the interest of which was given to Mary Maxwell for life, and to the trustees at her death, did not sink into the general residue of the trust, but was given to the trustees beneficially and for trouble. It did not, however, seem possible to maintain that proposition. The clause came within the general words creating a trust; the words were "but in trust always for the ends, uses, and purposes after mentioned." The sum was given to them by the name of trustees; it was also given to their foresaids, that is, to the new trustees to be assumed by them, and of whom the maker of the deed knew nothing. To hold it to be a gift for trouble would be doing violence to the whole tenor of the instrument, and nothing but express words or plain implication could take it out of the general trust fund. No reliance, indeed, was placed upon this point at the bar, and had there been nothing more in the case, I should not have detained your Lordships with any observations. But two other questions have been made, and on those the argument has mainly turned; first, whether [*107] or not there is a trust constituted by the *deed so as to enable the application of the fund to be effected according to the makers' intention, supposing that to be sufficiently certain, and that it is such an intention as can be supported; and secondly, whether or not the intention is sufficiently certain and can be supported.

Upon the first question, there seems no reasonable ground of doubt. It might be enough to look at the part of the deed immediately following the charitable gift, providing that the trustees named shall execute the conveyances to those whom they are empowered to assume into the trust, with the same powers and for the purposes therein written. Now, among these, is that of assuming others to fill up the vacancies by death or declining to act; and though the trustees are only empowered to assume on vacancies, that is quite sufficient for continuing the trust, and would make it their duty to continue it even if they altogether declined themselves. But there is a sufficient power in the Court of Session to provide for continuing the trust in a case of this description, had there been no such clause. It is unnecessary to inquire, what power the Court has or what it is in the habit of exercising in the case of private trusts becoming defective by death or non-acceptance, although the cases of *Busby*, 2 Shaw & D. 176; of *Christie*, 5 Shaw & D. 293; and still more precisely that of

Moir, 4 Shaw & D. 801; cases so late as 1823, 1826, and 1827, appear to leave no doubt, that in one way or another, the Court will prevent the failure of a testator's or a disponer's intention for want of trustees. And to this proposition, of course, those cases are no kind of exception, in which the Court refused to interfere, where the property was given to the heir or *other [*108] person, upon the trustees dying or refusing to act, as *Macdowall* v. *Macdowall*, Morrison, 7453, a case that came precisely within the principle which ought to govern the exercise of the power of supplying a trust, that if a trustee dies or refuses the trust, where it is quite clear that the intention of the testator was that, in such an event, the heir should take the estate discharged from any trust, the Court would not be fulfilling the intention of the maker of the deed, but acting contrary to his intention, if it supplied a trustee; for that is the very event provided for, the gift going over and the trust ceasing. I apprehend (though it is unnecessary to dispose of that question), that this gift cannot be considered as being in the predicament in which it was contended at the bar it was, namely, that though there is a most distinct constitution of a trust, yet no mention being made of heirs, executors and administrators, if one of the trustees refused to act, so that the *quorum* no longer existed, or if they all refused to act, or all died, the Court had no power to give effect to the testator's intention, an argument which would require a much stronger case to support it than any produced at the bar. But it is unnecessary to enter upon that consideration, for in the present case there is no question whatever arising on it. The case of *Macdowall* v. *Macdowall* clearly shows, without deciding how the Court would act in the case of a private trust, that without any doubt the Court "will interpose," as it is there said, "where no person has any immediate interest in the management," and estates destined to charitable uses are expressly given as an instance. On this point, I have rather referred to the cases, and especially the more recent ones, than even to the highly *respect- [*109] able authority of Mr. Erskine in the third book of his Institutes, because certainly in former times the Court of Session was used to go further in supplying defects in trusts than its later practice appears to warrant.

Then, my Lords, as to the second question. Is this gift validly given to charitable uses? The maker of the deed first says that

the residue shall be applied by the trustees to such benevolent *and* charitable purposes as they may think proper. Suppose we read "and" "or," the authorities in the Scotch law do not entitle us to hold that this is so uncertain as to be void. In *Hill* v. *Burns*, decided by this House, the fund was to be distributed among institutions established or to be established in Glasgow or its neighbourhood "for charitable and benevolent purposes," the same words; this was held sufficiently certain by the Court of Session, and their judgment was affirmed by your Lordships. Indeed the distinction between charitable and benevolent uses was not taken in that case, and there appears nothing in the authorities on this subject which should lead us to suppose that the Scotch law has ever given the technical meaning to the words "charity" or "charitable," which our English law has given since the statute of Elizabeth. It is true that in *Hill* v. *Burns*, institutions in or near Glasgow are named, but I am now citing the case on the use of the word "benevolent" only. For that nothing can turn upon the generality of the words in the present case, namely, "charitable purposes," if the addition of benevolent does not vitiate the gift, appears clear from the latest decision of this House, that in *Crichton* v. *Grierson*, where it was held, after a careful consideration of all the authorities by the noble and learned Lord who then presided, that a gift to trustees [*110] * to be applied to such charitable purposes as they shall think fit, is good by the law of Scotland. The addition in that case of bequests to friends and relations was much relied on in the argument at the bar, and in the printed cases, but it does not form the ground of the decision. My noble and learned friend, Lord LYNDHURST, expressly held that charitable purposes would be sufficient by the law of England, and that the Scotch law is less strict than ours in this respect, of which indeed there can be no doubt.

I do not however think that the case rests here. There follows, after the general gift, a recommendation of a specific distribution, namely, yearly payments to faithful domestic servants settled in Glasgow and its neighbourhood, who can produce testimonials of good conduct from their masters after ten years' service, and no one to receive more than £10 a year, how much less being in the discretion of the trustees. There are several gifts in the cases referred to, which have been supported by the Court below as well

as by this House, though considerably less precise and definite than this. Nor does the word "recommend" indicate here a mere suggestion or advice. It must be taken as imperative. The disponer first, it is true, gives the trustees a full discretion, but he then proceeds to specify and provide for two events, the one that of the residue exceeding £600, and the other that of its falling below £600. In the former event he specifies, under the form of recommending, the support of old servants; in the latter event he leaves the trustees to distribute to such charitable or benevolent purposes as they may think proper. Supposing therefore that any doubt could have arisen whether "recommend" was imperative or not, had it merely followed the first general words (though I do not at all *think it would in that case have been [*111] otherwise than imperative), the addition of the third clause removes all doubt, and shows that the discretion only is vested where the sum falls short of £600. That there can be no difficulty in superintending the administration of this fund, I take it to be quite clear. The cases referred to before, and also the case of *Cowan's Hospital*, 4 Shaw & D. 276, prove incontestably that persons having an interest in a charity are entitled to put the powers of the Court in motion with respect to its management, and I take it to be equally clear that the next of kin of the founder may pursue the same course.

The decree appealed from must therefore be affirmed; but as whatever doubt may be thought to exist in the case has been occasioned by the terms of the deed, and more especially considering that this is a case of a fund given to a charity by a person who appears not to have been at all sure, — probably who did not suppose that it would turn out to be anything like so considerable as it has done, for he speaks of its exceeding £600, or falling short of £600, and it turned out to be £12,000, — I am of opinion that the whole of all parties' costs, both below and here, should be borne by the estate.

ENGLISH NOTES.

The interpretation of the word "charitable," as applied to uses or trust purposes, has in English cases been much influenced by the preamble of the Act of Elizabeth above referred to (43 Eliz. c. 4), relating to charitable uses. The preamble specifies as charitable uses the following: "Relief of aged, impotent, and poor people, maintenance of sick and maimed soldiers and mariners, schools of learning, free schools,

and scholars in universities, repair of bridges, ports, havens, causeways, churches, seabanks, and highways, education and preferment of orphans, relief, stock, or maintenance for houses of correction, marriages of poor maids, supportation, aid, and help of young tradesmen, handicraftsmen, and persons decayed, relief or redemption of prisoners or captives, aid and ease of any poor inhabitants concerning payments of fifteens, setting out of soldiers, and other taxes." And accordingly "charitable," as applied to uses or trust purposes, has acquired in English law the meaning of "within the description of the above preamble, or of a similar nature to the purposes therein described."

"Where there is a general indefinite charitable purpose, not fixing itself upon any particular object, the disposition is in the King by the sign manual; but where the gift is to trustees, with general or some objects pointed out, the Court will take upon itself the execution of the trust." *Per* Sir T. PLUMER, M. R., in *Ommaney* v. *Butcher* (1823), Turn. & Russ. 260, 270, citing the gist of the decision of Lord ELDON, C., in *Moggridge* v. *Thackwell* (1802), 7 Ves. 36, 86.

Where a testatrix expressed herself thus: "If there is any money left unemployed, I desire it may be given to charity," it was decided by the CHANCELLOR (Lord ELDON) that by the word "money" the testatrix meant to pass the general residue of her estate, and that it was well given in charity. *Legge* v. *Asgill* (1823), Turn. & Russ. 265, n. In the subsequent case of *Ommaney* v. *Butcher* (1823), Turn. & Russ. 260, where the testator, after bequeathing legacies to various persons and charitable institutions, ordered his books, jewels, &c., to be sold and various small gifts to be made to certain persons, concluded: "In case there is any money remaining, I should wish it to be given in private charity." Sir T. PLUMER, M. R., decided that the gift was intended to be confined to the residue of the produce of the articles directed to be sold, and that "private charity" meant assisting individuals in distress, and was not an object which the Court could carry out, and therefore the gift failed.

In the case of *Williams* v. *Kershaw* (in 1835, before Sir C. PEPYS, M. R., afterwards Lord COTTENHAM), cited in the principal case No. 2, and reported in 5 Cl. & Fin. 111, the testator had directed his trustees to apply the residue of his personal estate to and for such benevolent, charitable, and religious purposes as they in their discretion should think most advantageous and beneficial. Lord COTTENHAM held this direction void for uncertainty. He construed the will as restraining the discretion of the trustees only within the limits of what was benevolent *or* charitable *or* religious.

In *Ellis* v. *Selby* (1835), 7 Sim. 352, (1836) 1 My. & Cr. 286, where a testator after giving a fund to his executors upon certain trusts, de-

clared it to be his will that, in the event (which happened) of the failure of those trusts, his trustees should apply the fund to and for such charitable or other purposes as they should think fit without being accountable to any person for such their disposition thereof, it was held by Lord COTTENHAM, C. (affirming the judgment of Vice-Chancellor SHADWELL), that the trust purposes failed for indefiniteness, and that the fund fell into the residue. Lord COTTENHAM referred to his own decision in *Williams* v. *Kershaw*, *supra*, as made on the same principle. It is to be observed that the latter of the principal cases (*Miller* v. *Rowan*) was an appeal from Scotland, where the decisions are said to have given to charitable gifts a somewhat greater latitude than in England; and it is observed that the question does not, as in England, resolve itself into the question whether the gift is for one of the objects enumerated in the Statute of Elizabeth or an analogous object. But although, for the purposes of the decision, Lord BROUGHAM assumed that Lord COTTENHAM's construction putting "or" for "and" might be applied to the gift in question in the Scotch case, it does not appear that he agreed with that construction. And it can hardly be supposed that the House would have come to a different conclusion upon the same words in an English will. Upon this point Lord COTTENHAM's decision appears to be a solecism.

In *Nightingale* v. *Goulburn* (1847), 5 Hare, 484, 16 L. J. Ch. 270, (1848), 2 Phillips, 594, 17 L. J. Ch. 296, a bequest to the Chancellor of the Exchequer for the time being, to be by him appropriated to the benefit and advantage of Great Britain, was held by Lord COTTENHAM, affirming the judgment of Vice-Chancellor SHADWELL, valid as to the personalty, as being in the nature of a charitable bequest.

In *Attorney-General* v. *Lawes* (1849), 8 Hare, 32, 19 L. J. Ch. 300, a gift for the benefit of any of the ministers and members of the churches now forming upon the apostolical doctrines brought forward by the late Edward Irving, who may be persecuted, aggrieved, or in poverty for preaching or upholding those doctrines, was held by Vice-Chancellor WIGRAM to be a good charitable bequest.

A gift to trustees to apply in such manner as they, in their uncontrolled discretion, think proper, "for the benefit, advancement, and propagation of education and learning, in every part of the world, so far as circumstances will permit," is a good charitable bequest. *Whicker* v. *Hume* (Sir J. ROMILLY, M. R. 1851), 14 Beav. 509 (Lord Justices 1852), 1 De G. M. & G. 506, 21 L. J. Ch. 406 (H. L. 1858), 7 H. L. C. 124, 28 L. J. Ch. 396.

In *University of London* v. *Yarrow* (1856), 23 Beav. 159, (1857) 1 De G. & J. 72, 26 L. J. Ch. 70, 430, a bequest to a corporation for "the founding, establishing, and upholding an institution for investi-

gating, studying, and, without charge beyond immediate expenses, endeavouring to cure maladies, distempers, and injuries any quadrupeds or birds useful to man may be found subject to," was held by Lord Cranworth, C., and the Lord Justices Turner and Knight Bruce, affirming the judgment of Lord Romilly, M. R., a good charitable gift.

In *The Mayor, &c. of Beverley* v. *Attorney-General* (H. L. 1857), 6 H. L. Cas. 310, 27 L. J. Ch. 66, the rule was laid down that where a testator gives to A. for charitable purposes the whole of an estate, appropriating the rents among those objects, then (even though the appropriation was not exhaustive) any surplus of or any increase in the rents should be applied to the same charitable purposes. But if the sum allocated to the different objects does not exhaust the income, and there appears an intention, expressed or implied, that the surplus should be enjoyed by A., then A. will take for his own benefit the whole surplus, and not merely an aliquot part proportioned to the original surplus.

In *Thompson* v. *Corby* (1860), 27 Beav. 649, a gift of the interest of a fund "to be divided twice in the year between twenty aged widows and spinsters of the parish of Peterborough" was held by Romilly, M. R., a good charitable gift.

In *Thornton* v. *Howe* (1862), 31 Beav. 14, 31 L. J. Ch. 767, a trust "for printing, publishing, and propagating the sacred writings of Joanna Southcote" was held by Romilly, M. R., a good charitable trust.

In *Dolan* v. *MacDermot* (1867), L. R., 5 Eq. 60, (1868) L. R., 3 Ch. 676, a bequest of pure personalty for "such charities and other public purposes as lawfully might be in the parish of T.," was held by the Appellate Court in Chancery, affirming the judgment of Lord Romilly, M. R., to be good.

The decision in *Williams* v. *Kershaw* was applied by Vice Chancellor Hall in *Re Jarman's Estate, Leavers* v. *Clayton* (1878), 8 Ch. D. 584, 47 L. J. Ch. 675, 39 L. T. 89, where the testator directed that his executors should apply to any charitable or benevolent purpose they might agree upon, and at any time, the residue of his personal property which might by law be applied to charitable purposes. The bequest was held void.

Williams v. *Kershaw* is again followed by Kay, J., in *Re Hewitt's Estate, Gateshead (Mayor of)* v. *Hudspeth* (1884), 53 L. J. Ch. 132, 49 L. T. 587, where a testator bequeathed a sum of money to the treasurer of a municipal corporation, the interest to be paid annually to the Mayor "to be expended by him in acts of hospitality or charity at such times and in such manner as he might think best." The learned Judge

held that the gift was not confined to charitable purposes only, and was therefore void for uncertainty.

Williams v. *Kershaw* was distinguished by PEARSON, J., in *Re Sutton, Stone* v. *Attorney-General* (1885), 28 Ch. D. 464, 54 L. J. Ch. 613, where the testatrix desired that "the whole of the money over which I have a disposing power be given in charitable and deserving objects." PEARSON, J., held that the addition of the words "and deserving" did not enlarge, but restricted the scope of the objects embraced by the word "charitable."

AMERICAN NOTES.

The principal cases are cited by Pomeroy on Equity Jurisprudence, and the first by Beach on Equity Jurisprudence. Mr. Pomeroy says (p. 1017): "One of the distinguishing elements of a 'charitable' as compared with an ordinary trust, consists in the generality, indefiniteness, and even uncertainty which is permitted in describing the objects and purposes or the beneficiaries. From the very definition of a 'charitable trust' the beneficiaries are always an uncertain body or class; but the doctrine goes further than this. If the donor sufficiently shows his intention to create a charity, and indicates its general nature and purpose, and describes in general terms the class of beneficiaries, the trust will be sustained and enforced, although there may be indefiniteness in the declaration and description, and although much may be left to the discretion of the trustees." Citing the English cases, and observing (note 2): "The decisions appear to be very conflicting, and it is certainly difficult to harmonize them all." Then continuing: "This uncertainty, however, must not be carried too far. The intention of the donor to create some kind of charity — religious, benevolent, educational, or otherwise — must never be left uncertain. It must sufficiently appear that he designed to establish a charity, and the purpose must be indicated with sufficient clearness to enable the Court, by means of its settled doctrines, to carry the design into effect. Such is the well-established English doctrine, and the Court strives to carry out a charity if at all practicable. In this country the doctrine has been adopted only to a partial extent. In a few of the States, where the system of charitable trusts prevails, the English theory seems to have been accepted with little or no modification. In most of the States, more certainty in defining the purposes of the charity and terms of the trust, or in designating the class of persons who are intended to be the beneficiaries, is required in order to sustain the gift, than is necessary under the methods of the English Courts."

This subject has been repeatedly adjudicated in this country, and the following are the holdings in prominent cases. Devise to a city for a college for "poor white male orphans between six and seven years of age," held valid. *Vidal* v. *Girard's Ex'rs*, 2 Howard (U. S. Supreme Ct.), 127, and see *Ex'rs of McDonogh* v. *Murdock*, 15 ibid. 367; *Russell* v. *Allen*, 107 United States, 163. A bequest in trust "to divide such remainder among such charitable institutions in the city of St. Louis as he (the trustee) shall deem worthy,"

held valid. *Howe* v. *Wilson*, 91 Missouri, 45; 60 Am. Rep. 226. A bequest to found a school in another State, to such persons as the judges of that State may appoint to receive it, held invalid. *Bascom* v. *Albertson*, 34 New York, 583. Legacy to a certain society, "appointed to preach the gospel to the poor," not incorporated until after the testator's death, held invalid. *Owens* v. *Missionary Society*, 14 New York, 380; 67 Am. Dec. 160. Devise "to be distributed to the poor of St. Peter's church," held invalid. *Flanayan* v. *Flanagan*, 8 Abbott's New Cases (New York), 415. "To such charitable societies for indigent and respectable persons, especially females and orphans, as they in their discretion shall think of," held invalid. *Beekman* v. *Bonsor*, 23 New York, 298; 80 Am. Dec. 269. To be applied toward "feeding, clothing, and educating the poor children belonging to the congregation of a specified church," held invalid. *Dashiell* v. *Attorney-General*, 5 Harris & Johnson (Maryland), 392; 9 Am. Dec. 572. "To the poor, needy, and fatherless" in two designated townships, "to such poor as are not able to support themselves, to be divided as my executors may deem proper, without any partiality," held valid. *Urmey's Ex'rs* v. *Wooden*, 1 Ohio State, 160; 59 Am. Dec. 615. To a town to erect a town house, held valid. *Coggeshall* v. *Pelton*, 7 Johnson's Chancery (New York), 292; 11 Am. Dec. 471. To a priest to say masses for the soul of the testator, held invalid. *McGirr* v. *Aaron*, 1 Penrose & Watts (Pennsylvania), 49; 21 Am. Dec. 361. "For the promotion of true evangelical piety and religion," to be distributed by the trustees in such divisions, and to such societies and religious charitable purposes as they may think fit and proper, held valid. *Going* v. *Emery*, 16 Pickering (Massachusetts), 107; 26 Am. Dec. 645. "For educating some poor orphans" of a particular county, "to be selected by the County Court, who are the guardians of such, and to be confined to such as are not able to educate themselves," held valid. *Moore's Heirs* v. *Moore's Devisees*, 4 Dana (Kentucky), 354; 29 Am. Dec. 417. To pay or maintain a faithful and competent instructor in a school to be established by the trustees for pious and indigent youth, held valid. *Sanderson* v. *White*, 18 Pickering (Massachusetts), 328; 29 Am. Dec. 591. "To a public seminary," held valid. *Curling's Adm'rs* v. *Curling's Heirs*, 8 Dana (Kentucky), 38; 33 Am. Dec. 475. Devise to construct an asylum for aged sailors, held valid. *Inglis* v. *Trustees*, 3 Peters (U. S. Sup. Ct.), 119. Devise to the Methodist church, "to be appropriated to the uses and purposes which the conference may deem most advantageous for said church; more especially for the support of Sunday-schools, for the purchase of religious tracts and the distribution of the same," held valid. *Shields* v. *Jolly*, 1 Richardson Equity (South Carolina), 99; 42 Am. Dec. 349. "To be applied to foreign missions and to the poor saints," "as my executors may think the proper objects according to the Scriptures," held invalid. *Bridges* v. *Pleasants*, 4 Iredell Equity (North Carolina), 26; 44 Am. Dec. 94. To the yearly meeting of Quakers, held void. *Green* v. *Dennis*, 6 Connecticut, 293; 16 Am. Dec. 58. To be distributed among needy and respectable widows, a similar devise to a certain congregation in Richmond, to build and support a chapel, and a devise to trustees to permit the Roman Catholics of Richmond to build a church, held void. *Gallego's Ex'rs* v. *Attorney-General*,

3 Leigh (Virginia), 450; 24 Am. Dec. 650. "For the use of the members of the Methodist Episcopal Church in the United States," held void. *Methodist Church* v. *Remington*, 1 Watts (Pennsylvania), 218; 26 Am. Dec. 61. Devise for "building convenient places of worship free for the use of all Christians," etc., held void. *White* v. *Attorney-General*, 4 Iredell Equity (North Carolina), 19; 44 Am. Dec. 92. "For the preaching of the gospel of the blessed Son of God as taught by the people known now as Disciples of Christ," at a certain place, held valid. *Sowers* v. *Cyrenius*, 39 Ohio State, 29; 48 Am. Rep. 418. "To the support and management of such worthy and meritorious charitable and educational and religious institutions of the Roman Catholic faith" as he may determine, held valid. *Quinn* v. *Shields*, 62 Iowa, 129; 49 Am. Rep. 141. Devise for a burying-ground for "all the white religious societies of Christians," held void. *Brown* v. *Caldwell*, 23 West Virginia, 187; 48 Am. Rep. 376. To county commissioners to preserve, repair, and keep the graves and monuments of the testatrix and named relatives, held invalid. *Johnson* v. *Holifield*, 79 Alabama, 423; 58 Am. Rep. 596. "For such charitable purposes as he shall think proper," held valid. *Minot* v. *Baker*, 147 Massachusetts, 348; 9 Am. St. Rep. 713. Devise "for educational purposes" and the erection of "a college or institution of learning," held valid. *Raley* v. *Umatilla County*, 15 Oregon, 172; 3 Am. St. Rep. 142. "To the Sunday-school of said church," held valid. *Eutaw P. B. Church* v. *Shiveley*, 67 Maryland, 423; 1 Am. St. Rep. 412. "To aid needy and meritorious widows" of a named town, in the trustee's discretion, held valid. *Camp* v. *Crocker's Adm'r*, 54 Connecticut, 21. Devise "for the express purpose of spreading the light of social and religious liberty and justice in these United States of America," held valid *George* v. *Braddock*, 45 New Jersey Equity, 757; 14 Am. St. Rep. 754. "At discretion by the selectmen of B. for the special benefit of the worthy, deserving, poor, white, American, Protestant, democratic widows and orphans residing in B.," held valid. *Beardsley* v. *Selectmen of Bridgeport*, 53 Connecticut, 489; 55 Am. Rep. 152. "For such religious and charitable purposes and objects, and in such sums and in such manner as will, in his judgment, best promote the name of Christ," held invalid. *Maught* v *Getzendanner*, 65 Maryland, 527; 57 Am. Rep. 352. For masses "for the repose of the testator's soul and the souls of his family, and also for the souls of all other persons who may be in purgatory," held void. *Holland* v. *Alcock*, 108 New York, 312; 2 Am. St. Rep. 420. To build a free schoolhouse and extend the education of poor children, held void. *Stonestreet* v. *Doyle*, 75 Virginia, 356; 40 Am. Rep. 731. To church trustees to suppress manufacture and sale of intoxicating liquor, held valid. *Hames* v. *Allen*, 78 Indiana, 100; 41 Am. Rep. 555. Devise to trustees, with request to procure the incorporation of a free library and reading-room in the city of New York, and to promote such scientific and educational objects as the trustees may designate, held void. *Tilden* v. *Green*, 130 New York, 29; 27 Am. St. Rep. 487; 14 Lawyers' Reports Annotated, 33 (three Judges dissenting). To such charitable institutions and in such proportions as his executors shall choose and designate, held void. *Read* v. *Williams*, 125 New York, 560; 21 Am. St. Rep. 748. "For the benefit of the inhabitants of East Dennis and vicinity for educa-

tional purposes," with direction to erect a building in a certain place, held valid. *Sears* v. *Chapman*, 158 Massachusetts, 400; 35 Am. St. Rep. 502. Devise that proceeds shall be devoted to a free female college, and "if the way be not clear to that end," "for some charitable purpose, preference being given to something of an educational nature," held void. *Johnson* v. *Johnson*, 92 Tennessee, 559; 36 Am. St. Rep. 104; 22 Lawyers' Reports Annotated, 179. "For the relief of the poor and unfortunate," to be expended according to the judgment of the testator's sisters, held valid. *Bullard* v. *Chandler*, 149 Massachusetts, 532; 5 Lawyers' Reports Annotated, 104. "To some Presbyterian institution in Baltimore as they may determine, for charitable or religious purposes," held void. *Gambel* v. *Trippe*, 75 Maryland, 252; 32 Am. St. Rep. 388; 15 Lawyers' Reports Annotated, 235. For hospitality to ministers and others "travelling in the service of truth," and to the personal relief of the poor or otherwise in the service of the truth," held void. *Kelly* v. *Nichols*, 18 Rhode Island, —; 19 Lawyers' Reports Annotated, 413. Bequest to a town for the benefit of the poor of the town, not confined to the town paupers, held invalid. *Fosdick* v. *Hempstead*, 125 New York, 581; 11 Lawyers' Reports Annotated, 715. For an "art institute," held valid. *Almy* v. *Jones*, 17 Rhode Island, 265; 12 Lawyers' Reports Annotated, 414. To establish and maintain a school "for destitute and friendless children," held valid. *Woodruff* v. *Marsh*, 63 Connecticut, 125; 38 Am. St. Rep. 346. For a free public library in Chicago, held valid. *Crerar* v. *Williams*, 145 Illinois, 625; 21 Lawyers' Reports Annotated, 454. For poor churches of a city and its vicinity, held valid. *McAlister* v. *Burgess*, 161 Massachusetts, 239; 24 Lawyers' Reports Annotated, 158. For "next of kin who may be needy," held void. *Fontaine's Adm'r* v. *Thompson's Adm'r*, 80 Virginia, 229; 56 Am. Rep. 588. To a Sunday-school "to be employed in making Christmas presents to the scholars," held void. *Goodell* v. *Union Ass'n*, 29 New Jersey Equity, 32. Bequest to church to be annually laid out in bread for the poor, held valid. *Witman* v. *Lex*, 17 Sergeant & Rawle (Pennsylvania), 88; 17 Am. Dec. 644, citing the *Morice case*. To procure laws enlarging rights of married women, held invalid. *Jackson* v. *Phillips*, 14 Allen (Massachusetts), 539. To aid in the anti-slavery movement, held valid. Ibid. To maintain a Shaker community, held valid. *Guss* v. *Wilhite*, 2 Dana (Kentucky), 170. To maintain and repair a family burying-ground, held valid. *Dexter* v. *Gardner*, 7 Allen (Massachusetts), 243; *Swasey* v. *Am. Bible Soc.*, 57 Maine, 523. A bequest to a church for masses for the repose of the testator's soul, held void. *Festorazzi* v. *St. J. R. C. Church*, Alabama Sup. Ct., 25 L. R. A. 360. A trust for an infidel society cannot be sustained. *Zeisweiss* v. *James*, 63 Pennsylvania St. 465; but a devise to be used in distributing the works of Henry George was sustained as a charitable trust, notwithstanding this author teaches that private ownership of land is robbery. *George* v. *Braddock*, 45 New Jersey Equity, 757; 14 Am. St. Rep. 754.

"For the relief of the resident poor in a certain village," and to "establish a school for the education of young persons in the domestic and useful arts," held valid. *Webster* v. *Morris*, 66 Wis. 466; s. c. 57 Am. Rep. 278. "For the aid and support of those of my children and their descendants who may

be destitute, and in the opinions of said trustees need such aid," held invalid. *Kent* v. *Dunham*, 142 Mass. 216; s. c. 56 Am. Rep. 667. A devise to the people of the United States, or if Congress does not effectuate it, to the people of Virginia, or if they decline, to certain Hebrew congregations, for certain educational purposes, held void. *Levy* v. *Levy*, 36 New York, 97. "For such charitable institution for women in the City of Chicago as he may elect," held valid. *Mills* v. *Newberry*, 112 Ill. 123; s. c. 54 Am. Rep. 213. For a home "for aged, respectable, indigent women who have been residents of New London," held valid. *Coit* v. *Comstock*, 51 Conn. 352; s. c. 50 Am. Rep 29. "To be distributed by them (executors) after my decease among my relations, and for benevolent objects, in such sums as in their judgment shall be for the best," held valid. *Goodale* v. *Mooney*, 60 N. H. 528; s. c. 49 Am. Rep. 334. "For the suppression of the manufacture and sale of intoxicating liquors," held valid. *Haines* v. *Allen*, 78 Ind. 100; s. c. 41 Am. Rep. 555. "To assist, relieve, and benefit the poor and necessitous persons, and to assist and co-operate with any such charitable, religious, literary, and scientific societies and associations, or any or either of them as shall appear to the trustees best to deserve such assistance or co-operation," held valid. *Suter* v. *Hilliard*, 132 Mass. 412; s. c. 42 Am. Rep. 444. For "the education of the scholars of poor people," of a certain county, held valid. *Clement* v. *Hyde*, 50 Vt 716; s. c. 28 Am. Rep. 522. "Among such Roman Catholic charities, institutions, schools, or churches in the City of New York" as a majority of the trustees should select, and in such sums as they should think proper, held valid. *Power* v. *Cassidy*, 79 N. Y. 602; s. c. 35 Am. Rep. 550. "For the purchase and distribution of such religious books as they should deem best," held valid. *Simpson* v. *Welcome*, 72 Me. 496; s. c. 39 Am. Rep. 349. To "distribute to such persons, societies, or institutions as they shall consider most deserving," held valid. *Nichols* v. *Allen*, 130 Mass. 211; s. c. 39 Am. Rep. 445. "For any and all benevolent purposes that he may see fit," held void. *Adye* v. *Smith*, 44 Conn. 60; s. c. 26 Am. Rep. 424. "Among such incorporated societies organized under the laws of the State of New York or the State of Maryland, having lawful authority to receive or hold funds upon permanent trusts for charitable or educational uses," as the trustees might select, and in such sums as they should determine, held void. *Pritchard* v. *Thompson*, 95 N. Y. 76; s. c. 47 Am. Rep. 9. "To aid indigent young men" of a certain town "in fitting themselves for the evangelical ministry," held valid. *Trustees, &c.* v. *Whitney*, 54 Conn. 342. "For worthy educational, charitable, and benevolent purposes and objects, and not for any other purposes whatever," held valid. *Fox* v. *Gibbs* (Maine), 29; Atlantic Rep. 940.

In a recent case, *Kinsley* v. *Kinsley*, 15 Can. Law Times, 47, the Ontario Court of Appeal held that a bequest by which the executors were directed "to invest the residue of the estate and to apply the annual interest therefrom in such way and manner as the executors should deem expedient and proper for the promotion of free thought and free speech in the province of Ontario," was void as opposed to Christianity.

It will be seen from the foregoing collection of cases that no definite rule

can be deduced from the American authorities, except perhaps that uncertainty as to the favoured members of a class is excused if the class is definite. Mr. Pomeroy says (note 1, Equity Jurisprudence, p. 1518): "It is impossible to formulate any more specific American rule" (than that quoted above from his text), "since there is a radical difference in the theories and fundamental views prevailing in various States." Mr. Pomeroy cites a great many authorities other than those given above, much to the same general purport — that no rule can be laid down for all the States. The particular subject, and the general subject of charitable trusts, and the *cy près* doctrine, is very learnedly discussed in the New York authorities cited above and other New York cases referred to in them, and in Moore's Heirs and Moore's Devises, 4 Dana (Kentucky), 351; 29 Am. Dec. 417. See Dr. Bigelow's notes to 1 Jarman on Wills (6th Am. ed.), pp. 200, 201, 202; *Levy* v. *Levy*, 33 New York, 97.

As to the different rules of charitable trusts, see the particular analysis of Mr. Pomeroy (Equity Jurisprudence, § 1029 and notes).

No. 3. — PHILPOTT (Appellant) *v.* PRESIDENT AND GOVERNORS OF ST. GEORGE'S HOSPITAL AND OTHERS (Respondents).

ATTORNEY-GENERAL (Appellant) *v.* PHILPOTT AND OTHERS (Respondents).

(1857.)

RULE.

A BEQUEST of money to be employed in buildings for a charitable object, if land shall at some future limited time be given for that purpose, is a valid bequest notwithstanding the Mortmain Acts.

Philpott (Appellant) v. President and Governors of St. George's Hospital and Others (Respondents).

Attorney-General (Appellant) v. Philpott and Others (Respondents).

6 H. L. Cas. 338–375 (s. c. 27 L. J. Ch. 70; 3 Jur. N. S. 1269).

Charity. — Mortmain Act.

Testator devised to S. a piece of land in the hamlet of N. He then declared that he had long contemplated erecting and endowing almshouses on some part of his estate in the parish of N., and if within 12 months after his decease any person should give a piece of land as a site for such almshouses, then as soon as the same had been legally dedicated to charitable uses he

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directed his trustees to pay to the trustees of the intended charity £60,000, to be devoted to the purposes of the said charity, but so that no part should be applied to the purchase of lands for the same. S., within 12 months of the testator's death, duly dedicated to the purposes of the charity the land which had been devised to him. On a bill filed to have the £60,000 applied for the benefit of the charity, — *Held*, that the gift by the will of that sum as it expressly excluded the purchase of land, was a valid bequest, and was not affected by the Mortmain Act (9 Geo. II. c. 36).

This was an appeal against two decrees of the MASTER OF [338] THE ROLLS in suits instituted to declare and carry into effect the will of the Right Hon. Reginald John Pindar, Earl Beauchamp.

This will was dated on the 18th June, 1847, and after another devise, not necessary to be referred to, gave and devised "all that piece or parcel of pasture land, situate, &c., in the hamlet of Newland, in the County of Worcester," to "Charles Grantham Scott, his heirs and assigns forever." The will then proceeded as follows: "And whereas I have contemplated erecting and endowing almshouses, either upon some part of my estate or elsewhere * in the hamlet of Newland aforesaid for the [* 339] residence of twelve or such larger number of poor men and women, members of the Church of England, who shall have been employed in agriculture and have been reduced by sickness, misfortune, or infirmity; now, in case I happen to die without effecting such object, and any persons or person should, within twelve months after my decease, at their, his, or her expense, purchase or give a suitable piece of land in Newland aforesaid as a site for such almshouses, and with intent that the same should be devoted to such purpose, then I empower and direct the trustees or trustee for the time being of this my will, when and so soon as such land shall have been legally dedicated to charitable uses, provided they, he, or she shall approve the scheme of the intended charity, and the rules and regulations proposed for the government thereof, to pay to the trustees of the said intended charity out of such part of my personal estate as is hereinafter mentioned the sum of £60,000, to be by them devoted to the several purposes of the said charity in the manner to be determined in respect of the funds of the same; but so nevertheless that the said sum, or any part thereof, shall not be applied in or towards the purchase of any lands for the purposes of the said charity. And if and in case no such piece or parcel of land shall be found and provided as aforesaid, or

being such, the scheme of the intended charity or the rules and regulations for the government thereof, shall not in the opinion of the majority of my said trustees be in accordance with what they may consider my wishes upon the subject to have been, then I give and bequeath the said sum of £60,000 to the trustees for the time being of St. George's Hospital, situate at Hyde Park Corner, in the county of Middlesex, to be by them applied to the purposes of that institution."

[* 340] * The testator appointed C. G. Scott, Susan Kitching, and the Rev. T. Philpott, executors and executrix of his will, and died 22d January, 1853, leaving pure personalty more than sufficient to satisfy the legacy in question.

By an indenture dated the 6th December, 1853, and made between Charles Grantham Scott, on the one part, and John Abel Smith, Susan Kitching, and the Rev. Thomas Philpott, of the other part, duly executed and enrolled in chancery, after reciting the material parts of the will of Earl Beauchamp relative to the charity; and that C. G. Scott was desirous of effectuating the object contemplated by the testator, it was witnessed that C. G. Scott, for a nominal consideration, did grant and convey unto John Abel Smith, Susan Kitching, and the Rev. Thomas Philpott, and their heirs and assigns, all that piece of pasture land in Newland, in the will described, to hold to them, their heirs and assigns, forever. Nevertheless, upon trust and to the intent that the same piece of land and hereditaments should thenceforth be devoted to the purposes, and be used as a site for the erection of such almshouses, as in the will mentioned, and other the purposes of the said intended charity; and that the same should be used and enjoyed for those purposes, and be subject to such powers and provisions, in relation thereto; and that the scheme of the said intended charity, and the rules and regulations for the government thereof, should be framed and settled in such manner in all respects as the trustees for the time being of the now stating indenture should, with the approbation of the trustees for the time being of the testator's will, thereafter determine, and should by any indenture executed by them, and enrolled in Chancery, direct and declare accordingly.

By an Act 4th & 5th Will. 4, c. 38: "The President, Vice-

[* 341] presidents, Treasurers, and Governors of St. George's * Hospital" are made a body corporate, and by that name have perpetual succession and a common seal, and are made capable to

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obtain and hold, for the purpose of the institution, any monies and other personal estate and property of what nature or kind soever.

Various conflicting claims having arisen in respect of the sum of £60,000, the appellant, on 3d June, 1854, filed his bill against the respondents, praying that the rights and interests of all parties under the will in respect of the said sum might be ascertained and declared, and that the trusts of the said will might be carried into effect so far as the same related thereto.

The President and Governors of St. George's Hospital, by their answer, claimed the said sum of £60,000 by virtue of the will, notwithstanding the execution of the indenture of the 6th December, 1853, and submitted that if such indenture had been executed and enrolled as before mentioned, nevertheless the land comprised therein had not been thereby legally dedicated to charitable uses.

The cause came on to be heard before the MASTER OF THE ROLLS, who, by a decree made on the 19th November, 1855, adjudged and declared that the bequest contained in the will of Earl Beauchamp was void as regards the almshouses mentioned therein, as coming within the provisions of 9 Geo. II. c. 36 (the Mortmain Act), and that the bequest as regards the trustees of St. George's Hospital, in the county of Middlesex, did not take effect, by reason of the events on which the gift to the trustees was to take effect not having arisen.

On the 5th December, 1855, the Attorney-General intervened in the matter, and filed his information against all the other parties, insisting that the indenture of the 6th December, 1853, was a valid dedication of the land, and that the bequest contained in the will was a valid bequest, and * ought to be carried [* 342] into effect and the charity established. The case was heard at the Rolls, and on the 10th March, 1856, a decree was made dismissing the information (21 Beav. 134). Both these decrees were appealed against.

The Attorney-General (Sir R. Bethell) and Mr. G. M. Giffard, for the appellant, Philpott.

Mr. R. Palmer and Mr. R. Hawkins, for St. George's Hospital.

Mr. Lloyd and Mr. Cairns appeared on behalf of Mrs. Kitching and Mr. Grantham Scott.

Mr. H. Terrell for the Attorney-General.

THE LORD CHANCELLOR: — . . . [347]

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The question here is, I conceive, a question wholly dependent upon the true construction to be put upon the Act of the 9th Geo. II. c. 36. The question arises upon the will of Lord Beauchamp, dated the 18th of June, 1847, which contains this bequest. [His Lordship read it.]

Before the statute 9 Geo. II. c. 36, there was nothing, so far as I am aware, that prevented the disposition of lands for charitable purposes (provided they were kept free of feudal difficulties) arising upon the Statute of Mortmain. Then it was thought objectionable to give money for the purpose of buying lands, and restrictions on such bequests of money was introduced.

[* 348] * There is no doubt that the bequest of this £60,000 was not a gift by a deed enrolled in the manner pointed out by the statute; and if, therefore, it is within the prohibition of "money given to be laid out in the purchase of land," it is struck at by the statute. If it is not within the prohibition, it is not struck at by the statute. The question, therefore, is merely a question upon the true construction of that statute.

Now, it was argued at the bar, that in truth this was a purchase of land, for it was a direction in some mode or other to acquire the lands. And we have an ingenious, and, I dare say, correct definition of the word "purchase" given to us. It was said that "purchase" may mean anything that a person may be able *pour chasser* to gain or pursue; that these lands were to be gained, and that consequently those were lands directed to be purchased. That was a very ingenious argument; but I think the answer made to it by the Attorney-General is quite conclusive, that, whatever meaning may be given to the word "purchase," when used on other occasions and in other contexts, here it is perfectly certain and demonstrable that it means "purchase" in the ordinary sense of the word, just as where you speak of the purchase of a horse or the purchase of a watch. The language of the statute is that no sum of money shall be given to be laid out in the purchase of lands, — that is, if you like, *pour chasser* lands, in consideration of money given for them; that is to say, it prohibits the buying of lands. I apprehend, therefore, that there can be no possible doubt that this is not a purchase within the express words of the statute; it is not money given to be applied in buying lands.

Indeed, the Master of the Rolls in his judgment did not so consider it; but he held the bequest to be nevertheless void, as

coming within the spirit of the statute, having, as he described it, a direct tendency to bring lands into mortmain. Now, in one sense, that is perfectly true; this bequest has a direct tendency to bring lands into mortmain, — * it is a solicitation; it is [* 349] something that may even operate as an improper pressure upon some one else to bring lands into mortmain. But I must own I think that is not the way in which any court of justice has a right to deal with prohibitory statutes. Prohibitory statutes prevent you from doing something which formerly it was lawful for you to do. And whenever you can find that anything done that is substantially that which is prohibited, I think it is perfectly open to the Court to say that that is void, not because it comes within the spirit of the statute, or tends to effect the object which the statute meant to prohibit, but because by reason of the true construction of the statute it is the thing, or one of the things actually prohibited.

And I think that distinction is very well illustrated by one of the cases that was cited in the course of the argument; I mean the case of *The Attorney-General* v. *Davies*, 9 Ves. 535; 7 R. R. 295. What is prohibited is giving money to be laid out in the purchase of lands. In *The Attorney-General* v. *Davies* the testator gave the residue of his estate for the use of the Orphan School in the City Road, upon the condition that the committee of that school would convey certain lands. That was not strictly a purchase, but it clearly differed only in name. It was giving them money as a consideration for their giving lands to a charity. And the Court — I think very properly — held that that was prohibited by the statute, not because it came within the spirit of the statute, or tended to the evil which the statute was meant to remedy, but because it was expressly prohibited by the statute.

So, in this case, if it had been found (no such question has been raised here, but undoubtedly the fact might have awakened great suspicion), — if it had been found that the * testator [* 350] had said to certain persons, "I will give you land by my will, but with the understanding that when I give money to endow that which you shall build, you shall give the land for the purpose of the charity," that would in truth have been void, not because it came within the spirit of the statute, but because it would have been a thing directly struck at by the statute. It would have been in form a devise to those gentlemen, but in substance a devise to

charity, making them in truth trustees. No such question as that has been raised here. I assume, in the observations which I am about to make, that this transaction is, as it purports to be on the face of it, an independent gift of £60,000 for the maintenance of certain almshouses, if within a year after the death of the testator somebody else should give lands and build such almshouses. Now, that is not struck at by the express words of the statute.

Then the only question is, whether, by a long series of authorities, or any course of decisions, it is shown that transactions similar to this have been considered as avoided by the statute. Because, if that should be so, just as I said in the preceding case (*Mayor, &c. of Beverley* v. *The Attorney-General*, 6 H. L. Cas. 310), it does not behove us, after a long course of decisions, to inquire minutely or narrowly into what the origin of such course of decisions has been. But upon looking at all the cases I not only do not find such a course of decisions, but it appears to me that, when the cases are examined, there is a perfectly uniform course of decisions to the contrary. I do not rest my judgment in this case upon any previous authorities as warranting my decision here, but, in the view I take of it, I decide this case upon the construction of the statute and the absence of any authority which interferes with the literal meaning of this enactment.

[* 351] *The first case to which I shall advert, and which was decided soon after the passing of this statute, in the time of Lord HARDWICKE, was the case of *The Attorney-General* v. *Bowles*, 2 Ves. Sen. 547; 3 Atk. 806. That was a bequest to executors of a sum of £500 to lay out a part in building a small school-house, with a little house adjoining for the schoolmaster, the purchase of the ground and expenses of the building not to exceed £200. Lord HARDWICKE held that that £200 might be lawfully laid out in building upon lands belonging to, or which might belong to the parish.

I have not the least hesitation in saying that all the Judges who have questioned this decision have questioned it upon the soundest ground. I am surprised that a Judge of Lord HARDWICKE'S extreme accuracy and knowledge of jurisprudence generally, should have fallen into such an error as that. The statute has expressly prohibited the giving of money to be invested in land, and in that case there was a positive direction to invest a sum of money in buying a site of ground and building upon it, the whole expendi-

ture not to exceed £200. No doubt, Lord HARDWICKE might have truly said, "If the testator had only given £200 to be employed in building, not upon land which he himself gave, but upon land to be given by others, that would have been valid," but what he gave was money to be laid out upon the purchase of land and in building upon it.

That was undoubtedly a wrong decision, and it is declared to be so by Lord NORTHINGTON just ten years afterwards, in the case of *The Attorney-General* v. *Tyndall*, 2 Eden, 207; Amb. 614, where Lord NORTHINGTON pointed out the error into which Lord HARDWICKE had fallen. It is said, and we know from the history of the times that it was so, that Lord * NORTHINGTON owed [* 352] a grudge to Lord HARDWICKE, and that he liked to throw out observations against his judgments, and probably there may be something of feeling in the mode in which he expressed himself in that case. But I must say that I quite agree with Lord NORTHINGTON in his opinion that the judgment which Lord HARDWICKE gave in the case of *The Attorney-General* v. *Bowles* is utterly irreconcilable with the statute and with all subsequent decisions.

But Lord NORTHINGTON, while triumphantly showing the error in *The Attorney-General* v. *Bowles*, says, "Building on a site is laying out the money in realty, and therefore contrary to the spirit of the statute. It is demandable in a *præcipe*, and is a purchase of so much realty." That has been entirely overruled in subsequent times. No doubt it is an improvement of the realty, but nobody will now pretend to argue that a bequest is void because it directs money to be laid out in building upon, or otherwise improving land already in mortmain. This seems, however, to have been the opinion of Lord NORTHINGTON.

My Lords, those two opposite judgments, the first in 1754, and the other in 1764, for a great many years afterwards, during the times of Lord CAMDEN and Lord BATHURST, and even down to the time of Lord THURLOW, led to a great deal of conflicting decisions upon this question, whether bequests for building for charitable purposes were or were not good. Just before Lord THURLOW gave up the Great Seal in the year 1792, there came before him the case of *The Attorney-General* v. *Nash*, 3 Bro. C. C. 588, which I think is a very important case with reference to the true view of this subject. There the bequest was upon trust that the persons to whom it was given should cause to be erected and built in

[*353] Droitwich a *school-house and certain other buildings; and then the testatrix directed and empowered her trustees to purchase such spot of ground as they should think proper for the purpose. This was argued before Lord THURLOW more than once. The decision of Lord THURLOW is given in rather a strange way; it is not given as having been a judgment pronounced at the time the decree was made, but as if some observations had been thrown out by Lord THURLOW in the course and at the conclusion of the argument. I observe, looking at the date of the decree, that it was made just three weeks before he gave up the Great Seal, and I dare say it was one of those cases in which he directed the judgment to be entered up, having previously expressed what his views were. Eventually he decided against the validity of the bequest, and I think most properly. The testatrix at first directed that the trustees should cause to be erected a certain school-house upon land which she expressly declared was not to be purchased by her trustees, but was to be land already in mortmain. This direction was, I apprehend, perfectly good. But then she went on and expressly directed and empowered her trustees to purchase such a spot of ground as they should think proper for the purpose. Even there Lord THURLOW struggled hard to endeavour to support the bequest. He says, "I cannot conceive that it would disappoint her intention if the whole land came *aliunde*," treating it as if she had authorised it to come *aliunde*. "The question is, whether authority given to the executors to lay out the money in land would bring it within the statute. If land were given I think it clear that the executors could not keep back one shilling of the bequest for the maintenance of the charity." Therefore what Lord THURLOW said upon that occasion was this, I think it is clear that if anybody else gave the land for the charity the be-

[*354] quest would be *perfectly good and the trustees could not, without a breach of duty, keep back a farthing of the money. Eventually, however, without giving any reason for altering his opinion, he allowed the demurrer in that case, which was in truth an expression of his decided opinion that the bequest was bad; and clearly it was bad, because the land did not come *aliunde* to the executors, it was a direction to the executors to purchase whatever land they thought fit. Still it was clearly an intimation of Lord THURLOW'S opinion that if there was money to be invested on land acquired *aliunde*, the bequest would be good.

No. 3. — Philpott v. St. George's Hospital, 6 H. L. Cas. 354, 355.

The next case was that of *The Attorney-General* v. *Whitchurch*, 3 Ves. 141, before Lord ALVANLEY, in the year 1796, and it has been supposed to be a case in which Lord ALVANLEY had intimated an opinion that a bequest to build upon land that should hereafter be given was bad. I think Lord ALVANLEY meant nothing of the sort. In that case there was a devise of four houses for almshouses, and £2000 to trustees for the benefit of their inmates. There was not the least doubt about the invalidity of that bequest. It was not a bequest of money to be laid out in land, but a bequest of four houses, and the question was whether the bequest of the houses was bad. It was argued that the bequest of the £2000 might be good, in order to be applied, not to the almshouses devised by the testator, but to some other almshouses. But it was eventually decided that that could not be; that the substratum falling, that which was upon it fell also. There Lord ALVANLEY says, "*The Attorney-General* v. *Bowles* has been shaken by subsequent authorities, and it is not one of those decisions of his that I can entirely concur in; I mean that part of it where admitting that the object * was to erect a building upon [* 355] land not then given, he throws out that if land should be afterwards given, the statute would not be evaded by applying the money to erect a building upon it." What Lord ALVANLEY says there is perfectly true, and gives a perfectly correct view of the law. But with respect to that case of *The Attorney-General* v. *Bowles*, the question there was, not drawing a distinction between a grant of money to be laid out on land that was to be thereafter given, and money to be laid out upon land that was to be purchased, but the question was whether, if the bequest was to lay out in land that was to be purchased with the money, you could repudiate so much of it as directed the purchase of land, and retain the other which directed the building. Lord ALVANLEY truly says, Lord HARDWICKE'S view of the law, so understood, cannot be supported.

That a good bequest may be made of money laid out on land to be afterwards acquired, not by means of that money but by gift or otherwise, appears to me to be a matter not so much decided as taken for granted by all modern Judges down to very recent times. Indeed Lord ELDON, in the case of *The Attorney-General* v. *Parsons*, 8 Ves. 186, 191; 7 R. R. 22, 26, states this (the facts of the case are not very material, but I chiefly refer to that case for what Lord ELDON says upon it): "I agree with

the late cases, which go a great way to establish that the Court cannot put such a construction upon the word 'erect' as was put upon that word in former cases, and that *primâ facie* the testator must be taken to mean by the word, that land shall be bought." That refers to a course of decisions with which I need not trouble your Lordships, in which this question has been in innu-
[* 356] merable cases raised. Supposing a testator simply * directs his executors to build almshouses, or to build a house, does that necessarily imply that they are to get land for the purpose? May it not mean that they are to build if they can find any person willing to give the land? There has long been a great struggle to hold that that was the meaning of it: Lord HARDWICKE saying that "*erigere*" does not mean merely erecting in the sense of physical erection; he alludes to the words by which corporations are constituted, where "*erigere*" is used in the sense of "constitute." Therefore he says to erect almshouses may simply mean to endow something which has been built by somebody else. However, Lord ELDON approves of the more modern decisions upon that subject as coming under the common-sense view, that where there is a direction to built or erect almshouses, and those words alone are used, it must mean that ground must be acquired for the purpose, unless there is something to point out that the houses are to be built upon ground not to be purchased, but upon ground already existing in mortmain, or to be given by some other person for the purpose. He adds to what I have before quoted. "I think the good sense is with the later cases, requiring that the testator himself should have manifested his purpose to be sufficiently answered if they could hire, or beg land, according to the expressions in the different cases." Is not that conclusive to show that Lord ELDON considered that a direction to build upon land which the devisee could hire, or beg, would be a good bequest. Then he says, "I have reason to know Lord THURLOW's opinion was, that if a testator directs a school to be built, and does not advert himself by words in his will to a purpose that the land is to be acquired otherwise than by purchase, you ought to infer that he meant it to be acquired by purchase; and then it will not do." It is
[* 357] quite clear that * Lord ELDON considered that if it was a direction to build upon land which the donees of the money could beg, or upon land which they could otherwise acquire, or upon land already in mortmain, it would be a perfectly good

bequest. He does not say that, but he assumes it as being unquestionable, and all his reasoning goes upon the assumption that that is the law.

Then comes the case to which I have already adverted. *The Attorney-General* v. *Davies*, 9 Ves. 535; 7 R. R. 295, is extremely important. The case came before Sir WILLIAM GRANT, and then by appeal before Lord ELDON. There the bequest was of "the sum of £5000, more or less, as it may be wanted, to build twelve almshouses, purchase the ground, six for poor men, six for poor women, economy and convenience observed in the structure." Then there was a general gift of the residue to the Orphan School in the City Road, upon the condition that the directors of that school should procure a piece of ground for almshouses, which in truth was a direction substantially to purchase land. The MASTER OF THE ROLLS held both those bequests to be bad. As to the first there is no doubt. He says, "It must be admitted that if the will stopped with the bequest of the £5000, it would be wholly void, for the testator gives it expressly to purchase land; and even if he had said nothing about purchasing, a bequest of money to build almshouses would be void according to the later determinations; as the Court will not imply an intention of which the will affords no trace, that if the land should be given, then, and then only the building shall take place;" clearly showing that Sir WILLIAM GRANT understood the law, not to be controverted, that a gift of money to be employed in building upon land, if land shall hereafter be given, was a perfectly good gift.

* Lord ELDON affirmed the decree of Sir WILLIAM GRANT, [* 358] and said, "Whatever were the decisions formerly when charity in this Court received more than fair consideration, it is now clearly established, and I am glad it has come back to some common sense, that, unless the testator distinctly points to some land already in mortmain, the Court will understand him to mean that an interest in land is to be purchased, and the gift is not good." That has been taken as if Lord ELDON meant to say that the only case in which the bequest would be good, would be if the almshouse was to be built upon land already in mortmain. That is not a legitimate deduction from what Lord ELDON says, taken in connection with what he had previously said in *The Attorney-General* v. *Parsons*. The question then was only between land already in mortmain and land to be purchased. He

says in effect, "I cannot infer that this is land already in mortmain, or land which is to be acquired in any other mode. If you simply say that you give money to be laid out in building, that *primâ facie* means to be laid out in building upon land which is to be procured with the money." I think, therefore, the irresistible inference from all those cases is, that Lord ELDON and Sir WILLIAM GRANT both thought that a gift of money to be laid out in building upon land, which the person to whom the money was given would beg, as he says, or procure in some other way, would be a perfectly good bequest.

Then there was the case of *Henshaw* v. *Atkinson*, 3 Mad. 306, which was before Sir JOHN LEACH. There the testator, having bequeathed a sum of money to erect a blue-coat school at Oldham, and establish a blind aslyum in Manchester, adds these [* 359] words: "But I direct that the said money shall not * be applied in the purchase of lands, or the erection of buildings, it being my expectation that other persons will, at their expense, purchase lands and buildings for those purposes." Now, Sir JOHN LEACH in his judgment refers to those words as conclusively showing that the gift was perfectly good, because the testator had said that the money was not to be laid out in the purchase of land, or in the erection of buildings upon land, which it was expected other parties would give. It is supposed, however, and I see Lord LANGDALE seems to imagine, that that case was only to be supported by reason of what follows. For in the codicil there was a direction that till the almshouses could be gotten, the money should be applied to the maintenance of men who were already in almshouses. I think that has been misunderstood, for Sir JOHN LEACH, after showing that the bequest was good, because it was to be applied not in building upon land to be purchased out of the money given by the will, but in building upon land which some other person should give, says (dropping that part of the argument altogether), "It is next argued that it was this testator's intention that the charities were not to take effect until lands or buildings were supplied by others, and that the money may be locked up for an indefinite period of time, and therefore that the bequest cannot be sustained. The cases of *Downing College*, Amb. 550, and *The Attorney-General* v. *The Bishop of Chester*, 1 Bro. C. C. 444, seem to be authorities against that objection." There being no time limited in that case, it was said the

bequest may not take effect for a century, because no almhouses may be procured for an indefinite length of time. But Sir JOHN LEACH says that the decision in the case of *The Attorney General* v. *The Bishop of Chester* was a perfectly *good answer to [*360] that. That was a case in which the testator gave money to found a bishoprick in Newfoundland in case a bishop should be appointed. And it was argued that that was bad upon the very ground that Sir JOHN LEACH alludes to, that there was no reason to suppose that a bishop would ever be appointed. However, that was very much canvassed before Lord THURLOW, and it was held to be good. The grounds of that decision it is not necessary for me to go into. Sir JOHN LEACH alludes to it, and he says, "But the point does not arise here." In his second codicil the testator directs that his bequest "shall take effect immediately." Therefore I think that Sir JOHN LEACH meant to abide by the opinion he had expressed upon those words, namely, that the bequest of money to build almshouses was not void, because it was a direction to build upon land which other people might give for the purposes of the charity.

Then, my Lords, in the present case, his Honor referred to the different authorities, and made his comments upon them, and then he relied upon the three subsequent cases of *Pritchard* v. *Arbouin*, 3 Russ. 456; 5 L. J. Ch. 175, *Giblett* v. *Hobson*, 5 Sim. 651, 3 My. & K. 517, 4 L. J. Ch. 41, and *Mather* v. *Scott*, 2 Keen, 172; 6 L. J. Ch. 300. Now, the case of *Pritchard* v. *Arbouin* was a bequest to build a new church. It is referred to both by the MASTER OF THE ROLLS and by Lord LANGDALE as a decision of Lord LYNDHURST. It was in fact a decision of Sir JOHN LEACH after he became MASTER OF THE ROLLS. However, that is immaterial. In that case he lays it down, that "it is the standard rule of construction that a direction to build is to be considered as including a direction to purchase land for the purpose of building, unless the testator distinctly points to some land already in mortmain." For the purpose of that case that was quite accurate. * It was not necessary there to go on to say, "or to some [*361] land to come to his trustees, not through the instrumentality of any purchase directed by him." It is quite clear that the learned Judge only meant to say, "It will not do if there is merely a direction to build," as there was in that case, and therefore void.

Exactly the same remark applies to the case of *Giblett* v. *Hobson*, 3 My. & K. 517, 4 L. J. Ch. 41, which came before my noble and learned friend when he held the Great Seal. There the bequest was, "I give and bequeath to the Butchers' Charitable Institution £5000 towards building almshouses to the said institution." Exactly the same principle applies there. That was a direction to build, implying, according to the later authorities, a direction to get land for the purpose of building. My noble and learned friend held, and with perfect propriety, that that was a bad bequest.

Then comes the remaining case of *Mather* v. *Scott*, 2 Keen, 172, 6 L. J. Ch. 300, before Lord LANGDALE. There the gift was of residue to trustees, with a request that they will entreat the lord of the manor to give a spot of ground suitable for the erection of so many decent buildings or rooms, something like the charity called the *Twelves*. Lord LANGDALE, the MASTER OF THE ROLLS, said, "I think the language does not exclude the trustees from purchasing land if they think proper, and, if so, the bequest will be void." I think that that was a perfectly right decision; certainly it was a right construction of the will. The right construction of the will was that they were to get a site at all events, if they could from the lord of the manor, but if not, by buying it, and therefore, according to all the authorities, that bequest was bad.

[* 362] * I have thought it necessary to allude to the different authorities, not for the purpose of founding myself upon any of those authorities in the present case. I rest upon the true construction of the statute, which I think does not forbid what has been done here. I refer to those authorities only for the purpose of showing that they do not lead to any contrary conclusion. If there had been no authorities at all, I should still have come to the same conclusion; but the authorities, so far as they go, appear to me rather to warrant than to go against what I consider to be the true construction of the statute. Therefore, in this case, I am of opinion that there has been a miscarriage in the Court below, and that the decree must be reversed.

Lord BROUGHAM: —

My Lords, I think with my noble and learned friend, that in this case there has been a miscarriage, looking to the principle upon which the decision of the Court below seems to have proceeded. The learned MASTER OF THE ROLLS appears to have gone upon the assumption that under the words of the Act, "money, or any

other personal estate whatsoever, to be laid out or disposed of in the purchase of land," we have a right to include a bequest of money which may lead to the purchase of land, or be employed in any manner, or which may ultimately tend in its effect to produce a purchase of land. My answer to that is, that the Legislature has not said so; it confines the prohibition to the laying out of money in the purchase of lands; and I think that the expression, "purchase of lands," in this case, must be taken in its ordinary sense, as it occurs in the first and second sections, and more especially in the third section, where the words are, "money, goods, chattels, or other personal estate, or securities for
* money, to be laid out or disposed of in the purchase of [* 363]
any lands." My Lords, we cannot feel any doubt, when the question arises, as to the meaning of the words used; we may look at the spirit as well as at the letter of the enactment. But here, in order to uphold the decision, we are called upon to go a great deal further, and to look at the presumed intention of the Legislature. Because the Legislature has confined itself to one specific mode of accomplishing its purpose of carrying into effect the intention with which it made the enactment, we are therefore to add enactments which the Legislature never made, provisions beyond what the Legislature has made, for the purpose of completing that which it left incomplete, for the purpose of supplying what it left defective. I am not at all prepared to adopt any such general principle of construction.

If the cases went to that extent, I agree with my noble and learned friend that no doubt they would throw great light upon the subject, and would make one hesitate in confining the rule of construction so closely as I think it ought to be confined. But I do not discover anything in any of the cases which leads to that conclusion. Much has been said of the case which was before me, of *Giblett* v. *Hobson*, 3 My. & K. 517; 4 L. J. Ch. 41, and I think that the MASTER OF THE ROLLS goes, among other grounds, upon that case. I think there is nothing in it to warrant the conclusion at which he has arrived. I have looked into it very carefully, and I find no reason whatever to depart from the opinion which I then held. I said that I would draw two positions from the statute itself, and from the cases which have been decided upon the construction and application of that statute. One of those positions was that money given for erecting or building

[* 364] houses, if nothing further is found * in the gift, must be taken to mean money to be laid out in lands, inasmuch as houses cannot be built except upon land; always excepting no doubt, what from the nature of the case clearly must not be considered as within the prohibition of the Act, viz., land already in mortmain, for, no doubt, money directed to be laid out in the building of houses upon land already in mortmain is no contravention of the Statute, although certainly there is something in Lord NORTHINGTON'S language which shows that, very likely he would have been prepared to hold that money directed to be laid out in improving land already in mortmain, should be taken as money to be invested in land not in mortmain, and consequently to be considered void. It would be impossible to contend that, even if there were no cases to the contrary. It appears to me, with great deference to the authority of that learned Judge, to be inconsistent, not to say absurd.

Then the other position which I drew from the Act and from the decided cases was, that if it appeared from other circumstances in the will, or even if it appeared from matter *dehors* the instrument, that the intention of the giver was that the money should be laid out simply in building upon land, not perhaps already in mortmain, but that the intention of the testator was to give money for the purpose of building houses upon land if not already in mortmain, at least on land to be obtained in any other way than by purchase with the money given by himself, then in that case it was not a gift of money, either directly or indirectly, for the purchase of land, but it was a gift of money to build houses upon land either already in mortmain, or which was to be obtained, not by purchase with that money, but to be obtained *aliunde*, and consequently that that gift of money was not, within the statute, forbidden as a gift for the purchase of land and therefore void.

[* 365] * I have no reason whatever to doubt that both those propositions are according to the law upon the subject. But neither of them at all supports the judgment of the MASTER OF THE ROLLS, in this case, any more than the other decision to which my noble and learned friend has adverted, of *The Attorney-General* v. *Parsons*, 8 Ves. 186–191; 7 R. R. 22–26. It not only does not support the decision of the MASTER OF THE ROLLS, but it appears to me to go directly against it.

There is a doubt raised upon the case of *The Attorney-General* v.

Davies, 9 Ves. 535; 7 R. R. 295, as if Lord ELDON had confined the exception there to the single case of building upon land already in mortmain. Now, it is perfectly clear, from the reason of the thing indeed, but still more from the case of *The Attorney-General* v. *Parsons*, that he could not have had any such intention whatever. *The Attorney-General* v. *Parsons* having been decided before *The Attorney-General* v. *Davies*, Lord ELDON must have been confining himself there to land already in mortmain, because that was the matter in dispute. My noble and learned friend on the woolsack has pointed out the reason why he confined himself to that specific point. The fact is, that *The Attorney-General* v. *Parsons*, which speaks of "hiring or begging" land, is the strongest possible confirmation of the view which we have put, and of the construction we are now putting upon the word "purchase" in the Statute of the 9th of Geo. II.

On the whole, therefore, I am of opinion that there has been in this case a miscarriage, and that according to the true construction of the words of the Mortmain Act, and according to the true construction to be put upon the decisions under that Act, the case is not such as to come within the enactment.

* Lord WENSLEYDALE: — [* 366]

My Lords, in this case I am of the same opinion as both my noble and learned friends who have preceded me. I think that this is a very clear case. It arises entirely upon the construction of the statute. We have to see whether that statute forbids this particular disposition of money, viz., money to be laid out in erecting almshouses in the particular place in which these almshouses are to be erected. We have nothing to do in the present case, whatever our suspicions may be, with any supposed trust on the part of Colonel Scott to devote some of the lands bequeathed to him by Lord Beauchamp for the purpose of the charity. No such case has been made; and though we may have a great suspicion on the subject, it would not warrant us in coming to the conclusion that this gift is void on that ground. If there was a secret trust, I apprehend that that would be within the statute, and consequently void. Therefore that matter we must dismiss entirely from our consideration. The real question in the case is whether this in the true construction of the Statute of Mortmain, is a transaction which is defeated by the provisions of that Act, and I am clearly of opinion that it is not. We ought to look to the words

of the statute and to give those words their natural and ordinary meaning. But in this case, as has I think sometimes happened in other cases, instead of the words of the original statute being referred to, the learned Judges have proceeded upon the conclusions of law arrived at in the prior decisions and not upon the words of the Act itself.

If we look at the words of the Act there is not the least question about their meaning. The statute says [His Lordship read the recital and enactment]. This did not mean, as the MASTER OF THE ROLLS seems to have supposed, "to be laid out or disposed [* 367] of on land," but * to be laid out or disposed of in the purchase of land. The same observations may be made with respect to Lord NORTHINGTON'S decision in the case which has been cited, where he spoke of the impossibility of allowing money to be laid out in improving land, he considering the words of the statute to be, to be "laid out or disposed of on land." The thing prohibited is money "to be laid out or disposed of in the purchase of any lands, tenements, or hereditaments." Such money shall not be given, granted, aliened, limited, released, transferred, assigned, or appointed, or any ways conveyed, or settled to, or upon any person or persons, bodies politic, or corporate, or otherwise, for any estate or interest whatsoever, or any ways charged or encumbered by any person or persons whatsoever, in trust or for the benefit of any charitable uses whatsoever.

Now, it is quite clear that the statute prohibits all dispositions of land, and all dispositions of money to be employed in the purchase of land to be devoted to charitable uses. The word "purchase," which occurs in four sections of the statute, is clearly, I think, to be understood in its ordinary sense, in the way in which it would be understood at the time; that is, as meaning buying land, giving an equivalent for the land in money, or in personal property, and acquiring the land in that way; as my noble and learned friend has said, it does not mean the acquisition or pursuit according to the supposed derivation taken from the old French law. It is impossible to put that construction upon it. It is equally impossible, I think, to put upon it the construction of purchase, as contrasted with descent. It must mean, according to the language here used, a purchase in the ordinary sense of the word, for a consideration. So we must hold it, unless some cases have [* 368] put a contrary construction upon it, and I should * expect,

in order to prevent our making use of the natural and ordinary meaning of that word, that there should be produced some uniform course of decisions which had established a different meaning.

Now, looking at the collection of cases which has been referred to by the MASTER OF THE ROLLS in the case of *Trye* v. *The Corporation of Gloucester*, 14 Beav. 173; 21 L. J. Ch. 81 (and I believe he has there collected them all together), I cannot find any trace of any doctrine which has put a different construction upon the word "purchase." It is very true that there are two or three *dicta*. In *The Attorney-General* v. *Whitchurch*, 3 Ves. 141, there is a *dictum* of Lord ALVANLEY, in which he says, that if these transactions were allowed, it would be something like equivalent to the purchase of land. Then again there is a *dictum* of Lord NORTHINGTON, which has been already referred to, where he considers the matters as if the statute had not used the word "purchase," and therefore he argues that every employment of money to be laid out, even upon land already in mortmain, everything that gives additional value to the land is prohibited by the statute, because it is increasing the value of the land, which he says could be recovered in a real action; he considers that every expenditure of money upon land, whether purchased or not, would be a violation of the statute. Then, again, there is a *dictum* of Lord LANGDALE, when Master of the Rolls in the case of *Mather* v. *Scott*, 2 Keen, 172; 6 L. J. Ch. 300, in which he gives an opinion upon the construction of a will; and he seems to intimate that anything which tends to the laying out of money upon land comes within the statute.

But if you look at the decided cases really and truly, there is not a single one which says that the word "purchase" is to be construed in any other than its * ordinary sense. There [* 369] are some cases which have been decided, and which have not been impugned, where transactions exactly similar to the present were upheld. There is the case of *Henshaw* v. *Atkinson*, 3 Madd. 306, before Sir JOHN LEACH; there is the case of *Dixon* v. *Butler*, 3 Y. & C. 677, which was decided by the late Baron ALDERSON, a very great authority upon all matters of law. He considered that in that case it was perfectly right, and not at all prohibited by the statute, to give a sum of money to build a church upon ground already consecrated, and where the land was already provided. These are two cases expressly in point, putting the true

construction upon the word "purchase," that no money is to be laid out in acquiring land, but that if the land is given *aliunde*, these transactions are not at all touched by the statute.

Then let us refer to some of the other authorities, from which the MASTER OF THE ROLLS seems to deduce a new rule upon the subject, and upon which he says that the statute strikes at this very mode of dealing with land which would induce persons to give it in mortmain. That is the principle which he deduces from these authorities. He also deduces another principle; that if a person directs a sum of money to be laid out in buildings, it must be considered as a direction to purchase land, except in the solitary case, as he expresses it, of money so to be expended upon some land already in mortmain. Those are the two principles which the MASTER OF THE ROLLS deduces from all the authorities which are cited. He says that the true construction of the statute 9 Geo. II. c. 36, is, that that is void which tends directly to bring fresh lands into mortmain. I think it will be found that that principle, or any principle of that nature, cannot really be deduced from the [* 370] cases which he * quotes. He also says that a bequest of money, to be expended in the erection or repair of buildings, is void, unless the testator expressly states in his will his intention that the money so bequeathed is to be expended on some land then already in mortmain. The only exception, in his opinion, is if the testator directs the money to be expended upon land already in mortmain. I apprehend that no such principle, either one or the other, can be deduced from the cases.

It is perfectly well established, that if a person directs money to be laid out in erecting a building, that is to be considered as, by implication, also directing the land to be procured upon which to erect the building. There is no doubt, looking at the cases, that that is unquestionably the law; that if he directs simply, without any qualifying circumstances, and without any explanation whatever, that the money is to be laid out in building houses, it does import *primâ facie*, until it is explained, that it is to be expended partly upon the purchase of land. But then there are many exceptions to that. If at the same time he declares that no part is to be expended in the purchase of land, no one will hold that that is to be considered as a direction to purchase land. That is one of the classes of exception. Or if he refers (that is another) to any particular land which is already in mortmain, then that also is an

exception to the rule, provided that he points out that land particularly; for then the circumstances demonstrate that the money is not to be laid out in land.

Now, all these cases were commented upon by Lord ELDON in that of the *Attorney-General* v. *Parsons*, 8 Ves. 186; 7 R. R. 22. That which his Lordship there said was confined to the case of money being to be laid out in land afterwards to * be acquired or procured by any means, except purchase, [*371] from any other person, in order to erect a building upon it. That, in the opinion of Lord ELDON, is valid. He afterwards held, in the case of *The Attorney-General* v. *Davies*, 9 Ves. 535; 7 R. R. 295, that the bequest there was clearly a purchase of land, because there was a direction that the money was to be given to any person who would devote land to charitable purposes. That is neither more nor less than a purchase of land, which is clearly struck at by the statute. Then Lord ELDON says that, unless the testator distinctly points to some land already in mortmain, he must understand that the testator means that some land should be purchased; and that in that case the gift is not good.

I think there is a farther expression of Lord ELDON's to the same effect in another case. That point must therefore be regarded as settled, — that a direction to build must be considered as implying also a direction to obtain land whereon to build. That is the whole of what Lord ELDON said upon the subject. But he clearly contemplates that building may be not merely upon land which is already in mortmain, but upon land which may be procured *aliunde* without purchase, and the gift will be valid.

Now the MASTER OF THE ROLLS, in giving his judgment, also relied upon the expressions of Sir JOHN LEACH, when Master of the Rolls, in the case of *Pritchard* v. *Arbouin*, 3 Russ. 456, where it was said "that it was the settled rule of construction that a direction to build is to be considered as including a direction to purchase land for the purpose of building, unless the testator distinctly pointed to some land which was already in mortmain," and he declared the bequest void. It is obvious there that that is only one of the * circumstances which prevent the [*372] direction to build being construed to be a direction to purchase. There are others.

The MASTER OF THE ROLLS also relied upon some observations made in the case of *Giblett* v. *Hobson*, 3 My. & K. 517, 526, 530, by

Lord BROUGHAM, who goes through all the cases there and comments upon each. His Lordship had a very clear opinion upon what the effect would be if the direction were to build upon land not already in mortmain, but acquired *aliunde* by some mode other than by purchase. In that very distinct, able, and elaborate judgment, his Lordship says, "No one can doubt that the doctrine which Lord NORTHINGTON laid down in *The Attorney-General* v. *Tyndall*, though not the decision itself, is contrary to law. When he states it to be as clear as any proposition in Euclid that the Mortmain Act prohibits not merely bequests for the purchasing of lands, but also all realising for the benefit of a charity, and expressly adds, to leave no doubt as to what he meant by realising, that but for such prohibition £20,000 might be laid out in building upon land not worth £50, it is quite clear that his Lordship stated what was not law; for no one can think of maintaining that a bequest of money to be laid out in building on land already in mortmain, or which might be acquired in aid of a testator's charitable purpose, through independent and valid titles, is struck at by the statute." Therefore that is a clear opinion on the part of his Lordship,— that in a case where the land was procured other than by giving money from the testator in exchange for land, it would not be a gift in mortmain; the money might be laid out properly, and without being forbidden by the Statute of Mortmain, in erecting buildings upon that land. His Lordship goes on to allude to the case of [*373] *The* **Attorney-General* v. *Davies*. He says: "Again, if we take the words of Lord ELDON literally in *The Attorney-General* v. *Davies*, they seem to confine the exception to cases where the land to be built upon is already (that is, at the date of the will, or at least at the testator's death) in mortmain. But the reason of the matter extends this also to cases where the testator may plainly appear to have in contemplation a future acquisition of building-land otherwise than by means of the legacy," — that is, otherwise than by using the legacy in purchasing that land; "and Lord ELDON clearly assumes that in what he says in the other case I have referred to, *The Attorney-General* v. *Parsons*, where he speaks of hiring or begging land."

Therefore, considering all the cases which have been decided upon this subject, without going farther into them at present, I think it perfectly clear that the natural and ordinary meaning of the word in the statute is a purchase of land, or money given in

exchange for land. There is no course of decisions, but far from it, which shows that it is to be understood in any other than the ordinary sense. On the contrary, the decisions to which I have referred show clearly that, if land is given by another person, and not through the instrumentality of the money of the testator, or as the price of the money left by the testator, that is untouched by the Statute of Mortmain. Therefore I consider it perfectly clear that there is nothing in this case to prevent our putting the proper construction upon these words. The words have a clear and distinct meaning, and no doubt they are used in the statute in the sense in which they would be used anywhere else. And with respect to the principle which the MASTER OF THE ROLLS deduces from the cases, I think he is hardly warranted in coming to the conclusion at which he arrives. I do not think any such principle has been laid down. It is perfectly * clear that if a man directs [*374] money to be laid out in building, he impliedly authorizes the money to be laid out in the purchase of land; and if he says no more, that bequest will fail. But I think that that inference may be repelled if he directs that the money is not to be laid out in the purchase of land, but is to be laid out upon land already in mortmain, so that no other land is put in mortmain, and also if he directs that the land shall be procured from any other person who will give it without any reward to himself, and dedicate it to the purpose of the charity.

I am of opinion, therefore, that we ought to refer to the words of the statute itself, and that, acting upon them, the circumstances of this case do not bring it within the mischief provided for by the statute. I think that the MASTER OF THE ROLLS has come to a wrong conclusion, and that the judgment must, therefore, be reversed. . . .

Decrees reversed, and causes remitted, with a declaration, and a direction as to costs. [375]

Lords' Journals, 24 July, 1857.

ENGLISH NOTES.

The Act of 9 Geo. II. c. 36, commonly termed the Statute of Mortmain, was passed in 1736. By this Act it was enacted, in effect, that no lands, nor any sum of money, nor personal estate to be laid out in the purchase of lands, shall be given or charged for the benefit of any charitable uses, unless the gift be made by deed indented and enrolled

pursuant to the Act. The Act did not extend to the disposition of any estate, real or personal, lying or being within Scotland. The effect of this Act, and a number of other Acts, generally called the Mortmain Acts, was embodied in the Consolidation Act of 1888 (51 & 52 Vict. c. 42), which formally repealed the earlier Acts. Amending Acts were passed in 1891 (54 & 55 Vict. c. 73), and in 1892 (55 Vict. c. 11). By the Act of 1891, sect. 7, it is enacted that any personal estate by the will of a testator dying after the Act directed to be laid out in the purchase of land to or for the benefit of any charitable uses shall be held to or for the benefit of the charitable uses as though there had been no such direction to lay it out in the purchase of land. This will in future alter the law in relation to such cases as *Corbyn* v. *French* (1799), 4 Ves. 418, 4 R. R. 254 (and see Tudor's Leading Cases on Real Property), where there was a bequest of money to the trustees of a chapel to be applied towards the discharge of a mortgage of the chapel, and the bequest was held void as a direction to purchase an interest in land. It may be a question whether the section of the Act of 1891 is applicable to a case where the general intention of the charitable use cannot be carried out without the purchase of land.

It has been held that a legacy to build a parsonage house on a site already available for the purpose is valid. *Sewell* v. *Creuze Read* (Lord Romilly, M. R. 1866), L. R., 3 Eq. 60, 36 L. J. Ch. 136; *Cresswell* v *Cresswell* (1868), L. R., 6 Eq. 69, 37 L. J. Ch. 521.

To bring the gift within the principle, the intention that part of the bequest should be spent upon the site must be expressly or impliedly excluded, and the Court will not go out of its way to raise such an implication. *Tatham* v. *Drummond* (1864), 34 L. J. Ch. 1; *In re Watmough's Trusts* (1869), L. R., 8 Eq. 272, 38 L. J. Ch. 723; *Cox* v. *Darie* (Bacon, V. C., 1877), 7 Ch. D. 204, 47 L. J. Ch. 72.

Testatrix bequeathed personal estate to trustees upon trust, to be applied by them in aid of erecting or endowing an additional church at A. It was held by Lord Hatherley, L. C., that the intention was not confined to a church in course of erection or contemplated at the date of the will or at the death of the testatrix; and an inquiry was directed whether the bequest, or any and what part thereof, could be laid out and employed as directed by the will. *Sinnett* v. *Herbert* (1872), L. R., 7 Ch. 232, 41 L. J. Ch. 388.

A testatrix bequeathed personal estate to trustees to be applied in building almshouses, "when land should be given for the purpose." The full Appellate Court in Chancery, reversing the decision of Lord Romilly, M. R., held that the gift was in effect immediate, although the mode of executing it was postponed, and that it did not therefore contravene the rule as to perpetuities. And an inquiry was directed

similar to that directed in *Sinnett* v. *Herbert*. *Chamberlayne* v. *Brockett*(1872), L. R., 8 Ch. 206, 42 L. J. Ch. 368.

Where the intention is expressed of distributing the gift amongst objects some of which are legal and some not, having regard to the Statute of Mortmain, then, if it can be ascertained how much according to the terms of the gift ought to be spent on the legal objects, the gift to that extent will be good. *Champney* v. *Davy* (1879), 11 Ch. D. 949, 48 L. J. Ch. 268.

Where a testator directed income to be applied "in the establishment of a soup kitchen for the parish of S. and of a cottage hospital adjoining thereto in such manner as not to violate the Mortmain Acts," this was held by Hall, V. C., equivalent to a gift, provided there is land available, or provided some one will give the land, and that it was valid. But he held that a direction to trustees, "so far as they lawfully can without violating the law against the disposition of property in mortmain, to apply" a sum of £1000 in establishing an independent chapel at A. in the county of W., was invalid. *Biscoe* v. *Jackson* (1881), 50 L. J. Ch. 597.

In the case of *In re Holburne*, *Coates* v. *Mackillop* (1885), 53 L. T. 215, a testatrix bequeathed a collection of pictures, &c., to trustees to form a museum in Bath, to be called the Holburne Museum, and bequeathed to the trustees a sum of money to be held for the perpetual protection, maintenance, and endowment of the collection. It was held by Chitty, J., that this was a good charitable gift. The intention that the museum was to be for the enjoyment of the public was sufficiently implied; and the object did not necessarily involve the purchase of land, or any estate or interest therein, for the trustees might carry out the object by hiring rooms on such terms as not to give the hirer any exclusive right of occupation. He accordingly declared that the gift was a valid gift for charitable purposes, and directed an inquiry to the same effect as in *Sinnett* v. *Herbert*.

AMERICAN NOTE.

The principal case is not cited by Mr. Pomeroy or Mr. Beach.

No. 4. — MOGG *v.* HODGES.

(1750.)

RULE.

An English Court of Equity will not (having regard to the Statute of Mortmain) marshal the assets in favour of

a charity. The rule of the Court is to appropriate the fund, as if no legal objection existed against applying any part of it to the charitable legacies, and then to hold so much of the charity legacies to fail, as would in that way be payable out of the prohibited fund.

Mogg v. Hodges.

2 Ves. Sen. 52-53 (Reg. Lib. 1750, B. fol. 611).

Charity. — Mortmain Act. — Marshalling Assets.

[52] Assets not marshalled in support of a devise contrary to law as a gift to a charity. Money directed to be laid out in lands for such an illegal purpose shall not be laid out for the heir, but the trust is void altogether. As to the testatrix's real estate which was devised to be sold, partly for such purposes, the heir was declared entitled to the surplus proceeds.

Jane Churchill by will leaves her real estate to trustees to be sold, the profits to be applied to the uses of the will; directs that her debts and legacies should be paid out of the personal estate; makes the trustees executors, and leaves them all the residue of her personal estate and of that money, that should be raised by sale of her real, to be given by them in what charities they should think proper, particularly recommending to them the hospital at Bath.

The trustees agreed, that as all money arising from a real estate is to be accounted as real, the bequest was so far void by Statute of Mortmain, 9 Geo. II. c. 36; but desired, that in compliance with the intent of testatrix, the assets should be so marshalled that all the other legacies should be paid out of the real estate, and so the personal go to the charity, which legally might, according to *Dalton* v. *James*, Ambl. 20; and the common course of the Court, where there are bond and other creditors, is to direct the bond creditors to be paid out of the real estate, that the personal might be left to others.

Lord Chancellor thought himself not warranted to set up a rule of equity, contrary to the common rules of the Court, merely to support a bequest which was contrary to law. It would be contrary to the express direction of the testatrix, who desires, first, that her legacies and debts should be paid out of the personal, that is, the natural fund; and if the heir or devisee of the real

estate is sued by a bond creditor, he may stand in the place of that creditor to be reimbursed out of the personal. In *Dalton* v. *James* the legacies were particularly chargeable on both estates; and the Court will always for the furtherance of justice, as in the case of * debts, or, to comply as far as is consistent with [* 53] law with the intention of testator, in the case of legacies, when there are two different funds for payment of debts and legacies, order each particular to be paid out of that fund it legally may. But the assets cannot be so marshalled to support a legacy contrary to law.

It has been argued that the hospital at Bath, which was incorporated by Act of Parliament, had some particular clauses in it contrary to the Statute of Mortmain, and consequently in those particulars not subject thereto.

Lord Chancellor held that the words in that Act were to be considered as in a charter; that the charter of incorporation was only granted by Parliament to avoid expense to the promoters of that charity, who were forced to apply to Parliament for some other powers which the Crown could not grant; therefore the charter was inserted in the Act, and is to be construed as any other charter given by the King only. The clause mentioned was inserted to avoid the trouble of applying for a license in Mortmain, and was to be considered as such a license; that the governors are thereby empowered to take lands to such a value, but still with a proviso that they are granted to them in the manner prescribed by that law.

Several sums having been left by the will to be laid out in lands for the use of particular charities, it was urged that, though void as to the charity, it should take effect so far as to be laid out in lands, and descend to the heir.

But it was decreed that the trust must either take effect according to the whole intent, or not at all; and as all money arising from the sale of a real estate was still to be accounted as real, so all lands, to be bought with personal, were still to be considered as part of the personal. *Ex Relatione.*

ENGLISH NOTES.

In *Williams* v. *Kershaw*, 5 Cl. & F. 111 (the case cited, pp. 566, 572. *ante*, before Lord Cottenham when Master of the Rolls), there were particular charitable legacies, as well as a gift of the residue which failed

It was contended that the particular charitable legacies ought to be made good out of so much of the residue as consisted of pure personalty. Lord Cottenham's observation as to this point was as follows: "This would be marshalling the assets at least against the next of kin, and would be contrary to the rule of the Court adopted in all such cases, which is to appropriate the fund as if no legal objection existed as to applying any part of it to the charity legacies, then holding so much of the charity legacies to fail, as would in that way be to be paid out of the prohibitive fund." The case is reported on this point in 1 Keen, 274, *n*.

The question of marshalling will be of comparatively little importance in regard to wills coming into operation after the passing (5 August, 1891) of the Mortmain and Charitable Uses Act 1891, (54 & 55 Vict. c. 73). For by sections 5 & 6 of that Act land may be assured by will to be for the benefit of any charitable use, but the land must be sold as provided by the Act, and the proceeds applied for the benefit of the charity. The question will be one not of substantial interest, but of administration.

AMERICAN NOTES.

The principal case is cited by Redfield on Wills, p. 788, without American support. In the very learned editions of Jarman on Wills, edited by Messrs. Randolph and Talcott and Dr. Bigelow, no American cases are cited to the principal case. The same is true of Mr. Perkins' edition of Williams on Executors.

No. 1. — Newberry v. Colvin, 7 Bing. 190. — Rule.

CHARTER-PARTY.

See also notes to No. 10 of "Accident," 1 R. C. 346. And see "Bill of Lading," Nos. 1, 3, 4, & 5, 4 R. C. p. 665 and p. 680 *et seq.*; "Contract," No. 43, in 6 R. C.; and "Dead Freight," and "Demurrage," *post.*

No. 1. — NEWBERRY *v.* COLVIN.

COLVIN *v.* NEWBERRY.

(Ex. ch. 1830; H. L. 1832.)

RULE.

Where a ship engaged under a charter-party is employed as a general ship, the responsibility of the owner of the ship for goods shipped depends on whether the charter-party amounts to a demise of the ship and whether the shippers have notice of it. To operate as a demise of the ship it is not necessary that the charter-party should contain the formal words "let" or "demise," but it is sufficient if the intention appears that the charterer should act as temporary owner of the ship. The mere circumstance that the owners at the outset engage the master and crew is not sufficient, nor is the circumstance that the master is himself the charterer sufficient to disprove that intention.

Newberry v. Colvin.

Colvin v. Newberry.

7 Bing. 190–210; 1 Cl. & Fin. 283–301 (s. c. 8 B. & C. 166; 4 M. & P. 876).

Ship. — Charter-party. — Demise of Ship. — Liability of Owner.

The owner of a ship by an instrument called a charter-party appointed [190] G. B. to the command, and agreed that G. B. should be at liberty to receive on board a cargo of lawful goods (reserving 100 tons to be laden for account of the owner), and proceed therewith to Calcutta, and there reload the

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ship with a cargo of East India produce, and return therewith to London; and upon her arrival there and discharge, the intended voyage and service should end; and the owner further agreed that a complement of thirty-five men should, if possible, be kept up; that he would supply the ship with stores, and that she might be retained in the said service twelve months, or so much longer as was necessary to complete the voyage; in consideration of which G. B. agreed to take the command, and receive the ship into his service for twelve months certain, and such longer time as might be necessary to complete the voyage and pay to the owner for the use and hire of the ship after the rate of 25*s.* per ton per month, of which £1000 was to be paid on the execution of the charter-party. And it was further agreed that G. B. should remit all freight bills for the homeward cargo to B. B & Co., in London, who should hold them as joint trustees for the owner and G. B.; that they should be applied to payment of the balance of freight due from G. B., and the surplus, if any, be handed over to him. It was then provided that the owner should have an agent on board, who was to have the sole management of the ship's stores, and power to displace G. B. for breach of any covenant in the charter-party, and appoint another commander. C. & Co., in Calcutta, having knowledge of this instrument, shipped goods on board the vessel for London, which were never delivered there. *Held*, by the Exchequer Chamber and the House of Lords, reversing a judgment of the King's Bench, that C. & Co. could not recover against the original owner of the ship. For, during the continuance of the charter-party G. B. was the owner of the ship, and was as such alone liable to persons who, knowing the provisions of the charter-party, had shipped goods for the homeward voyage.

Case against Newberry and another, the defendants below, as the owners of the ship *Benson*, for the loss of goods shipped by the plaintiffs in India to be conveyed to England.

The first count of the declaration alleged that the defendants, before and on the 11th day of March, 1817, were owners of the *Benson*, whereof one George Betham then was master, and which ship or vessel was then riding at anchor in parts beyond the seas, to wit, in the river Hooghly, in the East Indies, and bound on a voyage from thence to the port of London; and that the de-
[* 191] fendants so being owners of the ship or vessel as * aforesaid, the plaintiffs on, &c., in the river Hooghly, aforesaid, shipped and loaded, and caused to be shipped and loaded, in and on board the said ship or vessel, whereof the said George Betham then was master, divers goods and merchandises, to wit, 2171 bags of sugar and 191 chests of indigo, of them the plaintiffs, then being in good order and well conditioned, and of a large value, to wit, of the value of £20,000 of lawful money of Great Britain, to be taken care of and safely and securely carried and conveyed in and on board of

the said ship or vessel from the river Hooghly aforesaid, to the port of London aforesaid, and there, to wit, at the port of London aforesaid, to be safely and securely delivered in the like good order and well conditioned, to certain persons commonly called and known by the name, and using the style and firm of Messrs. Bazett, Farquhar, Crawford, and Company, or to their assigns (the act of God, the king's enemies, fire, and all and every other dangers and accidents of the seas, rivers, and navigation of whatever nature and kind soever, excepted), for certain freight and reward, payable by bills in that behalf; and although the said goods and merchandises were then and there had and received by the said George Betham, so being master of the said ship or vessel aforesaid, in and on board of the said ship or vessel in the river Hooghly aforesaid, to be carried, conveyed, and delivered as aforesaid; yet the defendants, so being owners of the said ship or vessel as aforesaid, not regarding their duty as such owners, but neglecting the same, and contriving and wrongfully and unjustly intending to injure the plaintiffs in this behalf, did not, nor would, take care of and safely or securely carry or convey the said goods or merchandises, or cause the same to be carried and conveyed in or on board of the said ship or vessel, or otherwise, from the river Hooghly
* aforesaid, to the port of London aforesaid, nor there, to [* 192]
wit, at the port of London aforesaid, safely or securely deliver the same, or cause the same to be delivered to Messrs. Bazett, Farquhar, Crawford, and Company, or to their assigns, although the defendants were not prevented from so doing by the act of God, the king's enemies, fire, or other dangers, or accidents of the seas, rivers, or navigation of any nature or kind soever; but on the contrary thereof, they, the defendants, so being owners of the said ship or vessel aforesaid, so improperly behaved and conducted themselves, with respect to the said goods and merchandises, that by and through the mere carelessness, negligence, misconduct, and default of the defendants and their servants, in this behalf, a great part of the said goods and merchandises being of great value, to wit, of the value of £10,000 of the like lawful money, became and was wholly lost to the plaintiffs; and also thereby the residue of the said goods and merchandises, being of great value, to wit, of the value of £10,000 of like lawful money, became and was greatly damaged, lessened in value, and spoiled, and the plaintiffs lost and were deprived of divers great gains and profits, which might and

would otherwise have arisen and accrued to them from the sale thereof, to wit, at London aforesaid.

The defendants pleaded the general issue.

At the trial before Lord TENTERDEN, C. J., at the London sittings after Michaelmas term, 1826, a special verdict was found, in substance as follows: On the 11th of March, 1817, the plaintiffs shipped on board the ship *Benson*, near Calcutta, in the East Indies, 2171 bags of sugar, and 191 chests of indigo, then being in good order and well conditioned, for which the following bill of lading was signed by George Betham, then being the master of [*193] the said ship, under *the circumstances hereinafter mentioned: "Shipped, by the grace of God, in good order and well conditioned, by Messrs. Colvin, Bazett, and Company, in and upon the good ship called the *Benson*, whereof is master, under God, for this present voyage, George Betham, now riding at anchor in the river Hooghly, and by God's grace bound for London, to say, 2171 bags of sugar and 191 chests of indigo, being marked and numbered as in the margin; and are to be delivered in the like good order, and well conditioned, at the aforesaid port of London, the act of God, the king's enemies, fire, and all and every other dangers and accidents of the seas, rivers, and navigation, of whatever nature and kind soever excepted, unto Messrs. Bazett, Farquhar, Crawford, and Company, or to their assigns; freight for the said goods being paid by bills."

George Betham received the said goods on board the said ship in the river Hooghly, to be carried and conveyed according to the bill of lading. At the time of the said goods being so shipped and received, and the said bill of lading signed, and before that time, the defendants were the owners of the said ship; and before the said ship sailed to the East Indies, and whilst they were such owners, the following charter-party, bearing date the 7th of June, 1816, was executed by the defendant, Thomas Starling Benson, who was then the managing owner of the ship, and acting on behalf of himself and the other owner of the ship on the one part, and G. Betham of the other part, for the said ship *Benson*: —

"This charter-party of affreightment, made and concluded in London, the 7th of June, 1816, between Thomas Starling Benson of the city of London, part owner of the good ship or vessel called the *Benson*, of 573 tons measurement, or thereabouts, now lying in the port of London, of the one part, and George

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* Betham of the city of London, merchant and mariner, [* 194] freighter of the said ship, of the other part, witnesseth, that the said owner, for the consideration hereinafter mentioned, doth hereby promise and agree to and with George Betham, his executors, administrators, and assigns, that he George Betham shall have, and he is hereby appointed to the command of the said ship, but with such restrictions as hereinafter mentioned, and subject to the proviso and condition hereinafter contained respecting the appointment of an agent on board the said ship on the part of the said owners; and the said ship being tight, staunch, and substantial, and every way properly fitted, victualled, and provided, as is usual for vessels in the merchants' service, and for the voyage and service hereinafter mentioned, and being also manned with thirty-five men and boys, the said commander included, the said George Betham shall be at liberty and he is hereby allowed and permitted to receive, take, and load on board the said ship in the port of London, all such lawful goods, wares, and merchandise as he may think proper to ship, not exceeding in the whole what the said ship can reasonably stow and carry over and above her stores, tackle, apparel, and provisions, and reserving sufficient room in the said ship for one hundred tons of goods to be laden by or for account of the said owner as hereinafter is mentioned; and the said ship being so laden, George Betham shall and will set sail therewith, and proceed to Calcutta in the East Indies, with liberty to touch at Madeira and Madras in her outward passage; and being arrived at Calcutta aforesaid, shall and will unload the said outward cargo, and reload the said ship with a cargo of East India produce, and return with the same to the port of London, and upon her arrival there, and being finally discharged of her cargo, and cleared by the revenue officers, the said intended voyage and service is to end and be * completed; the act [* 195] of God, the king's enemies, restraint of princes and rulers, fire, and all and every the dangers and accidents of the seas and navigation, of what nature or kind soever excepted; and the said owner doth hereby further promise and agree to and with George Betham, his executors, administrators, and assigns, that in case any of the aforesaid complement of thirty-five men and boys shall happen to die, or desert, or leave the said ship during the said intended voyage and service, so that the number shall be reduced below thirty-two, that then and in every such event happening,

the aforesaid number of thirty-two shall, if practicable, be kept and made up at the expense of the said owner; and further, that the said ship shall at all times during the said intended voyage and service, be furnished and provided with proper and sufficient stores, provisions, and other necessary articles, and that the said ship shall, if required, be kept and continued in the service aforesaid, for and during the term of twelve calendar months, to be accounted for from the 12th day of the present month of June, and for and during such longer time or term as may be necessary to complete her aforesaid voyage, and until her return to the port of London, being finally discharged of her homeward cargo, and cleared by the revenue officers; and the said owner doth also promise and agree, that the said ship shall, previous to her departure from the port of London, on her above-mentioned voyage, be furnished and provided with good water-casks, capable of containing eighteen tons of water; and the said owner doth also engage to provide the said ship with coals and wood for cooking and dressing the passengers' provisions, for which the said freighter is to pay or allow unto the said owner, at and after the rate of fourteen pence for every passenger or servant per lunar month, and so in proportion for a less period; in consideration whereof, [* 196] and of everything above * mentioned, he, George Betham, doth hereby promise and agree to and with the said Thomas Starling Benson, in manner and form following, that is to say, that he George Betham shall and will take upon himself the command of the said ship, for and during her said intended voyage, and until her return to the port of London, and shall and will navigate her to the best and utmost of his skill and ability; and also, that he George Betham shall and will accept, receive, and take the said ship into his service, for and during the term and space of twelve calendar months certain, to commence and be accounted from the 12th day of the present month of June, and for and during such longer time or term, if any, as may be necessary to complete the said voyage, and until her return to, and final clearance in the port of London; and further, that he shall and will well and truly pay, or cause to be paid unto the said owner, freight for the use and hire of the said ship, at and after the rate of 25*s.* per ton, register measurement of the said ship, per calendar month, for and during the aforesaid term of twelve calendar months certain, and for and during such longer time or term, if any, as may be necessary to

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complete her said intended voyage, and until her return to the port of London, and being finally discharged of her homeward cargo, and cleared by the revenue officers, or up to the day of her being lost, captured, or last seen or heard of; such freight to be paid in manner following, that is to say, the sum of £1000 part thereof at or before the execution of these presents; the sum of £2000 further part thereof by approved bill or bills, to be drawn in London upon Calcutta, in favour of the said owner, payable, as to one moiety thereof, at one calendar month, and as to the other moiety thereof at two calendar months next after the ship shall arrive at Calcutta; and the residue and remainder of such freight to be paid or secured to the satisfaction of the said * owner, upon the arrival of the ship in the port of London, [* 197] and previous to commencing the discharge of her homeward cargo: Provided always, that in case the said ship shall be kept or detained at Calcutta aforesaid more than ninety days, then and in such case the said George Betham doth hereby engage to pay or cause to be paid, at Calcutta aforesaid, to the agent of the said owner the sum of £1000, either in cash or by bills to be approved of by such agent in part payment of the balance of freight which may become due under and by virtue of this charter-party; and the further sum of £1000 at the expiration of every sixty days, after the said ninety days, which the said ship may expend or lie at Calcutta aforesaid; and it is hereby declared and agreed by and between the said parties, that bills remitted from India, in manner hereinafter expressed, shall be deemed, taken, and considered as good and sufficient security for the payment of the residue or balance of freight which may become due under and by virtue of these presents as hereinbefore mentioned; and George Betham doth hereby expressly promise and agree, that all and every the bills of exchange which may be taken in payment of the freight of the said ship's homeward cargo, shall be made payable to, or to the order of, Messrs. Buckles, Baxter, and Buchanan, of the city of London, merchants, or be indorsed over to them, and delivered to the owner's agent to be by him remitted to the said Buckles, Baxter, and Buchanan, in London, who, it is expressly agreed by and between the said parties, are to receive the amount thereof, as joint trustees for the said owner and George Betham; he, George Betham, authorising and empowering them to appropriate the proceeds of such bills of exchange in or towards

payment to the owner of the balance of freight which may be or become due to him under and by virtue of these presents; and the residue, if any, to George Betham; and George Betham [* 198] doth hereby further * promise and agree to furnish and provide, at his own expense, sufficient provisions and water, and also all other necessaries for the use of the passengers on board the said ship; and that he shall and will pay for all provisions belonging to the owners of the ship which shall be issued for the use of, or consumed by, any of the passengers or servants during the voyage, on account of the same being rendered to him once a week by the said owner's agent, or by the steward on board the ship; and farther, that all expenses of bulkheads, cabins, and other accommodation for passengers, shall be paid by him, George Betham; the materials for which are to be left on board the ship at the termination of the voyage, and to become the property of the owne ; and George Betham doth also agree to pay and defray all port charges and pilotage which may be incurred by the ship during her intended voyage, save and except such as may be incurred in the port of London, outward and homeward bound, and once at Calcutta; and George Betham doth hereby further agree, that the owner shall have the liberty of shipping on board the said ship outward bound, freight free, any quantity of iron, vinegar, and mustard he may think fit, not exceeding in the whole one hundred tons, to be delivered at Calcutta: Provided always, and it is hereby expressly agreed and understood by and between the parties to these presents, and particularly by George Betham, that an agent shall be put on board the ship by the owner for and during the whole of her aforesaid voyage and service, and who is to have a separate cabin in the said ship for his sole use, and to mess at the said George Betham's table; which agent is to have the sole management, direction, and superintendence of the ship's stores and provisions, and the issuing and delivering out of the same for and during the intended voyage; and such agent is likewise to have the sole ordering and purchasing of any sup- [* 199] plies, stores, * provisions, and other articles which may be required for the use of the ship during her voyage; and that all bills which may be required to be drawn upon the owners of the ship for any such supplies, or otherwise on account of the ship, shall be drawn by such agent only: Provided also, and it is hereby further agreed by and between the said parties, and espe-

cially by the owner, that the freighter shall have the liberty and privilege of employing the ship in the East Indies for any intermediate voyage or voyages he may think fit, without prejudice to this charter-party, but not exceeding in the whole the time or term of twelve months, to be computed from and after the expiration of thirty days next after the arrival of the ship at Calcutta aforesaid, upon George Betham paying or causing to be paid to the owner the same rate of freight as is hereinbefore stipulated, viz., 25*s.* per ton per month, for all such additional time as the ship may be so employed or detained in India; such additional freight being paid to the owner's agent for the time being, or secured to his satisfaction, previous to the ship entering or proceeding on such additional voyage or service; and it is hereby expressly provided and declared, that in case George Betham shall proceed with the said ship to any part or place, other than Madeira, Madras, and Calcutta aforesaid, without the special leave in writing of the agent of the owner for the time being, or if George Betham shall be guilty of a breach of any or either of the promises and agreements herein contained on his part, then and in any such case he shall be and become divested of any further command of or in the ship, and it shall thereupon be lawful for the owner's agent for the time being to appoint another commander for the said ship in lieu and instead of the said George Betham."

This charter-party was made and executed *bonâ fide*.

On the 25th July, 1816, the following memorandum *was signed and agreed to by the defendant, Thomas Star- [*200] ling Benson, and the said George Betham: "Conditions agreed between Thomas Starling Benson, Esq., owner, and George Betham, Esq., commander of the ship *Benson*, on a voyage to India. Wages, say £10 per month. No primage or privilege of tonnage whatever. Cabin allowance for voyage (it being understood that the agent, chief, and second mates, and surgeon, if any, mess in cabin) £150, owner providing nothing. Allowance while in India, three sicca rupees per day."

Samuel Oviatt went as agent on board the ship *Benson* under the charter-party, on the said voyage, and carried out letters of introduction from the persons using the said firm of Buckles, Baxter, and Buchanan, being merchants in London, on behalf of the said defendants, to the plaintiffs, by which he was directed to apply to them in case of necessity, and he did apply to them, and they

acted as agents at Calcutta, both for the said defendants and G. Betham, as hereinafter mentioned. Samuel Oviatt acted under a power of attorney executed by the defendant Thomas Starling Benson, which recited the charter-party, and then gave Oviatt authority to do on his behalf all things for which that instrument contemplated the appointment of an agent. Samuel Oviatt carried out with him the charter-party, and communicated it to the plaintiffs as soon as he arrived at Calcutta, and before the shipping of the goods, and the plaintiffs before that time read the charter-party and received a copy thereof; and for the freight of the said quantity of sugar and indigo in the bill of lading mentioned, the plaintiffs drew bills upon certain other persons, payable sixty days after the ship *Benson's* arrival in London, to the order of Buckles, Baxter, and Buchanan; which bills they delivered to Samuel Oviatt to be remitted to the said last-mentioned persons, pursuant [*201] to the stipulation of the charter-party; and the * said bills were so remitted. George Betham employed the plaintiffs as his agents at Calcutta, who accordingly acted as his agents, and collected and paid over to him the freight of the goods carried in the ship on the voyage from London to Calcutta, and procured freight for him in the voyage from Calcutta to London; and they had a commission from him for procuring such freight.

The ship sailed on her voyage from the river Hooghly to London with the said quantities of sugar and indigo on board, but they were never delivered to the plaintiffs, or their assigns, pursuant to the bill of lading, although no act of God, the king's enemies, fire, or any other dangers or accident of the seas, rivers, or navigation, of what nature or kind soever, prevented the same from being so delivered; but, on the contrary thereof, 1651 bags of the said sugar, and twelve chests of the said indigo, were wholly lost to the plaintiffs, and the residue of the said sugar and indigo greatly lessened in value.

Judgment having been given for the plaintiffs below, in the Court of King's Bench, the case was brought into this court by writ of error; and was now argued by

Campbell for the defendants below, and F. Pollock, *contra*.

The Court took time for consideration.

[206] Tindal, C. J. In this writ of error the sole question appears to be, whether, upon the legal construction of the charter-party set out at length in the special verdict, the defendants

below were the owners of the vessel called the *Benson*, at the time the contract for the carriage and conveyance of the goods in question was made; or, whether, on the contrary, Betham, the captain and freighter of the vessel, became, *pro tempore*, the owner thereof: —

For the present action, although in form an action upon a tort, is virtually and substantially an action upon the contract contained in the bills of lading, and set out in the declaration. To decide therefore whether the action is rightly brought, it must be ascertained with whom the contract was made; whether with the defendants below, as the owners of the vessel, through Betham, as their master or agent, or with Betham himself, as the freighter and owner *pro hac vice*, for his own benefit, and on his own behalf.

Now the special verdict has found two things; first, that this charter-party was entered into *bonâ fide;* by which we understand that there was no secret or sinister design in framing this charter-party to leave the shipowners in the dominion of their ship, and the enjoyment of the profits, and at the same time to exempt them from responsibility to the shippers of goods, but that the real object of the owners and the freighters was such as is to be collected from the charter-party itself, and such only. The other fact found by the jury is, "that the charter-party was communicated to the plaintiffs before the shipping of the goods, and that the plaintiffs before that time read the charter-party, and received a copy * thereof," which latter finding negatives any inference [*207] that would otherwise arise, that Betham, by reason of his command of the vessel, was held out by the defendants to the plaintiffs below as their agent in the conduct and management of the ship, as they knew the real situation and relative rights of the captain and the owners before they put their goods on board to be carried on that voyage The question to be considered, therefore, is simply that of the construction of the charter-party; and we think, upon the whole instrument taken together, the construction is such as to constitute Betham, as between him and the shippers of goods, the owner of the ship during the continuance of the voyage described in the charter-party.

In the first place, by the terms of the charter-party, the owners covenant "that the ship shall, if required, be kept and continued in the service described therein, during the term of twelve calendar months, and such longer time as may be necessary to com-

plete the voyage." And Betham, on the other hand, covenants "to accept, receive, and take the ship into his service for the term of twelve calendar months certain, until the voyage shall be ended, and to pay to the owner for the use or hire of the said ship at and after the rate of 25*s.* per ton per calendar month, during the said term of twelve calendar months certain, and until her return to the port of London and clearance, or up to the day of her being lost, captured, or last seen or heard of."

But it is objected by the plaintiffs below, that such contract contains no words of express demise; and undoubtedly it does not. But even in a lease of lands, no such words are absolutely necessary, "but any words which amount to a grant are sufficient for a lease." Co. Lit. 45 b. And there are cases in the [*208] books that if a * man covenants that A. shall have the land for a term, rendering rent, or that the covenantee shall enjoy the land (1 Leon. 136,) these words would amount to a lease.

Now the present case comes very near those referred to; for the owners do covenant that the ship shall be kept in the service of Betham for a certain time; Betham covenants that he will receive her into his service during that time; and that he will pay for the use or hire of her a certain freight, — stipulations that appear equivalent in their effect to an actual demise of the ship.

But further, the whole of the ship is so far parted with that it is thought necessary that Betham should covenant with the owners that they should have liberty to load, on the outward voyage, iron and other articles, not exceeding in the whole 100 tons.

Again, the mode in which the ship was to be used, and in which the freight reserved by the charter-party is to be paid, support the same construction of the charter-party. The ship, both on her outward and her homeward voyage, was to be put up by Betham (in many parts of the charter called the freighter) as a general carrying ship. The freight which the owners stipulate to receive from him is quite independent of that which he receives for the carriage of goods. Theirs is a time freight; his depends on the carriage of the goods shipped. If the ship went out without any cargo, or was lost before her arrival at her outward or homeward port of destination, in all which cases Betham might receive no freight, the owner would still receive the same amount as if she had returned full, or, in case of loss of the ship, up to the day of

her loss. Under these circumstances, we think the captain, in putting up the ship as a general ship, and signing bills of lading, cannot be considered as acting as the servant or agent *of the shipowners, or in any other manner than as the [*209] temporary owner of the ship.

Three objections have been principally relied on in argument by the defendants in error: first, that the same person who takes the ship as freighter, was himself appointed as the captain by the owners of the ship; secondly, that an agent was put on board by the owners with powers inconsistent with Betham's ownership of the vessel *pro tempore;* and, thirdly, that the owners virtually receive the benefit of the homeward freight, by the transmission of the freight bills to England.

But, with respect to the first objection, it is almost the invariable practice and usage, that the owners of a ship, although they let it out upon freight to a charterer, do themselves appoint a captain and the crew; the chartering of the ship not being so much the chartering of the hull, as of the ship in a state fit for the purposes of mercantile adventure. There seems no reason, therefore, that the chartering of the ship in any particular case to the captain of that ship, should create any more responsibility in the owner to the shippers of goods, where such fact is made known to them, than if the ship were freighted to an entire stranger.

The second objection is answered by reference to the charter-party; by which it appears that the authority of the agent was limited to the superintendence of the acts of Betham as captain, and not as freighter; the utmost authority given to the agent being that of displacing the master and appointing another, in case Betham should be guilty of a breach of any of the covenants or agreements on his part. But if Betham ceased to be master, he did nevertheless, by the terms of the charter-party, continue the freighter of the ship; possessing the same power to take goods on board, and liable to the same responsibilities, on the one hand, to the owners for the time freight for which he had contracted, on the *other hand, to the shippers of goods for [*210] the safe conveyance of the goods shipped.

As to the third objection, the charter-party gives the owners a security upon the freight bills received by the freighter, but gives the owners no direct or immediate interest in the freight earned, the whole of the surplus of which belongs to Betham. If Betham

had obtained no homeward cargo from Calcutta, so that no freight bills could have been transmitted, the owners would still have been entitled to their time freight. The freight earned by Betham on the intermediate voyage for twelve months in India, does not become a security to the owners. Even in the homeward voyage, if the ship had been lost, there might have been no freight payable to the freighter, but still he must have made good his own liability to a monthly freight for the use and hire of the vessel.

Upon the whole, therefore, we think the effect of this charter-party was to make the freighter the legal owner of this ship *pro tempore;* that the freight for the carriage of these goods was paid to him for his own use; and, consequently, that the defendants below are not liable to an action for the non-delivery of the goods. We think, therefore, the judgment of the Court of King's Bench must be reversed. *Judgment reversed.*

Colvin v. Newberry.

1 Cl. & Fin. 283-301.

The above judgment having been brought up to the House of Lords by writ of error, the case was argued by Mr. Serjeant Taddy for the plaintiff in error, and by Mr. Campbell and Mr. V. Richards for the defendant in error. The decision of the House was finally given on the 11th of July, 1832, when judgment was moved as follows, — by

[* 296] * Lord TENTERDEN: My Lords, there is a case of *Colvin and others* against *Newberry and another*, very lately argued before your Lordships, and in the absence of my noble and learned friend, who has just left the House, it falls to my lot to supply his place on the woolsack. The case was argued before several of the Judges, and I have had an opportunity of collecting from them their opinions, and it did not appear to me to be necessary to put to them any formal question, they being all of opinion that the judgment from which the writ of error is brought to this House, namely, the judgment of the Court of Exchequer Chamber, should be affirmed. The Judges of that Court reversed the judgment which had been given in the Court of King's Bench. At the time it was given, I was present in the situation which I now have the honour to fill, and among the Judges who were present at the argument in this House was one of the learned Judges, I mean my learned brother Baron BAYLEY, who was a Judge of the Court of

King's Bench at the time this case was decided there, and he, upon reflection, has changed his opinion, and is one of the Judges upon whose unanimous opinion I shall take the liberty to move your Lordships to affirm the judgment of the Court of Exchequer Chamber. Some other of the learned Judges, who were present on that occasion, had not been members of either of the Courts at the time the case was argued. The matter, therefore, to them was new. Having stated shortly to your Lordships the manner in which the case proceeded, I shall, with your Lordships' permission, direct your attention to the point in dispute, what the case really was, and upon what grounds the judgment of the Court below should be affirmed. My Lords, it was the case of an action brought by the present * plaintiffs in error, against the defendants, [* 297] as the owners of a ship called the *Benson*. The action was upon a bill of lading of goods shipped on board that ship at Calcutta, for which a person of the name of Betham, who was then master of that ship, had signed the bill of lading for the right delivery of the goods in London; but the goods were not delivered. Two propositions of law are clear, as applicable to a case like this: the first is, that in the common case of goods shipped on board a vessel belonging to a person, of which the shipment is acknowledged by a bill of lading signed by the master, if the goods are not delivered, the shipper has a right to maintain an action against the owner of the ship; the other, which is equally clear, is this, that if the person in whom the absolute property of the ship is vested charters that ship to another for a particular voyage, although the absolute owner provides the master, crew, provisions and everything else, and is to receive from the charterer of the ship a certain sum of money for the use and hire of the ship, an action can be brought only against the person to whom the absolute owner has chartered the ship, and who is considered the owner *pro tempore*, during the voyage for which the ship is chartered. It cannot be maintained against the person who has let out the ship on charter, namely, the absolute owner. Those two propositions being clear, the question is, whether the instrument, to which I am about to direct your Lordships' attention, is to be considered as a charter of the ship to Betham, who went out as master, or whether the true legal effect of the instrument is only this, that the owners of the ship, the defendants, consented to allow Betham to go out as master of the ship, and to receive from him a certain sum, and to allow

him to take all the profits? A contract of that kind
[*298] *certainly can be made between the owner of the ship
and the master, but it would be open, if there were nothing more in the case, to a very great objection, because it would afford an opportunity to the owners of the vessel, in a great many cases, to relieve themselves from the responsibility which attaches upon their character as owners, and leave the shipper of the goods to his remedy against the master alone, who, in many cases, is a person by no means sufficient to answer the demand which might be made upon him in case of loss or injury done. Now the instrument in question is one of a very peculiar character, and I will presently direct your Lordships' attention to such parts of it as appear to be material. The instrument is a contract made between the owners of the ship, the persons whom I have mentioned, and Mr. Betham, and it begins by alleging that the owners of the ship agree to appoint, and do by this instrument appoint him the commander of the ship, subject to the condition therein mentioned, which is, that in case of his misconduct in the character of master, the person whom they have a right to send out to represent them shall have the power of dismissing him from the command. Now, if this instrument had contained nothing more the case would be one of the kind which I have first mentioned to your Lordships; but it contains a great deal more, for it then goes on to state that Mr. Betham, the master, shall be allowed and permitted to take on board the ship all such goods as he may think proper, and proceed therewith to Calcutta, in the East Indies, there to unload and reload the ship, and to return thence to the port of London: and upon her arrival there, and final discharge of her cargo, the intended voyage and service are to end. The owner further agrees that
the ship shall be, before her departure, furnished with
[*299] *proper water casks, and provisions, and everything of
that kind, and he agrees also to provide the ship with coals and wood for cooking and dressing the passengers' provisions, for which the freighter is to pay the owner. The person who is, in the first instance, called the master of the ship, is now called the freighter, the term freighter applying to a person who takes the ship under a charter. The owner then stipulates that Betham shall pay him, the owner, freight for the use or hire of the ship, at a certain rate per ton here specified; and it is agreed that that shall not be paid until the ship's return into the port of London

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Then he further agrees that the bills that may be drawn in Calcutta, in part payment of the freight of the goods that may be laid in there, shall be sent over to certain persons in this kingdom, who are to be trustees, and who are to apply the proceeds of those bills towards the payment to the owner of the balance of freight that may be due to him. There is also another provision. The ship being, in the first instance, intended to go from London to Calcutta, there is a provision that the freighter shall have the liberty and privilege of employing the ship in the East Indies, for any immediate voyage, he may think fit, paying a certain sum. Then comes the proviso to which I have already adverted, namely, that if he misconducts himself as master, the agent for the owner, who is on board the ship, shall appoint another commander, without any injury to the rights of the owner upon the charter. That being the character of the instrument, the special verdict also sets out a memorandum of an agreement that was made between the owner and the same person, which specifies the sum he was to receive as wages, he having been previously appointed as master. The special verdict then proceeds to state the power of attorney,
* which was given to a person who went as agent in the [*300] ship, upon the particulars of which it does not appear that anything turns; it is therefore unnecessary for me to draw your Lordships' attention to it. Then the jury find as a fact, that this instrument was made *bonâ fide*, by which I understand them to mean, that the contract was really such as it purported and professed to be, that is, that it was a letting of the ship to the master for the voyage mentioned; and they further find, that the person who went out as agent on behalf of the owner carried with him the charter-party, and communicated it to the plaintiffs, who were the shippers of the goods. As soon as he arrived at Calcutta, he communicated to them the nature of the charter-party. They had already received a copy of it; so that they knew, before the ship arrived, the state in which the ship had come out, and were acquainted with the contract made between the defendants as owners of the ship, and Betham as the master. Now, the Court of King's Bench were of opinion that this instrument was nothing more than a contract between the owners of the ship and the master, the owners agreeing on their part, if he would pay a certain sum to them, that he should have for his own use all the profits over and above that sum; but, on the other hand when the case came

before the Court of Exchequer Chamber, it was argued more at length, and more elaborate judgments given, than in the Court of King's Bench; and that Court was of opinion that this instrument, although it did not contain in terms any words by which the owners let or chartered the ship out to Betham, still it was in effect, and in point of law, and in legal effect a letting of the ship to him for that voyage, and he was therefore in the situation of the person whom I mentioned to your Lordships in the [* 301] second proposition; * namely, that he was to all intents and purposes the charterer of the ship, and consequently that any contract made with him for shipping goods may be considered as a contract made with him as the owner *pro tempore* of the ship, and could not be considered as a contract made by the plaintiffs with the defendants, against whom the action was brought. I have already intimated to your Lordships that in this opinion of the Court of Exchequer Chamber, and in the reasons given by that Court upon the subject, all the Judges who were here upon the argument concurred.

For myself, I should say I am inclined to think that the judgment of the Court of Exchequer Chamber is right, and I shall have no hesitation on this occasion, and I hope I never shall have any hesitation, in acknowledging any error which I may have committed in the seat of justice, and in endeavouring as far as I can, to correct that error. I shall therefore advise your Lordships to confirm the judgment of the Court of Exchequer Chamber, and reverse the judgment which I myself, together with the other Judges of the Court of King's Bench, have given in this case, thinking as I do, that, upon the whole, that is the soundest judgment, and knowing, as I have already mentioned, that that is the opinion of almost every Judge in Westminster Hall.

Judgment of the Exchequer Chamber affirmed.

ENGLISH NOTES.

In *Sandeman* v. *Scurr* (1866), L. R., 2 Q. B. 86, 36 L. J. Q. B. 58, 15 L. T. 608, the action was brought by the consignee under a bill of lading for damage to the goods shipped, consisting of a cask of wine which had leaked owing to improper stowage. The defendant gave in evidence a charter-party made between the captain of the ship as agent for the owners and one Hodgson. It was thereby agreed that, the ship

being tight, &c., shall, with all convenient speed, sail to Oporto, and there load from the factors of the same affreighters a full cargo of wine, &c., and being so loaded, shall therewith proceed to a safe port in the United Kingdom, as ordered on signing bills of lading, and deliver the same on being paid freight as follows, viz.: 18*s.* per ton of 252 gallons, &c. . . . The captain to sign bills of lading if required, at any rate of freight without prejudice to this charter. The ship to be addressed to charterer's agents at Oporto on usual terms, sufficient cash to be allowed the captain at the port of loading for ship's ordinary disbursements. It appeared that the shippers had no notice of the charter-party. The Court (Cockburn, C. J., Mellor, J., and Shee, J.), held that there was no demise of the ship, express or implied. The charter-party amounted to no more than a grant to the charterer of the right to have his cargo brought home in the ship, while the ship itself continued, through the master and crew, in the possession of the owners, the master and crew remaining their servants. They accordingly held the plaintiff entitled to retain his verdict.

In *Wagstaff* v. *Anderson* (1879), 4 C. P. D. 283, 48 L. J. C. P. 759, 39 L. T. 332, and (C. A. 1880), 5 C. P. D. 171, 49 L. J. C. P. 485, 44 L. T. 720, the plaintiff sued the charterers of a ship for conversion of goods shipped under bill of lading, — the goods having been sold by the master under circumstances which did not warrant his doing so. By the charter-party it was agreed that the ship should perform a voyage from London to Callao; that the whole ship should be at the disposal of the charterers, except the space necessary for the crew and stores; that the master and owner should give the same attention to the cargo, and in every respect remain responsible to all whom it might concern, as if the ship were loaded in her berth by and for the owners independently of the charterers; that the master was to sign bills of lading at any rate of freight the charterers might require without prejudice; that the ship should be addressed to the charterers' nominees at the port of discharge; that the ship, being loaded, should proceed to Callao, and deliver the cargo agreeably to bills of lading in the usual and customary manner, the act of God, &c., excepted. Total freight £2500 to be paid against captain's order by charterers' acceptances payable at 90 days from the ship's final sailing from Gravesend, or in cash £5 discount at captain's option. But the owners to accept in satisfaction of freight all bills of lading bearing freight payable abroad, not exceeding one third of charter. The charterer's liability, except for freight, to cease on the vessel being loaded. It was held by the Lords Justices of Appeal, affirming the judgment of Denman, J., that the charterers were not in the position of owners so as to be responsible for the acts of the master.

The principle of the ruling case came to be further considered in the

case of *Baumwoll Manufactur Von Carl Scheibler* v. *Furness* (1892), 1893, A. C. 8, under the following circumstances: —

The owner of a ship, who was also registered as managing owner, chartered her for a period of 4 months, and concurrently agreed to sell her on certain terms, the sale to be completed on the expiration of the charter-party. By the charter-party the owner agreed to let and the charterer to hire the ship for 4 months, she being placed at the disposal of the charterers fitted for the service, with full complement of men, &c. The charterers were to provide and pay for all the provisions and wages of the captain, officers, engineers, firemen, and crew, owner to pay for the insurance of the vessel, also to maintain her in a thoroughly efficient state in hull and machinery for the service. The charterers were to provide and pay for all coals, fuel, port charges, pilotages, agencies, commissions, and all other charges whatsoever, except those before stated, and to pay for the hire of the ship £750 per month. It was agreed that the whole reach, burthen, and passage accommodation of the ship should be at the charterer's disposal, reserving only proper and sufficient space for ship's officers, crew, tackle, apparel, furniture, provisions, and stores; that the captain (with the words "although appointed by the owner" struck out) shall be under the orders and direction of the charterers as regards employment, agency, or other arrangements, and the charterers agreed to indemnify the owners from all consequences or liabilities that may arise from the captain signing bills of lading. The owner was to have the option of appointing chief engineer, to be paid by the charterers. The charterers undertook, at the expiration of the charter, to purchase the vessel for the sum of £13,000 *per contract* (of even date). The owner was to have a lien on all cargoes and subfreights for freight or charter money due under the charter; and the charterers to have a lien on the ship for all monies paid in advance, and not earned. The charterers had in fact appointed the captain and crew; and the owner exercised his option of appointing the chief engineer. The plaintiff shipped goods under bills of lading, not referring to the charter-party, of which the plaintiff had in fact no knowledge. The action was for loss of the goods owing (as was alleged) to the unseaworthiness of the ship.

The House of Lords, affirming the decision of the Court of Appeal, and reversing that of CHARLES, J. (who held that there was no demise of the vessel, and that the shipper, having no notice that the master's ordinary authority had been put an end to, was entitled to hold the registered owner liable), decided that the owner was not liable. Lord HERSCHELL, in giving his reasons, made the following observations: "The person who has the absolute right to the ship, who is the registered owner, the owner (to borrow an expression from real property law) in fee,

may be properly spoken of, no doubt, as the owner; but at the same time he may have so dealt with the vessel as to have given all the rights of ownership for a limited time to some other person, who, during that time, may equally properly be spoken of as the owner. When there is such a person, and that person appoints the master, officers, and crew of the ship, pays them, employs them, and gives them the orders, and deals with the vessel in the adventure, during that time all those rights which are spoken of as resting upon the owner of the vessel, rest upon that person who is for those purposes during that time in point of law to be regarded as the owner. When that distinction is once grasped it appears to me that all the difficulties that have been raised in this case vanish. There is nothing in your Lordships' judgment, as I apprehend, which would detract in the least from the law as it has been laid down with regard to the power of a master to bind an owner, or with regard to the liabilities which rest upon an owner. The whole difficulty has arisen from failing to see that there may be a person who, although not the absolute owner of the vessel, is during a particular adventure the owner for all those purposes."

"In *Colvin* v. *Newberry*, both in the Exchequer Chamber and in your Lordships' House, the law seems to have been regarded as I have submitted it to your Lordships to be. It is quite true that in that case the shipper had notice of the charter, and therefore knew of the relation which existed between the shipowner and the charterer. But I do not gather from the judgments either in the Exchequer Chamber or in your Lordships' House that that was considered an essential part of the defendant's case. It was alluded to rather as meeting an argument which had no doubt been suggested, that the master of the vessel, who was in that case himself the person to whom the vessel had been let, might have been properly regarded by those who dealt with him as acting, not merely on behalf of himself, but as acting on behalf of some owner or other, if they had not had notice that he was in fact at the time being the owner. But certainly it seems to me that it would not be correct to say that the decision in that case, either in the Exchequer Chamber or in your Lordships' House, was rested solely or mainly upon the fact that such notice existed."

As to the argument upon the Merchant Shipping Acts, he observed that all that has been done is to make the register *primâ facie* evidence of ownership; and that (with the exception of certain penal liabilities in case of the vessel not being seaworthy, and the owner failing to prove that he had taken proper precautions), it did not alter the actual legal relations.

AMERICAN NOTES.

The presumption is that the vessel is under the owner's control and the master is his agent. *Urann* v. *Fletcher*, 1 Gray (Massachusetts), 125; *Swift* v. *Tatner*, 89 Georgia, 660; 32 Am. St. Rep. 101. Courts do not incline to hold a charter-party a demise, although it contains such express words, unless its whole tenor clearly calls for that construction. *Richardson* v. *Winsor*, 3 Clifford (U. S. Circ. Ct.), 395. The intention that the charterer should have exclusive possession and control must appear in order to exempt the owner from liability. *Robinson* v. *Chittenden*, 69 New York, 525, citing the principal case, and giving a valuable review of all the pertinent cases; *Shaw* v. *United States*, 93 United States, 235; *Campbell* v. *Perkins*, 8 New York, 430. In *Leary* v. *U. S.*, 14 Wallace (U. S. Supreme Ct.), 607, a vessel was chartered to the government for its exclusive use, except quarters for the crew, but the command and control were retained by the owners; they were held liable. Mr. Justice FIELD said: "If the charter-party let the entire vessel to the charterer with a transfer to him of its command and possession, and consequent control over its navigation, he will generally be considered as owner for the voyage or service stipulated. But on the other hand, if the charter-party let only the use of the vessel, the owner at the same time retaining its command and possession, and control over its navigation, the charterer is regarded as a mere contractor for a designated service, and the duties and responsibilities of the owner are not changed. In the first case the charter-party is a contract for the lease of the vessel; in the other it is a contract for a special service to be rendered by the owner of the vessel." In *First Nat. Bank* v. *Stewart*, 26 Michigan, 83, the hirer undertook to man and equip, to load and unload, and pay all the expenses; the owner was held not liable. This is supported by *Taggard* v. *Loring*, 16 Massachusetts, 336; 8 Am. Dec. 140; *Reynolds* v. *Toppan*, 15 Massachusetts, 370; 8 Am. Dec. 110; *Pitkin* v. *Brainerd*, 5 Connecticut, 451; *Houston* v. *Darling*, 16 Maine, 413; *Gracie* v. *Palmer*, 8 Wheaton (United States Supreme Ct.), 605; *Hagar* v. *Clark*, 78 New York, 45; *Thompson* v. *Snow*, 4 Greenleaf (Maine), 264; 16 Am. Dec. 263; *Wordin* v. *Bemis*, 32 Connecticut, 268; 85 Am. Dec. 255; *Purvis* v. *Tunno*, 1 Brevard (So. Carolina), 259; 2 Am. Dec. 664; *Donahoe* v. *Kettell*, 1 Clifford (U. S. Circ. Ct.), 138, 139.

The owner cannot escape responsibility for the safe management of a vessel, so far as passengers are concerned, by entrusting it to a charterer. *Cuddy* v. *Horn*, 46 Michigan, 596; 41 Am. Rep. 178. "Any other rule would but point out the way to owners of vessels by which they could violate all rules and regulations adopted to insure the safety of passengers without incurring any liability to them therefor."

When the master victuals and mans the vessel and sails her under a contract at the halves he is *pro hac vice* owner. *Bridges* v. *Sprague, &c. Co*, 57 Maine, 543; 99 Am. Dec. 788; and he alone is liable for damages by collision. *Somes* v. *White*, 65 Maine, 542; 20 Am. Rep. 718.

But in such case, the owners are not relieved from liability for neglect of sick seamen (disapproving *Taggard* v. *Loring*, *supra*); *Scarff* v. *Metcalf*, 107 New York, 211; 1 Am. St. Rep. 807.

No. 2. — Stanton v. Richardson. — Rule.

A common carrier which uses a steamboat in the prosecution of its business is not released from liability for the wilful conduct of one of the crew toward a passenger, by chartering it, with the crew, for an excursion to points not upon its regular lines. *White* v. *Norfolk & S. R. Co.* (North Carolina), 20 S. E. Rep. 191.

One of the owners of a vessel, who takes it to sail on shares, he to man it pay the crew and furnish the supplies, is the owner *pro hac vice*, and responsible to the other owners for due care in its management. *Williams* v. *Hays*, 143 New York, 442; 26 Lawyers' Reports Annotated, 153; citing *Webb* v. *Peirce*, 1 Curtis (U. S. Circ. Ct.), 113; *Thorp* v. *Hammond*, 12 Wallace (U. S. Supr. Ct.), 416; *Somes* v. *White*, *supra*. The Court said: "The defendant, under the arrangement between him and the other owners, in no sense became their agent or servant. In *Webb* v. *Peirce*, it was held that where a master hires a vessel on shares under an agreement to victual and man her, and employ her on such voyages as he thinks best, having thereby the entire possession, command, and navigation of her, he thereby becomes her owner *pro hac vice*, and the relation of principal and agent does not exist between him and the owners. The other cases are to the same effect. The defendant thus became the charterer or lessee of the vessel, and was responsible to the other owners for due care in her management, and so the trial Judge held. The case of *Moody* v. *Buck*, 1 Sandf. 304, which holds that one co-owner of a vessel, who takes and navigates her for his own benefit, is not liable to his co-owners for her loss by his carelessness, even if correctly decided upon the facts there existing, is not applicable to a case like this, where the co-owner takes the vessel, not in his right as co-owner, for the purpose of using his own, but under an agreement with the other owners whereby he became the charterer, lessee, or bailee of the vessel, and thus bound to some duty of care and fidelity. There can however be no question that that case was incorrectly decided, and the rule laid down therein is not consonant with reason or justice. I cannot find that it has ever been followed as authority in any subsequent case, and it is in conflict with many authorities. *Sheldon* v. *Skinner*, 4 Wend. 525; 21 Am. Dec. 161; *Chesley* v. *Thompson*, 3 N. H. 9; 11 Am. Dec. 324; *Herrin* v. *Eaton*, 13 Me. 193; 29 Am. Dec. 499; *Martyn* v. *Knowllys*, 8 T. R. 145; *Guillot* v. *Dossat*, 4 Mart. (La.) 203; 6 Am. Dec. 702; Domat Civil Law, § 1849; 1 Parsons Maritime Law, 95; Ford Mercantile Shipping, 35, 45; Cooley Torts, 328, 659."

No. 2. — STANTON *v.* RICHARDSON.

RICHARDSON *v.* STANTON.

(1872, EX. CH. 1874.)

RULE.

A SHIP-OWNER by entering into a charter-party impliedly undertakes that the ship shall be reasonably fit for the car-

riage of a reasonable cargo of any of the kinds specified in the charter-party; and if the ship is not so fit, and cannot be made so without a delay which would frustrate the object of the voyage, the charterer may decline to put a cargo on board, and recover damages in an action against the shipowner for breach of contract.

Stanton v. Richardson.

Richardson v. Stanton.

L. R., 7 C. P. 421–437; L. R., 9 C. P. 390–392 (s. c. 41 L. J. C. P. 180; 43 L. J. C. P. 230; 45 L. J. C. P. 78).

[421] *Ship. — Charter-party. — Warranty of Seaworthiness.*

A charter-party provided that the ship should load a full and complete cargo of sugar in bags, hemp in compressed bales, $\frac{\text{and}}{\text{or}}$ measurement goods. It likewise specified different rates of freight for dry and wet sugar. The ship proceeded to her port of loading, where a cargo of wet sugar was provided for her by the charterer. A great deal of moisture drains from wet sugar, and when the cargo had been nearly all shipped it was found that there was such an accumulation of molasses in the hold — the result of drainage from the sugar — that the ship would not be seaworthy for the voyage if she proceeded in her then condition. Owing to the nature of the material and the depth of the hold, the ship's pumps were unable to clear the ship of the drainage from the sugar. The ship was perfectly seaworthy except with respect to this particular cargo, and the pumps were quite sufficient for all ordinary purposes. The sugar had to be unloaded again, and the charterer then refused to reload it or to provide any other cargo. Cross-actions were brought, — the one by the shipowner against the charterer for refusing to provide a cargo, and the other by the charterer against the shipowner to recover damages by reason of the ship not being fit to carry the cargo provided for her.

At the trial the jury, in answer to questions left to them by the Judge, found that the cargo of sugar which was offered was a reasonable cargo to be offered; that the ship was not reasonably fit to carry a reasonable cargo of wet sugar; that the ship could not have been made fit within such a time as would not have frustrated the object of the adventure; and that the ship would not, without new pumps, and with a reasonable cargo of wet sugar on board, have been seaworthy: —

Held, that the shipowner, by entering into the charter-party, undertook that the ship should be reasonably fit for the carriage of a reasonable cargo of any of the kinds of goods specified in the charter-party, and consequently of a reasonable cargo of wet sugar; and that, upon the findings of the jury that she was not so fit, and could not be made so in such a time as not to frustrate the object of the voyage, the charterer was entitled to succeed in both actions.

No. 2. — Stanton v. Richardson, L. R., 7 C. P. 421, 422.

Cross-actions upon a charter-party between the owner and the charterer of a ship called the *Isle of Wight*.

*The first count of the declaration in the action by the [*422] shipowner against the charterer (*Stanton* v. *Richardson*) set out the terms of the charter-party, and alleged as breaches that the defendant neglected and refused to load a full and complete cargo on board the ship, and that he neglected and refused to pay the freight. The second count alleged as a breach of the charter-party that the defendant loaded a large portion of the cargo, to wit, sugar in bags, and the same was afterwards properly and necessarily for the safety of the ship and cargo landed by the master at the port of lading, on account of a part thereof being in a damaged state in the hold of the vessel, and that all conditions were performed, &c., necessary to entitle the plaintiff to reload the said portion of the said cargo, and to have the residue of the cargo supplied; yet the defendant refused to allow the said portion to be reloaded and to supply the residue. The third count was similar to the second. The fourth count alleged as a breach of the charter-party that, though a large portion of the cargo, consisting of sugar in bags, was loaded on board the ship by the defendant, a portion of it was in such a bad, dangerous, and unfit state for conveyance in the ship that the same damaged and injured the ship and her pumps, and also the residue of the sugar, so that the ship could not safely set sail and proceed on her voyage, whereby, &c. Fifth, money counts.

The pleas were the ordinary traverses of the allegations of the declaration, &c., with the exception of the third plea, which alleged that the vessel was not tight, staunch, and strong, or fit to receive and carry a cargo as she was required to be according to the true intent and meaning of the charter-party, and that the defendant could not, although he was ready and willing so to do, safely or securely load on board the ship a full and complete or any cargo; and by reason of the condition of the ship was prevented from deriving any benefit from the charter-party, and the consideration for the same wholly failed.

Issues.

In the action by the charterer against the shipowner (*Richardson* v. *Stanton*) the first count of the declaration set out the charter-party, and alleged as a breach that the master did not take all proper means to keep the ship tight, staunch, and strong, well

No. 2. — Stanton v. Richardson, L. R., 7 C. P. 423, 424.

manned and sound, and in every way fitted for the voyage;
[*423] and * that the ship at the time of receiving the cargo on board was not a good risk for insurance, and did not load or carry a full and complete or any cargo, according to the charter-party, whereby the plaintiff lost the benefit of the charter, and was put to great expense in landing the cargo and warehousing the same, and was compelled to ship the cargo by another vessel; and a portion of the cargo which had been loaded on board the ship was either wholly lost or much damaged and injured, &c. Second and third counts respectively alleged bailments of certain goods to defendant for carriage in his ship, and damage to the goods through the negligence of the defendant and his servants, and through the defective and unseaworthy condition of the defendant's ship. Fourth, money counts.

Pleas: The ordinary traverses, &c.

Issues.

The charter-party, so far as material, was as follows: It was therein agreed between the master of the ship called the *Isle of Wight*, for and on behalf of himself and the owner of the said vessel, of the one part, and the Borneo Company, Limited, as agents for and on behalf of the charterer, of the other part, that the said master should, after having discharged his inward cargo with all proper despatch, "sail for Manilla, or as near thereunto as he might safely get, for orders to load within there or at Yloilo or at Zebu, the following cargo of lawful merchandise, &c.: a full and complete cargo of sugar in bags, hemp in compressed bales, and/or measurement goods, always sufficient dead weight to ballast the vessel;" and that the vessel, being so loaded, should sail to Cork or Falmouth for orders to discharge in a port in the United Kingdom or in Europe, between Havre and Hamburg. The provisions concerning rate of freight specified that the rate should be £4 2*s.* 6*d.* for dry sugar, £4 5*s.* for wet sugar, and £4 15*s.* for hemp and measurement goods. The charter did not commence with the usual clause as to the vessel's being tight, staunch, and strong, but contained this provision: "The master engages that the vessel, before and when receiving cargo, shall be a good risk for insurance; and he will, when required, provide a survey report declaring her to be so; and during the voyage the master shall take all proper means to keep the vessel tight, staunch,
[*424] and strong, * well manned and provided, and in every way fitted and provided for the voyage."

No. 2. — Stanton v. Richardson, L. R., 7 C. P. 424, 425.

At the trial before BRETT, J., at the sittings in London after Hilary Term, the facts were as follows: The *Isle of Wight* proceeded to Manilla, and thence, in accordance with orders given by the charterer's agents, to Yloilo, which is in the Philippine Isles. At Yloilo she was surveyed, in pursuance of the terms of the charter-party, and reported to be a first-class risk and fit to carry a dry and perishable cargo to any part of the world. A cargo of what is known as wet sugar, in bags, was provided for her by the charterer. It appears that a very large quantity of moisture drains from cargoes of wet sugar, and when the bulk of the cargo had been loaded it was found that there was such a large accumulation of molasses in the hold, the result of drainage from the sugar, that the ship would not be seaworthy for the voyage if she proceeded in her then condition. An attempt was made to get rid of the drainage by means of the ship's pumps. The pumps were of the usual kind for a ship of the size of the *Isle of Wight*, and quite sufficient for ordinary purposes, but, owing to the depth of the ship's hold, and the nature of the material, they were unable to deal with the drainage from the sugar. The ship was perfectly seaworthy, excepting with respect to this particular cargo of wet sugar and the insufficiency of the pumps to deal with it. It ultimately became necessary to unload the cargo again and warehouse it at Yloilo, whence it was afterwards, by arrangement between the parties, sent to Europe in another ship called the *Milton*. The charterer refused to provide another cargo. It appeared that there was no means of procuring any other pumps for the purpose of pumping out the drainage from the sugar except by sending for them to Manilla, and it would have taken a very considerable period — probably seven or eight months — before they could be so procured.

The following were the questions left to the jury, and the answers given by the jury to them: 1. Did the charterer in the first place offer a full cargo? — Yes. 2. Did the charterer refuse to allow the cargo to be reshipped, or any cargo, after the first was discharged, to be shipped and carried in the *Isle of Wight*? — Yes. 3. Was the cargo shipped on board the *Milton* by mutual consent? — Yes. * 4. Was the sugar which was offered to [* 425] the captain a reasonable cargo to be offered? — Yes. 5. If not, was the defect such, and so apparent, that a captain of ordinary care and skill, if he meant to object to it, ought to have rejected it? — No. 6. Was the ship fit to carry the cargo which

No. 2. — Stanton v. Richardson, L. R., 7 C. P. 425, 426.

was offered to her? — No. 7. Was the ship reasonably fit to carry a reasonable cargo of Yloilo wet sugar? — No. 8. Did the captain use reasonable skill and care in the treatment of the cargo delivered to him? — No. 9. Was the damage suffered by the sugar the result of its own defective condition, without any defect in the ship or any fault of the captain? — No. 10. Was the damage to the sugar caused by the unfitness of the ship to carry the cargo offered to her, or by the ship being unreasonably unfit to carry a reasonable cargo of Yloilo wet sugar, or by want of reasonable care or skill of the captain in treating the cargo delivered to him? — Yes. 11. If the ship was defective, was the captain willing and able to make her fit within a reasonable time? — Willing, but not able. 12. Was he willing and able to make her fit within such a time as would not have frustrated the object of the adventure? — Willing, but not able. 13. Would the ship, without new pumps, and having the sugar which was offered to her on board, have been seaworthy? — No. 14. Would the ship, without new pumps, and with a reasonable cargo of Yloilo sugar on board, have been seaworthy? — No.

Upon these findings the learned Judge directed the verdict to be entered for the charterer in both actions, and reserved leave to the shipowner to move to enter a verdict, the Court to be at liberty to make all amendments that the Judge ought to have made. It was agreed that the damages in both actions should be referred.

A rule *nisi* was obtained to enter the verdict pursuant to the leave reserved, on the ground that Richardson, the charterer, had no right to throw up the charter-party, and refuse to load a cargo, and that, upon the findings of the jury, Stanton, the shipowner, was entitled to have the verdict entered for him, and also for a new trial on the ground of misdirection on the part of the Judge in directing a verdict to be entered for Richardson upon the findings of the jury, and in telling the jury that there was a warranty on the part of the shipowner that the ship was fit to carry a reasonable cargo of Yloilo wet sugar, and that there was an [*426] obligation on the part of the *shipowner and master of the ship to have the ship in a state fit for such a cargo, and that the master should possess the necessary knowledge enabling him to deal with and manage such a cargo, and in telling the jury that the shipowner was bound within a reasonable time to make the ship fit to take such a cargo, and to do so within such a

time as would not frustrate the objects of the adventure, or upon the ground that the verdicts were against the weight of the evidence, — first, in the answers given by the jury to the 6th, 7th, and 14th questions; secondly, in the answers to the 8th, 9th, and 10th questions; and thirdly, in the answers to the 11th and 12th questions.

Sir J. Karslake, Q. C., Butt, Q. C., and J. C. Mathew, showed cause. The charter-party clearly specifies wet sugar as one of the kinds of cargo which may be loaded under it. The jury have found that the cargo offered was a reasonable one. It is contended that the shipowner is bound to provide a ship reasonably fit for the purpose of carrying any of the specified cargoes which he has undertaken to carry, and the charterer is under no obligation to provide a cargo of the sorts specified which may be suitable to the particular ship. It must be admitted that compliance with a warranty is not always and in all cases a condition precedent; but here the jury have found that the objects of the voyage were wholly frustrated. The cases establish that when the defect in the ship or the breach of contract on the shipowner's part goes to the whole consideration there is an answer to an action for refusing to load. *Tarrabochia* v. *Hickie*, 1 H. & N. 183; 26 L. J. Ex. 26; *Behn* v. *Burness*, 3 B. & S. 751; 32 L. J. Q. B. 204; No. 44 of "Contract" in 6 R. C.; *McAndrew* v. *Chapple*, L. R., 1 C. P. 643; 35 L. J. C. P. 281. There is an express condition in this charter-party that the ship shall be a good risk for insurance at the time of receiving the cargo; this shows that it was intended that the vessel should be seaworthy with regard to the particular cargoes specified. Apart from this there would be a warranty of seaworthiness in respect of the cargoes specified in the charter. The shipowner relies on the analogy of a specific chattel purchased, as to which it is not a condition precedent that it shall be fit for a particular purpose. That is not a true analogy; the case more * nearly resembles that of a contract to pro- [*427] vide goods which shall answer a certain description and be fit for a certain purpose. See *Brown* v. *Edgington*, 2 Man. & G. 279; 10 L. J. C. P. 66; *Shepherd* v. *Pybus*, 4 Scott, N. R. 434; 11 L. J. C. P. 101; *Jones* v. *Just*, L. R., 3 Q. B. 197; 37 L. J. Q. B. 89.

It may be difficult to find any distinct statement in the text-books that the ship at the time of loading must be fit to receive the particular cargo specified in the charter, but it is clear that the shipowner's liability goes even further than that. See the

observations of BLACKBURN, J., in *Readhead* v. *Midland Ry. Co.* L. R., 2 Q. B. 433–437; No. 12 of "Carrier," *ante*, p. 436 *et seq.* The distinction was drawn in that case between carriers by land and by sea, and LUSH, J., at p. 418, says, "As to shipowners, I agree that there is abundant authority for the doctrine laid down." It cannot be that the charterer is bound to load a cargo on board a ship that is unseaworthy or not fit to receive it, as, for instance, to put silk into a ship that is leaky. Therefore the charterer here was not bound to load, or, the cargo having been unloaded, to reload while the ship was in her then state; and as the jury have found that she could not have been fitted to receive the cargo in such time as not to totally frustrate the objects of the voyage he was absolved from the obligation to provide a cargo altogether, and was entitled to recover damages for the breach of contract on the part of the shipowner.

They also cited Bell's Commentaries on the Laws of Scotland, s. 499; Pothier, Chartepartie, 30; Parsons on Shipping, 285; *Thompson* v. *Gillespy*, 5 E. & B. 209; 24 L. J. Q. B. 340; *Burges* v. *Wickham*, 3 B. & S. 669; 33 L. J. Q. B. 17; *Knill* v. *Hooper*, 2 H. & N. 277; 26 L. J. Ex. 377; *Towse* v. *Henderson*, 4 Ex. 890; 19 L. J. Ex. 163; *Lyon* v. *Mells*, 5 East, 427, No. 3 of "Carrier," p. 266, *ante*; *Gibson* v. *Small*, 4 H. L. Cas. 353; Abbott on Shipping, 5th ed. p. 218, 10th ed., by Shee, 254; *Freeman* v. *Taylor*, 8 Bing. 124; 1 L. J. C. P. 26; *Clipsham* v. *Vertue*, 5 Q. B. 265; 13 L. J. Q. B. 2.

Henry James, Q. C., Watkin Williams, and Cohen, supported the rule. The first question is whether the shipowner was bound to provide a ship fit to carry such a cargo as was offered. [* 428] The * jury have not found that the cargo was a reasonable cargo in relation to this particular ship. The ship was perfectly seaworthy in the ordinary sense of the term, and could have carried any ordinary cargo. The pumps were in good order and fit for ordinary purposes. It is contended that the shipowner was not bound to alter the construction of the ship in order to take one particular sort of cargo for which she was not adapted. The charter-party specifies that the charterer may load various cargoes of lawful merchandise; that must be taken to mean of a kind suitable to the ship. The charterer must be taken to know what the nature of a cargo of wet sugar is, and may satisfy himself if he will whether the ship is suitable for carrying such a cargo before he charters her. He is not entitled to throw on the shipowner the necessity of altering the construction of the vessel to take a cargo

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of an exceptional character, the peculiar nature of which the shipowner is not likely to know when he enters into the contract. The specification of the cargo in a charter-party must be taken to refer to a cargo of an ordinary description. Suppose the charter specified a cargo of machinery, would the charterer be entitled to tender a cargo consisting of pieces of machinery of enormous size which could not be got into the hold without altering the construction of the ship? The charterer is bound to supply a cargo within the terms of the charter that the vessel can carry. The case is like that of a purchase of a specific chattel, the charterer of the ship must be taken to hire the ship as she is for a particular purpose; and the shipowner is only bound to fulfil that purpose so far as the vessel as she is can do so.

[Brett, J. That construction of the charter-party appears to me to destroy the option which was expressly given to the charterer. Considerations derived from the knowledge or ignorance of the parties before entering into the contract seem immaterial when we are dealing with the terms of a written contract.]

With respect to the finding of mismanagement on the part of the master with regard to the cargo the same considerations apply. The obligation on him to bring skill and knowledge to the treatment of the cargo applies only to an ordinary, and not an exceptional, cargo. Secondly, it is not a condition precedent to the * obligation to load that the vessel should be seaworthy [* 429] at the time of loading, or the smallest defect which could be easily remedied before sailing would be fatal.

[Bovill, C. J. Must she not be fit to receive the cargo?]

In order to entitle the charterer to repudiate the obligation of loading a cargo it must be shown that the ship could not be of any use whatever to him; otherwise the whole consideration has not failed, and his remedy is by cross-action for any damage he may have suffered. *Behn* v. *Burness*, 3 B. & S. 752; 32 L. J. Q. B. 204; No. 44 of "Contracts," 6 R. C. The ship could have taken a cargo of any of the kinds specified in the charter except this exceptional cargo of wet sugar. It is sufficient if the charterer may derive any benefit from the ship, and with respect even to such a cargo, though the delay would have been considerable, she might have been rendered fit. The whole purpose of the adventure must be rendered impossible to exonerate the charterer. *McAndrew* v. *Chapple*, L. R., 1 C. P. 643; 35 L. J. C. P. 281; *Tarrabochia* v. *Hickie*, 1 H. & N.

183; 26 L. J. Ex. 26; *Dimech* v. *Corlett*, 12 Moo. P. C. 199. This was a charter-party by which the ship was to go and take a cargo of the produce of the place, not a particular specific cargo which had been procured for her. It is contended that even if the charterer would have been entitled in the first instance to refuse to load on the ground that the ship was not fitted with sufficient pumps for a cargo of wet sugar, having loaded the sugar he had waived the condition precedent and could not reject the ship because the parties could not be placed in *statu quo*.

[Brett, J. The loading was no benefit to the charterer.]

They also cited *Blasco* v. *Fletcher*, 14 C. B. (N. S.) 147; 32 L. J. C. P. 284.

Bovill, C. J. The verdict in both these actions was for the charterer, the defendant in the first action and the plaintiff in the second. A rule was obtained on behalf of the shipowner to enter a verdict for him in both actions on the findings of the jury or for a new trial on the ground of misdirection, and that the verdict was against the evidence. After hearing the evidence that was given read over, I am of opinion that the findings of the jury [*430] were in * accordance with the evidence. My Brother Brett is not dissatisfied with the verdict, and, on the whole, it does not appear to me that there is any sufficient ground for disturbing the verdict on any of the questions that were left to the jury. With regard to the motion to enter a verdict, or for a new trial on the ground of misdirection, the matter depends upon the relative obligations of the shipowner and the charterer. The facts with reference to this question are undisputed. The ship was good and sound enough for ordinary purposes, and the cargo was a proper cargo for a ship that was suitable to carry it. The charter-party into which the parties entered was not quite in the ordinary form with regard to the fitness of the ship. The usual terms do not occur in the beginning, but the contract, which is between the master of the one part, on behalf of the owner and the agents of the charterer of the other part, is, that the master after having discharged his inward cargo shall sail for Manilla for orders to load within there, or at Yloilo, &c., the following cargo of lawful merchandise, a full and complete cargo of sugar, in bags, hemp in compressed bales, $\frac{\text{and}}{\text{or}}$ measurement goods. In that part of the charter nothing is said as to the nature of the sugar, but in the clause relating to the rate of freight it is provided that the rate

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shall be £4 2*s.* 6*d.* for dry sugar, and £4 5*s.* for wet sugar. Towards the end of the charter is this engagement by the master, "that the vessel before and when receiving cargo shall be a good risk for insurance, and he will, when required, provide a survey report declaring her to be so, and during the voyage the master shall take all proper means to keep the vessel tight, staunch, and strong, well manned and provided, and in every way fitted and provided for the voyage." Under this charter the charterer was clearly at liberty to offer a cargo of wet sugar. He was clearly at liberty to load the ship at Yloilo. It appears to be well understood that the sugar which is there is wet sugar, of such a description that there is a considerable drainage from it of molasses and moisture. Under such a charter there is no doubt that the cargo offered must be a reasonable cargo of the description specified, but I am not aware of any authority to support the proposition that the charterer is bound to offer a cargo suitable to the particular ship in the state in which she is at the time of loading. The only
* limit with respect to the nature of the cargo which the [*431] charterer may ship appears to be that of reasonableness.
Mr. James suggested as an illustration of his contention, the offer of exceptionally large pieces of machinery or heavy guns under a charter which simply provided for a cargo of merchandise. The answer to the argument derived from that illustration appears to be that in such a case the jury would probably say that such a cargo was not a reasonable cargo to offer; that seems to me the only mode in which such a case could be disposed of. Another illustration may be taken. Suppose the charter provided for a cargo of cattle, could it be said that the charterer was bound to offer a cargo of cattle suitable to the ship in the state in which she was at the time? If the ship were not properly fitted to receive a cargo of heavy cattle is the charterer to be bound to provide a cargo of light cattle? I think the ship must be fit to receive any reasonable cargo of the nature that the shipowner undertook to carry. The jury in the present case found that the sugar offered was a reasonable cargo to be offered. They have also found that the ship was not reasonably fit to carry a reasonable cargo of Yloilo sugar. There is a further finding that the captain, though willing, was not able to make the ship fit to carry the cargo within a reasonable time, or within such a time as not to frustrate the object of the adventure. The reason of the unfitness of the ship arose

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from the nature of the sugar and the character of the pumps. If the cargo had remained on board or had been reloaded, the pumps being wholly unequal to dealing with the accumulation of the drainage from the sugar, the safety of the vessel would have been endangered and the cargo wholly ruined and rendered unmerchantable. The jury having found that the vessel was not only unfit, but that she could not be made fit in such time as not to frustrate the object of the adventure, the question arises what is the obligation of the shipowner with reference to a ship chartered to carry a particular sort of goods? It seems to me that he is bound to furnish a vessel fit to carry the cargo that the charterer has undertaken to put on board. There are additional terms in this charter, viz., as to what is to be done during the voyage, and that the vessel is to be a good risk before and at the time of receiving the cargo. The jury found that the ship, at such time, [* 432] * was unfit to receive the cargo. Is there any obligation under such circumstances, on the charterer to load, or if, having been loaded, the cargo is obliged to be immediately discharged as here, to reload? The question appears to me to answer itself. The charterer is not bound to load or reload unless the ship is fit to receive the cargo and carry it. It was said that there was an absence of authority as to the exact obligation of the shipowner in relation to these questions. This may arise from the absence of doubt as to the nature of such obligation. There seems to me, however, to be sufficient authority for the propositions for which I am now contending. Lord Ellenborough, in the case of *Lyon* v. *Mells*, says: "In every contract for the carriage of goods between a person holding himself forth as the owner of a lighter or vessel ready to carry goods for hire, and the person putting goods on board or employing his vessel or lighter for that purpose, it is a term of the contract on the part of the carrier or lighterman implied by law, that his vessel is tight and fit for the purpose or employment for which he offers and holds it forth to the public."

It is true that these observations apply chiefly to persons following a public employment, and are made on the footing that the nature of such employment will be a guide to what the contract must be between the parties. But in a later case, before Lord Ellenborough, a similar question arose under a charter-party. That case is *Havelock* v. *Geddes*, 10 East, 564; 12 East, 622; 10 R. R. 380. Lord Ellenborough there says, "Had the

plaintiffs' neglect here precluded the defendants from making any use of the vessel, it would have gone to the whole consideration, and might have been insisted on as an entire bar." That was because the consideration would then have wholly failed. Here the jury found that what occurred did wholly frustrate the objects of the voyage, and so this case comes distinctly within the doctrine laid down in the passage I have cited. It was argued by Mr. Williams that this doctrine about frustrating the objects of the voyage was a new doctrine, introduced by the case of *Tarrabochia* v. *Hickie*. This is not really so in my opinion. Several other cases, establishing the same principle, have been referred to in * the argument, which are much older than *Tarra-* [*433] *bochia* v. *Hickie*, and especially the case of *Freeman* v. *Taylor*. The question there was one of deviation. TINDAL, C. J., laid it down to the jury that if the deviation were so long and unreasonable as that in the ordinary course of mercantile business it would frustrate the whole object of the voyage, the contract was at an end. He left the case to the jury precisely as my Brother BRETT left the present case, and the Court, after taking time to consider, upheld his ruling. The same doctrine may be traced back as far as the case of *Constable* v. *Cloberrie*, Palm. 397, where the covenant was to sail with the first wind. It appears to me, therefore, in the present case, that, the object of the voyage being frustrated, the charterer was not bound to load a cargo. It is true that he did load a cargo in the first instance, but after it was so loaded it had to be removed from the vessel, because she was unfit to carry it. It appears to me that the same reasoning applies to the question whether he was bound to reload, as applies to the question of his obligation to load. The question may be regarded from another point of view. When there are concurrent acts to be performed on each side, as, for instance, where one is to receive cargo and the other to deliver it, the party who claims as for a breach of the contract must have been ready and willing to do his part. The jury having found that the ship could not be made fit within a reasonable time, or such a time as that the object of the voyage would not be frustrated, that finding appears to me to amount to a finding that the shipowner was not ready and willing to receive the cargo offered. For these reasons, I think the verdicts must stand, and the rule be discharged.

BYLES, J. I am of opinion that in these cross actions the char-

terer is entitled to the judgment of the Court, and to hold his verdicts. In other words, that the ship was to blame, and not the sugar.

The charter-party provides in express terms that wet sugar may be shipped, but at a higher rate of freight than dry sugar. The evidence shows that the ship's pumps were of such a height, [* 434] * diameter, and description, that they would not and did not discharge the water mixed with the drainage of the wet sugar. The ship, therefore, was not, in respect of the pumps, reasonably fit to carry the goods; that is to say, the wet sugar she had contracted to carry. The charterer knew nothing of the existing pumps, neither their power nor their capacity. The shipowner or captain was bound to know, and did know. The charterer, perhaps, knew nothing of the disproportion of the thick drainage to the power of the pumps. The jury have found the negligence to be in the shipowner.

My Brother Brett's directions, which were in accordance with this view of the case, seem to me unassailable. The Judge is not dissatisfied with the verdicts in these cases, and therefore they must stand.

Brett, J. It seems to me that three questions arise in this case: first, whether the correct questions were left to the jury; secondly, if so, and they were properly answered, what is the effect of such answers on the rights of the parties; thirdly, whether they were properly answered. The answer to the first question depends on the question, what the rights and obligations of the parties are. It appears to me that they must be determined by the written contract, the construction of which is for the Court, without regard to any consideration as to the knowledge of either party, and with respect to the character of the ship or cargo. Such considerations are immaterial with regard to a written contract. The contract is a charter-party, by which the charterer is to have the option of loading a full and complete cargo of sugar, in bags, hemp, in compressed bales $\frac{\text{and}}{\text{or}}$ measurement goods. This stipulation giving an option as the nature of the cargo, is in favour of the charterer. Amongst the things which the charterer has the option of shipping is a cargo of wet sugar. The shipowner undertakes to carry such a cargo. In addition, the shipowner took on himself the obligation to provide a vessel that should be a good risk for insurance, and procure a survey report declaring her to be so. It was urged that, by virtue of that stipulation, the shipowner was bound to provide a ship that was seaworthy when the cargo was

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on board or whilst loading, I should be sorry to rest my decision on that express undertaking. * I think the ques- [*435] tion turns on another undertaking, not express, but implied. I admit that some of the questions that were put to the jury may not, in point of form, define with perfect strictness the obligations of the shipowner, and the rights of the charterer, but it appears to me that, taking all the questions together, in substance the case was correctly presented to the jury.

It is found that the cargo offered was a reasonable cargo, and that the ship was not fit to carry a reasonable cargo; and therefore the answers to questions 6 and 7 become in the event equivalent to one another. What then is the effect of these findings, considered with regard to the reciprocal duties arising between the charterer and shipowner from the mere fact of their having entered into an ordinary charter-party? It seems to me that the obligation of the shipowner is to supply a ship that is seaworthy in relation to the cargo which he has undertaken to carry.

I do not think, however, that this proposition completely expresses his liability, though the proposition I am about to state with regard to such liability in many cases may amount to the same thing only in effect. I think the obligation of the shipowner is to supply a ship reasonably fit to carry the cargo stipulated for in the charter-party. This appears to be the measure of his liability as stated in the case of *Lyon* v. *Mells* by Lord Ellenborough, and by Lord Wensleydale in the case of *Gibson* v. *Small*, and again by Lord Ellenborough in *Havelock* v. *Geddes*. The same rule is adopted in the edition of Abbott on Shipping, by Mr. Justice Shee, and by Blackburn, J., in the case of *Readhead* v. *Midland Ry. Co.*

It is argued that the charterer is bound to ship a cargo that is suitable for the particular ship. That would be to destroy the option that is expressly reserved by the charter-party to him. With all the assistance rendered to me by counsel, I can find no more decisive mode of stating the true proposition with regard to the duties of the charterer and shipowner, than that the one must offer a reasonable cargo of the kind specified in the charter, and the other must provide a ship reasonably fit to carry such a reasonable cargo. In truth it often happens in jurisprudence, that the * law can lay down only such general rules, [*436] leaving the application of them to the particular facts to be

determined by the findings of the jury. If such be the rights and duties of the parties, what is the effect as to these two actions? With respect to the action by the charterer, he sues for damages for not providing a ship according to the charter. For the purposes of that action, it is sufficient to hold that, by reason of the unfitness of the ship, there was a breach of contract, and all damages necessarily occasioned by such breach of contract, *e. g.* damage to the sugar, and expenses, are recoverable.

With regard to the action for not loading or not reloading, the further question arises, whether, under the circumstances, the charterer had a right to refuse to load or reload. In this action we must decide whether there was not only a breach of contract, but such a breach of contract as entitled the charterer to refuse to load or reload. The question in such cases is said to be whether the warranty was a condition. I apprehend that a stipulation amounting to a condition is necessarily also a warranty, and there may be circumstances preventing its being treated as a condition, and then it is only available as a warranty; as, for instance, when the stipulation is that the ship shall be ready to load within a fixed time or a reasonable time, and the cargo is loaded and carried; though before loading this might be a condition precedent, inasmuch as the charterer has loaded and derived benefit from the charter, he cannot rely on it as a condition, but must treat it as a warranty. The question, therefore, here is, whether the unfitness of the ship may be treated as a breach of a condition precedent; that is to say, whether it amounted to a breach of contract entitling the charterer to refuse to load or reload. I think the questions as to loading or reloading are the same, for in my opinion the effect of the agreement between the parties was that the matter should be treated as if the charterer had a cargo ready to load and refused to load it. Now, assuming that to be so, and the findings to be correct, the jury have found that the ship was not reasonably fit to carry the cargo, and that she was so unfit as to be unseaworthy with the cargo on board. But it is not necessary to decide whether the charterer would be entitled on account of such unfitness and unseaworthiness to reject the ship at once, [*437] for the *jury have gone further, and found that not only was the ship unfit and unseaworthy, but also that she could not be made reasonably fit and seaworthy, not only within a reasonable time but within such a time as would not entirely

frustrate the whole adventure. It seems to me that the conclusion to be drawn from all the cases analogous to this is, that if the breach of contract by the shipowner be such as to justify the charterer in not putting the cargo on board at the moment of the breach, and it cannot be remedied within such a time as not to frustrate the object of the voyage, this absolves the charterer altogether. It would be a gross injustice if it were otherwise. The charterer must be taken to have entered into the contract with the usual mercantile objects of such a contract, which objects must be taken to be known also to the shipowner, and it cannot be that the shipowner is to hold the charterer to his bargain if those objects are frustrated.

If in such a case as the present he were bound to put the cargo on board in the first instance, he clearly was not bound to reload after what occurred.

The only remaining question is whether the findings of the jury were against the evidence, and with regard to this question I cannot say that after the case was fully gone into there appeared to me to be much difficulty with regard to the facts. It seems to me that the verdicts ought not to be disturbed. For these reasons I think that the rule should be discharged. *Rule discharged.*

The shipowner (Stanton) appealed from this decision to the Exchequer Chamber.

*A. L. Smith (Ridley with him), for the [L. R. 9 C. P. *391] shipowner. There is no warranty in this charter that the ship shall be seaworthy to carry a cargo of wet sugar. The usual words, "tight, staunch, and strong," are left out in the description of the vessel, and the only express warranty is that the ship, before and when receiving cargo, shall be a good risk for insurance, and that a survey report shall be provided declaring her to be so. That warranty was complied with, and it is submitted that there can be no implied warranty, on the principle that *expressum facit cessare tacitum*. *Dickson* v. *Zizinia*, 10 C. B. 602; 20 L. J. C. P. 73.

[Cockburn, C. J. I do not see here that the express warranty necessarily would exclude an implied warranty that the vessel was seaworthy for the purpose for which she was chartered. It is something superadded by way of additional protection to the charterer.]

The words "tight, &c.," are so usually inserted in charter-parties that it would seem probable that they were deliberately left out

with a purpose. It might be that the shipowner, knowing that the ship was going to Yloilo, and might have a cargo of wet sugar tendered for which she was unfit, expressly declined to stipulate for her fitness.

[Cockburn, C. J. Had the words "tight, &c.," been struck out of a printed form?]

No; they were simply omitted. The shipowner might be bound to take some wet sugar, but he was not bound to take a whole cargo of wet sugar. He was only bound to take so much wet sugar as the ship might be seaworthy to carry. It is a strong proposition to say that the shipowner was bound to have pumps fit to pump out a certain proportion of the cargo itself, and that, because they were not fit to do that, the ship was unseaworthy.

The second question is, whether the unfitness of the ship to carry wet sugar was a breach of a condition precedent, entitling the charterer to throw up the charter-party. It was not so. Assuming that there was a stipulation that the ship should be fit, it was merely a collateral stipulation. There is no total frustration of the adventure. The charterer had the option of offering five sorts of cargoes; any of those sorts but wet sugar the ship could have taken.

[Mellor, J. Your contention deprives the charterer of the option expressly given to him by the charter.

[*392] *Cockburn, C. J. The master was obliged to unload the cargo for the safety of the ship, and it was shown that it would have taken a long time to make the ship fit for a cargo of wet sugar.]

He cited *Tarrabochia* v. *Hickie*, 1 H. & N. 183; 26 L. J. Ex. 26.

Sir J. Karslake, Q. C. (with him Butt, Q. C. and J. C. Mathew), for the charterer, was not called upon.

Cockburn, C. J. I am of opinion that the judgment of the Court below should be affirmed. If the words upon the omission of which so much stress has been laid had been struck out purposely, there would perhaps have been more ground for the argument based upon their omission. But looking to the whole of the charter-party together it appears to be an engagement on the part of the shipowner to carry a cargo of dry or wet sugar, because, although at first sugar *simpliciter* is mentioned, subsequently among the rates of freight the rate for wet sugar is specified, which imports an option on the charterer's part of loading either

wet or dry sugar. A cargo of wet sugar was offered. The captain shipped it as he was bound to do. He then discovered that the pumps, though fit for the ordinary purposes of the ship, were inadequate for this cargo, the drainage from which, mixing with the ordinary leakage of the ship, formed a viscous matter which the pumps were unable to discharge. The cargo had consequently to be discharged. The shipowner was bound, I think, under this charter-party, to have his ship fit to take a cargo of wet sugar, and the ship was unable to do so; there is, therefore, a breach of the shipowner's engagement. It is true he offers, after discharging the cargo, to make the ship fit to take a cargo of wet sugar, but it is admitted that that would take him months. In the meanwhile the cargo had to be sent to Europe by another ship. For these reasons I think the judgment of the Court below was right.

MELLOR, J., and BRAMWELL, CLEASBY, POLLOCK, and AMPHLETT, BB., concurred. *Judgment affirmed.*

The judgment was again unanimously affirmed in the HOUSE OF LORDS, the learned Lords present being Lord CAIRNS, C., Lord HATHERLEY, Lord O'HAGAN, and Lord SELBORNE. The speeches of the learned Lords are reported (45 L. J. Q. B. 78–86), but add nothing in principle to the reasons of the Courts below.

ENGLISH NOTES.

The rule is, in effect, an application of the rule already stated under the cases Nos. 4 & 5 of "Bill of Lading." These cases and the notes to them 4 R. C. pp. 677, 722, are here referred to.

In an action to recover damages for iron armour-plates lost on board the defendants' ship, it appeared that the defendants, by their servants, stowed the ship, and that during rough weather one of the plates broke loose and went through the side of the ship, which went down with the rest of the cargo. At the trial the judge directed the jury that a shipowner warrants the fitness of the ship when she sails, and not merely that he will honestly and *bonâ fide* endeavour to make her fit, and left to them the questions: Was the vessel at the time of sailing in a state, as regards the stowing and receiving of these plates, reasonably fit to encounter the ordinary perils that might be expected on a voyage at that season; secondly, if she was not in a fit state, was the loss that happened caused by that unfitness? Held by the Queen's Bench Division, BLACKBURN, J., QUAIN, J., and FIELD, J., that the direction was right. *Kopitoff* v. *Wilson* (1876), 1 Q. B. D. 377, 15 L. J. Q. B. 135, 34 L. T. 677.

No. 3. — Jackson v. Union Marine Ins. Co., L. R., 8 C. P. 572. — Rule.

AMERICAN NOTES.

The principal case is reported in 3 Moak's English Reports, 314, and 10 ibid. 223.

In *Purvis* v. *Tunno*, 1 Brevard (So. Carolina), 259; 2 Am. Dec. 664, it was held that where a vessel chartered for a voyage becomes disabled by an accident while loading the cargo, the freighter will not be bound by the contract unless she is repaired and rendered fit for the voyage within a reasonable time.

The rule of the principal case is implied in *The Giles Loring*, 48 Federal Reporter, 463; *The Caledonia*, 50 ibid. 567; *The Marlborough*, 47 ibid. 667; *The Calvin S. Edwards*, 1 U. S. Appeals, 173; 50 Federal Reporter, 447.

No. 3. — JACKSON *v.* UNION MARINE INS. CO.

(1873, EX. CH. 1874.)

RULE.

WHERE, by charter-party, a vessel is to proceed with all possible dispatch to port A. and there load a cargo of rails for a voyage to port B., — the rails being, in the knowledge of both parties, required for the making of a railway in the neighbourhood of the latter port, — and the ship is detained (whether by excepted perils or otherwise) and arrives at A. so late as to put an end in a commercial sense to the adventure contemplated by both parties, the charterer is discharged from any obligation under the contract.

Jackson v. Union Marine Insurance Company.

L. R., 8 C. P. 572–595, 10 C. P. 125–148 (s. c. 42 L. J. C. P. 284; 22 W. R. 79; 44 L. J. C. P. 27; 31 L. T. 789; 23 W. R. 169).

Marine Insurance. — Loss of Freight. — Delay through Perils of the Sea. — Frustration of Adventure. — Right of Charterer to Refuse to Load.

The plaintiff, a shipowner, in November, 1871, entered into a charter-party, by which the ship was to proceed with all possible dispatch (dangers and accidents of navigation excepted) from Liverpool to Newport, and there load a cargo of iron rails for San Francisco. The plaintiff effected an insurance on the chartered freight for the voyage. The ship sailed from Liverpool on the 2nd of January, 1872, and on the 3rd got aground in Carnarvon Bay. She was got off by the 18th of February and repaired, the time necessary for the completion of such repairs extending to the end of August. In the mean

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time, on the 15th of February, the charterers had thrown up the charter and chartered another ship to carry the rails (which were wanted for the construction of a railway) to San Francisco. In an action by the plaintiff on the policy of insurance on the chartered freight, the jury found that the time necessary for getting the ship off and repairing her was so long as to put an end, in a commercial sense, to the commercial speculation entered upon by the shipowner and the charterers: —

Held, by BRAMWELL, B., BLACKBURN, MELLOR, and LUSH, JJ., and AMPHLETT, B. (CLEASBY, B., dissenting), affirming the decision of the Court below (BRETT, J., and KEATING, J., against BOVILL, C. J.), that the charterers were, by reason of the delay, not bound to load the ship, and that there was therefore a loss of the chartered freight by perils of the sea.

These were actions upon two policies of insurance, the one on thirty-four sixty-fourths of the ship *Spirit of the Dawn*, valued at £8000, the other on chartered freight, valued at £2900, to be earned by that vessel on a voyage from Newport to San Francisco. In the action upon the policy on ship, the defendants paid £1200 into Court; in the action upon the policy on freight, they denied that there was any loss by a peril insured against.

Both causes were tried together before BRETT, J., at the Liverpool Summer Assizes, 1872. Evidence was given that the ship before reaching Newport got upon the rocks in Carnarvon Bay and was after considerable delay got off much damaged.

* Evidence was also given as to the amount of repair [* 573] which would be required to make the ship seaworthy, and of her value when repaired, and also of the probable time which would be consumed in repairing her. It was further proved that the vessel had been chartered by Messrs. Rathbone & Co. to carry rails which were wanted for the construction of a railway at San Francisco; and that, time being of importance to the charterers, they immediately on being made aware of the disaster to the ship hired another to take out the rails.

The learned Judge left it to the jury to say, — first, whether there was a constructive total loss of the ship, — secondly, whether the time necessary for getting the ship off the rocks and repairing her so as to be a cargo-carrying ship was so long as to make it unreasonable for the charterers to supply the agreed cargo at the end of such time, — thirdly, whether such time was so long as to put an end in a commercial sense to the commercial speculation entered upon by the shipowner and the charterers. The jury answered all these questions in the affirmative.

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The learned Judge, being of opinion that there was no evidence of a constructive total loss of the ship, and no evidence of a loss of freight by the perils insured against, directed a verdict to be entered for the defendants, subject to leave reserved to the plaintiff to move to enter a verdict for him on both or either of the policies.

A rule *nisi* was accordingly obtained in the following Michaelmas Term to enter a verdict for the plaintiff, on the grounds that the learned Judge was wrong in holding that there was no evidence of a total loss of freight, that the plaintiff was under the circumstances entitled to insist upon the fulfilment of the charter-party, that the reasonableness of the delay was not a question for the jury, and that the reasonable time allowed to the shipowner was the time required for getting the vessel off the rocks and repairing her; or for a new trial on the ground of misdirection in those respects, — the defendants to be at liberty, in showing cause against the rule, to argue that the findings of the jury upon the questions submitted to them were against the weight of evidence; and the Court to have power to refer any question to an average-stater, and to enter the verdict in accordance with his adjustment.

[* 574] * Cause was shown against this rule in Hilary Term, 1873, by C. Russell, Q. C., and Benjamin, Q. C., for the defendants; and Butt, Q. C., and Gully, for the plaintiff, were heard in support of the rule. The Court took time to consider.

The facts which were proved at the trial, and the arguments which were urged and the authorities cited upon the hearing are fully set out in the respective judgments. *Cur. adv. vult.*

July 15. There being a difference of opinion, the presiding Judge (Bovill, C. J.) first read the judgment of Brett, J. (who was absent on circuit, and in whose judgment Keating, J., also on circuit, concurred).

Two actions were brought on two policies of insurance effected by the plaintiff with the defendants, the first being on the ship *Spirit of the Dawn*, of which the plaintiff was owner, and the second on chartered freight to be earned by the same ship.

At the trial before me at the Summer Assizes held at Liverpool in 1872, on which occasion both actions were tried together, it was proved that the plaintiff, on the 22nd of November, 1871, entered into a charter-party with Messrs. Rathbone & Co., by which the

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ship *Spirit of the Dawn* was to proceed with all convenient speed from Liverpool to Newport, and there ship a cargo of iron rails (railway iron) for San Francisco, ordinary perils excepted, and the freight payable on right delivery of the cargo, &c.

On the 9th of December, 1871, the plaintiff, through his agents, effected with the defendants the freight policy sued on, being "on chartered freight valued at £2900, at and from Liverpool to Newport in tow, while there, and thence to San Francisco, &c." On the 12th of December, 1871, the policy on ship was effected for the same voyage on thirty-four 64ths of ship, valued at £8000.

*After some complaints from the charterers as to delay, [*575] the ship sailed in tow from Liverpool on the 2nd of January, 1872. On the 4th of January, 1872, the ship, which was an iron ship, before arriving at Newport took the rocks in Carnarvon Bay. By authority of the plaintiff and the defendants, Captain Chisholm, of the Salvage Association, proceeded to endeavour to extricate and save the ship. She was got into a place of comparative safety on the rocks on the 18th of February, 1872, and was got off the rocks and into Holyhead between the 21st and 24th of March, and was by consent of the plaintiff and the defendants taken back to Liverpool, still in charge of the Salvage Association, on the 12th of April, 1872. The salvage charges for rescuing the ship and bringing her to Liverpool were £4208. Upon survey, the estimated cost of repairs was £3650. Due notice of abandonment was given on both policies, but not accepted. The ship was thereupon sold to a Mr. Wilson, who proceeded to repair her. The ship was still under repair at the time of the trial, which was the 16th of August, 1872.

On the 16th of February, 1872, Messrs. Rathbone & Co. chartered, without the consent of the plaintiff, another ship, by which they forwarded the rails to San Francisco. The rails were wanted there for the construction of a railway.

Upon this evidence, and some other as to the value of the ship when repaired, I left it to the jury to say, — first, whether there was a constructive total loss of the ship, — secondly, whether the time necessary for getting the ship off and repairing her so as to be a cargo-carrying ship was so long as to make it unreasonable for the charterers to supply the agreed cargo at the end of such time, — thirdly, whether such time was so long as to put an end in

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a commercial sense to the commercial speculation entered upon by the shipowner and the charterers. The jury answered all these questions in the affirmative. I, upon the view that there was no evidence, according to the figures, of a constructive total loss of the ship, and no evidence of a loss of freight by the perils insured against, because the shipowner had a right to repair his ship, however long it might take, and insist after its repair on the delivery of the agreed imperishable cargo so as to enable him to earn the chartered freight, directed the verdict to be entered for
[* 576] * the defendants, reserving leave to the plaintiff to move to enter a verdict on either or both of the policies.

Mr. Butt moved accordingly and obtained a rule *nisi* in Michaelmas Term, 1872; it being agreed that, upon showing cause against such rule, the defendants should be at liberty to argue, as against the application to enter the verdict for the plaintiff, that the findings of the jury on all or any of the questions left to them were against the weight of evidence. This rule was argued before us in Hilary Term of the present year.

It was determined in the course of the argument that the verdict as to the total loss of the ship was unsatisfactory; and by the agreement of the counsel that part of the case is to be referred as an average loss.

In the action on the policy on freight, it was argued for the defendants that, unless there was a total loss of ship, either actual or constructive, there could be no loss of freight by perils of the sea; that the plaintiff, the shipowner, in the case of damage to the ship, however great, where such damage was not caused by any default of his own, had a legal right under such a charter-party as the present to repair his ship with reasonable diligence, and to tender her when repaired, however long a period of time such repairs might take, to the charterer, and to insist on the loading of the agreed cargo, if the cargo was of such a nature as to be able to be carried at the end of such period on the agreed voyage so as to earn freight. If the shipowner, it was argued, is in such circumstances prevented from earning freight by the refusal of the charterer to supply cargo, his loss must be recovered by action against the charterer; it is a loss caused by the illegal refusal of the charterer to supply cargo, and not by the perils insured against. It was further argued that none of the findings of the jury displaced this position, and that the findings of the jury were against the weight of the evidence.

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For the plaintiff it was urged, that the findings of the jury were justifiable, and that on either or both of them the shipowner ceased to have the power to enforce his rights under the charter-party to earn freight; that, assuming either or both of the findings to be true, although the ship was not a total loss, the charterer, who had not as yet received any benefit from the charter-party, * could not be obliged to supply any cargo; that [*577] the power of earning the chartered freight, which was the freight insured, was consequently lost to the plaintiff immediately on the happening of the damage to the ship, such damage being to the extent found by the jury, that such damage was caused by, and therefore the loss was the immediate result of, a peril insured against.

The first point raised by these arguments is, whether the findings are so far against the weight of the evidence as to call upon the Court to set them aside. If it had been within my province, I would at the trial have given answers to both questions different from the answers returned by the jury. But the amount of freight on which shipowners will undertake charters depends very much upon the time at which such charters are negotiated and the time then calculated for their fulfilment. Freights rise and fall according to the variations of the freight market, and so, on the other hand, the expediency or otherwise of the export of iron or iron rails depends upon the iron market and its fluctuations at different times. Taking these views into consideration, and paying considerable deference to the finding of a mercantile special jury with regard to them, I am not prepared to say that the findings are wrong. They must, therefore, be treated as correct and binding

The question then is whether, assuming the findings to be correct, there was a loss of freight by perils of the sea. That question divides itself into two, — first, did the injury to the ship, caused as it undoubtedly was by sea peril, make it impossible for the ship owner to earn the chartered freight? — secondly, if it did, does such impossibility so caused amount to a loss by perils of the sea within the meaning of a freight policy on chartered freight? The first question depends upon what were the rights under the circumstances of the plaintiff and the charterers under the charter-party, the second upon the rights of the plaintiff and the defendants under the policy.

As to the first, the question is whether, upon an injury happen-

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ing to a chartered ship in the voyage preliminary to that on which the chartered freight is to be earned, happening before the charterer has received any advantage from the contract, where the injury is caused by a peril excepted in the charter-party, where [* 578] * it is caused without default of the shipowner, where he has not been wanting in due diligence to arrive at the appointed place of loading, but where the injury is so great as to prevent the arrival of the ship or of her presentment to the charterer in a state fit to carry cargo within a reasonable time having regard to the business of the charterer, or within any time which could have been at the time of making the contract in the contemplation of either the charterer or shipowner as a time in any way applicable to the commercial speculation of either of them, — the question is, whether the contract is not at an end, in the sense that neither party to it can enforce any obligation under it against the other. In other terms, the question may be stated to be, whether in such a contract there is not an implied stipulation that the shipowner cannot, upon the happening of such extensive injury to the ship, though without default of his, compel the charterer to supply at so remote a date a cargo, and that the charterer, conversely, cannot compel the shipowner at so remote a date to tender his ship, — the reason being that the contract is not applicable, and could not in the mind of either party have been considered as applicable, at the time of making it, to the earning of profit either by the shipowner or the charterer by reason of the transport of goods at so remote a period under mercantile contingencies and on mercantile considerations which must be absolutely different from and unconnected with any consideration then before them. There being no stipulation that the ship should be at Newport at any fixed date, the stipulation being only that she should proceed there with all convenient speed, there is no condition precedent that she should be there at any given time. *Hadley* v. *Clarke*, 8 T. R. 259; 4 R. R. 641. The cases of *Clipsham* v. *Vertue*, 5 Q. B. 265; 13 L. J. Q. B. 2; *Hurst* v. *Usborne*, 18 C. B. 144; 25 L. J. C. P. 209; and *Jones* v. *Holm*, L. R., 2 Ex. 335; 36 L. J. Ex. 192, seem to me authorities for saying that there is no condition precedent, though there is a contract that the ship shall arrive or be fit to be tendered within a reasonable time in regard to the charterer's business. If the finding of the jury, therefore, on the second question proposed to them is immaterial, the question itself was immaterial. Even a delay

caused by the default of the shipowner will not of itself release the charterer from his obligation to *provide a [*579] cargo. *Havelock* v. *Geddes*, 10 East, 555; 12 East, 622; 10 R. R. 380; *Clipsham* v. *Vertue*. But, in *Havelock* v. *Geddes*, Lord ELLENBOROUGH deals with the rights of the parties where the ship is so unfit as to take from the charterer all the advantage he can be supposed to have originally contemplated from the contract, and where he has in fact had no advantage whatever from it. "Had the plaintiff's neglect," he says (10 East, at p. 564, 10 R. R. at p. 387), "here precluded the defendants from making any use of the vessel, it would have gone to the whole consideration, and might have been insisted upon as an entire bar." In *Freeman* v. *Taylor*, 8 Bing. 124; 1 L. J. (N. S.) C. P. 26, TINDAL, C. J., directed the jury, in an action for not loading, "that the freighter could not for an ordinary deviation put an end to the contract; but, if the deviation was so long and unreasonable that in the ordinary course of mercantile concerns it might be said to have put an end to the whole object the freighter had in view in chartering the ship, in that case the contract might be considered at an end." He left it to the jury to decide. The jury found for the defendant, the freighter; and the Court held that there was no misdirection. In *Tarrabochia* v. *Hickie*, 1 H. & N. 183; 26 L. J. Ex. 26, CRESSWELL, J., in an action against the freighter for not loading, asked the jury whether the vessel sailed and proceeded to Cardiff with convenient speed, or in a reasonable time; and, if not, whether the object of the voyage was thereby frustrated. The jury found that the vessel did not with all convenient speed, or in a reasonable time, sail and proceed to Cardiff, but that the object of the voyage was not thereby frustrated. A verdict was entered for the defendant; leave being reserved to the plaintiff to move to enter a verdict for him. The rule was refused. That case is a direct authority against the second question and answer in this case; but it seems to assume the propriety and materiality of the third question and answer.

In *Blasco* v. *Fletcher*, 14 C. B. (N. S.) 147; 32 L. J. C. P. 284, it was elaborately argued that the shipowner, in case of damage to the ship by an excepted peril in the charter-party, is entitled to any period of time, however long, to repair his ship, and is entitled to insist on carrying the agreed *cargo [*580] and on earning freight at the end of such time. The decision is put on other grounds; but it is evident that the Court

did not accept the validity of the argument urged on behalf of the shipowner. In *MacAndrew* v. *Chapple*, L. R., 1 C. P. 643, 648; 35 L. J. C. P. 281, WILLES, J., states the present position of decision to be thus: "It seems to be now settled that delay by deviation is the same as a delay in starting; and it is also settled, at any rate in this Court, that a delay or deviation which, as has been said, goes to the whole root of the matter, deprives the charterer of the whole benefit of the contract, or entirely frustrates the object of the charterer in chartering the ship, is an answer to an action for not loading a cargo; but that loss, delay, or deviation short of that gives an action for damages, but does not defeat the charter." In *Geipel* v. *Smith*, L. R., 7 Q. B. 404; 41 L. J. Q. B. 153, BLACKBURN, J., speaking of the contract of charter-party, and of the parties to it, says (L. R., 7 Q. B. at p. 413): "The object of each of them was the carrying out of a commercial speculation within a reasonable time; and, if restraint of princes intervened and lasted so long as to make this impossible, each had a right to say 'our contract cannot be carried out,' and therefore the shipowner had a right to sail away, and the charterer to sell his cargo or refrain from procuring one, and treat the contract as at an end."

In the opinions given by the Judges in the House of Lords in *Rankin* v. *Potter*, L. R., 6 H. L. 83; 42 L. J. C. P. 169; 1 R. C. 71, BLACKBURN, J., says (L. R., 6 H. L. at p. 117; 42 L. J. C. P. at p. 185): "I should have added a further term, that the repairs could be done so promptly that she might arrive at Calcutta within a reasonable time as between the shipowner and De Mattos, were it not for the case of *Hurst* v. *Usborne*, 18 C. B. 144; 25 L. J. C. P. 209, which seems to me an authority against this position. And, though I should not hesitate to advise your Lordships to reconsider that case, if necessary, I think it is not necessary to do so in the present case." And BRAMWELL, B., says (L. R., 6 H. L. at p. 136; 42 L. J. C. P. at p. 195): "I may observe in passing that I could not, acting as a juryman, find as a fact that they could have repaired the ship in time for it to be ready for the adventure for which De Mattos agreed to find the cargo; and indeed, as the case [*581] stands, I should *think he might have refused, on the ground that the ship was a year overdue." And, again (L. R., 6 H. L. p. at 137; 42 L. J. C. P. at p. 196): "No doubt, had the owner repaired the ship, the loss of freight would not have been total, supposing the repairs in time for the voyage for which

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De Mattos undertook to find a cargo, which, if it were in controversy, I could not find in the plaintiff's favour." And BRETT, J., said (L. R., 6 H. L. at p. 104; 42 L. J. C. P. at p. 177): "Without therefore relying upon the other impediment and prevention obviously in the way of the plaintiff's earning the charter-party freight, viz., the certainty from the extent of damage that the ship could not be repaired so as to be seaworthy within any time during which the charterer would be bound to wait, it seems to me that the other facts which I have mentioned show conclusively that there was a loss of freight by reason of damage to the ship caused by sea peril, happening during the voyage insured."

These authorities seem to support the proposition, which appears on principle to be very reasonable, that, where a contract is made with reference to certain anticipated circumstances, and where, without any default of either party, it becomes wholly inapplicable to or impossible of application to any such circumstances, it ceases to have any application; it cannot be applied to other circumstances which could not have been in the contemplation of the parties when the contract was made. Such a state of things arises where the third question left to the jury in this case can be properly answered as the jury have answered it in this case.

In such a state of things arising under a charter-party such as the charter-party under discussion, where no benefit of any kind has accrued to the charterer, the shipowner has lost his power of earning any part of the chartered freight. The immediate cause of such a loss is, the extent of injury caused to the ship by a peril insured against under the policy during the voyage thereby insured. Such a loss is therefore a loss caused by a peril insured against, within the policy on freight.

For these reasons, I think that, in the action on the policy on freight, the rule must be made absolute to enter the verdict for the plaintiff for a total loss.

BOVILL, C. J. The first question in these cases was, whether *there was a total loss of the ship within the [*582] meaning of the policy. The jury found that there was such a constructive total loss; but my Brother BRETT was dissatisfied with the verdict upon that point, and during the argument it was agreed that the Court should dispose of it, and that, if in our opinion the total loss could not be maintained, the amount of the average loss upon the ship should be referred to an average-stater.

The evidence upon this point was no doubt contradictory; but it strongly preponderated in favour of the defendants (quite independently of any liability of the freight to contribute to the expenses of salvage); and, although the ship was upon the rocks, yet, from her position there, and the probability of her being got off, and looking to the evidence of the damage which she had sustained and of the probable expense of repairing her, I am of opinion that the circumstances were not sufficient to establish a total loss of the ship, or to justify her abandonment. An intimation to this effect was given by the Court in the course of the argument; and I concur with my learned brothers in their judgment that the plaintiff cannot maintain his claim for a total loss of the ship. The amount of the partial loss will be ascertained by an average-stater, as arranged.

With respect to the insurance on the freight, I have the misfortune to differ from my learned brothers, and think that the plaintiff is not entitled to recover. As there was no total loss, either actual or constructive, of the ship, the only loss of freight was that which arose from the refusal of the charterers to load the vessel, and from the plaintiff's not having insisted upon their performance of the contract. The plaintiff contends that, under the circumstances, and by reason of the perils insured against, the charterers were absolved from their engagement to load the vessel, and that he was therefore justified in adopting the charterers' refusal to load, and may maintain this action for a loss of the freight against the underwriters on freight.

The question then is, whether the charterers were justified in throwing up the charter. By the charter-party the vessel was to proceed with all convenient speed (dangers and accidents of navigation excepted) from Liverpool to Newport, and there load a cargo of iron rails for San Francisco. On the 2nd of January, 1872, the vessel, having been properly equipped, proceeded on her
[* 583] voyage * from Liverpool to Newport, and on the following day took the rocks in Carnarvon Bay. Whilst she remained there, viz., on the 15th of February, the charterers threw up the charter, and the next day hired another ship by which they forwarded the iron rails to San Francisco. The plaintiff on the same 15th of February, gave notice of abandonment of ship and freight to the underwriters, but which was not accepted. If there had been a total loss of the ship, both the charterers and the plaintiff would have been justified in the course which they took, and the

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underwriters would have been responsible for the loss of the freight; but, upon the facts as they appeared at the trial, we have already decided that there was no such total loss of the ship.

It was probably a very convenient course as well for the charterers as for the shipowner, in the then position of the vessel, and looking to the delay which would necessarily be occasioned by repairing her, to abandon the charter; and the plaintiff may have been more willing to acquiesce in its abandonment, from the hope of being able to claim the freight from the underwriters; but, if the charterers were not entitled to abandon their contract, the plaintiff clearly cannot recover for a loss of freight against the underwriters.

In considering whether the charterers were absolved from their contract, the position of the shipowner must also be borne in mind. When the accident occurred, we must assume that in the ordinary course of business the shipowner would have incurred expense in equipping his vessel and providing her with some portion at least of her stores and supplies, and had made engagements with the crew, and for having the vessel towed to Newport, as well as other arrangements for the voyage; he would also in the ordinary course have probably insured her; and the voyage had actually been commenced. A shipowner also constantly makes engagements for the further employment of his vessel, dependent upon the completion of a previous voyage: it is important to all parties to know what their rights and obligations are with reference to the prosecution of the voyage on the one hand, and the loading of the vessel on the other; and it would, as it seems to me, lead to the greatest inconvenience to shipowners with reference to the engagements connected with their vessels if under such circumstances, after they * had [* 584] incurred expense and partially performed their part of the contract, and made no default, a charterer was at liberty to throw up the contract.

The vessel having met with misfortune in the course of navigation, and being upon the rocks, it was the duty of the plaintiff, both as regards the charterer and the underwriters, to use all reasonable and practicable means to get her off and repair her within a reasonable time, and then to prosecute the voyage and fulfil her engagements without any unreasonable delay. The reasonable time, however, would be that which was required for

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the purpose of putting the vessel in a fit state to continue her voyage; and, if the shipowner had made default in that duty, his rights and liabilities might be very different from those which arise where there is no default on his part.

There was no engagement in this charter-party that the vessel should arrive at Newport by any particular day or within any specified time; and, if it was of importance to the charterers that the ship should be there to receive the rails by any particular time, they might have introduced a stipulation into the charter to that effect. As they did not do so, the risk and consequences of any justifiable delay must, I think, rest with and fall upon them. If a charter-party were altogether silent as to the time of proceeding to the port of loading, the law would imply that it was to be done within a reasonable time; but, in this case, as in most charter-parties, the obligation of the shipowner was not left to be implied, but was made the subject of express stipulation; and all that the shipowner agreed to do was, to proceed to Newport with all convenient speed, with an express stipulation, in the usual form, whereby the dangers and accidents of the seas were excepted. This stipulation would, in my opinion, equally apply to any implied engagement to proceed within a reasonable time as to the express agreement to proceed with all convenient speed, and must govern the rights of both parties. Where such an exception is contained in a charter-party, it seems to me that, upon a misfortune occurring to a vessel, not amounting to an actual or constructive total loss, and for which neither party is responsible, it is not competent either for the charterer or the shipowner, of his own will, and without the concurrence of the other party, to put an end to [* 585] * the contract, and on this simple ground, that by the terms of the contract the parties have expressly agreed that such an occurrence shall not affect its continuance. If this were not so, whenever a vessel was stranded or got upon rocks, or even when she met with serious damage requiring heavy repairs and a long time to complete them, it would be in the power of a charterer who found the delay inconvenient or injurious, and likely to frustrate his object in making the charter, to abandon the charter-party; which would be contrary to every principle of law as applicable to contracts generally or to charter-parties which contain the usual exceptions of the dangers and accidents of navigation.

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In cases where the delay, inconvenience, or expense of repairing the vessel would materially affect and be injurious to both parties, they would generally agree to cancel the contract. But, where it is the interest of one party only to put an end to it, he must make out his right to do so before he can be justified in refusing to perform it. In order to excuse himself, he must bring his case within some exception in the contract, or there must be a breach by the other party of some condition or warranty, or of some stipulation in it which goes to defeat the whole consideration; otherwise, and however great the inconvenience may be to both or either of the parties from some unforeseen occurrence which is not provided for, the engagements of the contract must still be performed.

Upon a charter-party where the charterer does not stipulate for the arrival of the vessel by any particular date, the risk of her non-arrival, by reason of weather and the accidents of navigation, always rests with the charterer; and, where the stipulation is simply that the ship will proceed to the loading port with all convenient speed, the dangers of the sea excepted, the shipowner performs his part of the contract, and there is no breach of it by him, if without his default the arrival of the vessel is delayed only by the accidents and dangers of the seas, even although that delay may prevent the loading of the vessel at the usual time, or so as to be profitable to the charterer.

The law has no power to make a contract different from that which a person has entered into; and, where a shipowner does not agree that his vessel shall arrive at the loading port by any * particular day, but only that she shall proceed [* 586] there with all convenient speed, or, what the law would imply, that she shall proceed and arrive within a reasonable time, and expressly stipulates that this shall be subject to the dangers and accidents of the seas and navigation, I do not see how that exception is to be got rid of, or how a contract with such an exception can properly be construed as, or converted into, an absolute engagement on his part that his vessel shall proceed or arrive within a reasonable time, as if there were no such exception. If the contract could be so treated, it must be equally open to the shipowner to put an end to it, and this in some cases might be productive of the greatest inconvenience to the charterer.

I quite admit the great inconvenience and possible loss to both

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shipowner and charterer when any serious delay is caused by the necessity for heavy repairs arising from sea perils; but the answer to such an argument, as it seems to me, is, that, if either party desires to protect himself from such risk or inconvenience, he should introduce stipulations into the contract with that object; and if, instead of doing so, both parties agree that the vessel is to proceed and load subject to the accidents of navigation, which they expressly except, I think it is not competent for either of them afterwards to claim to be absolved from his contract by reason of an accident of navigation which he has expressly agreed shall be excepted.

If a man chooses to enter into a contract to do a particular act, he is bound to answer for it, although the performance of the act may be prevented by the occurrence of unforeseen circumstances which it was beyond his power to control, and which have arisen from no act or default of his own, because he might and ought to have provided for the contingency by his contract. See *Paradine* v. *Jane*, Aleyn, 26. Where such a contingency is provided for, effect must be given to such provision as affecting the rights and obligations of both parties; and there is no principle of law that I am aware of which would excuse either party from performance of a contract, because such performance would be highly inconvenient or injurious to himself, or lead to extraordinary expense.

[* 587] Where a lessee had engaged to pay a proportion of the value of coal to be raised, unless prevented * by unavoidable accident from working the pit, and the pit became flooded with water from an unavoidable accident, which prevented the coal being raised except at a cost exceeding its value when raised, it was held that, as all coal-pits are liable to such accidents, and inasmuch as the water might have been removed, though at a ruinous cost, and after some months' interruption of the working, the lessee was not excused from working the pit or paying the stipulated proportion of the coal which could have been so raised. *Morris* v. *Smith*, 3 Doug. 279.

In all maritime contracts, the performance of them must necessarily be affected by the winds and waves, and also by the regulations of foreign ports, which may be wholly or partially inaccessible in consequence of sanitary or police regulations, or restrictions in time of war, and they must equally be dependent in some parts of the world upon frost and ice and all the accidents

of the weather, as well as upon fire and all contingencies which are considered as the act of God; but, in the absence of express stipulation, the risks arising from such causes would not generally excuse the performance of the engagements of the contract on either side: see generally *Barker* v. *Hodgson*, 3 M. & S. 279; 15 R. R. 485; *Kearon* v. *Pearson*, 7 H. & N. 386; 31 L. J. Ex. 1, and *Jones* v. *Holm*, L. R., 2 Ex. 335; 36 L. J. Ex. 192. It is on this account that, in charter-parties, bills of lading, and other contracts of a similar description, the dangers of the seas and many other contingencies are usually provided against and excepted; and, in such cases, unless some precise time be stipulated for the arrival of a vessel, I apprehend there is no engagement by a shipowner that the ship shall arrive within a reasonable time, but only that she shall arrive within a reasonable time unless prevented by the excepted perils. Where such matters have not been provided for by the contract, they have constantly led to the greatest possible inconvenience and serious loss to one or both of the parties, and the occurrence of them has practically frustrated the purposes and objects of one or other and sometimes of both the contracting parties; and yet it has, I believe, always been held that their occurrence, unless provided for, will not absolve either party; whilst, if they are provided for and excepted in the contract, the * engagements of the parties [* 588] must be construed accordingly, and the obligations of each party will be qualified by the exception.

In the case of *Hadley* v. *Clarke*, 8 T. R. 259; 4 R. R. 641, goods had been put on board the defendant's vessel under a contract to carry them for the plaintiff from Liverpool to Leghorn, the dangers of the seas only excepted. Leghorn was then in the possession of the French Republic; and, when the vessel reached Falmouth, an embargo was laid upon her under an order in council, and she remained there under the embargo for more than two years, viz., from July, 1796, until August, 1798. The question was, whether the defendants were bound to carry on the plaintiff's goods. It was contended amongst other things for the defendants, that it was sufficient if they had waited a reasonable time after the embargo was first laid, and that, there being no probability that it would be taken off within a reasonable time, and it in fact lasted for two years, that the contract was at an end. The Court, however, considered that the defendants were

not absolved from the contract. Upon this point, LAWRENCE, J., said (8 T. R. 267; 4 R. R. 648): "The counsel for the defendants were driven to the necessity of introducing into this contract other terms than those which it contains. They contended that the defendants were only bound to fulfil their engagement within a reasonable time, and then argued that, as the embargo prevented the completion of the contract within a reasonable time, the defendants were absolved from the engagement altogether. But it was incumbent on the defendants when they entered into this contract to specify the terms and conditions on which they would engage to carry the plaintiff's goods to Leghorn. They accordingly did express the terms, and absolutely engaged to carry the goods, 'the dangers of the seas only excepted.' That, therefore, is the only excuse which they can make for not performing the contract. If they had intended that they should be excused for any other cause, they should have introduced such an exception into their contract. In Aleyn, p. 27, this distinction is taken, — 'Where the law creates a duty or charge, and the party is disabled to perform it without any default in him, and hath no remedy over, there the law will excuse him; but, when the party by his own contract creates a duty or charge upon himself, he is bound to make it good if he may, notwithstanding [* 589] * any accident by inevitable necessity, because he might have provided against it by his contract.' So, in this case, there was one accident against which the defendants provided by their contract. They might also have provided against an embargo: but we cannot vary the terms of this contract, and the defendants must be bound by the terms of the contract that they have made."

In the case of *Touteng* v. *Hubbard*, 3 Bos. & P. 291; 6 R. R. 791, a Swedish vessel belonging to the plaintiffs, and then in London, was chartered to proceed to St. Michael's and there load a cargo of fruit for London, restraints of princes and rulers excepted. The vessel proceeded on her voyage from London for St. Michael's, and put into Ramsgate Harbour, where she was detained under an embargo by the British government upon Swedish vessels for six months, viz., from the 15th of January until the 19th of June. She was then released; but the season for shipping fruit from St. Michael's was at that time over, and the charterer refused to load a cargo, on the ground that the

season for shipping fruit had long since passed, and that the voyage would therefore be wholly useless and nugatory. The case was twice argued; and the ultimate decision proceeded upon the ground that the plaintiff, as a Swedish subject, could not recover from the defendant, a British subject, damages sustained in consequence of an embargo by the British government upon Swedish vessels. But, upon the general question, in the judgment of the Court delivered by Lord ALVANLEY, there are the following passages, 3 Bos. & P. at p. 298; 6 R. R. 799: "The only question, therefore, will be, whether the defendant was bound by the terms of the charter-party to furnish a cargo to the plaintiff, notwithstanding the intervention of the embargo? I will first consider for what purpose and for whose benefit the words 'restraint of princes and rulers during the said voyage always excepted' were inserted in the charter-party. It appears to me that they were introduced for the benefit of the master, not of the merchant, and that the true construction of the charter-party is this, — the captain engages to go to St. Michael's, restraint of princes excepted, and the merchant engages to employ him and furnish the ship with a cargo. Lord KENYON, in the case of *Blight* v. *Page*, 3 Bos. & P. 295 n.; 6 R. R. 795 n., put this construction on an instrument *nearly similar [*590] with the present. If, then, this had not been the case of a Swedish ship hired by an English merchant, the merchant would have been under the necessity of furnishing the ship with a cargo if she had arrived at St. Michael's as soon as she conveniently might after the embargo was taken off, although, by arriving after the fruit season was over the object of the voyage might be defeated: such is the doctrine in *Hadley* v. *Clarke* and *Blight* v. *Page*. I have no difficulty in subscribing to the doctrine laid down in *Hadley* v. *Clarke*, that a common embargo does not put an end to any contract between the parties, but is to be considered as a temporary suspension of the contract only, and that the parties must submit to whatever inconvenience may arise therefrom, unless they have provided against it by the terms of their contract. The object of the voyage might equally have been defeated by the act of God as by the act of the State, as, if the ship had been weather-bound until the fruit season was over; and yet in that case the merchant would have been bound to fulfil his contract. The principle of *Hadley* v. *Clarke* is, that

an embargo is a circumstance against which it is equally competent to the parties to provide as against the dangers of the seas, and, therefore, if they do not provide against it, they must abide by the consequences of their contract."

In *Hurst* v. *Usborne*, 18 C. B. 144; 25 L. J. C. P. 209, a vessel which was under charter by the defendants was delayed by perils of the seas one hundred and fifty-two days beyond the usual time of the voyage to the port of loading, and the defendants in consequence refused to load her, partly on the ground that she had arrived after the time when the export trade usually took place from the port of loading, viz., Limerick. All the Judges were of opinion that the state of the trade at Limerick did not affect the question; and WILLES, J., upon this point laid down the law as follows, 18 C. B. at p. 155: "As to the other question, whether the construction of the charter-party can be affected by the fact that the particular description of cargo could only be supplied at a certain season of the year, the answer to that, I apprehend, is, that the charter-party was probably entered into in the hope that the vessel would arrive at Limerick at [* 591] that time of the year. But the * question is, who takes the risk whether she will or not? Why, the person who is to ship the goods takes the risk, unless he stipulates that the other party shall take it. Here it is not stipulated that the vessel shall arrive at Limerick by any particular day, but only that she shall proceed there with all convenient speed. The owner has performed his contract to proceed to Limerick with all convenient speed, when he has done all he could, but has been prevented by dangers of the seas."

In the American case of *Allen* v. *Mercantile Marine Insurance Co.*, 5 Hand's Ap. Cas. (now cited, by authority, as 44 New York Rep.) 437, a vessel had been stranded and sprung a leak which took three weeks to repair, during which time she was frozen in by ice, and there was no possibility that the navigation would be free or the vessel be able to continue her voyage for five months. There was the usual exception in the bill of lading of dangers of navigation. The cargo had been delivered up to the shipper free of freight, and the action being brought against the underwriters for loss of freight, it was held that both the stranding and the closing of the navigation were dangers of the navigation within the exception of the bill of lading, and

excused the delay which would necessarily ensue in making delivery of the cargo at the port of destination, and did not afford a sufficient excuse for the voluntary surrender of the cargo to the shipper free of freight, and that the underwriters on freight therefore were not liable. The Court there expressed their opinion that the repairs must be done within a reasonable time; and that no doubt would be so; but, unless the owner failed to complete them within a reasonable time, there would be no breach of contract by him. In that case it was also held that, so long as the vessel is capable of completing the voyage and thus earning the freight, neither the question of profit and loss to the owner nor of the length of time required to deliver the cargo, can so excuse the surrender without payment of freight as to render the insurers liable as for a loss; and that neither an injury to the vessel not sufficient to create a total loss, but repairable within a reasonable time, nor the act of God in closing navigation by ice, would authorize the abandonment of the voyage; but that either would authorize a detention of the goods until the voyage could be completed.

* The case of *Blasco* v. *Fletcher*, 14 C. B. (N. S.) 147; [* 592] 32 L. J. C. P. 284, was relied upon by the plaintiff. It was an action for the freight of goods which during the voyage and in consequence of serious damage to the ship had been taken possession of by the charterer and sold by him: but the decision really turned upon the point, whether the charterer had authority from the shipowner to act as he had done, and which depended upon whether he had adopted a reasonable course under his special authority; and, he having so acted and adopted a reasonable course for the interests of all parties, it was held that no claim for freight could be maintained. I fail to see the application of that decision to the present case.

The case of *Geipel* v. *Smith*, which was also relied upon by the plaintiff, turned entirely upon the exception in the charter-party of the "restraint of princes;" and it was held that, by reason of that exception, a blockade which prevented the defendant (the shipowner) from proceeding to the port of discharge, absolved him from doing so, or even from loading; and, *à fortiori*, where by reason of the blockade the charter-party could not (as was alleged in one of the pleas demurred to) have been carried out within a reasonable time. The defendants, the shipowners, in

that case, were held to be wholly excused by the terms of the charter-party from proceeding to deliver the cargo if loaded, and therefore it was considered to be useless for them to load, and that they were absolved from doing so. The expressions to be found in the judgments in that case as to reasonable time must, I think, be considered to have reference to the particular allegations in one of the pleas to that effect.

There are, no doubt, cases where delay which frustrated the object of a contract has been held to absolve a party from the further performance of it; but that is only where there has been some default or breach of contract by the other party as to a stipulation which was not in the nature of a condition precedent, and would not, but for such frustration of the adventure, have gone to the whole consideration or have afforded an excuse in law for the breach of contract complained of. The cases of *Havelock* v. *Geddes*, *Freeman* v. *Taylor*, and *Tarrabochia* [* 593] v. *Hickie*, were all cases where * there had been a breach or default by one of the parties; and the question arose as to the effect of such breach if it frustrated the whole object of the contract; but I am not aware of any case in which the mere frustration of the voyage by an unforeseen circumstance, where there has been no breach or default, has been held to absolve either party from his engagement.

The observations of several of the learned Judges in *Rankin* v. *Potter*, in the House of Lords, are certainly deserving of great consideration with reference to the obligation of a charterer to load a cargo where, upon a ship becoming disabled, the necessary repairs are likely to cause considerable delay and inconvenience to him. But, on the other hand, the consequences to the shipowner if a charterer were at liberty to throw up the contract under such circumstances might, and in many instances would be, very serious with reference not only to the engagements into which the shipowner had entered with the crew and other persons connected with the voyage, but also with reference to further charters and engagements of the vessel which might be dependent on the first charter.

It seems to me almost impossible to determine the rights or obligations of the parties upon any principle or doctrine of convenience, which must vary in almost every case, and might affect the respective parties to the contract so very differently; and

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the only safe rule, as it seems to me, is, to abide by the general principles of law and the cases that have been decided. Those decisions have, as far as I am aware, been uniform, that a charterer is not discharged where the delay arises from an excepted cause, and where there has been no breach of contract or default by the shipowner. I am not aware of any decision to the contrary, although expressions may be found in some of the cases to that effect; nor have I been able to discover any authority for saying that a shipowner who makes a contract to proceed with convenient speed (sea perils excepted) comes under any obligation that his ship shall arrive within a reasonable time with reference to the business of the charterer; and I cannot find any clear ground of mutual convenience in such cases which should induce the Courts to lay down such a rule. It also appears to me that, if any such doctrine were * allowed to prevail, it would give rise to great confusion, [* 594] and no one would know, when once a ship was disabled, what the effect would be on her engagements, or what course ought to be taken either by the owner or the charterer. Where parties desire to protect themselves against contingencies, they can always do so by express provisions; and, if they omit to adopt this precaution, and especially when such contingencies are provided for by being excepted from the contract, they have no good ground for complaint if they suffer inconvenience or loss by being held to the terms of their contract.

Where, from the nature of the contract, circumstances occur which make its provisions altogether inapplicable, it may be admitted that the contract has no longer any effect: but that doctrine, as it seems to me, does not apply to a case like the present, where the vessel might and ought to have been repaired, and where the cargo of iron could have been loaded and carried to its destination, and where the contract might thus have been fully performed on both sides, and where the contingency which has occurred of damage to the vessel by sea perils was specially contemplated and provided for in the contract itself.

In answer to questions put by the learned Judge, the jury found that the time necessary for getting the ship off and repairing her was so long as to make it unreasonable for the charterers to supply the agreed cargo at the end of such time, and so long as to put an end in a commercial sense to the commercial speculation entered upon by the shipowner and the charterers.

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If the general views which I have stated with respect to the law applicable to this case be correct, then I apprehend these findings by the jury are wholly immaterial, and that the defendants, notwithstanding what the jury have so found, would be entitled to our judgment; but, as such findings of the jury seem to have proceeded mainly upon the intention and object of the charterers in agreeing to load the vessel, it appears to me that they cannot consistently with the view of the law which I have ventured to express be supported in point of fact.

The underwriters do not insure against mere delay or its consequences, nor against wrongful breaches of contract or the voluntary surrender of a charter-party; and, assuming that the [* 595] charterers * were not justified in their refusal to load the vessel under the charter-party, then it is clear there is no loss of freight by any of the perils insured against. The vessel was not wholly lost, but might and ought to have been repaired; and she would then have been capable of completing the voyage and earning the freight.

The probable delay in this case was provided for and excepted by the express terms of the charter-party; and there was consequently no breach of any condition or warranty, — no default or breach of the charter-party by the plaintiff; and not even a breach of any stipulation in the contract for which an action for damages could have been maintained against him; and therefore in my opinion nothing to justify the charterers on that ground, or under the provisions of the charter, in refusing to carry it out.

If the charterers were not entitled — as I think they were not — to throw up the charter, then the remedy of the plaintiff for the freight is against them (unless he has precluded himself from that remedy by assenting to the abandonment of the charter), and not against the underwriters; and I think, under the circumstances, that, upon this point, the view which my Brother Brett originally took at the trial was correct, and that our judgment ought to be for the defendants. My two learned Brothers, however, being of a different opinion, the judgment of the Court will be entered for the plaintiff.

The rule will therefore be absolute to enter the verdict for the plaintiff in the first action, for a partial loss on the ship, the amount of which loss is to be ascertained by an average-stater, as arranged between the parties; and also to enter the verdict in

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the second action for the plaintiff as for a total loss of the freight. *Rule absolute accordingly.*

The defendants having appealed to the Exchequer Chamber, the question was argued by Benjamin, Q. C. (with him Russell, Q. C., and Aspland) for the defendants (appellants), and by Butt, Q. C. (with him Gully) for the plaintiff.

The court took time for consideration; and, there being a difference of opinion the following judgments were delivered.

Cleasby, B. The question in this case [L. R., 10 C. P. 126] was whether there was a total loss by perils of the sea of the freight to be earned under a charter-party.

By the charter-party the vessel, *Spirit of the Dawn*, was to proceed from Liverpool to Newport, and there take on board and carry to San Francisco a cargo of iron rails.

The vessel sailed from Liverpool on the 2nd of January, 1872, got aground on the 3rd, upon the rocks in Carnarvon Bay, was got off and taken to a place of safety on the 18th of February, then taken to Holyhead, and afterwards to Liverpool, where she was sold by auction, on the 13th of June, for £5300. The purchasers repaired her; and it was proved that on the 15th of August, it would take about a fortnight more to complete the repairs. But in the meantime, after the vessel got on the rocks, and as soon as it was plain that some time would be required for her repairs, attempts had been made by the charterers to come to some arrangement with the plaintiff for taking up another ship to forward the rails, which were wanted for the construction of a railway. The plaintiff refused to release the charterers from their contract; and on the 16th of February the charterers chartered another ship, by which they forwarded the rails.

Under the circumstances, the plaintiff, who had effected an insurance for £1500 on chartered freight valued at £2900, upon the voyage from Liverpool to Newport and thence to San Francisco, claimed for a total loss on the ground that he was prevented, by sea perils, from earning the freight.

The case was tried at Liverpool before Brett, J., and he may be considered, for the purpose of the present case, to have left two questions to the jury, viz., first, whether the time necessary for getting the ship off and repairing her, so as to be a cargo-

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carrying ship, was so long as to make it unreasonable for the charterers to supply the agreed cargo at the end of the time, — and secondly, whether such time was so long as to put an end, in a commercial sense, to the commercial speculation entered upon by the shipowner and the charterers.

The jury found both questions in the affirmative; and the learned Judge being of opinion, notwithstanding the findings of the jury, that there was no evidence of a loss of freight [* 127] by the * perils insured against, directed a verdict for the defendants, reserving leave to move to enter a verdict for the plaintiff.

A motion was made, and afterwards a rule made absolute to enter a verdict for the plaintiff as for a total loss of freight.

The question upon the case on appeal is stated to be, whether the plaintiff is entitled to have the verdict entered for him; and, if the court is of opinion that he is so entitled, then judgment is to be entered for £1500 or such sum as the court, or an average-adjuster appointed by them, shall direct.

The principal question argued before us was, whether the necessary delay caused by the getting the vessel off the rocks and repairing her, and which had the effect found by the jury, disentitled the plaintiff to insist upon the performance of the charter-party, by reason of its being an implied term and condition of the charter-party that the vessel should arrive at Newport within a reasonable time.

Another question was also raised by the learned counsel for the defendants, viz., that, supposing there was such an implied term, and the plaintiff was disabled by the delay from insisting upon the performance of the charter-party, still the loss of freight was not the immediate consequence of the sea-damage, but of the right exercised by the charterers of throwing up the charter-party, which they might or might not have done, and in doing which they were influenced by the exigency of the particular case and the necessity of getting the rails to San Francisco as soon as possible. And it was forcibly argued that, if this necessity had not existed, and freights had risen, the charterers would have claimed the performance of the charter; and that the underwriters were only responsible for the necessary consequences of sea-damage, and not for a loss arising from the manner in which any option or right is exercised.

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This view was rejected by the court upon the argument, and, as I think, upon the ground that, at the time of the alleged loss, the plaintiff's interest was the right under the charter-party to have the rails loaded, and so to earn the freight; and that, as soon as that right was destroyed by sea-damage, there was a total loss of his interest by the perils insured against. If the question had been a new one, I should have thought it followed from the * interest lost being the right under the charter- [* 128] party to have the executory contract of the freighters performed, that the total loss would be measured by the value of that right, and that the proper course would be, not to enter the verdict for £1500, but to resort to the second alternative above referred to, and have the verdict entered for such sum as an average-stater shall direct. But the authorities are decisive that, where there is a charter-party under which the shipowner will be entitled to certain freight, as soon as the voyage under the charter-party has commenced the right to the whole freight attaches; and, as I cannot presume to overrule those authorities, so far as the question now under consideration is concerned, the verdict is properly entered.

But this was not the principal question raised in the case argued before us. The principal question was one of great interest, because the decision upon it not only decides the case before us but regulates the conduct of all who enter into charter-parties, — a very numerous class of persons of many nations, and who ought to have some known rule to act upon. The question is whether, under the circumstances of the present case, the plaintiff was entitled to repair the vessel (using all proper despatch in doing so), and to call upon the charterers to fulfil their charter. I agree with the opinion expressed by my Brother Brett at the trial, and adopted by Lord Chief Justice Bovill in the court below, that the findings of the jury are immaterial, and that, upon such facts as the present, which are free from question, it was not for the jury to put a construction upon those facts, but for the law to determine the rights of the parties upon them. Indeed, I think the law has already done so by settled principles and decided cases.

The settled principle is, that, where in an agreement a provision is made applicable to a particular subject, that provision forms the agreement on that subject. The rule is, *Expressum facit*

cessare tacitum. There is no further qualification or limitation to be implied. This is essential to all certainty in the obligations which persons place themselves under; or the agreement would be the uncertain conclusion of a particular jury as to what was reasonable or convenient. In such a case as that under consideration, the charter relates to a voyage necessarily
[*129] *exposed to disasters causing delay, and the whole enterprise is made subject to the consequences of these disasters; the voyage from Liverpool to Newport and from Newport to San Francisco equally so. It must not be read as an agreement the object of which is proceeding from Liverpool to Newport: the object of the agreement is, carrying a cargo of rails from Newport to San Francisco. There is no limit to the time to be occupied in doing so, unless the delay be caused by some breach of duty. If the rails had been taken on board at Newport, and the vessel had gone upon a rock the day after leaving Newport, no matter how great the delay, the shipowner would have been entitled to repair, to earn the freight under the charter by completing the voyage. No one disputes this: and the same thing may happen over and over again in the several parts of so long a voyage as from Newport to San Francisco, which in the result may not be completed within a year, or even possibly two years. Still, the charter would continue in force. If the goods were intended for a particular market or a particular purpose, it would not be a question whether an unreasonable time had been occupied, or whether the commercial speculation of the charter-party was at an end; so far as the charterers were concerned, their commercial speculation must have been ruined by the delay; and so far as the shipowner was concerned also (except so far as he was indemnified by insurances, or, possibly, by means of valued policies, was making a profit of each disaster); but still the agreement would continue, because nothing had happened except what was provided for. The agreement for conveying the rails from Newport to San Francisco is as much acted upon by setting sail from Liverpool with the ship equipped for the voyage and prepared to receive the cargo of rails, as if the rails had been taken on board; and the same rule of course ought to apply. It cannot properly depend upon the part of the voyage in which the damage is sustained. The preliminary voyage might be a long one, to the other extremity of the globe, and the disaster happen

towards the end of it: the rule must be the same whether it be to Newport to carry out rails, or to the Chinchas to bring home guano.

The principal argument addressed to us was, that convenience was so much in favour of the charter-party not continuing in force * after a delay of unusual and unreasonable length [* 130] in proceeding to the port of lading, that a term or condition ought to be implied making the charter no longer obligatory upon the freighters after such delay.

I have already pointed out that it is one voyage under the charter-party, and that the inconvenience of detention would apply to all parts. It would be extremely inconvenient that the rails which were wanted at San Francisco should be loaded and detained at Monte Video or Valparaiso for four or five months, when they might be forwarded at once at an easy freight to San Francisco; and yet that would not affect the charter-party. But, independently of this, it appears to me that, when the matter is properly considered, the argument of convenience is entirely against the implication contended for.

The rule to be laid down not only settles the rights of parties to such an agreement, but regulates their conduct in a very important matter. The question is, what are the masters of vessels under charter to do when they have sustained damage? They are in a position of trust and great responsibility, — belonging to all nations, — and ought to have a clear and definite rule of conduct to go by. The rule of conduct which the law has hitherto prescribed is, "Repair your vessel, and proceed with your charter." But the rule now sought to be laid down would place shipowners and freighters in a position of the greatest uncertainty and difficulty. Instead of having a clear course to pursue, without delay, and independent of collateral considerations such as I have mentioned, the master of a damaged vessel is to form a conclusion upon a doubtful matter, viz., the time to be consumed in repairs, and then, either by himself or with the assistance of others, to get at the effect of this, and thus satisfy himself whether the delay is likely to make it unreasonable for the charterer to wait, or, in the words of the case, whether the delay would put an end in a commercial sense to the commercial speculation entered into between him and the charterer.

It would be a puzzling question for him to answer if he under-

stood it. The answer would depend upon a variety of circumstances. The captain might say, "The commercial speculation which I entered into was and continues an excellent one. [* 131] I had a * charter for San Francisco at a high freight, and have from my connections a good expectation of finding a return cargo at San Francisco, and freights have here now fallen." The charterer, if freights had fallen, would say, "This has been a bad commercial speculation for me; and the best thing I can do would be to get out of it, and hire a vessel at once at a lower rate of freight." If, on the other hand, freights had risen, the captain would wish to get out of the charter and procure a high freight; and the freighter contrariwise. Thus, while upholding the charter in its terms, you give a rule of conduct which is certain, clear, and not influenced by unfair collateral considerations of interest; by introducing the suggested implication, you make the course of conduct difficult, dependent upon doubtful intervals of time, and results which cannot be ascertained, and expose it to the influences which I have suggested. In short, one rule makes it the duty of both parties under all circumstances to uphold the charter; the other, in every case of considerable damage and necessary delay in repairing, gives each party the chance of getting out of the charter, according as it is his interest to do so.

As is usual in all arguments founded upon convenience, we were pressed by extreme cases; and it was asked how long a man was to keep a cargo, — perhaps a perishable one: was he to keep it for months, a year? The answer is, that, if the cargo is of such a nature, or an early shipment of vital importance, the charterer should have a special clause in the contract; but, if he does not, still the contract is not one upon which there can be a claim for a specific performance. As soon as it is plain that the delay will be really serious as regards the condition of the intended cargo or the purpose to which it was destined, the charterer should forward his cargo by another vessel. He does not by doing so break his contract, because he may provide another cargo. If he cannot do so, he should give notice at the earliest period to the shipowner. He will be liable in damages, no doubt, but not to the freight; and the amount will depend upon the state of freights. If freights had risen, the shipowner would sustain but little damage; and the charterer would himself

be a loser by forwarding his cargo at a high rate. If freights had fallen, there might be a considerable liability; but the charterer would share the *advantage by having his goods [*132] forwarded at an easier rate. In the present case, the damages would probably not be heavy; for, all the loss of delay and detention would not be the fault of the charterers, but be caused by perils for which they were not responsible; and the shipowner would be in the same state as he was in before he started.

The charter-party might perhaps be so framed as to make the charterer liable for a specified amount of stipulated damages for a particular default. If this were so, it would be his fault for entering into such a stipulation, when the delay by sea perils would be so serious. In the present case, as is usual, the penalty for non-performance would not make the liability greater than the damages sustained.

It appears to me, therefore, that too much stress was laid during the argument upon the apparent injustice which would be done in a particular case of extreme delay if the charter was upheld, and not sufficient regard had to the general inconvenience which would arise if the charter were defeated in such cases; and that, so far as the argument from convenience is concerned, it preponderates in favour of a construction which gives a certain, clear, and honest rule of conduct to act by in all cases, upholding a contract, over one which introduces uncertainty and difficulty as to conduct, and admits of reasons for defeating a contract which are to be derived from considerations of interest at the time.

Independently, therefore, of authority, I should think the general rule should prevail, of construing the contract as to all matters within its provisions, and not introducing an additional implied term.

I have more fully considered the case upon principle, because, although the authorities appear to preponderate, and, indeed, but for some very recent *dicta* and decisions, to be conclusive in favour of this view, I do not propose to refer to them in detail, as that has been done so fully by the late Lord Chief Justice Bovill in his judgment in the court below, with which I entirely agree.

The learned Judge then went at some length into the authorities

already dealt with in the judgment referred to, and concluded as follows: —

[141] For the reasons which I have now given, it appears to me that the charter-party in the present case continued binding upon the charterers; that, consequently, there was no loss of freight by sea perils; and therefore that the defendants are entitled to judgment, which would be a reversal of the judgment already given.

Bramwell, B. The first question is, whether the plaintiff could have maintained an action against the charterers for not loading; for, if he could, there certainly has not been a loss of the chartered freight by any of the perils insured against.

In considering this question, the finding of the jury that "the time necessary to get the ship off and repairing her so as to be a cargo-carrying ship was so long as to put an end in a commercial sense to the commercial speculation entered into by the shipowner and charterers," is all-important. I do not think the question could have been left in better terms; but it may be paraphrased or amplified. I understand that the jury have found that the voyage the parties contemplated had become impossible; that a voyage undertaken after the ship was sufficiently repaired would have been a different voyage, not, indeed, different as to the ports of loading and discharge, but different as a different adventure, — a voyage for which at the time of the charter the plaintiff had not in intention engaged the ship, nor the charterers the cargo; a voyage as different as though it had been described as intended to be a spring voyage, while the one after the repair would be an autumn voyage.

It is manifest that, if a definite voyage had been contracted for, and became impossible by perils of the seas, that voyage

[* 142] * would have been prevented and the freight to be earned thereby would have been lost by the perils of the seas. The power which undoubtedly would exist to perform, say, an autumn voyage in lieu of a spring voyage, if both parties were willing, would be a power to enter into a new agreement, and would no more prevent the loss of the spring voyage and its freight than would the power (which would exist if both parties were willing) to perform a voyage between different ports with a different cargo.

But the defendants say that here the contract was not to per-

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form a definite voyage, but was at some and any future time, however distant, provided it was by no default in the shipowner, and only postponed by perils of the seas, to carry a cargo of rails from Newport to San Francisco; and that, no matter at what distance of time, at what loss to the shipowner, whatever might be the ship's engagements, however freights might have risen, or seamen's wages, though the voyage at the time when the ship was ready might be twice as dangerous, and possibly twice as long, from fogs, ice, and other perils, though war might have broken out meanwhile between the country to whose port she was to sail and some other, still she was bound to take and had the right to demand the cargo of the shippers; who in like way had a right to have carried and were bound to find the agreed cargo, or, if that had been sent on already, a cargo of the same description, no matter at what loss to them, and however useless the transport of the goods might be to them. This is so inconvenient, that, though fully impressed with the considerations so forcibly put by Mr. Aspland, and retaining the opinion I expressed in *Tarrabochia* v. *Hickie*, 1 H. & N. 183; 29 L. J. Ex. 26, I think that, unless the rules of law prohibit it, we ought to hold the contrary.

The question turns on the construction and effect of the charter. By it the vessel is to sail to Newport with all possible dispatch, perils of the seas excepted. It is said this constitutes the only agreement as to time, and, provided all possible dispatch is used it matters not when she arrives at Newport. I am of a different opinion. If this charter-party be read as a charter for a definite voyage or adventure, then it follows that there is necessarily an implied condition that the ship shall arrive at Newport in time for * it. Thus, if a ship was chartered to go [* 143] from Newport to St. Michael's in terms in time for the fruit season, and take coals out and bring fruit home, it would follow, notwithstanding the opinion expressed in *Touteng* v. *Hubbard*, 3 Bos. & P. 291; 6 R. R. 791, on which I will remark afterwards, that, if she did not get to Newport in time to get to St. Michael's for the fruit season, the charterer would not be bound to load at Newport, though she had used all possible dispatch to get there, and though there was an exception of perils of the seas.

The two stipulations, to use all possible dispatch, and to arrive

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in time for the voyage, are not repugnant; nor is either superfluous or useless. The shipowner, in the case put, expressly agrees to use all possible dispatch: that is not a condition precedent; the sole remedy for and right consequent on the breach of it is an action. He also impliedly agrees that the ship shall arrive in time for the voyage: that is a condition precedent as well as an agreement; and its non-performance not only gives the charterer a cause of action, but also releases him. Of course, if these stipulations, owing to excepted perils, are not performed, there is no cause of action, but there is the same release of the charterer. The same reasoning would apply if the terms were, to "use all possible dispatch, and further, and as a condition precedent, to be ready at the port of loading on June 1st." That reasoning also applies to the present case. If the charter be read, as for a voyage or adventure not precisely defined by time or otherwise, but still for a particular voyage, arrival at Newport in time for it is necessarily a condition precedent. It seems to me it must be so read. I should say reason and good sense require it. The difficulty is supposed to be that there is some rule of law to the contrary. This I cannot see; and it seems to me that, in this case, the shipowner undertook to use all possible dispatch to arrive at the port of loading, and also agreed that the ship should arrive there "at such a time that in a commercial sense the commercial speculation entered into by the shipowner and charterers should not be at an end, but in existence." That latter agreement is also a condition precedent. Not arriving at such a time puts an end to the contract; though, as it arises from an excepted peril, it gives no cause of action.

The same result is arrived at by what is the same [* 144] argument * differently put. Where no time is named for the doing of anything, the law attaches a reasonable time. Now, let us suppose this charter-party had said nothing about arriving with all possible dispatch. In that case, had the ship not arrived at Newport in a reasonable time, owing to the default of the shipowner, the charterers would have had a right of action against the owner, and would have had a right to withdraw from the contract. It is impossible to hold that, in that case, the owner would have a right to say, "I came a year after the time I might have come, because meanwhile I have been profitably employing my ship: you must load me, and bring your action for

damages." The charterers would be discharged, because the implied condition to arrive in a reasonable time was not performed. Now, let us suppose the charter contains, as here, that the ship shall arrive with all possible dispatch, — I ask again, is that so inconsistent with or repugnant to a further condition that at all events she shall arrive within a reasonable time? or is that so needless a condition that it is not to be implied? I say certainly not. I must repeat the foregoing reasoning. Let us suppose them both expressed, and it will be seen they are not inconsistent nor needless. Thus, I will use all possible dispatch to get the ship to Newport, but at all events she shall arrive in a reasonable time for the adventure contemplated. I hold, therefore, that the implied condition of a reasonable time exists in this charter. Now, what is the effect of the exception of perils of the seas, and of delay being caused thereby? Suppose it was not there, and not implied, the shipowner would be subject to an action for not arriving in a reasonable time, and the charterers would be discharged. Mr. Benjamin says the exception would be implied. How that is, it is not necessary to discuss, as the words are there: but, if it is so, it is remarkable as showing what must be implied from the necessity of the case.

The words are there. What is their effect? I think this: they excuse the shipowner, but give him no right. The charterer has no cause of action, but is released from the charter. When I say *he* is, I think *both* are. The condition precedent has not been performed, but by default of neither. It is as though the charter were conditional on peace being made between countries A. and B., and it was not; or as though the charterer agreed to load a cargo of coals, strike of pitmen excepted. If a strike of *probably long duration began, he would be [*145] excused from putting the coals on board, and would have no right to call on the shipowner to wait till the strike was over. The shipowner would be excused from keeping his ship waiting, and have no right to call on the charterer to load at a future time. This seems in accordance with general principles. The exception is an excuse for him who is to do the act, and operates to save him from an action and make his non-performance not a breach of contract, but does not operate to take away the right the other party would have had, if the non-performance had been a breach of contract, to retire from the engagement: and, if one

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party may, so may the other. Thus, A. enters the service of B., and is ill and cannot perform his work. No action will lie against him; but B. may hire a fresh servant, and not wait his recovery, if his illness would put an end, in a business sense, to their business engagement, and would frustrate the object of that engagement: a short illness would not suffice, if consistent with the object they had in view. So, if A. engages B. to make a drawing, say, of some present event, for an illustrated paper, and B. is attacked with blindness which will disable him for six months, it cannot be doubted that, though A. could maintain no action against B., he might procure some one else to make the drawing. So, of an engagement to write a book, and insanity of the intended author. So of the case I have put, of an exception of a strike of pitmen.

There is, then, a condition precedent that the vessel shall arrive in a reasonable time. On failure of this, the contract is at an end and the charterers discharged, though they have no cause of action, as the failure arose from an excepted peril. The same result follows, then, whether the implied condition is treated as one that the vessel shall arrive in time for that adventure, or one that it shall arrive in a reasonable time, that time being, in time for the adventure contemplated. And in either case, as in the express cases supposed, and in the analogous cases put, non-arrival and incapacity by that time ends the contract; the principle being, that, though non-performance of a condition may be excused, it does not take away the right to rescind from him for whose benefit the condition was introduced.

On these grounds, I think that, in reason, in principle, [* 146] and for * the convenience of both parties, it ought to be held in this case that the charterers were, on the finding of the jury, discharged.

It remains to examine the authorities. The first in date relied on by the defendants is *Hadley* v. *Clarke*, 8 T. R. 259; 4 R. R. 641. Now, it may safely be said that there the question was wholly different from the present. There was no question in that case as to the performance of a condition precedent to be ready at a certain or within a reasonable time, or such a time that the voyage in question, the adventure, should be accomplished and not frustrated. That condition had been performed: the ship had loaded and sailed in due time. The plaintiff had had a part

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of the benefit intended. The defendant had in justice earned part of his freight. Had the plaintiff demanded his goods at Falmouth, he ought to have paid something for their carriage there. He could not, therefore, well have said that he would not go on with the adventure, but undo it. But, if I am right, unless both could, neither could. Further, in that case there was no finding, nor anything equivalent to a finding, that the objects of the parties were frustrated. This case is therefore in every way distinguishable. Then, there is the case of *Touteng* v. *Hubbard*. The opinion there expressed was *obiter*, — of weight, no doubt; but not of the same weight it would have been had it been the *ratio decidendi*. I cannot think that it would have been so held, had it been necessary to act on it. To hold that a charterer is bound to furnish a cargo of fruit at a time of year when there is no fruit, — at a time of year different to what he and the shipowner must have contemplated, the change to that time being no fault of his, but the misfortune at best of the shipowner, — is so extravagant, when the consequences become apparent, that it could not be. Suppose a charter to fetch a cargo of ice from Norway, entered into at such a time that the vessel would reach its destination, with reasonable dispatch, in February, when there was ice, and bring it back in June, when ice was wanted, and by perils of the seas it could not get to Norway till the ice was melted, nor return till after ice was of no value: can it be that the charterer would be bound to load? that he had agreed in those events to do so?

Another case is *Hurst* v. *Usborne*, 18 C. B. 144; 25 L. J. C. P. 209. That is a case of which, * if I knew [* 147] no more than I learn from the books, I should say it did not decide the question we have before us. It is true that the report in the Law Journal, 25 L. J. C. P. at p. 211, as Mr. Aspland pointed out, says that Mr. Justice Cresswell said he knew of no time the shipowner was bound to, except to use reasonable dispatch. Still, I cannot see from the reports that the point now before us was presented to the Judges in that case. My Brother Blackburn, who was counsel in the cause, says it was intended to raise this point by the evidence that was rejected at *nisi prius*. No doubt, therefore, that was so; but I cannot think it so understood by the court. I see no adjudication on it. Mr. Butt pointed out that the charter was for barley or other

lawful merchandise. Even if for barley only, it does not appear that barley might not have been stored at Limerick, nor that barley from Limerick arriving in England at the time it would, had the defendant loaded, would not have been as valuable as barley arriving earlier. I cannot but think it was a hasty decision: a rule was refused; and certainly one would think, after the argument we have heard, that the matter was worth discussing. At the same time, its tendency is favourable to the defendants. I think it is unsatisfactory, and, if a decision on the question now before us, wrong. Mr. Justice WILLES did not seem to be of opinion that the law was as he is supposed to have laid it down in that case: see his judgment in *M'Andrew* v. *Chapple*, L. R., 1 C. P. 643; 35 L. J. C. P. 281, where, indeed, there had been a breach of his contract by the shipowner; but the observations are general. I may also properly refer to the opinions, if not of myself, of my Brothers BLACKBURN and BRETT in *Rankin* v. *Potter*, L. R., 6 H. L. 83; 42 L. J. C. P. 169. They undoubtedly assume the law to be as the plaintiff contends.

There is also *Geipel* v. *Smith*, L. R., 7 Q. B. 404; 41 L. J. Q. B. 153, nearly if not quite in point. The shipowner there was excused, not merely for refusing to take a cargo to a port which became blockaded after the charter, but also in effect for refusing to do so after the blockade was removed. Restraint of princes not only excused, but discharged him. The same, no doubt, would have been held as to the charterers.

Then, there are the cases which hold that, where the shipowner has not merely broken his contract, but so broken it that the condition precedent is not performed, the charterer is dis-
[* 148] charged: see * *Freeman* v. *Taylor*, 8 Bing. 124. Why? Not merely because the contract is broken. If it is not a condition precedent, what matters it whether it is unperformed with or without excuse? Not arriving with due diligence, or at a day named, is the subject of a cross-action only. But not arriving in time for the voyage contemplated, but at such a time that it is frustrated, is not only a breach of contract, but discharges the charterer. And so it should, though he has such an excuse that no action lies. *Taylor* v. *Caldwell*, 3 B. & S. 826; 32 L. J. Q. B. 164, is a strong authority in the same direction. I cannot but think, then, that the weight of authority, as might be expected, is on the side of reason and convenience.

On the other question, viz., whether, though the charterers by perils insured against had a right to refuse to load the cargo, there has been a loss of freight by perils of the seas, — I am of opinion there has been.

It was argued that the doctrine of *Causa proxima, non remota spectetur*, applies; and that the proximate cause of the loss of the freight here was, the refusal of the charterers to load. But, if I am right, that the voyage, the adventure, was frustrated by perils of the seas, both parties were discharged, and a loading of cargo in August would have been a new adventure, a new agreement. But, even if not, the maxim does not apply. The perils of the seas do not cause something which causes something else. The freight is lost unless the charterers choose to go on. They do not. In the case of goods carried part of the voyage, and the ship lost, but the goods saved, the shipowner may carry them on if he chooses, but is not bound. Suppose he does not, his freight is lost. So, if he does not choose to repair a vessel which remains *in specie*, but is a constructive total loss.

For these reasons, I think the judgment should be affirmed.

My Brothers Blackburn, Mellor, and Amphlett agree in this judgment, as does my Brother Lush, who, however, heard part only of the argument. *Judgment affirmed.*

ENGLISH NOTES.

The reasoning of Bramwell, B., in delivering his judgment in the Exchequer Chamber, in the principal case, is adopted by Blackburn, J., in *Poussard* v. *Spiers* (1876), 1 Q. B. D. 410–414, 45 L. J. Q. B. 621, 34 L. T. 572, where the question arose upon the engagement of a *prima donna* for the performance of a new opera. She was incapacitated by illness from acting on the first and three following performances, but tendered herself for the fourth performance. Blackburn, J., observed: "The analogy is complete between this case and that of a charter-party in the ordinary terms, where the ship is to proceed in ballast (the act of God, &c. excepted), to a port and there load a cargo. If the delay is occasioned by excepted perils, the shipowner is excused. But if it is so great as to go to the root of the matter, it frees the charterer from his obligation to furnish a cargo."

The principal case is again referred to and applied by Lord Blackburn in delivering his reasons in the House of Lords in *Dahl* v. *Nelson* (1881), 6 App. Cas. 38, 50 L. J. Ch. 411, 44 L. T. 381. The charter-party there was for a voyage to "London Surrey Commercial Docks, or as

near thereto as she may safely get and lie always afloat." The docks being full, the manager refused entrance. It was held that this refusal was not the fault of either party; and that the shipowner was entitled, under the circumstances, to take the ship to the Deptford Buoys, being the nearest place where the ship could lie in safety afloat, and discharge into lighters there at the expense of the charterers, who were also liable for demurrage. Lord BLACKBURN in his reasons for holding that "as near thereto as she may safely get" implied the condition "without unreasonable delay," and in aid of this construction cited the observations of Mr. Justice MAULE, in *Moss* v. *Smith* (C. P. 1850), 9 C. B. 94, 19 L. J. C. P. 225 (a case of total loss on an insurance, see 1 R. C. p. 34), — "In matters of business, a thing is said to be impossible where it is not practicable, and a thing is impracticable when it can only be done at an excessive or unreasonable cost." Lord BLACKBURN proceeded: "Though the particular case (*Moss* v. *Smith*) was a policy of insurance, Mr. Justice MAULE speaks generally of mercantile contracts. And on this principle it was held in *Geipel* v. *Smith*, L. R., 7 Q. B. 404, by the whole Court, and in *Jackson* v. *Union Marine Insurance Co.*, by a majority in the Common Pleas, and in the same case in error by a majority of the Court of Exchequer Chamber, that a delay in carrying out a charter-party caused by something for which neither party was responsible, if so great and so long as to make it unreasonable to go on with the adventure, entitled either of them, at least while the contract was executory, to consider it at an end. I said in *Geipel* v. *Smith*, L. R., 4 Q. B. 414: 'Very different considerations arose when the cargo is already on board, or, as in *Hadley* v. *Clarke*, 8 T. R. 259, 4 R. R. 641, is already on the voyage, but while the contract still remains executory. I think time is so far of the essence of the contract, as that matter which arises to cause unavoidable but unreasonable delay is sufficient excuse for refusing to perform it.' I still think there is a distinction between the cases, for when the shipowner has got the merchant's cargo on board he cannot simply put an end to his contract; he must do something with the cargo. But in this case the parties have provided for what is to be done with it. If the ship cannot get into dock, she is to go as near as she may safely get, and there deliver. It certainly seems to me that any cause which would excuse the ship from going into the dock if the contract was wholly executory, must be sufficient to excuse her, and so bring the alternative into operation when the cargo is on board. There was a dissenting minority in *Jackson* v. *Union Marine Insurance Co.*, and some previous authorities are perhaps not quite consistent with the decision. It is no doubt competent to your Lordships to reconsider that case, and decide contrary to it. I think it was rightly decided, but I can only refer your Lordships to

the judgment delivered by Baron BRAMWELL in that case, in the reasoning of which I then concurred and still concur, and to which I have nothing to add."

AMERICAN NOTE.

The principal case is reported in 6 Moak's English Reports, 268; 11 ibid. 290.

CHURCH.

ATTORNEY-GENERAL *v.* PEARSON.

(1817.)

RULE.

WHERE property is held in trust for the purposes of religious worship and teaching, the nature of the original institution must alone, in the case of a split, be looked to as the guide for the decision of the Court between rival sections, claiming to have the trusts carried out. The deed (if any) creating the trust is the primary source for ascertaining what was the form of worship and what was the doctrine intended by the foundation; but if it cannot be discovered from the deed what form of worship or what doctrine was intended, the usage of the congregation must be inquired into, and will be presumed to be in conformity with the original purpose.

Attorney-General v. Pearson.

3 Merivale 353-420 (s. c. 17 R. R. 100-107).

Church. — Deed of Endowment. — Usage.

Information and bill to quiet the possession of the relators and [353] plaintiffs (one claiming as the surviving trustee, the other as minister, of a Protestant Dissenting meeting-house); for an appointment of new trustees; and an injunction to stay proceedings in ejectment by the defendants, claiming also to be trustees of the meeting-house. Upon motion for an in

Attorney-General v. Pearson, 3 Merivale, 363.

junction, it appearing that the meeting-house was erected in the year 1701, under a trust-deed, whereby the purpose was declared to be "for the worship and service of God;" the plaintiffs and relators contending, from the purpose so expressed, that the intention was for promoting the doctrine of the Holy Trinity, and that the trust could not be diverted from the purpose for which it was intended; the defendants insisting that the intention was as general as the purpose expressed, and had no regard to any particular tenets; it being also made a question, whether a trust for supporting Unitarian worship is legal and can be supported; and it being further disputed who, according to the true construction of the deed, were entitled, as trustees, to the possession; and whether the minister of a Dissenting congregation, elected for a limited period, is afterwards removable at pleasure; and also as to the construction of the deed, and as to an alleged agreement or understanding between the parties, with regard to such removal: the injunction was granted (upon the parties undertaking to abide by such order as the Court should thereafter make), and it was referred to the master to inquire in whom the legal estate was vested, the particular object (with respect to worship and doctrine) for which the trust was created, the usage of Protestant Dissenters as to the election of ministers, and the duration of their office, and whether any agreement or understanding relative thereto subsisted between the parties.

This was a case arising out of a dispute concerning the rights of the minister and congregation of a Dissenting meeting-house. The acting trustees by a majority had commenced proceedings to eject the minister, and a suit in the form of an information and bill in Chancery was brought by the minister (the Rev. J. Steward), and a person claiming to be surviving trustee, for an injunction to restrain the ejectment, and for a declaration that the plaintiff (Steward) was entitled to receive the annual income of the trust premises, and that he might be quieted in his office of minister and in the use of the meeting-house.

The original deed of trust relating to the foundation was a deed of 1701, by which it was declared to be the true intent of the parties to the grant of the land and all others who had contributed towards the building, that there should be a house built upon the land (which had been done) and the same was intended "for a meeting-house for the worship and service of God."

By a deed of 1720, a grant was made of an acre of land to certain persons and their heirs in trust to permit the rents, etc., to be received by A. (the then minister) during his life, and after his decease "by the minister for the time being who should be the
[363] stated and settled minister of the congregation or society

of Dissenting Protestants belonging to the said meeting-house," towards the support and maintenance of such minister, forever. But in case the statute then in force, entitled, "An Act for exempting their Majesties' Protestant subjects dissenting from the Church of England from the penalties of certain laws" [the Toleration Act, 1 W. & M. c. 18], should at any time thereafter happen to be repealed, and the said congregation should by law be prohibited to assemble for the worship and service of God, that then and in such case, the trustees should, from time to time, during such prohibition, pay the whole of the rents, issues, and profits to the person that was minister of the congregation at the time of such repeal or prohibition, for and during his life, for his sole use and benefit, and, after his death, to and for the use and benefit of such silenced Protestant Dissenting minister, or ministers, as the trustees for the time being, or the major part, should nominate and appoint, provided that, when and as often as any of the trustees should die, or desert or forsake the said congregation, and should change or become of any other religion or persuasion whatsoever, contrary to and different from the said congregation; or in case any of the said trustees should, at any time thereafter, remove eight miles distant from the town of Wolverhampton, to inhabit or dwell, that then and in every such case the * surviving or other trustees, or the major part, should, within ——— days next after such decease, desertion, or removal, by any note or memorandum in writing, to be subscribed by the said trustees, or the major part of them, elect and nominate one of the most sufficient substantial persons of the congregation to be trustee, in the place of him or them so dying, deserting, or removing; and, in case the said trustees, or the major part, should refuse or neglect, within such time, so to elect and nominate, etc., then it should be lawful to and for the minister of the said congregation for the time being (if any such there be), or else for such silenced Dissenting Protestant minister, or ministers as aforesaid, for the time being, to whom the rents and profits of the premises thereby granted should of right appertain, by any note, etc., under his or their hand, to elect and nominate such trustee or trustees, upon the same trusts as aforesaid, and so from time to time, etc., whereby the said trust might have a perpetual continuance, and might not come to or vest in the heirs of any surviving trustee, or in any person or persons whatsoever not of the said congregation." [* 364]

The pleadings contained lengthy statements as to the disputes which had taken place, as to elections of trustees, and as to the doctrines preached by the minister whom it was sought to eject.

It was contended by the bill that the intention of the donors was to promote the belief of the Holy Trinity, and that the defendants belonged to a sect of Protestant Dissenters called Unitarians, professing themselves to be opposed to Trinitarianism, and that the meeting-house and trust premises had been diverted from the purposes of the trusts. The answer denied the original purpose of the trust as alleged, and stated that Steward had been invited to become minister for three years on his profession of tenets in accordance with those approved by the congregation, and that he afterwards changed those tenets and preached doctrines objectionable to the congregation; and that he insisted, against the will of the congregation and of the trustees, on holding the position of minister after the expiring of the three years for which he was appointed.

Much argument turned on the question whether, having regard to the state of the statute law at the time of the foundation, or according to the existing common law, a trust for the maintenance of a religious teaching which denied the doctrine of the Trinity could be regarded as lawful. The Lord Chancellor (Lord Eldon) after adverting to this point, made the following observations:

"But there is another view in which the case should be
[*400] * considered — and it is this — that, where an institution exists for the purpose of religious worship, and it cannot be discovered from the deed declaring the trust what form or species of religious worship was intended, the Court can find no other means of deciding the question, than through the medium of an inquiry into what has been the usage of the congregation in respect to it; and, if the usage turns out upon inquiry to be such as can be supported, I take it to be the duty of the Court to administer the trust in such a manner as best to establish the usage, considering it as a matter of implied contract between the members of that congregation. But if, on the other hand, it turns out — (and I think that this point was settled in a case which lately came before the House of Lords by way of appeal out of Scotland) — that the institution was established for the express purpose of such form of religious worship, or the teaching of such particular doctrines, as the founder has thought most conformable to the

principles of the Christian religion, I do not apprehend that it is in the power of individuals, having the management of that institution, at any time to alter the purpose for which it was founded, or to say to the remaining members, "We have changed our opinions — and you, who assemble in this place for the purpose of hearing the doctrines, and joining in the worship, prescribed by the founder, shall no longer enjoy the benefit he intended for you unless you conform to the alteration which has taken place in our opinions." In such a case, therefore, I apprehend — considering it as settled by the authority of that I have already referred to — that where a congregation become dissentient among themselves, the nature of the original institution must alone be looked to, as the guide for the decision of the Court — and that, *to [*401] refer to any other criterion — as to the sense of the existing majority, — would be to make a new institution, which is altogether beyond the reach, and inconsistent with the duties and character, of this Court.

In this view of the case, it is of the first importance to see what the record before the Court says upon the subject of the original institution. Without entering into what may be the effect of the late statute repealing several then existing laws on the subject, (a question which it is not for me, sitting in a Court of equity, to determine, and which would certainly be much better decided by the Judges of the Courts of common law) without even so much as looking to the point, whether it be, or be not, legal at this day, to impugn the doctrine of the Trinity (although that is a point upon which indeed I have an opinion, only I do not find myself called upon now to declare it) what I have now to inquire is, whether the deed creating the trust does, or does not, upon the face of it, (regard being had to that which the Toleration Act at the time of its execution permitted, or forbade, with respect to doctrine) bear a decided manifestation that the doctrines intended by that deed to be inculcated in this chapel were Trinitarian? Because, if that were originally the case, and if any number of the trustees are now seeking to fasten on this institution the promulgation of doctrines contrary to those which, it is thus manifest, were intended by the founders, I apprehend that they are seeking to do that which they have no power to do, and which neither they, nor all the other members of the congregation, can call

upon a single remaining trustee to effectuate. In this view of the case, also, supposing even that, at the time of the establishment of this institution, it had been legal to impugn the [* 402] doctrine of the * Trinity, yet if the institution had been established for Trinitarian purposes, it could not now be converted to uses which are anti-Trinitarian. For (meaning, however, to speak with all due reverence on such a subject) to allow such a conversion would be to allow a trust for the benefit of A. to be diverted to the benefit of B. And the question then resolves itself into this, — whether such a conversion, in the case of a trust, can possibly be supported. If, therefore, this appears, on the face of the deeds, to be the nature of the present case, — as I am inclined to believe it does, — it disposes of the question; affording a short and direct reason for not refusing the interference of the Court.

I am fully aware of the importance, with a view to conciliation, and abating the heat with which I am sorry to see controversies of this sort generally carried on, that a final determination should speedily be made; but, at the same time, if deeds have been framed with so little in them that leads to a right understanding of the objects they had in view, it is impossible that the Court should decide without a previous inquiry, which, according to the necessary course of business, must greatly postpone the decision. And this, though it may be lamented, is not the fault of the Court, but the fault of the parties by whom the trusts were originally constituted.

With respect to the choice of the minister, — regard being had to the circumstance that this is the case of a Protestant Dissenting minister, — I am not sufficiently acquainted with the principles upon which these congregations usually act, to say much upon that subject, without more information than has yet been communicated to me. It may be according to general [* 403] usage, among certain classes of persons dissenting * from the Establishment, to appoint their ministers for limited periods, or to make them removable at pleasure; and, although a Court of equity may not be disposed to struggle hard in support of such a plan, yet, were the Court to find such a plan established, I know of no principle upon which the Court would not be bound, if called upon for the purpose, to carry it into effect. The policy of the Established Church has been, by giving the minister an estate

for life in his office, to render him (in a certain degree) independent of his congregation. But I do not see how this policy can be extended so as to govern the decision of the Court in a case of this nature, where the trust which the Court is called upon to establish is otherwise constituted.

So again, with respect to those in whom resides the right of election, I apprehend that here also the Court must not be governed altogether by what it finds on inquiry to have been the established usage. On this subject various statements have been made in the present case, but the deeds are silent. At the same time, however, that I am fully aware of the difficulties the Court has to encounter in executing a trust of this kind, I also know that it is the duty of the Court to struggle with them; and I shall endeavour to execute the trust as well as I can. But, while so many points are unascertained, it is impossible to come to any right decision, — it is impossible for the Court to execute any trust until it knows who are the persons in whom it is vested, and what are its objects.

Of one thing at least I am certain, — that there must be no proceeding to trial of the ejectment; which cannot, under these circumstances, be attended with any other than a most fruitless and unnecessary expense to the parties; and because, if I can find out the true state of * the case, with reference [* 404] to the subject-matter of these inquiries, I shall thereby be enabled to make such an order as will embrace all points in dispute between them.

On finally disposing of the motion: —

17 July, 1817. — The Lord Chancellor. [Having adverted to the state of the law at the time of the instruments in question, in order to see what might be collected by way of fair inference, as to the meaning of the original founders, he read the deed of 1701; and, upon the purpose for which the meeting-house was declared to be erected, — viz., "for the worship and service of God," — he remarked that the terms were very general. He proceeded]: —

There is quite sufficient of allegation in the information [409] to show that it was a body of Protestant Dissenters who established this meeting-house, in order to have preached in it the religious doctrines to which they were attached; and, more especially, if it cannot be said for the express purpose of inculcat-

ing the doctrines of the Trinity, yet that they were Dissenters entertaining such a class of opinions, as that the doctrine of Unitarianism would be directly at variance with their purpose in founding this meeting-house. I observe upon this particularly; because I take it that, if land or money were given (in such a way as would be legal notwithstanding the statutes concerning dispositions to charitable uses) for the purpose of building a church or a house, or otherwise for the maintaining and propagating the worship of God, and if there were nothing more precise in the case, this Court would execute such a trust, by making it a provision for maintaining and propagating the established religion of the country. It is also clearly settled that, if a fund, real or personal, be given in such a way that the purpose be clearly expressed to be that of maintaining a society of Protestant Dissenters, — promoting no doctrines contrary [*410] to * law, although such as may be at variance with the doctrines of the established religion, — it is then the duty of this Court to carry such a trust as that into execution, and to administer it according to the intent of the founders. In this case, it is impossible to doubt that the trust was originally created for the purpose of maintaining a Protestant Dissenting institution; and it would be doing violence to the intention of the parties to these deeds to say, that, the worship and service of God being the object expressed by them, the trust must be administered in such a way as to maintain the religion of the Established Church. Nevertheless, I take it from the experience of many years in this Court, that, if any body of persons mean to create a trust of land, or money, in such a manner as to render the gift effectual, and to call upon this Court to administer it according to the intent of the foundation, whether that trust has religion for its object or not, it is incumbent on them, in the instrument by which they endeavour to create that trust, to let the Court know enough of the nature of the trust to enable the Court to execute it; and therefore, where a body of Protestant Dissenters have established a trust without any precise definition of the object or mode of worship, I know no means the Court has of ascertaining it, except by looking to what has passed, and thereby collecting what may, by fair inference, be presumed to have been the intention of the founders. From this deed, I can collect that the founders were Protestant Dissenters, and thence

presume that their object was the maintenance of Protestant Dissenting worship; but I have nothing to inform me what species of doctrine this institution was intended to maintain, except as I may be able to infer from some of the clauses of the deed, and particularly from that clause which alludes to the possibility of the future prohibition by law of the worship thereby intended to be established, and also from that * which re- [*411] lates to the binding effect of orders to be made by a majority of the trustees, upon matters relating to the meeting-house only; from which it should appear, both that the founders meant to establish an institution which was not then contrary to law, and that they did not mean to invest in the trustees, or the major part of them, any right to vary the system or plan of doctrinal teaching which was to be maintained in this meeting-house according to their own discretion. . . .

[His Lordship, having read the deed of 1720, which is [412] stated above, p. 690, proceeded: —]

Upon the provisions of this deed there arises a question (upon which usage will have great effect), Whether, according to the original constitution of this society, the minister, preacher, or pastor could be appointed for three years only, or, whether, according to the general * principles of this [*413] body of Dissenters, the congregation and minister might agree, that the one will give, and the other accept, a nomination for three years only. It appears highly probable, that the person who gave this part of the fund contemplated a provision for the minister for his life, since he has expressly given it to him for life, even when he could no longer officiate as minister; but, on the other hand, it may turn out to be established by usage, that he was only a temporary minister, elected with the concurrence of the congregation, and liable to be removed in the same manner as he was called upon to officiate.

Upon the clause respecting the desertion or removal of any of the trustees, which occurs in this deed also, and contemplates the event that the trustees "should change, or become of any other religion or persuasion whatsoever, contrary to, and different from, the said congregation," I must observe that, if the question comes before this Court, in the execution of a trust, whether a trustee has been properly removed, and that point depends upon the question, whether the trustee has changed his religion, and

become of another (as in this instance), different from the religion of the rest of the society, it must then be *ex necessitate* for the Court to inquire, what was the religion and worship of the society from which he is said to have seceded, — not for the purpose of animadverting upon it, but in order to ascertain whether or not the charge is substantiated. It must then (I say) be necessary that this Court should inquire what religion the congregation is of, and also what is the religion of the man who is, or is sought to be, removed from the trusteeship because he is of a different religious persuasion from that of the congregation. . . .

[417] Where a clergyman is presented to a living in the Church of England, we know the duties committed to him, and the grounds upon which he is bound to execute those duties; but, as the justice of this country has, for the ease of men's consciences, permitted them to secede from the Established Church, and to form religious institutions for themselves, to a certain extent, it has become the duty of this Court, and others of a like nature, to enforce the execution of trusts for such institutions, and to give the parties who are trustees that relief which the legislature meant they should have. It is necessary, therefore, to look to the instruments, to know what are the [* 418] trusts which the Court is called upon * to enforce the execution of; and, if the parties themselves do not give the information which is requisite, it is in vain to look for a prompt decision with reference to the point in controversy; because, till inquiry has been made as to the nature of the trusts, a judge must remain in ignorance of the duty he has to perform. Where, then, a charitable institution of this kind is founded, — or, say it were for a civil purpose, that we may the more temperately discuss the subject, — I apprehend then, that where a man gives his money to such an institution for a civil purpose, one of the duties of this Court is to take care that those who have the management of it shall apply it to no other purpose so long as it is capable of being applied according to the original intention. And if, upon inquiry, it shall be found that in this case the land was originally given, and the money originally subscribed, for the purpose of forming an institution such as the Attorney-General in his information has alleged that this institution should be, then those who object to any change in the institution from its

original purposes are not guilty of departing from the institution, but are only doing their duty in endeavouring to prevent such a departure from the purposes of the institution in others; and, if the allegation is, that there has been such an alteration of sentiments on the part of the congregation, they certainly do throw great difficulties in the way of the Court's carrying the trusts into execution in any manner whatever.

I must here again advert to the principle which was, I think, settled in the case to which I referred the other day as having come before the House of Lords on an appeal from Scotland (see notes p. 700, *post*), — viz., that if any person seeking the benefit of a trust for charitable purposes should incline to the adoption of a different system from that which was intended by the original donors and founders; * and if others of those [*419] who are interested think proper to adhere to the original system, the leaning of the Court must be to support those adhering to the original system, and not to sacrifice the original system to any change of sentiment in the persons seeking alteration, however commendable that proposed alteration may be. Upon these grounds, I have nothing at all to do with the merits of the original system, as it is the right of those who founded this meeting-house, and who gave their money and land for its establishment, to have the trusts continued as was at first intended. It is necessary, therefore, to make inquiries as to what was the nature of that original system; and in the mean time, it is perfectly absurd that any ejectment should be going on.

For these reasons, I shall now grant an injunction, not till the hearing of the cause, but till the further order of this Court; the parties undertaking to account for the intermediate rents and profits (except so far as is necessary to maintain the minister), and to obey such order as the Court shall make. If the parties will submit to give that undertaking, I don't know how to go more promptly to a decision than by allowing the matter of inquiry to go to the master immediately. I wish there were any shorter mode of deciding it; and, if by *mandamus*, or by any other proceeding you can propose, such a decision can be accomplished, I shall have no objection.

The order made was as follows: —

* " The relators and defendants undertaking to obey [*420] such order as this Court may hereafter think fit to make,

with respect to the possession and intermediate rents of the meeting-house, &c., let the defendants be restrained by the injunction of this Court from further proceeding at law in the ejectment, &c., and from all other proceedings at law to recover possession, &c. until the further order of this Court; and refer it to the master to inquire, in whom the legal estate of and in all the trust premises, &c. is vested; and who have a right to call in the money due on the promissory note for £260. And let the master inquire what was the nature and particular object (with respect to worship and doctrine) for the observance, teaching, and support of which, each and every of the said charitable funds or estates respectively were or was created or raised, distinguishing when and by whom the same were or was respectively created; and let the said master inquire and state, &c. the usage of Protestant Dissenters as to the election of their ministers, and the duration of their office as such, and particularly whether any agreement or understanding was entered into between the relator, John Steward, and the defendants, Joseph Pearson, Joseph Stanley, Joseph Baker, and Thomas Williams, or any of them, and the persons for the time being members of the congregation attending the said meeting-house, and subscribing to its support, touching the duration of the ministry of the said John Steward in the said meeting-house, &c."

ENGLISH NOTES.

The appeal from Scotland referred to by the above judgment of Lord Eldon was probably the case of *Craigdallie* v. *Aikman*, which is reported on the final judgment in 1820 in 2 Bligh. 529; 21 R. R. 107. There appears to have been a previous judgment of the House in 1813 by which the case was remitted to the Court of Session with certain findings; and the judgment of the Court of Session which formed the subject of the appeal disposed of in 1820, was dated in 1815; so that there may have been one or more arguments of that appeal heard before the judgment was pronounced in the principal case. The case arose out of a schism in 1796 in the congregation of a meeting-house of Seceders from the Church of Scotland. The original secession was that which took place in 1731 on the question of Church Patronage. It appeared that, consequently on the differences which arose in 1796, several members of the congregation, including the representatives of some of the trustees to whom the legal right of property had devolved, separated themselves from the rest of the community and absolved themselves from the

authority of the Associate Synod, which was the constituted authority for the government of the community. The separation took place on an alleged difference of opinion, on a question as to the power of the civil magistrates in religious concerns. The separating members brought an action to have it declared that the meeting-house belonged to them as adhering to the original principles of the Secession. A counter-action for the purpose of being quieted in their possession was raised by the other party. The Court of Session pronounced a Corinthian judgment, finding "that the pursuers have failed in rendering intelligible to the Court, on what ground it is that they aver that there does at this moment exist any *real* difference between their principles and those of the defendants." They consequently dismissed the action, and sustained the counter-action; but found no expenses due to either party. The House of Lords, under the advice of Lord Eldon (L. C.), affirmed this judgment. Lord Eldon observed that he had not been able, any more than the Court of Session, who were more likely to understand the matter, to understand what were the principles on which it was alleged that the defendants had deviated, and whether they had in fact deviated from the standard of the original Seceders; and the consequence was that those who have not attended the meeting, but who are yet insisting that they have interests in the property in which the meeting is held, are to be considered as persons voluntarily separating themselves from the congregation without cause.

The judgment of Lord Eldon in the principal case was referred to in the judgments of Mr. Baron Alderson, and of Lord Lyndhurst in *Shore* v. *Wilson* (1842), 9 Cl. & Fin. 355, 382, 390, where the purpose of a charity called "Lady Hewley's Charity" was elaborately discussed. The principal question was the intention of the words in the will of the foundress declaring the objects of the charity as "poor and godly preachers of Christ's holy gospel;" and the question was much considered whether the evidence which had been given of the religious views of Lady Hewley and of the tenets and customary language of the sect to which she belonged was admissible for the interpretation of these words. The final result was that the evidence was held admissible under the qualification expressed by Lord Cottenham (9 Cl. & Fin. 580), as follows: "The part of the evidence which goes to show the existence of a religious party by which the phraseology found in the deeds was used, and the manner in which it was used, and that Lady Hewley was a member of that party, is admissible; that being in effect no more than receiving evidence of the circumstances by which the author of the instrument was surrounded at the time."

AMERICAN NOTES.

The seceding members of a church forfeit all right to church property. *McKinney* v. *Griggs*, 5 Bush (Kentucky), 401; 96 Am. Dec. 360.

A Court of Chancery will enforce the trust for the uses for which it was founded. *Nelson* v. *Benson*, 69 Illinois, 31.

Title to church property is in that part, although a minority, which adheres to the ecclesiastical laws, usages, and principles of the denomination under which the church was constituted. *Schnorr's Appeal*, 67 Pennsylvania State, 138; 5 Am. Rep. 415, citing the principal case: *Roshi's Appeal*, 69 Pennsylvania State, 462; 8 Am. Rep. 275, citing the principal case. So *Harmon* v. *Dreher*, 1 Spears' Equity (South Carolina), 87; *Baker* v. *Fales*, 16 Massachusetts, 487; *Miller* v. *English*, 1 Zabriskie (New Jersey), 317; *Hale* v. *Everett*, 53 New Hampshire, 9; 16 Am. Rep. 82; where a majority of a Unitarian society formed a new society and employed a pastor, who avowed that he was neither a Unitarian nor a Christian, and the minority had an injunction against such preaching in the meeting-house. (SARGENT, J., gave an opinion of 108 pages of the American Reports, and DOE, J., dissented at the length of 150 pages of the original report.) See to the same effect, *Gaff* v. *Greer*, 88 Indiana, 122; 45 Am. Rep. 449; *Baker* v. *Ducker*, 79 California, 365; *Hackney* v. *Vawter*, 39 Kansas, 615; *Smith* v. *Pedigo*, — Indiana, —; 19 Lawyers' Reports Annotated, 433; *Mt. Zion Baptist Church* v. *Whitmore*, 83 Iowa, 138; 13 Lawyers' Reports Annotated, 198; *Finley* v. *Brent*, 87 Virginia, 103; 11 Lawyers' Reports Annotated, 214; *Lutheran Evan. Church* v. *Gristgan*, 34 Wisconsin, 337; *Lamb* v. *Cain*, 129 Indiana, 486; 14 Lawyers' Reports Annotated, 518; *Bear* v. *Hearsley*, 98 Michigan, 279; 24 Lawyers' Reports Annotated, 615.

But in *Petty* v. *Tooker*, 21 New York, 267, it was held (distinguishing the principal case) that the trustees and a majority of the society could change from Congregationalist to Presbyterian (no difference in doctrine but only in forms), and retain possession of the church property against those who adhered to the faith of the founders of the church and society. See *Gram* v. *Prussia, &c. German Soc.*, 36 New York, 161; *Robertson* v. *Bullions*, 11 New York, 243. In *Petty* v. *Took*, *supra*, the Court said of the principal case: "Worship by Unitarians and the preaching of Unitarian doctrines at the time the trust was created were prohibited by law: were indeed a crime under the common law and under the statute of 9 and 10 Will. III. ch. 32; and it was not to be *presumed* that any person intended to establish a trust and a worship which was illegal and criminal. That this was the true reason upon which the decision was based may be proved beyond doubt or cavil from the case itself."

Where both parties adhere to the tenets and discipline of the organization, the property should be divided between them in proportion to their numbers at the time of the separation. *Niccolls* v. *Rugg*, 47 Illinois, 47; 95 Am. Dec. 462.

CONFLICT OF LAWS.

See also "Accident," No. 10, R. C. Vol. 1, p. 338; "Action," No. 2, R. C. Vol. 1, p. 533; "Administration," Nos. 2 & 3, R. C. Vol. 2, pp. 56, 78; "Bill of Exchange," No. 13, R. C. Vol. 4, p. 287, *et seq.*

SECTION I. — *Jurisdiction.*

No. 1. — HARVEY *v.* FARNIE.

(H. L. 1882.)

RULE.

THE Court of competent jurisdiction in the country where the husband is domiciled is the proper Court to determine any question regarding the *marriage status*, and in particular to pronounce a judgment dissolving the marriage; and a judgment of divorce duly pronounced by such Court is valid everywhere.

Harvey v. Farnie.

8 App. Cas. 43-64 (s. c. 52 L. J. P. D. & A. 33; 48 L. T. 273; 31 W. R. 433).

Conflict of Laws. — Marriage. — Domicil. — Jurisdiction for Purpose of [43] *Divorce only. — Validity of Decree of Divorce.*

The English Courts will recognize as valid the decision of a competent foreign Christian tribunal dissolving the marriage between a domiciled native in the country where such tribunal has jurisdiction, and an English woman, when the decree of divorce is not impeached by any species of collusion, or fraud. And this, although the marriage may have been solemnized in England, and may have been dissolved for a cause which would not have been sufficient to obtain a divorce in England.

No. 1. — Harvey v. Farnie, 8 App. Cas. 43, 44.

When an English woman marries a domiciled foreigner, the marriage is constituted according to the *lex loci contractus;* but she takes his domicile and is subject to his law.

A domiciled Scotchman married, in England, an English woman. Immediately after the ceremony the married couple went to Scotland and resided there as their home. Two years after, the wife obtained in Scotland a divorce *à vinculo matrimonii*, on the ground of her husband's adultery only. The husband came to England, and married there another English woman, the first wife being still alive. In a suit for a declaration of the nullity of the first marriage at the instance of the second wife : —

Held, affirming the decision of the Court below, that the divorce in Scotland was a sentence of a Court of competent jurisdiction, not only effectual within that jurisdiction but entitled to recognition in the Courts of this country also.

Lolley's Case, Russ. & Ry. 237, explained: *Warrender* v. *Warrender*, 2 Cl. & F. 488; *Geils* v. *Geils*, 1 Macq. 255, undistinguishable; *Maghee* v. *M'Allister*, 3 Ir. Ch. 604, also undistinguishable and affirmed; *M'Carthy* v. *Decaix*, 2 Russ. & My. 614, dissented from.

Query, Whether a *bonâ fide* change of domicile which was English at the date of the contract would affect the question of dissolution; and whether *Pitt* v. *Pitt*, 4 Macq. 627 would govern cases like *Niboyet* v. *Niboyet*, 4 P. D. 1, if they arose in Scotland.

Appeal from the Court of Appeal.

Henry Brougham Farnie, the respondent, a Scotchman by birth, and domiciled in Scotland at the time of his marriage, married on the 13th of August, 1861, at Cardigan, Elizabeth Bebb Davies, an English woman; and immediately after his marriage re-
[* 44] turned with her to Scotland, as their permanent * matrimonial home. He lived with her there until 1863, when his wife obtained in the Scotch Courts a decree for divorce *à vinculo matrimonii*, upon the sole ground of his adultery committed in Scotland.

After the dissolution of the marriage, the respondent came to England; and on the 31st of May, 1865, married the appellant, his first wife being still alive. In 1879, when the appellant was about to prosecute a suit for divorce on the grounds of cruelty, adultery, and desertion, she heard for the first time of the prior marriage and of the decree of divorce; and having ascertained that the said Elizabeth Bebb Davies was living at the time of the marriage in 1865, she presented a petition praying for a declaration that her marriage with the respondent was null and void.

The respondent, in his answer, referring *inter alia* to his Scotch

domicil, set out the decree of the Court of Divorce in Scotland, and prayed the rejection of the appellant's petition.

The appellant in her reply stated, that whatever may have been the effect in Scotland of the decree, the respondent did not thereby become free during the life of Elizabeth Bebb Davies to contract a valid and lawful marriage in England.

James, Cotton, and Lush, L JJ., affirming the decision of the President of the Probate and Divorce Division, 5 P. D. 153; 49 L. J. P. D. & A. 33, dismissed the petition. 6 P. D. 35; 50 L. J. P. D. & A. 17.

Nov. 28, 30. Benjamin, Q. C., and Fooks contended, for the appellant, that it is a general rule of English law that a marriage solemnized in England between an English woman domiciled in England and a foreigner (a Scotchman being for this purpose in the same position with a foreigner) is an "English marriage" in contemplation of English law. Secondly, that no foreign Court had any jurisdiction to dissolve such a marriage: *Lolley's Case*, Russ. & Ry. 237; 2 Cl. & F. 567; Lord Eldon in *Tovey* v. *Lindsay*, 1 Dow. App. 117, pp. 136, 141; 14 R. R. 19, 32, 35; *M'Carthy* v. *Decaix*, 2 Russ. & My. 614; 2 Cl. & F. 568; Lord Lyndhurst in *Warrender* v. *Warrender*, 2 Cl. & F. 488, at pp. 558, 567; Lord Westbury in *Shaw* v. *Gould*, L. R., 3 H. L. at pp. 86, 87; 37 L. J. Ch. 444; or, at all events, a dissolution by an otherwise competent foreign jurisdiction was only recognised by * the English Courts when granted for causes for which [*45] it might have been obtained in England. Thirdly, even considering the validity of the Scotch decree it could not have any extra-territorial effect and must be held invalid in England.

Lolley's Case, 1812, Russ. & Ry. 237; 2 Cl. & F. 567, decided that no sentence or act of any foreign Court or state could dissolve an "English marriage *à vinculo matrimonii* for grounds for which it was not liable to be dissolved *à vinculo matrimonii* in England." That unanimous decision of twelve Judges was not based upon the particular facts of that case, but upon general principles peculiarly applicable to the general law of England. It was upheld by all the subsequent cases. In *Tovey* v. *Lindsay*, 1813, 1 Dow. 117; 14 R. R. 19, the question whether the Scotch Courts have jurisdiction to entertain suits for dissolving marriages contracted and solemnized in England according to English law, was submitted, but was not decided. The interlocutors under appeal were

pronounced before *Lolley's Case* was decided, and the Judges being of opinion that that decision and other questions had given the case a more serious aspect, it was remitted for further consideration, but Mr. Lindsay dying it never came to a final decision. See 2 Cl. & F. at p. 565. But there Lord ELDON said, by English law, "an English marriage could not be anywhere dissolved except by Act of the Legislature." 1 Dow. at p. 136; 14 R. R. 32.

That case was followed by *M'Carthy* v. *Decaix*, 1831, 2 Russ. & My. 614; 2 Cl. & F. 568, and from the printed papers and the judgment, it plainly appears, that the question was clearly raised and absolutely decided in the appellant's favour. The husband, a domiciled Dane, married in England an English woman; they returned to Denmark as their matrimonial home, and after a time the husband obtained a valid Danish divorce there. The wife returned to England. After the death of both, a question between the personal representative of each, arose, whether the husband after the divorce and death of the wife had renounced all claims which accrued to him under a settlement, or in his marital character. The point was made that the husband had been deceived, both as to the effect of the divorce and also as to the deceased wife's property; and then arose the point as to the recog-
[* 46] nition of the Danish divorce * by English law. And Lord BROUGHAM decided that the wife was still the wife. 2 Russ. & My. at p. 619. He said, "Now, if it has not validly and by the highest authorities in Westminster Hall been holden, that a foreign divorce cannot dissolve an English marriage, then nothing whatever has been established. For what was *Lolley's Case?*"

Then what was an "English marriage?" In *Warrender* v. *Warrender*, 1835, 2 Cl. & F. 488; 9 Bl. N. S. 89, a case similar in facts to this, but no decision as to the English law, inasmuch as — and all the Lords specially mention it — this House was then sitting on a Court of Appeal as to the law of Scotland, Lord LYNDHURST called a marriage between a domiciled Scotchman solemnized in England according to English law and ritual, an "English marriage," 2 Cl. & F. 488, at p. 564; alluding to *Duchess of Hamilton* v. *Duke of Hamilton*, February 7, 1794; 9 Cl. & F. 327; see also Lord BROUGHAM, 2 Cl. & F. p. 540.

[Lord SELBORNE, L. C.: — The words "English marriage," are liable to two constructions, — the contract of marriage performed in England is an "English marriage;" and a marriage performed

with a domiciled Englishman is an "English marriage," and these words are used with this double sense by the Judges in the case of Lolley and others.]

When the words "English marriage," or "Scotch marriage" are used in these mixed marriages, the marriages are called, with respect to the dissolution, an "English marriage," and with regard to civil rights, a "Scotch marriage." In *Munro* v. *Munro*, 1840, 7 Cl. & F. 842, a Scotchman cohabited with a woman in England, and had children, and then married her in England, with regard to a question as to the descent of real estate in Scotland, Lord COTTENHAM called it a "Scotch marriage," see also *Birtwhistle* v. *Vardill*, 1835, 2 Cl. & F. 571, No. 5, p. 748, *post*. In *Geils* v. *Geils*, 1 Macq. at pp. 258, 259, 263, 364, Lord ST. LEONARDS said, "She (the wife) is equally an English wife; the marriage is both an English and a Scotch marriage." Then he continued: "I am not here to advise your Lordships to dispute the law in *Lolley's Case*. It shows, that which we know well exists, a conflict between the law of England and that of Scotland." And *he [*47] concurred with Lord BROUGHAM that *Warrender* v. *Warrender*, 2 Cl. & F. 488, would not break in on *Lolley's Case*. The only point there was whether the wife had lost her right to go to the Court of Scotland for further relief in consequence of the relief which she had already obtained in the Courts of this country, and it was then held that the Scotch Courts had jurisdiction in Scotland for Scotch purposes. In *Dolphin* v. *Robins*, 1859, 7 H. L. C. 390, at p. 414; 29 L. J. P. & M. 11, Lord CRANWORTH stated that *Lolley's Case* had been frequently acted on. That it was now established that the Scotch Courts had no power to dissolve an "English marriage where the parties are not really domiciled in Scotland;" and he declined to give an opinion whether the Scotch Courts could dissolve such a marriage if there had been *bonâ fide* domicil in Scotland.

[LORD SELBORNE, L. C.: — If the parties were domiciled in England at the time of the marriage, the question then might arise, if the husband changed his domicil, whether there was not a breach of the contract, and it could not be dissolved according to the law of the new domicil.]

The only question in this House in *Pitt* v. *Pitt*, 1864, 1 Ct. Sess. Cas., 3rd Series, 106; reversed on app. 4 Macq. 627,[1] — a marriage

[1] As to remarks of the LORD CHANCELLOR, see Lord WESTBURY at p. 640.

in England, — was as to whether Colonel Pitt had obtained an absolute domicil in Scotland; the counsel for the respondent, Colonel Pitt, having withdrawn the contention that the Scotch Courts could annul the marriage of a foreigner, not domiciled, though temporarily resident within the Scotch jurisdiction. In *Maghee* v. *M'Allister*, 1853, 3 Ir. Ch. 604, it was held that a marriage solemnized in England between a domiciled Scotchman and an Irish woman may be dissolved by decree for divorce pronounced by the Scotch Courts. That case was not cited in *Pitt* v. *Pitt*, or *Dolphin* v. *Robins*; but admittedly, it was against the appellant so far as it went. In *Shaw* v. *Gould*, 1868, L. R., 3 H. L. 55, at p. 81; 37 L. J. Ch. 433, a question arose as to the right of children by a second marriage to succeed to property situated in England. Two domiciled English persons were married in England, the marriage was never consummated; but the husband committed adultery in England. [*48] *For the purpose of getting a divorce they proceeded to Scotland, and there the wife obtained a divorce; and married in Scotland, an Englishman, who thenceforth took up his permanent abode in Scotland. In that case Lord WESTBURY was of opinion, L. R., 3 H. L. at pp. 86, 87; 37 L. J. Ch. 447, that where a Scotchman married an English woman in England, that was an "English marriage," and he blamed Lord BROUGHAM for calling *Warrender* v. *Warrender* a Scotch marriage, which he did, said Lord WESTBURY, for the purpose of escaping from the resolution in *Lolley's Case*. Lord WESTBURY also said: "The foreign decree may be perfectly valid and unimpeachable within the territorial jurisdiction of the Judge who pronounced it, . . . but it may still not be such a sentence as by the comity of nations has an extra-territorial effect and authority. The first essential for the validity of a foreign decree is that it should be pronounced by a Court of competent jurisdiction between parties who are *bonâ fide* subject to that jurisdiction." L. R., 3 H. L. at p. 81.

Applying that proposition to the further point, where one of the parties is English, the wife in this case, and taking the element of the English marriage, it applied here, and it followed that though the decree of divorce might be good and valid in Scotland, it had no extra-territorial effect in England. In *Niboyet* v. *Niboyet*, 1878, 4 P. D. 1; 48 L. J. P. D. & A. 1, domicil was held not necessary to give jurisdiction. The doctrine of the English

law is that the wife had a right to remain the wife as a consequence of the marriage, — though equally true, that the domicil of the husband is the domicil of the wife. But her consent to go into a foreign jurisdiction does not alter the circumstances under which she entered into the marriage contract, namely, on the footing — as it must be taken — that the English contract would be governed by the law of England. They submitted, the House could not decide this case in the same way as the Court below had done without overruling *Lolley's Case*. [*Ringer* v. *Churchill*, 1840, 2 Ct. Sess. Cas. 2nd Ser. 307, and *Sotomayer* v. *De Barros*, 5 P. D. 94; 49 L. J. P. D. & A. 1; No. 8, *post*, were also referred to.]

Winch and Alexander Ward for the respondent were not heard.

* Lord Selborne, L. C.: — [* 49]

My Lords, this case has been argued by the learned counsel for the appellant at considerable length, and the legal principle involved in it is not new to your Lordships. If it were not that there has been much consideration and discussion, if not in cases exactly resembling the present, yet in cases involving principles bearing upon the present, I have no doubt that your Lordships would have desired to hear a full argument on both sides; but looking to the nature of this particular case and to the state of authority upon the subject, I believe your Lordships are all of opinion that it is not necessary to call upon the counsel for the respondent here.

The ground upon which this Scotch divorce is impeached appears to be this, and this alone, that by the law of England a divorce for such a cause (adultery) as was alleged here, is only granted at the suit of the husband, except under particular circumstances, which in this case do not appear to have existed. The husband's adultery, without anything more, would not in England be a ground of divorce. It is a ground of divorce in Scotland; and this divorce was upon that ground at the suit of the wife.

The circumstances under which this divorce was obtained were these. The marriage had been solemnized in England; but at the time of the marriage the husband was domiciled in Scotland. That matrimonial domicil was never changed. The husband and wife lived in Scotland; the adultery was committed in Scotland;

and when both parties were resident there the suit for divorce was instituted in Scotland, and a decree was regularly pronounced by the Scottish Courts. The Judge of the Divorce Court and the Court of Appeal have both held that under those circumstances the sentence of divorce, not being impeached for any species of collusion or fraud, was the sentence of a Court of competent jurisdiction, not only effectual within that jurisdiction, but entitled to recognition in the Courts of this country also. On the other side it has been contended that there is a general rule of English law supposed to have been established in *Lolley's Case* and not [* 50] to have been since departed from, * to the effect that if an English woman is married within the English jurisdiction to a foreigner (a Scotchman being for this purpose in the same position with a foreigner), that is a marriage which the English Courts must regard as indissoluble by any other than an English jurisdiction; or at all events only dissoluble, in the view of an English Court, if dissolved by some other competent jurisdiction for a cause for which it might have been dissolved in England.

Now, I must take the liberty of saying that if this question is to be tested upon principle apart from authority, although it cannot be denied that the varying jurisprudence, and perhaps legislation also, of different countries may and do introduce some undesirable cases of conflict between the laws of those different countries on questions of matrimonial status, yet I should certainly say that in such circumstances as those which exist in the present case the principles of private international law point in the direction of the validity of such a sentence and of its recognition by the Courts of other countries. Of course I assume that in the way of that recognition there would not be interposed any positive legislation bearing upon the point, or any positive prohibition of its own law binding upon the Court in which the question arises. Upon this point of principle how does the matter stand? Let it be granted (and I think it is well settled), that the general rule, internationally recognised, as to the constitution of marriage is, that when there is no personal incapacity attaching upon either party, or upon the particular party who is to be regarded, by the law to which he is personally subject, that is, the law of his own country, then marriage is held to be constituted everywhere if it is well constituted *secundum legem loci contractus*. But that merely determines what in all these cases

is the point you start from. When a marriage has been duly solemnized according to the law of the place of solemnization, the parties become husband and wife. But when they become husband and wife what is the character which the wife assumes? She becomes the wife of the foreign husband in a case where the husband is a foreigner in the country in which the marriage is contracted. She no longer retains any other domicil than his, which she acquires. The marriage is contracted with a view to * that matrimonial domicil which results from her [*51] placing herself by contract in the relation of wife to the husband whom she marries, knowing him to be a foreigner, domiciled and contemplating permanent and settled residence abroad. Therefore it must be within the meaning of such a contract, if we are to inquire into it, that she is to become subject to her husband's law, subject to it in respect of the consequences of the matrimonial relation and all other consequences depending upon the law of the husband's domicil. That would appear to be so upon principle; and that principle followed out would certainly apply in a case like this, where the domicil into which she has married has never undergone a change, where there has been no divergence of cohabitation or residence, and where the crime was committed in the country both of the domicil and of the forum. It would appear, therefore, that if this question is to depend on any principle at all it must be upon the principle of recognising the law of the forum and matrimonial domicil, when, as in this case, they both concur.

Let us now see how the matter really stands upon the authorities. There are a number of different cases which may be mentioned, and which may be distinguished from each other; but as far as I know there are only two or three cases, among those mentioned at the bar, which present concurrently all the circumstances relied upon for the foundation of the jurisdiction in the present case.

It is said that those circumstances existed in the case of *M'Carthy* v. *Decaix*, 2 Russ. & My. 614, because there the solemnization of the marriage was also in England, but the husband was a Dane. As I collect, the parties lived together in Denmark as long as they lived together at all, and in the Courts of Denmark, while they both lived there, a sentence of divorce was pronounced. That sentence was not for a cause which even under our present

law would be recognised in England, — it was for what abroad is called, or at least that is our English translation of the foreign legal term, incompatibility of temper. But except as to the nature of the cause of divorce that case would seem in its original facts to have been like the present. It is said that Lord
[* 52] * Brougham, in the case of *M'Carthy* v. *Decaix*, decided that because the solemnization of the marriage with an English woman had taken place in England, therefore the Danish Court could not under those circumstances dissolve the marriage. I have all due respect for the judicial decisions of all who have at any time filled the office of Lord Chancellor. I have great respect for the high reputation of Lord Brougham; but I am compelled to speak without much respect of the decision in *M'Carthy* v. *Decaix*, not only because it appears to me to proceed upon a view of *Lolley's Case*, Russ. & Ry. 237, which is not really tenable, but also because it is a decision which, upon principles universally recognised, would be incapable of being supported even if it were true that the English Court ought not to have recognised that Danish divorce; because beyond all doubt on that supposition both the husband and the wife lived and died domiciled in Denmark, and the distribution of both their personal estates would, by a law which is beyond controversy, fall to be regulated in England and everywhere by the law of Denmark, and not by the law of England; and therefore, unless it had been ascertained that the law of Denmark under those circumstances would not distribute those estates in the same manner as if there had been a valid divorce, the decision manifestly lost sight of the true question in the cause. I do not, therefore, think it necessary to say more about the case of *M'Carthy* v. *Decaix*. It has been commented upon on various occasions in a manner certainly tending to shake its authority; but to my mind nothing more is necessary to destroy its authority than to bear in mind the fact that even if the English Courts ought to have declined to recognise in that case the Danish divorce, still the English Courts could not with propriety have applied the English law to the case, because the distribution of the movable property in question depended entirely upon Danish law, and the English Courts were bound to treat it as depending upon Danish law.

Therefore the case of *M'Carthy* v. *Decaix* may be put aside. I am not quite sure, but I think that in the case of *Geils* v.

Geils, 1 Macq. 255; 13 Court Sess. Cas. 2nd Ser. 321, the circumstances were also parallel with those of the present case; *because there, if I am not mistaken, not only was the [*53] Scotch matrimonial domicil unchanged at the time of the divorce, but I think the adultery was committed in Scotland, and at the time of the action brought, the husband, against whom it was brought, was resident in Scotland. In that case the decision of the Scotch Court was upheld upon an appeal from Scotland to this House. No doubt that by itself does not prove that an English Court ought also to have recognised the validity of the decision; but having regard to what has constantly fallen from the Judges who in this House have determined questions of that kind with reference to general principles, I think the presumption is that an English Court ought, unless some reason, which at present I am unable to perceive, be shown to the contrary, to recognise the decision of a Scotch Court in a case in which this House has held that the Scotch Court had proper jurisdiction to pass such a sentence.

The third case is *Maghee* v. *M'Allister*, 3 Ir. (Ch.) 604, a case in Ireland before Lord Chancellor BLACKBURNE. There, as in the Danish case, the cause of divorce was one which would not be sufficient in England (desertion and non-adherence), but the parties there also had been from the first matrimonially and actually domiciled in Scotland. They were not both in Scotland when the action was brought, and that makes it stronger. I rather think that the cause of action arose out of the fact that the wife, against whom the action was brought, had withdrawn herself and she was living elsewhere. Nevertheless the jurisdiction was upheld on the same principles on which this House upheld the Scotch jurisdiction in *Warrender* v. *Warrender*, 2 Cl. & F. 488; 9 Bl. N. S. 89, where the matrimonial domicil had all along been Scotch, but the crime was alleged to have been committed out of Scotland, and the wife was resident out of Scotland. Still this House held, in a Scotch appeal undoubtedly, that the Scotch Court had proper jurisdiction; and the LORD CHANCELLOR of Ireland, under circumstances similar in principle, held that an Irish Court ought upon principle, according to the comity of nations, to recognise the competency of the Scotch jurisdiction to pronounce the divorce which had been pronounced in *Maghee* v. *M'Allister*.

I believe that those are the only cases which are in their

[*54] *material circumstances exactly like the present. Much of illustration and of valuable and important doctrine is undoubtedly to be found in other authorities. I will just glance at some of those authorities in order to see precisely what they do and what they do not determine. I will begin with *Lolley's Case*, Russ. & Ry. 237.

Now what was *Lolley's Case?* It was a case of this class, that persons who had married, and had always been and always continued to be matrimonially and actually domiciled in England, had recourse to Scotland for the purpose of constituting a merely forensic domicil, and there obtained a divorce for a crime, I take it, committed in Scotland. That was held by the English Courts not to be a valid sentence. I do not myself think that there was any very great hardship upon Mr. Lolley, the husband, because, whether there was collusion on the part of his wife or not, it is quite certain that he went through the whole proceeding in order to get rid of his wife and marry another woman with whom he had already entered into a conditional engagement. But there was a total absence of matrimonial or actual domicil. We need not consider whether a change of domicil would or would not have been sufficient — the domicil was throughout English, and the recourse to Scotland was merely for the purpose of getting rid of the marriage. That case decided, and every subsequent case is consistent with the decision, that in those circumstances the Scotch Court had no proper jurisdiction, or at all events, not such a jurisdiction as could be recognised for the purpose of giving any effect to its sentence in England.

There arose a somewhat similar question in the case of *Torey* v. *Lindsay*, 1 Dow. 117, at p. 124, 14 R. R. 19, 23, and it is remarkable that there Lord ELDON did in the course of the argument, according to the report which I hold in my hand, once or twice, before he came to deliver judgment, express himself in terms not different from those used at your Lordships' bar by the learned counsel for the appellant as to the point decided in *Lolley's Case*. He is reported to have said, on page 124 of the report, that the "twelve Judges had lately decided that as by the English law marriage was indissoluble, a marriage contracted in England could not be dissolved in any way except by an Act of the Legis-
[*55] lature;" which is very much the way in *which Mr. Benjamin put it. And, again, on the top of the next page,

"You say that the marriage ought to be dissolved; her answer to that is, that being contracted within the pale of the English law it is indissoluble." So that Lord ELDON, during the argument, once or twice expressed himself, with regard to *Lolley's Case*, in the terms of the appellant's argument in this case; but when he came to deliver his judgment it is quite plain that upon mature consideration he saw reason to take a different view. The material facts there were these. The original domicil of the husband was Scotch; he had afterwards lived a good deal in England, particularly at Durham; he had separated from his wife, his wife remained in Durham, and he afterwards sued her for a divorce in Scotland, she being out of the jurisdiction. The Scotch Courts had treated it as a confessedly Scotch domicil. Lord ELDON in the whole of his judgment treats domicil as the point upon which the question ought properly to depend, not however ultimately deciding anything, and certainly not deciding the very important question which might have arisen if the change to an English domicil had been established, namely, how far a subsequent change of domicil would affect the jurisdiction to dissolve the marriage; but he considered the fact of domicil to be necessary to be ascertained, which according to the view of *Lolley's Case* taken by the appellant's counsel at your Lordships' Bar could not have been necessary at all. Therefore I think we may infer very clearly that in Lord ELDON'S mind it could not be determined offhand that the Scotch Court had no jurisdiction, merely on the ground that the marriage had taken place in England.

Then I come to observe upon two other classes of cases, or rather one other class, because *Dolphin* v. *Robins*, 7 H. L. C. 390; 29 L. J. P. & M. 11, and *Shaw* v. *Gould*, L. R., 3 H. L. 55; 37 L. J. Ch. 433, seem to me to be very nearly the same in their circumstances as *Lolley's Case*, and I therefore will not dwell upon those cases. The other class of cases is that which was last mentioned, namely, *Niboyet* v. *Niboyet*, 4 P. D. 1; 48 L. J. P. D. & A. 1, where the forum which dissolved the marriage was not that of the matrimonial domicil, but was that of the *bonâ fide* residence of both parties, both being * within the juris- [* 56] diction, and the crime having been committed there. Now, if that case was well decided, it is certainly not an authority in the appellant's favour; because it goes to this length, that at all events under the English statute, if those circumstances are

found concurring, even domicil is not necessary to give jurisdiction to dissolve a marriage. Whether another country, the country of those parties (France, I think), would have recognised that decision, we need not at present inquire, because either it is applicable on the present occasion, or it is not; if it is applicable it is certainly an authority against the appellant, if it is not applicable it does not help her.

The case of *Pitt* v. *Pitt*, 4 Macq. 627, no doubt, was one which did not present the same circumstances which your Lordships have to consider here; because in *Pitt* v. *Pitt*, in which this House on an appeal from Scotland reversed an order which had affirmed the jurisdiction of the Scotch Court, and therefore determined that the Scotch Court had no jurisdiction, the circumstances were these: The matrimonial domicil was English — the solemnization of the marriage was in England — Col. Pitt, the husband, had gone to Scotland; it was in controversy whether he had there acquired an actual domicil or not, but it was decided that he had not. He therefore retained his English domicil. The wife was not in Scotland, and the alleged adultery was not committed in Scotland. In those circumstances the House came to the opposite decision from that which it had arrived at in *Warrender* v. *Warrender*, 2 Cl. & F. 488; 9 Bl. N. S. 89, the circumstances being very parallel, except that in the one case there was, and in the other case there was not, a Scotch domicil. In *Warrender* v. *Warrender* where there was under those circumstances a Scotch domicil, the jurisdiction was upheld, though the crime had not been committed in Scotland, and though the wife, who was the defender, was not resident in Scotland. In *Pitt* v. *Pitt* the jurisdiction was denied, because there was not a Scotch domicil, the other circumstances being the same.

Now, my Lords, I do not say that the case of *Pitt* v. *Pitt* would of necessity govern cases like *Niboyet* v. *Niboyet* for example, if they were to arise in Scotland. That is not a [* 57] question * which your Lordships have now to determine, and it is not desirable that you should go beyond the case which you have to determine; but this I will say, without going through the authorities or all the cases which have been cited, that when they are carefully examined you find that the current of judicial opinion which pervades them is in favour of regarding and not disregarding international principles upon this subject,

No 1. — Harvey v. Farnie, 8 App. Cas. 57, 58.

when you do not find the positive law of the country of the forum in conflict with those principles, unless *M'Carthy* v. *Decaix*, 2 Russ. & My. 614, may be considered to be an exception. The present decision in the Court of Appeal is in accordance with international law, and with the whole stream of sound authority, including Lord Lyndhurst, Lord Brougham himself (though no doubt, from the view which he took of *Lolley's Case* he not unfrequently contended against it in terms which your Lordships probably would not adopt), Lord St. Leonards, Lord Westbury, Lord Cranworth, Lord Chelmsford, and Lord Kingsdown, all of whom concur. I have no hesitation in saying that, from the passages which have been read from the judgments of each and every one of those noble and learned Lords, I should confidently infer that, if the present case had been argued before all or any one of them, they would have concurred in the judgment which I now move your Lordships to pronounce, which is that the present appeal be dismissed with costs.

Lord Blackburn : —

I am entirely of the same opinion. I agree in almost everything that has been said, and I should hardly consider it necessary to add anything if it were not that I wish to point out that the only question that we have to decide at present is that in this case the divorce was good, that the Court in Scotland had under the circumstances of this case the proper power to divorce, and that that divorce put an end to the marriage. Several cases were cited and arguments used for the purpose of showing that in some cases a divorce might not have been good where there was not so much ground for it as there is here. That, I apprehend, we have * not to consider. It is no objection to this being [* 58] a good divorce and putting an end to the marriage in this case to say that there might be cases in which the facts did not go so far and in which a divorce might not be good according to some of the decisions. That would not at all affect the present decision, which is that in the present case there is enough to do it.

Let us now see what the present case is. A Scotchman domiciled in Scotland, and being to all intents and purposes a Scotchman, comes to England and there marries an English wife. She was an English woman up to the moment of her marriage. The marriage took place in England according to the forms of English

law, and from the moment of her marriage she became a domiciled Scotch woman just as her husband was a domiciled Scotchman. There was nothing whatever to change that domicil; and whilst they were both in Scotland there was a divorce by a Scotch Court from the marriage, a dissolution *a vinculo matrimonii* on the particular ground of an offence committed in Scotland. Now the question is, Is that divorce good in England? Is it according to English law that a dissolution of marriage by a Scotch Court under those circumstances is a good dissolution of marriage in England? Whether it would have been good in Scotland or not would not have been the same question. I can easily suppose that there might be good divorces in Scotland that would not be good in England. The question is whether this is good in England.

Seeing that there was this complete domicil, which almost every writer and speaker upon the subject has regarded as certainly the most important element in considering what the status of married people is, and the status of those divorced from a marriage (this was in its origin a Scotch domicil from the very beginning), the only ground upon which it has been said that a Scotch Court could not divorce the parties was that the actual marriage, the contract, was made in England. I do not myself see why upon any principle that should make any difference. What was urged was that there was authority for that proposition, and for that purpose *Lolley's Case* was cited.

Now, Lord BROUGHAM did more than once cite and act [* 59] upon * *Lolley's Case* as though he had understood it as going to the full extent of what I have just said, that the fact that a marriage was contracted locally in England made it an English marriage, and therefore indissoluble by any foreign Court on the ground of adultery or anything else. Lord BROUGHAM appears to have thought that that was the decision in *Lolley's Case*, but I think that that was not the decision. When you look at the facts in *Lolley's Case* they are clear. An English husband married an English wife in England; he was a domiciled Englishman, she was a domiciled English woman. They continued to be domiciled Englishman and English woman down to the moment when, going into Scotland for a temporary purpose, he there committed adultery, and she, therefore, caused him to be divorced in a Scotch Court. Now in that state of facts the point which was

decided by the twelve Judges, upon the point being brought forward, was this. They said they could not and would not inquire into whether there was fraud or not, because if there had been any fraud it ought to have been left to a jury to find it and that the fraud was not left to a jury; but they did find upon the very point that was brought before them, and which they had before them, that there was an English domicil throughout the whole period of the case, and when they decided that an "English marriage," which, I think, is the phrase that was used, was indissoluble by a foreign Court, I think they meant an English marriage under these circumstances and in this way, namely, one where the domicil was English from the beginning to the end of the transaction. Lord BROUGHAM certainly did not understand it so, and more than once in his anger against *Lolley's Case* he was inclined to maintain that *Lolley's Case* was decided upon the ground of the contract being English, and to drive it to absurd results, a *reductio ad absurdum*, to show that *Lolley's Case*, as he understood it, was wrong and could not possibly be right; but there is no case that I am aware of which says that *Lolley's Case*, as I have just put it, was not right. There is no case which either in Scotland or in this country decides finally that even in Scotland a divorce under such circumstances as those of *Lolley's Case* would be good. Whether upon the authorities it might not be *decided hereafter (it has not yet been decided) [* 60] that a divorce in Scotland in such circumstances as those of *Lolley's Case* would not be valid even by Scotch law is a point which does not arise in the present case, and upon which I wish to express no opinion either one way or the other.

Assuming that in *Lolley's Case* the divorce would be good in Scotland, it would not be to my mind a very uncomfortable result that it should be good in Scotland and bad in England; but it does not, to my mind, prove at all that this case was not rightly decided. We have not even to consider whether or not a divorce under the circumstances of *Lolley's Case* would in England be bad, but whether a divorce under the circumstances of this case would be bad because it might have been shown to have been void in *Lolley's Case* under the circumstances of that case. The validity of the divorce in *Lolley's Case* is not the question which is now at all before your Lordships.

Several of the other cases which were cited, such as the case of

Niboyet v. *Niboyet*, 4 P. D. 1; 48 L. J. P. D. & A. 1, would only, I think, at the utmost go to this, that there may be grounds (I do not inquire whether they would be good or bad grounds) for saying that a divorce may be good and valid, and ought of course to be valid in every country if it is valid in the country where it is pronounced, under circumstances which go the length of these. There was a difference of opinion in that case, and I wish to express no opinion upon it one way or the other; but supposing it were valid, going even further than this case, how can that be an authority for saying that it is not valid when the circumstances only go as far as they do here?

Now, I need not repeat what has been said with regard to Lord Brougham's expressions. I can only say that weighing them, not as authorities binding upon me, but, merely as expressions of Lord Brougham's opinion, his reasoning in the cases which have been cited does not carry much weight or influence in my mind. And the authority of the Lord Chancellor Blackburne, *Maghee* v. *M'Allister*, 3 Ir. Ch. D. 604, certainly seems to me to decide exactly the contrary. It appears to me that he was quite right in [* 61] his decision upon the facts before him, * and he gives very good grounds for it. I think his decision is in conformity with all that has been thrown out by various Judges at different times. Without going further than that, and without entering into the question and saying whether a *bonâ fide* change of a domicil which was originally English would affect the question or not, I say that it seems to me that there is no authority except Lord Brougham's, against the proper doctrine which is now laid down by the Court below in the present case, but that there is every authority, except Lord Brougham's, going the other way.

I must observe one thing further. I should have said it, perhaps, a little earlier. I think when you come to look at the expressions which, in a case decided immediately after *Lolley's Case*, namely, *Torey* v. *Lindsay*, 1 Dow. 117; 14 R. R. 19, Lord Eldon used with reference to *Lolley's Case*, you find that although Lord Brougham had given a report of that case in which he said that it was held that a marriage was indissoluble in Scotland when contracted in England, Lord Eldon, before he come to deliver judgment, saw that the decision in *Lolley's Case* was that it was indissoluble when it was an English domiciled marriage *ab initio* down to the time of the divorce. All that was done in that case

was to send the cause back again to Scotland in order that the Scotch Courts might consider with great care before they decided that they had the power to divorce under circumstances which raised such questions as those involved in that case, namely, the effect of the domicil of origin having been Scotch; and apparently continuing such when the marriage was contracted locally in an English colony; and then the domicil being changed to England, and then after a separation the husband renewing his original domicil. It appears that the party died shortly afterwards, and it was not decided then and I do not think it was ever finally decided by the Scotch Courts; at all events, I do not think it would be proper now for your Lordships to form the opinion that that question was decided. I think that all that should be decided here is this, that upon such facts as are here stated the Scotch Court had power to direct a divorce which should be valid everywhere.

* Lord WATSON concurred. [* 62]

Fooks, for the appellant, asked that the appeal might be [64] dismissed without costs.

Lord SELBORNE, L. C.: — That will probably depend upon whether security has been given or not. If it has been given, the persons who gave the security will have to pay the costs, and they must get them in the best way they can. [The register of appeals was then sent for, and his Lordship having examined it, said:] — My Lords, I find that there was a petition presented by the appellant in this case praying that the usual security for costs might be dispensed with, and the agent for the respondent consenting thereto, the order was made as prayed. I think that under those circumstances, my Lords, our order ought to be without costs.

Order appealed from affirmed; and appeal dismissed without costs.

ENGLISH NOTES.

The principal case has been followed in *Scott* v. *Attorney-General* (1886), 11 P. D. 128, 55 L. J. P. 57, 56 L. T. 924, and *Turner* v. *Thompson* (1888), 13 P. D. 37, 57 L. J. P. D. & A. 40, 58 L. T. 387.

The jurisdiction of a Court to grant divorce being established, the *lex fori* determines the sufficiency of the causes for dissolving a marriage. English Courts follow this rule in recognising the validity of

foreign divorces, as appears by the principal case; and *à converso* they recognise it in pronouncing judgments of divorce. *Ratcliff* v. *Ratcliff* (1859), 1 S. & T. 467. In *Wilson* v. *Wilson* and *Howell* (1872), L. R., 2 P. & M. 435, 41 L. J. P. & M. 1, 25 L. T. 600, the jurisdiction was upheld even where the husband had acquired English domicil after the adultery and the wife had never been in England.

How far residence, not amounting to domicil will found a jurisdiction for divorce is not very clear.

On the one hand, it seems that English Courts will refuse recognition to the divorce of an English marriage pronounced by the Court of a country where one of the parties was resident, but not domiciled. *Conway* v. *Beasley* (1831), 3 Hagg. Ec. 639; *Tollemache* v. *Tollemache* (1859), 1 S. & T. 557, 30 L. J. P. & M. 113, 2 L. T. 87; *Dolphin* v. *Robins* (1859), 7 H. L. Cas. 390, 3 Macq. H. L. Cas. 563, 29 L. J. P. & M. 11; *Shaw* v. *Gould* (1868), L. R., 3 H. L. 55, 37 L. J. Ch. 433, 18 L. T. 833; *Shaw* v. *Attorney-General* (1870), L. R., 2 P. & M. 156, 39 L. J. P. & M. 81, 23 L. T. 322, all cited in the principal case. In *Brigg* v. *Brigg* (1880), 5 P. D. 163, 49 L. J. P. & M. 38, the marriage was celebrated in England, but the husband went to Kansas and obtained a divorce there, on the ground of desertion. This was held ineffectual.

On the other hand the English Court has assumed jurisdiction in granting divorce from a foreign marriage, where the petitioner was resident, although neither of the parties was domiciled in England. In *Brodie* v. *Brodie* (1861), 2 S. & T. 259, 30 L. J. P. & M. 185, 4 L. T. 307, the husband's residence in England was held sufficient to found jurisdiction. In *Deck* v. *Deck* (1860), 2 S. & T. 90, 29 L. J. P. & M. 129, 2 L. T. 542, the facts that the marriage was English and that the wife continued to reside in England were held sufficient to give jurisdiction for divorce on the wife's petition. In *Santo Teodoro* v. *Santo Teodoro* (1876), 5 P. D. 79, 49 L. J. P. D. & A. 20, 42 L. T. 331, where the domicil was foreign, but the matrimonial domicil had been English previous to the cause of divorce arising, divorce was decreed at the instance of the wife who had continued to reside here. And in the case of *Niboyet* v. *Niboyet* (1878), 4 P. D. 1, 48 L. J. P. D. & A. 1, 39 L. T. 486, which is referred to, and apparently questioned, by the judgments in the principal case, the wife's domicil of origin was English, the marriage was celebrated in Gibraltar, and the adultery and desertion took place in England. The husband's domicil was French. The Court upheld its jurisdiction in spite of the husband's protest.

But these cases appear to be questionable on principle. In *Manning* v. *Manning* (1871), L. R., 2 P. & M. 223, 40 L. J. P. & M. 18, 24 L. T. 196, Lord Penzance clearly indicated his opinion that residence not

amounting to domicil should not confer jurisdiction in divorce. He said (L. R., 2 P. & M. 226, 40 L. J. P. & M. 20): "When the case has been reversed, and when the Courts of this country have had to consider how far persons who are domiciled Englishmen shall be bound by the decree of a foreign matrimonial Court, the strong tendency has been to repudiate the power of the foreign Court under such circumstances to dissolve an English marriage. It would be unfortunate if an opposite course should be followed by the Courts of this country when they are determining to what extent they will entertain the matrimonial suits of foreigners." In *Le Sueur* v. *Le Sueur* (1876), 1 P. D. 139, 45 L. J. P. D. & A. 73, 34 L. T. 511, where a wife deserted by her husband came to live in England, Sir Robert Phillimore refused to entertain her suit for a divorce — England being the place neither of the husband's original nor of his acquired domicil, nor of his residence, nor of the marriage. In *Le Mesurier* v. *Le Mesurier*, 29 June, 1895, the Judicial Committee followed the opinion of Lord Penzance in *Manning* v. *Manning*, and affirmed the judgment of the Supreme Court of Ceylon, who refused to entertain a suit for divorce in Ceylon, the domicil being English.

AMERICAN NOTES

Mr. Bishop cites the principal case (2 Marriage, Divorce, and Separation, §§ 52, 53), to the doctrine of the American States, that "the jurisdiction to dissolve a marriage, wherever celebrated, and for whatever cause, is with the courts of the domicil of the parties, and not elsewhere."

But here the wife may have a domicil separate from the husband's, and a valid divorce may be granted where only one of the parties lives. Bishop, § 55, note 4, disapproving Dr. Phillimore's remarks in *Niboyet* v. *Niboyet*, 3 P. D. 52; and ibid. 112, *et seq.* The doctrine that the husband's domicil is the wife's is subject to the condition that he cannot change hers without inviting or notifying her. *Champon* v. *Champon*, 10 Louisiana Annual, 28. See to this effect, *Harteau* v. *Harteau*, 11 Pickering (Massachusetts), 181; 25 Am. Dec. 372; *Colvin* v. *Read*, 55 Pennsylvania State, 375, 379; *Elder* v. *Reel*, 62 Pennsylvania, 308; 1 Am. Rep. 414; *Mellen* v. *Mellen*, 10 Abbott's New Cases (New York), 329; *Jones* v. *Jones*, 60 Texas, 451; *Frary* v. *Frary*, 10 New Hampshire, 61; 32 Am. Dec. 395; *Harding* v. *Alden*, 9 Greenleaf (Maine), 140; 23 Am. Dec. 549; *Jenness* v. *Jenness*, 21 Indiana, 345; 87 Am. Dec. 335; *Craven* v. *Craven*, 27 Wisconsin, 418; *Hanberry* v. *Hanberry*, 29 Alabama, 719; *Moffatt* v. *Moffatt*, 5 California, 280; *Yates* v. *Yates*, 13 New Jersey Eq. 280; *Kinnier* v. *Kinnier*, 45 New York, 535; 6 Am. Rep. 132; *Fiskli* v. *Fiskli*, 2 Littell (Kentucky), 337; *Sawtell* v. *Sawtell*, 17 Connecticut, 284; *Shanks* v. *Dupont*, 3 Peters (U. S. Sup. Ct.), 242; *Hinds* v. *Hinds*, 1 Iowa, 36; *Wilson* v. *Cheever*, 9 Wallace (U. S. Supreme Ct.), 108; *Sewall* v. *Sewall*, 122 Massachusetts, 156; 23 Am. Rep. 299; *Ditson* v. *Ditson*, 4 Rhode Island, 87; *Cook* v. *Cook*, 56 Wisconsin, 195; 43 Am. Rep. 706; *Smith* v. *Morehead*, 6

Jones Equity (Nor. Carolina), 360; *De Meli* v. *De Meli*, 120 New York, 485; 17 Am. St. Rep. 652; *Williams* v. *Williams*, 130 New York, 193; 27 Am. St. Rep. 517.

These States unanimously hold that domicil of one of the parties is necessary to jurisdiction, and that this lack of jurisdiction may always be shown in one State as against a decree of divorce granted in another. The rules on the subject of marital domicil in respect to divorce may be thus summarized: 1. A divorce in the State where both reside, in compliance with the law of substituted service, although the defendant was not personally summoned and did not appear, is valid everywhere. *Pennoyer* v. *Neff*, 95 United States, 714. 2. A divorce granted at the domicil of either, upon personal service at that domicil, or appearance, is valid everywhere. 3. A divorce granted where neither was domiciled is valid nowhere else. *Watkins* v. *Watkins*, 125 Indiana, 163; 21 Am. St. Rep. 217. 4. Lack of jurisdiction may be shown anywhere outside the State of the divorce. *Litowich* v. *Litowich*, 19 Kansas, 451; 27 Am. Rep. 145.

The prevailing American doctrine was strikingly laid down in *Hunt* v. *Hunt*, 72 New York, 217; 28 Am. Rep. 129, where the parties being domiciled in Louisiana, the defendant husband had procured a divorce against the plaintiff wife, who was absent from the State, upon substituted service of process in accordance with its laws, and this was pronounced valid and conclusive against the maintenance of this action for divorce brought by the wife against the husband.

In *Roth* v. *Roth*, 104 Illinois, 35; 44 Am. Rep. 81, a subject of the King of Würtemberg, domiciled in Illinois, regularly married there. The marriage was void by the laws of Würtemberg because contracted without the license of the sovereign. Both parties returning and becoming domiciled in Würtemberg, the husband obtained a decree that the marriage was void. *Held*, that this deprived the wife of dower in Illinois. Citing the principal case.

A divorce granted by a rabbi, vested with power by the law of the country where the parties were married and are domiciled, to divorce members of his faith, regularly granted after a mode not repugnant to our institutions nor detrimental to society, is valid in New York. *Seshinsky* v. *Seshinsky* (New York Superior Ct.), 5 Miscellaneous Rep. 495.

In respect to a divorce obtained in one State against a resident of another, the situation is thus explained in *Rigney* v. *Rigney*, 127 New York, 408; 24 Am. St. Rep. 462: "The Courts of the United States and those of most of the several States, including New York and New Jersey, hold a divorce to be valid, so far as it affects the marital *status* of the plaintiff, which is granted by the Courts of a State, pursuant to its statutes, to one of its resident citizens in an action brought by such citizen against a resident citizen of another State, though the defendant neither appears in the action nor is served with process in the State wherein the divorce is granted. *Cheever* v. *Wilson*, 9 Wallace, 108; *Pennoyer* v. *Neff*, 95 U. S. 714; *People* v. *Baker*, 76 U. S. 78; 32 Am. Rep. 274; *Doughty* v. *Doughty*, 28 N. J. Eq. 581; Cooley's Constitutional Limitations, 400; 2 Bishop on Marriage and Divorce, sec. 150, *et seq.* But the Courts of this and some of the States hold that the marital *status* of such non-

resident defendant is not changed by a judgment so recovered, he or she remaining a married person. *People* v. *Baker*, 76 N. Y. 78; 32 Am. Rep. 274; *O'Dea* v. *O'Dea*, 101 N. Y. 23; *Jones* v. *Jones*, 108 N. Y. 415; 2 Am. St. Rep. 447; *Cross* v. *Cross*, 108 N. Y. 628; *Cook* v. *Cook*, 56 Wisconsin, 195; 43 Am. Rep. 706; *Doughty* v. *Doughty*, 28 N. J. Eq. 581; *Flower* v. *Flower*, 42 N. J. Eq. 152; 2 Bishop on Marriage & Divorce, secs. 153 *et seq.*; 2 Black on Judgments, sec. 926. In case a defendant is a resident of a State in which the action is brought and amenable to its substantive laws and its laws of procedure, his marital relation may be changed by an *ex parte* judgment of divorce, if constructive service of the process be duly made. *Hunt* v *Hunt*, 72 N. Y. 217; 28 Am. Rep. 129; *Hood* v. *Hood*, 11 Allen, 196; 87 Am. Dec. 709; 2 Black on Judgments, sec. 926; 2 Bishop on Marriage and Divorce, sec. 25." In a note on this case, 24 Am. St. Rep. 468, Mr. Freeman observes on the New York doctrine that the marriage relation is not *res* within the State of a party invoking the jurisdiction of a Court to dissolve it, so as to authorize the Court to bind the absent party, a citizen of another State: "While such appears to be the law in New York, there is no doubt that it is not the law in the other States, and that the Courts of any State are competent to entertain a suit for divorce by any *bonâ fide* resident thereof, against his or her non-resident spouse, and to enter judgment binding on such resident, whether based on constructive service of the process or not. Freeman on Judgments, secs. 581–586; *Cleely* v. *Clayton*, 110 U. S. 708; *Estate of Newman*, 75 Cal. 213; 7 Am. St. Rep. 146; *Jones* v. *Jones*, 67 Miss. 195; 19 Am. St. Rep. 299; *Van Orsdal* v. *Van Orsdal*, 67 Iowa, 35." See also note, 2 Am. St. Rep. 453.

No. 2. — GODARD *v.* GRAY.

(1870.)

No. 3. — SCHIBSBY *v.* WESTENHOLZ.

(1870.)

RULE.

English law treats as binding, and the English Courts will enforce, the judgment of a foreign Court having jurisdiction over the cause of action and over the person to be bound by the judgment.

But, on principles of general jurisprudence, English law does not recognize a duty in any person to submit to the jurisdiction of the Courts of a foreign state of which he is not a subject, and to which he has not owed temporary allegiance either at the time when the alleged obliga-

tion was contracted or at the commencement of the action. And such a person not having in any way submitted to or interfered in the proceedings, he is not, according to English law, bound by the judgment.

Godard v. Gray.

L. R., 6 Q. B. 139-154 (s. c. 40 L. J. Q. B. 62; 24 L. T. 89; 19 W. R. 348).

[139] *Foreign Judgment, Action on — How far Foreign Judgment examinable in English Court.*

It is no bar to an action, on a judgment *in personam* of a foreign Court having jurisdiction over the parties and cause, that the foreign tribunal has put a construction erroneous, according to English law, on an English contract.

Declaration on a judgment of a French Court having jurisdiction in the matter. Plea setting out the judgment, from which it appeared that the suit was for the breach by the shipowner of a charter-party made in England, in which was a clause: "Penalty for the non-performance of this agreement, estimated amount of freight;" and that the Court had treated this clause (contrary to the English law), as fixing the amount of damages recoverable, and had given judgment accordingly for the amount of freight. The proceedings showed that both parties had appeared and been heard before the judgment was pronounced, but no objection was taken by the defendant to the mode of assessing the damages: —

Held, by Blackburn and Mellor, JJ., that the defendant could not set up, as an excuse for not paying money awarded by a judgment of a foreign tribunal having jurisdiction over him and the cause, that the judgment proceeded on a mistake as to the English law, which was really a question of fact; and that it made no difference that the mistake appeared on the face of the proceedings.

By Hannen, J., that the French Court could only be informed of foreign law by evidence; and the defendant, having neglected to bring the English law to the knowledge of the French Court, could not impeach the judgment given against him on the ground of error as to that law.

This was an action on a foreign judgment; and the question before the Court was raised by demurrer to a plea the
[147] effect of which is sufficiently stated in the judgment of Blackburn and Mellor, JJ., delivered by

Blackburn, J. In this case the plaintiffs declare on a judgment of a French tribunal, averred to have jurisdiction in that behalf.

The question arises on a demurrer to the second plea, which sets out the whole proceedings in the French Court. By these it

appears that the plaintiffs, who are Frenchmen, sued the defendants, who are Englishmen, on a charter-party made at Sunderland, which charter-party contained the following clause, "Penalty for non-performance of this agreement, estimated amount of freight." The French Court below, treating this clause as fixing the amount of liquidated damages, gave judgment against the defendants for the amount of freight on two voyages. On appeal, the superior Court reduced the amount to the estimated freight of one voyage, giving as their reason that the charter-party itself, "fixait l'indemnité à laquelle chacune des parties aurait droit pour inexécution de la convention par la faute de l'autre; que moyennant paiement de cette indemnité chacune des parties avait le droit de rompre la convention," and the tribunal proceeds to observe that the amount thus decreed was after all more than sufficient to cover all the plaintiff's loss.

All parties in France seem to have taken it for granted that the words in the charter-party were to be understood in their natural sense; but the English law is accurately expressed in Abbott on Shipping, part 3, c. 1, s. 6, 5th ed., p. 170, and had that passage been brought to the notice of the French tribunal, it would have known that in an English charter-party, as is there stated, "Such a clause is not the absolute limit of damages on either side; the party may, if he thinks fit, ground his action upon the other clauses or covenants, and may, in such action, recover damages beyond the amount of the penalty, if in justice they shall be found to exceed it. On the other hand, if the party sue on such a penal clause, he cannot, in effect, recover more than the damage actually sustained." But it was not brought to the notice of the French tribunal that, according to the interpretation put by the English law on such a contract, a penal clause of this sort was in fact idle and inoperative. If it had been, they would, probably, have interpreted the English *contract made in England according to the [*148] English construction. No blame can be imputed to foreign lawyers for not conjecturing that the clause was merely a *brutum fulmen*. The fault, if any, was in the defendants, for not properly instructing their French counsel on this point.

Still the fact remains that we can see on the face of the proceedings that the foreign tribunal has made a mistake on the construction of an English contract, which is a question of

English law; and that, in consequence of that mistake, judgment has been given for an amount probably greater than, or, at all events, different from that for which it would have been given if the tribunal had been correctly informed what construction the English contract bore according to English law.

The question raised by the plea is, whether this is a bar to the action brought in England to enforce that judgment, and we are all of opinion that it is not, and that the plaintiff is entitled to judgment.

The following are the reasons of my Brother MELLOR and myself. My Brother HANNEN, though agreeing in the result, qualifies his assent to these reasons to some extent which he will state for himself.

It is not an admitted principle of the law of nations that a state is bound to enforce within its territories the judgment of a foreign tribunal. Several of the continental nations (including France) do not enforce the judgments of other countries unless where there are reciprocal treaties to that effect. But in England and in those States which are governed by the common law, such judgments are enforced, not by virtue of any treaty nor by virtue of any statute, but upon a principle very well stated by PARKE, B., in *Williams* v. *Jones*, 13 M. & W. 633; 14 L. J. Ex. 145: "Where a Court of competent jurisdiction has adjudicated a certain sum to be due from one person to another, a legal obligation arises to pay that sum, on which an action of debt to enforce the judgment may be maintained. It is in this way that the judgments of foreign and colonial courts are supported and enforced." And taking this as the principle, it seems to follow that anything which negatives the existence of that legal obligation, or excuses the defendant from the performance [* 149] * of it, must form a good defence to the action. It must be open, therefore, to the defendant to show that the Court which pronounced the judgment had not jurisdiction to pronounce it, either because they exceeded the jurisdiction given to them by the foreign law, or because he, the defendant, was not subject to that jurisdiction; and so far the foreign judgment must be examinable. Probably the defendant may show that the judgment was obtained by the fraud of the plaintiff, for that would show that the defendant was excused from the performance of an obligation thus obtained; and it may be that where the

foreign Court has knowingly and perversely disregarded the rights given to an English subject by English law, that forms a valid excuse for disregarding the obligation thus imposed on him; but we prefer to imitate the caution of the present Lord Chancellor, in *Castrique* v. *Imrie*, No. 14, *post*, L. R., 4 H. L. 445; 39 L. J. C. P. 364, and to leave those questions to be decided when they arise, only observing that in the present case, as in that, "the whole of the facts appear to have been inquired into by the French Courts, judicially, honestly, and with the intention to arrive at the right conclusion, and having heard the facts as stated before them they came to a conclusion which justified them in France in deciding as they did decide."

There are a great many *dicta* and opinions of very eminent lawyers, tending to establish that the defendant in an action on a foreign judgment is at liberty to show that the judgment was founded on a mistake, and that the judgment is so far examinable. In *Houldsworth* v. *Donegall*, 2 Cl. & F. at p. 477, Lord Brougham goes so far as to say: "The language of the opinions on one side has been so strong, that we are not warranted in calling it merely the inclination of our lawyers; it is their decision that in this country a foreign judgment is only *primâ facie*, not conclusive, evidence of a debt." But there certainly is no case decided on such a principle; and the opinions on the other side of the question are at least as strong as those to which Lord Brougham refers.

Indeed it is difficult to understand how the common course of pleading is consistent with any notion that the judgment was only evidence. If that were so, every count on a foreign judgment must be demurrable on that ground. The mode of pleading shows * that the judgment was considered, not [* 150] as merely *primâ facie* evidence of that cause of action for which the judgment was given, but as in itself giving rise, at least *primâ facie*, to a legal obligation to obey that judgment and pay the sum adjudged. This may seem a technical mode of dealing with the question; but in truth it goes to the root of the matter. For if the judgment were merely considered as evidence of the original cause of action, it must be open to meet it by any counter evidence negativing the existence of that original cause of action.

If, on the other hand, there is a *primâ facie* obligation to obey

the judgment of a tribunal having jurisdiction over the party and the cause, and to pay the sum decreed, the question would be, whether it was open to the unsuccessful party to try the cause over again in a Court, not sitting as a Court of appeal from that which gave the judgment. It is quite clear this could not be done where the action is brought on the judgment of an English tribunal; and, on principle, it seems the same rule should apply, where it is brought on that of a foreign tribunal. But we think it unnecessary to discuss this point, as the decisions of the Court of Queen's Bench in *Bank of Australasia* v. *Nias*, 16 Q. B. 717; 20 L. J. C. P. 284, of the Court of Common Pleas in *Bank of Australasia* v. *Harding*, 9 C. B. 661; 19 L. J. C. P. 345, and of the Court of Exchequer in *De Cosse Brissac* v. *Rathbone*, 6 H. & N. 301; 30 L. J. Ex. 238, seem to us to leave it no longer open to contend, unless in a Court of error, that a foreign judgment can be impeached on the ground that it was erroneous on the merits; or to set up as a defence to an action on it, that the tribunal mistook either the facts or the law.

But there still remains a question which has never, so far as we know, been expressly decided in any Court.

It is broadly laid down, by the very learned author of Smith's Leading Cases, in the original note to *Doe* v. *Oliver*, 2 Sm. L. C. 2nd ed. at p. 448, that "it is clear that if the judgment appear on the face of the proceedings to be founded on a mistaken notion of the English law," it would not be conclusive. For this he cites *Novelli* v. *Rossi*, 2 B. & Ad. 757, which does not decide [*151] that point, and no other authority; but the great * learning and general accuracy of the writer makes his unsupported opinion an authority of weight; and accordingly it has been treated with respect. In *Scott* v. *Pilkington*, 2 B. & S. at p. 42; 31 L. J. Q. B. at p. 89, the Court expressly declined to give any opinion on the point not then raised before them. But we cannot find that it has been acted upon; and it is worthy of note that the present very learned editors of Smith's Leading Cases have very materially qualified his position, and state it thus, if the judgment "be founded on an incorrect view of the English law, knowingly or perversely acted on;"[1] the doctrine thus qualified does not apply to the present case, and there is, therefore, no need to inquire how far it is accurate.

[1] See notes, p. 742, *post*.

No. 2. — Godard v. Gray, L. R., 6 Q. B. 151, 152.

But the doctrine as laid down by Mr. Smith does apply here; and we must express an opinion on it, and we think it cannot be supported, and that the defendant can no more set up as an excuse, relieving him from the duty of paying the amount awarded by the judgment of a foreign tribunal having jurisdiction over him and the cause, that the judgment proceeded on a mistake as to English law, than he could set up as an excuse that there had been a mistake as to the law of some third country incidentally involved, or as to any other question of fact.

It can make no difference that the mistake appears on the face of the proceedings. That, no doubt, greatly facilitates the proof of the mistake; but if the principle be to inquire whether the defendant is relieved from a *primâ facie* duty to obey the judgment, he must be equally relieved, whether the mistake appears on the face of the proceedings or is to be proved by extraneous evidence. Nor can there be any difference between a mistake made by the foreign tribunal as to English law, and any other mistake. No doubt the English Court can, without arrogance, say that where there is a difference of opinion as to English law, the opinion of the English tribunal is probably right; but how would it be if the question had arisen as to the law of some of the numerous portions of the British dominions where the law is not that of England? The French tribunal, if incidentally inquiring into the law of Mauritius, where French law prevails, would be * more likely to be right than the [* 152] English Court; if inquiring into the law of Scotland it would seem that there was about an equal chance as to which took the right view. If it was sought to enforce the foreign judgment in Scotland, the chances as to which Court was right would be altered. Yet it surely cannot be said that a judgment shown to have proceeded on a mistaken view of Scotch law could be enforced in England and not in Scotland, and that one proceeding on a mistaken view of English law could be enforced in Scotland but not in England.

If, indeed, foreign judgments were enforced by our Courts out of politeness and courtesy to the tribunals of other countries, one could understand its being said that though our Courts would not be so rude as to inquire whether the foreign Court had made a mistake, or to allow the defendant to assert that it had, yet that if the foreign Court itself admitted its blunder they would not

then act: but it is quite contrary to every analogy to suppose that an English Court of law exercises any discretion of this sort. We enforce a legal obligation, and we admit any defence which shows that there is no legal obligation or a legal excuse for not fulfilling it; but in no case that we know of is it ever said that a defence shall be admitted if it is easily proved and rejected if it would give the Court much trouble to investigate it. Yet on what other principle can we admit as a defence that there is a mistake of English law apparent on the face of the proceedings, and reject a defence that there is a mistake of Spanish or even Scotch law apparent in the proceedings, or that there was a mistake of English law not apparent on the proceedings, but which the defendant avers that he can show did exist.

The whole law was much considered and discussed in *Castrique* v. *Imrie*, No. 14, *post*, where the French tribunal had made a mistake as to the English law, and under that mistake had decreed the sale of the defendant's ship. The decision of the House of Lords was, that the defendant's title derived under that sale was good, notwithstanding that mistake, Lord Colonsay pithily saying, "It appears to me that we cannot enter into an inquiry as to whether the French Courts proceeded correctly, either as to their own course of procedure or their own [*153] law, nor whether under the circumstances they * took the proper means of satisfying themselves with respect to the view they took of the English law. Nor can we inquire whether they were right in their views of the English law. The question is, whether under the circumstances of the case, dealing with it fairly, the original tribunal did proceed against the ship, and did order the sale of the ship."

The question in *Castrique* v. *Imrie* was as to the effect on the property of a judgment ordering a ship, locally situate in France, to be sold, and therefore was not the same as the question in this case as to what effect is to be given to a judgment against the person. But at least the decision in *Castrique* v. *Imrie* establishes this, that a mistake as to English law on the part of a foreign tribunal does not operate in all cases so as to prevent the Courts of this country from giving effect to the judgment.

In the course of the arguments in that case the point now under consideration was raised. In the opinion I delivered at the bar of the House, L. R., 4 H. L. at pp. 434–435, the cases which

are commonly referred to as authorities for the opinion expressed by Mr. Smith in his note to *Doe* v. *Oliver* are referred to. We have nothing to add to what is there said. And in the case of *Novelli* v. *Rossi*, it will be found on perusing the judgment of Lord TENTERDEN that it does not contain one word in support of the doctrine for which it is cited. We think that case was rightly decided for the reasons given in *Castrique* v. *Imrie;* but at all events it does not bear out Mr. Smith's position.

For these reasons we have come to the conclusion that judgment should be given for the plaintiffs.

HANNEN, J. I agree that our judgment should be for the plaintiffs in this case, but as I do not entirely concur in the reasoning by which my Brothers BLACKBURN and MELLOR have arrived at that conclusion, I desire shortly to explain the ground on which my judgment is founded.

I think that the authorities oblige us (not sitting in a Court of error) to hold that the defendants, by appearing in the suit in *France, submitted to the jurisdiction of the [*154] French tribunal, and thereby created a *primâ facie* duty on their part to obey its decision; but I do not think that any authority binds us, nor am I prepared to decide that a defendant, not guilty of any laches, against whom a foreign judgment *in personam* has been given, is precluded from impeaching it on the ground that it appears on the face of the proceedings to be based on an incorrect view of the English law, even though there may be no evidence that the foreign Court, knowingly or perversely, refused to recognize that law.

I do not, however, enter at length upon the consideration of this question, because I have arrived at the conclusion that the defendants in this case were guilty of laches. It does not appear upon the face of the proceedings, nor at all, that the French Court was informed of what the English law was. It was the duty of the defendants to bring to the knowledge of the French Court the provision of the English law on which they now for the first time rely, and having failed to do so, they must submit to the consequences of their own negligence. The French Courts, like our own, can only be informed of foreign law by appropriate evidence, and the party who fails to produce it cannot afterwards impeach the judgment obtained against him on account of an error into which the foreign Court has fallen presumably in con-

sequence of his own default. Suitors in our own Courts, in similar circumstances, must suffer a like penalty for the negligence. A defendant who has omitted to produce evidence which was procurable at the trial of a cause cannot have a rehearing on that account; and in an action on a judgment of one of our own Courts, we do not permit the defendant to plead any facts which might have been pleaded in the original action. These instances offer analogies by which I think the present case is governed, and on this ground I am of opinion that the defendants are precluded from impeaching the decision of the French tribunal, and that our judgment should be for the plaintiffs.

Judgment for the plaintiffs.[1]

Schibsby v. Westenholz.

L. R., 6 Q. B. 155-163 (s. c. 40 L. J. Q. B. 73; 24 L. T. 93; 19 W. R. 587).

[155] *Action. — Foreign Judgment. — Judgment for default of Appearance against a Defendant not Resident nor a Subject of the Country.*

A judgment of a foreign Court, obtained in default of appearance against a defendant, cannot be enforced in an English Court, where the defendant, at the time the suit commenced, was not a subject of nor resident in the country in which the judgment was obtained: for there existed nothing imposing on the defendant any duty to obey the judgment.

This was an action upon a foreign judgment to which it was pleaded *inter alia* that the foreign Court had no jurisdiction. After verdict for the plaintiffs, the case was argued before the Court of Queen's Bench on a motion (pursuant to leave at the trial) to have the verdict entered for the defendants.

[156] The pleadings, evidence, and course of the trial are fully stated in the judgment of the Court (Blackburn, Mellor, Lush, and Hannen, JJ.) delivered after consideration by

Blackburn, J. This was an action on a judgment of a French tribunal given against the defendants for default of appearance.

The pleas to the action were, amongst others, a plea of never indebted, and, thirdly, a special plea asserting that the defendants were not resident or domiciled in France, or in any way subject to the jurisdiction of the French Court, nor did they appear; and that they were not summoned, nor had any notice or knowledge of the pending of the proceedings, or any opportunity

[1] See the next case, *Schibsby* v. *Westenholz*.

of defending themselves therefrom. On these pleas issue was joined.

On the trial before me the evidence of a French avocat was *given, by which it appeared that by the law of [*157] France a French subject may sue a foreigner, though not resident in France, and that for this purpose an alien, if resident in France, was considered by the French law as a French subject.[1] The mode of citation in such a case, according to the French law is, by serving the summons on the Procureur Impérial. If the foreign defendant thus cited does not within one month appear, judgment may be given against him, but he may still, at any time within two months after judgment, appear and be heard on the merits. After that lapse of time the judgment is final and conclusive. The practice of the imperial government is, in such a case, to forward the summons thus served to the consulate of the country where the defendant is resident, with directions to intimate the summons, if practicable, to the defendant; but this, as was explained by the avocat, is not required by the French law, but is simply done by the imperial government voluntarily from a regard to fair dealing.

It appeared by other evidence that the plaintiff in this case was a Dane resident in France. The defendants were also Danes, resident in London and carrying on business there. A written contract had been made between the plaintiff and defendants, which was in English, and dated in London, but no distinct evidence was given as to where it was signed. We think, however, that, if that was material, the fair intendment from the evidence was that it was made in London. By this contract the defendants were to ship in Sweden a cargo of Swedish oats free on board a French or Swedish vessel for Caen, in France, at a certain rate for all oats delivered at Caen. Payment was to be made on receipt of the shipping documents, but subject to correction for excess or deficiency according to what might turn out to be the delivery at Caen. From the correspondence it appeared

[1] See Article 14 of the Code Civil: "L'étranger même non résidant en France pourra être cité devant les tribunaux français, pour l'exécution des obligations par lui contractées en France avec un français; il pourra être traduit devant les tribunaux de France pour les obligations par lui contractées en pays étranger envers des français."

Codes Annotés de Sirey: Code Civil, Art 14, Note 42: "Un étranger qui a une maison de commerce établie et patentée en France, peut, aussi bien qu'un français, assigner un autre étranger devant un tribunal français."

that the plaintiff asserted, and the defendants denied,
[* 158] that the delivery at * Caen was short of the quantity for which the plaintiff had paid, and that the plaintiff made some other complaints as to the condition of the cargo which were denied by the defendants. The plaintiff very plainly told the defendants that if they would not settle the claim he would sue them in the French Courts. He did issue process in the manner described, and the French consulate in London served on the defendants a copy of the citation.

The following admissions were then made, namely: that the judgment was regular according to French law; that it was given in favour of the plaintiff, a foreigner domiciled in France, against the defendants, domiciled in England, and in no sense French subjects, and having no property in France.

I then ruled that I could not enter into the question whether the French judgment was according to the merits, no fraud being alleged or shown.

I expressed an opinion (which I have since changed) that, subject to the third plea, the plaintiff was entitled to the verdict, but reserved the point.

The jury found that the defendants had notice and knowledge of the summons and the pendency of the proceedings in time to have appeared and defended the action in the French Court. I then directed the verdict for the plaintiff, but reserved leave to enter the verdict for the defendants on these facts and this finding.

No question was raised at the trial as to the sufficiency of the pleas to raise the defence. If there had been, I should have made any amendment necessary, but, in fact we are of opinion that none was required.

A rule was accordingly obtained by Sir George Honyman, against which cause was shown in the last term and in the sittings after it before my Brothers Mellor, Lush, Hannen, and myself. During the interval between the obtaining of the rule and the showing cause the case of *Godard* v. *Gray*, *ante*, p. 726, (L. R., 6 Q. B. 139), on which we have just given judgment, was argued before my Brothers Mellor, Hannen, and myself, and we had consequently occasion to consider the whole subject of the law of England as to enforcing foreign judgments.

[* 159] * My Brother Lush, who was not a party to the dis-

cussions in *Godard* v. *Gray*, *ante*, p. 726, (L. R., 6 Q. B. 139), has, since the argument in the present case, perused the judgment prepared by the majority in *Godard* v. *Gray*, and approves of it; and, after hearing the argument in the present case, we are all of opinion that the rule should be made absolute.

It is unnecesary to repeat again what we have already said in *Godard* v. *Gray*.

We think that, for the reasons there given, the true principle on which the judgments of foreign tribunals are enforced in England is that stated by PARKE, B., in *Russell* v. *Smyth*, 9 M. & W. 819; 11 L. J. Ex. 308, and again repeated by him in *Williams* v. *Jones*, 13 M. & W. 633; 14 L. J. Ex. 145, that the judgment of a Court of competent jurisdiction over the defendant imposes a duty or obligation on the defendant to pay the sum for which judgment is given, which the Courts in this country are bound to enforce; and consequently that anything which negatives that duty, or forms a legal excuse for not performing it, is a defence to the action.

We were much pressed on the argument with the fact that the British legislature has, by the Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76), ss. 18 and 19, conferred on our Courts a power of summoning foreigners, under certain circumstances, to appear, and in case they do not, giving judgment against them by default. It was this consideration principally which induced me at the trial to entertain the opinion which I then expressed and have since changed. And we think that if the principle on which foreign judgments were enforced was that which is loosely called "comity," we could hardly decline to enforce a foreign judgment given in France against a resident in Great Britain under circumstances hardly, if at all, distinguishable from those under which we, *mutatis mutandis*, might give judgment against a resident in France; but it is quite different if the principle be that which we have just laid down.

Should a foreigner be sued under the provisions of the statute referred to, and then come to the Courts of this country and desire to be discharged, the only question which our Courts could *entertain would be whether the acts of the British [*160] legislature, rightly construed, gave us jurisdiction over this foreigner, for we must obey them. But if, judgment being

given against him in our Courts, an action were brought upon it in the Courts of the United States (where the law as to the enforcing foreign judgments is the same as our own), a further question would be open, viz., not only whether the British legislature had given the English Courts jurisdiction over the defendant, but whether he was under any obligation which the American Courts could recognize to submit to the jurisdiction thus created. This is precisely the question which we have now to determine with regard to a jurisdiction assumed by the French jurisprudence over foreigners.

Again, it was argued before us that foreign judgments obtained by default, where the citation was (as in the present case) by an artificial mode prescribed by the laws of the country in which the judgment was given, were not enforceable in this country because such a mode of citation was contrary to natural justice, and if this were so, doubtless the finding of the jury in the present case would remove that objection. But though it appears by the report of *Buchanan* v. *Rucker*, 1 Camp. 63, that Lord Ellenborough in the hurry of *nisi prius* at first used expressions to this effect, yet when the case came before him *in banco* in *Buchanan* v. *Rucker*, 9 East, 192; 9 R. R. 531, he entirely abandoned what (with all deference to so great an authority) we cannot regard as more than declamation, and rested his judgment on the ground that laws passed by our country were not obligatory on foreigners not subject to their jurisdiction. "Can," he said, "the Island of Tobago pass a law to bind the rights of the whole world?"

The question we have now to answer is, Can the empire of France pass a law to bind the whole world? We admit, with perfect candour, that in the supposed case of a judgment, obtained in this country against a foreigner under the provisions of the Common Law Procedure Act, being sued on in a Court of the United States, the question for the Court of the United States would be, Can the Island of Great Britain pass a law to bind the whole world? We think in each case the answer should be, No, but every country can pass laws to bind a great many [*161] persons, and therefore * the further question has to be determined, whether the defendant in the particular suit was such a person as to be bound by the judgment which it is sought to enforce.

No. 3. — Schibsby v. Westenholz, L. R., 6 Q. B. 161, 162.

Now on this we think some things are quite clear on principle. If the defendants had been at the time of the judgment subjects of the country whose judgment is sought to be enforced against them, we think that its laws would have bound them. Again, if the defendants had been at the time when the suit was commenced resident in the country, so as to have the benefit of its laws protecting them, or, as it is sometimes expressed, owing temporary allegiance to that country, we think that its laws would have bound them.

If at the time when the obligation was contracted the defendants were within the foreign country, but left it before the suit was instituted, we should be inclined to think the laws of that country bound them; though before finally deciding this we should like to hear the question argued. But every one of those suppositions is negatived in the present case.

Again, we think it clear, upon principle, that if a person selected as plaintiff the tribunal of a foreign country as the one in which he would sue, he could not afterwards say that the judgment of that tribunal was not binding upon him.

In the case of *General Steam Navigation Company* v. *Guillou*, 11 M. & W. 877, 894; 13 L. J. Ex. 168, on a demurrer to a plea, PARKE, B., in delivering the considered judgment of the Court of Exchequer, then consisting of Lord ABINGER, C. B., PARKE, ALDERSON, and GURNEY, BB., thus expresses himself: "The substance of the plea is that the cause of action has been already adjudicated upon, in a competent Court, against the plaintiffs, and that the decision is binding upon them, and that they ought not to be permitted again to litigate the same question. Such a plea ought to have had a proper commencement and conclusion. It becomes, therefore, unnecessary to give any opinion whether the pleas are bad in substance; but it is not to be understood that we feel much doubt on that question. They do not state that the plaintiffs were French subjects, or resident, or even present in France when the suit began, so as to be bound by reason of allegiance or temporary presence by the decision of a *French Court, [*162] and they did not select the tribunal and sue as plaintiffs, in any of which cases the determination might have possibly bound them. They were mere strangers, who put forward the negligence of the defendant as an answer, in an adverse suit in a foreign country, whose laws they were under no obligation to obey."

It will be seen from this that those very learned Judges, besides expressing an opinion conformable to ours, also expressed one to the effect that the plaintiffs in that suit did not put themselves under an obligation to obey the foreign judgment, merely by appearing to defend themselves against it. On the other hand, in *Simpson* v. *Fogo*, 1 J. & H. 18; 29 L. J. Ch. 657; 1 H. & M. 195; 32 L. J. Ch. 249, where the mortgagees of an English ship had come into the Courts of Louisiana, to endeavour to prevent the sale of their ship seized under an execution against the mortgagors, and the Courts of Louisiana decided against them, the VICE-CHANCELLOR and the very learned counsel who argued in the case seem all to have taken it for granted that the decision of the Court in Louisiana would have bound the mortgagees, had it not been in contemptuous disregard of English law. The case of *General Steam Navigation Company* v. *Guillou*, 11 M. & W. 877; 13 L. J. Ex. 168, was not referred to, and therefore cannot be considered as dissented from; but it seems clear that they did not agree in the latter part of the opinion there expressed.

We think it better to leave this question open, and to express no opinion as to the effect of the appearance of a defendant, where it is so far not voluntary that he only comes in to try to save some property in the hands of the foreign tribunal. But we must observe that the decision in *De Cosse Brissac* v. *Rathbone*, 6 H. & N. 301; 30 L. J. Ex. 238, is an authority that where the defendant voluntarily appears and takes the chance of a judgment in his favour he is bound.

In *Douglas* v. *Forrest*, 4 Bing. 703, the Court, deciding in favour of the party suing on a Scotch judgment, say: "We confine our judgment to a case where the party owed allegiance to the country in which the judgment was so given against him, from being born in it, and by the laws of which country his property was, [* 163] at the time those * judgments were given, protected. The debts were contracted in the country in which the judgments were given, whilst the debtor resided in it." Those circumstances are all negatived here. We should, however, point out that, whilst we think that there may be other grounds for holding a person bound by the judgment of the tribunal of a foreign country than those enumerated in *Douglas* v. *Forrest*, we doubt very much whether the possession of property, locally situated in that country and protected by its laws, does afford such a ground

It would rather seem that, whilst every tribunal may very properly execute process against the property within its jurisdiction, the existence of such property, which may be very small, affords no sufficient ground for imposing on the foreign owner of that property a duty or obligation to fulfil the judgment. But it is unnecessary to decide this, as the defendants had in this case no property in France. As to this, see *London and North Western Railway Company* v. *Lindsay*, 3 Macq. 99.

We think, and this is all that we need decide, that there existed nothing in the present case imposing on the defendants any duty to obey the judgment of a French tribunal.

We think, therefore, that the rule must be made absolute.

Rule absolute.[1]

ENGLISH NOTES.

That a foreign judgment *in personam* is *res judicata*, — in other words, is conclusive evidence of the facts adjudicated upon, — was decided as early as 1678, by Lord Nottingham, in *Cottingham's case*, 2 Swanst. 326. In the same year and by the same authority, one partner was allowed to charge another with money paid for a partnership debt under a foreign judgment. *Gold* v. *Canham* (1678–9), 2 Swanst. 325. Both these cases are cited from the MSS. of Lord Nottingham in note (a) to *Kenedy* v. *Earl of Cassillis* (1818), 2 Swanst. 323, 325, 326. In later cases the doctrine was questioned. But in *Henderson* v. *Henderson* (1843), 3 Hare, 100, the law was finally settled as in the principal case of *Godard* v. *Gray*. The facts of that case were these. William Henderson, a merchant of Bristol and Newfoundland, took his two sons A. & B. into partnership, and in 1817 resigned all his interest in the trade, worth about £15,000, to them. The two carried on the concern and employed the interest as part of the firm's assets until B. died intestate in 1830. B.'s widow took out letters of administration of her husband's estate in Newfoundland; she and A. carrying on the partnership business for the purposes of winding up. Before that was done the buildings, books, ledgers, &c., were destroyed by fire; and disputes arose between A. and B.'s widow. She in 1832 sued A. in Newfoundland for an account and for administration of the estates of William Henderson and B. A. failed to file accounts or to appear before the Court. The Colonial Court, in 1840, ordered A. to pay certain sums of money to B.'s widow as due to her from the estate of William Henderson and complained that no accounts had been filed. B.'s widow now sued A. upon the decree. A. then filed a bill in the

[1] See the preceding case, *Godard* v. *Gray*, p. 726, *ante*.

English Court of Chancery against B.'s widow and others, alleging that there were various errors and irregularities in the proceedings of the Colonial Court, and praying to have the accounts taken by the Court of Chancery and that B.'s widow should be restrained from further proceedings in the decree of the Colonial Court. Wigram, V. C., decided that as the whole of the matters were in question between the parties, and might probably have been the subject of adjudication in Newfoundland, he would not go behind the decree. He added: "I do not say that my conclusion would have been the same if the proceedings which were impeached had taken place in a foreign Court from which there was no appeal to any superior jurisdiction, which a Court of Equity in this country would regard as certain to administer justice in this case. I express no opinion on that point." The point raised in this quotation was settled in favour of the binding force of a judgment of any competent foreign Court, in *De Cosse Brissac* v. *Rathbone* (1861), 6 H. & N. 301, 30 L. J. Ex. 238; *Vanquelin* v. *Bouard* (1863), 15 C. B. (N. S.) 341, 33 L. J. C. P. 78, 9 L. T. 582, and the principal case of *Godard* v. *Gray*.

It appears from the principal case of *Godard* v. *Gray*, that if a question of English law is fairly adjudicated on by the foreign tribunal as a question of fact, the judgment is not to be impugned merely because the foreign tribunal has mistaken the law; and the statement in the original edition of Smith's Leading Cases deduced from the case of *Novelli* v. *Rossi* (as mentioned at p. 730, *supra*), cannot now be taken as law. At the same time it is not to be assumed that everything decided by the foreign Court contrary to English law is to be treated as *res judicata* here. The case of *Novelli* v. *Rossi*, as explained by Blackburn, J., in *Castrique* v. *Imrie* (No. 14, *post*), is there put on the ground that the French Court had no jurisdiction to decide as they did, that the plaintiff had no right of action in England. In *Simpson* v. *Fogo* (1863), 1 H. & N. 195, 32 L. J. Ch. 249, 8 L. T. 61, a case which is also explained in the same judgment of Blackburn, J., a British ship was mortgaged in English form to a Liverpool bank, whilst she was at sea. She was attached by unsecured creditors of the mortgagor at New Orleans and sold under an order of the Court there, the mortgagee intervening and ineffectually claiming possession. When the ship came to England, the mortgagee sued the purchaser. The foreign judgment was held not to bar his claim, on the ground that it appeared on the face of that judgment that the title of the English mortgagee was ignored on grounds relating to the law of the local tribunal, and in disregard of the comity of nations by which such a title ought to have been recognised.

In *Meyer* v. *Ralli* (1876), 1 C. P. D. 358, 45 L. J. C. P. 741, 35 L. T.

838, it was held that where both parties admit that the foreign Court was mistaken as to its own law, the judgment is not binding on the Court here.

In order that action may be brought on a foreign judgment, the judgment must satisfy the following conditions: —

(1) It must be a final judgment, conclusively settling (unless by appeal to a higher Court) the question between the parties according to the rules of the foreign Court. *Patrick* v. *Shedden* (1853), 2 El. & Bl. 14, 22 L. J. Q. B. 283; *Paul* v. *Roy* (1852), 15 Beav. 433, 21 L. J. Ch. 361; *In re Henderson, Noucion* v. *Freeman* (H. L. 1889), 15 App. Cas. 1, 59 L. J. Ch. 337, 62 L. T. 189.

(2) The sum awarded must be certain in amount. If any costs of defendant are to be deducted from the amount of the foreign judgment, taxation thereof in the foreign Court is a condition precedent to the recovery of the judgment in England. *Sadler* v. *Robins* (1808), 1 Camp. 253.

(3) The Court must have had jurisdiction over the parties and the cause of action. The following circumstances have been held or assumed to be sufficient to found jurisdiction of the foreign Court: —

(i) Permanent or temporary allegiance owed to the foreign government (cases *passim*).

(ii) Residence in the foreign country (the same).

(iii) Voluntary submission to the jurisdiction of the foreign Court, *e. g.*, putting in appearance personally, or by attorney, as plaintiff or defendant. *Molony* v. *Gibbons* (1810), 2 Camp. 502, 11 R. R. 778: and this although the appearance of the party is so far induced by duress, that his property has been seized or is in danger of being seized under the process of the foreign Court if he does not appear. *Voinett* v. *Barrett* (1885), 54 L. J. Q. B. 521, affirmed (1885), 55 L. J. Q. B. 39, following *De Cosse Brissac* v. *Rathbone* (1861), 6 H. & N. 301, 30 L. J. Ex. 238.

(iv) It was at one time thought that former residence coupled with a provision by the law of the country for service on a public officer, on which there would be a *primâ facie* presumption that the party had notice of the proceedings, might be sufficient. *Becquet* v. *McCarthy* (1831), 2 B. & Ad. 951. But a contrary doctrine has been laid down, on very high authority, as the rule of international law (per Earl of Selborne, delivering the judgment of the Judicial Committee in *Sidar Gurdyal Singh* v. *Rajah of Faridkote* (1894), A. C. 670. At all events, if the older view were to prevail, in order to make the party an absentee, you must prove that he had

been in the place (per Lord ELLENBOROUGH in *Cavan* v. *Stewart* (1816). 1 Starkie, 525, 530).

The possession of moveable property within the jurisdiction does not, of itself, confer jurisdiction on a foreign Court. Per BLACKBURN, J., in *Duflos* v. *Burlingham* (1876), 34 L. T. 688.

(v) Contract to submit to the jurisdiction in regard to a certain class of liabilities. In *Copin* v. *Adamson* (1874), L. R., 9 Ex. 345, 43 L. J. Ex. 461, 31 L. T. 242, a shareholder in a French company was held bound by a clause in the articles of the company by which all disputes between shareholders should be submitted to the French Courts, and that every shareholder should effect a domicil for service of process, and in default service might be made at a certain public office in Paris.

The simple fact of having made a contract in the foreign country is not sufficient. In *Rousillon* v. *Rousillon* (1880), 14 Ch. D. 351, 49 L. J. Ch. 339, 42 L. T. 679, effect was refused to a judgment obtained in France, the *forum contractûs*, without notice to the defendant who did not own property there.

A foreign judgment may be impeached for fraud, although fraud had been negatived by the judgment of the foreign Court. *Abouloff* v. *Oppenheimer* (1882), 10 Q. B. D. 295, 52 L. J. Q. B. 1, 47 L. T. 325; *Vadala* v. *Lawes* (C. A. 1890), 25 Q. B. D. 310, 63 L. T. 128.

It should be observed that a foreign judgment does not merge the original cause of action, which may still be sued upon in England. *Hall* v. *Odber* (1809). 11 East, 118, 10 R. R. 443.

In *Doglioni* v. *Crispin* (1866), L. R., 1 H. L. 301, 35 L. J. P. D. & A. 129, 15 L. T. 44, the Probate Court was held to be bound by the judgment of the Portuguese Court, being the Court of the domicil, adjudicating upon a question of title to the personal estate. To a similar effect, see *Enohin* v. *Wylie* (1862), 2 H. C. 56, 10 H. L. Cas. 1, 31 L. J. Ch. 402; *In re Trufort, Trafford* v. *Blanc* (1888), 36 Ch. D. 600, 57 L. J. Ch. 135, 57 L. T. 674.

AMERICAN NOTES.

In respect to citizens of one of the United States sued in another State, it is the rule that a State has jurisdiction over all persons found and served with process within its borders. *Sturgis* v. *Fay*, 16 Indiana, 429; 79 Am. Dec. 440; *Dearing* v. *Bank of Charleston*, 5 Georgia, 497; 48 Am. Dec. 300; *Gilman* v. *Thompson*, 11 Vermont, 643; 34 Am. Dec. 714; *Molyneux* v. *Seymour*, 30 Georgia, 440; 76 Am. Dec. 662; *Peabody* v. *Hamilton*, 106 Massachusetts, 221.

But judgments thus rendered are impeachable in other States for fraud or want of jurisdiction. See cases, *ante*, p. 724; Browne on Parol Evidence, § 121: *Sewall* v. *Sewall*, 122 Massachusetts, 156; 23 Am. Rep. 299; *Hoffman* v. *Hoffman*, 46 New York, 30; 7 Am. Rep. 299; *Shelton* v. *Tiffin*, 6 Howard (U. S. Supreme Ct.), 163; *Rand* v. *Hansom*, 154 Massachusetts, 87; 26 Am. St. Rep. 210; *Johnson* v. *Waters*, 111 United States, 667; *Thompson* v. *Whitman*, 18 Wallace (United States Supreme Ct.), 457.

Mr. Black quotes from *Godard* v. *Gray* (Judgments, § 843) at some length, and admitting that it "will undoubtedly incline our own Courts in the same direction," states that the question, whether a foreign judgment founded on a mistaken conception of law in another country, is impeachable in such other country, "so far as it has been adjudicated in this country, seems to have been answered in the affirmative." Citing *Lang* v. *Holbrook*, Crabbe (U. S. Dist. Ct.), 179.

As to the effect of fraud, if there was fraud in the technical process of obtaining of the judgment, the foreign judgment is impeachable. *Rankin* v. *Goddard*, 54 Maine, 28; 89 Am. Dec. 718; *Ward* v. *Quinlivin*, 57 Missouri, 725; *Wood* v. *Watkinson*, 17 Connecticut, 500. But this doctrine does not extend to the mere facts of false testimony and suppression of the truth on the trial, *Hilton* v. *Guyot*, *supra*, disapproving *Abouloff* v. *Oppenheimer*, 10 Q. B. Div. 295; nor as between the States, to testimony irregularly or surreptitiously introduced. *Parker* v. *Albee*, 86 Iowa, 46.

It may always be shown, either directly or collaterally, that the foreign Court had no jurisdiction. *Carleton* v. *Bickford*, 13 Gray (Massachusetts), 591; 74 Am. Dec. 652; *Rose* v. *Himely*, 4 Cranch (U. S. Supreme Ct.), 241; *Long* v. *Hammond*, 40 Maine, 204; *Thorn* v. *Salmonson*, 37 Kansas, 441; *Bischoff* v. *Wethered*, 9 Wallace (U. S. Supreme Ct.), 812; Black on Judgments, § 836, citing the *Schibsby case*: *Battle* v. *Jones*, 6 Iredell Equity (Nor. Carolina), 567; *Shepard* v. *Wright*, 59 Howard Practice (New York), 512; *McEwan* v. *Zimmer*, 38 Michigan, 765; 31 Am. Rep. 332; *Bruckman* v. *Taussig*, 7 Colorado, 761; *Kerr* v. *Condy*, 9 Bush (Kentucky), 372; *Cheriot* v. *Foussat*, 3 Binney (Pennsylvania), 220; *Gunn* v. *Peakes*, 36 Minnesota, 177; 1 Am. St. Rep. 661; *St. Sure* v. *Sindsfelt*, 82 Wisconsin, 346; 19 Lawyers' Reports Annotated, 515, with notes.

In respect to foreign judgments, the principal cases are much cited by Black on Judgments, who says (§ 228): "In this country, in almost all the earlier cases in which the effect and conclusiveness of foreign judgments became a question, rulings were made to the effect that such judgments were only *primâ facie* evidence of debt, and that they were not conclusive on the merits. It will be observed however that all these decisions rest upon the earlier English cases holding the same doctrine. The latter have now been repudiated or overruled, as we have just pointed out, but not until after the theory of the inconclusiveness of such judgments had come to be generally recognized by the American Judges. Had the same cases been decided in the light of the recent English adjudications, the result would undoubtedly have been different, for the Courts professed to be guided by the views obtaining in Westminster Hall. Among the more recent American cases there are a few which

still adhere to the old doctrine that foreign judgments are only *primâ facie* evidence of debt and not conclusive." Citing *Middlesex Bank* v. *Butman*, 29 Maine, 19 ; *Taylor* v. *Barron*, 30 New Hampshire, 78; 64 Am. Dec. 281 ; *Burnham* v. *Webster*, 1 Woodbury & Minot (U. S. Circ. Ct.), 172 ; *Rankin* v. *Goddard*, 54 Maine, 28; 89 Am. Dec. 718. "But the modern tendency of the decisions, in this country, is plainly and uniformly in the direction of holding foreign judgments *in personam*, rendered by Courts having jurisdiction, to be binding and conclusive upon the parties, and not re-examinable upon the merits." *Lazier* v. *Westcott*, 26 New York, 146 ; 82 Am. Dec. 404 ; *Dunstan* v. *Higgins*, 138 New York, 70; 34 Am. St. Rep. 431 ; 20 Lawyers' Reports Annotated, 668; *McEwan* v. *Zimmer*, 38 Michigan, 765; 31 Am. Rep. 332 ; *Cincinnati, &c. R. Co.* v. *Wynne*, 14 Indiana, 385; *Baker* v. *Palmer*, 83 Illinois, 568; *Hilton* v. *Guyott*, 42 Federal Reporter, 249 ; *McMullen* v. *Richie*, 41 ibid. 502 ; 8 Lawyers' Reports Annotated, 268; *Glass* v. *Blackwell*, 48 Arkansas, 50. "It is true that these new rulings have been confined to a few States. But it does not appear that the question has arisen of late years in the others, and there is every reason to believe that all our Courts will eventually agree in the new and better rule."

In *Dunstan* v *Higgins*, *supra*, it was held that the refusal of the English Court to allow a commission to examine a witness in this country does not render the judgment of that Court subject to collateral attack in an action upon it here. See notes, 20 Lawyers' Reports Annotated, 668, containing a careful and extended review of the authorities, including the principal cases.

Mr. Freeman says (Judgments, § 196) : "The majority of the reported American cases were decided prior to those English decisions which have resulted in enhancing the dignity of foreign judgments in that country. It will accordingly be found that the greater number of the American Courts have declared in favour of the law as it is now stated in *Phillips* v. *Hunter*, 2 H. Bl. 410, and by which the foreign judgment is regarded as examinable on the merits." In a note, 1 Am. Dec. 325, he says : "A late decision in Kentucky is noticeable, as the Court held a similar principle to that in *Schibsby* v. *Westenholz*, in England, already noticed. Indeed, it is a principle that must be universally adopted." Citing *Kerr* v. *Conely*, *supra*. In a note, 82 Am. Dec. 413, Mr. Freeman cites these earlier cases, including *Bissell* v. *Briggs*, 9 Massachusetts, 462; 6 Am. Dec. 88; *Jordan* v. *Robinson*, 15 Maine, 167; *Pelton* v. *Platner*, 13 Ohio, 209 ; *Williams* v. *Preston*, 3 J. J. Marshall (Kentucky), 600; 20 Am. Dec. 179, and cites the opinion of Story (Conflict of Laws, § 607), and of Kent (*Taylor* v. *Bryden*, 8 Johnson [New York], 173), to the contrary : and in Judgments, § 597, he observes : "The considerations which have influenced the adjudications in the English Courts will no doubt make themselves felt in America. No prediction in regard to future decisions is more likely to be realized than that our Courts will in time place foreign judgments on the same footing which they now occupy in the mother country." Citing *Low* v. *Mussey*, 41 Vermont, 393 ; *Silver Lake Bank* v. *Harding*, 5 Ohio, 545.

Section II. — *Status and Capacity.*

No. 4. — LAUDERDALE PEERAGE CASE.

(Committee for Privileges 1885.)

No. 5. — BIRTWHISTLE *v* VARDILL.

DOE d. BIRTWHISTLE *v.* VARDILL.

(H. L. 1840.)

RULE.

The *status* of legitimacy as depending upon *legitimatio per subsequens matrimonium* is determined by the law of the country of the domicil of the father.

But the character of heir to English land is determined by the law of England.

Lauderdale Peerage Case.

10 App. Cas. 692–762.

[The following brief abstract may suffice here; as the full report seems more appropriate to other topics to be hereafter dealt with.]

Conflict of Laws. — Legitimatio per Subsequens Matrimonium. — Domicil. — Marriage. — Evidence.

The father of a child born out of wedlock being domiciled in Scotland, by subsequent marriage even on deathbed makes the child legitimate.

Charles, twelfth Earl of Lauderdale, heir male of Charles, the second surviving son of Charles, the sixth Earl, died on the 12th of August, 1884, without having been married.

The peerage was claimed by Major Frederick Maitland, of the Bengal Staff Corps, who claimed descent from Patrick, second son of Colonel Richard Maitland, fourth son of Charles, sixth Earl of Lauderdale; the third surviving son of that Earl, named George, having died unmarried.

There was a rival claim by Sir James Gibson Maitland, who claimed as heir-male of Alexander, the fifth son of Charles, sixth Earl, on the ground that Colonel Richard, the fourth son of Charles, sixth Earl, died without lawful issue.

The question was whether Patrick who was born in 1769 was the lawful son of Colonel Richard Maitland. It was claimed that he was legitimated by the subsequent marriage of his parents at New York in 1772. The questions chiefly dealt with in the arguments and judgments were, first, whether certain evidence was admissible to prove the marriage in 1772; secondly, whether the marriage was valid, it being contended that a certain local law of the province of New York passed in 1684 had not been complied with; and, thirdly, whether Colonel Richard was at the time of the marriage which took place on his deathbed, a domiciled Scotchman. It was, throughout the arguments and judgments, admitted and assumed as common ground, that, if the marriage was proved, the *status* of legitimacy would depend on the law of the domicil of the father. The Committee, on considering the evidence, held that the marriage was duly proved, and that the domicil was Scotch as well at the time of the birth of the child as up to the date of the marriage. And it was further held that the fact that the marriage took place on deathbed was, according to the law of Scotland, no reason why the ordinary rule of the Scotch law as to *legitimatio per subsequens matrimonium* should not prevail.

The claim of Major Frederick Maitland was therefore held good, and his right to the peerage established accordingly.

Birtwhistle v. Vardill.

Doe d. Birtwhistle v. Vardill.

2 Cl. & Fin. 571-600; 7 Cl. & Fin. 895-957 (s. c. 5 B. & C. 438; 6 Bligh, N. S. 479; 6 Bing. N. C. 385; 9 Bligh, N. S. 32; 4 L. J. (O. S.) K. B. 190).

Conflict of Laws. — Legitimatio per Subsequens Matrimonium. — Heir to English Land.

A child born in Scotland, of parents domiciled there, who at the time of his birth were not married but who afterwards intermarried in Scotland (there being no lawful impediment to their marriage either at the time of the birth or afterwards), although legitimate by the law of Scotland, is not by such marriage rendered capable of inheriting lands in England.

No. 5. — Birtwhistle v. Vardill, 2 Cl. & Fin. 571–573.

Ejectment for an undivided third part of lands in several parishes in Yorkshire. The title of the claimant, which is more particularly stated in the opinion of the Judges hereafter set forth, depended on his legitimation by the marriage of his parents subsequent to his birth. The King's Bench (1826) gave judgment in favour of the defendant on the ground that the question was settled by the Statute of Merton, 20 H. III. c. 9.[1]

This judgment was brought by writ of error to the House of Lords, and the matter was argued (in 1830) before the Judges upon the following question: —

"A. went from England to Scotland and resided and was [573] domiciled there, and so continued for many years till the time of his death. A. cohabited with M., an unmarried woman, during the whole period of his residence in Scotland, and had by her a son, B., who was born in Scotland. Several years after the birth of B., who was the only son, A. and M. were married in Scotland according to the laws of that country. By the laws of Scotland, if the marriage of a mother of a child with the father of such child takes place in Scotland, such child, born in Scotland before the marriage, is equally legitimate with children born after the marriage, for the purpose of taking land and for every other purpose. A. died seised of real estate in England and intestate. Is B. entitled to such property, as the heir of A.?"

The opinion of the Judges, subsequently delivered by the Lord Chief Baron ALEXANDER, was to the effect that, although, under the circumstances stated in the question, B. is the eldest legitimate son of his father in England as well as in Scotland, that *status* does not entitle him as the heir of that father to the real property situated in England, without his answering the further condition of having been born within the state of lawful matrimony.

Consequently it was the opinion of all the Judges who attended the argument of the case, that B., described in the question, was *not* entitled to the property in England as the heir of A.

The House, having received the opinion of the Judges, took the

[1] The Statute (1235) is as follows: — Ad breve Regis de bastardia, utrum aliquis natus ante matrimonium habere poterit hereditatem, sicut ille qui natus est post. Responderunt omnes Episcopi, quod nolunt, nec possunt, ad istud respondere; quia hoc esset contra communem formam ecclesie. Ac rogaverunt omnes Episcopi Magnates, ut consentirent, quod nati ante matrimonium essent legitimi, sicut illi qui nati sunt post matrimonium, quantum ad successionem hereditariam, quia ecclesia tales habet pro legitimis. Et omnes Comites et Barones unâ voce responderunt, quod nolunt leges Anglie mutare que usitate sunt et approbate.

case into consideration on the 2nd September, 1835, when they ordered a further argument. The case was argued accordingly (in 1839) before the House in presence of the Judges (TINDAL, C. J., VAUGHAN, J., BOSANQUET, J., PATTESON, J., WILLIAMS, J., COLERIDGE, J., COLTMAN, J., and MAULE, J., PARKE, B., and GURNEY, B.,) and on the 20th of July, 1839, their unanimous opinion was delivered in the following terms (7 Cl. & Fin. 924), by

Lord Chief Justice TINDAL: My Lords the facts of the case upon which your Lordships propose a question to Her Majesty's Judges are these: "A. went from England to Scotland, and resided and was domiciled there, and so continued for many years, till the time of his death. A. cohabited with M., an unmarried woman, during the whole period of his residence in Scotland, and had by her a son B., who was born in Scotland. Several years after the birth of B., who was the only son, A. and M. were married in Scotland, according to the laws of that country. By the laws of Scotland, if the marriage of the mother of a child with the father of such child takes place in Scotland, such child born in Scotland before the marriage is equally legitimate with children born after the marriage, for the purpose of taking land, and for every other purpose. A. died seised of real estate in England and intestate." And your Lordships, upon the foregoing state of facts, found this question, namely: "Is B. entitled to such prop-
[*925] erty as the heir of A.?" And *in answer to the question so proposed to us, I have the honour to state to your Lordships, that it is the opinion of all the Judges who heard the argument that B. is not entitled to such property as the heir of A. We have indeed reason to lament that we have been deprived of the assistance of one of our learned brethren who heard the case argued at your Lordships' bar, the late Mr. Justice VAUGHAN; but as he had expressed a concurrent opinion upon the case at a meeting held immediately after the argument, I feel myself justified in adding the authority of his name to that of the other Judges.

My Lords, the grounds and foundation upon which our opinion rests are briefly these: That we held it to be a rule or maxim of the law of England, with respect to the descent of land in England from father to son, that the son must be born after actual marriage between his father and mother; that this is a rule *juris positivi,* as are all the laws which regulate succession to real pro-

perty, this particular rule having been framed for the direct purpose of excluding, in the descent of land in England, the application of the rule of the civil and canon law, by which the subsequent marriage between the father and mother was held to make the son born before marriage legitimate; and that this rule of descent being a rule of positive law annexed to the land itself, cannot be allowed to be broken in upon or disturbed by the law of the country where the claimant was born, and which may be allowed to govern his personal *status* as to legitimacy, upon the supposed ground of the comity of nations.

My Lords, to understand the nature and force of this rule of our law, "that the heir must be a person * born in [* 926] actual matrimony in order to enable him to take land in England by descent," and to perceive, at the same time, the positive and inflexible quality of this rule, and how closely it is annexed to the land itself, it will be necessary to consider the earlier authorities in which that rule is laid down and discussed both before and subsequently to the Statute of Merton, and more particularly the legal construction and operation of that statute.

If we take the definition of heir which Lord COKE adopts from the ancient text-writers, and which is borrowed originally from the Roman law (Coke upon Littleton, 7 b) viz. that he is "ex justis nuptiis procreatus," the very description points at a marriage celebrated according to the rules, requisites, and ritual of the civil or Roman law. "Operae pretium est scire quid sint justae nuptiae," says Huber (Lib. 23, lib. tit. 2, de Ritû Nuptinum). He adds, "In promptû est Justiniani Responsio, — sunt ea quae secundum praecepta legûm contrahuntur."

But to refer to the "Mirror of Justices," perhaps the very earliest of our text books, it is there laid down in page 70 as an admitted principle, "that the common law only taketh him to be a son whom the marriage proveth to be so." Granville, who wrote in the reign of Henry II., (probably about half a century before the passing of the Statute of Merton,) in book 7, chapter 13, states that "Neither a bastard nor any person not born in lawful wedlock can be, in the legal sense of the term, an heir; but if any one claims an inheritance in the character of heir, and the other party object to him that he cannot be heir because he was not born in lawful wedlock, then indeed the plea shall cease in the King's Court, and the Archbishop, or Bishop of the place shall be

[* 927] * commanded to inquire concerning such marriage, and to make known his decision either to the King or his Justices." He then, in chapter 14, gives the form of the writ, which will be found not unimportant to the present inquiry, namely, — "The King to the Archbishop: Health. — W., appearing before me in my Court, has demanded against R., his brother, certain land, and in which the said R. has no right, as W. says, because he is a bastard born before the marriage of their mother; and since it does not belong to my Court to inquire concerning bastardy, I send these unto you, commanding you that you do, in the Court Christian, that which belongs to you; and when the suit is brought to its proper end before you, inform me by your letter what has been done before you concerning it. Witness," etc.

Your Lordships will observe the form of this writ; how precisely it puts the objection against the heir's title upon the very rule of the English law, "that he was born before the marriage of his mother;" by which it is necessarily implied that the marriage of the parents had subsequently taken place. Now if the question had been put generally on the fact, whether any marriage had taken place, or upon the legality of such marriage as had taken place; to such a question of general bastardy, as it is called, the Bishop would have found no difficulty in answering, for the answer to that question would have been purely and exclusively determinable by the spiritual law. But as the canon law, on the one hand, held that the subsequent marriage of the parents made the *antenatus* legitimate, and as the common law of England, on the other hand, held that such *antenatus* was not legitimate for the purpose of inheriting land in England, if the question had gone in the general form, the answer of the Bishop would [* 928] have certified such * *antenatus* to have been legitimate. The law, therefore, framed the question in the precise form contained in the writ, namely, a question of special bastardy, proving thereby how closely, and with how much jealousy, the law adhered to the rule of descent before pointed out. Now, the question so framed did obviously place the Bishop in extreme difficulty in making answer thereto; a difficulty which was very much increased by the constitution of Pope Alexander III. which had been issued very recently before the time when Glanville wrote, namely, in the sixth year of King Henry II.; by which constitution (in part set out by Lord Coke, 2nd Institute, 96) it was

ordained "that children born before solemnization of matrimony, where matrimony followed, should be as legitimate to inherit unto their ancestors as those that are born after matrimony;" and it is upon the subject of this constitution that Glanville is commenting in his 15th chapter, when he says, "Upon this subject, it hath been made a question whether, if any one was begotten or born before the father married the mother, such son is the lawful heir if the father afterwards married his mother? Although, indeed, the canons and the Roman laws consider such son as the lawful heir, yet according to the law and custom of this realm, he shall in no measure be supported as heir in his claim upon the inheritance, nor can he demand the inheritance by the law of the realm. But yet, if a question should arise whether such son was begotten or born before marriage or after, it should, as we have observed, be discussed before the ecclesiastical Judge, and of his decision he shall inform the King or his justices; and thus, according to the judgment of the Court Christian concerning the marriage, namely, whether the demandant was born or begotten before *marriage contracted or after, the King's Court [*929] shall supply that which is necessary in adjudging or refusing the inheritance respecting which the dispute is; so that by its decision the demandant shall either obtain such inheritance or lose his claim."

The Bishops being placed in the difficulty of this *conflictus legûm* by reason of the precise form of the King's writ, at length, at the Parliament holden at Merton, in the 20th Henry III., the statute was framed, which will be found to have a strong and direct application to the present question. That statute had not upon the original roll the title prefixed thereto, upon which observations were made at your Lordship's bar, that it showed the intention of the law to have been no more than to declare the personal *status* of those who are described in such statute. In the edition of the statutes published under the commission from the Crown, there is no other than the general title "Provisiones de Merton;" and no more argument can justly be built upon the title prefixed in some editions of the statutes, than upon the marginal notes against its different sections. That statute or provision of Merton runs thus, namely: "To the King's writ of bastardy, whether any one being born before matrimony may inherit in like manner as he that is born after matrimony, all the Bishops answered that they would not

nor could not make answer to that writ, because it was directly against the common order of the church, and all the Bishops instanted the Lords that they would consent that all such as were born afore matrimony should be legitimate, as well as they that be born within matrimony, as to the succession to inheritance, forasmuch as the church accepteth such as legitimate. And all the Earls and Barons, with one voice, answered that they would not [* 930] * change the laws of the realm which hitherto had been used and approved."

It is manifest from Bracton, who lived and wrote in the time of Henry III. that, shortly after the Statute of Merton, this question of special bastardy ceased to be sent to the Bishop, and became the subject of inquiry and determination in the King's Courts. In book 5th, chapter 19, after stating the circumstances attending the statute of Merton, and also a subsequent council holden in the same year before the King, the Archbishop, the Bishops, Earls, and Barons, whose names he gives, it is ordered that the words in which the writ shall go to the Bishop shall be, "Whether such a one was born before espousals or marriage, or after; and that the ORDINARY shall write back to our lord the King, in the same words, without any evasion or subtilty." And he then states, it was further ordered at that council, "That for the reasons before given, and of such common consent, it may be in the election of our lord the King whether he will demand that inquisition to be taken before the ORDINARY, or in his own Court; because, when the exception is properly taken, the answer ought not to be obscure;" and accordingly it will be found, by reference to the Year Books, that from the time of Edward III. the distinction became settled that general bastardy shall be tried by the ORDINARY, special bastardy shall be tried *per pais* — (See the various authorities collected in Viner's Abridgment, title Trial Bastardy.)

My Lords, the extent of the dominions of the Crown at the time of the passing of the statute of Merton demands particular attention. Normandy, Aquitaine, and Anjou, were then under the allegiance of the King of England, and had been so at least from the commencement of the reign of Henry I. Many [* 931] of * the nobles and other subjects of the King had large possessions both in England and in the countries beyond sea. Those born in Normandy, Aquitaine, or Anjou (as also, in subsequent periods of our history, those born in Guienne, Gascony,

Calais, or Tournay), whilst under the actual dominion of the Crown, were natural born subjects, and could inherit land in England. *Calvin's case*, 2 R. C. 575, 7 Co. Rep. 1, 20, *b*. Many of the very persons who attended at the coronation of Henry III. the occasion on which the Parliament met at Merton and the statute was passed, Bishops and Earls and Barons, are known from history, and would so appear from their very names and titles, to have been of foreign lineage, if not of foreign birth, and were, at all events, well acquainted with the rule of law which was then so strongly contested: yet — notwithstanding the rule of the civil and canon law prevailed in Normandy, Aquitaine, and Anjou, by which the subsequent marriage makes the *antenatus* legitimate for all purposes and to all intents; and notwithstanding the precise question then under discussion was whether this rule should govern the descent of land locally situate in England, or whether the old law and custom of England should still continue as to such land, under which the *antenatus* was incapable to take land by descent — there is not the slightest allusion to any exception in the rule itself as to those born in the foreign dominions of the Crown, but the language of the rule is, in its terms, general and universal as to the succession to land in England. The question is, whether, after the declaration made by that statute, one of the King's subjects, born in Normandy or Aquitaine, or Anjou, under the circumstances supposed by your Lordships, could have inherited land in England? It is not so much a parallel case with the * present; it is the very case itself; and it seems im- [* 932] possible to contend that such would have been held to be the law. In the first place, there is no other form of any writ to the Bishop than the old form given in Glanville and Bracton, which raises the express point whether the claimant was born or not before espousals and matrimony of his father and mother; and if the question was brought before a jury, as afterwards became the course of proceeding, then there was no other than that precise issue which could be raised upon the record. Further, if the question was sent to the Bishop, it must have been sent to the Bishop of the diocese where the action was brought, that is, where the land was situate, and not to the Bishop of the diocese where the party whose legitimacy is disputed was born (see the book of Assisa, 35 pl. 7); which case seems not obscurely to indicate, that if the birth had been in France, the trial would be still before the

English Bishops; for SKIPWORTH, a judge of the Common Pleas, is made to say there, "You may carry your proofs before him in what place you please, in England, or from France." Again, the contest above adverted to was a contest between the ancient law and custom of England, on the one hand, and the canon law on the other, which should prevail as to the hereditary succession to land in England: canon and civil law being acknowledged and prevailing in England in all other respects, with the single exception of its application to the descent of land; the same canon and civil law prevailing in the foreign dominions of the Crown generally, and without any exception. There seems, therefore, no reasonable or probable ground for the surmise of any intention in the law-makers of that day, that, with the general refusal and repudiation of this rule of the civil and canon law as to the hereditary succession to land in England, there should be a tacit [*933] *exception in favour of a claimant born beyond the seas. Again, the custom would rather seem to be one which applies to the land itself, and not to the person only of the claimant, according to an observation of Bracton, in the place above cited, when discussing the very point of the exception on the ground of bastardy, he says, "that every kingdom hath its own customs differing from those of others. For there may be one custom in the kingdom of England, and another in the kingdom of France, as to succession." And it would be singular indeed, if any such exception existed, that neither Bracton, who wrote with so much diffuseness on this very question at the time of this notable refusal of Parliament to alter the law, nor the author of Fleta, nor any of the other early writers, should have left the slightest vestige of an allusion to such exception in the rule.

On the contrary, the observations of Lord Coke 2d Institute, 93, although not made in any case in a Court of Law, proves, in a manner which leaves no doubt, what would have been the opinion of that great lawyer upon the point now under discussion, if it had arisen in his time: "Some have written," he says, "that William the Conqueror, being born out of matrimony, Robert, his reputed father, did after marry Arlot, his mother, and that thereby he had right by the civil and canon law; but that is *contra legem Angliæ*, as here it appeareth." This is in effect saying, although born in Normandy, and legitimated in Normandy by the subsequent marriage of his father and mother there, so that he could inherit land

in Normandy, yet as to land in England he could not take it by descent for the same law would be the law of descent of a kingdom and of land within it. This is the very case now put to the judges by your Lordships.

* It therefore appears to be the just conclusion from [* 934] these premises, that the rule of descent to English land is, that the heir must be born after actual marriage of his father and mother, in order to enable him to inherit; and that this is a rule of a positive inflexible nature, applying to and inherent in the land itself which is the subject of descent, of the same nature and character as that rule which prohibited the descent of land to any but those who were of the whole blood to the last taker, or like the custom of gavel-kind or borough-English, which cause the land to descend in the one case, to all the sons together; and in the other, to the younger son alone.

And if such be, as it appears to us to be, the rule of law which governs the descent of land in England without any exception, either express or implied therein, on the score of the place of birth of the claimant, it remains to be considered whether, by any doctrine of international law, or by any comity of nations, that rule is to be let in by which B., being held to be legitimate in his own country for all purposes, must be considered as the heir-at-law in England.

The broad proposition contended for on the part of the plaintiff in error is, that legitimacy is a personal status to be determined by the law of the country which gives the party birth; and that, when the law of that country has once pronounced him to be legitimate, he is, by the comity of international law to be considered as legitimate in every other country, also, and for every purpose: and it is then contended that, as by the Scotch law there is a *presumptio juris et de jure*, that, under the circumstances supposed, the parents of B. were actually married to each other before the birth of B., such presumption of the Scotch law, by which his legitimacy is effected, must * also be adopted and received to [* 935] the same extent in the English as in the Scotch Courts of Justice.

Now, there can be no doubt but that marriage, which is a personal contract, when entered into according to the rites of the country where the parties are domiciled and the marriage celebrated, would be considered and treated as a perfect and complete marriage throughout the whole of Christendom.

But it does not therefore follow that, with the adoption of the marriage contract, the foreign law adopts also all the conclusions and consequences which hold good in the country where the marriage was celebrated. That the marriage in question was not celebrated in fact until after the birth of B., is to be assumed from the form of the question. Indeed, except on that supposition, there would be no question at all. Does it follow, then, that because the Scotch hold a marriage celebrated between the parents after the birth of a child to be conclusive proof of an actual marriage before, a foreign country, which adopts the marriage as complete and binding as a contract of marriage, must also adopt this consequence? No authority has been cited from any jurist or writer on the subject of the law of nations to that effect. Nothing beyond the general proposition that a party legitimate in one country, is to be held legitimate all over the world. Indeed, the ground upon which this conclusion of B.'s legitimacy is made by the Scotch law, is not stated to us, and we have no right to assume any fact not contained in the question which your Lordships have proposed to us. We may however observe that, in the course of the argument at your Lordships' bar, the ground has been variously stated, upon which the laws of different countries have arrived at the [* 936] same conclusion. It was asserted * that, by the law of Scotland, the subsequent marriage is not to be taken to be the marriage itself, but only evidence, though conclusive in its nature, of the marriage prior to the birth of B.; that the canon law rests the legitimacy of the son born before such marriage upon a ground totally different, viz., that having been born illegitimate, he is made legitimate, — *legitimatus*, by the subsequent marriage, by a positive rule of law, on account of the repentance of his parents; whereas, by the Scotch law, a marriage previous to his birth is conclusively presumed, so that he always was legitimate, and his parents had nothing to repent of. Pothier, on the other hand (Contrat de Marr, part V. ch. 2, art. 2), when he speaks of the effect of a subsequent marriage, in legitimating children born before it, disclaims the authority of the canon law, nor does he mention any fiction of an antecedent marriage, but rests the effect upon the positive law of the country. He first instances the custom of Troyes. "Les enfans nés hors mariage De Soluto et Solutâ puis que le père et la mère s' epousent l'un l'autre, succèdent et viennent à partage avec les autres enfans si aucuns y' à;" and then adds, "that it is a common right received throughout the whole kingdom."

No. 5. — Birtwhistle v. Vardill, 7 Cl. & Fin. 936–938.

Now, it could never be contended by any jurist, that the law of England in respect to the succession of land in England, would be bound to adopt a positive law of succession like that which holds in France, the distinction being so well known between laws that relate to personal status and personal contracts, and those which relate to real and immovable property; for which it is unnecessary to make reference to any other authority than that of Dr. Story in his admirable Commentaries on the Conflict of Laws (see section 430 and following, where all the * authorities [*937] are brought together). And if such positive law is not upon any principle to be introduced to control the English law of descent, what ground is there for the introduction into the English law of descents, not only of the contract of marriage observed in another country, which is admitted to be adopted, but also of a fiction with respect to the time of the marriage? that is, in effect, of a rule of evidence which the foreign country thinks it right to hold.

But admitting, for the sake of argument, and we are not called upon to give our opinion on that point, that B., legitimate in Scotland, is to be taken to be legitimate all over the world; the question still recurs, whether, for the purpose of constituting an heir to land in England, something more is not necessary to be proved on his part than such legitimacy; and if we are right in the grounds on which we have rested the first point, one other step is necessary, namely to prove that he was born after an actual marriage between his parents; and if this be so, then, upon the distinction admitted by all the writers on international law, the *lex loci rei sitæ* must prevail, not the law of the place of birth.

My Lords, in the course of the discussion, some stress appears to have been placed on the argument that if B. had died before A., the intestate, leaving a child, such child might have inherited to A., tracing through his legitimate parent; and then it was asked if the child might inherit, why might not the parent himself inherit? But the answer to that supposed case appears to be, that if the parent be not capable of inheriting himself, he has no heritable blood which he can transmit to his child; so that the child could not, under the assumed facts, have inherited, and the question therefore becomes, in truth, the same with * that [*938] before us. The case supposed would be governed by the old acknowledged rule of descent: "Qui doit inheriter al père, doit inheriter al fitz."

My Lords, the two decided cases that have been relied upon in the course of argument, that of *Shedden* v. *Patrick*, Dic. Dec., July 1, 1803, "Foreign," App. n. 6, and that of the *Strathmore Peerage*, 4 Wils. & Sh. App. 89, n. 5, do not, upon consideration, create any real difficulty. Those cases decide no more than that no one can inherit without having the personal status of legitimacy; a point upon which all agree; but they are of no force to establish the main point in dispute in this case, viz., that such personal status is sufficient of itself to enable the claimant to succeed as heir to land in England.

Upon the whole, in reporting to your Lordships as the opinion of the Judges, "that B. is not entitled to the real property as the heir of A.," I am bound at the same time to state, that although they agree in the result, they are not to be considered as responsible for all the grounds and reasons on which I have endeavoured to support and to explain such opinion.

After some discursive observations from Lord BROUGHAM, judgment was moved as follows by the

[957] LORD CHANCELLOR (Lord COTTENHAM): — My Lords, I was not in your Lordships' House when this case was first argued; but I was present at the argument when the learned Judges were in attendance, and I gave my attention to the opinion expressed by the LORD CHIEF JUSTICE, and I entirely concur in that opinion. I am extremely satisfied with the ground upon which the Judges put it, because they put the question on a ground which avoids the difficulty that seems to surround the task of interfering with those general principles peculiar to the law of England, principles that at first sight seem to be somewhat at variance with the decisions to which the Courts have come. Under these circumstances, as my noble and learned friend does not move the judgment, I move judgment for the defendant in error.

Judgment accordingly.

ENGLISH NOTES.

A question left open by the former part of the rule is at what time is the domicil of the father to be inquired into? At the time of the birth of the child? or at the time of marriage? or at both times?

It seems to be settled law according to English authority that *legitimatio per subsequens matrimonium* is ineffective unless permitted by the personal law of the father at the date of the child's birth. *In re Wright's Trusts* (1856), 2 K. & J. 595, 25 L. J. Ch. 621; *Goodman* v.

Goodman (1862), 3 Giff. 643: *Udny* v. *Udny* (1869), L. R., 1 H. L. Sc. 441. In the last case, HATHERLY, V. C., said: "I have myself held, and so have other Judges in the English Courts that according to the law of England, a bastard child whose putative father was English at its birth, could not be legitimated by the father afterwards acquiring a foreign domicil and marrying the mother in a country by the laws of which a subsequent marriage would have legitimated the child. I see no reason to retract that opinion." The doctrine has been re-asserted by STIRLING, J., and COTTON, L. J., in *In re Grove, Vaucher* v. *Solicitor to the Treasury* (1888), 40 Ch. D. 216, 58 L. J. Ch. 57, 59 L. T. 587. Savigny's opinion is to the contrary. He says: "Legitimation by subsequent marriage is regulated according to the father's domicil at the time of the marriage, and in this respect the time of the birth of the child is immaterial. It has indeed been asserted that this latter point of time must be regarded, because by his birth the child has already established a certain legal relation, which only obtains fuller effect by the subsequent marriage of the parents; and it is added that the father could arbitrarily elect before the marriage a domicil disadvantageous to the child. But we cannot speak at all of a right of such children, or of a violation of it, since it depends on the free will of the father not only whether he marries the mother at all, but even if he contracts such a marriage, whether he will recognise the child. In both these cases, the child acquires no right of legitimacy, for a true proof of filiation out of wedlock is impossible, and accordingly, voluntary recognition along with marriage and independently of it, can alone confer the rights of legitimacy." Guthrie's Translation of Savigny's Heut. Rom. Rechts, p. 250.

Though the point has never been decided directly, it has been laid down on high authority that legitimation, to be effective must also be permitted by the law of the father's domicil at the date of the marriage.

In *Countess of Dalhousie* v. *M'Donall* (1840), 7 Cl. & Fin. 817, and *Munro* v. *Munro* (1840), 7 Cl. & Fin. 842, as well as in the principal case of *The Lauderdale Peerage*, the paternal domicils remained unchanged between the dates of birth and subsequent marriage. In these cases, Lord BROUGHAM, in some remarks which he made (*more suo*) without having heard the arguments, adopted the opinion of the Scotch Judges that "if the domicile was not the same at these two periods, we should hold that that of the father at the time of the marriage should give the rule," (7 Cl. & Fin. 884).

In *Skottowe* v. *Young* (1871), L. R., 11 Eq. 474, 40 L. J. Ch. 366, 24 L. T. 220, a testator devised to each of his daughters whom he had legitimated according to the law of France, where he was domiciled, a share of proceeds of real estate given by his will to trustees in trust for

sale; and the question arose as to the amount of legacy duty which was claimed by the Crown on the footing of the daughters being "strangers in blood" within the meaning of the legacy duty Acts. Vice-Chancellor STUART held that each of the legatees held the *status* of a legitimate daughter as well in this country as elsewhere, and that the circumstance that she could not have inherited English land according to the rule in *Birtwhistle* v. *Vardill*, was immaterial.

In the case of *In re Goodman's Trusts* (1881), 17 Ch. D. 266, 50 L. J. Ch. 425, 44 L. T. 527, the question was elaborately considered by the Court of Appeal whether a child born in Holland of parents domiciled there at the time of the birth and of the subsequent marriage, was entitled, by reason of legitimation according to the law of Holland, to a share as one of the next of kin in the distribution of the intestate personal estate of a person who died domiciled in England. The Court by a majority, COTTON, L. J., and JAMES, L. J., against LUSH, L. J., held, reversing the decision of the MASTER OF THE ROLLS (Sir G. JESSEL), that the child was so entitled.

The two decisions last mentioned were followed by KAY, J., in *In re Andros*, *Andros* v. *Andros* (1883), 24 Ch. D. 637, 52 L. J. Ch. 793, 49 L. T. 163, where a testator bequeathed personalty to the "children" of a foreigner, and it was held that children who had been legitimated by the law of the domicil were entitled.

In *Escallier* v. *Escallier* (1885), 10 App. Cas. 312, 54 L. J. P. C. 1, 53 L. T. 884, where the local law of Trinidad allowed illegitimate children to have equal rights of inheritance with legitimate children born of the same parents, all the children of both descriptions were permitted to share the land of their mother equally. So in *Doglioni* v. *Crispin* (1866), L. R., 1 H. L. 301, 35 L. J. P. & M. 129, 15 L. T. 44, the right of a natural son of a Portuguese noble recognised by Portuguese laws was given effect to here.

In *Re Grey*, *Grey* v. *Earl of Stamford* (1892), 1892, 3 Ch. 88, 61 L. J. Ch. 662, the effect of the *status* of legitimacy was considered upon a specific devise of real estate to "children" of H., where H. left children born out of wedlock, but legitimated according to the law of the country of his domicil. STIRLING, J., held that these children were entitled. He adopted the observation of Lord Justice JAMES in *Re Goodman's Trust*; namely that the opinions of the Judges first consulted by the House of Lords in *Birtwhistle* v. *Vardill*, had contained two propositions, (a) that the claimant was to all intents legitimate, and (b) that such legitimacy did not include heirship to English land, and that the former of those propositions had never been questioned; and, in conclusion, he considered that the rule laid down in *Birtwhistle* v. *Vardill*, relates only to the descent of land on intestacy, and does not affect the case of a devise in a will to children.

AMERICAN NOTES.

The *Birtwhistle case* is abundantly cited by Story on Conflict of Laws. He treats the subject at great length and with vast learning, and states the law correctly, no doubt, as follows: "All the authorities in both countries, so far as they go, recognize the principle, in its fullest import, that real estate, or immovable property, is exclusively subject of the laws of the government within whose territory it is situated." *United States* v. *Crosby*, 7 Cranch (U. S. Supreme Ct.), 115; *Harper* v. *Hampton*, 1 Harris & Johnson (Maryland), 687; *Goodwin* v. *Jones*, 3 Massachusetts, 514; 3 Am. Dec. 173; *Holmes* v. *Remsen*, 4 Johnson Chancery (New York), 460; 8 Am. Dec. 581; 20 Johnson (New York), 254; *Milne* v. *Moreton*, 6 Binney (Pennsylvania), 353; 6 Am. Dec. 466; *Depras* v. *Mayo*, 11 Missouri, 314; 49 Am. Dec. 88; *Baxter* v. *Willey*, 9 Vermont, 276; 31 Am. Dec. 623; *Richardson* v. *De Giverville*, 107 Missouri, 422; 28 Am. St. Rep. 426; *Donaldson* v. *Phillips*, 18 Pennsylvania State, 170; 55 Am. Dec. 614; *Baum* v. *Birchall*, 150 Pennsylvania State, 164; 30 Am. St. Rep. 797; *Smith* v. *Kelly's Heirs*, 23 Mississippi, 167; 55 Am. Dec. 87; *Harvey* v. *Ball*, 32 Indiana, 98; *Lingen* v. *Lingen*, 45 Alabama, 410; *Apperson* v. *Bolton*, 29 Arkansas, 418; *Short* v. *Galray*, 83 Kentucky, 501; 4 Am. St. Rep. 168.

But as to the effect of foreign legitimation there is some conflict in this country. The analogous case of foreign adoption has been quite largely considered.

The laws of Louisiana, having made slaves immovables, govern in reference to the succession thereto, notwithstanding anything to the contrary in the laws of Tennessee. *McCollum* v. *Smith*, Meigs (Tennessee), 342; 33 Am. Dec. 147.

A child having been legally adopted and thus entitled to inherit lands in another State, having with its adopted father become resident in Massachusetts, where similar laws of adoption prevail, may inherit real estate in Massachusetts, although the wife has given no formal consent to the adoption, as required in the latter State. *Ross* v. *Ross*, 129 Massachusetts, 243; 37 Am. Rep. 321. In *Keegan* v. *Geraghty*, 101 Illinois, 26, it was held that the adoption law of Wisconsin will not be recognized in Illinois so as to enable the child to inherit from the lineal or collateral kindred of the adopting parents.

In *Smith* v. *Derr's Adm'rs*, 34 Pennsylvania State, 126; 75 Am. Dec. 641, it was held, citing the *Birtwhistle case*, that a child born out of wedlock, and legitimated under the law of another State, is not thereby clothed with inheritable capacity in Pennsylvania, where the fact of birth in wedlock alone gives the capacity to inherit. There was no discussion of the point in the opinion, the Court founding its views on the *Vardill case*, and observing: "That case was so thoroughly and learnedly discussed in the King's Bench, Exchequer Chamber, and House of Lords, that we are saved from the labour that would be required if the question were new."

But the contrary was held in New Jersey as to the right of a child legitimated by subsequent marriage in Pennsylvania to inherit land in New Jersey.

Dayton v. *Adkisson*, 45 New Jersey Chancery, 603; 14 Am. St. Rep. 763; 4 Lawyers' Reports Annotated, 488. In the latter case the Court observed: —

"The question involved was elaborately discussed in England in *Doe* v. *Vardill*, 5 Barn. & C. 438; 2 Clark & F. 571; *sub nom. Birtwhistle* v. *Vardill*, 7 Clark & F. 895; in New York in *Miller* v. *Miller*, 91 N. Y. 315; and in Massachusetts, in *Ross* v. *Ross*, 129 Mass. 243.

"In the latter case Chief Justice GRAY cites and comments upon every case up to that date (1880), and after an exhaustive discussion of the whole subject, comes to the conclusion that the particular reasons that influenced the English Court in holding in *Doe* v. *Vardill*, that an heir to land in England must be actually born in wedlock, do not apply to this country; and that a person declared to be a legitimate child of another by the law of the State of the domicile must be held to have all the rights of a legitimate child wherever he goes. The Court of Appeals of New York in 1883, in the case above cited, came to the same conclusion in a case where a son born out of wedlock in Germany was legitimized by the subsequent marriage and cohabitation of his parents in Pennsylvania, by force of the same statute above quoted, and held such son entitled to inherit lands in New York.

"The result in these cases has the support of Judge Story in his Conflict of Laws, section 93, *et seq.*, of Dr. Wharton in his work on the same subject, section 240, *et seq.*, and of Professor Parsons, in 2 Parsons on Contracts, 5th ed. p. 600.

"An examination of these cases will show that the contrary result in England was attempted to be justified by the language of the Statute, so called, of Merton, 20 Hen. III. chap. 9, which it was claimed negatively enacted that the English heir must be born in lawful wedlock.

"Lord Brougham, in 2 Clark & F., and again in 7 Clark & F., combats this position with arguments that the Courts of New York and Massachusetts seemed to think unanswerable; and they appear so to me. And see the strictures upon the result of the English decision, in the judgment of Lord Justice JAMES, in *Re Goodman's Trusts*, L. R., 17 Ch. Div. 296–298.

"The English Judges in *Doe* v. *Vardill* did not deny, but admitted, that the effect of the Scotch marriage in that case was to legitimize the previous born issue, and that being legitimate in Scotland, the country of his domicile, he was also legitimate in England. But they held, as before stated, that a person who inherits lands in England must not only be legitimate, but must have been actually born in wedlock. *Ross* v. *Ross*, 129 Mass. 252–254; *Miller* v. *Miller*, 91 N. Y. 321, 322.

"It is worthy of remark that the famous Statute of Merton, 20 Hen. III. chap. 9, is in fact not a statute, but a mere entry on the minutes of Parliament of the refusal by the English Lords to assimilate the laws of England to that of the other civilized countries, by affirmatively declaring that the marriage of the parents subsequent to the birth rendered the child legitimate.

"An equivalent of this Statute of Merton was enacted in Pennsylvania (Purdon's Digest, 9th ed. p. 565; Pam. 1833, p. 318. See Report of the Judges, 3 Binn. 595–600), and while in force produced the decision in *Smith* v. *Derr*, 34 Pa. 126, the hardship of which probably led to the passage of the law of 1857 above quoted.

"I am unable to find among our statutes any enactment equivalent to the Statute, so called, of Merton, and I think public policy at this date favours the adoption of the rule which I have concluded to apply in this case, and that that rule is supported by the weight of authority in this country. Statutes similar to that in Pennsylvania exist in many, if not most, of our sister States, and also statutes which provide, as our own does, for the adoption of children by legal proceedings.

"Many persons come to reside among us from neighbouring States, and from those countries of Europe governed by the civil law system, and bring with them children whom they suppose to be their lawful heirs for all purposes, but who would be denied the right of heirs as to real estate by the rule adopted in England in *Doe* v. *Vardill*, while as to personal property, they would be lawful next of kin. I do not think such a state of the law a desirable one, and am not willing to be the first Judge to declare such to be the law in this State. Nor do I think a law enabling or even encouraging parents to do simple justice to their innocent offspring begotten out of wedlock, by investing them with the complete attributes of heirs, is immoral, or tends to promote immorality. I see no reason why a man should not be permitted to adopt and invest with rights of heirship his own illegitimate child by marrying its mother; and I see no difference in morals between such mode of adoption and that provided by our statutes, which enables a man to adopt with that effect even the illegitimate child of unknown parents."

This subject was examined with great research by GRAY, C. J., in *Ross* v. *Ross*, *supra* (A. D. 1880), who commenced by saying that "the question how far a child, adopted according to law in the State of the domicile, can inherit lands in another State, was mentioned by Lord BROUGHAM, in *Doe* v. *Vardill*, 7 Cl. & Fin. 895, 898, and by Chief Justice LOWRIE, in *Smith* v. *Derr*, 34 Penn. St. 126, 128; but so far as we are informed, has never been adjudged." He summarizes "the leading case in Great Britain on this subject," *Shedden* v. *Patrick*, 5 Paton, 194, and observes that it "is wholly inconsistent with the theory that upon general principles, independently of any positive rule of law, the question whether a person claiming an inheritance in real estate is the lawful child of the last owner, is to be decided by the *lex rei sitæ*; for if that law had been applicable to that question, the plaintiff must have been held to be the legitimate heir; and it was only by trying that question by the law of the domicile of his father that he was held to be illegitimate." He continues: —

"In the well-known case of *Doe dem. Birtwhistle* v. *Vardill*, it was, indeed, held by the Court of King's Bench in the first instance, and by the House of Lords on writ of error, after two arguments, at each of which the Judges attended and delivered an opinion, that a person born in Scotland, and there legitimate by reason of the subsequent marriage of his parents in Scotland, they having had their domicile there at the time of the birth and of the marriage, could not inherit land in England. 5 B. & C. 438; 8 D. & R. 185; 2 Cl. & Fin. 571; 9 Bing. N. R. 32; 7 Cl. & Fin. 895; 6 Bing. N. C. 385; 1 Scott, N. R. 828; West, H. L. 500.

"One curious circumstance connected with that case is, that under the

English usage which allows counsel in a cause, if raised to the bench during its progress, to sit as Judges in it, Chief Justice TINDAL, who had argued the case for the plaintiff in the King's Bench, gave the opinion of the Judges in the House of Lords in accordance with which judgment was finally rendered for the defendant: and Lord BROUGHAM, who had taken part as counsel for the defendant in the first argument in the House of Lords, was most reluctant, for reasons which he stated with characteristic fulness and power, to concur in that judgment. 5 B. & C. 440; 2 Bl. & Fin. 582–598; 7 id. 924, 940–957.

"But that case, as clearly appears by the opinions of Chief Justice ABBOTT and his associates in the King's Bench, as well as by that of the Judges, delivered by Chief Justice TINDAL, and those of Lord BROUGHAM and Lord COTTENHAM, after the rehearing in the House of Lords, was decided upon the ground, that admitting that the plaintiff must be deemed the legitimate son of his father, yet by what is commonly called the Statute of Merton, 20 Hen. III. ch. 9, the Parliament of England, at a time when the English Crown had possessions on the continent in which legitimation by subsequent matrimony prevailed, had, although urged by the bishops to adopt the rule of the civil and canon law, by which children born from the marriage of their parents are equally legitimate as to the succession of inheritance with those born after marriage, positively refused to change the law of England as theretofore used and approved. The *ratio decidendi* is most clearly brought out by Mr. Justice LITTLEDALE and by Chief Justice TINDAL."

"It was upon the 'very great new light' thus thrown upon the question, and the 'very important additions' thus made to the former arguments, that Lord BROUGHAM, though not wholly convinced, waived his objections to judgment for the defendant. 7 Cl. & Fin. 939, 943–946. And Lord COTTENHAM, the only other law lord present, in moving that judgment, said, 'I am extremely satisfied with the ground upon which the Judges put it, because they put the question upon a ground which avoids the difficulty that seems to surround the task of interfering with those general principles peculiar to the law of England, principles which at first sight seem to be somewhat at variance with the decisions to which the Court have come.' 7 Cl. & Fin. 957. And see Lord BROUGHAM, Lord CRANWORTH, and Lord WENSLEYDALE, in *Fenton* v. *Livingstone*, 3 Macq. 497, 532, 544, 550."

"The most accomplished commentators on the subject, English and American, are agreed that the decision in *Doe* v. *Vardill*, which has had so great an influence with English Judges, does not rest upon general principles of jurisprudence, but upon historical, political, and constitutional reasons peculiar to England. Westlake's Private International Law (ed. 1858), 90–93; (ed. 1880), intro. 9, 53, 168; 4 Phillimore's International Law (2d ed.), 538, note; Dicey on Domicile, 182, 188, 191, pref. iv.; 2 Kent Com. 117, note a, 209, note a; 4 id. 413, note d; Story Confl., 93 w and note; Whart. Confl. Laws, 242. Upon questions of comity of States, considerations derived from the feudal law, from an Act of Parliament of the time of Henry III., and from the constitution and policy of the English government, have no weight in Massachusetts at the present day."

In *Miller* v. *Miller*, 91 New York, 315; 43 Am. Rep. 669, it was held that an illegitimate child, made legitimate by the subsequent marriage of his parents, according to the law of the State or country of the marriage and the parents' domicile, is thereafter legitimate everywhere. The Court observed: "The statutes of this State, to which we have referred, do not contain the words 'born out of wedlock,' or the word 'bastard.' The English Statute of Merton, so called (20 Hen. III. chap. 9), not only required that a child, in order to inherit, should be legitimate, but that 'he should be born in lawful wedlock as well.' This constitutes a marked difference between that statute and the statute of this State cited *supra*." "The learned Judge Story, in his Conflict of Laws, devotes nearly the entire fourth chapter, and no inconsiderable portion of the work, to the consideration of the question involved in the case at bar, and he asserts the rule, that if a person is legitimated in a country where domiciled, he is legitimate everywhere and entitled to all the rights flowing from that *status*." Citing *In re Goodman's Trust*, L. R., 17 Ch. Div. 266. And the Court continued: "The celebrated case of *Birtwhistle* v. *Vardill*, reported in 11 Eng. C. L. 266, also in 2 Clark & Fin. 581, and 7 id. 895, and 9 Bing. 7, involved a case of similar character to that presented in the case at bar, and is specially relied upon by the respondent's counsel. It was there held that a child born in Scotland, of unmarried parents, domiciled in that country, and who afterward intermarried there, is not by such marriage rendered capable of inheriting lands in England. By the Scottish law the marriage legitimated the child. It was laid down by the Chief Baron on behalf of the Court that the comity existing between nations is conclusive to give the claimant the character of the eldest legitimate son of his father, and to give him all the rights which are necessarily consequent upon that character. Thus sustaining the general doctrine that by the comity between different nations the laws of one should be recognized by the other in reference to rendering children born out of wedlock legitimate, but it further held that the son should not inherit in England, for the reason that although he was legitimate, he was not born in wedlock. The distinction between being legitimate and being born in wedlock would seem to be a narrow one, and it is difficult to see how it can be urged that a person can be made legitimate although born a bastard, and yet for the purpose of inheriting real estate be illegitimate because not born in wedlock. The particular phraseology of the Statute of Merton, so called, had much to do with this limited and narrow construction, and it is but fair to assume that if the term 'born in wedlock' had been excluded, the right of inheritance would have been maintained. It was said in that case by Bayley, J., that 'the right to inherit lands depends upon the quality of the land and not upon any personal statutes.' It would thus seem that the case was decided upon the peculiar laws governing real estate in England, and especially upon the Statute of Merton. It was twice argued in the House of Lords (2 Clark & Fin. 581; 7 id. 895), and eventually decided upon the sole ground that although a child born in Scotland before the marriage of his parents would become legitimate by the subsequent marriage of said parents, yet he could not inherit in England, for the reason that the English statute does not only require that the child be legitimate, but that he must also be

born in wedlock. This distinction was strongly criticised by Lord Brougham, one of the ablest of English jurists, and one of the Judges in that case when last heard. He says: 'If what is laid down in this case be law, the bounds of that law are very narrow; if it is the law anywhere, it prevails only as the law within the bounds of Westminster Hall. I know, wherever I go in Europe it is boldly denied to be the law. I know the opinion of Dr. Story and other American jurists is against us, and I do not think I could overstate the degree in which all these jurists dissent from the judgment in this case.' See 7 Clark & Fin. 915. Wharton, in his Conflict of Laws, 241, says in regard to this case, 'The opinion was based on the special ground that the English law as to the descent of honours and real property was of a distinctive character, and could not be invaded by the prescription of a foreign jurisprudence.' Parsons in his work on Contracts, in commenting on this case says: 'We think such a marriage in Scotland, supposing parents and child afterward come to America and be naturalized here, would be held here to make the child an heir as well as give him all other rights of legitimacy.'

"The case of *Birtwhistle* v. *Vardill* is so limited and restricted that it must be held only to apply to the law as established in Great Britain."

In *Lingen* v. *Lingen*, 45 Alabama, 410 (A. D. 1871), it was held that a bastard born in France and legitimated there, cannot inherit the estate of his father in Alabama, nor can he inherit his personal property, if his father, at the time of his death, was domiciled in Alabama. The Court cited the *Vardill case*, 5 B. & C. 438, and *Smith* v. *Derr's Adm'r*, 34 Pennsylvania State, and adds nothing by way of argument, but concludes that "There is no law in this State that gives validity to an act of legitimation in a foreign country, or even in a sister State." This decision was pointedly disapproved by the New York Court in *Miller* v. *Miller*, *supra*, with the observation that it "is contrary to the general authority, and should not, we think, be followed."

In *Smith* v. *Kelly's Heirs*, 23 Mississippi, 167, the statement of Story (Conflict of Laws, § 105), if offspring would be legitimated by subsequent marriage in the country of their birth they would, "perhaps in any country, at all events in this," become legitimate and be so recognized everywhere. The Court referred to the opinion of "the majority of the English" Judges that as to lands in England the laws of that country must govern. And the *status* of illegitimacy being fixed in this case by the laws of South Carolina, it was recognized in Mississippi.

The most recent adjudication on this subject appears to be *Van Matre* v. *Sankey* (A. D. 1893), 148 Illinois, 536; 39 Am. St. Rep. 196; 23 Lawyers' Rep. Annotated, 325, holding that real property in Illinois may descend to a child who by adoption in Pennsylvania, has become there the lawful heir of the owner of the property. The reasoning of Mr. Justice Gray, in *Ross* v. *Ross*, *supra*, is said to have been adopted in *Keegan* v. *Geraghty*, 101 Illinois, 26, and is reaffirmed, and the latter decision is distinguished on the ground that the question there was as to the right of the adopted child "to take, not from the adopting parent, but from collaterals, and by representation."

The subject is considerably treated in a note, 39 Am. St. Rep. 229, where the conclusion is that "The manifest tendency of the recent American de-

cisions is to treat adoption as fixing the *status* of the child both in the State of its domicile where the adoption takes place and in every other State in which its claims as an adopted child may be asserted." Citing *Estate of Williams*, 102 California, 70; 41 Am. St. Rep. 163, which case appears to be founded on *Ross* v. *Ross*, *supra*. See also note, 17 Lawyers' Rep. Annotated, 439.

As to legitimation, it is said, in a note, 12 Am. St. Rep. 103: "The extra-territorial effect of the legitimizing of a child, like that of an adoption, is not finally settled. The better opinion is, we think, that when an illegitimate child has been made legitimate in any mode sanctioned by the laws of the State or country in which it and its parents at the time reside, its *status* of legitimacy becomes thereupon established, and entitles it everywhere to inherit as the legitimate offspring of such parents." Citing the foregoing cases, with the *Vardill case* and the Pennsylvania and Alabama cases to the contrary.

In *Blythe* v. *Ayres*, 96 California, 532; 19 Lawyers' Rep. Annotated, 40, it was held that the law of the domicile of the father, and not that of the mother or of the child, governs the question of the legitimation of a bastard child by the father's acknowledgment and other acts, the same as in case of subsequent marriage. This is a learned discussion, and the Court found the decision on *Munro* v. *Munro*, 1 Rob. Sc. App. H. L. 492, "a case crystallizing the judicial thought of the age upon the subject, and commanding the respect of all writers and judges upon the law of domicile." And they observe: "In the celebrated case of *Birtwhistle* v. *Vardill*, 7 Clark & F. 936, to which the learned Chief Justice refers in his opinion in the *Ross case*, the decision would undoubtedly have been in line with *Ross* v. *Ross*, if in lieu of the Statute of Merton, England's law of descent had been similar to the Massachusetts provision."

A child legally adopted in a foreign State will be treated as if he had been adopted in Rhode Island, for the purpose of determining his right of succession to an inheritance of property under its laws. *Melvin* v. *Martin* (Rhode Island), 30 Atlantic Reporter, 467.

In *Williams* v. *Kimball*, Florida Supreme Court, 26 Lawyers' Rep. Annotated, 746, this doctrine was applied in the case of issue of a slave marriage. The Court said: "It is contended, however, that the plaintiff Williams is and has always been a resident of the State of Georgia; that by an Act of that State he has been legitimated, and that thus being legitimate in Georgia he has a *status* established by law which makes him legitimate in every other State and country. The effect of this contention would be that the capacity of a person to inherit real estate in this State would depend, not upon our laws, but upon the varying statutes of perhaps a hundred or more different States or countries in which the claimants of the estate might reside. In such a state of the law, one a resident citizen of the State would be excluded as an heir, but would be entitled to share in the estate if he accidentally lived over the border line of an adjoining State. This contention of the appellant cannot be sustained. By the common law, which is law with us, all questions of the distribution and descent of real estate must be determined by the law

of the jurisdiction in which the property is situated. Story on Conflict of Laws, sec. 483; *Boyce* v. *St. Louis*, 29 Barb. 650; *Dawes* v. *Boylston*, 9 Mass. 337; 6 Am. Dec. 72; *Bryan* v. *Moore*, 11 Mart. (La.) 26; 13 Am. Dec. 317, and authorities cited in note; 3 Am. & Eng. Encyclop. Law, p. 566; *Abston* v. *Abston*, 15 La. Ann. 137; *Potter* v. *Titcomb*, 22 Me. 300; *Elliott* v. *Minto*, 6 Madd. Ch. 16; *Chapman* v. *Robertson*, 6 Paige, 627; 3 L. ed. 1128; 31 Am. Dec. 264.

"Being convinced that a Georgia statute not in harmony with our system, upon the capacity of persons to inherit real estate, could not prevail here, we have not attempted to interpret or construe the same. It cannot be denied that a number of decisions can be found upholding the proposition that persons made legitimate by the laws of one State are legitimate everywhere. We have taken great pains to examine a number of these decisions. They mostly apply to residents of the States in which suits are brought, who, before their removal thereto, have been legitimated in other States. Some proceed upon statutory grounds, some expressly repudiate the common law and ancient English statutory doctrine. Before the Parliament of Merton, in the 20th year of Henry III., A. D. 1235, it had been the law of England with respect to the descent of land, that the son must be born after the actual marriage of his father and mother. This rule was framed for the express purpose of excluding in the descent of land in England the application of the rule of the civil and canon law, by which the subsequent marriage of the parents was held to make the son born before marriage legitimate. At the Parliament of Merton the clergy proposed to change the law, so that *antenati* legitimated by the marriage of their parents might inherit, but the barons refused to change the law of the realm. Therefore the Statute of Merton instead of being a new enactment upon the subject, was a legislative declaration of an ancient law. It has been declared to be in force in England by the British House of Lords as late as 1839. *Birtwhistle* v. *Vardill*, 7 Clark & F. 895; *Doe* v. *Vardill*, 6 Bing. N. C. 385. It is now by adoption the law in this State (sec. 7, p. 708, McClellan's Digest), and, with the statutory exceptions hereinafter noted, those only possess heritable blood who are born in lawful wedlock, or in a competent time after its termination. It has been held that legitimation in a foreign country does not make lawful heirs, in other countries where the common law or the Statute of Merton is now in force, of those who were born out of lawful marriage. So far as the law of descents is concerned, the *lex loci rei sitæ* must prevail, and the different States of this Union are foreign countries to each other. In the case of *Birtwhistle* v. *Vardill*, *supra*, it was decided that a child born in Scotland before the marriage of his parents, but who was legitimated by their subsequent marriage according to the laws of that country, could not inherit lands in England. In *Lingen* v. *Lingen*, 45 Ala. 410, it was held that a bastard child conceived in Alabama, but born in France, and legitimated by an acknowledgment of the father in due form of law, according to the laws of that country, was not a lawful heir to real estate in Alabama. In *Smith* v. *Derr*, 34 Pa. 126; 75 Am. Dec. 641, under the authority of *Doe* v. *Vardill*, 5 Barn. & C. 438, and same case on appeal to the House of Lords, cited above, it was

held that a bastard child duly legitimated by a decree of a Circuit Court of Tennessee, according to the laws of that State, was not thereby rendered capable of inheriting land in Pennsylvania. Later decisions in Pennsylvania are to different effect, but they are placed upon the express ground that the Statute of Merton has been abolished in that State since the decision in *Smith* v. *Derr*.

"The *status* of negroes born of marriages terminating before the general emancipation of the slaves in the Southern States is a peculiar one. To some extent the right of marriage was recognized among them. It is a part of the history of the extinct institution of slavery in the Southern States that these slave marriages were often had with the approbation of the owners of the slaves; that the marriage ceremonies were publicly celebrated, often by the ministers of the gospel, and were sanctioned by the churches of the country. The subsequent cohabitation of the parties was never regarded as illicit or immoral, but as perfectly right and proper; and it was regarded as a wicked thing for either party to be unfaithful to the marriage vow. The children born of such marriages were regarded as standing upon a different plane to those slave children who were bastards pure and simple. These views prevailed from regarding marriage as a divine institution, and not from looking upon it from the standpoint of the law which has concern with it only as a civil contract. The progeny of such marriages, while perhaps from a liberal point of view are not bastards, are yet, so far as want of inheritable blood is concerned, placed in the same category as bastards."

See *Greenhow* v. *James' Ex'r*, 80 Virginia, 636; 56 Am. Rep. 603.

No. 6. — ABD-UL-MESSIH *v.* FARRA.

(Judl. Com. 1888.)

RULE.

Questions as to testamentary capacity, and as to the rights of persons who claim a succession to personalty *ab intestato* are governed primarily by the domicil of the deceased; and distinctions of nationality or membership of a religious community in regard to the succession can only be looked to so far as those distinctions are given effect to by the law of the country of the domicil.

No. 6. — Abd-ul-Messih v. Farra, 13 App. Cas. 431, 432.

Abd-ul-Messih v. Farra.[1]

13 App. Cas. 431–445 (s. c. 57 L. J. P. C. 88, 59 L. T. 106.)

[431] *Law of Personal Status. — Power of Testacy. — Distribution. — Turkish Domicil. — British protected Subject. — Chaldean Catholics.*

The testator, a member of the Chaldean Catholic community, having a Turkish domicil of origin, fixed his permanent residence in Cairo, where he acquired the status of a protected British subject : —

Held, that he died domiciled in the dominions of the Porte, and that the Consular Court at Constantinople, being bound by sects. 5 and 6 of the Order in Council of 1873 to follow the same principles which would have been observed by an English Court of Probate, was right in holding that the law of Turkey governing the succession to a member of the Chaldean Catholic community domiciled in Turkey be followed in considering the power of testacy of the deceased and in distributing his effects.

There is no such thing as domicil arising from society and not from connection with a locality ; consequently, as Cairo was not a British possession governed by English law, the testator's permanent abode therein under British protection did not attract to him an English or Anglo-Egyptian domicil.

Appeal from an order of the Supreme Consular Court of Constantinople (May 28, 1886), by which it was ordered that the law of Turkey governing the succession to a member of the Chaldean Catholic community domiciled in the Ottoman dominions, should be followed in distributing the effects of Antoun Youssef Abd-ul-Messih, deceased.

The facts are stated in the judgment of their Lordships. The order was made on a petition presented by the appellant as executor and residuary legatee under her husband's will on the 27th of October, 1885, for probate thereof.

[*432] * The respondents (nephew and sister to the deceased) obtained an order from the Court giving them leave to plead, among others, a plea to the jurisdiction of the Court on the ground that the deceased being an Ottoman subject, born at Bagdad, within the Ottoman dominions, and having died at Cairo, also within the Ottoman dominions, the Court had no jurisdiction over the deceased, nor any jurisdiction over his estate at Cairo.

The Court on the 24th of February, 1886, decreed —

[1] *Present :* — Lord Watson, Lord Hobhouse, Sir Barnes Peacock, and Sir James Hannen.

That the deceased having acquired the status of a protected British subject, this Court has jurisdiction over the succession of the above-named deceased;

and further decreed —

That the question as to what law the Court will follow in distributing the effects of the above-named deceased may be raised by future argument.

This judgment was not appealed from and was final.

On the 28th of May, 1886, the Court ordered as above.

After argument, the judgment of their Lordships was [436] delivered by

Lord WATSON: —

The appellant, in October, 1885, instituted the present suit, before Her Majesty's Supreme Consular Court at Constantinople, for probate of the will of her husband Antoun Youssef Abd-ul-Messih, who died at Cairo in February, 1885, leaving a large personal estate. Her application was opposed on its merits by the respondents, two of the next of kin of the deceased, who also pleaded that the Court had no jurisdiction. The Judge of the Consular Court, by a decree of the 24th of February, 1886, sustained his own jurisdiction, in respect of "the deceased having acquired the status of a protected British subject;" and in that finding both parties have acquiesced. Issues were then adjusted, the first being, — "Is English law to be followed in distributing the assets?" and the second, — "If the Court is of opinion that English law is not applicable, is Turkish, or what other law?" Evidence, both oral and documentary, bearing upon these issues was adduced; and thereafter, on the 28th of May, 1886, the learned Judge pronounced the order now appealed from, whereby he found that the testator "died domiciled in the Ottoman Empire, his domicil of origin, and a member of the Chaldean Catholic community;" and in respect of these findings, decreed

* "that the law of Turkey governing the succession to a [*437] member of the Chaldean Catholic community domiciled in Turkey be followed in considering the power of testacy of the said deceased and in distributing the deceased's effects."

It is therefore *res judicata* that the Consular Court has jurisdiction to entertain the present suit, and to administer the estate of the deceased, in accordance with the provisions of Her Majesty's Order in Council, dated the 12th of December, 1873. Sect. 5 of

the Order enacts that Her Majesty's civil jurisdiction in the Ottoman dominions shall be exercised under and according to the provisions of the Order, "and not otherwise;" and sect. 6 prescribes that (subject to the other provisions of the Order) the civil jurisdiction thereby established shall, as far as circumstances admit, "be exercised on the principles of and in conformity with the common law, the doctrines of equity, the statute law, and other law for the time being in force in and for England." By sect. 91 it is enacted that the Supreme Consular Court at Constantinople shall be a Court of Probate, and shall, as far as circumstances admit, have "for and within the Ottoman dominions, with respect to the property of deceased resident subjects or protected persons, all such jurisdiction as for the time being belongs to Her Majesty's Court of Probate in England." According to the interpretation clause (sect. 4) the word "subject" means a subject of Her Majesty by birth or by naturalization; and the expression "a protected person" means a person enjoying Her Majesty's protection. These are the only classes of persons whose estates, on their decease, are made subject to the probate jurisdiction of the Consular Court.

Having regard to the enactments of sects. 5 and 6 of the Order, their Lordships are of opinion that it was the duty of the Consular Court to follow, in the present case, the same principles which would have been observed by an English Court of Probate. It is a settled rule of English law that civil status, with its attendant rights and disabilities, depends, not upon nationality, but upon domicil alone; and, consequently, that the law of the testator's domicil must govern in all questions arising as to his testacy or intestacy, or as to the rights of persons who claim his succession *ab intestato*. That doctrine was clearly ex-
[*438] plained *by Lord CRANWORTH in *Enohin* v. *Wylie*, 2 R. C. 68, 10 H. L. C. 19. Accordingly, the tribunal in which the estate of a deceased is to be administered, if it be not itself the forum of the domicil, must defer on all these points to the law of the domicil, and accept that law as its only guide.

The late Antoun Youssef Abd-ul-Messih, who was born at Bagdad of Ottoman parents resident there, went in early life to India, where he remained for a considerable period, and then transferred his abode to Jeddah, in the dominions of the Porte. In the year 1858 he left Jeddah for Cairo, where he continued to reside until the time of his death, and he does not appear to have

entertained any intention of changing his residence. During the whole period of his stay in Cairo he was *de facto* under the protection of the British Government. In 1876 he was married to the appellant, the ceremony being performed in the manner prescribed by 12 & 13 Vict. c. 68, which was enacted for the purpose of affording facilities for the marriages of Her Majesty's subjects resident abroad. On the 9th of June, 1882, he executed in English form the will now sought to be admitted to probate, by which he constituted the appellant his residuary legatee and representative. These are the whole facts in evidence which have any material bearing upon the question of domicil; and (apart from the fact of his having enjoyed British protection in Cairo) they establish, beyond doubt, that the testator, at the time of his death, had his domicil in the dominions of the Porte. If he did gain a domicil in India (of which there is no satisfactory proof), he ceased to retain it when he left that country for Jeddah without the intention of returning. His domicil of origin then revived and continued to adhere to him until the acquisition of a new domicil.

It was argued for the appellant that her husband's selection of a permanent abode, in Cairo, under British protection, attracted to him an English, or, as it was termed, an Anglo-Egyptian domicil. That result would, doubtless, have followed if Cairo had been a British possession governed by English law; but Cairo is in no sense British soil; it is the possession of a foreign Government, and subject to the sovereignty of the Porte. *Certain privileges have been conceded by treaty to residents [*439] in Egypt, whether subjects of the Queen or foreigners, whose names are duly inscribed in the register kept for that purpose at the British Consulate. They are amenable only to the jurisdiction of our Consular Courts in matters civil and criminal; and they enjoy immunity from territorial rule and taxation. They constitute a privileged society, living under English law, on Egyptian soil, and independent of Egyptian Courts and tax-gatherers. The appellant maintained that a community of that description ought, for all purposes of domicil, to be regarded as an ex-territorial colony of the Crown; and that permanent membership ought to carry with it the same civil consequences as permanent residence in England, or in one of the colonial possessions of Great Britain, where English law prevails.

The idea of a domicil, independent of locality, and arising simply

from membership of a privileged society, is not reconcileable with any of the numerous definitions of domicil to be found in the books. In most, if not all of these, from the Roman Code (10, 39, 7) to Story's Conflict (§ 41), domicil is defined as a locality — as the place where a man has his principal establishment and true home. Probably Lord WESTBURY was more precisely accurate, when he stated, in *Bell* v. *Kennedy*, L. R., 1 H. L., Sc. 320, that domicil is not mere residence, "it is the relation which the law creates between an individual and a particular locality or country." The same learned Lord, in *Udny* v. *Udny*, L. R., 1 H. L., Sc. 458, speaking of the acquisition of a residential domicil, said: "Domicil of choice is a conclusion or inference which the law derives from the fact of a man fixing voluntarily his sole or chief residence in a particular place, with an intention of continuing to reside there for an unlimited time." According to English law, the conclusion or inference is, that the man has thereby attracted to himself the municipal law of the territory in which he has voluntarily settled, so that it becomes the measure of his personal capacity, upon which his majority or minority, his succession, and testacy or intestacy must depend. But the law which thus regulates his personal status must be that of the governing power in whose dominions he resides; and residence in a foreign country, [*440] without * subjection to its municipal laws and customs, is therefore ineffectual to create a new domicil.

No authority was cited which gives the least support to the appellant's contention, except perhaps a single passage in Mr. Westlake's Treatise (2nd ed., p. 262), in which the learned author mentions "Anglo-Indian, or Anglo-Turkish domicil" as affording apt illustrations of the principle that "in the East every person is a member of that civil society existing in the country in which he is domiciled which his race, political nationality, or religion determine." If by "Anglo-Turkish" the same kind of domicil is meant as that which the appellant seeks to establish, it has no analogy whatever to an "Anglo-Indian" domicil. The latter is altogether independent of political status; it arises from residence in India, and has always been held to carry with it the territorial law of that country, whether under the empire of the Queen, or under the previous rule of the East India Company, which the Courts of England treated (in questions of domicil) as an independent government. By the law established in India, the members of

certain castes and creeds are, in many important respects, governed by their own peculiar rules and customs, so that an Indian domicil of succession may involve the application of Hindu or Mahomedan law; but these rules and customs are an integral part of the municipal law administered by the territorial tribunals. The legal condition of foreigners resident in Turkey, who are exempted by treaty from the jurisdiction of its local Courts, is very well described by Feraud Girand (Jurisdiction française, vol. ii., p. 58), one of the authorities referred to by the appellant's counsel. They form, according to the view of that learned writer, an anomalous ex-territorial colony of persons of different nationalities, having unity in relation to the Turkish Government, but altogether devoid of such unity when examined by itself; the consequence being that its members continue to preserve their nationality, and their civil and political rights, just as if they had never ceased to have their residence and domicil in their own country. But it is needless to pursue this topic farther. Their Lordships are satisfied that there is neither principle nor authority for holding that there is such a thing as *domicil arising from [*441] society, and not from connection with a locality. *In re Tootal's Trusts*, 23 Ch. D. 532, 52 L. J. Ch. 664, is an authority directly in point; and their Lordships entirely concur in the reasoning by which Mr. Justice CHITTY supported his decision in that case.

It was next argued that the order not only permits subjects and protected persons, who at the time of their decease are resident in the Ottoman dominions, to test according to English law, but prescribes that they shall make their wills in English form, and in no other. It was represented to be the effect of the order that, in the case of such persons, English law is the sole criterion by which their capacity to make a will, and its validity when made, must be determined. If that were the true construction of the order it might lead to very singular consequences. All that is required, in order to give complete probate jurisdiction to the Consular Court, is that the testator shall have been resident in the Ottoman dominions at the time of his decease; it is not requisite that he should have had his only or his principal residence there. If a Scotchman went to reside in Egypt for the purposes of his business, leaving his family at home, and happened to die there, his testament, sufficiently executed according to the law of Scotland, might be

invalided by the Statute of Wills; and he, having acquired the testamentary capacity of a domiciled Englishman, could gratuitously defeat the legal rights of his widow and children, according to the law of his and their domicil. The same or similar results would follow in the case of British subjects coming to Turkey from any part of Her Majesty's dominions where the law of testate succession differs from that of England.

The professed object of the order of the 12th of December, 1873, is, throughout, to confer jurisdiction upon the Consular Courts as thereby regulated, and to lay down rules for their procedure; and it is hardly conceivable that enactments framed for these purposes only, and not affecting to deal with substantive law, should have been intended to introduce such great and important alterations of the personal status and civil rights of Her Majesty's subjects. The enactments, which not only confer jurisdiction but specify [* 442] the law to be administered by these Courts, give no * indication that any such changes were contemplated. According to sect. 6, they are to administer the law for the time being in force "in and for England," an expression which simply denotes the law for the time being administered in the Courts of England; and, according to sect. 91, they are to have the same jurisdiction in probate as belongs to the English Court of Probate. If this suit had been brought in the Court of Probate here, there can be no doubt that the law applicable would have been that of the testator's domicil; but it was suggested for the appellant that the words "in and for England," must be read as if they had been "in England and for Englishmen." That construction would not avail her, because the testate succession of an Englishman is regulated by his domicil, which may be in France or elsewhere abroad. In order to support the argument, it would be necessary to make the gloss run thus, "in England and for Englishmen domiciled there." The suggestion has hardly the merit of plausibility, seeing that it involves the necessity of adding to the otherwise plain language of the enactment words which have the effect of giving it a totally different meaning.

The only part of the order which lends some colour to this branch of the appellant's argument is sect. 229, which relates to proceedings in the case of probate or administration with the will annexed. It provides that the Court shall ascertain whether the will propounded was signed by the testator, or some other person

in his presence or by his direction, and subscribed by two witnesses, "according to the enactments relative thereto," and shall refuse probate if satisfied that it was not, in fact, executed in accordance with these enactments. The framers of sect. 229, which is, in terms, a rule of procedure, and nothing more, had obviously in view the English Statute of Wills, and they do not seem to have made provision for proceedings to prove a will executed in any other form, but that does not establish that a will executed in English form must necessarily be valid. There is no section of the order which enacts that the Court shall grant probate without reference to the capacity of the testator, and it does not follow from the terms of the 229th section that it was intended to override the general provisions of sect. 6, and to enact by implication that the capacity or incapacity of testators * is not [*443] to be determined by the laws which ordinarily govern their personal status. The directions of the order with respect to procedure in cases of intestacy leave untouched the provisions of sect. 6, so that the property of subjects and protected persons dying intestate must be administered by the Consular Courts in accordance with the law of their domicil. It can hardly have been contemplated that a man's personal status should be dependent upon the circumstance of his having made a will, and that subjects of the Queen, not being domiciled Englishmen, are to retain the status which they carried with them to Egypt if they die intestate, and must lose it if they leave a will which complies with the provisions of the English statute, as well as with the requirements of their domiciliary law. There can be no presumption that the provisions of the order with respect to procedure were intended to produce such anomalies; and, in the absence either of express enacting words, or of plain implication necessitating the inference, their Lordships cannot hold that the enactments of sect. 229 qualify the provisions of sect. 6, or in anywise affect the civil status of those residents in Egypt whose persons and estates are subject to the jurisdiction of Her Majesty's Consular Courts.

The next alternative presented by the appellant's counsel was this, that her husband had *de facto*, or at all events according to Ottoman law, lost his Turkish nationality, and had become a subject of the Queen. That change in his political status was said to be attended with one or other of these consequences, viz., either that his civil status became that of a domiciled Englishman; or,

assuming his domicil to have been in Bagdad, that a Turkish tribunal would, in administering his estate, defer to the law of England, as the law of his nationality.

It is clear that the deceased was not, in the sense of English law, a subject of Her Majesty. Neither did he possess that status, within the meaning of the order, which expressly enacts that it must be attained either by birth or naturalization. But the appellant relied upon its having been determined, for the purposes of this litigation, in the final decree of the 24th of February, 1886, that he had "acquired the status of a protected British subject."

[*444] *The phrase "protected British subject" does not occur in the order; it has no technical significance; and it must therefore be taken to express that which the learned judge unquestionably meant to affirm, viz., that the deceased had *de facto* enjoyed the same measure of protection which is accorded by treaty to British subjects in the dominions of the Porte.

It was argued, however, that it is the law of Turkey, and not the law of England, which must determine, for the purposes of this case, whether the deceased ought to be regarded simply as a protected alien, or as a British subject who had cast off his allegiance to the Porte. Upon this point evidence was led on both sides. Four legal experts were examined for the appellant, who asserted that he had, and six for the respondents who asserted that he had not, become in the eye of Ottoman law, a subject as well as a protégé of Great Britain. All of these learned gentlemen were agreed that there is no Turkish text or judicial decision having any bearing upon the question; and they merely expressed their individual opinions as to the inference which an Ottoman tribunal ought to derive, and would probably derive, from the tenor of existing treaties, and the law on the subject of Ottoman nationality promulgated by the Porte on the 19th of January, 1869. Their Lordships do not consider it necessary to decide between these conflicting opinions, because a decision in her favour would not assist the appellant's case. If it be assumed that, in consequence of his having placed himself under foreign protection, the Porte resigned the deceased, both civilly and politically, to the law of the protecting power, that would merely give him the same rights as if his nationality had been English, and the territorial law of his domicil would still be applicable to his capacity to make a will, and to the distribution of his estate.

There is no evidence whatever tending to show that the Courts of Turkey, in administering the estate of a person in the position of the deceased, would be guided not by their own municipal law, but by the rules followed by English Courts, in the case of domiciled Englishmen. But it was submitted that the appellant ought now to be allowed to lead proof for the purpose of establishing that proposition. The record contains no allegation, not even a suggestion, that there is any special law in Turkey * with [* 445] respect to the succession of a protected person; and the appellant has already had ample opportunity of bringing forward such evidence as she thought fit, bearing upon the issues settled for the trial of the cause. In these circumstances, their Lordships do not think she is entitled to any further allowance of proof. There must still be some evidence taken, but it must be confined to the single point specified in the judgment appealed from.

The appellant lastly endeavoured to maintain that the deceased's residence in Cairo had at least the effect of giving him an Egyptian as distinguished from a Turkish domicil. That argument was not addressed to the Court below; but there appear to be two sufficient answers to it. The one is, that the appellant has not shown that a domicil in Egypt, so far as regards its civil consequences, differs in any respect from a domicil in other parts of the Ottoman dominions; and the other, that residence in a foreign State, as a privileged member of an ex-territorial community, although it may be effectual to destroy a residential domicil acquired elsewhere, is ineffectual to create a new domicil of choice.

Their Lordships are accordingly of opinion that no cause has been shown for disturbing the judgment of the Consular Court; and they will humbly advise Her Majesty to that effect. The appellant must bear the costs of this appeal; but their Lordships will humbly advise Her Majesty that the costs of all parties in the Court below ought to come out of the estate.

ENGLISH NOTES.

The question of testamentary capacity was considered in the case (cited in the argument) of *Maltass* v. *Maltass* (1844), 1 Rob. Ecc. Cas. 67, and also in the case of *Bremer* v. *Freeman* (1857), 1 Deane Ecc. Rep. 192. In the former case, a will propounded for probate was made by Mr. Maltass, a British subject born and settled all his life at Smyrna. His father had been a domiciled Englishman. It was

contended that the supposed testator being domiciled in Turkey was devoid of testamentary capacity. The question was held to be concluded by the treaties with the Sultan, which reserves to British subjects a power to make a will.

In the latter case, an Englishwoman, domiciled at the time in France, made in 1842, a will in Paris in the English form, executed according to the Wills Act, 1838, but not in accordance with the requirements of the French law. The deceased at the time of making the will and at her death was not naturalised in France, nor had she obtained any authorization as required by the Code Napoleon. It was held, that she being domiciled in France, authorization of the French government was not necessary to confer the right of testacy; but the will was invalid for non-compliance with the provisions of the *lex domicilii*. The effect of the decision that the form of execution depends on the *lex domicilii* has been modified by the Act 24 & 25 Vict. c. 114, enabling a British subject to make a valid will out of the United Kingdom by executing it according to the *lex loci actus* the *lex domicilii* at the time of the execution, or the *lex domicilii originis*.

The law of the domicil to be applied in determining the validity of testamentary gifts, or in distributing the estate of an intestate, is the law at the time of his death; and a subsequent change in the law has no effect. *Lynch* v. *Paraguay* (1871), L. R., 2 P. & D. 268, 40 L. J. P. & M. 81, 25 L. T. 164, 19 W. R. 982; *In re Aganoor*, Probate Division, June, 1895.

As to the effect of a will and of the judgment of the Court of the domicil on beneficial interests in the property dealt with, see *Enohin* v. *Wylie*, "Administration," No. 1, 2 R. C. p. 56, and notes p. 74–77, and Nos. 2 & 3, pp. 726 & 734, *supra*, and notes thereto, p. 741 *et seq.*, *supra*.

AMERICAN NOTES.

This principle is recognized in many of the authorities cited at p. 744, *ante*. To these may be added, *Peterson* v. *Chemical Bank*, 32 New York, 21; 88 Am. Dec. 298; *Townes* v. *Durbin*, 3 Metcalfe (Kentucky), 352; 77 Am. Dec. 176; *McLean* v. *Hardin*, 3 Jones Equity (North Carolina), 294; 69 Am. Dec. 740; *Lawrence* v. *Kitteridge*, 21 Connecticut, 577; 56 Am. Dec. 385; *Carpenter* v. *Pennsylvania*, 17 Howard (U. S. Supreme Ct.), 462; *Gravillon* v. *Richards' Ex'r*, 13 Louisiana, 293; 33 Am. Dec. 563; *Goodall* v. *Marshall*, 11 New Hampshire, 88; 35 Am. Dec. 472; *Minor* v. *Cardwell*, 37 Missouri, 350; 90 Am. Dec. 390; *Speed* v. *May*, 17 Pennsylvania State, 91; 55 Am. Dec. 540; *Harvey* v. *Richards*, 1 Mason (U. S. Circ. Ct.), 381, by Story, J. See 2 Kent Commentaries, Lecture 37.

In *Lawrence* v. *Kitteridge*, *supra*, the law of Vermont that the half-blood inherits equally with the whole was recognized, although opposed to the Connecticut Rule.

No. 7. — BROOK *v.* BROOK.

(H. L. 1861.)

No. 8. — SOTTOMAYOR *v.* DE BARROS.

(C. A. 1877.)

SOTTOMAYOR *v.* DE BARROS (QUEEN'S PROCTOR INTERVENING).

(1879.)

RULE.

THE forms of entering into a contract of marriage depend upon the *lex loci contractûs*, — the essentials upon the *lex domicilii*.

Where both parties are, at the time of an alleged marriage, domiciled in the same country, their personal capacity to contract a marriage is determined by the law of that country.

But where a marriage is celebrated in England between parties who, according to the law of England, are not subject to any legal incapacity to marry, and one of whom is, at the time of the marriage, domiciled in England, the marriage will not be annulled in an English Court on the ground of an incapacity imposed by the law of the country where the other party was domiciled at the time of the marriage.

Brook and others (Appellants) v. Brook and others and The Attorney-General (Respondents.)

9 H. L. C. 193–245 (s. c. 7 Jur. N. S. 422, 4 L. T. 93, 9 W. R. 461).

Conflict of Laws. — Marriage. — Domicile. [193]

A. and B., British subjects, intermarried; B. died; A. and C. (the sister of B.), being both at the time domiciled British subjects, went to Denmark, where the marriage of a man with the sister of his deceased wife is valid, and there were duly married according to the laws of Denmark: —

No. 7. — Brook v. Brook, 9 H. L. C. 193–195.

Held, that by the provisions of the English Act 5 & 6 W. 4, c. 54 (which makes void all marriages within the prohibited degrees of consanguinity or affinity) and having regard to the previous state of the English law and the declaratory Acts of Hen. VIII., relating to the subject, the marriage in Denmark was void.

William Leigh Brook of Meltham Hall, in the County of York, married in May, 1840, at the parish church of Huddersfield, in Yorkshire, Charlotte Armitage. There were two children of that marriage, Clara Jane Brook and James William Brook. [*194] In October, 1847, Mrs. * Brook died. On the 7th June, 1850, William Leigh Brook was duly, according to the laws of Denmark, married at the Lutheran church at Wandsbeck, near Altona in Denmark, to Emily Armitage, the lawful sister of his deceased wife. At the time of this Danish marriage, Mr. Brook and Miss Emily Armitage were lawfully domiciled in England, and had merely gone over to Denmark on a temporary visit. There were three children of this union, Charles Armitage Brook, Charlotte Amelia Brook, and Sarah Helen Brook. On the 17th September, 1855, Mrs. Emily, the second wife of Mr. Brook, died at Frankfort of cholera; and two days afterwards Mr. Brook himself died of the same complaint at Cologne, leaving all the five children him surviving.

Mr. Brook, in the early part of the day on which he died, executed a will, by which he disposed of his property among his five children, and appointed his brother Charles Brook, and his two brothers-in-law, John and Edward Armitage, his executors and trustees. In consequence of the state of his property and of some pending purchases of land, and afterwards on account of the death of the infant Charles Armitage Brook, it became necessary to institute an administration suit, and a bill was filed for this purpose in March, 1856, which by order of the Court was amended, and in July, 1856, a supplemental bill was filed, making the Attorney-General a party to the suit.

The causes came on to be heard in March, 1857, before Vice-Chancellor STUART, when certain inquiries were ordered, and in June, 1857, the chief clerk certified (among others) the facts above stated, and the certificate raised the question of the validity of the marriage at Wandsbeck. Evidence was taken on this [*195] subject, and several * declarations were made by officials and by advocates in Holstein, that the marriage of a

widower with the sister of his deceased wife was perfectly lawful and valid in Denmark to all intents and purposes whatever.

The cause coming on for hearing, on farther directions, Vice-Chancellor STUART called in the assistance of Mr. Justice CRESSWELL, who, on the 4th December, 1857, declared his opinion that the marriage at Wandsbeck was by the law of England invalid. Vice-Chancellor STUART, on the 17th April, 1858, pronounced judgment, fully adopting this opinion, and decreed accordingly. This appeal was then brought.

The question having been fully argued, the learned Lords present, on the 18th March, 1861, delivered their opinions as follows: —

The LORD CHANCELLOR (Lord CAMPBELL): [205]

My Lords, the question which your Lordships are called upon to consider upon the present appeal is, whether the marriage celebrated on the 9th June, 1850, in the duchy of Holstein, in the kingdom of Denmark, between William Leigh Brook, a widower, and Emily Armitage, the sister of his deceased wife, they being British subjects then domiciled in England, and contemplating England as their place of matrimonial residence, is to be considered valid in England, marriage between a widower and the sister of his deceased wife being permitted by the law of Denmark?

* I am of opinion that this depends upon the question [* 206] whether such a marriage would have been held illegal and might have been set aside in a suit commenced in England in the lifetime of the parties before the passing of Statute 5 & 6 Will. 4, c. 54, commonly called Lord LYNDHURST'S Act.

I quite agree with what was said by my noble and learned friend during the argument on the *Sussex Peerage Case*, 11 Cl. & Fin. 85: that this Act was not brought in to prohibit a man from marrying his former wife's sister, and that it does not render any marriage illegal in England which was not illegal before. The object of the second section was to remedy a defect in our procedure, according to which marriages illegal, as being within the prohibited degrees either of affinity or consanguinity, however contrary to law, human and divine, and however shocking to the universal feelings of Christians, could not be questioned after the death of either party. But no marriage that was before lawful was prohibited by the Act; and I am of opinion that no marriage can now be considered void

under it, which, before the Act, might not, in the lifetime of the parties, have been avoided and set aside as illegal.

There can be no doubt that before Lord LYNDHURST'S Act passed, a marriage between a widower and the sister of a deceased wife, if celebrated in England, was unlawful, and in the lifetime of the parties could have been annulled. Such a marriage was expressly prohibited by the legislature of this country, and was prohibited expressly on the ground that it was "contrary to God's law." Sitting here, judicially, we are not at liberty to consider whether such a marriage is or is not "contrary to God's law," nor whether it is expedient or inexpedient.

[* 207] Before the Reformation the degrees of relationship by * consanguinity and affinity, within which marriage was forbidden were almost indefinitely multiplied; but the prohibition might have been dispensed with by the Pope, or those who represented him. At the Reformation, the prohibited degrees were confined within the limits supposed to be expressly defined by Holy Scripture, and all dispensations were abolished. The prohibited degrees were those within which intercourse between the sexes was supposed to be forbidden as incestuous, and no distinction was made between relationship by blood or by affinity. The marriage of a man with a sister of his deceased wife is expressly within this category. *Hill* v. *Good*, Vaugh. 302, and *Reg.* v. *Chadwick*, 11 Q. B. 173, 205; 2 Cox C. C. 381; 17 L. J. M. C. 33, are solemn decisions that such a marriage was illegal; and if celebrated in England such a marriage unquestionably would now be void.

Indeed, this is not denied on the part of the appellants. They rest their case entirely upon the fact that the marriage was celebrated in a foreign country, where the marriage of a man with the sister of his deceased wife is permitted.

There can be no doubt of the general rule that "a foreign marriage, valid according to the law of a country where it is celebrated, is good everywhere." But while the forms of entering into the contract of marriage are to be regulated by the *lex loci contractûs*, the law of the country in which it is celebrated, the essentials of the contract depend upon the *lex domicilii*, the law of the country in which the parties are domiciled at the time of the marriage, and in which the matrimonial residence is contemplated. Although the forms of celebrating the foreign marriage may be different

from those required by the law of the country of domicile, the * marriage may be good everywhere. But if the con- [* 208] tract of marriage is such, in essentials, as to be contrary to the law of the country of domicile, and it is declared void by that law, it is to be regarded as void in the country of domicile, though not contrary to the law of the country in which it was celebrated.

This qualification upon the rule that "a marriage valid where celebrated is good everywhere," is to be found in the writings of many eminent jurists who have discussed the subject.

I will give one quotation from *Huberus de Conflictu Legum*, Bk. 1, tit. 3, s. 2. "Rectores imperiorum id comiter agunt, ut jura cujusque populi intra terminos ejus exercita, teneant ubique suam vim, quatenus nihil potestati aut juri alterius imperantis, ejusque civium præjudicetur." Then he gives "marriage" as the illustration: "Matrimonium pertinet etiam ad has regulas. Si licitum est eo loco, ubi contractum et celebratum est, ubique validum erit effectumque habebit, sub eâdem exceptione, præjudicii aliis non creandi; cui licet addere, si exempli nimis sit abominandi; ut si incestum juris gentium in secundo gradu contingeret alicubi esse permissum; quod vix est ut usu venire possit." Id. s. 8. The same great jurist observes: "Non ita præcise respiciendus est locus in quo contractus est initus, ut si partes alium in contrahendo locum respexerint, ille non potius sit considerandus. Contraxisse unusquisque in eo loco intelligitur, in quo ut solveret se obligavit. Proinde et locus matrimonii contracti non tam is est, ubi contractus nuptialis initus est, quam in quo contrahentes matrimonium exercere voluerunt." Id. s. 10.

Mr. Justice STORY, in his valuable treatise on "The Conflict of Laws," while he admits it to be the "rule that a marriage valid where celebrated is good everywhere," says (s. 113 a) there are exceptions: those of marriages involving * polygamy [* 209] and incest, those positively prohibited by the public law of a country from motives of policy, and those celebrated in foreign countries by subjects entitling themselves, under special circumstances, to the benefit of the laws of their own country, he adds (s. 114), "in respect to the first exception, that of marriages involving polygamy and incest, Christianity is understood to prohibit polygamy and incest, and, therefore, no Christian country would recognise polygamy or incestuous marriages; but when we

speak of incestuous marriages care must be taken to confine the doctrine to such cases as by the general consent of all Christendom are deemed incestuous." The conclusion of this sentence was strongly relied upon by Sir Fitz Roy Kelly, who alleged that many in England approve of marriage between a widower and the sister of his deceased wife; and that such marriages are permitted in Protestant States on the Continent of Europe and in most of the States in America.

Sitting here as a judge to declare and enforce the law of England as fixed by Kings, Lords, and Commons, the supreme power of this realm, I do not feel myself at liberty to form any private opinion of my own on the subject, or to inquire into what may be the opinion of the majority of my fellow-citizens at home, or to try to find out the opinion of all Christendom. I can as a judge only look to what was the solemnly pronounced opinion of the Legislature when the laws were passed which I am called upon to interpret. What means am I to resort to for the purpose of ascertaining the opinions of foreign nations? Is my interpretation of these laws to vary with the variation of opinion in foreign countries?

Change of opinion on any great question, at home or [* 210] abroad, may be * a good reason for the Legislature changing the law, but can be no reason for Judges to vary their interpretation of the law.

Indeed, as Story allows marriages positively prohibited by the public law of a country, from motives of policy, to form an exception to the general rule as to the validity of marriage, he could hardly mean his qualification to apply to a country like England, in which the limits of marriages to be considered incestuous are exactly defined by public law.

That the Parliament of England, in framing the prohibited degrees within which marriages were forbidden, believed and intimated the opinion that all such marriages were incestuous and contrary to God's word, I cannot doubt. All the degrees prohibited are brought into one category; and although marriages within those degrees may be more or less revolting, they are placed on the same footing, and before English tribunals, till the law is altered, they are to be treated alike.

An attempt has been made to prove that a marriage between a man and the sister of his deceased wife is declared by Lord LYNDHURST'S Act to be no longer incestuous. But the enactment

relied upon applies equally to all marriages within the prohibited degrees of affinity, and on the same reasoning would give validity to a marriage between a step-father and his step-daughter, or a step-son and his step-mother, which would be little less revolting than a marriage between parties nearly related by blood.

The general principles of jurisprudence which I have expounded have uniformly been acted upon by English tribunals. Thus, in the great case of *Hill* v. *Good*, * Lord Chief Jus- [* 211] tice VAUGHAN and his brother Judges of the Court of Common Pleas, held, that "When an Act of Parliament declares a marriage to be against God's law, it must be admitted in all Courts and proceedings of the kingdom to be so."

In *Harford* v. *Morris*, 2 Hagg. Con. Rep. 423, 434, the great Judge who presided clearly indicates his opinion that marriages celebrated abroad are only to be held invalid in England, if they are according to the law of the country where they are celebrated, and if they are not contrary to the law of England. He adds, "I do not say that foreign laws cannot be received in this Court, in cases where the Courts of that country had a jurisdiction. But I deny the *lex loci* universally to be a foundation for the jurisdiction, so as to impose an obligation upon the Court to determine by those foreign laws."

I will only give another example, the case of *Warrender* v. *Warrender*, 2 Cl. & Fin. 488, in which I had the honour to be counsel at your Lordship's bar. Sir George Warrender, born and domiciled in Scotland, married an English-woman in England according to the rites and ceremonies of the Church of England; but instead of changing his domicile, he meant that his matrimonial residence should be in Scotland, where he had large landed estates, on which his wife's jointure was charged. Having lived a short time in Scotland, they separated. Sir George, continuing domiciled in Scotland, commenced a suit against her in the Court of Session, for a dissolution of the marriage on the ground of adultery alleged to have been committed by her on the Continent of Europe. It was objected that this being a marriage celebrated in England, a country in which, by the then existing law, marriage was indissoluble, the Scotch Court had no jurisdiction to *dis- [* 212] solve the marriage, and *Lolley's Case*, Fac. Coll. March, 1812, and Russ & Ry. 237, was relied upon, in which a domiciled Englishman having been married in England, and while still

domiciled in England, having been divorced by decree of the Court of Session in Scotland, and having afterwards married a second wife in England, his first wife being still alive, he was convicted of bigamy in England, and held by all the Judges to have been rightly convicted, because the sentence of the Scotch Court dissolving his first marriage was a nullity. But your Lordships unanimously held that, as Sir George Warrender at the time of his marriage was a domiciled Scotchman, and Scotland was to be the conjugal residence of the married couple, although the law of England, where the marriage was celebrated, regulated the ceremonials of entering into the contract, the essentials of the contract were to be regulated by the law of Scotland, in which the husband was domiciled, and that although, by the law of England, marriage was indissoluble, yet as, by the law of Scotland, the tie of marriage might be judicially dissolved for the adultery of the wife, the suit was properly constituted, and the Court of Session had authority to dissolve the marriage.

It is quite obvious that no civilised state can allow its domiciled subjects or citizens, by making a temporary visit to a foreign country, to enter into a contract to be performed in the place of domicile, if the contract is forbidden by the law of the place of domicile as contrary to religion, or morality, or to any of its fundamental institutions.

A marriage between a man and the sister of his deceased wife, being Danish subjects domiciled in Denmark, may be good all over the world, and this might likewise be so, even if they were native-born English subjects, who had abandoned their English [* 213] domicile, and were domiciled in * Denmark. But I am by no means prepared to say that the marriage now in question ought to be, or would be, held valid in the Danish Courts, proof being given that the parties were British subjects domiciled in England at the time of the marriage, that England was to be the matrimonial residence, and that by the law of England such a marriage is prohibited as being contrary to the law of God. The doctrine being established that the incidents of the contract of marriage celebrated in a foreign country are to be determined according to the law of the country in which the parties are domiciled and mean to reside, the consequence seems to follow that by this law must its validity or invalidity be determined.

Sir Fitz Roy Kelly argued that we could not hold this mar-

riage to be invalid without being prepared to nullify the marriages of Danish subjects who contracted such a marriage in Denmark while domiciled in their native country, if they should come to reside in England. But on principles which I have laid down, such marriages, if examined, would be held valid in all English Courts, as they are according to the law of the country in which the parties were domiciled when the marriages were celebrated.

I may here mention another argument of the same sort, brought forward by Sir Fitz Roy Kelly, that our Courts have not jurisdiction to examine the validity of marriages celebrated abroad according to the law of the country of celebration, because, as he says, the Ecclesiastical Courts, which had exclusive jurisdiction over marriage, must have treated them as valid. But I do not see anything to have prevented the Ecclesiastical Court from examining and deciding this question. Suppose in a probate suit the validity of a marriage had been denied, its validity must have been determined by the Ecclesiastical Court, * according to the [* 214] established principles of jurisprudence, whether it was celebrated at home or abroad.

Sir Fitz Roy Kelly farther argued with great force, that both Sir Cresswell Cresswell and Vice Chancellor Stuart have laid down that Lord Lyndhurst's Act binds all English subjects wherever they may be, and prevents the relation of husband and wife from subsisting between any subjects of the realm of England within the prohibited degrees. I am bound to say that in my opinion this is incorrect, and that Lord Lyndhurst's Act would not affect the law of marriage in any conquered colony in which a different law of marriage prevailed, whatever effect it might have in any other colony. I again repeat that it was not meant by Lord Lyndhurst's Act to introduce any new prohibition of marriage in any part of the world. For this reason, I do not rely on the *Sussex Peerage Case* as an authority in point, although much reliance has been placed upon it; my opinion in this case does not rest on the notion of any personal incapacity to contract such a marriage being impressed by Lord Lyndhurst's Act on all Englishmen, and carried about with them all over the world; but on the ground of the marriage being prohibited in England as "contrary to God's law."

I will now examine the authorities relied upon by the counsel for the appellants. They bring forward nothing from the writ-

ings of jurists except the general rule, that contracts are to be construed according to the *lex loci contractûs*, and the saying of Story with regard to a marriage being contrary to the precepts of the Christian religion, upon which I have already commented.

But there are various decisions which they bring forward as conclusive in their favour. They begin with *Compton* v. *Bearcroft*, Buller's N. P. 113, 114, 2 Hagg. Cons. Rep. 444 *n.*, and the class of cases in which it was held that Gretna Green marriages [* 215] were valid in * England, notwithstanding Lord HARDWICKE'S Marriage Act, 26 Geo. 2, c. 33. In observing upon them, I do not lay any stress on the proviso in this Act that it should not extend to marriages in Scotland or beyond the seas; this being only an intimation of what might otherwise have been inferred, that its direct operation should be confined to England, and that marriages in Scotland and beyond the seas should continue to be viewed according to the law of Scotland and countries beyond the seas, as if the act had not passed. But I do lay very great stress on the consideration that Lord HARDWICKE'S Act only regulated banns and licenses, and the formalities by which the ceremony of marriage shall be celebrated. It does not touch the essentials of the contract or prohibit any marriage which was before lawful, or render any marriage lawful which was before prohibited. The formalities which it requires could only be observed in England, and the whole frame of it shows it was only territorial. The nullifying clauses about banns and licenses can only apply to marriages celebrated in England. In this class of cases the contested marriage could only be challenged for want of banns or license in the prescribed form. These formalities being observed, the marriages would all have been unimpeachable. But the marriage we have to decide upon has been declared by the legislature to be "contrary to God's law," and on that ground it is absolutely prohibited. Here I may properly introduce the words of Mr. Justice COLERIDGE in *Reg.* v. *Chadwick*, 11 Q. B. 238, 17 L. J. M. C. 33. "We are not on this occasion inquiring what God's law or what the Levitical law is. If the Parliament of that day [Hen. 8] legislated on a misinterpretation of God's law we are bound to act upon the statute which they have passed."

[* 216] * The appellants' counsel next produced a new authority, the very learned and lucid judgment of Dr. RADCLIFF, in *Steele* v. *Braddell*, Milw. Ecc. Rep. (Ir.) 1. The Irish statute, 9

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Geo. II. c. 11, enacts, "that all marriages and matrimonial contracts, when either of the parties is under the age of twenty-one, had without the consent of the father or guardian, shall be absolutely null and void to all intents and purposes; and that it shall be lawful for the father or guardian to commence a suit in the proper Ecclesiastical Court in order to annul the marriage." A young gentleman, a native of Ireland, and domiciled there, went while a minor into Scotland, and there married a Scottish young lady without the consent of his father or guardian. A suit was brought by his guardian in an Ecclesiastical Court in Ireland, in which Dr. RADCLIFF presided, to annul the marriage on the ground that this statute created a personal incapacity in minors, subjects of Ireland, to contract marriage, in whatever country, without the consent of father or guardian. But the learned Judge said, "I cannot find that any Act of Parliament such as this has ever been extended to cases not properly within it, on the principle that parties endeavoured to evade it." And after an elaborate view of the authorities upon the subject, he decided that both parties being of the age of consent, and the marriage being valid by the law of Scotland, it could not be impeached in the Courts of the country in which the husband was domiciled, and he dismissed the suit. But this was a marriage between parties who, with the consent of parents and guardians, might have contracted a valid marriage according to the law of the country of the husband's domicile, and the mode of celebrating the marriage was to be * according to the law of the country in which it was celebrated. [* 217]
But if the union between these parties had been prohibited by the law of Ireland as "contrary to the word of God," undoubtedly the marriage would have been dissolved. Dr. RADCLIFF expressly says, "it cannot be disputed that every state has the right and the power to enact that every contract made by one or more of its subjects shall be judged of, and its validity decided, according to its own enactments and not according to the laws of the country wherein it was formed."

Another new case was brought forward, decided very recently by Sir CRESSWELL CRESSWELL, *Simonin* v. *Mallac*, 29 L. J. P. & M. 97. This was a petition by Valerie Simonin for a declaration of nullity of marriage. The petitioner alleged that a pretended ceremony of marriage was had between the petitioner and Leon Mallac of Paris, in the parish church of St. Martin's-in-the-Fields:

that about two days afterwards the parties returned to Paris, but did not cohabit, and the marriage was never consummated; that the pretended marriage was in contradiction to and in evasion of the Code Napoleon; that the parties were natives of and domiciled in France, and that subsequently to their return to France the Civil Tribunal of the department of the Seine had, at the suit of Leon Mallac, declared the said pretended marriage to be null and void. Leon Mallac was served at Naples with a citation and a copy of the petition, but did not appear. Proof was given of the material allegations of the petition, and that the parties coming to London to avoid the French law, which required the consent of parents or guardians to their union, were married by license in the parish church of St. Martin's-in-the-Fields. Sir [* 218] CRESSWELL CRESSWELL, after the * case had been learnedly argued on both sides, discharged the petition. But was there anything here inconsistent with the opinion which the same learned Judge delivered as assessor to Vice Chancellor STUART in *Brook* v. *Brook*? Nothing whatever; for the objection to the validity of the marriage in England was merely that the forms prescribed by the Code Napoleon for the celebration of a marriage in France had not been observed. But there was no law of France, where the parties were domiciled, forbidding a conjugal union between them; and if the proper forms of celebration had been observed, this marriage by the law of France would have been unimpeachable. The case, therefore, comes into the same category as *Compton* v. *Bearcroft* and *Steele* v. *Braddell*, decided by Dr. RADCLIFF. None of these cases can show the validity of a marriage which the law of the domicile of the parties condemns as incestuous, and which could not, by any forms or consents, have been rendered valid in the country in which the parties were domiciled.

Some American decisions, cited on behalf of the appellants, remain to be noticed. In *Greenwood* v. *Curtis*, 6 Mass. Rep. 358, the general doctrine was acted upon that a contract, valid in a foreign state, may be enforced in a state in which it would not be valid, but with this important qualification, "unless the enforcing of it should hold out a bad example to the citizens of the state in which it is to be enforced." Now the Legislature of England, whether wisely or not, considers the marriage of a man with the sister of his deceased wife "contrary to God's law," and of bad example.

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Medway v. *Needham*, 16 Mass. Rep. 157, according to the marginal note, decides nothing which the council for the respondents *need controvert. "A marriage which is [*219] good by the laws of the country where it is entered into, is valid in any other country; and although it should appear that the parties went into another State to contract such marriage, with a view to evade the laws of their own country, the marriage in the foreign country will, nevertheless, be valid in the country in which the parties live; *but this principle will not extend to legalize incestuous marriages so contracted.*" This judgment was given in the year 1819. As in England, so in America, some very important social questions have arisen on cases respecting the settlement of the poor. Whether the inhabitants of the district of Medway, or the inhabitants of the district of Needham were bound to maintain a pauper, depended upon the validity of a marriage between a mulatto and a white woman. They were residing in the province of Massachusetts at the time of the supposed marriage, which was prior to the year 1770. As the laws of the province at that time prohibited all such marriages, they went into the neighbouring province of Rhode Island, and were there married according to the laws of that province. They then returned to Massachusetts. Chief Justice PARKER held that the marriage was there to be considered valid, and, so far, the case is an authority for the appellants. But I cannot think that it is entitled to much weight, for the learned Judge admitted that he was overruling the doctrine of Huberus and other eminent jurists; he relied on decisions in which the forms only of celebrating the marriage in the country of celebration and in the country of domicile were different; and he took the distinction between cases where the absolute prohibition of the marriage is forbidden on mere motives of policy, and where the marriage is prohibited as being contrary to religion on the ground of incest. I myself must deny the *distinction. [*220] If a marriage is absolutely prohibited in any country as being contrary to public policy, and leading to social evils, I think that the domiciled inhabitants of that country cannot be permitted, by passing the frontier and entering another State in which this marriage is not prohibited to celebrate a marriage forbidden by their own State, and immediately returning to their own State, to insist on their marriage being recognised as lawful. Indeed Chief Justice PARKER expressly allowed that his doctrine

would not extend to cases in which the prohibition was grounded on religious considerations, saying, "If without any restriction, then it might be that incestuous marriages might be contracted between citizens of a State where they were held unlawful and void, in countries where they were prohibited."

The only remaining case is *Sutton* v. *Warren*, 10 Met. Mass. Rep. 451. The decision in this case was pronounced in 1845. I am sorry to say, that it rather detracts from the high respect with which I have been in the habit of regarding American decisions resting upon general jurisprudence. The question was, whether a marriage celebrated in England on the 24th of November 1834, between Samuel Sutton and Ann Hills, was to be held to be a valid marriage in the State of Massachusetts. The parties stood to each other in the relation of aunt and nephew, Ann Hills being own sister of the mother of Samuel Sutton. They were both natives of England, and domiciled in England at the time of their marriage. About a year after their marriage they went to America, and resided as man and wife in the State of Massachusetts. By the law of that state a marriage between an aunt and her nephew is prohibited, and is declared null and void. Nevertheless, the Supreme [* 221] Court of * Massachusetts held that this was to be considered a valid marriage in Massachusetts. But I am bound to say that the decision proceeded on a total misapprehension of the law of England. Justice Hubbard, who delivered the judgment of the Court, considered that such a marriage was not contrary to the law of England. Now there can be no doubt that although contracted before the passing of 5 & 6 Will. IV. c. 54, it was contrary to the law of England, and might have been set aside as incestuous, and that Act gave no protection whatsoever to a marriage within the prohibited degrees of consanguinity; so that if Samuel Sutton and Ann Hills were now to return to England, their marriage might still be declared null and void, and they might be proceeded against for incest. If this case is to be considered well decided and an authority to be followed, a marriage contrary to the law of the State in which it was celebrated, and in which the parties were domiciled, is to be held valid in another State into which they emigrate, although by the law of this State, as well as of the State of celebration and domicile, such a marriage is prohibited and declared to be null and void. This decision, my Lords, may alarm us at the consequences which might follow from

adopting foreign notions on such subjects, rather than adhering to the principles which have guided us and our fathers ever since the Reformation.

I have now, my Lords, as carefully as I could, considered and touched upon the arguments and authorities brought forward on behalf of the appellants, and I must say that they seem to me quite insufficient to show that the decree appealed against is erroneous.

The law upon this subject may be changed by the Legislature, but I am bound to declare that in my opinion, by the existing law of England this marriage is * invalid. It is [* 222] therefore my duty to advise your Lordships to affirm the decree, and dismiss the appeal.

Lord CRANWORTH : —

My Lords, the important question to be decided in this case is, whether the marriage contracted in 1850, between William Leigh Brook, a widower, and Emily Armitage, the sister of his deceased wife, in Denmark, where such marriages are lawful, was a valid marriage in England, both parties to it being, at the time it was contracted, native born subjects of Her Majesty domiciled in England.

The Court of Chancery decided that it was invalid, as having been prohibited by the second section of the 5 & 6 Will. IV. c. 54.

One argument on behalf of the respondents was, that this enactment is of a nature so general and extensive that it must be construed as affecting all Her Majesty's subjects wheresoever born or domiciled, so that it would operate throughout all our colonies, and on all who owe allegiance to the British Crown wheresoever they may be. I cannot concur in that construction of the statute; no doubt the Imperial Legislature can, and occasionally does legislate, so as to affect our colonies, but ordinarily our Acts of Parliament speak only to the inhabitants of Great Britain and Ireland; and I see nothing to lead to the inference that the enactment in question was meant to have a wider import; indeed the exception of Scotland in the next section seems to me, independently of other considerations, conclusive on the subject.

Excluding, then, this more extensive operation of the enactment, it seems plain that the prospective effect of the Act is to make all marriages within the prohibited degrees absolutely void, *ab initio,* dispensing with the * necessity of a sentence in [* 223] the Ecclesiastical Court declaring them void.

The persons whose marriages by the second section are declared to be void, are the same persons, and only the same persons, whose marriages before the passing of that Act might, during the lives of both parties, have been declared void by the Ecclesiastical Court.

The question, therefore, is, whether before the passing of that statute the Ecclesiastical Court could have declared the marriage now in dispute void. It certainly could, and must have done so if it had been celebrated in England; and all that your Lordships have to say is, whether the circumstance that it was celebrated in a foreign country, where such unions are lawful, would have altered the conclusion at which the Court ought to have arrived.

In the first place, there is no doubt that the mere fact of a marriage having been celebrated in a foreign country did not exclude the jurisdiction of the Ecclesiastical Court, while the jurisdiction as to marriages was exercised by that Court. It was of ordinary occurrence that the Court should entertain suits as to the validity of marriages contracted out of its jurisdiction. So that the question for decision is narrowed to the single point whether in deciding on the validity of this marriage, if it had come into discussion before the year 1835, and during the lives of both the parties, the Ecclesiastical Court would have been guided by the law of this country or by that of the country where the marriage was contracted.

The case was most elaborately argued at your Lordships' bar, and we were referred to very numerous authorities bearing on the subject. The conclusion at which I have arrived, is the [* 224] same as that which my noble and * learned friend on the woolsack has come to, namely, that though in the case of marriages celebrated abroad the *lex loci contractûs* must *quoad solennitates* determine the validity of the contract, yet no law but our own can decide whether the contract is or is not one which the parties to it being subjects of Her Majesty, domiciled in this country, might lawfully make.

There can be no doubt as to the power of every country to make laws regulating the marriage of its own subjects, to declare who may marry, how they may marry, and what shall be the legal consequences of their marrying. And if the marriages of all its subjects were contracted within its own boundaries, no such difficulty as that which has arisen in the present case could exist. But that is not the case; the intercourse of the people of all Christian countries among one another is so constant, and the number

of the subjects of one country living in or passing through another is so great, that the marriage of the subject of one country within the territories of another must be matter of frequent occurrence. So, again, if the laws of all countries were the same as to who might marry, and what should constitute marriage, there would be no difficulty; but that is not the case, and hence it becomes necessary for every country to determine by what rule it will be guided in deciding on the validity of a marriage entered into beyond the area over which the authority of its own laws extends. The rule in this country, and I believe generally in all countries is that the marriage, if good in the country where it was contracted, is good everywhere, subject, however, to some qualifications, one of them being that the marriage is not a marriage prohibited by the laws of the country to which the parties contracting matrimony belong.

The real question therefore is, whether the law of this * country, by which the marriage now under consideration [* 225] would certainly have been void if celebrated in England, extends to English subjects casually being in Denmark?

I think it does; of the power of the Legislature to determine what shall be the legal consequences of the acts of its own subjects done abroad, there can be no doubt, and whether the operation of any particular enactment is intended to be confined to acts done within the limits of this country, or to be of universal application, must be matter of construction, looking to the language used and the nature and objects of the law.

It must be admitted that the statutes on this subject are in a confused state. But it must be taken as clear law, that though the two statutes of Hen. VIII., *i. e.* the 25 Hen. VIII. c. 22, and the 28 Hen. VIII. c. 7 (being the statutes which in terms prohibited marriage with a wife's sister as being contrary to God's law), are repealed, yet by two subsequent Acts of the same reign, namely, the 28 Hen. VIII. c. 16, and the 32 Hen. VIII. c. 38, which had for their object to make good certain marriages, the prohibition is, in substance, revived or kept alive. For in both of them there is an exception of marriages prohibited by God's law, and in one of them, 28 Hen. VIII. c. 16, the language of the exception is, "which marriages be not prohibited by God's laws limited and declared in the Act made in this present Parliament;" that is the repealed Act of the 28 Hen. VIII. c. 7, s. 11; so that it is to that Act, though repealed, that we

are to look in order to see what marriages the Legislature has prohibited as being contrary to God's law. It was, perhaps, unnecessary to advert to this after the decision of the Court of Queen's Bench in *Reg.* v. *Chadwick*, 11 Q. B. 173, 2 Cox, C. C. 381, [* 226] 17 L. J. M. C. 33, but * it is fit that the grounds on which we proceed should be made perfectly clear.

Assuming, then, as we must that such marriages are not only prohibited by our law, but prohibited because they are contrary to the law of God, are we to understand the law as prohibiting them wheresoever celebrated, or only if they are celebrated in England? I cannot hesitate in the answer I must give to such an inquiry. The law, considering the ground on which it makes the prohibition, must have intended to give to it the widest possible operation. If such unions are declared by our law to be contrary to the laws of God, then persons having entered into them, and coming into this country, would, in the eye of our law, be living in a state of incestuous intercourse. It is impossible to believe that the law could have intended this.

It was contended that, according to the argument of the respondent, such a marriage, even between two Danes, celebrated in Denmark, must be contrary to the law of God, and that, therefore, if the parties to it were to come to this country, we must consider them as living in incestuous intercourse, and that if any question were to arise here as to the succession to their property, we must hold the issue of the second marriage to be illegitimate. But this is not so. We do not hold the marriage to be void because it is contrary to the law of God, but because our law has prohibited it on the ground of its being contrary to God's law. It is our laws which makes the marriage void, and not the law of God. And our law does not affect to interfere with or regulate the marriages of any but those who are subject to its jurisdiction.

The authorities showing that the general rule which gives validity to marriages contracted according to the laws of [* 227] the place where they are contracted, is subject to * the qualification I have mentioned, namely, that such marriages are not contrary to the laws of the land to which the parties contracting them belong, have been referred to not only by my noble and learned friend, but in the able opinion of Sir Cresswell Cresswell, delivered in the Court below, as also in the judgment of the Vice Chancellor. I abstain, therefore, from going

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into them in detail; to do so would only be to repeat what is already fully before your Lordships.

I cannot, however, refrain from expressing my dissent from that part of Sir CRESSWELL CRESSWELL'S able opinion, in which he repudiates a part of what is said by Mr. Justice Story as to marriages which are to be held void on the ground of incest. That very learned writer, after stating (Sec. 113) that marriages valid where they are contracted, are in general to be held valid everywhere, proceeds thus: "The most prominent, if not the only known exceptions to the rule, are marriages involving polygamy or incest; those positively prohibited by the public law of a country from motives of policy, and those celebrated in foreign countries by subjects entitling themselves, under special circumstances, to the laws of their own countries." And then he adds that, "as to the first exception, Christianity is understood to prohibit polygamy and incest, and, therefore, no Christian country would recognise polygamy or incestuous marriages; but when we speak of incestuous marriages, care must be taken to confine the doctrine to such cases as, by the general consent of all Christendom, are deemed incestuous." With this latter portion of the doctrine of Mr. Justice Story, Sir CRESSWELL CRESSWELL does not agree. But I believe that this passage, when correctly interpreted, is strictly consonant to the law of *nations. [*228] Story, there, is not speaking of marriages prohibited as incestuous by the municipal law of the country. If so prohibited, they would be void under his second class of exceptional cases; no inquiry would be open as to the general opinion of Christendom. But suppose the case of a Christian country, in which there are no laws prohibiting marriages within any specified degrees of consanguinity or affinity, or declaring or defining what is incest: still, even there incestuous marriages would be held void, as polygamy would be held void, being forbidden by the Christian religion. But then, to ascertain what marriages are, within that rule, incestuous, a rule not depending on municipal laws, but extending generally to all Christian countries, recourse must be had to what is deemed incestuous by the general consent of Christendom. It could never be held that the subjects of such a country were guilty of incest in contracting a marriage allowed and approved by a large portion of Christendom, merely because, in the contemplation of other Christian countries, it would be considered to be against

God's laws. I have thought it right to enter into this explanation, because it is important that a writer so highly and justly respected as Mr. Justice Story should not be misunderstood, as, with all deference, I think he has been in the passage under consideration.

Having thus expressed my opinion, I do not feel that I should usefully occupy your Lordships' time by going again over the cases which had been so carefully examined by my noble and learned friend. I agree with him that the cases decided as to Gretna Green marriages, do not assist the appellants. Lord HARDWICKE'S Act, 26 Geo. II. c. 33, directs that marriages shall only be celebrated after publication of banns, or by license; if either party is under age, the 11th section makes the marriage [* 229] * void unless there has been the requisite consent of parent or guardian That section evidently cannot be extended to marriages celebrated out of England; the necessity for banns or license clearly shows that the operation of the statute was to be confined to this country, and on that ground such marriages as those I have alluded to have always been deemed valid.

It was on this same ground that the Irish case, *Steele* v. *Braddell*, Milw. Eec. Rep. (Ir.) 1, was decided. Dr. RADCLIFF held that the Irish Statute prohibiting the marriage of a minor without certain consents, was, from the nature of its provisions, and attending to all its enactments, to be deemed to be confined to marriages celebrated in Ireland; not that the nature of the provisions might not have been such as to show that its operation was intended to be universal; indeed he expressly stated the contrary. It has therefore no bearing on the present case, where the ground of the prohibition shows that it must have been meant to be of the widest possible extent.

I also concur entirely with my noble and learned friend that the American decision of *Medway* v. *Needham* cannot be treated as proceeding on sound principles of law. The State or province of Massachusetts positively prohibited by its laws, as contrary to public policy, the marriage of a mulatto with a white woman; and on one of the grounds of distinction pointed out by Mr. Justice Story, such a marriage certainly ought to have been held void in Massachusetts, though celebrated in another province where such marriages were lawful.

I shall not farther detain your Lordships. I think that this marriage is one clearly prohibited by the statutes of Henry

VIII. wheresoever celebrated; and therefore that * the [*230] statute of 5 & 6 Will. IV. c. 54, make it absolutely void.

I therefore concur in thinking that the appeal should be dismissed.

Lord St. Leonards: —

My Lords, the question before the House is one of great importance, but not of much difficulty. The learned counsel for the appellants insisted that as marriage was but a civil contract, it must, by international law, depend upon the law of the country where it is contracted, and that the question of domicile was excluded; that certain marriages in Scotland were allowed in England to be good, notwithstanding Lord Hardwicke's Marriage Act; and that but for the Act of Will. IV. this marriage could not be impeached. It was admitted that this country would not recognise a contract in a foreign country, which was contrary to religion or morality or was criminal; but it was argued that the allowance of marriages such as that under consideration, by other States, showed that they were not contrary to religion or morality, or criminal, and that the very Act of Will. IV. virtually repealed any former law of this country impeaching the validity of such marriages as contrary to the law of God; for if deemed to be contrary to God's law, Parliament would not have given legal validity to those which had been solemnised, and it was forcibly urged that no Act of Parliament treats a marriage with a deceased wife's sister as incestuous.

I consider this as purely an English question. It depends wholly upon our own laws, binding upon all the Queen's subjects. The parties were domiciled subjects here, and the question of the validity of the marriage will affect the right to real estate. *Warrender* v. * *Warrender*, 2 Cl. & Fin. 488, shows how [*231] the marriage contract may be affected by domicile. We cannot reject the consideration of the domicile of the parties in considering this question; I may at once relieve the case from any difficulty arising out of Scotch marriages in fraud, as it is alleged, of our Marriage Act. When those marriages are solemnised according to the law of Scotland, they are no fraud upon the Act, for it expressly, amongst other exceptions, provides that nothing contained in it shall extend to Scotland. Lord Hardwicke observed in *Butler* v. *Freeman*, Ambl. 301, that there was a door open in the statute as to marriages beyond seas and in Scotland.

I may observe that the door was purposely left open, and such marriages have no bearing upon the question before the House.

The grounds upon which, in my opinion, this marriage in Denmark is void by our law, depends upon our Act of Parliament and upon the rule that we do not admit any foreign law to be of force here, where it is opposed to God's law, according to our view of that law.

The argument, as I have already observed, for the appellants, was, that no law in this country branded marriages with a deceased wife's sister as incestuous. Let us see how this stands. The 25 Hen. VIII. c. 22, s. 3, states, "that many inconveniences have fallen as well within this realm *as in others*, by reason of marrying within degrees of marriage *prohibited by God's law*, that is to say," and then several instances are stated, "or any man to marry his wife's sister, which marriages, albeit they be plainly prohibited and detested by the laws of God," and it then alludes to the [*232] "dispensations by man's power * which is but usurped," and declares that no man hath power to dispense with God's law.

It then by section 4 enacts, "that no persons, subjects or resiants of this realm, or in any of the King's dominions, should from thenceforth, marry within the said degrees; and if any person had been married within this realm, or in any of the King's dominions, within any of the degrees above expressed, and by any Archbishop, &c. of the Church of England, should be separate from the bonds of such unlawful marriage, every separation should be good, and the children under such unlawful marriage should not be lawful nor legitimate, any foreign laws, &c. to the contrary notwithstanding."

The statute of 28 Hen. VIII. c. 7, repealed the 25 Hen VIII. c. 22, but by section 7 again prohibited at large the marriages, prohibited by the 25 Hen. VIII. The marriage of a man with his wife's sister is included in the prohibition, and that and the other prohibited marriages the Act states to be "plainly prohibited and detested by the law of God." The statute 28 Hen. VIII. c. 16, made good all past marriages whereof there was no divorce, and which marriages were not prohibited by God's laws, limited and declared in the Act made in this Parliament or otherwise by Holy Scripture.

These Acts were followed by the 32 Hen. VIII. c. 38, "For marriages to stand, notwithstanding pre-contracts." It enacted that

all marriages as within the Church of England which should be contracted between lawful persons (as by this Act were declared all persons to be lawful that were not prohibited by God's law to marry), were not to be affected by pre-contracts, and that no reservation or prohibition God's law except, should trouble or impeach any marriage without the Levitical degrees, and * no [*233] process to the contrary was to be admitted within any of the Spiritual Courts within this the King's realm or any of his Grace's other lands and dominions.

It appears from these Acts, that the marriage in question is by the law of England declared to be against God's law, and to be detested by God plainly, because, although there is only affinity between the parties, it was deemed, like cases of consanguinity, incestuous. We are not at liberty to consider whether the marriage is contrary to God's law, and detested by God; for our law has already declared such to be the fact, and we must obey the law. That law has been so clearly and satisfactorily explained by the learned Judges in the case of *Reg.* v. *Chadwick*, as to render it unnecessary to observe farther upon it or to trace the repeals and re-enactments of the laws to which I have referred. As one of the learned Judges observed, we need not tread the labyrinth of statutes to discover which of the enactments in question has been repealed or revived, and which has not. We may use the prior Acts simply as the best interpreters of the statute 32 Hen. VIII. c. 38, which is clearly in force.

This brings us to the 5 & 6 Will. IV. c. 54, which was passed with a view to put an end to the uncertainty of the marriage contract arising from the decisions in our Courts, that where the parties were within the prohibited degrees of affinity, the marriage was voidable only. The Act drew a distinction between affinity and consanguinity. It enacted, that all past marriages between persons within the prohibited degrees of affinity, should not be annulled for that cause by any sentence of the Ecclesiastical Court; provided that nothing in the Act should affect marriages between persons being within the prohibited degrees of consanguinity. And the Act then proceeds to enact, that all marriages which should thereafter be celebrated * between persons within [*234] the prohibited degrees of consanguinity or affinity shall be absolutely null and void to all intents and purposes whatsoever. The recital stated the intention to make them *ipso facto* void, and

not voidable. Nothing can be plainer. The statute created no farther prohibition; it treated the legal prohibition already in existence as well known by the general description in the Act. The construction of the Act was settled by *Reg.* v. *Chadwick* the law of which case was not disputed at the bar. By that decision the marriage now in question would have been absolutely void had it been contracted in England.

This case, then, is reduced to the simple question, Is the marriage valid in this country because it was contracted in Denmark, where a marriage with a deceased wife's sister is valid? This depends upon two questions, either of which if adverse to the appellants would be fatal to the validity of the marriage, namely, first, will our Courts admit the validity of a marriage abroad by an English subject domiciled here with his deceased wife's sister, because the marriage is valid in the country where it was contracted? Secondly, is such a marriage struck at by 5 & 6 Will. IV.?

I think that the marriage has no validity in this country on the first ground, for by our law such a marriage is forbidden, as contrary, in our view, to God's law. The objection that Parliament gave validity to such marriages already had, in cases of affinity, is no reason why, when we have in future carefully made all such marriages absolutely void, we should admit their validity in favour of the law of a foreign country. The learned Judge who assisted the learned VICE CHANCELLOR in the Court below, came to [* 235] * the conclusion, after an elaborate review of the authorities, that a marriage contracted by the subjects of one country, in which they are domiciled, in another country, is not to be held valid, if, by contracting it, the laws of their own country are violated. This proposition is more extensive than the case before us requires us to act upon, but I do not dissent from it.

I shall not, however, dwell upon this point, because I think that upon the second point the marriage is clearly invalid. The appellant relies upon the silence of the Act in respect to marriages abroad. Now the Act is general and contains a large measure of relief as well as a prohibition. It gives validity to *all* marriages celebrated before the passing of the Act, by persons being within the prohibited degrees of affinity. This is unlimited, and we could hardly hold that such of those persons as had been married abroad were excluded from the benefit of the Act. Why should the relief be confined, and not allowed as large a range as the words

will admit? Clearly no intention appears to limit the operation of the words. The next clause, which nullifies the contract, is equally unlimited. *All* marriages thereafter celebrated between persons within the prohibited degrees of consanguinity or affinity are declared to be null and void. We must give the same interpretations to the words in this section as to those in the former section. To whatever class the relief was extended, to the same class, in addition to those within the prohibited degrees of consanguinity, the prohibition must be applied. It is of course not denied that three or four additional words would have put the question at rest. But why when the words are "*all* marriages," without making any exception, are we to introduce an exception in order to give validity to the very marriages which the Legislature
*intended to render null and void? The marriage now [*236]
under consideration shows how expedient it was that the
law should prohibit it. It is not like the exception in the Marriage Act of marriages in Scotland, which enabled parties, without any real evasion of the law, to marry there without the forms imposed by the Act. What was intended was expressed. Here, on the contrary, the enactment is general and unqualified; and as it was intended to create a personal inability, there is of course no exception. The answer to the argument that the very case is not provided for in so many words, is, that, with the Marriage Act before them, the framers of the new law, would have introduced an exception to meet this case, if such had been the intention. But when we advert to the nature of the contract, and the state of our law in relation to such a contract, which law was not altered by the new enactment, and bear in mind that the contrary law in a foreign country ought to receive no sanction here, opposed as it is to our law declaring such a contract to be contrary to God's law, we cannot fail to perceive that this case falls directly within the enactment that *all* such marriages shall be null and void.

Authority is not wanting in favour of this construction. The Royal Marriage Act, as your Lordships are aware, has been held in this House to extend to marriages abroad. And yet how much weaker a case was that than the one now before us. In it there was no infraction of God's law as declared by our law. The prohibition there rested only on political grounds. There were difficulties to surmount in extending the Act to marriages abroad, which do not occur in this case; the last clause, which makes

persons who assist in celebrating the forbidden marriages incur the pains and penalties, makes the Act a highly penal one.

[*237] * The invalidity of the marriage of the Duke of Sussex at Rome, without the King's consent, was declared by this House (*The Sussex Peerage Case*, 11 Cl. & Fin. 85) with the assistance of six law Lords and seven common law Judges. The unanimous opinion of the Judges was delivered by Lord Chief Justice TINDAL. He stated the only rule of construction of Acts of Parliament to be, that they should be construed according to the intent of the Parliament which passed them. If the words of the statute are in themselves precise and unambiguous, then no more can be necessary than to expound those words in their natural and ordinary sense. The words themselves alone do in such case best declare the intention of the lawgiver. The Act created a personal inability in the Duke to contract a marriage without consent. The prohibitory words were general, that every marriage or matrimonial contract of any such person shall be null and void. As a marriage once duly contracted in any country will be a valid marriage all the world over, the incapacity to contract a marriage in Rome is as clearly within the prohibitory words of the statute as the incapacity to contract it in England. So again as to the second or annulling branch of the enactment, "that every marriage without such consent shall be null and void;" the words employed are general, or more properly universal, and cannot be satisfied in their plain literal ordinary meaning, unless they are held to extend to all marriages in whatever part of the world they may have been contracted or celebrated. The learned Chief Justice then addressed himself to the 2nd section of the Act, and made an observation strongly applicable to my observations on the operation of the 5 & 6 Will. IV. in rendering valid, as I submit, former

[*238] marriages wherever * celebrated. He said, as no doubt could be entertained by any one but that a marriage taking place with the due observance of the requisites of the 2nd section, would be held equally valid, whether contracted and celebrated at Rome or in England, so the Judges thought it would be contrary to all established rules of construction if the very same words in the 1st section were to receive a different sense from those in the 2nd; if it should be held that a marriage in Rome contracted with reference to the 2nd section is made valid, and at the same time a marriage at Rome is not prohibited under the first; surely (the

Chief Justice added), if a marriage of a descendant of Geo. II. contracted or celebrated in Scotland or Ireland, or on the continent, is to be held a marriage not prohibited by this Act, the statute itself may be considered as virtually and substantially a dead letter from the first day it was passed.

I think your Lordships will agree with me that the opinions of the learned Judges in the Royal Marriage case strictly apply to this case, and ought to rule it; I adopt every one of those opinions without reserve. It is true that the Acts are not framed, as they could not be, exactly alike; because the Royal Marriage Act did not intend to establish an absolute prohibition, unless in the last resort. But where that Act, and the Act of Will. IV. have the same object, viz., the annulling and rendering void a marriage contracted contrary to their provisions, they are identical, and cannot admit of two constructions.

I may observe that these were difficulties in the *Duke of Sussex's Case*, with which we have not to contend here; but the Judges were of opinion, and this House held, that the clause requiring the consent to be set out in the license and register of the marriage, was directory only, and applied only to a marriage in England by license. The * defect in the penal clause in [*239] not making provision for the trial of British subjects when they violate the statute out of the realm, did not operate to make the enactment itself substantially useless and inoperative.

Upon the whole, therefore, I am clearly of opinion that this marriage was rendered void by the Act of Will. IV. and I concur with my noble and learned friend on the woolsack, that the appeal should be dismissed, and the decree of the Vice Chancellor affirmed.

Lord Wensleydale: —

My Lords, I agree in the opinion expressed by my noble and learned friend on the woolsack, and my other noble and learned friends who have followed him: and after fully considering the arguments and judgments in the Court below, as well as the arguments addressed to your Lordships on the appeal, that you ought to affirm the decree of the Court below.

The question to be decided is, as the Lord Chancellor stated, whether a marriage celebrated on the 7th June, 1850, in the duchy of Holstein, between a widower and the sister of his deceased wife, both being then British subjects domiciled in England, and con-

templating England as their future matrimonial residence, is valid in England, such a marriage being permitted by the law of Holstein. The question what the consequences would have been if the parties had been English subjects domiciled there, is not the subject of inquiry. The sole question relates to British domiciled subjects.

Both the Judges in the Court below form their judgment, first, on the ground of the illegality of such a marriage in England, prohibited from very early times by the Legislature, and finally by Lord Lyndhurst's Act, 5 & 6 Will. IV. c. 54; secondly, on the [* 240] ground that that Act * itself is to be considered as a personal Act, in effect prohibiting all British born subjects, in whatever part of the world they might happen to be, from contracting such marriages, and declaring those marriages to be absolutely void. It was likened by them to the Royal Marriage Act, the 12 Geo. III. c. 11, which was clearly an Act affecting personally the descendants of King George II., in the realm, or out of it. That appears from the language of the Act itself, and the object it had in view.

It is unnecessary to enter into the discussion of this part of the case, if the other ground is satisfactory, which I think it is. But as at present advised, I dissent upon this point from my noble and learned friend who has just addressed your Lordships. I think the construction put upon this as a personal Act is wrong. I do not think the purpose of the statute was to put an end to such marriages by British subjects in any part of the world. Its object was only to make absolutely void thereafter all marriages in this realm between persons within the prohibited degrees of consanguinity or affinity which were previously voidable, that is, which were really void according to our law, though they could be avoided only by a suit in the Ecclesiastical Court, and that could be done only during the life of both the married parties.

The question then appears to me to be reduced to this single point: Was this such a marriage as the Ecclesiastical Court would have set aside if an application had been made to it for that purpose during the lives of both the married parties previous to the passing of the Act 5 & 6 Will. IV. c. 54? If it would have been voidable in that case before that Act, it is now by its operation absolutely void. I think it clear that it would have been set aside, and that the view taken particularly by Sir CRESS-

WELL *CRESSWELL in the first part of his opinion upon [*241] this part of the case is perfectly correct.

It is the established principle that every marriage is to be universally recognised, which is valid according to the law of the place where it was had, whatever the law may be. This is the doctrine of Lord STOWELL in the case of *Herbert* v. *Herbert*, 2 Hagg. Cons. Rep. 271. The same doctrine has been laid down in various authorities, as by Sir Edward SIMPSON in *Scrimshire* v. *Scrimshire*, 2 Hagg. Cons. Rep. 417, and by Story and others. If valid where it was celebrated, it is valid everywhere, as to the constitution of the marriage and as to its ceremonies; but as to the rights, duties, and obligations thence arising, the law of the domicile of the parties must be looked to. That is laid down by Story's Conflict of Laws, s. 110.

But this universally approved rule is subject to a qualification. Huber, in his 1st Book, Tit. 3, Art. 8, says, "Matrimonium si licitum est eo loco ubi contractum et celebratum est, ubique validum erit, effectumque habebit, sub eâdem exceptione, prejudicii aliis non creandi; cui licet addere, si exempli nimis sit abominandi; ut si incestum juris gentium in secundo gradu contingeret alicubi esse permissum; quod vix est ut usu venire possit."

A similar qualification is introduced by Story's Conflict of Laws, ss. 113 a, 114. He states, that the most prominent, if not the only known exceptions to the rule, are, first, those marriages involving polygamy and incest; second, those positively prohibited by the public law of a country from motives of policy, and a third having no bearing upon the question before us. And as to the first exception, he adds, that "Christianity is understood to prohibit polygamy and incest, but this doctrine must be confined to such cases as by *general* consent of all Christendom [*242] are deemed incestuous."

It would seem enough to say, that the present case falls within the two exceptions, for it is no doubt prohibited by the public law of this country. And it is by no means improbable, that Story's meaning was to apply his first exception only to those cases to which the second could not apply, as suggested by my noble and learned friend; to those cases, namely, in which there was no particular law in the country of the domicile of the parties to such marriages. And in that sense the position of Story is unobjectionable. His meaning would have been more clearly expressed, if

the second exception had been put the first, and the first made to apply where no such particular law existed.

It strikes me that this view of the case is correct. And, therefore, it is in reality quite unnecessary to discuss the question whether, where a marriage is objected to not on the ground of its being against the positive prohibition of a country, but on the ground of incest, where there is no such prohibition, the incest must be of such a character as is described in the first exception.

If that question is to be considered, I perfectly agree with the convincing reasoning of Sir CRESSWELL CRESSWELL on this point of the case. What have we to do with the general consent of Christendom, on the subject of incest, in a question which relates to our own country alone? Amongst Christian nations different doctrines prevail, and surely the true question would be, not, what is the doctrine of Christianity generally, in which all agree, nor what is the prevailing doctrine of Christian nations, but what is the doctrine, on this subject, of that branch of Christianity which this country professes. If it is condemned by [*243] us as forbidden by the law of God in Holy * Scripture, it is no matter what opinions other Christian nations entertain on this question. This reasoning appears so very clear, that I must think that so able a man as Mr. Justice Story, could never have meant to lay down the proposition that where any country prohibited a marriage on account of incest, it must be of such quality of incest as to be of that character in universal Christendom. If he really did mean to state such a proposition, I must say I think it cannot be supported.

I proceed, therefore, though I think it unnecessary, to show that this sort of marriage is forbidden in this country on the ground of its being against the law of God deduced from Holy Scripture. We have a distinct and clear opinion on this subject in a well-considered judgment of the Court of Queen's Bench in the case of *Reg.* v. *Chadwick*, 11 Q. B. 173, 205, 17 L. J. M. C. 33, which was argued for several days; and in which Lord DENMAN, Mr. Justice COLERIDGE, and Mr. Justice WIGHTMAN, delivered very full and satisfactory judgments. It was held that marriages within the prohibited degrees mentioned in the statute 5 & 6 Will. IV. c. 54, were those within the *Leviticul* degrees, which having been before voidable by suit in the Ecclesiastical Court, were by that statute absolutely avoided. The marriage of a wid-

ower with his wife's sister was considered as clearly falling within this class. The legislative declarations in Henry VIII.'s reign were considered as statutory expositions of what was intended by the term "Levitical degrees," whether those statutes in which they occur are repealed or not.

If we are to inquire into the latter question, whether they are repealed or not, it will require some research.

*The whole question is ably and distinctly stated in [*244] a note appended by the learned editor to the case of *Sherwood* v. *Ray*, 1 Moo. P. C. 353, 355 (*a*).

The state of the law appears to be this: The two statutes in which the term "Levitical degrees" is explained are the 25 Hen. VIII. c. 22, where they are enumerated and include a wife's sister, and the 28 Hen. VIII. c. 7, in the ninth section of which are described, by way of recital, the degrees prohibited by God's laws in similar terms, with the addition of carnal knowledge by the husband in some cases; and with respect to them the prohibition of former statutes was re-enacted.

The whole of this Act, 25 Hen. VIII. c. 22, was repealed by a statute of Queen Mary; and so was part of 28 Hen. VIII. c. 7, but not the part as to the prohibited degrees. That part was repealed by 1 & 2 Philip & Mary, c. 8. But by the 1 Eliz. c. 1, s. 2, that Act itself was repealed, except as therein mentioned, and several Acts were revived, not including the 28 Hen. VIII. c. 7; no doubt because it avoided the marriage with Ann Boleyn. But by the 10th section of the 28 Hen. VIII. c. 16 (which in the second section referred to marriages prohibited by God's laws as limited and declared in the 28 Hen. VIII. c. 7, or otherwise by Holy Scripture) all and every "branches, words, and sentences in those several Acts contained, are revived and are enacted to be in full force and strength to all intents and purposes." The question is, whether that part of 28 Hen. VIII. c. 7, which relates to prohibited degrees and describes them, is thus revived? I think it is. But whether it is or not, the statements in the statutes are to be looked at *as a statutory exposition of the meaning of the term [*245] "Levitical degrees." And that is the clear opinion of Lord Denman and Mr. Justice Coleridge in the case to which I refer.

The statute law of the country which is binding on all its subjects, therefore, must be considered as pronouncing that this mar-

riage is a violation of the Divine law, and therefore that it is void within the first exception made by Mr. Justice Story, and within the principle of the exception laid down by Huber. If our laws are binding, or oblige us, as I think they do, to treat this marriage as a violation of the commands of God in Holy Scripture, we must consider it in a court of justice as prejudicial to our social interest and of hateful example. But if not, it most clearly falls within the second exception stated by Story, which alone, I think, need be considered, as it is clearly illegal by the law of this country, whether it be considered incestuous or not, and a violation of that law.

I do not, therefore, in the least doubt that before the 5 & 6 Will. IV. it would have been pronounced void by the Ecclesiastical Court on a suit instituted during the life of both parties. And therefore I advise your Lordships that the judgment should be affirmed.

Order appealed against affirmed, and appeal dismissed with costs.

Lords' Journals, 18 March, 1861.

Sottomayor v. De Barros.

47 L. J. P. 23-26 (s. c. 3 P. D. 1; 37 L. T. 415; 26 W. R. 455).

Sottomayor v. De Barros (Queen's Proctor intervening).

49 L. J. P. 1-8 (s. c. 5 P. D. 94; 41 L. T. 281; 27 W. R. 917).

Conflict of Laws. — Marriage. — Degrees of Consanguinity.

A and B., being first cousins and natives of Portugal, where a marriage between first cousins without a Papal dispensation is void, came to England, and in 1856 contracted a marriage there.

On a petition for declaration of nullity of the marriage, after argument on the questions of law upon the assumption that the domicile of both parties at the time of the marriage was in Portugal, it was held by the Court of Appeal, reversing the decision of Sir R. Phillimore, that the marriage being invalid according to the law of the domicile of the parties must be declared null and void here.

But it being found on the questions of fact raised by the pleas of the Queen's Proctor, that the domicile of A. was English, the Court dismissed the petition.

[23] This was an appeal from a decision of Sir Robert Phillimore dismissing a petition of Dona Ignacia Sottomayor to have her marriage declared null and void.

No. 8. — Sottomayor v. De Barros, 47 L. J. P. 23, 24.

The facts of the case as they appeared before the more complete inquiry at the instance of the Queen's Proctor, are stated in the written judgment of the Court (JAMES, L. J., BAGGALLAY, L. J., and COTTON, L. J.), read on the 26th November, 1877, by

COTTON, L. J. This is an appeal from an order of the [24] Court of Divorce, dated the 17th of March, 1877, dismissing a petition presented by Ignacia Sottomayor, praying the Court to declare her marriage with the respondent, Gonzalo De Barros, to be null and void. The respondent appeared to the petition but did not file an answer or appear at the hearing; and by the direction of the Judge the Queen's Proctor was served with the petition, and appeared by counsel to argue the case against the petitioner. There were several grounds on which the petitioner originally claimed relief, but the only ground now to be considered is that she and the respondent were under a personal incapacity to contract marriage.

The facts are these: The petitioner and the respondent are Portuguese subjects, and are and have always been domiciled in that country where they both now reside. They are first cousins, and it was proved that by the law of Portugal first cousins are incapable of contracting marriage, by reason of consanguinity; and that any marriage between parties so related is, by the law of Portugal, held to be incestuous, and therefore null and void; but, though not proved, it was admitted before us that such a marriage would be valid if solemnised under the authority of a Papal dispensation.

In the year 1858 the petitioner, her father and mother, and her uncle De Barros and his family, including the respondent, his eldest son, came to England, and the two families occupied a house jointly in Dorset Square, London. The petitioner's father came to this country for the benefit of his health, and De Barros for the education of his children, and to superintend the sale of wine. De Barros subsequently, in 1861, became manager to a firm of wine merchants in London, under the style of Caldos Brothers & Co., of which the petitioner's father was made a partner, and which stopped payment in 1865. On the 21st of June, 1866, the petitioner, at that time of the age of fourteen years and a half, and the respondent of the age of sixteen years, were married at a registrar's office in London. No religious ceremony accompanied or followed the marriage, and although the parties lived together in the same house until the year 1872, they never slept together and the marriage was never consummated.

The petitioner stated that she went through the form of marriage contrary to her own inclination, by the persuasion of her uncle and mother, on the representation that it would be the means of preserving her father's Portuguese property from the consequences of the bankruptcy of the wine business.

Under these circumstances the appellant in November, 1874, presented her petition for the object above-mentioned, and Sir ROBERT PHILLIMORE, before whom the case was heard, declined to declare the marriage invalid, and dismissed the petition, but did so, as I understand, rather because he felt himself bound by the decision in the case of *Simonin* v. *Mallac*, 2 Sw. & Tr. 67, 29 L. J. P., M. & A. 97, than because he considered that on principle the marriage ought to be held good.

If the parties had been subjects of Her Majesty domiciled in England, the marriage would undoubtedly have been valid. But it is a well-recognised principle of law that the question of personal capacity to enter into any contract, is to be decided according to the law of domicile. It is however urged that this does not apply to the contract of marriage, and that a marriage valid according to the law of the country where it is solemnised, is valid everywhere. This in our opinion is not a correct statement of the law. The law of a country where a marriage is solemnised must alone decide all questions relating to the validity of the ceremony by which [* 25] the marriage is alleged to * have been constituted; but, as in other contracts, so in that of marriage, personal capacity must depend on the law of domicile, and if the laws of any country prohibit its subjects within certain degrees of consanguinity from contracting marriage, and stamp a marriage between persons within the prohibited degrees as incestuous, this in our opinion imposes on the subjects of that country a personal incapacity which continues to affect them so long as they are domiciled in the country where the law prevails, and renders invalid a marriage between persons, both, at the time of their marriage, subjects of, and domiciled in the country which imposes the restriction wherever such marriage may have been solemnised. In the argument several passages from Story's Conflict of Laws were referred to in support of the contention that in an English Court a marriage between persons who by our law may lawfully intermarry ought not to be declared void, though declared incestuous by the law of the parties' domicile, unless the marriage is one which the general consent of Christen-

dom stamps as incestuous. It is hardly possible to suppose that the law of England, or of any Christian country would consider as valid a marriage which the general consent of Christendom declared to be incestuous. Probably the true explanation of the passages in Story, is given in *Brook* v. *Brook*, p. 801, *ante* (9 H. L. Cas. pp. 227–28) by Lord CRANWORTH, and by Lord WENSLEYDALE, at pages 811, 812, *ante* (9 H. L. Cas. pp. 241–42), viz., that in their opinion, Story is referring to marriages not prohibited or declared to be invalid by the municipal law of the country of domicile.

But it is said that the impediment imposed by the law of Portugal can be removed by a Papal dispensation, and therefore that it cannot be said that there is a personal incapacity of the petitioner and respondent to contract marriage. The evidence is clear that by the law of Portugal, the impediment to the marriage between the parties is such, that, in the absence of a Papal dispensation, the marriage would be by the law of that country void as incestuous The statutes of the English Parliament contain a declaration that no Papal dispensation can sanction a marriage otherwise incestuous, but the law of Portugal does recognise the validity of such a dispensation, and it cannot in our opinion be held that such a dispensation is a matter of form affecting only the sufficiency of the ceremony by which the marriage is effected, or that the law of Portugal, which prohibits and declares incestuous, unless with such a dispensation, a marriage between the petitioner and respondent, does not impose on them a personal incapacity to contract marriage.

It is proved that the Courts of Portugal where the petitioner and respondent are domiciled and resident, would hold the marriage void as solemnised between parties incapable of marrying and incestuous. How can the Courts of this country hold the contrary, and, if appealed to, say the marriage is valid?

It was pressed upon us in argument that a decision in favour of the petitioner would lead to many difficulties if questions should arise as to the validity of a marriage between an English subject and a foreigner in consequence of prohibitions imposed by the law of the domicile of the latter. Our opinion on this appeal is confined to the case when both the contracting parties are at the time of their marriage domiciled in a country the laws of which prohibit their marriage. All persons are legally bound to take notice of the laws of the country where they are domiciled. No country is bound to recognise the laws of a foreign State, when they work injustice

to its own subjects, and this principle would prevent the judgment in the present case being relied on as an authority for setting aside a marriage between a foreigner and an English subject domiciled in England, on the ground of any personal incapacity not recognised by the law of this country.

Reliance was placed on *Brook* v. *Brook*, as a decision in favour of the appellant. If, in our opinion, that case had been a decision on the question arising on this petition, it would have been sufficient without more, to refer to that case as decisive. The judgment [* 26] in that case, however, only decided that the English * Courts must hold invalid a marriage between two English subjects, domiciled in this country, who were prohibited from intermarrying by an English statute, even though the marriage was solemnised during a temporary sojourn in a foreign country. It is therefore not decisive of the present case; but the reason given by the Lords who delivered their opinions in that case strongly support the principle on which this judgment is based.

It only remains to consider the case of *Simonin* v. *Mallac*. An objection to the validity of the marriage in that case, which was solemnised in England, was the want of the consent of parents required by the law of France, but not, in the circumstances, by that of this country. In our opinion this consent must be considered as part of the ceremony of marriage, and not a matter affecting the present capacity of the parties to contract marriage; and the decision in *Simonin* v. *Mallac* does not, we think, govern the present case.

The judgment appealed from must therefore be reversed, and a decree made declaring the marriage null and void

The case was then remitted to the Probate Division in order that the questions of fact raised by the Queen's Proctor's pleas should be determined. It was pleaded (*inter alia* and) sixthly, that the petitioner and respondent, at the time of the marriage, were domiciled in England. The facts as proved by the evidence appear from the judgment delivered on the 6th of August, 1878, by

The President (Sir JAMES HANNEN) [after dealing [*49 L. J. P. 3] with the other issues]. *The sixth issue is the important one on which the arguments have chiefly turned, namely, whether or not the petitioner and respondent were, or either of them was, at the time of the marriage domiciled in England. With

regard to the petitioner, as she was a minor at the time of the marriage, her domicile was that of her father. His domicile was Portuguese down to the time of his coming to England in 1858, and I am not satisfied that he had at that time, or at any time afterwards, mental capacity to change his domicile. I therefore find that the domicile of the petitioner at the time of the marriage was Portuguese. With regard to the respondent, he was also a minor, and his domicile was therefore, the same as his father's, whom I shall call Gonzalo de Barros, though he was sometimes called Caldos. This person formerly carried on the business of wine grower and exporter in Portugal. *In 1858 he came to England, bringing with [*4] him the whole of his family. Here he set up in business as a wine merchant and importer. In 1860 he took a lease of a house in Dorset Square for twenty-one years. On the 31st of July, 1861, an agreement was entered into for the formation of a partnership for twenty years between the brother of Gonzalo de Barros and his sister and sister-in-law as wine importers and merchants under the style of Caldos Brothers, of which partnership Gonzalo was to be manager at a salary of £500 per annum, with the option of becoming a partner. The business was to be and was carried on at 9 Catherine Court, St. Swithin's Lane. The firm of Caldos Brothers failed in 1865; but Gonzalo de Barros continued to reside in London, and his son, the respondent, being still a minor, set up in the wine business. It is said by one of the witnesses that Gonzalo de Barros lived privately in London at the time, by which it would seem to be meant that he followed no business, but it is probable that the business of the son was regarded as the business of both. In 1868, in the course of some legal proceedings which were instituted in Portugal, Gonzalo de Barros informed his solicitor that his domicile was English, and instructed him to collect evidence in support of this assertion, which was done. In 1870 Gonzalo de Barros died in London, never having quitted London since his coming here in 1858. Evidence was given that he frequently said during this period that he meant to remain in England; and, on the other hand, the only evidence besides that of the petitioner and her mother offered to rebut the inference to be drawn from the facts above stated was that of one witness that Gonzalo frequently said that he should return to Portugal "as soon as his affairs were settled." It is evident, however, that this is not the language of a man who has become the manager of a business at a

salary of £500 a year, and even assuming the correctness of the witness's memory, such declarations cannot outweigh the evidence of the facts above stated. *Doucet* v. *Geoghegan*, 9 Ch. D. 441. From these facts I draw the inference that the father of the respondent at the time he became the manager of the wine business adopted England as his place of permanent residence, with the intention of remaining there for an unlimited time; in other words, that he became domiciled here. It follows, therefore, that the respondent's domicile was English also. There is abundant evidence that the respondent himself, after he came of age, continued to look upon England as the place of his domicile, and this may perhaps have some reflex effect in considering what place his father had chosen as his domicile; but as the time of the marriage is the important point in the case, I do not think it necessary to dwell on the evidence of the respondent's subsequent intentions. The question then arises, what is the law applicable to such a case? It is clear that the judgment which has been already given by the Court of Appeal is not applicable to such a state of facts. The language of the Court of Appeal is explicit: —

"It was pressed upon us in argument that a decision in favour of the petitioner would lead to many difficulties if questions should arise as to the validity of a marriage between an English subject and a foreigner in consequence of prohibitions imposed by the law of the domicile of the latter. Our opinion on this appeal is confined to the case where both the contracting parties are at the time of their marriage domiciled in a country the law of which prohibits their marriage."

This passage leaves me free to consider whether the marriage of a domiciled Englishman in England with a woman subject by the law of her domicile to a personal incapacity not recognised by English law must be declared invalid by the tribunals of this country? Before entering upon this inquiry, I would observe that the Lords Justices appear to have laid down as a principle of law a proposition which was much wider in its terms than was necessary for the determination of the case before them. It is thus expressed: "It is a well-recognised principle of law that the question of personal capacity to enter into any contract is to be decided by the [* 5] law of domicile." * And, again: "As in other contracts, so in that of marriage, personal capacity must depend on the law of domicile." It is of course competent for the Court of Appeal

to lay down a principle which if it formed the basis of the judgment of that Court, must, unless it be disclaimed by the House of Lords, be binding on all future cases. But I trust I may be permitted, without disrespect, to say that the doctrine thus laid down has not hitherto been "well recognised." On the contrary it appears to me to be a novel principle for which, up to the present time, there has been no English authority. What authority there is seems to be distinctly the other way. Thus in the case of *Male* v. *Roberts*, 3 Esp. 163, 6 R. R. 823, the contract on which the defendant was sued was made in Scotland. The defence was that the defendant was an infant, but Lord ELDON held the defence bad, saying, "If the law of Scotland is that such a contract as the present could not be enforced against an infant, it should have been given in evidence. The law of the country where the contract arose must govern the contract." Sir E. SIMPSON, in the case of *Scrimshire* v. *Scrimshire*, 2 Consis. 412, when dealing with the subject, says: "This doctrine of trying contracts, especially those of marriage, according to the law of the country where they are made, is conformable to what is laid down in our books, and what is practised in all civilised countries." And again, "These authorities fully show that all contracts are to be considered according to the laws of the country where they are made, and the practice of civilised countries has been conformable to this doctrine, and by the common consent of nations has been so received" This is the view of the subject which is expressed by Burge (vol. 1, c. 4, 132), and by Story (Conflict of Laws, section 103); and Sir C. CRESSWELL in *Simonin* v. *Mallac*, 2 Sw. & Tr. 67, says, "In general the personal competency of individuals to contract has been held to depend on the law of the place where the contract was made." If the English reports do not furnish more authority on the point, it may perhaps be referred to its not having been questioned. I cannot but think, therefore, that the learned Lords Justices would not desire to base their judgment on so wide a proposition as that which they have laid down with reference to the personal capacity to enter into all contracts. In truth very many and serious difficulties arise if marriage be regarded only in the light of a contract. It is, indeed, based upon the contract of the parties, but it is a *status* arising out of contract to which each country is entitled to attach its own conditions, both as to its creation and duration. In some countries no other condition is imposed than that the parties, being of a certain age, and not related within certain specified degrees,

shall have contracted with each other to become man and wife; but that in those countries marriage is not regarded merely as a contract is clear, since the parties are not at liberty to rescind it. In some countries certain civil formalities are prescribed, in others a religious sanction is required. If the subject be regarded from this point of view, the effect of the recent decision of the Court of Appeal has only been to define a further condition imposed by English law, namely, that the parties do not both belong by domicile to a country the laws of which prohibit their marriage. But as I have already pointed out, that judgment expressly leaves altogether untouched the case of a marriage of a British subject in England, where the marriage is lawful, with a person domiciled in a country where the marriage is prohibited. With regard to such a marriage, all the arguments which have hitherto been urged in support of the larger proposition, that a marriage good by the law of the country where solemnised must be deemed by the tribunals of that country to be valid irrespective of the law of the domicile of the parties, remain with undiminished effect. They cannot be stated with greater accuracy and force than by Sir C. CRESSWELL in *Simonin* v. *Mallac*, 2 Sw. & Tr. 67; and, as I could not express myself so well, I shall adopt the language of that learned Judge as my own, without introducing the qualification which the de-
[*6] cision of the *Court of Appeal has created. But before quoting the language of that very eminent Judge, I must observe that the Court of Appeal has distinguished the present case from that of *Simonin* v. *Mallac*, 2 Sw. & Tr. 67, on the ground that there the incapacity arose from the want of consent of parents, and that "the consent of parents required by the law of France must be considered a part of the ceremony of marriage." Certainly Sir C. CRESSWELL did not base his judgment on that ground. After observing that a distinction might be drawn between an absolute and conditional prohibition, he proceeds: "But taking the decree of the French Court in the suit there instituted as evidence that by the law of France this marriage was void, we again come to the broad question: Is it to be judged of here by the law of England or the law of France? In general the personal competency or incompetency of individuals to contract has been held to depend upon the law of the place where the contract is made. But it was and is contended that such a rule does not extend to contracts of marriage, and that parties are with reference

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to them bound to the law of their domicile." Then, after reviewing the authorities, he says: "It is very remarkable that neither in the writings of jurists, nor in the arguments of counsel, nor in the judgments delivered in the Courts of justice, is any case quoted or suggestion offered to establish the proposition that the tribunals of a country where a marriage has been solemnised in conformity with the laws of that country should hold it void because the parties to the contract were the domiciled subjects of another country, where such a contract would not be allowed." And later on the following passage occurs which is specially applicable to the present case: "Every nation has a right to impose on its own subjects restrictions and prohibitions as to entering into marriage contracts, either within or without its own territories; and if its subjects sustain hardship in consequence of those restrictions, their own nation only must bear the blame; but what right has one independent nation to call upon any other nation equally independent to surrender its own laws in order to give effect to such restrictions and prohibitions? If there be any such right it must be found in the law of nations, that law to which all 'nations have consented, or to which they must be presumed to consent, for the common benefit and advantage.' And which would be for the common benefit and advantage in such a case as the present? The observance of the law of the country where the marriage is celebrated, or the law of a foreign country? Parties contracting in any country are to be assumed to know, or to take the responsibility of not knowing the law of that country. Now, the law of France (in this case read Portugal) is equally stringent, whether both parties are French or one only. Assume then that a French subject comes to England, and there marries without consent a subject of another foreign country, by the laws of which such a marriage would be valid, which law is to prevail? To which country is an English tribunal to pay the compliment of adopting its law? As far as the law of nations is concerned each must have an equal right to claim respect for its laws. Both cannot be observed. Would it not, then, be more just, and therefore more for the interest of all, that the law of that country should prevail which both are presumed to know and to agree to be bound by? Again, assume that one of the parties is English, would not an English subject have as strong a claim to the benefit of English law as a foreigner to the benefit of foreign law? . . . The great importance of having some

one certain rule applicable to all cases; the difficulty, not to say impossibility, of having any rule applicable to all cases, save that the law of the country where a marriage is solemnised shall in that country at least decide whether it is valid or invalid; the absence of any judicial decision or *dictum*, or of even any opposite opinion of any writer of authority on the law of nations, have led us to the conclusion that we ought not to found our judgment in this case on any other rule than the law of England as prevailing amongst English subjects."

This was the opinion of Sir C. CRESSWELL, CHANNELL, B., and [* 7] KEATING, J., * constituting the full Court, whose decisions at that time were only subject to review by the House of Lords. The Court of Appeal has, indeed, without alluding to the arguments of these very eminent Judges, now overruled their opinion; but Lord Justice COTTON has expressed his concurrence in their views so far as is necessary for the purposes of the present case. He says: "No country is bound to recognise the laws of a foreign State when they work injustice to its own subjects, and this principle would prevent the judgment in the present case being relied on as an authority for setting aside a marriage between a foreigner and an English subject domiciled in England on the ground of any personal incapacity not recognised by the law of this country." Numerous examples may be suggested of the injustice which might be caused to our own subjects if a marriage was declared invalid on the ground that it was forbidden by the law of the domicile of one of the parties. It is still the law in some of the United States that a marriage between a white person and a "person of colour" is void. In some States the amount of colour which will incapacitate is undetermined. In North Carolina all are prohibited who are descended from negro ancestors to the fourth generation inclusive, though an ancestor of each generation may have been a "white person" (Pearson on Marriage, section 308). Suppose a woman domiciled in North Carolina, with such an amount of colour in her blood as would arise from her great-grandmother being a negress, should marry in this country, should we be bound to hold that such a marriage was void? Or, suppose a priest or monk domiciled in a country where the marriage of such a person is prohibited, were to come to this country and marry an Englishwoman, could this Court be called on, at the instance of the husband, to declare that the marriage was null, and to give a legal sanction to his repudiation of his wife? Mr. Dicey, in

his excellent treatise on "Domicile," p. 223, answers these questions in the negative, and places these two cases under this head: —

"A marriage celebrated in England is not invalid on account of any incapacity of either of the parties which, though imposed by the law of his or her domicile, is of a kind to which our Courts refuse recognition."

But on what principle are our Courts to refuse recognition, if not on the basis of our laws? If this guide alone be not taken, it will be free to every Judge to indulge his own feelings as to what prohibitions by foreign countries on the capacity to contract a marriage are reasonable. What have we to do, or, to be more accurate, what have the English tribunals to do, with what may be thought in other countries on such a subject? Reasons may exist elsewhere why coloured people and white should not intermarry, or why first cousins should not. But what distinction can we properly draw between these cases? And why are they not both to be regarded in the same light here — namely, that as they are alike permitted by our laws, we cannot recognise their prohibition by the laws of other countries as a reason why we should hold that such marriages cannot be contracted here? Of the cases cited on the argument, the only one which I think necessary to mention is that of *Mette* v. *Mette*, 1 Sw. & Tr. 416, where Sir C. Cresswell held, that a domiciled English subject could not marry a deceased wife's sister at the place of her domicile, although by the law of that place the marriage would be good. But Sir C. Cresswell had himself pointed out in *Simonin* v. *Mallac*, 2 Sw. & Tr. 67, the difference between controversies arising in the country where the marriage was celebrated and those arising elsewhere, and his judgment in that case showed that he considered that the law of the place of celebration must prevail before the tribunals of that place.

Before concluding, I wish to direct attention to the statute law on this subject of the marriage of first cousins. The statute of 32 of Henry VIII. c. 38, after reciting that the See of Rome had usurped the power of making that unlawful which by God's law was lawful, and the dispensation whereof they always reserved to themselves, as in kindred or * affinity between [* 8] cousins-germayne, and all because they would get money by it, and keep a reputation for their usurped jurisdiction, enacts that all and every such marriage as within the Church of England shall be contracted between lawful persons, as by this Act we declare all

persons to be lawful that be not prohibited by God's law to marry, shall be valid. This statute and all the marriage Acts which have since been enacted are general in their terms, and, therefore, applicable to and bind all persons within the kingdom. In the weighty language of Lord MANSFIELD, "the law and legislative government of every dominion equally affects all persons and all property within the limits thereof, and is the rule of decision for all questions which arise there." *Campbell* v. *Hall*, Cowp. 208. Where is the enactment, or what is the principle of English law which engrafts on this statute the exception that it shall not apply to the marriage in England of cousins-german who, by the law of another country, were prohibited from marrying without the dispensation of the Pope? And, further, I would ask, what is the distinction between the prohibition of a marriage unless the consent of a parent be obtained, as in *Simonin* v. *Mallac*, 2 Sw. & Tr. 67, and the prohibition of a marriage unless the dispensation of the Pope be granted, as in this case? And if there be a distinction, which I am unable to perceive, why is greater value to be attached by the tribunals of this country to the permission of the Pope than to that of a father? For the reasons I have given, I hold that the marriage between the petitioner and the respondent was valid, and I dismiss the petition.

ENGLISH NOTES.

The mode of celebration of marriage and the consent of guardians or parents have been held not to belong to the essentials, but to the form, which depends on the *lex loci actus*. In *Scrimshire* v. *Scrimshire* (1752), 2 Hagg. Const. 395, the suit was for restitution of conjugal rights brought by the wife. The marriage was celebrated in France, where it does not appear that either of the parties was domiciled. The law of France requires that marriage of persons under the age of twenty must have been with the consent of parents or guardians, else it is null and void; and that marriages should be celebrated by priests, licensed to marry and exercise their functions within the district where the parties live. The husband and wife were both minors at the date of the marriage, which was solemnised in a private house by an unauthorised priest and without the consent of the parents. Mr. Scrimshire pleaded that the marriage was null and void on these grounds. Sir EDWARD SIMPSON dismissed the suit, observing "as the law of the country where the contract is made seems to be, according to the law of nations, the only law of determining in these cases, I cannot pronounce

for the marriage, but must pronounce against it, and dismiss Mr. Scrimshire from the suit." The same principle was affirmed in *Butler* v. *Freeman* (1756), Ambl. 303; *Harford* v. *Morris* (1776), 2 Hagg. Const. 423; *Middleton* v. *Janverin* (1802), ib. 437; *Dalrymple* v. *Dalrymple* (1811), 2 Hagg. Const. 54; *Lacon* v. *Higgins* (1822), 3 Stark. 178; *Swift* v. *Kelly* (1835), 3 Knapp, 257; *Kent* v. *Burgess* (1840), 11 Sim. 361; *Rooker* v. *Rooker* (1863), 3 S. & T. 526, 33 L. J. P. & M. 42.

Conversely, English Courts have pronounced in favour of marriages satisfying the *lex loci actus* in form. *Herbert* v. *Herbert* (1819), 3 Phil. Eccl. 58; *Smith* v. *Maxwell* (1824), Ry. & Mo. 50; *Brinkley* v. *Attorney-General* (1890), 15 P. D. 76, 59 L. J. P. D. 51, No. 10, p. 841, *post*.

The rule has been modified by statutes in favour of marriages of British subjects married according to the provisions of the Acts. Such statutes are 4 Geo. IV. c. 91 (1823); 12 & 13 Vict. c. 68 (1849), 42 & 43 Vict. c. 29 (1879).

Another exception to referring the form of marriage to the *lex loci actus* is in the case of marriages celebrated in a country or place where there is no law applicable to the case. A marriage in such a place celebrated according to the forms, so far as it is possible to observe them, and with the consents required by the personal law of the parties, is valid. *Lautour* v. *Teesdale* (1816), 8 Taunt. 830, 21 R. R. There a marriage between British subjects celebrated at Madras in such a manner as to constitute a valid marriage according to English law as it existed before the Marriage Act which relates only to England, was upheld; for there was no *lex loci actus* applicable to the marriage of Europeans. "British subjects," said the Chief Justice Gibbs, "settled at Madras, are governed by the laws of this country which they carry with them, and are unaffected by the laws of the natives." In *Ruding* v. *Smith* (1821), 2 Hagg. Cons. 371, the question related to the validity of a marriage at the Cape of Good Hope between British subjects in accordance with English law, at a time when a British army was in occupation after the surrender of the colony by the Dutch to the British arms under a capitulation stipulating (*inter alia*) that the inhabitants shall preserve the prerogatives which they enjoy at present. The marriage was not according to Dutch law by reason of its being celebrated in a private house, and that the consent of the parents or guardians had not been obtained. It was held by Lord Stowell, that the marriage could not be impeached on these grounds. The parties could not in such a matter be considered amenable to Dutch law; which under the circumstances would have rendered the marriage impossible; and there were no settled laws applicable to British subjects in such a case. Besides, the marriage took place under the sanction of the Commander-in-Chief who

represented the Crown in the newly conquered country and who in that capacity had the power of altering the law.

In the case of *Mette* v. *Mette* (1859), 1 Sw. & Tr. 416, 28 L. J. P. 117, referred to in the judgment of the President in *Sottomayor* v. *De Barros* (p. 825, *ante*), A., who had become naturalized and domiciled in England married B. and had children by her. After the death of B., A. went to Frankfort and there entered into a marriage lawful according to the law in force there with C., then domiciled at Frankfort, and who was sister-in-law of A. After the death of A. who all along remained domiciled in England, the validity of the marriage came to be determined by the English Probate Court, in a question relating to the distribution of A.'s estate. Sir C. Cresswell held the marriage in question void.

Simonin v. *Mallac* (1860), 2 Sw. & Tr. 67, 29 L. J. P. M. & A. 97, frequently referred to in the judgments of the latter principal case (*Sottomayor* v. *De Barros*), was a petition by the (supposed) wife for declaration of nullity of marriage. The petitioner (V.) was of French origin, and in 1853, when residing in Paris with her mother (her father being dead), made acquaintance with the respondent (L.) who made her an offer of marriage, and proposed that they should go to England to be married, assigning as a reason that if this were done his father would consent and that they should then be married in France. They were married in due form by licence in England. L. was twenty-nine; V. was twenty-two. They returned to France without consummating the marriage; and L. afterwards refused to marry her in France. L. was served with a citation at Naples and did not appear. Evidence was given that according to the law of France, the marriage was void for want of consent of L.'s father or of publication in France according to the terms of the French Code Civil, and on the ground that the marriage was had in England in evasion of the French law. The Court (consisting of Sir Cresswell Cresswell, Channell, B., and Keating, J.), held first that the Court had jurisdiction over L., by reason of his professing to make a contract in England, to the effect of declaring the force and effect of the contract; and secondly that the marriage must be held good. The question was stated by the judgment broadly thus: "Whether a marriage duly solemnised in England in the manner prescribed by the law of England, between parties of full age and capable of contracting according to that law, is to be held null and void because the parties to that marriage, being foreigners, contracted it in England in order to evade the laws of the country to which they belonged and in which they were domiciled." The reasons upon which the decision of this question in the negative are grounded are largely quoted in the judgment of the President on the last hearing of the principal case (*Sottomayor* v. *De Barros*). Whether they are to any extent overruled

by the judgment of the Court of Appeal given on an erroneous assumption of the facts in that case is a point which may some day arise for future discussion.

AMERICAN NOTES.

The principle is generally recognized in this country, that a marriage valid where celebrated is valid everywhere, and that a marriage invalid where celebrated is invalid everywhere. *Medway* v. *Needham*, 16 Massachusetts, 157, 8 Am. Dec. 131; *Stevenson* v. *Gray*, 17 B. Monroe (Kentucky), 193; *Morgan* v. *McGhee*, 5 Humphreys (Tennessee), 13; *Wall* v. *Williamson*, 8 Alabama, 48; *Patterson* v. *Gaines*, 6 Howard (U. S. Supreme Ct.) 550; *Phillips* v. *Gregg*, 10 Watts (Pennsylvania), 158; 36 Am. Dec. 158; *Fornshill* v. *Murray*, 1 Bland Chancery (Maryland), 479; 18 Am. Dec. 344. A marriage in China according to its laws is valid in the United States. *Re Lum Lin Ying*, 59 Federal Reporter, 682. In *True* v. *Rauney*, 21 New Hampshire, 52; 53 Am. Dec. 164, a marriage in Vermont between residents of New Hampshire, one of whom was imbecile, was held void; and in *Commonwealth* v. *Graham*, 157 Massachusetts, 73; 34 Am. St. Rep. 255, it was held that a marriage in Maine by a minor without consent of his father, in Massachusetts, worked an emancipation, although the law is different in Massachusetts, and the minor married in Maine to evade the statute.

This principle is subject here, as in England, to an exception in the case of marriages regarded as incestuous or immoral by the general sense of Christian and civilized countries, such as polygamous marriages. *Reynolds* v. *United States*, 98 United States, 145. So far has comity between the States carried this doctrine that in New York, where a marriage between nephew and aunt was formerly valid, an action for breach of promise of such a marriage made in a State where such a marriage is pronounced incestuous, was held not maintainable. *Campbell* v. *Crampton*, 8 Abbott New Cases, 363; 18 Blatchford (U. S. Circuit Ct.), 150. But such marriage would not be regarded as incestuous in one State because so regarded in the other. *Stevenson* v. *Gray*, 17 B. Monroe (Kentucky), 193. In North Carolina, a marriage between a white and a negro, residents of that State, who left that State for the purpose of evading the law, and were married in a State where such marriage was legal, and returned to North Carolina, was held void under the statute of that State. *State* v. *Kennedy*, 76 North Carolina, 251; 22 Am. Rep. 683; *Kinney* v. *Commonwealth*, 30 Grattan (Virginia), 858; 32 Am. Rep. 690. The rule of Massachusetts is the contrary. *Medway* v. *Needham*, 16 Massachusetts, 157; 8 Am. Dec. 131; *State* v. *Tutty*, 41 Federal Reporter, 753; 7 Lawyers' Reports Annotated, 50, citing the *Brook case*. But where such intent was lacking, and the negro was a resident of the other State, the marriage was held valid in North Carolina. *State* v. *Ross*, 76 North Carolina, 242; 22 Am. Rep. 678. And where a party, prohibited from remarrying by a decree of divorce, leaves the State where that decree was pronounced and goes to another State which has no such prohibition in its divorce law, and remarries there, for the express purpose of evading the decree, and returns to the former State, the remarriage must be recognized there as

valid. *Van Voorhis* v. *Brintnall*, 86 New York, 18; 40 Am. Rep. 505; *West Cambridge* v. *Lexington*, 1 Pickering (Massachusetts), 505; 11 Am. Dec. 231; *Stevenson* v. *Gray*, 17 B. Monroe (Kentucky), 193. See *Commonwealth* v. *Lane*, 113 Massachusetts, 458; 18 Am. Rep. 509. And it has even been held that the result will be the same, although the second marriage was contracted in a State whose statute contained a like prohibition. *Hernandez Succession*, 46 Louisiana Annual, 962; 24 Lawyers' Reports Annotated, 831. Such statutory penal regulations have no extra-territorial effect. (But see *Williams* v. *Oates*, 5 Iredell Law (Nor. Car.) 535.

In a late case, *Pennegar* v. *State*, 87 Tennessee, 244; 10 Am. St. Rep. 648, it was held, citing and approving the *Brook case*, that as the Tennessee statute prohibits marriage between a guilty husband or wife, after divorce, with the co-respondent, such a marriage, in a State where it was valid, but resorted to for the purpose of evasion, is void. Citing *State* v. *Bell*, 7 Baxter (Tennessee), 12; 32 Am. Rep. 549, where a marriage between a white and a negro in Mississippi, valid there, was held void under the Tennessee statute. The *Pennegar case*, however, disagreed with the doctrine of the *Brook case* as to marriage with one's deceased wife's sister, observing: "Such a marriage would, we think, not fall within any of the exceptions to the general rule. It certainly cannot be said to be incestuous in the estimation of Christendom, and it would seem that under the policy of many of the States of this Union such a marriage is not immoral, nor tending to any social evil affecting the welfare of society. But after all, it must be admitted that it was for that Court to determine whether or not the law infringed was indicative of a decided and essential public policy in England; and the Courts of that country would be as slow to approve our estimate of the public policy which condemns the marriage of the divorced adulterer, since the clause prohibiting such marriages was, upon the argument of Lord Palmerston that the guilty party was preserved from ruin by such a marriage, stricken from the divorce bill in the House of Commons, as we are to accept their opinion that a marriage between a man and his deceased wife's sister is contrary to good morals."

The *Brook case* was relied on in *Greenhow* v. *James' Ex'rs*, 80 Virginia, 636; 56 Am. Rep. 603, where it was held, that marriages between whites and negroes being void in Virginia, such a marriage in a State where it is legal will not legitimate children previously born to the parties in Virginia, under the statute of that State legitimating offspring by subsequent marriage. One Judge dissented.

The *Brook* case was relied on and approved in *State* v. *Tutty* (U. S. Circ. Ct., Georgia), 41 Federal Reporter, 753; 7 Lawyers' Reports Annotated, 50, holding that where a white man and a negro woman residing in Georgia, where marriage between them was prohibited, went to the District of Columbia, where such marriage was valid, for the purpose of evading the Georgia law, and married there and then returned to Georgia to reside, the marriage was void. Distinguishing *Medway* v. *Needham*, and approving *Pennegar* v. *State*. The Court conclude: "It is enough, for the purpose of its duty, for the Court to ascertain that by a legitimate and settled policy, the State of Georgia has declared such marriages unlawful and void; for while in this

country, where the home life of the people, their decency and their morality, are the basis of that vast social structure of liberty and obedience to law which excites the patriotic pride of our countrymen and the admiration of the world, and while these attributes of our citizenship should be cherished and protected by all in authority, and the creatures who defy them should be condemned by all, the Courts in their judicial functions are rarely concerned with the policy of the laws which are made to protect the community. The policy of the State upon this subject has been declared, as we have seen, by its Supreme Court as well as by its statutes, and it is enough to say that this Court is unable to discover anything in that policy with which the Federal Courts have the right or the power to interfere."

Except at an early day in Virginia (*Kelly* v. *Scott*, 5 Grattan, 479) the marriage of a widower with his deceased wife's sister has never been regarded as objectionable in this country. That it is unobjectionable was held in *Blodgett* v. *Brinsmaid*, 9 Vermont, 27. See Browne on Domestic Relations, p. 2, note.

Mr. Bishop discusses the *Brook* case at great length and disapproves it. His conclusion is that "whatever be the scruples as to connections between relatives further removed than brother and sister in the collateral line of consanguinity, the better opinion does not hold them incestuous by natural law." Citing *Sutton* v. *Warren*, 10 Metcalf (Massachusetts), 451; *Wightman* v. *Wightman*, 4 Johnson's Chancery (New York), 343; *Stevenson* v. *Gray*, 17 B. Monroe (Kentucky), 193, and Sir R. Phillimore's opinion in the *Sottomayor case*, 2 P. Div. 86. Mr. Bishop calls the *Brook case* "extraordinary and self-contradictory," and avows that an acceptance of its general doctrine in this country would be a "calamity." (See Bishop on Marriage, etc., §§ 841, 862, 872, 876–879).

The Massachusetts Court (*Commonwealth* v. *Lane*, 113 Massachusetts, 458; 18 Am. Rep. 509) say of the *Brook case*: "The judgment proceeds upon the ground that an Act of Parliament is not merely an ordinance of man, but a conclusive declaration of the law of God; and the result is that the law of God, as declared by an Act of Parliament and expounded by the House of Lords, varies according to the time, place, length of life of parties, pecuniary interests of third persons, petitions to human tribunals, and technical rules of statutory construction and rules of procedure. Such a decision, upon such reasons, from any tribunal, however eminent, can have no weight in inducing a Court not bound by its authority to overrule or disregard its own decisions." "The case recalls the saying of Lord Holt, in *London* v. *Wood*, 12 Mod. 669, 687, 688, that 'an Act of Parliament can do no wrong, though it may do several things that look pretty odd;' and illustrates the effect of narrow views of policy, of the doctrine of 'the omnipotence of Parliament,' and of the consequent unfamiliarity with questions of general jurisprudence upon Judges of the greatest vigor of mind, and of the profoundest learning in the municipal law and in the forms and usages of the judicial system of their own country."

It has been held that a marriage between a white and an American Indian is not rendered invalid by the fact that the Indians divorce at pleasure.

Johnson v. *Johnson's Admr's*, 30 Missouri, 72; 77 Am. Dec. 598; *Wall* v. *Williamson*, 8 Alabama, 48; 11 Ibid. 826; *Connolly* v. *Woolrick*, 11 Lower Canada Jurist, 197. But it is intimated to the contrary in *State* v. *Ta-cha-na-tah*, 64 North Carolina, 614, and so in *Roche* v. *Washington*, 19 Indiana, 53; 81 Am. Dec. 376.

Mr. Bishop says of the *Sottomayor* case, in the Court of Appeal (1 Marriage, Divorce, and Separation, § 849): "There is an English case which, if it is hereafter to be followed, transports foreign law to British soil, compels the Courts to inquire into the matrimonial law of every other country, and ejects from the tribunals in a class of cases every day occurring under the commands of Parliament, and substitutes for them the shifting laws of foreign countries *in respect of transactions on British soil*. It is believed that no civilized country ever witnessed the like before. As appearing in the judgment of the Court of Appeal it is flatly contradicted by American authorities, and one cannot well see how it can be given effect in any other common-law country."

Chief Justice Gray observes of the *Sottomayor* case: "The recent decision in *Sottomayor* v. *De Barros*, 3 P. D. 1, by which Lords Justices James, Baggallay, and Cotton, without referring to any of the cases that we have cited, and reversing the judgment of Sir Robert Phillimore, in 2 P. D. 81, held that a marriage in England between first cousins, Portuguese subjects, resident in England, who by the law of Portugal were incapable of intermarrying, except by a Papal dispensation, was therefore null and void in England, is utterly opposed to our law; and consequently the *dictum* of Lord Justice Cotton: 'It is a well-recognized principle of law that the question of personal capacity to enter into any contract is to be decided by the law of domicil,' is entitled to little weight here. It is true that there are reasons of public policy for upholding the validity of marriages that are not applicable to ordinary contracts; but a greater disregard of the *lex domicilii* can hardly be suggested than in the recognition of the validity of a marriage contracted in another State, which is not authorized by the law of the domicil, and which permanently affects the relations and the rights of two citizens and of others to be born." (In *Milliken* v. *Pratt*, 125 Massachusetts, 374; 28 Am. Rep. 241.)

The *Sottomayor* case is included in 32 Moak's English Reports, pp. 1, 336.

No. 9 — HYDE *v.* HYDE.

(1866.)

No. 10 — BRINKLEY *v.* ATTORNEY-GENERAL.

(1890.)

RULE.

A CONTRACT uniting a man and woman under a law which permits either of the parties, without dissolution of that union, to enter into a similar contract with another, cannot in an English Court be recognised as a marriage.

But a marriage, contracted on the basis of an exclusive union, in a country — though a non-Christian country — where the law regards marriage as an exclusive union, is held in England to be valid; provided it was celebrated according to the laws and customs of the country where it was contracted.

Hyde v. Hyde and Woodmansee.

L. R. 1 P. & D. 130–138 (s. c. 35 L. J. P. & M. 57; 12 Jur. N. S. 414; 14 L. T. 188; 14 W. R. 517).

Conflict of Laws. — Mormon Marriage. — Polygamy.

Marriage as understood in Christendom is the voluntary union for [130] life of one man and one woman, to the exclusion of all others.

A marriage contracted in a country where polygamy is lawful, between a man and a woman who profess a faith which allows polygamy, is not a marriage as understood in Christendom; and although it is a valid marriage by the *lex loci*, and at the time when it was contracted both the man and the woman were single and competent to contract marriage, the English Matrimonial Court will not recognise it as a valid marriage in a suit instituted by one of the parties against the other for the purpose of enforcing matrimonial duties, or obtaining relief for a breach of matrimonial obligations.

THIS was a petition by a husband for a dissolution of marriage on the ground of adultery. There was no appearance by the respondent or the co-respondent. The cause was heard by the JUDGE ORDINARY on the 20th of January, 1866.

No. 9. — Hyde v. Hyde and Woodmansee, L. R., 1 P. & D. 130, 131.

The following facts were proved. The petitioner was an Englishman by birth, and in 1847, when he was about sixteen years of age, he joined a congregation of Mormons in London, and was soon afterwards ordained a priest of that faith. He made the acquaintance of the respondent, then Miss Hawkins, and her family, all of whom were Mormons, and they became engaged to each other. In 1850, Miss Hawkins and her mother went to the Salt Lake City, in the territory of Utah, in the United States; and in 1853, the petitioner, who had in the mean time been employed on a French mission, joined them at that place. The marriage took place at Salt Lake City in April, 1853, and it was celebrated by Brigham Young, the president of the Mormon church, and the governor of the territory, according to the rites and ceremonies of the Mormons. They cohabited as man and wife at Salt Lake City until 1856, and had children. In 1856, the petitioner went on a mission to the Sandwich Islands, leaving the respondent in Utah. On his arrival at the Sandwich Islands, he renounced the Mormon faith and preached against it. A sentence of excommunication was pronounced against him in Utah in December, 1856, and his wife was declared free to marry again. In 1857 a correspondence [* 131] passed between the petitioner and his wife, * who continued to live in Utah. In his letters he urged her to leave the Mormon territory, and abandon the Mormon faith, and to join him. In her letters she expressed the greatest affection for him, but refused to change her faith, or to follow him out of the Mormon territory. He did not return to Utah, and one of the witnesses was of opinion that he could not have done so after he had left the Mormon church without danger to his life. In 1857 he resumed his domicile in England, where he has ever since resided, and for several years he has been the minister of a dissenting chapel at Derby. In 1859 or 1860, the respondent contracted a marriage according to the Mormon form at Salt Lake City with the co-respondent, and she has since cohabited with him as his wife, and has had children by him.

At the time when the marriage between the petitioner and the respondent was celebrated, polygamy was a part of the Mormon doctrine and was the common custom in Utah. The petitioner and the respondent were both single, and the petitioner had never taken a second wife. A counsellor of the Supreme Court of the United States proved that a marriage by Brigham Young in

No. 9. — Hyde v. Hyde and Woodmansee, L. R., 1 P. & D. 131, 132.

Utah, if valid in Utah, would be recognised as valid by the Supreme Court of the United States, provided that the parties were both unmarried at the time when it was contracted, and that they were both capable of contracting marriage. The Supreme Court, however, had no appellate jurisdiction over the Courts of other States in matrimonial matters; and the matrimonial court of each State had exclusive jurisdiction within its own limits. Utah was a territory not within any State. There was a matrimonial court, having primary jurisdiction, in that territory, and the Judge was nominated by the President of the United States, with the consent of the Senate. The Judge was bound to recognise the laws which the people of Utah made for themselves, as long as they did not conflict with the laws of the United States. No evidence was given as to the law of that Court respecting Mormon marriages.

Dr. Spinks, for the petitioner. The Court cannot perhaps recognise a polygamous marriage, but this is not a polygamous marriage, for both the parties were single at the time when it was contracted. * The fact that polygamy is per- [* 132] mitted by the law of the country where the marriage was contracted does not render it invalid, or there can be no such thing as a valid marriage in polygamous countries. A marriage between two persons competent to contract marriage, and valid by the law of the place where it was contracted, is valid in every country in the world.

[The Judge Ordinary. It is necessary to define what is meant by "marriage." In Christendom it means the union of two people who promise to go through life alone with one another. It does not mean the same thing in Utah, as the man is at liberty to marry as many women as he pleases.]

That is not the question. It does not follow that because the consequences of a marriage in Utah and in England are different, the marriage in Utah is not to be recognised as valid in England. The validity of the marriage must be determined by the law of the place where it was contracted; the consequences of the marriage depend upon the law of the country where the parties reside, whether temporarily or permanently, after the marriage.

[The Judge Ordinary. It would be extraordinary if a marriage in its essence polygamous should be treated as a good marriage in this country. Different incidents of minor impor-

tance attach to the contract of marriage in different countries in Christendom, but in all countries in Christendom the parties to that contract agree to cohabit with each other alone. It is inconsistent with marriage as understood in Christendom, that the husband should have more than one wife.]

Cur. adv. vult.

The Judge Ordinary. The petitioner in this case claims a dissolution of his marriage on the ground of the adultery of his wife. The alleged marriage was contracted at Utah, in the territories of the United States of America, and the petitioner and the respondent both professed the faith of the Mormons at the time. The petitioner has since quitted Utah, and abandoned the faith, but the respondent has not. After the petitioner had left Utah, the respondent was divorced from him, apparently in accordance with the law obtaining among the Mormons, and has since taken another husband. This is the adultery complained of.

[* 133] * Before the petitioner could obtain the relief he seeks, some matters would have to be made clear and others explained. The marriage, as it is called, would have to be established as binding by the *lex loci*, the divorce would have to be determined void, and the petitioner's conduct in wilfully separating himself from his wife would have to be accounted for. But I expressed at the hearing a strong doubt whether the union of man and woman as practised and adopted among the Mormons was really a marriage in the sense understood in this, the Matrimonial Court of England, and whether persons so united could be considered "husband" and "wife" in the sense in which these words must be interpreted in the Divorce Act. Further reflection has confirmed this doubt, and has satisfied me that this Court cannot properly exercise any jurisdiction over such unions.

Marriage has been well said to be something more than a contract, either religious or civil, — to be an Institution. It creates mutual rights and obligations, as all contracts do, but beyond that it confers a status. The position or status of "husband" and "wife" is a recognised one throughout Christendom: the laws of all Christian nations throw about that status a variety of legal incidents during the lives of the parties, and induce

definite rights upon their offspring. What, then, is the nature of this institution as understood in Christendom? Its incidents vary in different countries, but what are its esssential elements and invariable features? If it be of common acceptance and existence, it must needs (however varied in different countries in its minor incidents) have some pervading identity and universal basis. I conceive that marriage, as understood in Christendom, may for this purpose be defined as the voluntary union for life of one man and one woman, to the exclusion of all others.

There are no doubt countries peopled by a large section of the human race in which men and woman do not live or cohabit together upon these terms, — countries in which this Institution and status are not known. In such parts the men take to themselves several women, whom they jealously guard from the rest of the world, and whose number is limited only by considerations of material means. But the status of these women in no way resembles that of the Christian "wife." In some parts they are *slaves, in others perhaps not, in none do they [*134] stand, as in Christendom, upon the same level with the man under whose protection they live. There are, no doubt, in these countries laws adapted to this state of things, — laws which regulate the duties and define the obligations of men and women standing to each other in these relations. It may be, and probably is, the case that the women there pass by some word or name which corresponds to our word "wife." But there is no magic in a name; and, if the relation there existing between men and women is not the relation which in Christendom we recognise and intend by the words "husband" or "wife," but another and altogether different relation, the use of a common term to express these two separate relations will not make them one and the same, though it may tend to confuse them to a superficial observer. The language of Lord BROUGHAM, in *Warrender* v. *Warrender*, 2 Cl. & F. 531, is very appropriate to these considerations: "If, indeed, there go two things under one and the same name in different countries — if that which is called marriage is of a different nature in each — there may be some room for holding that we are to consider the thing to which the parties have bound themselves according to its legal acceptance in the country where the obligation was contracted. But marriage is one and the same thing substantially all the Christian

world over. Our whole law of marriage assumes this; and it is important to observe that we regard it as a wholly different thing, a different status from Turkish or other marriages among infidel nations, because we clearly should never recognise the plurality of wives, and consequent validity of second marriages, standing the first, which second marriages the laws of those countries authorise and validate. This cannot be put on any rational ground, except our holding the infidel marriage to be something different from the Christian, and our also holding the Christian marriage to be the same everywhere. Therefore, all that the Courts of one country have to determine is whether or not the thing called marriage — that known relation of persons, that relation which those Courts are acquainted with and know how to deal with — has been validly contracted in the other country where the parties professed to bind themselves. If the [* 135] question is answered in the * affirmative, a marriage has been had, the relation has been constituted; and those Courts will deal with the rights of the parties under it according to the principles of the municipal law which they adminster." "Indeed, if we are to regard the nature of the contract in this respect as defined by the *lex loci*, it is difficult to see why we may not import from Turkey into England a marriage of such a nature as that it is capable of being followed by, and subsisting with, another, polygamy being there the essence of the contract."

Now, it is obvious that the matrimonial law of this country is adapted to the Christian marriage, and it is wholly inapplicable to polygamy. The matrimonial law is correspondent to the rights and obligations which the contract of marriage has, by the common understanding of the parties, created. Thus conjugal treatment may be enforced by a decree for restitution of conjugal rights. Adultery by either party gives a right to the other of judicial separation; that of the wife gives a right to a divorce, and that of the husband, if coupled with bigamy, is followed by the same penalty. Personal violence, open concubinage, or debauchery in face of the wife, her degradation in her home from social equality with the husband, and her displacement as the head of his household, are with us matrimonial offences, for they violate the vows of wedlock. A wife thus injured may claim a judicial separation and a permanent support from the husband under the name of alimony at the rate of about one-third of his

income. If these and the like provisions and remedies were applied to polygamous unions, the Court would be creating conjugal duties, not enforcing them, and furnishing remedies when there was no offence. For it would be quite unjust and almost absurd to visit a man who, among a polygamous community, had married two women, with divorce from the first woman, on the ground that, in our view of marriage, his conduct amounted to adultery coupled with bigamy. Nor would it be much more just or wise to attempt to enforce upon him that he should treat those with whom he had contracted marriages, in the polygamous sense of that term, with the consideration and according to the status which Christian marriage confers.

If, then, the provisions adapted to our matrimonial system are * not applicable to such a union as the present, [* 136] is there any other to which the Court can resort? We have in England no law framed on the scale of polygamy, or adjusted to its requirements. And it may be well doubted whether it would become the tribunals of this country to enforce the duties (even if we knew them) which belong to a system so utterly at variance with the Christian conception of marriage, and so revolting to the ideas we entertain of the social position to be accorded to the weaker sex.

This is hardly denied in argument, but it is suggested that the matrimonial law of this country may be properly applied to the first of a series of polygamous unions; that this Court will be justified in treating such first union as a Christian marriage, and all subsequent unions, if any, as void; the first woman taken to wife as a "wife" in the sense intended by the Divorce Act, and all the rest as concubines. The inconsistencies that would flow from an attempt of this sort are startling enough. Under the provisions of the Divorce Acts the duty of cohabitation is enforced on either party at the request of the other, in a suit for restitution of conjugal rights. But this duty is never enforced on one party if the other has committed adultery. A Mormon husband, therefore, who had married a second wife would be incapable of this remedy, and this Court could in no way assist him towards procuring the society of his wife if she chose to withdraw from him. And yet, by the very terms of his marriage compact, this second marriage was a thing allowed to him, and no cause of complaint in her who had acquiesced in that

compact. And as the power of enforcing the duties of marriage would thus be lost, so would the remedies for breach of marriage vows be unjust and unfit. For a prominent provision of the Divorce Act is that a woman whose husband commits adultery may obtain a judicial separation from him. And so utterly at variance with Christian marriage is the notion of permitting the man to marry a second woman that the Divorce Act goes further, and declares that if the husband is guilty of bigamy as well as adultery, it shall be a ground of divorce to the wife. A Mormon, therefore, who had according to the laws of his sect, and in entire accordance with the contract and understanding made with the first woman, gone through the same ceremony with a second, might find himself in the predicament, under the appli-
[* 137] cation *of English law, of having no wife at all; for the first woman might obtain divorce on the ground of his bigamy and adultery, and the second might claim a decree declaring the second ceremony void, as he had a wife living at the time of its celebration: and all this without any act done with which he would be expected to reproach himself, or of which either woman would have the slightest right to complain. These difficulties may be pursued further in the reflection that if a Mormon had married fifty women in succession, this Court might be obliged to pick out the fortieth as his only wife, and reject the rest. For it might well be that after the thirty-ninth marriage the first wife should die, and the fortieth union would then be the only valid one, the thirty-eight intervening ceremonies creating no matrimonial bond during the first wife's life.

Is the Court, then, justified in thus departing from the compact made by the parties themselves? Offences necessarily presuppose duties. There are no conjugal duties, but those which are expressed or implied in the contract of marriage. And if the compact of a polygamous union does not carry with it those duties which it is the office of the marriage law in this country to assert and enforce, such unions are not within the reach of that law. So much for the reason of the thing.

There is, I fear, little to be found in our books in the way of direct authority. But there is the case of *Ardaseer Cursetjee* v. *Perozeboye*, 10 Moo. P. C. 375, 419, in which the Privy Council distinctly held that Parsee marriages were not within the force

of a charter extending the jurisdiction of the Ecclesiastical Courts to Her Majesty's subjects in India, "so far as the circumstances and occasions of the said people shall require." And the following passage sufficiently indicates the grounds upon which the Court proceeded: "We do not pretend to know what may be the duties and obligations attending upon the matrimonial union between Parsees, nor what remedies may exist for the violation of them; but we conceive that there must be some laws or some customs having the effect of laws which apply to the married state of persons of this description. It may be that such laws and customs do not afford what we should deem, as between Christians, an adequate relief; but it *must be [*138] recollected that the parties themselves could have contracted for the discharge of no other duties and obligations than such as from time out of mind were incident to their own caste, nor could they reasonably have expected more extensive remedies, if aggrieved, than were customarily afforded by their own usages."

In conformity with these views the Court must reject the prayer of this petition, but I may take the occasion of here observing that this decision is confined to that object. This Court does not profess to decide upon the rights of succession or legitimacy which it might be proper to accord to the issue of the polygamous unions, nor upon the rights or obligations in relation to third persons which people living under the sanction of such unions may have created for themselves. All that is intended to be here decided is that as between each other they are not entitled to the remedies, the adjudication, or the relief of the matrimonial law of England.

Petition dismissed.

Brinkley v. Attorney-General.

15 P. D. 76-81 (s. c. 59 L. J. P. D. 51; 62 L. T. 911).

Conflict of Laws. — Marriage. — Japanese Marriage. — Japan (a Monogamous though non-Christian Country).

In a petition to establish the validity of a marriage under the [76] Legitimacy Declaration Act, 21 & 22 Vict. c. 93, it appeared that the petitioner, who was a British subject with an Irish domicil of origin, and temporarily resident in Japan, had married a Japanese woman in Japan, according to the forms required by the law of the country.

No. 10. — Brinkley v. Attorney-General, 15 P. D. 76, 77.

Evidence having been adduced which showed that the marriage was valid according to the law of Japan, and that by such a marriage the petitioner was precluded from marrying any other woman during the subsistence of the marriage, —

Held, that the marriage was valid in this country.

This was a petition under the Legitimacy Declaration Act, 1858 (21 & 22 Vict. c. 93), presented by Francis Brinkley, praying for a declaration of the validity of his marriage with Yasu Tanaka, a Japanese woman, celebrated in Japan on March 25, 1886, according to the laws in force in that country. The petitioner, who is at present temporarily resident at Tōkiō in Japan, was a retired officer of the Royal Artillery, being a natural born subject of the Queen, and having his domicil in Ireland. He had cohabited with his wife in Japan ever since their marriage, and there had been one son issue of the marriage.

The Attorney-General had been cited, and had filed an answer traversing the petition.

Leave had been given on summons, with the consent of the Attorney-General, that the petitioner at the trial of the petition should be allowed to prove the facts by affidavits and certificates.

Mr. Brinkley's affidavit was as follows: "I was born on or about the 9th day of November, 1841, at Parsonstown, county Meath, Ireland, of parents then and there domiciled, and have since served her Majesty as a captain in the Royal Artillery. I am now temporarily resident at Naka-Tokubendio-Tōkiō, in Japan; but have no intention of permanently residing there. On the 25th day of March, 1886, I was married in Japan to Yasu Tanaka, a subject of the empire of Japan. The certificates of my said marriage [* 77] are now produced and shown to me marked A. * and B., and the translations thereof, which I believe to be correct, are now produced and shown to me marked C. and D. I say that I am the petitioner in this suit, and I and the said Yasu Tanaka are respectively the same persons as 'Francis Brinkley, a British subject,' and Yasu Tanaka, of No. 20 of the 6th Ward of Jida-Machi Kogimachi District, city of Tōkiō, named in the said certificate marked A., and the translation thereof marked C., now produced and shown to me. I am advised and believe that my said marriage is valid according to the laws in force in Japan, and that I am thereby precluded from intermarrying with any other woman during the subsistence of the said marriage. I have since the said marriage

cohabited with my said wife, and there is issue of my said marriage one son, born on the 25th day of March, 1887. There is no collusion or connivance between myself and any person other than my said wife"

The following certificates were also put in and read: —

"I certify that Yasu Tanaka, of No. 20 of the 6th Ward Jida-Machi, Kogimachi District, city of Tōkiō, was duly married according to the laws of this empire to Francis Brinkley, a British subject, on the 25th day in the 3rd of Mauh of the 19th year of Meiji (25th of March, 1886). (Signed) Ginbayashi Tsunao, Chief Secretary, Tōkiō City, Local Government, for Takasaki Garoku, Governor of Tōkiō City."

"I certify that the above certificate by Ginbayashi Tsunao, Chief Secretary of the Tōkiō City Government, representing Takasaki Garoku, Governor of Tōkiō City, is correct and legal. (Signed) Aoki Shinyo, Vice-Minister of State for Foreign Affairs, 10th day of 6th month of 19th year of Meiji (10th June, 1886)."

The following affidavit as to the marriage law of Japan and the validity of this particular marriage was also read: —

"I, Kazno Hatoyama, Chief Professor of Law in the Imperial University of Japan, solemnly declare and say as follows: I am the chief professor of Law in the Imperial University of Japan, and am thoroughly acquainted with the law of marriage of the empire. I have read the affidavit of Francis Brinkley, sworn herein on the 2nd day of November, 1888, and am of opinion that the facts therein deposed do show a valid marriage between the above-named petitioner, Francis Brinkley, and Yasu Tanaka, therein * named, according to the laws of Japan, and that [* 78] the said petitioner, Francis Brinkley, is thereby precluded from intermarrying with any other woman during the subsistence of the said marriage."

Bayford, Q. C. (Melsheimer, with him), for the petitioner. The principle established by the cases from *Warrender* v. *Warrender*, 2 Cl. & F. 488, 530, onwards is that this Court will recognize a marriage contracted abroad as valid if it has been solemnized according to the *lex loci*, and that applies just as much to a marriage in a heathen as in a Christian country. Whether a marriage has or has not been celebrated according to Christian laws has no bearing upon the question. The essential thing is the nature of the contract which we call marriage; that is what we look to when

we speak of a Christian marriage. The term "Christian marriage" must be taken to mean a monogamous marriage, — a marriage which prevents the man who enters into it from marrying any other woman while his wife continues alive. Such a marriage is valid wherever celebrated, if celebrated in accordance with the forms required by the *lex loci*. In *Hyde* v. *Hyde and Woodmansee*, p. 833, *ante*, L. R., 1 P. & M. 130, 35 L. J. P. & M. 57, Lord PENZANCE refused relief on the express ground that Mormon marriages are polygamous, although both parties were single at the time the marriage was contracted; and in *Bethell* v. *Hildyard*, 38 Ch. D. 220; 57 L. J. Ch. 487, the judgment of STIRLING, J., proceeded on the ground that the marriage which Mr. Bethell intended to contract was not a marriage in the Christian sense, but a marriage in the sense in which the term was used among the Barolongs, which implies the power of taking another wife, — that it was in fact a polygamous marriage.

[He referred also to *Johnson* v. *Johnson's Administrator*, 30 Missouri State Rep. 72, *Connolly* v. *Woolrich*, 11 Low. Can. Jur. 197, and *Ardaseer Cursetjee* v. *Perozeboye*, 10 Moo. P. C. 419.]

Gwynne James, for the Attorney-General. It may be conceded that upon proof that a marriage which has been celebrated in a country non-Christian according to the laws of such country is not polygamous in its nature, the Court may take cognizance [* 79] of * it and give relief under the Legitimacy Declaration Act. But before the petitioner's prayer is granted, especially as he has obtained leave to prove his case by affidavit, it is requisite that the case shall be strictly proved. It is submitted that the evidence here is insufficient. No independent proof has been given as to what constitutes a valid marriage in Japan; and there is no evidence as to what ceremony, if any, took place, whether in a temple or a registry office.

[THE PRESIDENT. You do not dispute that there would be a valid marriage if it were established that it was celebrated according to the law of Japan, and that it excluded the possibility of Mr. Brinkley marrying another wife while this marriage subsists.]

That is conceded; but it is submitted that there is not sufficient evidence of such a marriage having been celebrated.

John Frederick Lowder, a member of the English Bar, who had practised before the Japanese Courts and the Consular Courts for

thirty years, was then called, and deposed as follows: "A civil marriage is contracted before the governor of the city in which the parties reside. He is the registrar, and the registration constitutes the marriage. The parties go before him, or somebody acting for him, and register their names as man and wife, and that is the whole ceremony. The certificates produced are the very best certificates that could be procured in Japan of the fact that the marriage took place. I recognize the names on the certificates. Ginbayashi Tsunao is the chief secretary of the governor of Tōkiō, and Takasaki Garoku is the governor of Tōkiō. They are known to me to hold those offices."

The President. This case is clear from the difficulties which arose in the Mormon case and in the South African case, because in both those instances it was an attempt to establish as a valid marriage one which admitted of the possibility of a marriage with another person than the first spouse. The principle which has been laid down by those cases is that a marriage which is not that of one man and one woman, to the exclusion of all others, though it may pass by the name of a marriage, is not the status which the English law contemplates when dealing with the * subject of marriage. But in this case it has been proved [* 80] in the most satisfactory manner by the deposition of a Japanese professor of law, that by the law of Japan marriage does involve this, and that one man unites himself to one woman to the exclusion of all others. Therefore, though throughout the judgments that have been given on this subject, the phrase "Christian marriage," "marriage in Christendom," or some equivalent phrase, has been used, that has only been for convenience to express the idea. But the idea which was to be expressed was this, that the only marriage recognised in Christian countries and in Christendom is the marriage of the exclusive kind I have mentioned, and here it was proved that in Japan marriage is of that character. We all know that Japan has long taken its place among civilized nations, whose forms and laws and ceremonies are not to be treated as on the same footing with those of the Baralong tribe of South Africa. I have, therefore, come clearly to the conclusion that these cases do not apply, and that, as has been candidly admitted by Mr. James, a valid marriage can take place in Japan between an Englishman and a Japanese woman according to the law of Japan, which would be a valid marriage in this

country and everywhere else. The only question, therefore, which remains is that which has been very properly raised by Mr. James, whether or not I have evidence before me that a valid marriage according to the law of Japan has been celebrated. Mr. Lowder has been called, who practised thirty years in Japan before the Japanese Courts. He has given satisfactory evidence upon the subject of the law. He states that the marriage is constituted by the persons obtaining from a particular officer, the governor or his deputy, a certificate that they had agreed to become man and wife. And I have before me that which purports to be a certificate from that officer. He certifies that those two persons were duly married according to the laws of the empire, and, of course, I must assume that things have been rightly done; indeed, Mr. Lowder has himself proved that the governor and his deputy, the secretary named here, are persons filling that office, and therefore would be competent to give a certificate to that effect. The evidence, therefore, does satisfy my mind that a valid marriage has been celebrated between these two persons.

[*81] * I therefore pronounce the decree asked, that the marriage be valid.

ENGLISH NOTES.

Hyde v. *Hyde* was followed in *In re Bethell*, *Bethell* v. *Hildyard* (1888), 38 Ch. D. 220, 57 L. J. Ch. 487, 58 L. T. 674 (the South African case above referred to, p. 845, *ante*). There an Englishman (A.) went to South Africa in 1878, and while in that country married a woman (B.) of a semi-barbarous tribe, according to the custom of the natives, among whom polygamy is allowed. A. lived with B. as his only wife until 1884, when he was killed in the Boer war. Ten days after, B. gave birth to a girl. A. had never mentioned his marriage to his home correspondents; but by a will had made some provisions out of his South African property for B. and the child. Under the will of A.'s father real estate had been devised to A. for life with remainder to his lawful child or children. The question was whether the girl was entitled to this estate on A.'s death. It was held that she was not.

In *Re Ullee* (1885), 53 L. T. 711, 54 L. T. 286, B., an Englishwoman had, in London, gone through the ceremony of marriage with A., a Mohammedan domiciled in India, according to Mohammedan rites. A. recognised the children of the marriage as legitimate, settled property on them, and appointed guardians to them by will. B. instituted a suit in England, admitting the invalidity of her marriage and praying

for the custody of the children, who had been sent to England for education. It was held by CHITTY, J., that although the marriage was invalid according to the law of Christendom, the children were not necessarily illegitimate, as they were legitimate by Mohammedan law, and acknowledged and provided for by the father as legitimate; and that B. was not entitled to the custody. This decision was affirmed by the Court of Appeal.

AMERICAN NOTES.

Polygamous marriages are void. *Reynolds* v. *United States*, 98 United States, 145 (as to Utah marriages).

As to marriages with Indians, see note, *ante*, p. 831. Marriages among Indians according to the customs and laws of their tribes are recognized by the Courts and government of the United States. *Earl* v. *Godley*, 42 Minnesota, 361; 7 Lawyers' Rep. Annotated, 125; 18 Am. St. Rep. 517; *Kobogum* v. *Jackson Iron Co.*, 76 Michigan, 498; *Wall* v. *Williamson*, 8 Alabama, 48; *Boyer* v. *Direly*, 58 Missouri, 510; *The Kansas Indians*, 5 Wallace (U. S. Supreme Ct.), 737. In *Earl* v. *Godley*, *supra*, the Court observed: "Under the laws of the United States they are recognized as capable of managing their own affairs, including their domestic relations, and those persons who were recognized by the Indian custom and law as married persons must so be treated by their Courts, and their children cannot be regarded illegitimate."

A marriage in China according to its laws is valid in the United States. *Re Lum Lin Ying*, 59 Federal Reporter, 682.

The *Hyde* case is cited by Bishop (1 Marriage, &c., § 311), with the remark: "If while going through the marriage ceremony they mentally reserve the right to break the laws, by adultery or polygamy, still they promise what throughout Christendom is marriage. And to hold a marriage void by reason of such a mental reservation would be a decision both inherently vicious and without precedent." In regard to the expert evidence on the trial of this case that "a marriage by Brigham Young in Utah, if valid in Utah, would be recognized as valid by the Supreme Court of the United States, provided that the parties were both unmarried at the time when it was contracted, and that they were both capable of contracting marriage," Mr. Bishop observes, "whether this opinion is sound or not, it is mere opinion, and we have no adjudications of our own on the subject."

Mr. Bishop does not cite the *Brinkley* case, and it is not probable that there are any adjudications precisely in point in this country.

In *State* v. *Walker*, 36 Kansas, 297; 59 Am. Rep. 556, a "free-love" marriage, or sexual association dissoluble at pleasure, was condemned.

The *Hyde* case is cited by Lawson on Contracts, § 317.

Section III. — *Contracts Generally.*

No. 11. — GUÉPRATTE *v.* YOUNG.

(1851.)

RULE.

A CONTRACT is not invalid by reason of incapacity of a party who is, according to the law of his or her country of domicil, capable of making it.

A contract is not invalid in point of form if made according to the form necessary and sufficient in the place where it is made and is to be performed.

Guépratte v. Young.

4 De G. & Sm. 217–234.

Conflict of Laws. — Contract. — Coverture. — Locus regit Actum.

[217] 1. A married woman, domiciled in France, entered into a contract in England respecting her reversionary interest in trust money invested in the English funds, which was substantially valid according to French law, although invalid according to English law; but the contract was not entered into in the manner prescribed by French law, which requires that there should be as many original instruments as there are distinct parties to the contract: *Held*, that the French law gave capacity to make the contract; but, that the English law regulated the form of it, and that, therefore, the contract was valid; and it was enforced by decree.

2. In a conflict of evidence as to the law of France on a point relating to the rights of a married woman in personalty in reversion, no presumption can be derived from the law of England.

3. *Locus regit actum* is a canon of general jurisprudence, and must be assumed, in the absence of contrary evidence, to apply to a system of foreign law.

The principal question in this case was as to the validity of a family agreement entered into on the 28th of November, 1844, under the following circumstances: —

In the year 1819, Mr. Barretto married Miss Emily Potts. Both were resident in England, and were domiciled English subjects. The marriage took place in England.

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Before, and in consideration of the marriage, a deed of settlement was executed in England, dated the 20th September, 1819, whereby the sum of £32,525 Consols (which had been transferred by Mr. Barretto into and then stood in the names of the trustees of the settlement), and £17,475 sterling, due to Mr. Barretto on notes of the East India Company, which were assigned to the trustees by the settlement, were declared to be held upon trust to pay the income to the husband and wife during their joint lives, in equal moieties, and after the death of either of them upon trust to pay the whole of such income to the survivor during his or her life; with a proviso that if such survivor should marry a second time, and there should be three or more children of the marriage then living, the trustees should pay two-thirds only of the income unto the surviving parent, and should pay the remaining one-third for the maintenance of the children; and, after the decease of the survivor of the husband and wife, the trustees were directed to transfer the trust funds unto all or such one or more of the children or issue of the marriage, in such manner, and if more than one, in such shares, and for such terms, and with such limitations over or substitutions in favour of any one or more of the said children * and issue respectively as the [* 218] husband and wife should, during their joint lives, by any deed, or if there should be no joint direction or appointment, then as the survivor of them should direct or appoint by any deed to be executed in the presence of three witnesses, or by his or her will; and for want of any direction or appointment, upon trust, to transfer the funds, or such parts as should not be appointed, unto the children of the marriage, equally, or to such of them as being sons should attain twenty-one years of age, or being daughters should attain that age or marry; and in case there should be no child who should become entitled under the deed, then the funds were to be transferred to the representatives of Mr. Barretto, as part of his personal estate. And the settlement contained the usual provisions for maintenance and advancement.

Mr. and Mrs. Barretto made no joint direction or appointment.

In 1824 Mr. Barretto died, leaving his widow, one son, and two daughters, surviving him.

In 1828 Mrs. Barretto married Mr. Young.

In July, 1844, the eldest daughter of Mrs. Young by Mr. Barretto, being then a domiciled Englishwoman, married (in France)

M. Guépratte, an officer in the French Dragoons, and a domiciled Frenchman. The contract of marriage, which was made and signed in France, contained the following clauses: —

1. Les futurs époux declarent adopter, pour base de leur association conjugale, le régime dotal tel qu'il est établi par le code civil. Sauf les modifications ci-après, tous les biens, présents et à venir, de la demoiselle future épouse auront nature des biens dotaux.

Faculté de Vendre.

3. Le futur époux avec le concours et l'agrément de la demoiselle future épouse, pourra vendre, aliéner et échanger les immeubles dotaux de cette dernière; vendre, céder et transférer les [* 219] rentes qui pourraient lui appartenir soit * sur les états Anglais ou Français, soit sur tous autres états étrangers, sans que dans aucun cas il soit tenu de faire emploi ou remploi des prix des ventes ou transferts. La quittance collective des époux libérera valablement des acquéreurs ou débiteurs.

Apports de la Demoiselle future épouse.

Mademoiselle Barretto, future épouse apporte en mariage et se constitue personnellement en dot:

1. Un trousseau, &c.

2. Une somme, &c.

3. Une rente annuelle sur les fonds Anglais, de la somme de 4164fr. 34cent., ou 166 livres, 11*s.* 2*d.* sterling, que Mademoiselle Barretto a recueillie dans la succession de son père et qui provient de la somme de 1249,167 francs, représentant 40,967 livres, 15*s* sterling, que M. Barretto a donnée à Madame Young son épouse par contrat de mariage.

4. Le surplus des droits de la future épouse dans la dite somme de 49,967 livres, 15 schelins, sterlings (donnée comme on vient de la voir à Madame Young), laquelle somme est déposée sur les fonds Anglais, et sera divisible entre les trois enfants de M. Barretto, après la mort de sa mère qui en est usufruitière.

Up to the date of this settlement Mr. Barretto's widow (Mrs. Young) had executed no appointment.

On the 28th of November, 1844, the agreement in question was entered into by a written memorandum purporting to be made by

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and between Mr. Joseph Augustus Barretto (a domiciled English subject), of the first part, M. and Madame Guépratte, domiciled in France (the latter by her marriage), and both of whom were then in England, of the second part, and Mrs. Harrison (then Miss L. E. Barretto, a minor domiciled in England), of the third part.

By this instrument, after reciting that Joseph Augustus Barretto, H. P. Guépratte and his wife, and Louisa Elizabeth Barretto, being desirous that upon the death of their * mother, [* 220] Mrs. Young, the whole of the settlement funds should be equally divided between them, notwithstanding any appointment their mother might make to the contrary, had mutually agreed to enter into the agreement thereinafter expressed, it was witnessed, that the parties thereto did thereby mutually agree (so that any one or two of them might be entitled to maintain an action upon the said agreement, if broken), — that, if by exercise of the power of appointment reserved to her by the settlement of the 20th September, 1819, Mrs. Young should cause the shares of any or either of them in the settlement funds on the death of Mrs. Young to be of greater or less amount than the shares of others or other, or should in any manner appoint the said funds to the prejudice of the others or other, the said parties would, immediately on the funds becoming divisible, bring the whole of the shares into partition, and cause the funds to be divided equally, in the same manner as they would have been divided in case no such appointment had been made.

This agreement was signed in London, by Mr. Barretto, and by M. and Madame Guépratte, about the time it bore date, and by Miss L. E. Barretto, after she attained the age of twenty-one; but there was only one part of it, and in this respect, it did not conform to the law of France, which requires, in such a case, that there should be as many original instruments as there are distinct parties. See *post*, p. 857, note.

Mrs. Young and her three children were still living. Mr. Barretto continued domiciled in England. M. and Madame Guépratte were domiciled and living in France. The youngest daughter had since married, and was residing in India, but retained her English domicil.

In May, 1848, Mrs. Young executed a revocable deed, by which she exercised the power of appointment, and appointed the whole fund to the son.

M. and Madame Guépratte thereupon instituted the present suit, seeking to have effect given to the agreement of 1844.

[* 221] * There had been references to the Master to inquire and state what were the rights of the parties under the settlement of 1844, according to the French law.

The case now came on upon exceptions to the Master's report, and on further directions.

The remaining facts and the arguments appear sufficiently from the judgment.

The Vice-Chancellor (Knight Bruce): —

In this cause I have first to mention the exceptions to Mr. Tinney's report, with reference not only to those opinions of French lawyers, upon which, in fact, he proceeded, but to those, also, that, in consequence of what took place in December last, have been made part of the case, including the evidence of M. Le Moine. I am not aware, whether the judges of France (administering law under codes) differ among themselves seldomer than those of England who, in addition to unwritten law, and plain statutes, are occasionally required to expound legislative riddles, such as might have saved the sphinx. But I am satisfied, so far as relates to counsel, that Westminster Hall has never exhibited a more amazing conflict of opinions upon English law, than that which Mr Tinney's well-propounded questions upon French law have raised at the Parisian bar among so many of its eminent members, — a conflict not encouraging to those who look to codes, whether universal or partial, as being, at least when not prepared by quacks and sciolists, a kind of panacea for legal uncertainty.

When the Roman law flourished, the Responsa Prudentum sometimes agreed together, sometimes not. As to * each

[* 222] of which cases Gaius says, "Quorum omnium si in unum sententiæ concurrant, id quod ita sentiunt legis vicem obtinet. Si vero dissentiunt judici licet quam velit sententiam sequi." Now, if the words "quam velit" may be held to mean, "which he shall think most conformable to natural equity and abstract reason," the same rule is perhaps applicable substantially to a case of the present description, when different views of a question *positivi juris* are supported by equal or nearly equal reasoning, and equal or nearly equal authority, if, indeed, that is so here.

Possibly, therefore, it may not be amiss to consider how, in point of natural equity and abstract reason, stands the controversy

as to the validity and efficacy, against Mdme. Guépratte whether surviving or not surviving her husband, and against him, of the contract of November, 1844. Recollecting the second marriage, into which Mrs. Young had entered, and the events succeeding that step, it is, I think, clear, that the contract was one, in point of expediency and prudence, well recommendable to Mdme. Guépratte, and to her husband also. In saying which, I do not forget Mrs. Young's power to appoint to grandchildren exclusively, or otherwise, or the rules of English law applicable to the creation and effect of trusts for the separate use of married women, or the various modes in which Mrs. Young may, whether effectually or ineffectually, execute or attempt to execute her power as to Mdme. Guépratte and her sister, or either of them.

When contracts in any sense analogous to those which the French law terms "aléatoires" are considered, with reference to their prudence, we must take into account, and estimate, probabilities and chances. I conceive, moreover, that the contract was founded in right feelings; it was not only what their best friends might well have advised, but was what one or more of those friends in fact actively approved. Into this contract, I collect, that Mdme. Guépratte entered fairly, and without any compulsion or undue exercise of influence, though with the free assent and * concurrence of her husband; and it must, I think, be [* 223] matter of regret, if, by any rule of positive law, such an agreement should be prevented from having effect, for natural equity and abstract reason appear to me to be in favour of supporting it.

Still, however, the positive law of France may render that impossible. But is it so? As to this I have said, that the consulted jurists differ. I have considered the opinions of those learned persons attentively. Some of them not having been before the Master, I think it right, at the outset, to declare myself unable to say, that his conclusion upon the materials before him was not correct. Whether the materials before me authorise the same conclusion, is a different question. I wish also to observe, that those who impeach a report labour, in my opinion, under this disadvantage (if disadvantage it is), that, to raise a doubt in the mind of the Court as to the correctness of a Master's finding upon a matter of fact (as, for instance, a question of foreign law), is not enough to lead the Court to a contrary determination. Where no more is done, the Court, I apprehend, must

confirm the report, or direct a further investigation, either by a reference back to the Master, or in some other manner.

Now, in the present instance, considering all that has taken place, considering particularly the additions made to the evidence since the report, I am of opinion, that, to direct a further investigation as to the matter of foreign law here in dispute, whether by a reference back to the Master or otherwise, would be worse than useless, and that I am bound to decide upon the materials actually before me. The consequence is, that, in order to avoid a confirmation of the Master's finding, I must be able, upon the whole of the present materials, actually to dissent from what he has found; not merely to doubt whether he has found accurately.

It may be suggested, that, to doubt upon a finding of [* 224] * fact, ought to be tantamount to a decision against the litigant, on whom the affirmative is, or the proof lies. Perhaps this may be sometimes true, and perhaps there ought to be, so far, a qualification of what I have said; but no such qualification, I think, is applicable here.

I mean that, whatever may be the English law concerning the rights, powers, and capacities of married men and their wives, as to the wives' reversionary interests in personalty, it ought, in my opinion, not to create a presumption, or lead to any inference, as to the law of France on such subjects; that the difference of that law from ours in this respect ought to have been considered by the Master, as not less probable than the concord, until knowledge of the truth had been obtained; that here neither of the litigants had possession of the property in dispute; and that, under the decree or order of August, 1848, the plaintiffs, contending as they did, were substantially not more affirmants, did not more place themselves under a burthen of proof, than Mr. Barretto, contending as he did. And it must particularly not be forgotten that the contract of July, 1844, was a contract relating to moveables, was prepared by foreign hands in a foreign country, in the language and in consonance with the institutions of that country, and was there executed by both parties, of whom one was a native of that country, there domiciled at the time, and the other was contemporaneously intending to acquire (as she soon afterwards in fact acquired) the same domicil. If Mr. Tinney, whose name cannot be mentioned without recollecting

the great weight belonging to his opinion, — if he, after considering all the materials brought under his attention, had in the end been unable to satisfy himself whether any point of French law for which the plaintiffs had contended before him, was or was not as contended by them, I do not conceive that he ought therefore necessarily to have reported so far against them, or might not with propriety have certified that the materials *did not so far enable him to come to a conclusion (I [*225] mean under the particular reference); nor am I prepared to say, that if, beyond a mere translation of the contract of July, 1844, there were not now any evidence before me as to the meaning of any of its terms, or as to the law of France, and all parties were agreed in declining to add to the evidence, I should not feel myself bound (whatever the law of England as to the contracts of married women and their husbands) to treat the instrument of November, 1844, as binding on the plaintiffs, it being admitted that the contract of July, 1844, was prepared in France, and executed in France, the country of M. Guépratte's original domicil, — a domicil not suggested to have been ever abandoned or changed.

[His Honour proceeded to say, that the first question was, whether the agreement contained in the instrument of November, 1844, related to such a subject, or was of such a nature as to contravene or be forbidden by the 1130th Article of the Civil Code of France; and after discussing the evidence upon this point, his Honour came to the conclusion that it was not so forbidden.]

The second question was, whether, apart from the fact of Mdme. Guépratte's marriage, the agreement was contrary to any principle of the French law, or to morals or public policy, as those terms are understood in France, and particularly by French lawyers; I say so, because that, apart from the fact of her marriage, it was not contrary to English law, or to morals or public policy, as those terms are understood in England, is perfectly clear. As to this question, the opinions of MM. Duvergier, Berryer, Chaix, d'Estange, and De Vatimesnil, appear to me better founded, better reasoned, and more sound than those opposed to them. I am convinced by the evidence, that it was consistent with French law, and conformable to its views of morals and public policy, that the children of the late Mr. Barretto should, so far as they could, neutralise among

[*226] *themselves the power of their re-married mother as to this property, and the influences, whether safe or dangerous, to which she was, or might be, in respect of it subjected. Upon this point I do not think it necessary to investigate the law applicable to substitutions or *fidei commis* in France, as it was previously to the reign of Louis XVI.; for whatever that law may have allowed or forbidden, with respect to contracts analogous to the instrument of November, 1844, in the present case, I am of opinion, I repeat, that for the last thirty or forty years, or more, such an agreement as this has not been, in any sense, repugnant to law or policy in the French nation.

Then comes the question, whether the transaction was one expressly and in terms authorised by the marriage contract of M. and Mdme. Guépratte, a point, as to which, however, I decline stating any opinion, for a reason that will presently appear; the next question being, whether the agreement of November, 1844, was consistent with the French Dotal Law, allowed by that law, and not forbidden by that contract, — a question perhaps not free from difficulty, but which, as it seems to me, ought to be answered in a manner unfavourable to the present contention of Mr. Barretto.

It is, I think, a correct view of the transaction of November, to regard it as one of prudent management and wise administration of the dotal property on the part of M. and Mdme. Guépratte, — one which (intended not for its increase but neither for its diminution) was meant to protect and defend it, — one of a cautious and conservative description, avoiding the chance of gain for the sake of security against loss; and therefore (though possibly coming within the language of the 1964th Article of the Civil Code, and perhaps therefore ascribable in a sense to the class of contracts called in the French law "aléatoires") not of a rash or visionary or gambling nature. The agreement, [*227] moreover, was a family arrangement, recommended, *I think, by every moral consideration, — one of equality — union — peace. Nor can I think that the dotal law of France was meant to interfere with the possibility of effecting transactions of such a character. I repeat that I am fully alive to the power vested in Mrs. Young of appointing, whether exclusively or otherwise, in favour of grandchildren, and to the terms of restriction against alienation and anticipation, in which the English law and

the settlement of 1819 have enabled that lady to express herself with respect to her daughters, — terms which, if they have been or shall be used, may or may not yield to the contract of November, 1844. I think such considerations, for every present purpose, of no weight.

The last question appears to be, whether the case is affected by the 1325th Article of the Civil Code?[1] Upon it the opinions of M. Paillet and M. Amyot are not satisfactory to my mind, nor is that of M. Billault (whatever quickness and power it may show) convincing; M. Lemoine has alluded to it scarcely or not at all; M. Lionville touches it but slightly, and does not persuade me. I may say the same of M. Coindelisle; and without intending the least disrespect or discourtesy towards him or M. Billault, those two gentlemen may, I think, to borrow an expression from other times, be not unfairly described as *cupidi testes* which honourable men may be. There are five or six advocates, some, if not all of them, eminent and distinguished lawyers, who consider the case clear of the the 1325th Article; and I must say that my opinion is so.

Under the kings of France, in the seventeenth and the earlier part of the eighteenth century at least, it was, I believe, a general rule of French law (at least as to moveables) that "la loi du lieu où se passe chaque acte en régit * la forme," or, in [*228] the shorter Latin phrase, *locus regit actum*. Of this there seems no room for reasonable doubt. The maxim was frequently brought into action by the different laws or customs under which different parts of the kingdom were, — those of Poitou, for instance, differing from those of Brittany; those of Champagne widely differing from both; while many proprietors, having residences and estates in two or more provinces, were often at Paris, where a system of its own prevailed.

The rule, however, I apprehend to be, one not merely of French or English law, but one of jurisprudence (in the largest sense, at least so far as moveables and merely personal obligations are concerned), nor applied merely where there is the intervention of public functionaries; with reference to which it is not necessary to allude, as an instance, to the acknowledged validity of a marriage contracted in Scotland between persons domiciled elsewhere, in a

[1] Les actes sous seing privés qui contiennent des conventions synallagmatiques, ne sont valables qu'autant qu'ils ont été faits en autant d'originaux qu'il y a de parties ayant un intérêt distinct.

manner allowed by the law of that country. There may be exceptions from special reasons in particular countries. The English law, for instance, with respect to wills of moveables, may be among them. But the existence of the rule, as a general canon of jurisprudence, is, I conceive, incontrovertible. My opinion is, I repeat, with those who treat the 1325th Article as not barring or obstructing it. In the words of Modestinus, — Nulla juris ratio aut æquitatis benignitas patitur, ut quæ salubriter pro utilitate hominum introducuntur, ea nos duriore interpretatione contra ipsorum commodum producamus ad severitatem.

I am convinced by the evidence before me, that, if a French citizen, capable by the French law to contract, who is residing temporarily but not domiciled in a country not his own, makes in that country, with a person there domiciled, a contract relating to moveables, and the contract is made in such a form, and accompanied with such ceremonies (though private only) as to [* 229] render it valid and * binding, according to the law of that country (applicable to persons whose capacity to contract that law recognizes), the contract binds the Frenchman, wherever the moveables may be. But especially, if, when the contract was made, the moveables were in the country where it was made; and this though the contract be a synallagmatic contract, and the requisitions and conditions of the 1325th article be omitted and disregarded, and the agreement would therefore, if made in France, not have bound him. The proposition assumes of course a capacity to contract on the part of each of the contracting parties, — assumes the fairness of the contract, and assumes that it does not infringe good morals or the law or public policy of either country, all which assumptions may, I think, with propriety and truth, be made in favour of the transaction of November, 1844, under consideration.

It has, however, been suggested, as an objection to it, that, by the law of England, independently of the French law, and independently of the marriage contract of M. and Mdme. Guépratte, they had not, jointly or severally, power to affect any part of the capital under the settlement of 1819, in the event of M. Guépratte (the husband) not surviving Mrs. Young. Let it be assumed to be so. But the French law, and the marriage contract of Mdme. Guépratte are essential parts of the case, and cannot be rejected or disregarded.

It would be a mistake, however, to suppose a married woman

incapable, by the English law, of alienating or contracting as to her reversionary interests in personalty. She or her husband may by agreement before her marriage be enabled to do so, or the nature of the gift under which she is interested may be such as to place that power in her hands.

Then, if agreeing with some of the consulted advocates, I am right in my view of the French dotal law, or if one of the fairly suggested constructions of the instrument of *July, [*230] 1844, is correct, she and her husband were capable, during and notwithstanding her marriage, of contracting effectually in the manner expressed in the instrument of November, 1844. The 1325th article did not more apply to both or either of them than to any other French citizen, whether man or woman, married or unmarried, having a capacity to contract. That article applies alike to all French citizens, but (if those, with whom I think, are right) does not so apply to any French citizen as to interfere with the right or power to make effectually in a country, not his own, a contract conditioned as has been stated. Had M. Guépratte's domicil of origin been English, and that domicil never changed, it is, I apprehend, clear that the law of England would have recognised, as it does now, the validity and efficacy of the antenuptial contract between him and Mdme. Guépratte.

Again, if Mdme. Guépratte had been a single woman when she executed the instrument of November, 1844, or if her rights and interests under the settlement of 1819 had been, before her marriage, simply settled in an English form, to her separate use, or for such purposes as he and she should appoint, or with a power to join her brother and sister in excluding, as far as possible, unequal distribution by Mrs. Young, under the settlement of 1819, the law of England would have enforced the instrument of November, 1844, at the instance of any one or more of the parties to it. These then, are all the conditions that the French law requires, inasmuch as the agreement of November was planned in England, composed and written in England in the English form and language, and signed in England by every one of the parties to it (two, at least, of them being English), was, from its nature, necessarily intended to be performed in England, as relating wholly to English funds, vested in English trustees, under the English marriage settlement of an Englishman and Englishwoman. In effect the French law (the law of the *country of the marriage contract of [*231]

M. and Mdme. Guépratte, and of their domicil) was competent to give, and did here give the capacity, but permitted to the English law the form, which form was pursued and abided by.

I have little or no hesitation in saying, that, in my humble judgment, if the French Courts were to apply the 1325th article to the case of contracts respecting moveables out of France, made by French citizens out of France with others than French citizens, they would be setting at nought the most settled principles of enlightened jurisprudence, and infringing violently the comity of nations. On the whole, I conceive that the French law, as to the matter in controversy, has been unsuccessfully asserted to be different from the finding of the able and experienced Master, whose report is before me; a finding which I willingly confirm; and there ought, I think, to be now a declaration accordingly.

In what I have said, I have been treating the question of the binding nature of the agreement of November, 1844, upon Mdme. Guépratte and her husband, as if it were raised in a French litigation, and a French Court had to decide it. But, viewing it as if raised in England, where the Bank Annuities, the disputed subjects, are; as if raised here directly for the purpose of affecting the immediate distribution of those Bank Annuities; and, assuming that the transaction of November was of a nature, either expressly authorised by the marriage contract of July, 1844, or allowed by the dotal law of France, I do not see how Mr. Barretto's case as to the transaction can be more than this: A foreigner resident, but not domiciled in England, makes in England a contract with a native and domiciled Englishman concerning certain goods also here. The contract is oral merely, but such and so made that, were both the contractors English, it would clearly bind them both. Afterwards, one of the two, repenting of the bargain, refuses to abide by it, and breaks the contract. Being thereupon sued by the other in an English
[* 232] Court, the * defendant pleads and offers to prove in his defence that, according to the laws and customs of the foreigner's country, there cannot be an effectual or a valid contract concerning such goods, orally, or without certain ceremonies which, in the particular case, were omitted, though of a simple and easy nature.

Such a defence every one knows must fail. Every one knows that such a case would be decided here with reference to the English law only. Nor (assuming, I say, the agreement of November

to have been authorized expressly by the marriage contract of July, 1844, or allowed by the dotal law of France) have I the least doubt that, if Mrs. Young were no more, and the question (living or not living Mdme. Guépratte, living or not living her husband) were raised directly in this Court between all proper parties, at the instance of whatsoever plaintiff or plaintiffs, whether the agreement should be enforced between the persons who signed it and their representatives, this Court would so enforce it.

For the purpose of that litigation, the state of the English law with respect to the rights and powers of married women and their husbands on the subject of unsettled personalty belonging to the former, by way of reversionary interest, would be immaterial as concerning M. and Mdme. Guépratte; and so would the 1325th article of the Civil Code. For (their domicil being French, and the place of the agreement of November, 1844, being, as well as some of the parties to it, English) the only questions touching that agreement, as concerning the French parties, would be these: first, were they by any express contract, which (according to the law of France, or according to the law of England) was effectual, and bound them, enabled to enter into the agreement; and, secondly, if not, whether by the law of France they were enabled to enter into it. These two questions, or the latter of them, I have already, so far as my opinion extends, answered.

It is unnecessary to refer to Boullenois, and other well-
* known writers of authority on the subject, who are deci- [* 233]
sive, if they can properly be invoked. But though it is probably quite as unnecessary, I will employ a minute or two in stating three or four maxims or aphorisms, more questionable, perhaps, in point of latinity than on any solid or important ground, which are, I believe, of general acceptance, generally true, and consistent with each other in theory and practice. I mean these: —

"Statuta suo clauduntur territorio nec ultrà territorium disponunt."

"Bona mobilia sequi et regulari debent secundùm statuta loci domicilii ejus ad quem pertinent vel spectant."

"Si lex actui formam dat inspiciendus est locus actûs non domicilii."

"Si de solemnibus quæritur aut de modo actûs ratio ejus loci habenda est ubi celebratur."

I have but one superfluous word more to say before passing to

another part of the case. It is notoriously of continual practice in this Court to deal with the personal property of married women domiciled elsewhere than in England, otherwise than it would be dealt with were they domiciled in England; to do so, merely by reason of the domicil. The law of the country of the domicil being attended to, a husband not domiciled here, often, as we all know, exercises powers and obtains benefits which an English husband could not.

After discussing at some length the question of costs, his Honour stated the terms of the order, whereby the Master's report was confirmed; and it was declared that, according to the French law, the plaintiffs, Henry Pierre Guépratte and Emily Rosalia Paterson his wife, had, at the time of executing the indenture of the 28th of November, 1844, power thereby effectually to bind the interest of each of them under the indenture of the 20th of September, 1819, in the manner expressed in the indenture of the 28th of November, 1844; and that, by the French law, such [* 234] last-mentioned indenture was * binding on them and each of them; and it was declared that none of the defendants, except the defendants John Blake Kirby, Mary Wavell, and William Ashwell, were to have any costs to the date of that order.

ENGLISH NOTES.

The former branch of the rule is exemplified by the case of *Cooper* v. *Cooper*, in the House of Lords, on appeal from Scotland (1888), 13 App. Cas. 88, 59 L. T. 1. A contract in the nature of a marriage settlement was executed in Ireland in consideration of a marriage shortly afterwards performed in Ireland between a domiciled Scotchman and an Irish lady. The lady at the time of executing the contract was under the age of twenty-one years, so that by Irish law she was incapable of contracting, although by Scotch law she was capable of contracting, but a contract might be set aside if proved to be made to her prejudice. By the contract the wife purported to discharge her legal rights of terce (a right in the nature of dower) and *jus relictae* (a right, paramount to the provisions of her husband's will, to a certain share of his moveable or personal estate). After her husband's death the wife brought an action in Scotland to have the contract set aside. It was admitted on the record that "the pursuer (or plaintiff) was at the date of the marriage a domiciled Irishwoman." The House decided that the validity of the contract must depend on the law of Ireland and not on that of Scotland; so that the pursuer (or plaintiff) having elected to avoid the

contract was absolutely entitled to avoid it, without entering into the question whether it was to her prejudice in such a sense as to give her the right to avoid it by Scotch law. The domicil of the wife at the time of the marriage and the place of execution of the contract being both in Ireland were considered conclusive. The opinions of the Lord Chancellor (Lord Halsbury), and Lord Macnaghten, strongly favour the view that the fact of the wife's domicil at that time being Irish would have been alone conclusive; and it was clearly laid down that the question was not affected by the circumstance of the husband's domicil being Scotch, and that they then contemplated making, as they did in fact make, Scotland the home of their married life.

In re Hellmann's Will (1866), L. R., 2 Eq. 363, 39 L. J. Ch. 760, legacies had been bequeathed to a son aged seventeen years and a daughter aged eighteen years, both domiciled in Hamburg. According to the law of Hamburg, girls become of age at eighteen, boys only at twenty-one years. It was held that the legacy to the girl who was of age according to the law of the domicil, though not of age by English law, might be paid on her own receipt; and that the legacy to the boy might be paid on his attaining full age according to the law of England or Hamburg whichever first happened.

If the law of the place where a contract is made renders the contract void for want of a stamp, the unstamped contract is void in England. *Alves* v. *Hodgson* (1797), 7 T. R. 241, 4 R. R. 433; *Clegg* v. *Levy* (1812), 3 Camp. 166. An exception is made to this rule in the case of foreign bills by the Bills of Exchange Act, 1882, s. 72 (1) (*a*).

But if a stamp is only required by the foreign law before the document can be admitted in evidence, its absence will not prevent its being admitted in evidence in our Courts. *Bristow* v. *Sequeville* (1850), 5 Ex. 275, 19 L. J. Ex. 289.

A contract illegal by or opposed to the public policy of England cannot be enforced in English Courts, notwithstanding that it may be valid by the law governing the contract. In *Hope* v. *Hope* (1856), 8 De G. M. & G. 731, 26 L. J. Ch. 417, a contract in the French language was signed in England by a husband (a native of England who had married in England a lady who was a native of France, but was at the time of the contract domiciled in France), whereby he agreed to give up the custody of a child to his wife, and the contract also contained a stipulation that the wife should not oppose but on the contrary "facilitate" his obtaining a divorce in England. Specific performance of the agreement was refused in England on the ground that both the above stipulations were contrary to the public policy of this country. So in *Grell* v. *Lecy* (1864), 16 C. B. (N. S.) 73, 9 L. T. 721, an agreement made in France, but intended to be carried out in England, and

which would have been void on the ground of champerty if made in England, was held void by the Court here. So a contract for the sale of goods to be smuggled into England, the vendor helping in the intended perpetration of the fraud on the revenue, is held to be void. *Holman* v. *Johnson* (1775), Cowp. 341; *Clugas* v. *Penaluna* (1791), 4 T. R. 466, 2 R. R. 442; *Waymell* v. *Reed* (1794), 5 T. R. 599, 2 R. R. 675. But a contract made and executed abroad for the sale of goods to be smuggled into England is not invalid, although the vendor knew of the intention, but did not assist in carrying out the intention, of smuggling them. *Holman* v. *Johnson*, *supra*. A contract in general restraint of trade, although made abroad, cannot be enforced in England. *Roussillon* v. *Roussillon* (1880), 14 Ch. D. 351, 49 L. J. Ch. 339, 42 L. T. 679.

A curious case arising out of the English laws prohibiting the slave trade is that of *Santos* v. *Illidge* (1859, 1860), 6 C. B. (N. S.) 841, 28 L. J. C. P. 317, 8 C. B. (N. S.) 861, 29 L. J. C. P. 348. It was an action for breach of contract by Santos, a Brazilian, against the defendants who were British subjects. The contract was a contract made for sale by the defendants to the plaintiff of certain slaves on an estate in Brazil, where, according to the law of that country, the transaction was lawful. The Court of Common Pleas held that the action would not lie because, as they held, the transaction was a felony on the part of the vendors, being British subjects, under the Acts 5 Geo. IV. c. 113, and 6 & 7 Vict. c. 98. But this judgment was reversed by a majority (Bramwell, B., Channell, B., Hill, J., and Blackburn, J.; *diss.* Pollock, C. B., and Wightman, J.), in the Exchequer Chamber, on the ground that the transaction came within the exception of the 5th section of the latter statute: "that in all cases in which the holding or taking of slaves shall not be prohibited by this or any other Act of Parliament, it shall be lawful to sell or transfer such slaves, anything in this or any other Act contained notwithstanding." Blackburn, J., in giving judgment of himself and Channell, B., and Hill, J., stated the case as follows: "In this case the plaintiff sues on a contract by which the defendants sold to him certain slaves. Breach, that they did not deliver them. The plea is that the defendants are British subjects, and that the contract was made after the passing of the statute 6 & 7 Vict. c. 98. The replication is that the slaves were some of them acquired and purchased by the defendants in Brazil before the coming into operation of the statute 6 & 7 Vict. c. 98, and the others were their offspring; that purchasing and holding slaves is lawful in Brazil; and that the plaintiff is a Brazilian subject. To this there is a rejoinder that the slaves alleged in the replication to have been purchased before statute 6 & 7 Vict. c. 98, were purchased after the passing of the statute

5 Geo. IV. c. 113. There is a demurrer, by which it is for the purposes of our decision admitted that the slaves or their ancestors were purchased after the passing of the earlier act, and before the passing of the later one. The question then arises whether under these circumstances the contract can be enforced in a British Court. The Court of Common Pleas have decided that it cannot. They held, and I quite agree with them so far, that if the sale and delivery of slaves under these circumstances is by a British Act of Parliament prohibited, which it certainly is if made a felony, the contract is according to English law void." It was held by the majority that no statute prohibited the holding of slaves in Brazil, even although the purchasing of them there might have been a felony in a British subject; and that therefore this enactment legalised the sale. The judgment of the majority of the Exchequer Chamber was to the effect that by the above quoted exception of the latter statute the sale was permitted of slaves, the holding of whom was not prohibited by any Act of Parliament; and that no statute prohibited the holding of slaves in Brazil, even although the purchasing of them might have been a felony in a British subject. In *Madrazo* v. *Willes* (1820), 3 B. & Ald. 353, it was held that a foreigner who is not prohibited by the laws of his own country from carrying on the slave trade, may in a British Court of Justice recover damages in respect of the wrongful seizure by a British subject of a cargo of slaves. The application of this case is doubtless now much restricted by the extension of treaties and legislation in other countries against the slave trade.

In *Robinson* v. *Bland* (1760), 2 Burr. 1077, a gaming debt won in France was held to be not recoverable in England, as it was not recoverable by the laws of France, though it might have been enforced in France under the name of "a debt of honour," by a so-called Court having no legal power of execution. It was in the same case held that money lent in France at play there (the money being fairly lent by a third party, and it not appearing that the game was illegal), might be recovered in the English Courts as a debt; although a security for the debt might be avoided under the Statute of 9 Anne. In *Quarrier* v. *Colston* (1842), 1 Ph. 147, it was held that money lent for the purpose of gambling at the public tables which were then lawful in Germany, might be recovered in the Courts of this country. In the same case a small sum won at cards was held recoverable. It was observed in the judgments that such a sum won at cards might have been recoverable by English law. But this was before the Statute 8 & 9 Vict. c. 109, s. 18. In *Wynne* v. *Callander* (1826), 1 Russ. 293, bills of exchange made in France on French stamps and substituted in France for English bills of exchange which were originally given for a gambling debt

and void under the Statute of 9 Anne, c. 14, were ordered to be delivered up.

A contract which is void by the law where made and intended to be performed, will not be given effect to in England. *Burrows* v. *Jemino* (1726). 2 Str. 733; *Heriz* v. *De Casa Riera* (1840). 10 L. J. Ch. 47. But a contract of insurance made in Scotland by a branch office of an English Insurance Company contrary to the English statutes giving a monopoly of that business to the Royal Exchange Company, was held to be valid and enforceable by the Scotch Courts. *Patteson* v. *Mills* (1828), 1 Dow. & Clark, 342.

English law does not invalidate a contract contemplating breach of the revenue laws of a foreign country. *Planché* v. *Fletcher* (1779), 1 Doug. 251; *Bazett* v. *Meyer* (1814), 5 Taunt. 824; *Sharp* v. *Taylor* (1849), 2 Ph. 801; *Boucher* v. *Lawson*, Lee, Cas. Temp. Hardwicke, 85, 89, unless they should do so indirectly by reason of the contract having been first sued on in the foreign Court, and the judgment there forming *res judicata* as in *Burroughs* v. *Jamineau*, 12 Vin. Abr. 87, pl. 9, 2 Eq. Cas. Abr. 524, pl. 7, and see cases as referred to in *Boucher* v. *Lawson*, *supra*.

AMERICAN NOTES.

The general American rule is correctly stated by Mr. Kerr (Am. & Eng. Enc. of Law, "Conflict of Laws," vol. iii. p 552): "If valid and binding where made a contract is valid and binding everywhere; and if void or illegal there, it is generally held to be void and illegal everywhere else; although had the same contract been made where suit is brought, it would have been held valid." "A contract valid in the State where it is made will be enforced in another State, unless clearly contrary to good morals or repugnant to the policy or institutions of the latter State." See *Greenwood* v. *Curtis*, 6 Massachusetts, 358; 4 Am. Dec. 145, a contract for importing slaves. A few cases will serve to illustrate this doctrine.

W., residing in Maine, contracted there with an attorney residing in New York for the latter to collect a claim for him in New York, on shares. This was invalid in Maine but valid in New York. *Held*, void. *Blackwell* v. *Webster*, 23 Blatchford (U. S. Circ. Ct.), 537.

A note made by a wife in Louisiana as surety for her husband, void there, may be enforced against her land in Mississippi where it is valid. *Frierson* v. *Williams*, 57 Mississippi, 451.

A parol contract of sale of goods made in a State where there is no Statute of Frauds may be enforced in another State where it would have been void. *Allen* v. *Schuchardt*, 10 Am. Law Reg. 13.

Where a contract of guaranty for price of goods was signed by a wife at her domicil in Massachusetts, and mailed to Maine, and accepted there and acted on there, it was held that the contract was made in Maine, and although invalid by Massachusetts law would still be enforced there. Gray, C. J., delivered a learned opinion, reviewing all the authorities, and concluding that

the validity of a contract, even as regards the capacity of the parties, is to be determined by the law of the State where it is made. *Milliken* v. *Pratt*, 125 Massachusetts, 374; 28 Am. Rep. 241.

In *Bell* v. *Packard*, 69 Maine, 105; 31 Am. Rep. 251, it was held that a note written in Maine, but signed in Massachusetts and returned to the payee in Maine by post, is a Maine contract; and where one of the makers was a married woman, who signed as surety for her husband, which would not bind her in Massachusetts, she was still bound in Maine, whose laws authorized such a contract.

Assumpsit is maintainable in Rhode Island for breach of a contract of sale, there made and valid there, of goods in manufacture, although to be delivered in New York, where the contract was invalid under the Statute of Frauds. *Hunt* v. *Hunt*, 12 Rhode Island, 265.

One pleading infancy as a defence to a foreign contract must show that it is a good defence by the *lex loci contractus*. *Thompson* v. *Ketcham*, 8 Johnson (New York), 190. KENT, C. J., said: "The *lex loci* is to govern, unless the parties had in view a different place, *by the terms of the contract*." Citing *Robinson* v. *Bland*, 2 Burr. 1077.

A marriage contracted by a minor resident in Massachusetts, in Maine, where consent of parents is not essential, will be held valid in Massachusetts, where such consent is necessary, even though the parties went to Maine in order to evade the law. *Commonwealth* v. *Graham*, 157 Massachusetts, 73; 34 Am. St. Rep. 255; 16 Lawyers' Rep. Annotated, 578.

Parsons says (2 Contracts, p. 714): "In respect to the capacity of the wife to contract with a third party, we are inclined to hold that the law of the place of the contract determines this, as well as other questions of capacity, at least in respect to personal contracts; although, in the absence of sufficiently direct adjudication, and in the conflict of opinion to be found in text-writers, it is difficult to ascertain what the law is on this point."

A parol ante-nuptial agreement made in Pennsylvania by a resident of Illinois, the parties immediately after marriage removing to Illinois and there abiding, is construed by Illinois law. *Davenport* v. *Karnes*, 70 Illinois, 165.

A note made by a married woman in another State, where she lived and where such a note is valid, and payable there, is enforceable in Tennessee, in spite of the disability of coverture in that State. *Robinson* v. *Queen*, 87 Tennessee, 445; 10 Am. St. Rep. 690, and note, 698.

In *Baum* v. *Birchall*, 150 Pennsylvania State, 161; 30 Am. St. Rep. 797; it was held that a bond and mortgage by a married woman, executed in Pennsylvania, where she was under marital disability, upon land in Delaware, where they would have been valid if there executed, being delivered there, were valid. "The Courts of this State will administer, in such cases, the *lex loci contractus* as against one under disability. *Evans* v. *Cleary*, 125 Pa. St. 204; 11 Am. St. Rep. 886." Citing the *Milliken* case, *supra*.

If a husband and wife, residents of Florida, temporarily residing in Maine, contract in the latter State for separation, and that he shall pay her a monthly allowance for her support, the contract is enforceable in Maine, although invalid under the laws of Florida. *Carey* v. *Mackey*, 82 Maine, 516; 17 Am. St. Rep. 500.

Where a married woman, residing in a State where she is competent to contract as if unmarried, there executes a transfer of stock in a corporation in another State, where she is not so competent, the transfer being in form sufficient under the laws of the latter State will pass the stock there. *Hill* v. *Pine River Bank*, 45 New Hampshire, 300.

In *Matthews* v. *Murchison*, 17 Federal Reporter, 760, a contract made by a married woman in New York without consent of her husband, and valid there, was recognized in North Carolina, although there such consent is essential.

In *Petrie* v. *Voorhees' Ex'rs*, 18 New Jersey Equity, 285, it was adjudged that covenants in an indenture of apprenticeship, valid where executed, would be enforced in another State if not immoral or impolitic. "The *personal status* of each individual is governed by the law of actual domicil."

In *Pritchard* v. *Morton*, 106 United States, 124, it is held that "the foreign law may, by the act and will of the parties, have become part of their agreement, and in enforcing this the law of the forum may find it necessary to give effect to a foreign law, which without such adoption would have no force beyond its own territory. This, upon the principle of comity, for the purpose of promoting and facilitating international intercourse, and within limits fixed by its own public policy, a civilized State is accustomed and considers itself bound to do."

In *Milliken* v. *Pratt*, *supra*, GRAY, C. J., reviews the English and American authorities. He says: "It has often been stated by commentators that the law of the domicil, regulating the capacity of a person, accompanies and governs the person everywhere. But this statement, in modern times at least, is subject to many qualifications: and the opinions of foreign jurists upon the subject, the principal of which are collected in the treatises of Mr. Justice Story and Dr. Francis Wharton on the Conflict of Laws, are too varying and contradictory to control the general current of the English and American authorities in favour of holding that a contract, which by the law of the place is recognized as lawfully made by a capable person, is valid everywhere, although the person would not, under the law of his domicil, be deemed capable of making it." "Lord ELDON, when Chief Justice of the Common Pleas, and Chief Justice KENT and his associates in the Supreme Court of the State of New York, held that the question whether an infant was liable to an action in the Courts of his domicil, upon a contract made by him in a foreign country, depended upon the question whether by the law of that country such a contract bound an infant. *Male* v. *Roberts*, 3 Esp. 163; *Thompson* v. *Ketcham*, 8 Johnson, 189: 5 Am. Dec. 332." "The Supreme Court of Louisiana, in two cases which have long been considered leading authorities, strongly asserted the doctrine that a person was bound by a contract which he was capable by the law of the place, though not by the law of his own domicil, of making, as for instance in the case of a contract made by a person over twenty-one and under twenty-five years of age, in a State whose laws authorized contracts to be made at twenty-one, whereas by the laws of his domicil he was incapable of contracting under twenty-five. *Baldwin* v. *Gray*, 4 Martin [N. S.], 192, 193; 16 Am. Dec. 169. The same doctrine was recog-

nized as well settled in *Andrews* v. *His Creditors*, 11 Louisiana, 464, 476." "In *Pearl* v. *Hansborough*, 9 Humphreys, 426, the rule was carried so far as to hold that where a married woman domiciled with her husband in the State of Mississippi, by the law of which a purchase by a married woman was valid and the property purchased went to her separate use, bought personal property in Tennessee, by the law of which married women were incapable of contracting, the contract of purchase was void and could not be enforced in Tennessee. Some authorities on the other hand would uphold a contract made by a party capable by the law of his domicil, although incapable by the law of the place of the contract. *In re Hellmann's Will*, L. R., 2 Eq. 363; *Saul* v. *His Creditors*, 5 Martin (Louisiana), N. S. 569; 16 Am. Dec. 212." "In the great majority of cases, especially in this country, where it is common to travel, or to transact business through agents, or to correspond by letter, from one State to another, it is more just, as well as more convenient, to have regard to the laws of the place of the contract, as a uniform rule operating on all contracts of the same kind, and which the contracting parties may be presumed to have in contemplation when making their contracts, than to require them at their peril to know the domicil of those with whom they deal, and to ascertain the law of that domicil, however remote, which in many cases could not be done without such delay as would greatly cripple the power of contracting abroad at all."

No. 12. — LLOYD v. GUIBERT.

(EX. CH. 1865.)

RULE.

THE law of the place where the contract is made is *primâ facie* that which the parties intended, or ought to be presumed to have adopted, as the footing upon which they dealt.

But in a contract of affreightment this presumption is easily displaced, and in the absence of express provisions in the contract or other circumstances from which a different intention can be inferred, the rule for ascertaining the liabilities of the shipowner is presumably determined by the law of the flag.

Lloyd v. Guibert.

L. R. 1 Q. B. 115–130 (s. c. 35 L. J. Q. B. 74; 13 L. T. 602; 6 B. & S. 100).

[115] *Ship. — Contract of Affreightment. — Conflict of Laws. — Bottomry.*

The plaintiff, a British subject, chartered a French ship belonging to French owners, at a Danish West India port, for a voyage from St. Marc, in Hayti, to Havre, London, or Liverpool, at charterer's option. The charter-party was entered into by the master in pursuance of his general authority as master. The plaintiff shipped a cargo at St. Marc for Liverpool, with which the vessel sailed. On her voyage she sustained sea damage and put into Fayal, a Portuguese port for repair. There the master properly borrowed money on bottomry of ship, freight, and cargo, and repaired the ship, and she completed her voyage to Liverpool. The bondholder proceeded in the Court of Admiralty against the ship, freight, and cargo. The ship and freight were insufficient to satisfy the bond; and the deficiency with costs fell on the [* 116] plaintiff as owner of the cargo, for which he sought indemnity * against the defendants, the French shipowners. The defendants gave up the ship and freight to the shipper, so as that, by the alleged law of France, the abandonment absolved them from all further liability on the contract of the master: —

Held, that the parties must be taken to have submitted themselves, when making the charter-party, to the French law as the law of the ship, and therefore that, assuming the law of France to be as alleged, the plaintiff's claim was absolutely barred.

Error from the judgment of the Court of Queen's Bench in favour of the defendants, on demurrers, to a plea and replication.

Declaration that the defendants were the owners of the ship *Olivier*, of which J. F. Lemaire was duly appointed by the defendants master; and the plaintiff, while the ship was in the West Indies, shipped on board a cargo of goods, of the value of £3000., to be carried thence and delivered to the plaintiff at Liverpool, the dangers of the seas and navigation only excepted, for certain freight to be by the plaintiff paid to the defendants. That the ship on her voyage sustained damage from stormy weather, and was obliged to put into Fayal for repairs, that the ship was repaired, and that the master there borrowed, to pay for the repairs, &c., a sum amounting, with interest, to £2400 under circumstances justifying such borrowing and hypothecation, upon three bottomry bonds upon the ship, freight, and cargo, conditioned for the payment of principal and interest ten days after due completion of the voyage. That the defendants had notice of the premises, and in considera-

tion thereof promised the plaintiff to indemnify him, as owner of the cargo, against any consequent loss. That the ship afterwards sailed, and arrived safely with the cargo at Liverpool. That the money not being repaid, the bonds were put in suit in the Court of Admiralty, and that the plaintiff, in order to save the cargo from being sold by the court, was compelled to become a party to the suit, and was compelled to pay £1500 being less than the value of the cargo, and over and above the freight payable in respect thereof, together with £200 costs. That although all things, &c., have happened to entitle the plaintiff, as owner of the cargo, to be indemnified, yet the defendants have not repaid the said sums, &c.

First plea. That the cargo was loaded under a charter-party made between the plaintiff and the master at the Island of St. * Thomas, in the West Indies, by which it was provided [* 117] that the master should freight the ship, called in it a French ship, then in St. Thomas's, for a voyage from St. Marc, in Hayti, to Havre, in France, or London, or Liverpool, at the plaintiff's option. That the ship was a French ship, and the defendants, the owners, French subjects; and according to the laws of France, it is lawful for the owners of a French ship, in all cases, to free themselves from the acts and engagements of the master, in all that concerns the ship and cargo, by the abandonment of the ship and freight. That the bottomry bonds were executed by the master without any express authority from the defendants; and they have refused to ratify, and never did ratify, the act of the master; and that but for the bottomry bonds and the suit the goods would have been duly delivered to the plaintiff at Liverpool. That on the suit in the Court of Admiralty, the ship was sold, and the proceeds together with the freight, applied towards payment of the bonds. That the defendants did not appear in the suit, but, in order to obtain the protection afforded to shipowners by the law of France, they abandoned the ship and freight. That by such abandonment the defendants became released, according to the laws of France, from all liability to the plaintiff, in respect of the cargo not being delivered to him at Liverpool, and the acts of the master in executing the bonds, and the consequences thereof: and the defendants, except as aforesaid, did not promise to the plaintiff to indemnify him against any loss as owner of the cargo.

Demurrer and joinder.

Second replication to the first plea. That after the making of

the charter-party, and before the making of the bottomry bonds, and of the promise of indemnity in the declaration mentioned, the plaintiff exercised his option, and fixed Liverpool as the port of discharge. That the law in force in St. Thomas's, where the charter-party was made, and in Hayti, where the cargo was shipped, and in Fayal, where the bottomry bonds were made and the promise of indemnity given, is not the law of France, but is the general maritime law, and similar to the law of England in respect of the premises. That no part of the voyage, and no part of the charter-party, or of the said promise, was to be or was performed
[* 118] * in France, or in any other part of the world in which the laws of France are in force.

Demurrer and joinder.

The Court of Queen's Bench gave judgment for the defendants, on the ground that the power of the master to bind his owners personally is but a branch of the general law of agency, and that the flag of the ship was notice to the plaintiff, that the master's authority to bind his owners was subject to the limitation stated in the plea to be imposed by the law of France.[1]

The case was argued after Trinity Term by

Crompton Hutton, for the plaintiff,

J. H. Hodgson, for the defendants.[2] *Cur. adv. vult.*

Nov. 27. The judgment of the Court (Erle, C. J., Pollock, C. B., Martin, B., Willes, and Keating, JJ., and Pigott, B.) was delivered by

Willes, J. The facts disclosed by the record are as follows: — The plaintiff below, a British subject, at St. Thomas, a Danish West India Island, chartered the ship *Olivier*, belonging to the defendants, who are Frenchmen, for a voyage from St. Marc, in Hayti, to Havre, London, or Liverpool, at the charterer's option. The plaintiff must have known that the ship was French. The charter-party was entered into by the master in pursuance of his general authority as master, and not under any special authority from the owner. The plaintiff shipped a cargo at St. Marc for Liverpool, with which the vessel sailed. On her voyage, she sustained damage from a storm, which compelled her to put into

[1] See the report of the case in the court below, 33 L. J. Q. B. 241.

[2] The case having been argued before Michaelmas Term, the reporter has no note of the arguments and cases cited.

No. 12. — Lloyd v. Guibert, L. R., 1 Q. B. 118, 119.

Fayal, a Portuguese port, for repair. There the master properly borrowed money upon bottomry of the ship, freight, and cargo, and repaired the ship, which proceeded with the cargo, and arrived in safety at Liverpool. The bondholder proceeded in the Court of Admiralty against the ship, freight, and cargo. The ship and freight were insufficient to satisfy the bond; the deficiency and * costs fell upon the plaintiff as owner of the cargo, [* 119] and in respect thereof he seeks to be indemnified by the defendants as shipowners.

The defendants abandoned the ship and freight; and it must be taken as a fact (because it is alleged and not denied) that, by the law of France, they abandoned in time, and in such manner, and under such circumstances as are required by the French law, and that according to such law, abandonment, by which we understand a giving up of the ship and freight to the shippers (see *Dakin* v. *Oxley*, 15 C. B. (N. S.) 646, 33 L. J. C. P. 115) absolved them from liability. This law, if applicable, is one which furnishes an absolute bar to the plaintiff's claim by way of satisfaction or discharge, and affected the validity of the claim, and not merely the mode of proceeding to enforce it. Whether the French law permits abandonment under such exceptional circumstances is a question of fact, not before us, and which for the present purpose we must assume to be answered in the affirmative; (see, however, Devilleneuve et Massé Dictionnaire du Contentieux Commercial, titre *Armateur* ss. 23, 25).

By the English law a shipowner under such circumstances is liable personally, and not merely to the value of the ship and freight. And it is alleged, and not denied, that the Danish, Portuguese and Haytian laws agree in this respect with our own. The law of Hayti was not however relied upon in argument.

Upon these facts it was insisted for the plaintiff that the decision ought to proceed upon either what was called the "general maritime law," as regulating all maritime transactions between persons of different nationalities at sea; the Danish law, as that of the place where the contract was made (*lex loci contractus*); the Portuguese law, because the bottomry bond, which in one sense caused the question to arise, was given in a Portuguese port, and the rule that the place governs the act (*locus regit actum*) was supposed therefore to furnish a solution; or the English law, as being that of the place of the final act of performance by the delivery of the cargo (*quasi lex loci solutionis*), in either of

which alternatives the liability of the defendants was established. And it was argued, that, the charter-party having been entered into *bonâ fide* in the ordinary course of business by the [* 120] master, * within the scope of his ostensible authority to contract for the employment of the vessel, which the owner, by appointing a master and sending him abroad in command, allows him to assume, the right of the charterer could no more be narrowed by a provision of foreign law unknown to him than by secret instructions from the owners, which would clearly be inoperative; a proposition which needs no authority in our law, and for which French authorities will be found in Pailliet's edition of the Code de Commerce, art. 216, in the note.

For the defendants it was answered that by the French law they are absolved; and that that law, as being that of the ship, governs the case, either because the character of the transaction itself showing that the plaintiff impliedly submitted his goods to the operation of the law of the ship, or because the master, who entered into the contract (although his doing so was within the scope of the authority which he was allowed by the owners to assume), was disabled by the French law from binding his owners, otherwise than with the exception expressed or implied of exemption from liability by abandonment, and that of such disability, or lack of authority, his flag was sufficient notice.

Upon this latter ground the Court of Queen's Bench gave judgment for the defendants, not expressing any opinion upon the former; whereupon the plaintiff brought error, and the case was well argued at the sittings after Trinity Term last, before Erle, C. J., Pollock, C. B., Martin, B., Keating, J., Pigott, B., and myself, when we took time to consider.

In determining a question between contracting parties, recourse must first be had to the language of the contract itself, and (force, fraud, and mistake apart) the true construction of the language of the contract (*lex contractus*) is the touchstone of legal right. It often happens, however, that disputes arise, not as to the terms of the contract, but as to their application to unforeseen questions, which arise incidentally or accidentally in the course of performance, and which the contract does not answer in terms, yet which are within the sphere of the relation established thereby and cannot be decided as between strangers.

In such cases it is necessary to consider by what general law the

parties intended that the transaction should be governed, or rather * to what general law it is just to presume that [* 121] they have submitted themselves in the matter.

A familiar illustration of this will be found in the rule, that the lawful usages of a market are as much part of a contract entered into there, which does not expressly exclude them, as if they were set down at large. The binding force of such usages does not depend so much upon the knowledge of the parties as upon implied acquiescence; for whoso goes to Rome must do as those at Rome do.

So in the absence of express provision or special usage, the general law itself, in many points of view only a more extended usage, supplies the gaps which the parties have left, and in doing so sometimes modifies the construction of general words in the contract. For instance, a common carrier, while on the one hand he is bound by stringent rules for the protection of his customers, on the other is allowed certain exemptions from liability, even upon an express contract if it do not exclude such exemptions; thus, by the common law of England a person who expressly contracts absolutely to do a thing, not naturally impossible, is not excused for non-performance because of being prevented by the act of God, or the King's enemies (*Paradine* v. *Jane*, Aleyn, 26), and yet, in consideration of the risks to which common carriers are exposed, such prevention is in their case an implied exception. And in the case of ordinary bailees entrusted with the custody of goods, whether by express contract or not, the exceptions of overwhelming force (*vis major*), and accident without fault (*casus fortuitus*), are implied.

In the case of carriers by sea, these latter exceptions (*vis major* and *casus fortuitus*) are now, as to British ships stipulated for by the common exception in the charter-party, or bill of lading; whilst in foreign contracts of affreightment, even when made in British ports, such express stipulation is sometimes omitted; as for instance in the Spanish charter, in *Blasco* v. *Fletcher*, 14 C. B. (N. S.) 147, 32 L. J. C. P. 284, because by the law of many countries such an exception is implied (see Casaregis Disc. xxiii; Codigo de Comercio, art. 935; Allgemeines Deutsches Handels-gesetzbuch, art. 703). So that in the case just referred to, if the *lex loci contractus* were to prevail, the owner of a * Spanish [* 122] vessel, chartered in Liverpool for the Havana, might lose

the protection which the owners of an English vessel would of course have stipulated for.

And this diversity (or conflict) upon a point so important shows that the present and like questions affect not only contracts entered into by masters of ships, the law of whose country distinguishes between the obligations of a contract by the master as such, and that of the owner himself, or his broker, or of the master acting with a plenary authority, but touch all contracts of affreightment entered into in respect of any vessel in a port foreign as to her, whether the master happens to be an owner or not.

Hitherto we have viewed the question generally; but in order to its satisfactory solution as applied to the present case, we must deal with the operative facts, that the contract of affreightment was made by persons of different nationalities in a place where both of them were foreigners, to be performed partly there by breaking ground in order to start for the port of loading, — a place where both parties would also have been foreigners; partly at the latter port by taking the cargo on board; and partly on board a ship at sea, subject there to the laws of her own country, and never out of its jurisdiction as to acts done by those on board; and partly by final delivery in the port of discharge; that the principal subject-matter of the contract was the employment of a foreign ship for a voyage across the high seas; and that the question in dispute arose in consequence of sea damage to the ship, and its ordinary result.

In the diversity or conflict of laws, which ought to prevail is a question that has called forth an amazing amount of ingenuity, and many differences of opinion. It is, however, generally agreed that the law of the place where the contract is made, is *primâ facie* that which the parties intended, or ought to be presumed to have adopted as the footing upon which they dealt, and that such law ought therefore to prevail in the absence of circumstances indicating a different intention, as for instance, that the contract is to be entirely performed elsewhere, or that the subject-matter is immoveable property situate in another country, and so forth; which latter, though sometimes treated as distinct rules, appear more properly to be classed as exceptions to the more general one, by reason [* 123] of * the circumstances indicating an intention to be bound by a law different from that of the place where the contract is made; which intention is inferred from the subject-matter and from the surrounding circumstances, so far as they are relevant to construe and determine the character of the contract.

No. 12. — Lloyd v. Guibert, L. R., 1 Q. B. 123, 124.

The present question does not appear to have ever been decided in this country, and in America it has received opposite decisions, equally entitled to respect.[1] We must therefore deal with it as a new question, and endeavour to be guided in its solution by a steady application of the general principle already stated, viz., that the rights of the parties to a contract are to be judged of by that law by which they intended, or rather by which they may justly be presumed, to have bound themselves.

We must apply this test successively to the various laws which have been suggested as applicable; and first to the alleged general maritime law.

We can understand this term in the sense of the general maritime law as administered in the English Courts, that being in truth nothing more than English law, though dealt out in somewhat different measures in the Common Law and Chancery Courts, and in the peculiar jurisdiction of the Admiralty; but as to any other general maritime law by which we ought to adjudicate upon the rights of a subject of a country which, by the hypothesis, does not recognize its alleged rule, we were not informed what may be its authority, its limits, or its sanction. Passing over the common ground of ethics, and the elementary ideas of natural law (*jus gentium*), such as the rights of prior occupancy and self-preservation, the privileges and exemption of necessity, the common duties of humanity, of more or less perfect obligation, the idea of property, including the obligation of contracts, and those obligations, for the most part conventional, upon which is based the modern system of international law (*jus inter gentes*): inasmuch as these supply no precise rule for the matter in hand — it would be difficult to maintain that there is, as to such questions as the present, depending in a great measure upon national policy and economy, any general in the sense of universal law, binding at sea, any * more than upon land, nations which either have not [* 124] assented or have withdrawn their assent thereto.

Moreover, we are not satisfied that there is any such general concurrence of mankind, that shipowners should be absolutely answerable personally for the acts of the master. Pothier (sur la Charte-partie, part. 1, no. 34) was cited in the affimative, and Emerigon (Contrat á la grosse c. 4, s. 11) upon the negative side. Pothier founding his interpretation upon the civil law, *de exerci-*

[1] See *Arayo* v. *Currell*, 1 Louis. Rep. 528, and *Pope* v. *Nickerson*, 3 Story's Rep. 465

toriâ actione (see Valin sur l' Ordonnance, Livre 2, Tit. 8, Art. 2), thought that the clause of the celebrated "Ordonnance de la Marine" of 1681 (Livre, 2, Tit. 8, Art. 2), from which Art. 216 of the Code de Commerce was taken, applied only to illicit acts of the master, and that upon his contracts the owner was liable, and could not get rid of liability by abandonment. Emerigon, on the other hand, founding his opinion upon the general rule of maritime law, as he understood it, thought that from liability for all acts of the master, whether licit or illicit, including contracts, the owner could free himself by abandonment. The jurisprudence of the Court of Cassation leant towards the opinion of Pothier, and that led, in 1841, to the modification of Art. 216 to its present shape, by which, according to the statement of the learned annotator in Sirey's Code de Commerce annoté by Gilbert, note 18 upon Art. 216, the opinion of Emerigon is now established in France. To this may be added that similar, though not identical, provisions for the protection of the owner are to be found in other codes; for instance, that of Spain (Codigo de Comercio, Art. 621, 622) and Prussia (Allgemeines Deutsches Handels-gesetzbuch, Art. 451, 452, 453, and the following).

This is sufficient to show that there is no general uniform rule in maritime law upon the subject; indeed, looking at home, there seems little if any difference in principle between the French law under consideration, and our own statutory provisions for limited liability, in respect of obligations by reason of collision, which latter have now by express enactment been extended to collision between British and foreign vessels (25 & 26 Vict. c. 63, s. 54, *The Amalia*), 1 Moo. P. C. (N. S.) 471; 32 L. J. P. M. & A. 191.

In truth, any general, much more any universal mari-
[* 125] time law, * binding upon all nations using the highway of the sea in time of peace, except when limited as administered in some Court, is easier longed for than found. Accordingly, we observe that both the very learned Judge of the Court of Admiralty, and the Judicial Committee of the Privy Council, in deciding, in the case of *The Hamburg* (*Duranty* v. *Hart*, 2 Moo. P. C. (N. S.) 289; 33 L. J. P. M. & A. 116), that the validity of a bottomry bond given in a foreign port was to be determined by the general maritime law, and not by the law of the ship or the port where the bond was given, added to the expression "the general maritime law" this qualification, viz. "as administered in England."

That case was cited as an authority, and at first sight it appeared to be one, for applying English law to the present case, but upon consideration it appears altogether distinguishable. The alleged agency of the master in that case was founded upon necessity alone, and it was incumbent upon the bondholder to establish such necessity by evidence, and in order to do that he was bound (according to the rule prevailing since the case of the *Bonaparte*, 8 Moo. P. C. 459), to show a communication with the owner of the cargo, that being, as the Court held, reasonably practicable. So that the *lex fori* was undoubtedly supreme upon the question which then arose, it being one of evidence and procedure. Had the decision been intended to go further, the Judicial Committee of the Privy Council would probably have considered and compared the case of *Cammell* v. *Sewell*, No. 13, p. 891, *post*, 5 H. & N. 728; 29 L. J. Ex. 350, and pointed out the distinction in this respect between a hypothecation in case of necessity, and a sale in case of necessity, which, according to the decision of the majority of the Court in *Cammell* v. *Sewell*, against the opinion of BYLES, J., depends for its validity upon the law of the place where the sale was made, and not the general maritime law as administered in England; upon which, however, we offer no opinion.

In one other point of view the general maritime law, as administered in England, or (to avoid periphrasis) the law of England, viz. as the law of the contemplated place of final performance, or port of discharge, remains to be considered. It is manifest, however, that what was to be done at Liverpool (besides that, it might * at the charterer's option have been done at Havre) [* 126] was but a small portion of the entire service to be rendered, and that the character of the contract cannot be determined thereby. It is true that as to the mode of delivery the usages of Liverpool would govern, as those of Algiers did in *Robertson* v. *Jackson*, 2 C. B. 412; 15 L. J. C. P. 28, and as, in the mode of taking on board the cargo, the usage of the port of loading would be regarded (see *Hudson* v. *Clementson*, 18 C. B. 213; 25 L. J. C. P. 234, and the custom set out in the pleadings in *Gattorno* v. *Adams*, 12 C. B. (N. S.) 560, which custom was proved at the trial at Guildhall sittings after Michaelmas Term, 1862, and made an end of the case). And in this point of view it seems impossible to exclude the law of England or even that of Hayti from relevancy in respect of the manner of performing that portion of the service contracted for,

which was to be rendered in their respective territories; because the ship must needs for the time being conform to the usages of the port where she is. And for a like reason, the adjustment of a general average at the port of discharge, according to the law prevailing there, is binding upon the shipowner and the merchant, who must be taken to have assented to adjustment being made at the usual and proper place, and, as a consequence, according to the law of that place. *Simonds* v. *White*, 2 B. & C. 805.

It is unnecessary, however, to discuss this point further, because we have been anticipated and the question set at rest, in an instructive judgment of the Judicial Committee, delivered by the Lord Justice TURNER, since the argument of the present case, in that of *The Peninsular and Oriental Steam Company* v. *Shand*, 3 Moore, P. C. C. (N. S.) 272; 12 L. T. 808; 11 Jurist (N. S.) 771; where a passenger in an English vessel from Southampton to Mauritius, where French law prevails, sued the shipowners for the loss of his luggage upon an alleged liability by French law, from which liability the shipowner was exempt by the English law; and the passenger obtained judgment in his favour in the Mauritius Court, which judgment was reversed upon appeal by the Judicial Committee, their Lordships holding that the law of England governed the case.

Next, as to the law of Portugal: the only semblance of [* 127] authority * for resorting to that law, as being the law of the place where the bottomry bond was given, is the case already referred to of *Cammell* v. *Sewell*, No. 13, p. 891, *post*, 5 H. & N. 728; 29 L. J. Ex. 350; and we consider that the judgment in that case, if applicable at all, as to which we say nothing, could only affect the validity of the bottomry, and not the duties imposed upon the shipowner towards the merchant by the fact of the bottomry, which duties must be traced to the contract of affreightment and the bailment founded thereupon.

The law of Hayti was not mentioned nor relied upon in argument; and there remain only to be considered the laws of Denmark and of France, between which we must choose.

In favour of the law of Denmark, there is the cardinal fact that the contract was made within Danish territory; and, further, that the first act done towards performance was weighing anchor in a Danish port.

For the law of France, on the other hand, many practical con-

siderations may be suggested; and, first, the subject-matter of the contract, the employment of a sea-going vessel for a service, the greater and more onerous part of which was to be rendered upon the high seas, where, for all purposes of jurisdiction, criminal or civil, with respect to all persons, things, and transactions, on board, she was, as it were, a floating island, over which France had as absolute, and for all purposes of peace as exclusive, a sovereignty as over her dominions by land, and which, even whilst in a foreign port — according to notions of jurisdiction adopted by this country (18 & 19 Vict. c. 91, s. 21; 24 & 25 Vict. c. 94, s. 9), and carried to a greater length abroad (Ortolan Diplomatie de la Mer. c. xiii., the work of a French naval officer, but of which a jurist might well be proud) — was never completely removed from French jurisdiction.

Further, it must be remembered that, although bills of lading are ordinarily given at the port of loading, charter-parties are often made elsewhere; and it seems strange and unlikely to have been within the contemplation of the parties that their rights or liabilities in respect of the identical voyage should vary, first, according as the vessel was taken up at the port of loading or not; and secondly, if she were taken up elsewhere, according to the law * of the place where the charter-party was made, or [* 128] even ratified. If a Frenchman had chartered the *Olivier* upon the same terms as the plaintiff did, it would seem strange if he could appeal to Danish law against his own countryman because of the charter-party being made or ratified in a Danish port, though for a service to be rendered elsewhere, by a transient visitor, for the most part within French jurisdiction.

Moreover, there are many ports which have few or no seagoing vessels of their own, and no fixed maritime jurisprudence, and which yet supply valuable cargoes to the ships of other countries. Take Alexandria, for instance, with her mixed population and her maritime commerce almost in the hands of strangers. Is every vessel that leaves Alexandria with grain under a charter-party or bill of lading made there, and every passenger vessel leaving Alexandria or Suez, be she English, Austrian, or French, subject to Egyptian law? As to not a few half-savage places in Africa and Asia, with neither seagoing ships nor maritime laws, a similar question — What is the law in such cases, or is there none except that of the Court within whose jurisdiction the litigation first arises?

Again, it may be asked, does a ship which visits many ports in one voyage, whilst she undoubtedly retains the criminal law of her own country, put on a new sort of civil liability, at each new country she visits, in respect of cargo there taken on board? An English steamer, for instance, starts from Southampton for Gibraltar, calling at Vigo, Lisbon, and Cadiz. A Portuguese going in her from Southampton to Vigo would naturally expect to sail subject in all respects to English law, that being the law of the place and the ship. But if the locality of the contract is to govern throughout, an Englishman going from Vigo to Lisbon on the same voyage would be under English law as to crimes and all obligations not connected with the contract of carriage, but under Spanish law as to the contract of carriage; and a Spaniard going from Lisbon to Cadiz during the same voyage would enjoy Portuguese law as to his carriage, and be subject to English law in other respects.

The cases which we have thus put are not extreme nor exceptional; on the contrary, they are such as would ordinarily give rise to the question, which law is to prevail? The inconven- [* 129] ience and * even absurdities which would follow from adopting the law of the place of contract in preference to that of the vessel, are strong to prove that the latter ought to be resorted to.

No inconvenience comparable to that which would attend an opposite decision has been suggested. The ignorance of French law on the part of the charterer is no more than many Englishmen contracting in England with respect to English matters might plead as to their own law, in case of an unforeseen accident.

Nor can we allow any weight to the argument, that this is an impolitic law, as tending to interfere with commerce, especially in making merchants cautious how they engage foreign vessels. That is a matter for the consideration of foreigners themselves, and nothing short of a violation of natural justice, or of our own laws, could justify us in holding a foreign law void because of being impolitic. No doubt the French law was intended to encourage shipping, by limiting the liability of shipowners, and in this respect it goes somewhat further than our own; but whether wisely or not is matter within the competence and for the consideration of the French legislature, and upon which, sitting here, we ought to pronounce no opinion.

Exceptional cases, should they arise, must be dealt with upon

their own merits. In laying down a rule of law, regard ought rather to be had to the majority of cases upon which doubt and litigation are more likely to arise; and the general rule, that where the contract of affreightment does not provide otherwise, there, as between the parties to such contract, in respect of sea damage and its incidents, the law of the ship should govern, seems to be not only in accordance with the probable intention of the parties, but also most consistent and intelligible, and therefore most convenient to those engaged in commerce.

In order to preclude all misapprehension, it may be well to add, that a party, who relies upon a right or an exemption by foreign law, is bound to bring such law properly before the Court, and to establish it in proof. Otherwise the Court, not being entitled to notice such law without judicial proof, must proceed according to the law of England (see *Brown* v. *Gracey*, note to *Lacon* v. *Higgins*, D. & R., N. P. 41, n.).

* For these reasons we have arrived at the same conclu- [* 130] sion as the Court of Queen's Bench; and without examining the grounds upon which that Court proceeded, we are of opinion that the judgment was right, and ought to be affirmed.

Judgment affirmed.

ENGLISH NOTES.

In the case (cited at p. 880, *ante*) of *The Peninsular and Oriental Steam Company* v. *Shand* (1865), 3 Moore P. C. (N. S.) 272, 12 L. T. 808, a contract had been made between British subjects in England for safe carriage from Southampton to Mauritius, and the question arose as to the legality of a stipulation limiting the company's liability. It was held that the English law prevailed. The decision of the Judicial Committee was rested on the ground of the *lex loci contractus*; but it is to be observed that this was also the law of the flag.

The principal case was considered in *The Patria* (1871), L. R., 3 A. & E. 436, 41 L. J. Ad. 23, 24 L. T. 849, where Sir R. PHILLIMORE considered that the rule in the principal case can only be applied to events not contemplated by the contract; and further intimated the opinion that the rule can only apply to questions on which the general maritime law does not furnish a rule. The question in *The Patria* arose out of a bill of lading signed by the German master of a German ship chartered by Germans. The bill of lading was in the English language and stipulated for payment of freight in English money by English consignees of goods to be carried to a German port, "the dangers of

the seas only excepted." Delivery was delayed owing to the blockade of the German port by the French. It was argued that the contract ought to be construed and given effect to on the principles of the German law, which, it was contended, introduced further modifications of the liability under the bill of lading. Sir R. PHILLIMORE laid down the rules: (1) That the rights and obligations of parties to a contract are to be determined by the law which they have declared themselves to intend. (2) That where there is no express declaration of intention, the presumption as to the law contemplated by the parties must be gathered from the circumstances of the case. (3) That where the contract is plain in its language, that language must receive the ordinary and natural construction, and does not admit the introduction of a law *dehors* the contract. (4) That the contract must be executed according to its terms, or abandoned with due compensation to the party injured, unless supervening unforeseen circumstances of a certain character have rendered the execution legally impossible, as where the port of destination has become the port of the enemy of the State to which the shipowner belongs. (5) That the happening of unforeseen events may, according to the circumstances, justify a reasonable delay in the execution of a contract which does not infer the abandonment of it. In the circumstances of the case, Sir R. PHILLIMORE held that the breach of contract was not justified either by the law of the flag (the German law), by the English law, or by general maritime law, and he pronounced in favour of the claim of the consignees for damages against the shipowners.

In *Moore* v. *Harris* (1876), 1 App. Cas. 318, 45 L. J. P. C. 55, 34 L. T. 519, a bill of lading made in England by the master of an English ship for transport of goods to Canada, contained *inter alia* a condition "that no damage that can be insured against will be paid for, nor will any claim whatever be admitted unless made before the goods are removed." Damage was done during the voyage, but the complaint was not lodged till fifteen days after the delivery. It was held by the Judicial Committee, in a judgment delivered by Sir MONTAGUE E. SMITH, that the bill of lading was a contract to be governed and interpreted by English law, and therefore no substantive defence arising from delay in making the claim could be made apart from the express condition contained therein; notwithstanding the provisions of article 1,680 of the Canadian Civil Code.

Where an English company contracted in France to carry the plaintiff and her luggage from a French port in an English ship to England, the Lords Justices (JAMES, BAGGALLAY, and BRETT) were all inclined to the opinion that the English law applied, but as the same result was attained by the French law, it was unnecessary to determine the ques-

tion. *Cohen* v. *South-Eastern Railway Co.* (C. A. 1877), 2 Ex. D. 253, 46 L. J. Ex. 417, 36 L. T. 130.

By the law of the flag is meant the personal law of the country of the shipowners, which is *primâ facie* the country whose flag the ship carries. If a shipowner domiciled in and subject to the sovereign of country A., has his ship registered in another country B., the law of the flag is the law of country A. *Chartered Mercantile Bank of India* v. *Netherlands India Steam Navigation Co.* (C. A. 1882), 10 Q. B. D. 521, 52 L. J. Q. B. 220, 48 L. T. 546. There the defendants were registered in Holland as a Dutch Company, and were also registered in England as an English Joint Stock Company. The contract of affreightment was made in the English language at Singapore, but the ship carried the Dutch flag, and was commanded by a Dutchman who signed the contract with the plaintiffs. The defendants were described as a limited company, that is, as an English company. The goods were lost through a collision between that vessel and another vessel of the defendants. It was held that English law applied. Brett, L. J., said (10 Q. B. D. p. 529): "It seems to me clear beyond dispute that this was an English bill of lading, and is to be construed according to the English rules of construction. It is true the bill of lading was given by the captain of a ship which is registered in Holland, and which ship carried the Dutch flag; and it is suggested that on that account the contract must be construed as a Dutch contract. If the ship be English, the whole of that contention falls to the ground; but even if this is to be regarded as a Dutch ship, it seems to me that the contract is nevertheless English. It may be true in one sense to say that where the ship carries the flag of a particular country, *primâ facie* the contract made by the captain of that ship is a contract made according to the law of the country whose flag the ship carries. But that is not conclusive. The question what the contract is and by what rule it is to be construed, is a question of the intention of the parties, and one must look at all the circumstances and gather from them what was the intention of the parties. In this case the persons for whose benefit the ship was employed and for whom the ship was earning profit, were undoubtedly the defendants, every one of whom is an Englishman. The defendants are registered in Holland as a Dutch Company, but they are also registered in England as an English Joint Stock Company, the contract was made in an English form. The contract therefore was made by a servant and agent of the defendants, who authorized that contract to be made in order to obtain profit for themselves: the contract was made for the carriage of goods from an English port to a Dutch port; it was made with an English merchant: the contract was drawn up in the English language in the ordinary form of an

English bill of lading, and the defendants were named in the contract as a limited company; in other words, they were described as an English company. It seems to me that upon taking those circumstances into consideration, the defence is irresistible that it was the intention of the parties that the contract should be an English contract, even though one considers the ship to have been a Dutch ship, which I think she was not." Lindley, L. J., said (10 Q. B. D. p. 540): "As regards the construction and effect of the contract itself as between the plaintiffs and the defendants, there can I think be no doubt that the parties were contracting with reference to English law, and not with reference to the law of the country under whose flag the ship sailed in order to obtain the privilege of trading with Java. This conclusion is not at all at variance with *Lloyd* v. *Guibert*, but rather in accordance with it. It is true that in that case the law of the flag prevailed; but the intention of the parties was admitted to be the crucial test; and the law of the ship's flag was considered as the law intended by the parties to govern their contract, as there really was no other law which they could reasonably be supposed to have contemplated. The plaintiff there was English, the defendant French, the *lex loci contractûs* was Danish; the ship was French, her master was French, and the contract was in the French language. The voyage was from Hayti to Liverpool. The facts here are entirely different, and so is the inference to be deduced from them. The *lex loci contractûs* was here English, and ought to prevail unless there is some good ground to the contrary. So far from there being such ground, the inference is very strong that the parties really intended to contract with reference to English law."

The observations in the judgment (p. 876, *ante*) of the principal case, as to the law of the place of the contract being that which *primâ facie* the parties intended, is cited and applied in the judgment of the Court in *Jacobs* v. *Crédit Lyonnais*, — itself an important case on the general question of conflict of laws in regard to contracts. — C. A. 1884, No. 10 of "Accident," 1 R. C. 338, 342, 12 Q. B. D. 589, 53 L. J. Q. B. 156.

In re Missouri Steamship Co., Monroe's claim (C. A. 1889), 42 Ch. D. 321, 58 L. J. Ch. 721, 61 L. T. 316, the question arose upon the validity of a condition for exemption from liability caused by the negligence of the master or the crew inserted in a charter-party made at Boston with an American by the Boston agent of an English company owning the British ship by which the goods were to be carried to England. Mr. Justice Chitty, after citing *The Peninsular and Oriental Co.* v. *Shand*, *supra*, and the principal case, observed that the principle upon which the latter case proceeds ought to be applied not merely to questions of construction and the rights incidental to or aris-

ing out of the contract of affreightment, but to questions as to the validity of stipulations in the contract itself, and he held the stipulations valid; first, on the general ground that the contracts are governed by the law of the flag; and secondly, on the special ground that from the special provisions of the contracts themselves it appears the parties were contracting with a view to the law of England. The Court of Appeal affirmed this judgment, considering that the whole of the circumstances showed clearly the intention to contract according to English law.

The law of the flag has been held to determine the validity of a bottomry bond as depending on the implied authority of the master of the ship. *The Karnak* (1867), L. R., 2 P. C. 505, 38 L. J. P. D. & A. 57, 21 L. T. 159; *The Gaetano and Maria* (1882), 7 P. D. 137, 51 L. J. P. D. & A. 67, 46 L. T. 835.

In *The Stettin* (1889), 14 P. D. 142, 58 L. J. P. D. & A. 81, 61 L. T. 200, goods were shipped on board a German ship for a German port under a bill of lading in the English language and in usual English form. It was argued that the German law applied, and Butt, J., decided the case on this assumption; but it appeared that on the point in question the German law did not differ from the English.

As to the construction and effect of a policy of insurance it has been held that there is no presumption apart from express stipulation in favour of the law of the flag. *Greer* v. *Poole* (1880), 5 Q. B. D. 272, 49 L. J. Q. B. 463, 42 L. T. 687.

In the construction of marriage settlements an important element is the matrimonial domicil. *Lansdowne* v. *Lansdowne* (1820), 2 Bligh, 60, 21 R. R. 43; *Anstruther* v. *Adair* (1834), 2 My. & K. 513; *Duncan* v. *Cannan* (1855), 7 De G. M. & G. 78, 24 L. J. Ch. 460; *Chamberlain* v. *Napier* (1880), 15 Ch. D. 614, 49 L. J. Ch. 628. Matrimonial domicil for this purpose includes a domicil which the husband promises to take up, the marriage taking place on the faith of that promise. *Colliss* v. *Hector* (1872), L. R., 19 Eq. 334, 44 L. J. Ch. 267.

In *Duncan* v. *Cannan* (1855), 7 De G. M. & G. 78, 24 L. J. Ch. 460, a marriage contract in the Scotch form was executed in London on the eve of the marriage between a domiciled Scotchman and a domiciled Englishwoman. It was held that an obligation by the husband in this contract must be construed according to the law of Scotland, although some years subsequently to the marriage the parties changed their domicil from Scotland to England. Again in *In re Barnard, Barnard* v. *White* (1887), 56 L. T. 9, a contract (in the nature of a marriage settlement) was made in Scotland in the Scotch form in consideration of an intended marriage, which was duly celebrated in Scotland between James Barnard, a domiciled Englishman, and a Scotch lady. By

the contract James Barnard bound himself after his death to pay to the intended wife an annuity of £200 and to pay £3000 to the children of the marriage. In a proceeding upon the administration of the estate of James Barnard under his will, evidence was given that according to Scotch law the widow was a creditor of James Barnard in respect of her annuity, and the children were also creditors so far as to take precedence of the voluntary provisions of his will. Kay, J., held that the contract being made in Scotland in the Scotch form must be presumed to have been intended to be construed and to take effect according to the law of Scotland, and gave judgment accordingly. In *Hamlyn* v. *Talisker Distillery Co.* (H. L. Sc. 1894), App. Cas. 202, the House of Lords broadly laid down the principle that the primary guide as to which law is to apply, is the intention of the contracting parties. A contract made in London between an English and a Scotch firm contained a clause agreeing to submit disputes to arbitration. Such an agreement is valid and effectual by English law, but would be ineffectual by Scotch law by reason that an arbiter was not named. An action having been brought in the Scotch Court to enforce the contract, the House of Lords held that the defendant was entitled to have the action stayed until the matter had been determined by arbitration. Effect was thus given to the arbitration clause according to its intention. There was no difficulty about procedure, because in the case of a valid submission to arbitration the Scotch Courts have long been accustomed to enforce the submission in the manner provided for by the statute in England. See No. 3 of "Arbitration." 3 R. C. 374 *et seq.*

AMERICAN NOTES.

In *Pope* v. *Nickerson*, 3 Story (U. S. Circuit Ct.), 465, a vessel owned in Massachusetts and bound from Spain to Pennsylvania, was forced to put into Bermuda, where the master sold vessel and cargo. In an action by shippers against owners to recover the amount of their consignment, it was held that the law of Massachusetts where they resided prevailed, and not that of Spain where the contract of shipment was made. Disapproving *Malpica* v. *McKown*, 1 Louisiana, 249.

The principal case is cited in Story on Conflict of Laws, § 286, *cc.*, and "the learned reader is referred to the valuable judgment delivered by Willes, J."

In *Talbott* v. *Merch. U. D. T. Co.*, 41 Iowa, 247; 20 Am. Rep. 589, plaintiff delivered to defendant, at Hartford, Connecticut, goods to be transported to Des Moines, Iowa, and received a bill of lading exempting the defendant from liability for losses by fire. The goods were destroyed by fire at Chicago, Illinois, on the route. The exemption was valid in Connecticut and in Illinois, but void in Iowa. *Held*, that the contract was governed by the laws of Connecticut.

In *Potter* v. *The Majestic, &c. Co.* (U. S. Circ. Ct. App.), 60 Federal Reporter, 625, 23 Lawyers' Reports Annotated, 716, a condition on a steamship passage-

No. 12. — Lloyd v. Guibert. — Notes.

ticket provided that "All questions arising on this ticket shall be decided according to English law, with reference to which this contract is made." The Court observed: "The contract was made in London or in Liverpool, where the shipowner had a place of business, between a British corporation, which was the shipowner, and a citizen of the United States. The contract was for the transportation, upon the high seas, of passengers and their baggage from the city of Liverpool to the city of New York, and if the statement that it was made with reference to English law had been omitted, nothing in the contract would have indicated an intention that it was to be controlled by the law of the United States. Under such circumstances it was an English contract, and governed by the law of England. 'The general rule that the nature, the obligation, and the interpretation of the contract are to be governed by the law of the place where it is made, unless the parties, at the time of making it, have some other law in view, requires a contract of affreightment, made in one country, between citizens or residents thereof, and the performance of which begins there, to be governed by the law of that country, unless the parties, when entering into the contract, clearly manifest a mutual intention that it shall be governed by the law of some other country.'" Citing *Liverpool, &c. S. Co.* v. *Phœnix Ins. Co.*, 129 U. S. 397; *Fonseca* v. *Cunard S. Co.*, 153 Massachusetts, 553; 12 Lawyers' Reports Annotated, 340.

The latter case was on a passenger-ticket quite similar to that in *The Majestic* case. The Court said: "The contract being valid in England, where it was made, and the plaintiff's acceptance of it being under the circumstances equivalent to an express assent to it, and it not being illegal or immoral, it will be enforced here, notwithstanding that a similar contract made in Massachusetts would be held void as against public policy." Citing *Greenwood* v. *Curtis*, 6 Massachusetts, 358; *Forepaugh* v. *Delaware, &c. R. Co.*, 128 Pennsylvania State, 217; 5 Lawyers' Reports Annotated, 508; *Re Missouri St. Co.*, L. R., 42 Ch. Div. 326; and *The Majestic* case, *supra*. See notes, 5 Lawyers' Reports Annotated, 508, &c.

In *Liverpool, &c. S. Co.* v. *Phœnix Ins. Co.*, *supra*, it was held that a contract of affreightment, made in an American port by an American shipper with an English steamship company doing business there, for the shipment of goods there and their carriage to and delivery in England, where the freight is payable in English currency, is an American contract and governed by American law, so far as regards the effect of a stipulation exempting the company from responsibility for the negligence of its servants in the course of the voyage, and consequently that such a stipulation was invalid. The principal case is cited in the opinion of Mr. Justice Gray, who says of it: "The decision was, in substance, that the presumption that the contract should be governed by the law of Denmark, in force where it was made, was not overcome in favour of the law of England by the fact that the voyage was to an English port and the charterer an Englishman, nor in favour of the law of Portugal by the fact that the bottomry bond was given in a Portuguese port; but that the ordinary presumption was overcome by the consideration that French owners and an English charterer, making a charter-party in the French language, of a French ship, in a port where both were

foreigners, to be performed partly there by weighing anchor for the port of loading (a place where both parties would also be foreigners), partly at that port by taking the cargo on board, principally on the high seas, and partly by final delivery in the port of discharge, must have intended to look to the law of France as governing the questions of the liability of the owner beyond the value of the ship and freight." This he calls "a peculiar state of facts." He then cites *Chartered Bank of India* v. *Netherlands St. Nav. Co.*, 9 Q. B. D. 118; 10 ibid. 521; and *Jacobs* v. *Crédit Lyonnais*, 12 Q. B. D. 589, and observes of them: "In two later cases, in each of which the judgment of the Queen's Bench Division was affirmed by the Court of Appeal, the law of the place where the contract was made was held to govern, notwithstanding some of the facts strongly pointed toward the application of another law; in the one case to the law of the ship's flag, and in the other to the law of the port where that part of the contract was to be performed for the non-performance of which the suit was brought." He further remarks that "this Court has not heretofore had occasion to consider by what law contracts like that now before us should be expounded. But it has often affirmed and acted on the general rule that contracts are to be governed, as to their nature, their validity, and their interpretation, by the law of the place where they were made, unless the contracting parties clearly appear to have had some other law in view." Citing *Cox* v. *United States*, 6 Peters, 172; *Scudder* v. *Union Bank*, 91 U. S. 406; *Pritchard* v. *Norton*, 106 U. S. 124; *Lamar* v. *Micou*, 114 U. S. 218; *Watts* v. *Camors*, 115 U. S. 353. He distinguishes *Pope* v. *Nickerson*, *supra*, and cites *Hale* v. *N. J. S. Co.*, 15 Connecticut, 539; 39 Am. Dec. 398; *Dyke* v. *Erie Railway*, 45 New York, 113; 6 Am. Rep. 43; *McDaniel* v. *Chicago, &c. Ry. Co*, 24 Iowa, 412; *Pennsylvania Co.* v. *Fairchild*, 69 Illinois, 260. He distinguishes and impliedly doubts *Brown* v. *Camden, &c. R. Co*, 83 Penn. St. 316, and *Curtis* v. *Delaware, &c.*, 74 New York, 116; 30 Am. Rep. 271; and alludes to an *obiter dictum* in *Barter* v. *Wheeler*, 49 New Hampshire, 9; 6 Am. Rep. 434, as "based on a strained inference from" *Pope* v. *Nickerson*, *supra*, and concludes that the general rule as to the law of place "requires a contract of affreightment, made in one country between citizens or residents thereof, and the performance of which begins there, to be governed by the law of that country, unless the parties, when entering into the contract, clearly manifest a mutual intention that it shall be governed by the law of some other country." The Chief Justice and Mr. Justice Lamar took no part; otherwise the opinion was unanimous, seven Justices sitting. It is safe to say that no case escaped the consideration of Mr. Justice Gray, and that this decision correctly presents the law of this country.

Redfield on Carriers (§ 475) cites the principal case, and Edwards on Bailments (§ 511) cites it to the doctrine of the master's power to bind the agent.

See also the later cases of *China, &c. Co.* v. *Force*, 142 New York, 90; *O'Regan* v. *Cunard S. Co.*, 160 Massachusetts, 356; 39 Am. St. Rep. 484; *The Guildhall*, 58 Federal Reporter, 796. In the last case Brown, District Judge, held that a contract of affreightment, made at Rotterdam, for carriage of goods to New York, exempting the carrier from liability for damages caused by collision, would not avail him in a suit in New York, it being

shown that the collision was caused by his negligence. This was evidently on the ground that the contract did not profess to shield him against the consequences of his own negligence. In this light must be read the remark in the opinion: "As against the consignee and owner here, she cannot commit torts on the high seas against his property with impunity, nor justify such torts except by some valid contract, proved according to the law of the forum."

Section IV. — *Transfer of Property.*

No. 13. — CAMMELL *v.* SEWELL.

(EX. CH. 1860.)

No. 14. — CASTRIQUE *v.* IMRIE.

(H. L. 1870.)

RULE.

An act of transfer of property in a thing duly done according to the law of the country where the thing is, and by a person having according to that law power to transfer the property, is valid as a transfer of the property everywhere.

Consequently the decree *in rem* of a Court competent according to the law of the country to deal with the property in a thing within the jurisdiction constitutes *res judicata* as to the property everywhere.

IN THE EXCHEQUER CHAMBER.

(*Error from the Court of Exchequer.*[1])

Cammell and Others v. Sewell and Others.

29 L. J. Ex. 350-356 (s. c. 5 H. & N. 728).

Conflict of Laws. — Ship. — Cargo. — Sale of Cargo by Master. — Judgment in Rem.

[350]

The agent in Russia of an English merchant resident in England shipped in Russia a cargo of deals on board a Prussian vessel, owned by a Prussian and commanded by a Prussian captain, to be carried to Hull, consigned to the

[1] This case was first argued, Nov. 29 and 30, 1859, before Cockburn, C. J., Wightman, J., Williams, J., Crowder, J., and Byles, J. It was again argued, Feb. 9, 10 and 11, 1860, before Cockburn, C. J., Wightman, J., Williams, J., Crompton, J., Byles, J., and Keating, J.

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English merchant under an ordinary bill of lading. The vessel was wrecked on the coast of Norway, but the cargo was brought safe on shore there, and could have been reshipped and sent on to England. By the law of Norway the captain of a vessel placed in the position above stated, though responsible to the owners if he sold improperly, had power to sell the cargo so as to convey a good title to a *bonâ fide* purchaser. The captain, in the exercise of his discretion, and without any absolute necessity, sold the cargo of deals to a *bonâ fide* purchaser, one Clausen, who re-sold them to the defendant, who sent them to England, where the plaintiff, representing the English merchant, the original owner, claimed them, and brought an action of trover for them: — *Held* (*dissentiente* Byles, J.), that, the action could not be maintained, on the ground that the property in the deals passed to the purchaser by the sale in Norway, according to the law of that country; that the Courts of this country will recognize the Norwegian law in that respect, and that the property could not be divested by the deals being afterwards brought to England.

Error was brought in this case by the plaintiffs to reverse the judgment given by the Court of Exchequer in favour of the defendants on a special case stating facts to the effect briefly embodied in the above head-note.

After argument, the Court took time for consideration.

[352] Crompton, J. — In this case I will deliver the judgment of Cockburn, C. J., Wightman, J., Williams, J., Keating, J., and myself. We are of opinion that the judgment of the Court of Exchequer should be affirmed. At the same time, we are by no means prepared to agree with the Court of Exchequer in thinking the judgment of the Diocesan Court in Norway conclusive as a judgment *in rem*; nor are we satisfied that the defendants in the present action were estopped by the judgment of that Court, or by what was relied upon as a judicial proceeding at the auction. It is not, however, necessary for us to express any decided opinion on those questions, as we think that the case should be determined on the real merits as to the passing of the property. If we are to recognize the Norwegian law, and if, according to that law, the property passed by the sale in Norway to Clausen as an innocent purchaser, we do not think that the subsequent bringing of the property to England can alter the position of the parties. The difficulty which we have felt in the case principally arises from the mode in which the evidence is laid before us, — in the mass of papers and depositions contained in the appendix. We do not see evidence in the case sufficient to enable us to treat the transaction as fraudulent on the part of Clausen; although there are circum-

stances which would have made it better for him not to have become the purchaser. Treating him, therefore, as an innocent purchaser, it appears to us that the questions are, did the property, by the law of Norway, vest in him as an innocent purchaser; and are we to recognize that law? The question, what is the foreign law, is one of fact; and here again there is great difficulty in finding out from the mass of documents what is the exact state of the law. The conclusion which we draw from the evidence is, that, by the law of Norway, the captain, under circumstances such as existed in this case, could not, as between himself and his owners, or the owners of the cargo, justify the sale, but that he remained liable and responsible to them for a sale not justified under the circumstances: whilst, on the other hand, an innocent purchaser would have a good title to the property bought by him from the agent of the owners. It does not appear to us that there is anything so barbarous or monstrous in this state of the law that we can say that it should not be recognized by us. Our own law as to *market overt* is analogous; and though it is said that much mischief would be done by upholding sales of this nature, not justified by the necessities of the case, it may well be that the mischief would be greater if the vendee were only to have a title in cases where the master was strictly justified in selling as between himself and the owners. If that were so, purchasers, who seldom can know the facts of the case, would not be inclined to give the value; and on proper and lawful sales by the master, the property would be in great danger of being sacrificed. There appears nothing barbarous in saying that the agent of the owners, who is the person to sell, if the circumstances justify the sale, and who must, in point of fact, be the party to exercise his judgment as to whether there should be a sale or not, should have the power of giving a good title to the innocent purchaser, and that the latter should not be bound to look to the title of the seller. It appears in the present case that one purchaser bought the whole cargo; but suppose the farmers and persons in the neighbourhood at such a sale buy several portions of goods it would seem extremely inconvenient if they were liable to actions at the suit of the owners, on the ground that there was no necessity * for the [* 353] sale. Could such a purchaser coming to England be sued in our courts for a conversion? and can it alter the case, if he re-sell, and the property comes to this country? Many cases were men-

tioned in the course of the argument, and more might be collected, in which it would seem hard that the goods of foreigners should be dealt with according to the laws of our own or of other countries. Among others, our laws as to the seizure of a foreigner's goods for rent due from a tenant, or as to the title gained in them, if stolen, by sale in *market overt*, might appear harsh. But we cannot think that the goods of foreigners would be protected against such laws, or that, if the property once passed by virtue of them, it would be changed by being taken by the new owner into the foreigner's own country. We think that the law on this subject was correctly stated by the LORD CHIEF BARON, in the course of the argument in the Court below, where he says, "If personal property is disposed of in a manner binding according to the law of the country where it is, that disposition is binding everywhere;" and we do not think that it makes any difference that the goods were wrecked, and not intended to be sent to the country where they were sold. We do not think that goods which were wrecked here would, on that account, be the less liable to our laws as to market overt, or as to the landlord's right of distress, because the owners did not foresee that they would come to England. Very little authority on the direct question before us has been brought to our notice. The only case which seems at variance with the principles we have enunciated is the case of *The Eliza Cornish* or *Segredo*, 1 Ecc. & Adm. Rep. 36, before the High Court of Admiralty. If that case be an authority for the proposition, that a law of a foreign country of the nature of the law of Norway, as proved in the present case, is not to be regarded by the Courts of this country, and that its effect as to the passing of property in a foreign country is to be disregarded, we cannot agree with the decision; and with all the respect due to so high an opinion in maritime transactions, we do not feel ourselves bound by it when sitting in a Court of Error. We must remark also, in the case of *Freeman* v. *The East India Company*, 5 B. & Ald. 617, the Court of Queen's Bench appear to have assented to the proposition that the Dutch law as to *market overt* might have had the effect of passing the property in such a case, if the circumstances of the knowledge of the transaction had not taken the case out of the provisions of such law. In the present case, (which is not, like the case of *Freeman* v. *The East India Company*, the case of an English subject purchasing in an English colony property which he was taken to know that the vendor had

no authority to sell,) we do not think that we can assume on the evidence that the purchase was made with the knowledge that the sellers had no authority, or under such circumstances as to bring the case within any exception to the foreign law, which seems to treat the master as having sufficient authority to sell so as to protect the innocent purchaser where there is no representative of the real owner. It should be remarked also, that Lord STOWELL, in the passage cited in the case of *Freeman* v. *The East India Company* from his judgment in the case of *The Gratitudine*, 3 C. Rob. at p. 259, states that if the master acts unwisely in his decision as to selling, "still the foreign purchaser will be safe under his acts." The doctrine of Lord STOWELL agrees much more with the principles on which our judgment proceeds than with those reported to have been approved of in the case of *The Eliza Cornish*. As on the evidence before us we cannot treat Clausen otherwise than as an innocent purchaser, and as the law of Norway appears to us on the evidence to give a title to an innocent purchaser, we think that the property vested in him, and in the defendants as sub-purchasers from him, and that having once so vested it did not become divested by its being subsequently brought to this country; and, therefore, that the judgment of the Exchequer should be affirmed.

COCKBURN, C. J. — Concurring in the judgment which has been just delivered by my brother CROMPTON, it further appears to me that the case may be also put upon another and a shorter ground. Although the goods in question were at one time the property of English owners, * the property in them was trans- [* 354] ferred to others by a sale valid according to the law of Norway, a country in which the goods were at the time of such sale. Even if it were admitted, for the purpose of argument, that by the law of the country to which the ship belonged the master would not have had the power to dispose of the ship or cargo in case of wreck which the law of Norway gives in such a case, and that the law of Norway would be overridden by the law of the nation to which the ship belonged, then it is to be observed, that the ship having been a Prussian ship, and the carriers, the shipowners, Prussians, and the goods having been shipped in Russia, the power of the master must depend on the law either of the country to which the ship belonged or of the place where the contract to carry was entered into. The law of England never having attached to the goods, as

they never were on board an English vessel or reached British territory, cannot apply to the case. The law of nations cannot determine the question, for the international law is by no means uniform as to the power of a master, as abundantly appears from the various cases which were brought to our notice during the argument. But no evidence was adduced to show what was the law of Prussia or that of Russia in the matter in question. The case, therefore, stands nakedly thus: a good contract of sale to transfer the property in Norway, without any evidence to show that by the general law of nations, or by the law of any nation which can possibly apply to the present case, the sale valid in Norway can be invalidated elsewhere.

Byles, J. It is with great regret and sincere distrust of my own opinion, that I am compelled to differ from the rest of the Court on the principal point in their judgment, — a point, however, which the Court below have stated to be one of very great difficulty, and on which they have abstained from expressing any opinion. The plaintiffs have an undisputed title to the property in question, unless either the law of Norway or the proceedings founded upon it have divested that title. The burthen, therefore, of showing title is entirely on the defendants. Laying out of consideration for the present all judicial proceedings in Norway, and all imputations of bad faith or of notice, or of negligence in the purchaser under whom the defendants claim, the first question is this, Can such a foreign law as the law of Norway is alleged to be, avail in England to take the property in the cargo out of the English owners? What is that law? It appears, as stated in the case, to be this, that if by stress of weather a vessel, whether Norwegian or foreign, be wrecked on the coast of Norway, the captain may, if he please, sell the cargo in the absence of the owner so as to convey a title to the purchaser. I say, "if he please," for it appears from the case not only that there need be no necessity to sell, but the captain need not even exercise ordinary prudence. No checks whatever exist controlling the exercise of this alarming power. Even the loose expression "wreck" is undefined. The captain is not bound to avail himself of the assistance or authorization of any public functionary, but he may sell at his election either by private contract or by public auction. More compendiously stated, the law of Norway amounts to this: that if the ship has satisfied the single, but indefinite, condition of a "wreck," the cargo, however

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large, valuable, uninjured, or capable of transhipment, may be sold by the master. It is obvious that if a law of this nature were recognized by other countries as giving validity to the title of a purchaser, property at sea would be exposed to a species of confiscation. Although fraud, when proved, might avoid the contract, yet great temptations to fraud would be held out, both to masters of vessels and to purchasers of cargoes. Such a law would encourage wrecking, and discourage succour to vessels in distress. Small islands and petty States might be tempted to establish it, and thereby become public nuisances to the traffic of maritime nations. The personal liability of the master to the owners of ship or cargo is commonly of little value, and would not amount to any substantial indemnity. No other instance of such a law has been produced at the bar in the course of the two arguments which we have heard. On the contrary, the general maritime law of the world should seem, from the authorities cited, to be in accordance with the law of England, * which has long [* 355] recognized the doctrine that the master has no power to sell ship or cargo so as to confer a title on an innocent purchaser, except in the presence of irresistible necessity. The observations of BAYLEY, J., on what he calls the general marine law, in *Freeman v. the East India Company*, apply to the cargo as well as to the ship, and amount to this: that neither ship nor cargo can by the general maritime law be sold so as to convey a title to the purchaser without absolute necessity. "The purchaser," adds BEST, J., "knowing that necessity alone, can justify the sale and give him a title to what he purchases, will assure himself that there is a real necessity for the sale before he makes the purchase." There seems, on principle, to be no real difference between the master's power to sell the ship and his power to sell the cargo, except that the sale of the cargo is a stronger measure than the sale of the ship. For, first, in selling the cargo, the master lays his hands on property not belonging to himself or his employers; and, next, however hopeless may be the wreck of the ship, the cargo, or part of it, may nevertheless be (as here, in fact, the whole of it was) uninjured and capable of transhipment. If it be urged, on the other side, that the distribution of the cargo by sub-sales among innocent purchasers, and their subsequent dispossession, would inflict great hardships, the answer is, that so also, when a ship is broken up, and her materials or her equipment sold in parcels to sub-purchasers, the

same hardships are inflicted, though perhaps to a smaller extent. The sale of the cargo, therefore, without necessity, seems as difficult to justify as the sale of the ship, and more so. Yet there are, or have been, instances of municipal law relating to the sale of a ship by the master even more strict than what seems now the general maritime law. According to the ancient French law, the master could not have sold the ship under any circumstances; although, according to the existing law, Code de Commerce, liv. ii. tit. iv. s. 237, he may sell the ship in the single case of what the law calls *innavigabilité*. This alleged law of Norway, therefore, placing the cargo at the caprice of the master, seems to me to be a law not only of an alarming nature, but, so far as I can perceive, without precedent, without necessity, and at variance with the general maritime law of the world; at least as understood in this country. I think the comity of nations would not recognize a law of this character; and such a conclusion seems to have in its favour the high authority of Dr. Lushington in *The Eliza Cornish* or *Segredo*. There seems to me to be a distinction between a sale under this alleged law of Norway and the two cases in our law, supposed to be analogous, of the sale of a stranger's goods under a distress for rent, and the case of sale in *market overt*, both which sales, it is assumed, would be held valid all over the world wherever the property might afterwards be. Sales under a distress for rent, and sales in *market overt* have no standard with which they may be compared. They are domestic, and not international transactions, and are not at variance with any general law of nations on the subject. But the law of Norway, so far as it applies to foreign ships and cargoes, may be, and for the reasons which I have given, I think, is, at variance with that chapter of the law of nations which constitutes the general maritime law. And even if this distinction did not exist I should feel great difficulty in acceding to the universal proposition, that in the absence of a judgment *in rem*, a disposition of movable property, effectual by the law of the country where that property may be at the time, is necessarily operative without any exception, into what country soever that personal property may afterwards go. The sale of a foreigner's goods for rent due by another person, without notice to the owner of those goods, or any opportunity for him to redeem or replevy, might perhaps present a very nice question, should these goods get back to the original owner's domicil; and as to the sale in *market overt*, the Norwegian law

(as has been already observed) authorizes a sale by private contract. I admit if there be a judgment *in rem*, founded on a recognized law, and pronounced by a competent tribunal of the country where a movable chattel then is, that that judgment determines and changes the property everywhere and between all persons, as in the cases of a condemnation of goods in the [* 356] * Exchequer, or of a ship in a lawful prize Court of Admiralty. And this leads to the inquiry whether there has been in this case a judgment *in rem*. I collect that the opinion of the rest of the Court is, that there has been no judgment *in rem*. I entirely agree with them. Indeed, even the language of the Court below is very cautious, for it speaks of the judgment as in the nature of a judgment *in rem*. In addition to the objections arising to these judicial proceedings from the law upon which they are founded, there are others: and among them there is this objection to the decree of the Diocesan Court, (which alone can be contended to be a judgment *in rem*), that at the time of that judgment the goods in question were not within the jurisdiction of the Diocesan Court, for they had long before arrived in England. As to the effect of the same judgment, as a judgment *inter partes*, I collect that both the parties to this action are not in privity with that judgment; because the defendant's title to the deals had accrued before the judgment. This is not a mere objection of form against the justice of the case; for that judgment is contended to be an estoppel, and not examinable. It becomes unnecessary, therefore, to discuss any questions of fraud or notice in the original purchaser of the deals, for if the law of Norway does not justify the defendants here, and if there be no binding Norwegian judgment, the judgment of the Court below should be reversed; but as the rest of the Court are of a different opinion on the first point, the judgment of the Court of Exchequer will be affirmed.

Judgment affirmed.

Castrique v. Imrie.

39 L. J. C. P. 350-365 (s. c. L. R., 4 H. L. 414; 23 L. T. 48; 19 W. R. 1).

Conflict of Laws — Ship and Shipping. — Maritime Lien. — Foreign Judgment, — In Rem; In personam. [350]

An adjudication of a foreign Court, acting within the jurisdiction conferred upon it by the State within whose lawful control the subject-matter adjudicated upon is found, is conclusive against all the world, even though it pro-

fesses to proceed on an assumption of the law of another country, and that assumption is erroneous.

If the intention of the foreign Court was to deal with the subject-matter of the suit, an inference arises that the adjudication was *in rem*, though the proceedings may have been instituted *inter partes*.

Such an intention will be inferred in the case of proceedings to enforce a maritime lien in a State subject to a code founded on the civil law, or where the supposed owners of the chattel, the property in which is dealt with by such Court, have been necessarily summoned to attend the proceedings.

The master of a British ship drew a bill upon his owner for necessaries supplied to the ship in the course of her voyage. The owner, who had in the mean time mortgaged the ship and then become bankrupt, declined to accept the bill, and it was dishonoured at maturity. Afterwards, the ship having put into Havre, the holder of the bill indorsed it to a French subject, who commenced a suit upon it in the Court there, against the master, and against the ship, and obtained judgment against the master with privilege upon the ship, and the judgment having been affirmed by the Superior Court there, the vessel was sold. By the French law a mortgage or sale of the property in a ship while on its voyage, to the prejudice of creditors for necessaries supplied in the course of the voyage, is not recognised unless the transaction appears on the ship's papers. Also, in proceedings in a French Court to enforce a maritime lien by sale of the ship, all who appear to be the owners of the ship must be summoned. The original owner and his assignee in bankruptcy were cited accordingly before the Court at Havre, but they did not appear. After the decree for sale was made, the mortgagee instituted proceedings at Havre to replevy the ship, but his claim to intervene was disallowed in consequence of a mistaken view of English law adopted by the French Court, though evidence of the English law was produced and admitted before it.

Held, that the judgment of the foreign Court was a judgment *in rem*, and passed the property in the ship; and, as there was no suggestion of fraud, was unimpeachable in an English Court of justice.

This was a proceeding in error from the Court of Exchequer Chamber, which had reversed a previous decision of the Court of Common Pleas, and declared that the judgment of a foreign Court had been a judgment *in rem*, and could not be disturbed in an English Court. The facts out of which the question arose [* 351] were stated * in a special case, and, so far as are material, were as follows: —

In December, 1853, the British ship, the *Ann Martin*, sailed on a voyage to Australia and back, and in the course of the voyage the master of the ship, one W. Benson, in consideration of necessaries supplied to the ship at Melbourne, drew a bill of exchange for £601 16*s.* 6*d.* upon his owner in this country, one J. B. Claus, which bill

the owner, who had in the mean time mortgaged the ship and become bankrupt, declined to accept, and it was dishonoured.

The mortgage referred to was made by a bill of sale, dated 30th November, 1854, which was duly executed and registered in conformity with the statutes then in force, and by which Claus, the then registered owner, assigned the ship to one Thomas Harrison, with power of sale in default of payment by Claus of £4,000 and interest. By deed dated 2nd February, 1855, which was duly registered, Harrison assigned to one R. Emslie; and by another deed dated the 9th of April, 1855, Emslie assigned the ship to the plaintiff Castrique. In consequence of the fact that the Merchant Shipping Act, 1845, which rendered the sale of ships while on voyage void unless registered, having been repealed by the Merchant Shipping Act, 1854, which Act came into operation on 1st May, 1855, the transfer to the plaintiff was not registered until April, 1857.

The *Ann Martin* having, in the course of her voyage home, put into Havre, the holder in England of the dishonoured bill of exchange for the £601 16*s.* 6*d.* indorsed it over to Trotteux & Co., French subjects resident at Havre, in order that advantage might be taken of the law of France, by which a ship becomes liable to seizure for necessaries supplied in the course of a voyage on the contract of the master. Trotteux & Co. at once instituted a suit before the Tribunal de Commerce against Benson, the master, and against the ship, and on the 15th of May, 1855, that tribunal condemned Benson, "in his capacity of captain of the vessel and master, and by privilege on that vessel, to pay to the plaintiff (Trotteux & Co.) the sum of £601 16*s.* 6*d.*, being the amount of the bill drawn at Melbourne," together with interest and costs. In consequence of the judgment, the ship was seized and detained at Havre. But according to the law of France a sale of the ship could only be decreed after the judgment of the Tribunal de Commerce had been affirmed by the civil tribunal of the district in which the Court of Commerce was situated, and the persons appearing by the ship's papers to be the owners of the ship had been summoned before such civil tribunal. Accordingly Claus and his assignee in bankruptcy, one Bird, were summoned, but they did not appear. Neither Emslie, the registered owner, nor Castrique, his assignee, were summoned. And the civil tribunal, in default of appearance, confirmed the judgment of the Court of Commerce.

and a sale of the ship by auction was decreed. After the last-mentioned decree, namely, on the 22nd of September, 1855, Castrique commenced, in the Court of Havre, a suit to replevy the ship, but the Court by its judgment, given 19th April, 1856, disallowed the plaintiff's intervention, and dismissed the suit, on the ground that it was impossible that by the law of England a transfer of the property in the ship could take place in the course of a voyage to the prejudice of creditors upon a maritime lien without the transaction appearing on the ship's papers. The plaintiff appealed against this judgment to the Court of Appeal at Rouen, when an opinion of the then Attorney-General for England was read, stating that under the law of England the creditors for the money advanced to Benson had no claim upon the ship, but only as general creditors of the bankrupt, and that the property in the ship passed to the mortgagee by the bills of sale.

Nevertheless, the Court of Appeal confirmed the decision of the inferior Court, not only on the ground taken by that Court, but also on another erroneous impression of our law, namely, that the bill of sale to Castrique not having been registered, it was by our law invalid, and he had, therefore, no *locus standi*. But in fact such registration was not necessary, for the Merchant Shipping Act, 1845, which made transfers of ships void unless registered, was repealed by the Act of 1854, which came into operation on
[* 352] 1st * May, 1855. The ship was accordingly sold, and was bought by the defendants, who were English subjects, and who brought her to Liverpool, and registered her *de novo* in their own names.

Afterwards the plaintiff demanded possession of the ship, and being refused, brought his action for the conversion, on the ground that the sale at Havre was void as against him.

On the argument of the special case in the Court of Common Pleas, Williams, J., Willes, J., Byles, J., and Keating, J., were of opinion that the judgment of the foreign Court was given upon proceedings *in personam* and not *in rem*, and was not binding on the plaintiff. But in the Court of Exchequer Chamber, Cockburn, C. J., Wightman, J., Blackburn, J., Hill, J., Martin, B., Bramwell, B., and Channell, B., reversed that decision. The plaintiff now brought error to this House.

The Judges were summoned, and Bramwell, B., Blackburn, J., Keating, J., Mellor, J., Cleasby, B., and Brett, J., attended.

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Matthews for the appellant. — The foreign Court, if in truth it intended to and did direct the sale of the ship itself and not merely of the master's interest in it, proceeded on the application of French law to a matter which ought to have been regulated by purely British law, for all the parties to the bill, as well as the owners of the vessel, were British subjects, and the bill was drawn in a British colony, and it is not disputed that the decision of the Court was not in accordance with British law, for by that law necessaries supplied to a ship do not give a lien upon it. *The Neptune, Hodges* v. *Sims*, 3 Knapp, P. C. 94. The foreign judgment is not binding here, as it might have been if brought on proceedings *in rem*, for these proceedings were in the first instance *in personam*. To have been proceedings *in rem* they should have been against the ship in the first instance. *The Bold Buccleugh, Harmer* v. *Bell*, 7 Moore, P. C. 267. The *lex loci contractûs* regulates the rights of the parties, and as the French Courts disregarded that law the decision is not binding here. *Simpson* v. *Fogo*, 29 L. J. Ch. 657. Even if it had mistaken or misapplied the English law instead of wholly disregarding it, it would be inoperative in England. *Norelli* v. *Rossi*, 2 B. & Ad. 757; *Pollard* v. *Bell*, 8 T. R. 434; 5 R. R. 404; *Bird* v. *Appleton*, 8 T. R. 562; 1 East, 111; 5 R. R. 468. Moreover, the decision is not binding on Castrique inasmuch as he was never cited; so far, therefore, as he is concerned it is void. *Buchanan* v. *Rucker*, 1 Camp. 63; 9 East, 192; 9 R. R. 531. But in fact the suit was against the master personally, and all that the French Courts professed to sell was the interest or claim of the master in or against the ship in respect of the liability he had personally incurred for the necessaries supplied to the ship, and judgment having gone against the master upon the bill, the right was given to the holder of the bill to sell the claims of the master upon the ship and nothing more.

Matthews cited also French law to show that the judgment was not in accordance even with that law.

Mellish and Crompton Hutton, for the defendants in error. — The mistake of the foreign Court as to the law of England cannot affect this judgment, for it was a judgment *in rem*, obtained without fraud with respect to property within the jurisdiction of the Court, given in conformity with the law of France after evidence of the law of England had been tendered and duly considered. It is therefore binding on all the world. *Cammell* v. *Sewell*, p. 891, *ante*; *Hughes* v. *Cornelius*, 2 Shower, 232, Abbott on Shipping, Pt. 2, chap. iii. s. 9, 11th ed. p. 116.

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Matthews replied.

The following question was submitted to the Judges: —

Whether, under the circumstances stated in the special case, the plaintiff is entitled to recover from the defendants the ship in question and her appurtenances?

[* 353] Blackburn, J. (on Feb. 18, 1870). My * Lords, I have the honour to deliver the joint opinion of my brothers Bramwell, Mellor, Brett, Cleasby, and myself. We answer your Lordships' question by saying, that in our opinion the plaintiff was not entitled to recover from the defendants.

Our reasons for this opinion are as follows: —

It appears by the case that the plaintiff held a mortgage on the British ship *Ann Martin*, registered at Liverpool. This mortgage was originally made by Claus, the then owner of the ship, on the 30th of November, 1854, to Harrison. It was registered by Harrison at Liverpool on the 2nd of December, 1854, and was by him transferred to Emslie on the 2nd of February, 1855, and this transfer was registered at Liverpool on the 3rd of February, 1855: and the mortgage was transferred by Emslie to the plaintiff on the 9th of April, 1855: but this last transfer was registered at Liverpool on the 13th of April, 1857, and not before. The certificate of registry never was produced to the controller or collector of Liverpool, and no endorsement of these various transfers was ever entered upon it.

The first question which arises is, whether on these facts the plaintiff had any title in the ship. It was not contested at the bar, and we think it quite clear, that the law which governed the title to British ships during the period of those transactions up to the 1st day of May, 1855, was the 8th & 9th Vict. c. 89; and it is also clear that, on the true construction of the 37th section of that Act, no title in the ship was conveyed by any one of those transfers till registered at Liverpool, but that when so registered the title was complete, and that the endorsement on the certificate of the transfer is not essential to the title. Consequently, on the last day of April, 1855, the ship (as far as the mortgage extended) was the property of Emslie, and any action for a conversion of the ship prior to the 1st of May, 1855, must have been brought in the name of Emslie, though as the law then stood the present plaintiff might at any time, by registering his transfer from Emslie, perfect his title as transferee of the mort-

gage. But by the 17th & 18th Vict. c. 120, the 8th & 9th Vict. c. 89, is repealed as from the 1st day of May, 1855, and the now plaintiff Castrique's transfer was not registered till the 13th of April, 1857.

It is necessary to decide in this case whether Castrique can maintain an action of trover for a conversion subsequent to the register of his title after the 13th of April, 1857, and we agree in what is tacitly decided by both Courts below, that he might do so. The Legislature could not intend, by the repeal of the 8th & 9th Vict. c. 89, to deprive persons in the situation of the plaintiff of the right they had already acquired.

In the interval between the repeal of the Act 8 & 9 Vict. 89, namely, the 1st of May, 1855, and the actual registration of that transfer, namely, the 13th of April, 1857. there is a question whether any action depending on the right to the possession of the ship ought to have been brought by Emslie or by Castrique. This question might have come before the French Court in the course of the proceedings before them, to determine as a question of English law. It is not necessary for us in the present action to determine it, or to express any further opinion than that it was one on which good English lawyers might differ.

So far the case depends only on English law, and we think it clear that the plaintiff was entitled in this state of facts to recover in an action of trover for the conversion on the 20th day of August, 1857, unless the effect of the proceedings in France, and the sale of the ship under them on the 29th of May, 1857, was to confer on the defendant a title superior to that of the plaintiff.

What were the nature and effect of the proceedings in France? what jurisdiction the Courts there had? and what the effect of their determinations really was? are all questions depending on the French law, and it must be ascertained as a fact what that French law is. When once that fact is ascertained it becomes a question of English law to determine what effect is to be given to it in an English Court.

In the present case the parties at the trial agreed upon a statement of the facts, and gave the Court authority to draw inferences from them; but, unfortunately, *they have [*354] stated the facts as to the French law very imperfectly, and the result has been that the Court of Common Pleas has drawn one inference as to the French law, and the Court of

Exchequer Chamber has drawn another. It is very possible that a French lawyer may justly say that neither is right; it is quite certain that both cannot be. It is now for your Lordships to determine what the proper inference is, and on that point we must express our opinion. It is quite possible that the inference we draw may not be the correct one, but we apprehend that all that can be required of a tribunal adjudicating on a question of foreign law is to receive and consider all the evidence as to it which is available, and *bonâ fide* to determine on that, as well as it can, what the foreign law is. If from the imperfect evidence produced before it, or its misapprehension of the effect of that evidence, a mistake is made, it is much to be lamented, but the tribunal is free from blame.

We think that some points are clear. When a tribunal, no matter whether in England or a foreign country, has to determine between two parties, and between them only, the decision of that tribunal, though in general binding between the parties and privies, does not affect the rights of third parties, and if in execution of the judgment of such a tribunal process issues against the property of one of the litigants, and some particular thing is sold as being his property, there is nothing to prevent any third person setting up his claim to that thing, for the tribunal neither had jurisdiction to determine nor did determine anything more than that the litigant's property should be sold, and did not do more than sell the litigant's interest, if any, in the thing. All proceedings in the Courts of common law in England are of this nature, and it is every day's experience that where the sheriff, under a *fieri facias* against A., has sold a particular chattel, B. may set up his claim to that chattel either against the sheriff or the purchaser from the sheriff. And if this may be done in the Courts of the country in which the judgment was pronounced, it follows of course that it may be done in a foreign country. But when the tribunal has jurisdiction to determine not merely on the rights of the parties, but also on the disposition of the thing, and does in the exercise of that jurisdiction direct that the thing, and not merely the interest of any particular party in it, be sold or transferred, the case is very different.

It is not essential that there should be an actual adjudication on the status of the thing. Our Courts of Admiralty, when property is attached and in their hands, on a proper case being shown

that it is perishable, order that it shall be sold and the proceeds paid into Court to abide the event of the litigation. It is almost essential to justice that such a power should exist in every case where property, at all events perishable property, is detained.

In a recent case of *Stringer* v. *Marine Insurance*, in the Queen's Bench, 38 L. J. Q. B. 321; L. R., 4 Q. B. 676, it appeared that the American Prize Court, *pendente lite*, ordered a valuable cargo, which was claimed as prize, to be sold, and that not only without any adjudication that it was a prize, but although the decision of the Court below had been against the captors, and that decision was ultimately affirmed on appeal. We apprehend that it is clear that in all such cases Courts sitting under the same authority must recognize the title of the purchaser as valid. In Story on the Conflict of Laws, s. 592, it is said that the principle that the judgment is conclusive " is applied to all proceedings *in rem* as to moveable property within the jurisdiction of the Court pronouncing the judgment. Whatever it settles as to the right or title or whatever disposition it makes of the property by sale, revendication, transfer, or other act, will be held valid in every other country where the question comes directly or indirectly in judgment before any other foreign tribunal. This is very familiarly known in the cases of proceedings *in rem* in foreign Courts of admiralty, whether they be causes of prize or bottomry, or salvage or forfeiture, of which such Courts have a rightful jurisdiction founded in the actual or constructive possession of the subject-matter."

We may observe that the words as to an *action being [*355] *in rem* or *in personam* and the common statement that the one is binding on third persons and the other not, are apt to be used by English lawyers without attaching any very definite meaning to those phrases. We apprehend the true principle to be that indicated in the last few words quoted from Story. We think the inquiry is first whether the subject-matter was so situated as to be within the lawful control of the state under the authority of which the Court sits, and secondly, whether the sovereign authority of that state has conferred on the Court jurisdiction to decide as to the disposition of the thing, and the Court has acted within its jurisdiction. If these conditions are ful filled the adjudication is conclusive against all the world.

In the case of *Cammell* v. *Sewell*, (p. 891, *ante*), a more general

principle was laid down, viz., that "if personal property is disposed of in a manner binding according to the law of the country where it is, that disposition is binding everywhere." This we think as a general rule is correct, though no doubt it may be open to exceptions and qualifications, and it may very well be said that the rule commonly expressed by English lawyers, that a judgment *in rem* is binding everywhere, is in truth but a branch of that more general principle. But we think that it is unnecessary in this case to resort to the more general principle or to inquire what qualifications, if any, ought to be attached to it as a general rule. The ship *Ann Martin* was in France, and if the transfer of the ship in consequence of the decree of the French court, was in France good against all the world, it could only be so on the ground that the judgment of the French court was, according to the French law, a judgment *in rem* transferring the ship itself, and not merely the interest, if any, of Claus in the ship.

The first question therefore, as it seems to us, which must be determined is one of fact, namely, what was the nature of the proceeding before the Tribunal de Commerce at Havre, and what was the meaning and effect of their judgment on the 15th of May, 1855, pronounced against Benson as master of the *Ann Martin*, "et par privilége sur ce navire" for the amount of the bills drawn by Benson for necessaries supplied to that ship at Melbourne. It was under that judgment that the ship was arrested and ultimately sold; and as we must (at least till the contrary is clearly proved) give credit to a foreign tribunal for knowing its own law, and acting within the jurisdiction conferred on it by that law, it must, we think, be taken that the French law gave that Tribunal of Commerce jurisdiction to cause the ship to be arrested, and, through the intervention of the Civil Tribunal, to be sold; though it remains a question whether it was by a proceeding analogous to that of our own admiralty Courts (in which the ship itself and the interests of all persons in it are disposed of), or by a proceeding analogous to that under a *fieri facias* in furtherance of the judgment of one of our Courts of common law (in which only the interest, if any, of the litigant party is disposed of).

On this point the case is stated in a very unsatisfactory manner: but we must form the best opinion we can from the very

meagre materials laid before us. Your Lordships, sitting here as the ultimate Court of Appeal, take judicial notice of all English laws, including the general maritime law as it is administered in England by the Courts of Admiralty, but you do not know the municipal laws of foreign countries, except in so far as evidence to prove them is brought before you.

Mr. Matthews in the course of his argument wished to refer to various parts of the Code Civil and the Code de Commerce, and to ask your Lordships to construe them for yourselves. But this would have required your Lordships to take notice of facts (for foreign laws are facts) not proved in the cause; and there is great and obvious danger that any attempt to construe the written code of a foreign law, without the aid of foreign lawyers to explain it, might lead to error.

The Civil Tribunal of Havre, in the collateral suit to procure a *main levée*, so attempted to construe our Ships Registry Acts, and very naturally made a mistake. If the French law required the French tribunal to construe the English Acts for themselves this was a misfortune for * which the French [* 356] tribunal is not to blame; but it affords an example of the danger of such a mode of proceeding. We know, however, that both in our own country and in every other, persons who supply necessaries to a ship in a foreign port may, under some circumstances, acquire a right over the ship. In England such a right was required to be by a written contract or hypothecation, which, says Lord Tenterden, in his last edition of Abbott on Shipping (5 ed. p. 122, part 2, chap. 3, article 23), "does not transfer the property in the ship, but only gives the creditor a privilege or claim upon it to be carried into effect by legal process." The mode in England of carrying this privilege into effect has been instituting a suit in the Court of Admiralty against the ship, causing it to be arrested by warrant, and ultimately, if no one successfully intervenes to prevent it, selling the ship.

As in England the Court of Admiralty was liable to a prohibition if it attempted to institute a suit against the owners, (see *Johnson* v. *Shippen*, 2 Ld. Raym. 983), there never could be any doubt in England that such proceedings were against the ship. The contention of the defendant in the present case is that the proceeding "par privilége sur ce navire" was a proceeding analogous

to the seizure of a ship by the warrant of the English Admiralty as the beginning of a suit against the ship. The case before us, page 5, A. 3, states that the proceeding was commenced and presented by Trotteux against the said William Benson " and against the ship." If this is meant to be a statement of the fact on which the parties, having before them the evidence of French lawyers on both sides, agreed, it seems to conclude the question. It was, however, argued for the appellants that this was merely a phrase which had slipped in by accident, and that the words " par privilége sur ce navire " were not to be understood as meaning that the holders of the bills drawn in favour of those who supplied the necessaries to that ship had made a *primâ facie* case sufficient to entitle them to arrest that ship and try by legal process to carry their claim into effect against the ship (which is the sense in which Lord Tenterden uses the word " privilege "); but that it really meant that having obtained a judgment against the master, they had in effect obtained a judgment against his owners personally, and, therefore, were entitled to seize their debtor's ship and sell his interest, if any, in it, but no more; and that the meaning of " privilege " was no more than a preferential right to be paid out of the proceeds of the execution before an ordinary creditor, analogous to the right of a landlord in England to receive a year's rent from the sheriff.

We, however, do not think this latter interpretation consistent with the course of the proceedings as disclosed in the French Courts in the case. If the Tribunal of Commerce was merely awarding execution against the ship as far as it was a debtor's property, it was irrelevant and premature to say whether that debt would have priority of payment or not. If it was doing what was equivalent to the process of our own Court of Admiralty in issuing a warrant to seize the ship in order to institute a suit against it, there was very good reason for setting forth as the ground of this proceeding that the debt was such as to give rise to at least a plausible ground for a claim against the ship to be carried into effect by legal process, which is Lord Tenterden's understanding of the word " privilege." And the subsequent proceedings in the Civil Tribunal, though imperfectly stated in the case, seem to be very like the proceedings in the Court of Admiralty after the ship is libelled. All those who had any claim on the ship, of which, either by the ship's papers or other-

wise, either Trotteux or the Civil Tribunal had notice, were summoned to appear, and they having made default, a judgment was pronounced, not as it appears to us against them personally, but that the seizure of the ship should be confirmed, and that she should be sold; and notice of this judgment was served on Claus' assignee in bankruptcy, who had thereby another opportunity given him to oppose the sale of the ship.

We can, therefore, come to no other conclusion of fact than that this proceeding has been correctly stated to be a *proceeding against the ship, therein agreeing with the [*357] judgment of the Exchequer Chamber and differing from that of the Court of Common Pleas.

But it was argued that this judgment of the French Court was to be disregarded because it was founded on a misapprehension of the English law. It appears that, though Castrique had no formal notice of the proceedings, he became aware of them before the judgment was executed by the sale of the ship; and on the 22nd of September, 1855, relying upon his title as mortgagee according to English law, commenced a suit to release the ship from detention; and the Civil Tribunal, under a misapprehension of the English law, decided that the mortgage could not be available until it was registered on the ship's certificate, and consequently that Castrique had no *locus standi* (qu'ils n'ont pas dehors qualité pour critiquer la poursuite de Trotteux).

We may, without arrogance, say that on this question of English law the French Court were wrong, and the error was a material one, for if the French Court had rightly understood the English law, they would have known that Emslie at least had a perfect title to the ship, and that, if that title was not transferred to Castrique so as to enable Castrique to sue or intervene in his own name, he could have used that of Emslie, so that in one way or the other there was a *locus standi*. And the ultimate judgment of the Court of Rouen, after this action was tried, which is set forth in a note to the report of this case in 8 C. B., N. S., page 38, shows us that if Castrique had been permitted to oppose the sale, he would have succeeded, for he would have satisfied the French Court that according to the maritime law, as administered in France, the law of the flag (in this case that of England) alone ought to govern the question, though the ship was locally within the Empire of France. And that judgment,

with perfect accuracy, states that not being holders of any instrument of hypothecation, the holders of the bills "ne peuvent réclamer aucun privilége d'après la loi anglaise," and that "cette loi . . . exige certaines formalités qui n'ont pas été remplies, pour que les avances faites au capitaine en cours de son voyage soient privilégiées." But we cannot agree that this error renders the French judgment void altogether in a foreign country. Fraud will indeed vitiate everything; though we may observe that there is much force in what Mr. Mellish suggested in the course of his argument in this case, that even if there had been fraud on the part of the litigants, or even of the tribunal, it would be very questionable whether it could be set up against a *bonâ fide* purchaser who was quite ignorant of it. But fraud in the present case is out of the question, and we cannot think that a mistake on the part of the Court as to a foreign law is equivalent to fraud. It would be peculiarly ungracious to assert this doctrine in a case where the English Courts below have differed on the question what the French law is. We think, as already stated, that all that can be required of the tribunal that has to decide on a question of foreign law is that it should receive and consider all the evidence as to what the foreign law is, and *bonâ fide* determine on that as well as it can.

Various cases were cited as authorities that where a foreign Court has mistaken or misapplied the English law, the Courts of this country will not regard the foreign judgment, but we think they do not bear out any such general position. One class of cases — such as *Pollard* v. *Bell*; *Bird* v. *Appleton*; *Dalgleish* v. *Hodgson*, 7 Bing. 495; and several others — proceed on a principle not applicable to the present case. A judgment in an English Court is not conclusive as to anything but the point decided, and therefore a judgment of conviction on an indictment for forging a bill of exchange, though conclusive as to the prisoner being a convicted felon, is not only not conclusive, but is not even admissible evidence of the forgery in an action on the bill, though the conviction must have proceeded on the ground that the bill was forged. But very early in insurance cases a practice began of treating the judgment of a prize Court condemning a vessel as being the property of an enemy as not only conclusive evidence that the vessel was condemned, which of *course
[*358] it was, but also as conclusive evidence that the vessel was not neutral.

There are many cases which proceed on the principle, that where it can be made to appear that the judgment of the Prize Court did not proceed, on the ground that the vessel was an enemy's property, it cannot be conclusive evidence that she was not neutral. In *Lothian* v. *Henderson*, 3 Bos. & P. 544; 7 R. R. 878, the judgment of the House of Lords was that in a policy on a ship, warranted neutral, a stipulation that a condemnation should not be conclusive evidence that the vessel was not neutral was effectual. Lord ELDON, in delivering that judgment, expresses a strong opinion that the practice of receiving the sentences of Prize Courts as conclusive of the collateral matter was originally a mistake, but had become inveterate, and could not now be disturbed. And he also intimates an opinion that the class of cases just alluded to were attempts to graft a vicious exception on a rule originally vicious but now become law. It is unnecessary to form or express any opinion on this class of cases, further than that they proceed on a principle that has no bearing on the present question.

Novelli v. *Rossi*, which was relied on, also proceeds on a principle not at all applicable to the present case. It is clear that no judgment of a foreign Court can have any effect, unless the subject-matter of the decision (whether *inter partes* or *in rem*) is within the lawful control of the state whose tribunal has pronounced the judgment. In *Novelli* v. *Rossi*, a Frenchman had at Lyons drawn a bill on an Englishman in London. The defendant had at Manchester indorsed it to the plaintiff. Afterwards the defendant instituted a suit in France to have it declared that he and all prior parties were discharged from their obligations on the bill, on account of a cancellation of the acceptance in London by mistake; and notwithstanding the opposition of the plaintiff, the French Court, on a mistaken view of the English law, pronounced a judgment to that effect. But though the French Court had jurisdiction to determine that no one should sue on the bill in their Courts, they had none to determine that the plaintiff should not sue in an English Court on an English contract. If they had taken a correct view of the English law there would have been a defence, because such was the English law, not because the French Court had so decided. Being wrong, there was no defence, not because the French Court made a mistake, but because it had no jurisdiction.

The same principle will, we believe, be found to lie at the bottom of those cases in which our Courts have refused to enforce judgments obtained in a foreign country against a person not resident in that country, and who had no notice of the suit, such as *Buchanan* v. *Rucker*. It may very well be held that the foreign country has no jurisdiction to pronounce judgment against a person behind his back who is not subject to their jurisdiction, but it is unnecessary to examine these cases, for in the present one the ship *Ann Martin* was clearly within the jurisdiction of the Empire of France; and the plaintiff had notice, and was heard, though unluckily the French Court made a mistake.

Simpson v. *Fogo*, was also cited, but that case proceeded on principles very different from any applicable to the present case. There a creditor of Messrs. Kilgender, the owners of a British ship, obtained in Louisiana a judgment against them, under which their interest in the ship, and no more, was sold under a process exactly analogous to our *fieri facias*. There could be no doubt, if that had been all, that the Bank of Liverpool, who held a valid mortgage on the ship, might have taken possession of it as against the purchasers just as much as against the judgment debtors, Kilgender and Company. But the Bank of Liverpool had in Louisiana interceded and endeavoured to prevent the sale of their ship, and a judgment was pronounced against them on the ground that the Courts in Louisiana wholly disregarded all rights acquired in England on an English ship, unless they were acquired in such a manner as to be valid in Louisiana. The contention before the VICE CHANCELLOR was that the purchaser of the ship and the Bank of Liverpool were privies to this judg-
[* 359] ment, and that * therefore the purchaser was entitled to use it as an estoppel to preclude the Bank of Liverpool from setting up in an English Court their English right, though the judgment proceeded on the ground that the English right was to be wholly disregarded. The VICE CHANCELLOR decided otherwise. We should be sorry to cast any doubt on a decision which *primâ facie* seems to carry out justice and good sense, but all that it is necessary to say in the present case, and therefore all that we do say, is that no such point here arises. The judgment of the French Court decreeing the sale of the vessel was not, according to the view of the facts which we take, a judgment that only the interest of Claus, if any, in the ship should be sold, but

that the particular ship itself should be sold. And finding no authority for saying that the purchaser, under the decree of a foreign Court having competent jurisdiction to decree the transfer, is to be responsible for any mistakes made by that Court either in law or fact, we think we ought to act on the reason given in *Hughes* v. *Cornelius*, 2 Smith's Lead. Cas. 653: "We must not set them at large again, for otherwise the merchants would be in a pleasant condition." In truth the plaintiff asks an English Court to sit as a Court of Appeal from the French Court, which is not the province of an English Court; and even if the English Court had had jurisdiction as a Court of Appeal to reverse the judgment of the French Court, we are of opinion that the sale ordered and made whilst that judgment was unreversed would not be avoided.

KEATING, J. My Lords, I also am of opinion, in answer to the question put by your Lordships to the Judges, that the plaintiff is not entitled to recover against the defendants; but as the grounds upon which I come to that conclusion do not entirely coincide with those of others of my learned brethren, I deem it right to state the reasons upon which my opinion is founded.

I think the judgment of the French Court under which the ship *Ann Martin* was sold was not a judgment *in rem*, but a judgment *in personam*, upon proceedings instituted originally against the master personally, the seizure of the ship being only collateral in order to secure the debt; and I am further of opinion that such judgment was erroneous upon the face of it. I do not, however, at present propose to trouble your Lordships with the reasons at length which have led me to that conclusion, but rather crave leave to refer to the judgment pronounced by the Court of Common Pleas in the present case reported in 8th C. B. N. S. p. 35; 29 L. J. C. P. 328.

Since, however, that judgment was delivered, the case of *Cammell* v. *Sewell* has been decided by the Exchequer Chamber, and reported in 5 Hurl. & N. 728; 29 L. J. Ex. 350, see p. 891, *ante*. That was a case in which a cargo of deals consigned to an English firm was shipped in a Russian port on board a Prussian vessel, which on her way to England was cast away upon the coast of Norway, but the cargo was safely landed. Steps were taken by the captain, without authority or the existence of any necessity, to sell the cargo, and for that purpose certain judicial proceedings

took place, under which an auction was decreed, and the deals sold to a purchaser, under whom the defendant claimed, notwithstanding the protest of the agent of the plaintiffs, who were English underwriters, and who had become owners of the deals by having accepted their abandonment and paid as upon a total loss. The plaintiffs thereupon instituted a suit in the Superior Diocesan Court in Norway, praying that the public auction should be disallowed, and the purchaser compelled to deliver up the goods *in specie*. That Court, however, affirmed the previous proceedings and directed that the auction should be confirmed. The goods were afterwards consigned by the purchaser to the defendants in England, who refused to deliver them to the plaintiffs.

The Court of Exchequer, 5 H. & N. 740, considered the judgment of the Diocesan Court in Norway to be in the [* 360] nature of a judgment *in rem*, and that the plaintiffs * were concluded by it as such, but seemed to think that even if not a judgment *in rem*, it yet would bind the plaintiffs as being the judgment of a Court of competent jurisdiction to which they had themselves resorted, and they accordingly gave judgment for the defendant. Upon appeal, all the Judges in the Exchequer Chamber were of opinion, without finding it necessary to decide the point, that the judgment of the Diocesan Court in Norway was not a judgment *in rem*, but held (Byles, J., *dissentiente*) that inasmuch as by the law of Norway an innocent purchaser at the judicial sale would have a good title to the goods purchased, even though the master could not as between himself and his owners or the owners of the cargo justify such sale, the law of Norway would prevail; and in terms proceeded to affirm the proposition that "if personal property is disposed of in a manner binding according to the law of the country where it is, that disposition is binding everywhere," and the judgment of the Court of Exchequer was, upon that ground only, affirmed.

Now if that decision of the Court of Exchequer Chamber be law, it is difficult to say that the present case does not fall within the operation of the general rule there laid down, for although in the present case there is no express statement that by the French law the sale of the *Ann Martin* by judicial authority would conclusively transfer the property to an innocent purchaser, as the defendant in this case undoubtedly was, yet I think it must be inferred, from the facts stated in this

special case, that the defendant's title would be unimpeachable in France, and if so, then, according to *Cammell* v. *Sewell*, it would be equally so in this country.

No doubt the proposition seems to be rather startling, that a British ship putting into a French port in the ordinary course of navigation, may be seized and sold under the judgment of a French tribunal adjudicating upon an English contract, but misconceiving or disregarding the English law, so that the property of an English shipowner may be thus sold to pay the debt of another person in pursuance of a judgment erroneous upon its face, and that without even notice being necessarily given to him of the proceedings; and it may also perhaps well be doubted whether other nations will be at all disposed to reciprocate such comity; still, although such consequences may not have been foreseen in the decison of *Cammell* v. *Sewell*, yet I think that case does govern the present, and that although not of course binding upon your Lordships, it is so upon me.

I therefore answer your Lordships' question to the Judges, — that under the circumstances stated in the special case, the plaintiff is not entitled to recover from the defendants the ship in question and her appurtenances.

The Lord Chancellor (Lord Hatherley) stated the facts of the case, and on mentioning the dates of the transfers to Harrison and Esmlie, and the registration of those transfers, said: —

Emslie assigned the mortgage to the plaintiff Castrique on the 9th of April, 1855, but Castrique did not register that mortgage until the 13th of April, 1857, two years afterwards. The proceeding of the Tribunal of Commerce at Havre, as I said, was in May, 1855. At that time Emslie was the person who was the registered mortgagee, and the learned Judges who have assisted us in the consideration of this case, particularly Mr. Justice Blackburn, have pointed out to our attention the circumstance that there was some change with reference to the laws regulating British ships during the interval between May 1855, and April 1857, when the plaintiff Castrique registered his mortgage: but I agree with Mr. Justice Blackburn in the conclusion that Emslie, at all events, must be the person treated as being interested as the mortgagee on the register at the time when the proceedings were had as to the ship, and Castrique afterwards, by registering in 1857, acquired a title which would have enabled him

to take any proceedings in respect of the ship, after his so registering, notwithstanding some question might possibly arise upon the construction of the two Acts, and the result of any transactions which had commenced before the one Act had ceased [*361] its operation on the 1st of *May, 1855, and after the transfer of the mortgage from Emslie to the plaintiff, and between that time and the 13th of April, 1857, when the plaintiff Castrique registered his mortgage. I only mention that to show that I have not overlooked this circumstance, but I do not think it has any material bearing upon the question before us.

The next thing that was done was this. In the proceeding at Havre before the Tribunal of Commerce, Benson alone, and not Claus, the owner, nor the mortgagees, nor any person directly interested in the ship, had been summoned to appear as a party. I ought to have stated that in the mean time Claus, besides having made this mortgage to Harrison, had, after his mortgage to Harrison, become bankrupt, and an official assignee of the name of Bird had been appointed. Now it appears that by the law of France, there could be no farther proceeding taken with reference to the ship, in order, by the sale of the ship, to obtain any payment of the debt due to Messrs. Trotteux, without having the affirmation of the decision of the Tribunal of Commerce by the civil tribunal of the district, which was at Havre. Accordingly, Messrs. Trotteux proceeded before the civil tribunal at Havre; and there all the persons were summoned who appeared upon the ship's papers to be the owners of the ship, that is to say, Claus, who appeared to be the owner, was summoned, and Bird, as official assignee, of whom notice had been obtained by the tribunal, was also summoned. There was no notice, of course, upon the ship's papers in respect of those mortgages which had been made while the ship was still upon its voyage; and, therefore, nothing respecting that could appear upon the papers, and nothing was therefore done in reference to the summoning of the mortgagees of the vessel who were absent.

In that state of circumstances, Claus and Bird not having appeared before the tribunal, the tribunal at Havre proceeded to affirm the judgment which had been come to by the Tribunal of Commerce, and ordered, by an order recorded on the 16th of August, 1855, that the ship should be sold "by public auction to the highest bidder, at the sittings for sales of the said Civil

Tribunal, in the presence of one of the Judges of the said Civil Tribunal, duly delegated by the said judgment to receive the biddings at such sale of the said ship, and to pronounce the adjudication in respect thereof." Now that having been done, the plaintiff obtained notice of this sale having been directed, and of these proceedings having been taken in France, and although the plaintiff had not registered himself at the time as mortgagee in England, he nevertheless, having had that assignment of mortgage, took upon himself to institute proceedings in France. On the 22nd of September, 1855, he instituted proceedings "in the nature of a suit to replevy the ship," to release the ship from the custody, in respect of his interest in the vessel. Proceedings were had before a civil tribunal, and a judgment was arrived at by that tribunal on the 19th of April, 1856. The Judges of the Court then considered the whole case as brought before them by Messrs. Castrique & Co., and they state in their judgment that the question at issue really concerned the property of a vessel sailing under the name of Claus as owner; and they go on to state, "It is impossible to believe that under any commercial law whatsoever, it could be allowed that in the course of a voyage such property may be conveyed to a third party, or be mortgaged to him by way of security, without there appearing on the papers of the vessel any trace of that conveyance or modification of the property; that good faith, which is the soul of commerce, is contrary to such an idea." Then, having given these as their reasons, they came to the conclusion in fact that the claim of Castrique was not to be allowed, and that the sale of the vessel was to proceed.

The plaintiff Castrique seems upon that to have appealed against this order to the superior tribunal at Rouen, and in bringing it before that tribunal, he fortified himself with the opinion of the English Attorney-General as to the effect of his mortgage here. That opinion stated the law as it exists in this country with reference to mortgages, and stated further, that by the English law, "if the repairs were done, or money advanced on personal credit, *even if a bottomry bond be [*362] subsequently actually given, it will not hypothecate the vessel, as no repairs, &c., done on personal credit can be afterwards converted into a bottomry transaction." This opinion was brought before the Judges who heard the case at Rouen, and then

they came to a conclusion affirming the decision of the Court below. Mr. Castrique was condemned to certain costs and a certain payment in respect of damages which had accrued.

That being so, the ship was in effect sold in the usual manner required by the French law with a Judge presiding, and sold by auction. Mr. Castrique himself appeared at the auction, and gave no notice of any claim which he then set up. Under all the circumstances of the case, I do not rely upon his so appearing at the auction as forming an ingredient in that which ought to be the foundation of our conclusion. The question which really arises before us is this, whether or not the judgment of the French Court and the consequent sale had in pursuance of that judgment must be treated as having changed the property of the ship. The ship was bought at that auction by a person who was a British subject, and who came here and registered himself as the owner of the vessel, and is now represented by the defendant. The question is, as to the property of the ship as between Castrique and the defendant.

We have been assisted with the opinions of the learned Judges in this case, and I entirely concur in the conclusion at which they have arrived. It appears to me in the first place desirable to consider, whether this judgment must be taken as a judgment by the French Court *in rem*, or whether it is to be taken as a judgment purporting only to deal with the interest in the vessel, whatever that interest might be, of Benson, who was the debtor in the action, on the bill, and as giving no farther or other right than such interest as Benson had. As it was stated by the learned Judges, we are familiar in our law with that distinction; we are familiar with the course taken by the Court of Admiralty in proceedings against a ship selling a ship and giving a title against all third persons who become purchasers under a decree of that Court; we are familiar also with the course taken by our own Court of law in decreeing judgment of any property of a debtor taken by levy upon his goods, in which case the interest of the debtor in the chattel is sold, and that interest alone, and no farther or other right than that possessed by the debtor, can be transferred by persons purchasing under that sale. In other words, they purchase simply the interest of the debtor in that chattel.

If we look at the course of proceedings to see what were the

No. 14. — Castrique v. Imrie, 39 L. J. C. P. 362, 363.

intent and purpose and duty of the French Courts, and if we ask, did they proceed in this course which they took in directing the sale of the vessel as against the vessel itself, we find that there has been a difference of opinion upon that point between the Court of Common Pleas and the Court of Exchequer Chamber. The Court of Common Pleas thought that it was not a proceeding against the ship itself, but simply against such interest as the debtor had therein, while the Court of Exchequer Chamber came to the conclusion that it was a proceeding against the ship itself. Now I entirely concur in the remarks of the learned Judges who have assisted us in this case, that unfortunately the case being one of foreign law, which we must consider as a fact laid before us, it has not been stated in the special case with all the clearness which would have been desirable what that law is. But what is there stated, it appears to me, is sufficient to indicate, upon the whole, the course taken by the French Courts and the grounds of their procee ling. In the first place it was a proceeding against Benson and the ship which originated the matter. That being so, I think that it would be very difficult to say that a proceeding *in rem* was not one of the matters contemplated in the original judgment. The judgment of the Tribunal of Commerce was a judgment against Benson. He had desired not to be made personally liable, as the expression here is, in respect of this judgment, and it was given against him "by privilege upon the ship." The ship was then directed to be sold. A good deal of argument turned upon that expression, "by privilege upon the ship." The case was argued extremely * ably by [*363] Mr. Matthews at your Lordships' bar. He put the case to us thus: What was meant was no more than this: that when the ship should be sold the captain, by virtue of the French law, would be a privileged creditor, and would be entitled to be paid out of the first proceeds of the sale, but that it did not necessarily follow from this circumstance that the sale was ordered to be made as against all persons having an interest in the ship. He put it in this way: that it might be treated as if the Court had regarded the whole matter thus: that he, Benson, would have a certain amount of interest in the ship, by virtue of such privilege, as he might have, and the Court might merely mean to sell all such amount of interest as Benson had, and therefore to dispose only of those rights which he possessed in priority to others

and to the amount which might be due to him as captain in respect of any claim he had in that capacity upon the ship; in other words, to sell exactly what was due to Benson as captain, and not to sell the ship *per se* for any other purpose whatever. But, as was well observed by the learned Judges, in the first place, this privilege could only arise after the sale of the ship had taken place, to give him a priority over other creditors interested in disposing of the vessel. But farther than that, regard being had to the original proceeding being a proceeding against Benson and the ship, and Benson himself being excluded from any personal liability, and the judgment against him being by privilege upon the ship, it does appear to me that the word "privilege" as used here is used much more in the sense in which it is used by Lord Tenterden in his work upon shipping, of a charge upon a vessel which the person is entitled to realise by sale, than in the sense of saying simply, that, amongst all the several persons who may have claims when the ship comes to be sold, Benson is to stand in a favoured position. In other words, the French Court intended by the proceeding taken to adjudge the sale of the vessel in order to satisfy this privilege.

But, beyond that, I think the case becomes somewhat clearer when it is carried to the Civil Tribunal, which was called upon to affirm the judgment of the Tribunal of Commerce, and give efficacy to the dealing with the ship. What course did the Civil Tribunal take? It summoned all who were supposed to be the owners of the ship. The Judges of that Court only knew of Claus and Claus's assignee, they did not know any of the mortgagees whose titles did not appear upon the ship's papers; at all events, they considered, if anything was said about them, that they could pay no attention to persons of whom they could have no knowledge except through the medium of the ship's papers. For what purpose did they call Claus and his assignee? For the purpose of making them liable upon the bill, not because Claus had accepted it, but only because, being interested in the thing they were about to sell, they thought it right that Claus and his assignee should be present.

Therefore, upon the whole proceeding, taking first the proceeding against Benson and the ship, next the detainer of the vessel by the Tribunal of Commerce, for the purpose of the sale being affirmed by the Superior Court, and then the Superior Court,

when it arrives at the question of sale or no sale, taking care to summon those whom alone it could recognise as owners, I think there can be no doubt that the judgment of the Court was intended to be a judgment *in rem*, and therefore the Court intended to do what by the French law it did, namely, to transfer the ownership on the vessel.

That being so, the only remaining point is this: it is said that the French Judges decided against our English law, that the effect of our law was laid before them, and that they disregarded it and determined the case contrary to what the law of this country would be. It is said that the law of the flag should have governed the decision of the French Courts with reference to this vessel, and therefore, the Courts having come to an erroneous conclusion, the judgment that they erroneously gave and so acted upon would not here confer a title upon those who in France undoubtedly under that judgment did acquire it.

Now, my Lords, without expressing any opinion (for I purposely wish to avoid doing so) with reference to a decision of my own which has been cited in the case, *of [*364] *Simpson* v. *Fogo*, as to what might be done in the case of a Court wilfully determining that it will not, according to the usual comity, recognise the law of other nations when clearly and plainly put before it, without saying anything as to what would justify the Courts in our own country in hesitating to give effect to a foreign judgment if obtained by fraud or misrepresentation, it is enough for me to say upon the present occasion that in this case the whole of the facts appear to have been inquired into by the French Courts judicially, honestly, and with the intention to arrive at the right conclusion, and having heard the facts as stated before them, they came to a conclusion which justified them in France in deciding as they did decide. That decision confirmed the title by sale to the person who became the purchaser at the sale. According to the law of France, that title could not be thereafter disputed or disturbed; the Court at Rouen being the highest Court having jurisdiction in the matter.

That being so, there being neither a case of refusal to attend or listen to anything that might be said to them with reference to our own law, nor to adopt that as the ground to their conclusion, and there being no case, as far as I know, of any fraudulent misrepresentation or concealment with reference to any facts in the

case, and the decision having been come to and pronounced, not as in one of the cases which was cited in the absence of the parties, but in Castrique's own suit where he had every opportunity of bringing forward his own case, the decision cannot be complained of as one contrary to justice through its being pronounced in the absence from want of citation of any of the parties interested. I therefore think we are bound to give effect to the conclusion arrived at by the French Court, and to the title derived through the medium of that conclusion, and that the Court of Exchequer Chamber was right in the decision to which it came. And, therefore, I have to submit to your Lordships that the decision of the Court of Exchequer Chamber ought to be affirmed.

Lord CHELMSFORD. — My Lords, in order to entitle the plaintiff to recover the ship in question, it was necessary for him to show that the judgment in the French Court might be questioned, and to prove it to be one that our Courts would not recognise. It is admitted that if the judgment of the Court at Havre was a judgment *in rem*, the plaintiff cannot recover in this action unless he can impeach the judgment on the ground of fraud or as being contrary to natural justice. We cannot look out of the special case for an explanation of the nature of the judgment.

In the description of the original proceeding the case states that while the ship was in the port at Havre, Trotteux & Co. commenced and prosecuted a suit against William Benson, the master of the ship, in the Court of the Tribunal of Commerce at Havre, and "against the said ship." It was argued for the appellant, that from the other facts stated in the case the words "against the said ship" may be understood that the ship, being available for payment of a bill given by the master for necessaries supplied during a voyage, the suit was against the master personally, and only indirectly and by consequence against the ship. But assuming this to be so, it is stated on the case that according to the law of France, a sale of the ship could take place only after the judgment of the Court of Commerce was confirmed, and the sale of the ship ordered by a judgment of the Civil Tribunal of the district in which the said Court of Commerce was situated. And the case states a judgment in the Court of Commerce, and the seizure of the ship and her appurtenances in pursuance of the judgment. And that "proceedings were afterwards instituted in the Civil Tribunal of Havre (being the

No. 14. — Castrique v. Imrie, 39 L. J. C. P. 364, 365.

Civil Tribunal of the district in which the Court of Commerce is situate) and in default of the appearance of the parties summoned, a judgment by default was given and duly recorded in the said Civil Tribunal of Havre, by which the seizure of the ship and its appurtenances was confirmed." And it was ordered that the ship and its appurtenances should be sold by public auction to the highest bidder at the sittings for sales of the Civil Tribunal. This order * for the sale of the ship, whatever may be thought of the original proceeding, appears to be a judgment *in rem*. Without, however, looking to this ultimate order, I think that the original proceeding, being for the purpose of enforcing a maritime lien, which by the law of all foreign codes founded on the civil law exists for money advanced for repairs and necessaries on a voyage, was a proceeding *in rem*. [*365]

But then it is said that the law to be applied to this case was the English law, and by that law there is no charge or lien on the ship for necessaries supplied to the master during a voyage, and the Courts at Havre acted erroneously, and in ignorance of the law they were administering. But no proof was offered to the French Courts, whether by the law in existence at Melbourne, where the bill was drawn by the master of the ship, there was or was not a lien on the ship for necessaries, and they might well assume in the absence of evidence, that the general maritime law of lien prevailed, and attached upon the master's contract.

Assuming that there was a mistake of the law, still this error will not render the French judgment void in this country. Even if evidence had been offered to the French Courts of the English law applicable to the case, and they had honestly come to an erroneous conclusion upon the subject, their judgment could not be impeached in our Courts.

To sum up my opinion in the words of BLACKBURN, J., and the other learned Judges who concurred with him, "I think the inquiry is first, whether the subject-matter was so situate as to be within the lawful control of the state under the authority of which the Court sits; and secondly, whether the sovereign authority of that state has conferred on the Court jurisdiction to decide as to the disposition of the thing, and the Court has acted within its jurisdiction. If the conditions are fulfilled the adjudication is conclusive against all the world."

For the reasons thus shortly expressed, I am of opinion that

the judgment of the Court of Exchequer Chamber ought to be affirmed.

Lord COLONSAY. My Lords, I entirely concur in the judgment which is proposed to be pronounced in this case. It appears to me that we cannot enter into an inquiry as to whether the French Courts proceeded correctly either as to their own course of procedure or their own law, nor whether, under the circumstances, they took the proper means of satisfying themselves with respect to the view they took of the English law. Nor can we inquire whether they were right in their views of the English law. The question is whether, under the circumstances of the case, dealing with it fairly, the original tribunal did proceed against the ship, and did order the sale of the ship. I think the respondents are entitled to judgment, and that the judgment of the Court below ought to be affirmed.

Crompton Hutton applied to have the record amended in a formal manner. The two original defendants had died, and the representative of each had been added as a defendant, whereas it should have been the representative of the survivor.

An order was made accordingly.

Judgment of Court of Exchequer Chamber affirmed.

ENGLISH NOTES.

In *Messina* v. *Petrococchino* (1872). L. R. 4 P. C. 144, 41 L. J. P. C. 27, 26 L. T. 561, it was held by the Privy Council, affirming the judgment of the Appellate Court at Malta, that a sentence of the Greek Consular Court at Constantinople establishing a bottomry bond, — that Court being a competent Court having jurisdiction over a Greek ship and a cargo owned by Greek subjects, — was not open to examination by the Maltese Court.

In *Lee* v. *Abdy* (1886). 17 Q. B. D. 309, 55 L. T. 297, the plaintiff sued as assignee of a policy of life insurance under an instrument purporting to be an assignment made in Cape Colony. By the law of the colony such an assignment was void by reason of the alleged assignee being the wife of the assignor. It was held by DAY, J., and WILLS, J., that the title was determined by the law of the colony, and that the defendants were entitled to judgment.

In *Williams* v. *Colonial Bank* (1888). 38 Ch. D. 388, 57 L. J. Ch. 826, 59 L. T. 643, the title to certificates of American Railroad Shares, was held to be governed by English law, the certificates being in England at the moment of their transfer. The case was appealed to the

House of Lords under the name of *Colonial Bank* v. *Cady* (1890), 15 App. Cas. 267, 60 L. J. Ch. 131, 63 L. T. 27, where it became unnecessary to decide the point of conflict, as the House considered the result of American law would have been the same; but Lord Herschell expressed the opinion that although what is necessary to perfect the title must be answered by a reference to the State of New York, "the rights arising out of a transaction entered into by parties in this country, whether, for example, it operated to effect a binding sale or pledge as against the owners of the shares, must be determined by the law prevailing here."

In *Alcock* v. *Smith* (C. A. 1892), 1892, 1 Ch. 238, 61 L. J. Ch. 161, 66 L. T. 126, the question arose as to the title to a bill of exchange drawn in London upon London bankers and payable to order of Andresen of Christiania in Norway. The bill after being overdue was dealt with and indorsed in Norway and Sweden in such a manner that by the law of those countries (which recognise no difference in this respect between a current and an overdue bill) the holder acquired a perfect title free from all defects of title in prior holders. It was held by Romer, J., and by the Court of Appeal, that the title of the holder must be given effect to accordingly.

In *Concha* v. *Concha* (H. L. 1886), 11 App. Cas. 541, 56 L. J. Ch. 257, 55 L. T. 522, it was held that a decision by a Probate Court as to the testator's domicile, which was not necessary to the determination of the question whether the grant ought to be made, was not binding as a judgment *in rem*.

Where a person is adjudged bankrupt by the law of the place to which he is properly subject for that purpose, a curator, syndic or assignee of the property appointed by that law is entitled to the property of the bankrupt in this country in preference to all creditors whose title to the goods is incomplete at the date of the bankruptcy. *Sill* v. *Worswick* (1795), 1 H. Bl. 665, 2 R. R. 816; *Hunter* v. *Potts* (1791), *Phillips* v. *Hunter* (in error 1795), 4 T. R. 182, 2 H. Bl. 403, 2 R. R. 353; *In re Davidson's Settlement Trusts* (1873), L. R., 15 Eq. 383, 42 L. J. Ch. 347.

AMERICAN NOTES.

The principal cases are cited by Story on Conflict of Laws, § 591 *a*, and Black on Judgments, §§ 814, 819, and their principles approved as to judgments *in rem* rendered in foreign countries, subject to the condition that such judgments are impeachable for lack of jurisdiction (*Rose* v. *Himely*, 4 Cranch [U. S. Supreme Ct.], 241; *Wheelwright* v. *Depeyster*, 1 Johnson [New York], 471; 3 Am. Dec. 315). Mr. Black sums up the matter (§ 813): "It has been the express doctrine of both the English and American courts from early times that a foreign judgment *in rem* is binding and conclusive on all the

world, and not re-examinable on the merits, provided the court had jurisdiction and there was no fraud in procuring the sentence." Mr. Freeman (Judgments, §§ 591, 594, 618 *a*) cites both the principal cases. It was early decided (*Stewart* v. *Warner*, 1 Day [Connecticut], 142; 2 Am. Dec. 61), that such a judgment is not impeachable even for fraud, but this is disapproved by Mr. Freeman, and undoubtedly is not the law.

The Castrique case is cited by Mr. Freeman in note, 82 Am. Dec. 413, with *Warrener* v. *Kingsmill*, 8 U. C. Q. B. 407. In the same note the editor contrasts the earlier American decisions, holding foreign judgments only *primâ facie* evidence, with the later, holding them conclusive. See notes, *ante*, p. 745, 746.

A sentence of a foreign tribunal, condemning neutral property, although passed under an edict unjust in itself, contrary to the law of nations, and in violation of neutral rights, changes the property in the thing condemned. *Williams* v. *Armroyd*, 7 Cranch (U. S. Supr. Ct.), 123.

The general rule that a fact which has been directly tried and decided by a court of competent jurisdiction cannot be contested again between the same parties, in the same or any other court, is not confined to judgments of the same court or to decisions of courts of concurrent jurisdiction, but extends to all matters litigated before competent tribunals in foreign countries, to sentences of courts of admiralty, to those of ecclesiastical tribunals, and, in short, of every court which has proper cognizance of the subject-matter. *Hopkins* v. *Lee* (U. S. Sup. Ct.), 6 Wheaton, 109; *Smith* v. *Kernochen*, 7 Howard (U. S. Sup. Ct.), 198.

The sentence of a foreign court of competent jurisdiction, acting *in rem*, is conclusive in respect to the matter which it directly decides. *Peters* v. *Warren Ins. Co.*, 3 Sumner (U. S. Cir. Ct.), 389; *The Garland*, 16 Federal Reporter, 283; *Wilson* v. *Graham*, 4 Washington (U. S. Cir. Ct.), 53.

New York almost alone forms an exception to the general acceptance of this doctrine in this country. It is there held that the sentence of condemnation of a foreign court of admiralty, although conclusive to charge the property, is only *primâ facie* evidence of the facts on which it purports to have been founded, and in a collateral action it may be shown that no such facts existed. *Ocean Ins. Co.* v. *Francis*, 2 Wendell, 64; 19 Am. Dec. 549; *Vandenheuvel* v. *United Ins. Co.*, 2 Johnson's Cases, 450; 1 Am. Dec. 180 (court of errors, reversing opinion of Kent in supreme court), A. D. 1802. This doctrine was also adopted in *Bourke* v. *Granberry*, Gilmer (Virginia), 16; 9 Am. Dec. 589 (A. D. 1820). In this case the English decisions are characterized as "conflicting and unsatisfactory" and "unjust;" "as for those in our country, they are both ways; and some of them have regarded the English cases more than great principles. We are to judge for ourselves in this chaos of judgments," and so recollecting "that Britain is an insuring, while we are an insured nation," the court concluded "to mount up to the days of *Hughes* v. *Cornelius*, 2 Show. 232." See a learned note, 1 Johnson's Cases, 167.

A judgment *in rem* in one State, where the defendant is a non-resident, and was not served with notice, and did not appear, does not form a cause of action against him *in personam* in the State of his residence. *Melhop* v. *Doane*, 31

Iowa, 397; 7 Am. Rep. 147. But the judgment is valid in the former State *in rem*, unless impeached for fraud. The court said: "Whatever disposition the court makes of the property, by sale or transfer, will be held valid in every other country where the same question — the question of title thereto — comes either directly or indirectly in question before a foreign tribunal." Citing *Croudson* v. *Leonard*, 4 Cranch (U. S. Sup. Ct.), 434; *Williams* v. *Armroyd*, 7 ibid. 423; *Rose* v. *Himely*, 4 ibid. 241; *Grant* v. *McLachlin*, 4 Johnson (New York), 34; 2 Kent's Commentaries, 120; 1 Greenleaf on Evidence, §§ 540, 541, and notes.

Sentences of foreign courts of admiralty are conclusive upon all matters decided. *Cucullu* v. *Louisiana Ins. Co.*, 5 Martin, N. S. (Louisiana), 464; 16 Am. Dec. 199.

To invest any court with jurisdiction *in rem*, the *res* must be within the State or country pronouncing the decree, and the decree can have no extra-territorial effect. Thus a decree in one State can have no force as to lands in another State until it is put into the form of a judgment in the latter. This principle was very recently declared in *Bullock* v. *Bullock*, 51 New Jersey Equity, 444. A court of New York having jurisdiction over the action and parties, dissolved the bonds of matrimony between them, fixed the amount and directed the payment of alimony and ordered the husband to execute and deliver to the wife a mortgage upon lands in New Jersey to secure the payment of the alimony. *Held*, that a bill founded upon the order requiring such a mortgage to be given and praying a decree that the mortgage should be given in conformity to the order, disclosed no equity and was properly dismissed. The court said: "It is scarcely necessary to observe that a court of New York could not have been empowered to affect by its decree or judgment lands lying within another State. For no principle is more fundamental or thoroughly settled than that the local sovereignty, by itself or its judicial agencies, can alone adjudicate upon and determine the *status* of lands and immovable property within its borders, including their title and its incidents and the mode by which they may be charged or conveyed. Neither the laws of another sovereignty, nor the judicial proceedings, decrees, and judgments of its courts, can in the least degree affect such lands and immovable property. Story Conf. Laws, sec. 543, sec. 591. The concession as to the jurisdiction of the Supreme Court of New York in this case, must therefore be deemed to be limited to a jurisdiction to proceed *in personam* and not to extend to a determination, adjudication, or decree *in rem*. The jurisdiction thus conceded to the Supreme Court of New York is exactly analogous to the jurisdiction which, since the decision of *Penn* v. *Lord Baltimore*, 1 Ves. 444, has been universally recognized as inherent in courts administering equity. This recognized jurisdiction extends to making decrees in cases of equitable cognizance, such as fraud, trust, and specific performance, against persons brought into those courts notwithstanding such decrees incidentally affect lands beyond the court's jurisdiction. But the exercise of this jurisdiction has been supported solely on the ground that it operated *in personam* only, and did not extend to the utterance of decrees *in rem*. In the leading American case, Chief Justice Marshall declared that the question was whether the question

presented was an unmixed question of title, or a case of fraud, trust, or contract. *Massie* v. *Watts*, 6 Cranch, 148. If relief cannot be effectively given by the decree *in personam* such courts will not retain the bill. *Morris* v. *Remington*, 1 Pars. Eq. 387; *Lindley* v. *O'Reilly*, 21 Vroom, 636. Nor will the power be exerted *in personam* to compel an act affecting lands in another jurisdiction of doubtful legality. *Blount* v. *Blount*, 1 Hawks, 365. The power of such courts to make effective such decrees is limited to its process operating upon the party, such as sequestration of property within jurisdiction, attachment for contempt, and the like; it will not extend to validating a conveyance of the foreign lands made by its master or commissioner, in default of the performance of the decree by the party. *Watts* v. *Waddle*, 6 Peters, 389; *Burnley* v. *Stevenson*, 24 Ohio St. 474. When by the process of the court acting upon the party, obedience to the decree is enforced as by the conveyance, it is the conveyance, not the decree that affects the lands in the foreign jurisdiction. *Davis* v. *Headley*, 7 C. E. Green, 115."

A decree of divorce rendered in one State is ineffectual to award the custody of minor children resident in another. *Kline* v. *Kline*, 57 Iowa, 386; 42 Am. Rep. 47.

SECTION V. — *Remedies.*

NO. 15. — DON *v.* LIPPMANN.

(1837.)

RULE.

WHATEVER relates to the remedy to be enforced, must be determined by the *lex fori.* — the law of the country whose Courts are called on to enforce it.

So where an action was brought in Scotland to enforce a contract on a bill of exchange which was payable in France, and on which a judgment of the French tribunals had been obtained, the Scotch law of prescription, taking away the remedy by action upon a bill of exchange after the lapse of six years, was held to apply.

Don (appellant) v. Lippmann (respondent).

5 Cl. & Fin. 1–22.

Conflict of Laws.—Lex fori. — Remedy. — Prescription & Limitation.

Bills were drawn in France and accepted there by a domiciled Scotchman, who returned to Scotland during the currency of the bills. An action upon the bills was brought in the French Court and judgment in absence given

No. 15. — Don v. Lippmann, 5 Cl. & Fin. 1–3.

against the acceptor. After the lapse of six years from the due date of the bills and after the death of the acceptor, action was brought against his representatives founded on the bills and on the judgment in the French action. Held that the Scotch sexennial prescription applied to the action on the bill, and that the foreign judgment did not constitute a new cause of action; and that the debt could only be proved by the writ or oath of the party according to the law of Scotland.

The late Sir Alexander Don, the father of the appellant, happened to be within the French territory * in 1802, [* 2] when hostilities recommenced between this country and France after the peace of Amiens, and with many other British subjects was tyrannically detained in France. He remained a prisoner until February, 1810. Upon the 13th of November, 1809, Charles Fagan, merchant in Paris, drew two bills upon him, which are dated "Versailles," ordering him, as acceptor, to pay to the respondent Lippmann, who was named in the bills as payee, the sum of 20,000 francs, each bill being for that amount. These bills were drawn upon the acceptor at the "Hôtel de Richelieu, Paris," his place of residence; were made payable on the 1st of March; and were drawn and accepted in the following terms: —

Versailles le 13 9bre 1809.

Bon pour 20,000 fr.

Au premier Mars prochain, payé par cette première de change, à l'ordre de M. Lippmann, la somme de vingt mille francs, valeur reçu, sans autre avis.

Bon pour vingt mille francs.

(signed) Chas. Fagan.

A Monsieur, Monsr. Don.

Hôtel Richelieu, Rue Neuve.
St. Augustin, Paris.

Accepté pour la somme de vingt mille francs, payable le premier Mars 1810.

(signed) Alexander Don.

Versailles le 13 9bre 1809.

Bon pour 20,000 fr.

Au premier Mars prochain, payé par cette première de change, à l'ordre de M. Lippmann, la * somme de vingt mille [* 3] francs, valeur reçu, sans autre avis.

Bon pour vingt mille francs.

(signed) Chas. Fagan.

Monsieur, Monsr. Don.

Hôtel Richelieu, Rue Neuve,
St. Augustin, Paris.

Accepté pour la somme de vingt mille francs, payable le premier Mars 1810.

(signed) Alexander Don.

Before the bills became due, Sir Alexander Don left Paris, and was in England in the month of February, 1810. When the bills became due they were dishonoured, and protested for non-payment against the acceptor, and the dishonour was intimated to Charles Fagan, the drawer.

M. Lippmann then commenced proceedings according to the law of France, against both the acceptor and drawer of the bills, and, in the action raised before the Tribunal de Commerce of the department of the Seine, Charles Fagan, the drawer, made appearance, but he did not deny the validity of the debt. He requested the Court, however, to give him time, in order that he might arrange as to payments of the bills. On the 25th of July, 1810, judgment was pronounced against both the drawer who had made appearance, and against Sir Alexander Don, the acceptor in absence. All the requisites of the law of France were stated to have been complied with in these proceedings. The decree of the Court was for payment of the contents of the bills, and fifty-nine francs of expenses exclusive of the expense of registering the judgment. [* 4] This judgment was, in the * pleadings in the present suit, alleged to have been intimated on the 22nd of October, 1810, by the proper officer, and according to legal form, at the former residence of Sir Alexander Don; and it was stated, that he had left the Hôtel Richelieu about six months before, and was believed by the servants at the hotel to have gone to England. Execution then followed against the effects of Charles Fagan, as his person could not be found. That person afterwards died, and about the month of March, 1813, his effects were sold at the instance of M. Lippmann, and the sale was reported by the auctioneer as having produced 434 francs, after deducting expenses, for which credit is given. A claim was made on Sir Alexander Don, but he positively declared that he had remitted to France ample funds to pay all his just debts, and after a correspondence on the subject, which took place in 1814, no further claim was made on Sir Alexander Don in his lifetime. He died in April, 1820. The

action, now the subject of appeal, was commenced on the 3rd of April, 1829, and it was founded both upon the bills and the judgment. The defendant, who, being an infant, appeared by his tutor, set up in defence the Act of 1772, by which it is declared, "that no bill of exchange, &c., shall be of force in Scotland unless diligence shall be raised and executed, or action commenced thereon, within six years from and after the terms at which the sums in the said bills shall become exigible." The question therefore which was raised, was, whether the law of Scotland or that of France was applicable to the case. If the former, then the Act of 1772, which limits the right of suing to within six years after the bill, &c., becomes due, had taken effect, and the action was barred by prescription; if the latter, then the bar by prescription would take effect at five years from the * date of the in- [* 5] strument, unless proceedings were taken in a French Court on such instrument, but if such proceedings were taken, then after judgment therein obtained, the prescription would not be a bar for thirty years after the date of the judgment, and consequently the decree in the French Court might properly be made the ground of the present suit. When the case came before the LORD ORDINARY, he took the opinions of French counsel on the law of France and after having taken time for consideration, he pronounced an interlocutor repelling the plea of sexennial prescription, and finding that the defendant was entitled to be reponed against the judgment of the Tribunal of Commerce in France. He therefore appointed the parties to be further heard on the merits of the case. In a note appended to the interlocutor, his Lordship went fully into the question of the particular law by which a claim on bills of this sort was to be decided, and intimated that he looked upon the proceedings in France as merely sufficient to repel the plea of prescription but not as sufficient to preclude the defender from answering the claim by going into the merits of the case. The Lords of the First Division of the Court of Session sustained this interlocutor.

The appeal was argued by Sir W. Follett and Mr. M. Smith for the appellant; and by Dr. Lushington and Mr. Gordon for the respondent, and on a subsequent day —

Lord BROUGHAM: My Lords, there is a case of *Don* v. [11] *Lippmann* which was recently argued before your Lordships, and which, involving as it does a matter of international law, is one of considerable importance. The facts of the case are these. The

late Sir Alexander Don was the acceptor of two bills of exchange, drawn on him by one Fagan, for the sum of 20,000 francs each and payable on the 1st of March, 1810, to Fagan's order. He accepted these bills in France, but soon afterwards returned to Scotland and died there, leaving the present appellant an infant, who now appears with the concurrence of a tutor. This action was commenced in Scotland, in April, 1829, by the payee of the bill against the appellant as the representative of his father; the payee having previously, namely, in 1810, proceeded in the French Courts against Fagan the drawer and Sir Alexander Don the acceptor, and obtained judgment there. In that proceeding Sir Alexander Don was not cited, except according to a form known in the French Courts of judicature, by the affixing of notice in a public office. The payee then commenced this action both on the bills and on the judgment obtained in that proceeding in the French Courts. The appellant defended himself by setting up prescription under the Scotch Act of 1772. The LORD ORDINARY before whom the case came, after taking the opinions of French counsel for the purpose of informing the Court as to what was the French law, pronounced an interlocutor, repelling the defence of the Scotch limitation of [*12] six years, holding that the French judgment did operate * as an interruption of the prescription, and was valid as an answer to that defence in this case, and as he held the French law to be valid for the purpose of interrupting the prescription he allowed the judgment of the French Court to enter into his consideration of the case, but did not hold it to be conclusive. He therefore reponed the defendant below, and allowed him to make out a defence in what manner he could on the merits. On this decision the case was brought before the Lords of the First Division of the Court of Session, and they affirmed the judgment of the LORD ORDINARY. This appeal was then brought before your Lordships.

It appears that in Scotland, — and it is rather singular that it should be so, — where a bill is accepted payable generally, without any particular place being named, it shall be deemed payable at the place at which the acceptor is domiciled when it becomes due. It becomes of some importance to know where the bills were payable, because this principle, which has been adopted of late years in many of the Scotch decisions, and towards which I admit the great leaning of the Scotch profession is, renders it material to

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consider whether this is a Scotch or a foreign debt. Yet sometimes this expression is used in the cases without affording any accuracy of description, for sometimes the debt is called English or French in respect of the place where the contract was made; sometimes it is the place of the origin, sometimes of the payment of the contract, and sometimes of the domicile of one of the parties. But at all events it becomes important to consider whether this was a foreign or a Scotch debt. In the present case it was held most properly to be a foreign debt. That is a fact admitted; it is out of all controversy. This therefore must now be taken to be a French debt, and then the general law is that where * the acceptance [* 13] is general, naming no place of payment, the place of payment shall be taken to be the place of the contracting of the debt. I shall therefore deal with this bill as if it was accepted payable in Paris.

On these short and admitted facts, and on this further assumption, that the bill being accepted in France is payable there, the question arises, and it is one which is not only the principal point, but it disposes of all the rest, namely, which of the two laws, the law of France, where the bill is accepted and is payable, or that of Scotland, where the debtor resides, shall rule the decision of the case. That is, in other words, whether the prescription set up is to be that of Scotland or France. The law on this point is well settled in this country, where this distinction is properly taken, that whatever relates to the remedy to be enforced, must be determined by the *lex fori*, the law of the country to the tribunals of which the appeal is made. This rule is clearly laid down in *The British Linen Company* v. *Drummond*, 10 B. & C. 903; *De La Vega* v. *Vianna*, 1 B. & Ad. 284, and in *Huber* v. *Steiner*, 2 Scott, 304; 1 Hodges, 206; 2 Bing. (N. C.) 202; 2 Dowl. Prac. Cas. 781; 4 Moore & Scott, 328, though the reverse had previously been recognised in *Williams* v. *Jones*, 13 East, 439; 12 R. R. 401. Then assuming that to be the settled rule, the only question in this case would be, whether the law now to be enforced is the law which relates to the contract itself, or to the remedy. When both the parties reside in the country where the act is done, they look of course to the law of the country in which they reside. The contract being silent as to the law by which it is to be governed, nothing is more likely than that the *lex loci contractus* should be considered at the time * the rule, for the parties [* 14]

would not suppose that the contract might afterwards come before the tribunals of a foreign country. But it is otherwise when the remedy actually comes to be enforced. The parties do not necessarily look to the remedy when they make the contract. They bind themselves to do what the law they live under requires; but as they bind themselves generally, it may be taken as if they had contemplated the possibility of enforcing it in another country. That is the lowest ground on which to place the case. The inconvenience of pursuing a different cause is manifest. Not only the principles of the law, but the known course of the Courts renders it necessary that the rules of precedent should be adopted, and that the parties should take the law as they find it, when they come to enforce their contract. It is true that there may be no difficulty in knowing the law of the place of the contract, while there may be a great difficulty in knowing that of the place of the remedy. But that is no answer to the rule. The distinction which exists as to the principle of applying the remedy, exists with even greater force as to the practice of the Courts where the remedy is to be enforced. No one can say that because the contract has been made abroad, the form of action known in the foreign Courts must be presumed in the Courts where the contract is to be enforced, or the other preliminary proceedings of those Courts must be adopted, or that the rules of pleading, or the curial practice of the foreign country must necessarily be followed. No one will assert that before the Jury Court in Scotland the English creditor of a domiciled Scotchman would have the right to call for a trial of the case by a jury; or take the converse, that a Scotchman might refuse the intervention of a jury here, and insist [*15] on having the case tried, as in Scotland by a Judge *only.

No one will contend in terms that the foreign rules of evidence should guide us in such cases; and yet it is not so easy to avoid that principle in practice if you once admit, that though the remedy is to be enforced in one country, it is to be enforced according to the laws which govern another country. Look to the rules of evidence, for example. In Scotland some instruments are probative; in England, until after the lapse of thirty years, they do not prove themselves. In some countries forty years are required for such a purpose; in others thirty are sufficient. How, then, is the law to be ascertained which is to govern the particular case. In one Court there must be a previous issue of fact; in another

there need be no such issue. In the latter, then, the case must be given up as a question of evidence. Then come to the law. The question, whether a parol agreement is to be given up or can be enforced, must be tried by the law of the country in which the law is set in motion to enforce the agreement. Again, whether payment is to be presumed or not, must depend on the law of that country, and so must all questions of the admissibility of evidence, and that clearly brings us home to the question on the Statute of Limitations. Until the Act of Lord Tenderden, a parol agreement or promise was sufficient to take the case out of the Statute of Limitations; but that has never been the case in Scotland. It is not contended here that the practice of England is applicable to Scotland; but these are illustrations of the inconvenience of applying one set of rules of law to an instrument, which is to be enforced by a law of a different kind. It is said that the limitation is of the very nature of the contract. First, it is said that the party is bound for a given time, and for a given time only; that is a strained construction of the obligation. The party
*does not bind himself for a particular period at all, but [*16]
merely to do something on a certain day, or on one or other of certain days. In the case at the bar the obligation is to pay a sum certain at a certain day, but the law does not suppose that he is at the moment of making the contract contemplating the period at which he may be freed by lapse of time from performing it. The argument that the limitation is of the nature of the contract, supposes that the parties look only to the breach of the agreement. Nothing is more contrary to good faith than such a supposition. If the law of the country proceeds on the supposition that the contracting parties look only to the period at which the Statute of Limitations will begin to run, it will sanction a wrong course of conduct, and will turn a protection against laches into a premium for evasiveness.

Then it is said, that by the law of Scotland not the remedy alone is taken away, but that the debt itself is extinguished, and thus a distinction is relied on as taken by the law between an absolute prescription and the limitation provided by the statute. But it seems to me that there is no good ground for supposing such a distinction. I do not read the statute in that manner. The Act of 1772 is an Act for the limitation of the enforcement of titles to bills and notes, and the enactments of it are strong with respect to

the remedy to be enforced. The debt, however, is still supposed to be existing and owing.

It is not necessary to discuss the excellent distinction taken by Mr. Justice Story (Story's Confl. of Laws, s. 582), and approved of in the Court of Common Pleas in the case of *Huber* v. *Steiner*, 1 Hod. 210; 2 Scott, 304; 2 Bing. (N. C.) 202; namely, that where statutes of limitation are held to govern the rights of par-
[* 17] ties, it must be where the parties are resident within * the jurisdiction during the period. That may be taken as the ground of the decision of the Court in that case. But there is another principle to be considered, on which there are some Scotch cases, that must not be overlooked. *Galbraith* v. *Cunningham*, Morr. 4430, in 1626, where a suit on an Irish bond, not executed according to the law of Scotland, was sustained in the Scotch Courts, is a case of this kind. There was another case, of *Salton* v. *Salton*, in 1673, Morr. 4431, on a bond made in France; and in both instances, the instrument being valid according to the law of the country where it was made, though not according to the law of Scotland, the suit was sustained. These cases show that in them it was considered that the law of the country where the instrument is made ought to prevail. But a contrary decision occurred in 1691, the *Montrose case* and another, *Grey* v. *Grant*, in 1789, Morr. 4474, which was brought before the Lords Commissioners, who then refused to admit in the Scotch Courts such proof of a debt contracted in a foreign country as would have been sufficient proof in the country where the debt was contracted, but was not sufficient proof according to the law of Scotland. *Muir* v. *Muir*, decided in 1787, went to the same point. *Glyn* v. *Johnston*, 8 Shaw & Dunl. 889, seems to cast some doubt upon this point, as it was then held that the foreign law might be imported for such a purpose; and in *Gibson* v. *Stewart*, 9 Shaw & Dunl. 525, the same rule was adopted, but there the domicile of the debtor made the whole difference which was clearly wrong. The grounds of the opinion in this case are to be found in the case of *Glyn* v.
[* 18] *Johnston*. From the * judgment there, it appears that the whole of the *lex loci contractus* must be adopted from the foreign country. But it is to be observed, that Lord CRAIGIE (8 Shaw & Dunl. p. 891) dissented from that judgment, saying that no evidence could be received except such as was allowed by the law of Scotland. The preference of the *lex loci solutionis* is derived

from a sounder principle, that of the *lex fori*. The law of the domicile of the debtor comes from the same ground. The consideration of the forum prevails much more than any other throughout the cases, but it must be admitted that there is on the whole a conflict of the cases in the Scotch Courts. But though many of the Scotch authorities cannot well be reconciled with each other, the cases of *Talleyrand* v. *Boulanger*, 3 Ves. 447 ; 4 R. R. 58, in Chancery, and of *Melan* v. *Duke de Fitzjames*, 1 Bos. & P. 138, in the Common Pleas, furnish better guides for us; nor are those cases impugned by the principles to be drawn from *Groves* v. *Gordon*, Morr. 4511, or *Phillips* v. *Stamfield*, Morr. 4503. *Groves* v. *Gordon* proceeds upon reasons which will not support the decision, and much reliance cannot be placed upon *Phillips* v. *Stamfield*. All the Judges agreed that if it was not a case of traffic and of merchants, the law of Scotland must decide, though they were divided on the main point of the case. *Della Valle* v. *The York Buildings Co.*, Morr. 4472, is not an authority ; for the question there arose upon different circumstances, namely, those of the debt being extinguished. The ground of the decision was, that the bond might be sued on in England, and therefore did not fall within the particular words of the Statute of 1469, Scotch Acts, vol. i. p. 95, which * declares that certain bonds, &c., there men- [* 19] tioned "shall be of none avail."

Let us now see whether this was a French contract. Suppose a policy of insurance was effected in this country on a ship for a a voyage from port to port in America, it could not be said that that was an American contract, or that the money due upon the policy was an American debt. *Fawkes* v. *Aiken*, and *Wray* v. *Wright* are wholly irreconcilable both with that which is now admitted to be law, and with the principle which I have stated. Then there are the cases of *Thomson* v. *Lythgoe*, and *Renton* v. *Bayley*, in July, 1751, the latter of which is the case to which Erskine refers as settling the law. They were followed by *Macniel* v. *Macniel*, in 1761, by *Randal* v. *Innes*, Morr. 4520, in 1768, and by *Ker* v. *Home*, Morr. 4522, in 1771, all of the same kind. All the authorities, Huber de Conf. Leg., De Confl. Leg. in Div. Imp., Voet. Dig. Lib. 24, t. 3, s. 12, and Lord Kaimes, — Kaimes's Principles of Equity, 3. 8. 6. 1. 5. 3. are cited in that case. *Campbell* v. *Steiner*, 6 Dow. 116, was an action for a bill of costs for business done in this House. The Court below there allowed the rule of Scotch

prescription. That judgment was affirmed by Lord ELDON, who, however, said that he moved it with regret. He said that it had been ruled that the debtor being in Scotland and the creditor in England, the debtor might plead the Scotch rule of prescription; that that was against some of the old authorities, but was in accordance with those of later date. That case cannot be reconciled with the principle that the *locus solutionis* is to prescribe the law. It has nothing to do with the case. Why is it then, that the law of the domicile of the debtor was there allowed to prevent [*20] the plaintiff from recovering? It * was because the creditor must follow the debtor, and must sue him where he resides, and by the necessity of that case, was obliged to sue him in Scotland. In that respect, therefore, there was in that case no difference between the *lex loci solutionis* and the *lex fori;* and it must be admitted that in such a case the rules of evidence, and if so, the rules of practice, may be varied as they are applied in one Court or the other. But governing all these cases is the principle that the law of the country where the contract is to be enforced must prevail in enforcing such contract, though it is conceded that the *lex loci contractus* may be referred to for the purpose of expounding it. If, therefore, the contract is made in one country to be performed in a second, and is enforced in a third, the law of the last alone, and not of the other two, will govern the case. In reversing the most material part of the interlocutor appealed from, you do not introduce the law of England or of the commercial world into Scotland, but you are renewing in Scotland the principles of the old law of that country. The appellant was an alien enemy in France, and could not appear in the French Courts; he was, too, out of the country and he could not possibly possess any property, real or personal, by which he could be rendered amenable.

But supposing that the debt might have been sued for in France, then comes the question, whether the French judgment cannot be sued on as a substantive cause of action. It is, in fact, tendered as one of the grounds of suit here. A foreign judgment is good here for such a purpose, provided that it has not been obtained by fraud or collusion, or by a practice contrary to the principles of all [*21] law. *Fraser* v. *Sinclair*, Morr. 4543, * which was affirmed in this House, showed that we regard a foreign judgment only as *primâ facie* evidence of a debt. *Buchanan* v. *Rucker*, 1 Camp. 63; 9 East, 192; 9 R. R. 531, established that the Court before

which a foreign judgment is brought by a proceeding of this sort may examine whether it has been rightly obtained or not, and the principle of the decision cannot be confined to the case of a party not being within the jurisdiction at the time the judgment is obtained. If he is a foreigner, and is not within the jurisdiction, but is by force kept out of it before the action, and is not sued by proper forms, his case is even stronger than that of the defendant in *Buchanan* v. *Rucker*, and he must have the same principle applied to it. The case in the 4 Bing. (*Douglas* v. *Forrest*, 4 Bing. 686), shows how much the application of the rule is affected by circumstances. In that case, which was an action in an English court, on a Scotch judgment of horning against a Scotchman born, the Court guards itself against a general inference from the decision. The CHIEF JUSTICE, in delivering the judgment of the Court, says (4 Bing. p. 703) "We confine our judgment to a case where the party owed allegiance to the country in which the judgment was so given against him, and by the laws of which country his property was, at the time those judgments were given, protected." *Becquet* v. *MacCarthy*, 2 B. & Ad. 951, has been supposed to go to the verge of the law, but the defendant in that case held a public office in the very colony in which he was originally sued.

It cannot be doubted, that a foreign judgment is the same as to our right to examine into it in the Courts of this country, whether made in the absence of * parties, or with both of [*22] them present, *in foro contentioso*. On the whole of the case, my motion is to reverse the interlocutors of the 10 June, 1835, and 20 January, 1836, and to declare that the evidence of the sexennial prescription ought to be sustained, and that it is not affected by the proceedings which have taken place in the French Court.

The following order was afterwards made and entered on the Journals.

"It is *ordered* and *adjudged* by the Lords, &c, that the said interlocutors, in so far as complained of in the said appeal, be, and the same are hereby reversed; and it is declared that the defence of the sexennial prescription, according to the law of Scotland, ought to be sustained; that this prescription has suffered no interruption by reason of the proceedings in the French Courts; that these proceedings do not constitute a new ground of debt, nor evidence of a debt independent of the bill libelled upon; and that the debt can

only be proved by the writ or oath of the party, reserving all defences for the appellant; and it is further ordered and adjudged, that with this declaration the cause be remitted back to the Court of Session in Scotland, to do therein as shall be just and consistent with this judgment."

ENGLISH NOTES.

The principal case is one of a series of almost unbroken authorities on the rule. It may suffice to note two of the earlier cases. In *The British Linen Co.* v. *Drummond* (1830), 10 B. & C. 903, A. and the defendant resident and domiciled in Scotland incurred a debt of £400 to the plaintiffs. Forty years was the period of limitation of actions in Scotland; but the action being brought in an English Court, the English Statute of Limitations was held to apply, and to have barred the remedy after a lapse of six years.

In *Huber* v. *Steiner* (1835), 2 Bing. (N. C.) 202, the action was on a French bill of exchange which had been dishonoured and protested. According to French law, lapse of five years from the date of protest destroyed all remedies on the bill. The action was instituted here after five, but before the expiration of six years from the date of protest. It was contended at the bar that French law destroyed not only the remedy but also the right if no action was instituted within five years. This was not proved to the satisfaction of the Court, which entered judgment for the plaintiff.

In *Harris* v. *Quine* (1869), L. R., 4 Q. B. 653, 38 L. J. Q. B. 331, 20 L. T. 947, the rule of the principal case was applied conversely. Action was brought in the Court of the Isle of Man by an attorney there for his account for work done in a suit in the Island. That Court decided that the action was barred by the statute law of the Island. Action upon the same account was subsequently brought in the English Court, where it was decided (1) that the judgment of the Isle of Man Court, having been on the ground that the remedy was barred, and not on the merits, was no bar in the English Court, and (2) that some of the items in the account being within the English period of limitation, the action was not barred in respect of any of the items.

The same principle was applied in *The Alliance Bank of Simla* v. *Carey* (1880), 5 C. P. D. 429, 49 L. J. C. P. 781, an action on a bond executed under seal in India, where the same period of limitation — three years — applies to debts under seal as to simple contract debts. The action being brought in England within twenty years (the time of limitations for actions on contracts under seal) it was held by Lopes, J., that the question was one of procedure, and that the in-

strument being under seal the remedy in the English Court was not barred.

The *lex fori* governs not only prescriptions and limitations, but whatever else pertains to the remedy or to procedure. Thus in *De la Vega* v. *Vianna* (1830), 1 B. & Ad. 284, the plaintiff was allowed to enforce a debt by arrest according to the then law of England, although the cause of action was in respect of a contract made by two foreigners in Portugal, where the person of the debtor was not punishable for his debts. The question came before the Court on a motion by the defendant in the action who had been arrested on *mesne* process, to be discharged on filing common bail. Lord Tenterden in delivering the judgment of the Court, concurred with an observation of Mr. Justice Heath, in a case cited (*Melan* v. *Duke de Fitzjames*, 1 Bos. & P. 138, 142) "that in construing contracts the law of the country in which they are made must govern, but that the remedy upon them must be pursued by such means as the law points out where the parties reside." And Lord Tenterden further observed: "A person suing in this country must take the law as he finds it; he cannot by virtue of any regulation in his own country enjoy greater advantages than other suitors here; and he ought not therefore to be deprived of any superior advantage which the law of this country may confer. He is to have the same rights which all the subjects of the kingdom are entitled to; and the defendant is to have the advantages, if any, which the form of proceeding in this country may give to every defendant."

So the question whether the defendant in an action may plead a set-off is a question of procedure and is determined by the *lex fori*, *Meyer* v. *Dresser* (1864), 16 C. B. (N. S.) 646, 33 L. J. C. P. 289, 10 L. T. 612; *Allen* v. *Kemble* (1843), 6 Moo. P. C. 314, as explained by Cockburn, C. J., *in Rouquette* v. *Overmann* (1875), L. R., 10 Q. B. 525 at p. 541, 44 L. J. Q. B. 221, 4 R. C. 287, 302.

The 4th section of the Statute of Frauds denying the right of action upon certain contracts unless made pursuant to its provisions, has been held to apply to procedure and not to the validity of the contract. So a parol agreement made in France and valid there though not to be performed within a year, was held by reason of the 4th section of the Statute of Frauds not to be enforceable here. *Leroux* v. *Brown* (1852), 12 C. B. 801, 22 L. J. C. P. 1. And so as to evidence. So a certificate of marriage not purporting to be a copy of an entry in the register of marriages kept by the law of a foreign country, but only containing a reference to the register, cannot be received as evidence of the marriage, although it would be received as evidence in the foreign Court. *Finlay* v. *Finlay* (1862), 31 L. J. P. M. & A. 149.

The *lex fori* determines the necessary parties to an action and the

time allowed for appeal. *Bullock* v. *Caird* (1875), L. R., 10 Q. B. 276, 44 L. J. Q. B. 124, 32 L. T. 814.

AMERICAN NOTES.

This subject is learnedly treated in *Perkins* v. *Guy*, 55 Mississippi, 153; 30 Am. Rep. 510, where it is held that a statute of limitations at the place of contract, under which the bar is there complete, can be pleaded in bar of an action on the contract in a foreign jurisdiction, if the statute has extinguished the right of action; but otherwise if it goes only to the extinction of the remedy. The court said: "Remedies on contracts must be pursued according to the law of the forum where the action is brought, and not by the law of the country where the contract is made. This principle is of such universal acceptation, and is convenient and necessary to national and inter-State commerce, that it may properly be said to have found a place in the public laws. . . . The rule at common law, well established in the Courts long before the Revolution, was that the time of the limitation of actions on contracts depends on the law of the forum, and not on the law of the State or country where the contract was made." Citing *Dupleix* v. *De Roven*, 2 Vern. 540; *Williams* v. *Jones*, 13 East, 439; *Townsend* v. *Jemison*, 9 Howard (Mississippi), 407; *Andrews* v. *Herriott*, 4 Cowen (New York), 508; *M'Elmoyle* v. *Cohen*, 13 Peters (U. S. Supreme Ct.), 312. In *Carson* v. *Hunter*, 46 Missouri, 467; 2 Am. Rep. 529, it is said: "It is too well settled now to admit of question, that acts of limitation, unless they expressly discharge the debt, go to the remedy merely, and that none can be pleaded except those in force where the suit is brought." To this effect, *Pearsall* v. *Dwight*, 2 Massachusetts, 84; 3 Am. Dec. 35; *Nash* v. *Tupper*, 1 Caines (New York), 402; 2 Am. Dec. 197; 2 Kent Com. 463; 2 Parsons on Contracts, 588; Story on Conflict of Laws, § 470; *Krogg* v. *Atlanta, &c. Railroad*, 77 Georgia, 292; 4 Am. St. Rep. 79; *Evans* v. *Cleary*, 125 Pennsylvania State, 204; 11 Am. St. Rep. 886; *Atkill* v. *Huntington*, 70 Maryland, 191; 14 Am. St. Rep. 344; *Ambler* v. *Whipple*, 139 Illinois, 311; 32 Am. St. Rep. 202; *Rice* v. *Moore*, 48 Kansas, 590; 30 Am. St. Rep. 318; *Hepler* v. *Davis*, 32 Nebraska, 556; 29 Am. St. Rep. 457; *Blackburn* v. *Morton*, 18 Arkansas, 384; *Schorn* v. *Beckwith*, 30 West Virginia, 774; notes, 6 Lawyers' Reports Annotated, 152.

The principal case is repeatedly cited in Story on Conflict of Laws, and is cited in Wood on Limitation, p. 24.

An exception to the general rule, however, arises where a statute gives a right of action unknown to the common law. In that case the limitation enacted in the statute attaches in a suit upon the cause of action in another State. Thus in *Theroux* v. *Northern Pac. R. Co.*, United States Circuit Court of Appeals (64 Fed. Rep. 84), it was held that an action for death by wrongful act, occurring in a State which gives three years for suing therefor, may be maintained in another State, which gives only two years, at any time within three years.

The Court said: "It was held in *Boyd* v. *Clark* (8 Fed. Rep. 849), which is a leading case on the subject, that when a statute of a State or country gives

a right of action unknown to the common law, and, in conferring the right, limits the time within which action may be brought, such limitation is operative in any jurisdiction where it is sought to enforce such cause of action. The same doctrine was recognized and approved in the following cases: *The Harrisburg*, 119 U. S. 199, 214; *Munos* v. *Southern Pac. Co.*, 51 Fed. Rep. 188; *Eastwood* v. *Kennedy*, 11 Md. 563; *Railway Co.* v. *Hine*, 25 Ohio St. 629, and *O'Shields* v. *Railway Co.*, 83 Georgia, 621. Indeed, it may be said that cases of the kind last referred to form a well established exception to the general doctrine that the *lex fori* governs in determining whether a cause of action is barred by limitation. An attempt is made to distinguish the case at bar from *Boyd* v. *Clark* (*supra*), and to exempt it from the operation of the rule declared in that case, on the ground that in that case an effort was made to enforce a statutory cause of action in a foreign jurisdiction after it had ceased to be enforceable in the country by whose laws the right of action was given; whereas in the case at bar the effort is simply to bar a statutory cause of action when sued upon in a foreign State, by applying thereto the local limitation law which is applicable to similar causes of action when they originate within the State. We recognize the obvious difference between the two cases, but we think that it will not suffice to withdraw the case in hand from the operation of the rule enunciated in *Boyd* v. *Clark*, and in the other cases heretofore cited. It was said, in substance, by Mr Chief Justice Waite, in *The Harrisburg*, *supra*, that when a statute creates a new legal liability with the right to sue for its enforcement within a given period, and not afterwards, the time within which suit must be brought operates as a limitation of the liability, and not merely as a limitation of the remedy. The same thought was expressed by the Supreme Court of Ohio, in *Railway Co.* v. *Hine*, *supra*, and by the Supreme Court of Maryland, in *Eastwood* v. *Kennedy*, *supra*. In the Ohio case it was said that a proviso contained in a statute creating a new cause of action, which limits the right to sue to two years, is a condition qualifying the right of action, and not a mere limitation of the remedy. It must be accepted therefore as the established doctrine, that where a statute confers a new right, which by the terms of the act is enforceable by suit only within a given period, the period allowed for its enforcement is a constituent part of the liability intended to be created, and of the right intended to be conferred. The period prescribed for bringing suit in such cases is not like an ordinary statute of limitations, which merely affects the remedy. It follows, of course, that if the Courts of another State refuse to permit the cause of action to be sued upon during a part of the period limited by the foreign law, to that extent they refuse to give effect to the foreign law, and by so doing impair the right intended to be created. Doubtless the Courts of a State may refuse to enforce a liability unknown to the common law that has been created by the laws of a foreign State or country, but the rule of comity which prevails as between the various States of this Union requires that the Courts of each State shall enforce every civil liability that may have been created by the laws of other States, for an act done or omitted within their several territorial jurisdictions, unless the liability so created and sought to be enforced is clearly repugnant to some local law, or is opposed to some well established public policy of the State whose

Courts are asked to enforce it (*Railroad Co.* v. *Mase* [decided by this Court at the present term], 63 Fed. Rep. 114; *Railroad Co.* v. *Babcock*, 154 U. S. 190, 14 Sup. Ct. 978, and cases cited). In point of fact, nearly every State in this Union has now adopted the provisions of Lord Campbell's act, with slight variations; and we are not aware that the Courts of a single State have ever refused to entertain a suit founded on the provisions of that act, as adopted in a sister State, or to give all the provisions of the act full force and effect, where the wrongful act or omission of duty complained of was committed in the latter State."

Section VI. — *Territorial Waters.*

No. 16. — THE QUEEN *v.* KEYN.

(C. C. R. 1876.)

RULE.

The territory of England extends to a nautical league from the coast, and a crime committed — although by persons on board a foreign ship — within that distance of the coast, may be tried by an English Court having criminal jurisdiction, and punished according to English law (Opinion of a minority of the Court of Crown Cases reserved, since adopted by the Legislature, 41 & 42 Vict. c. 73).

The Queen v. Keyn.

2 Ex. D. 68–243 (s. c. 46 L. J. M. C. 17; 13 Cox, C. C. 403).

Territorial Waters. — Jurisdiction. — Three Mile Limit.

A foreign ship within three miles of the English coast runs into and sinks a British ship under circumstances which, by English law, would show the captain of the former ship to be guilty of manslaughter. The captain is indicted accordingly before the Central Criminal Court.

Held, by a majority of the Court that the Court had no jurisdiction to try him.

Contra, by a minority of the Court, on the ground that the sea within three miles of the English coast is part of the territory of England. And, by two of the minority, also on the ground that the offence was committed on board a British ship, — namely, the ship which was run into.

The judgment of the majority in this case turning on special points relating to the jurisdiction of the Central Criminal Court, it

is thought that the report of their opinions, which extends to a great length, is not of sufficient general interest to be reproduced here. But, as the opinion of the minority rests upon a general principle of international law, and the reasons given for it doubtless form the basis of the subsequent legislation by the Act of 1875, 41 & 42 Vict. c. 73, it seems proper to embody that opinion in the present collection.

The reasons of the opinion of the minority are fairly represented, and are fully stated, in the opinion of —

Brett, J. A. The prisoner was at the Central Criminal [124] Court convicted of manslaughter, that is to say, he was found to have been guilty of acts and their results which amount, according to the law of England, to the crime of manslaughter. The prisoner was a German subject.

The question reserved is, whether the Court which tried him had jurisdiction so to do. All are agreed that it had none, unless by reason of the locality in which the crime was committed. It was committed on the open sea, but within three miles of the coast of England. It is suggested that it was also committed on board an English ship. In either case it is urged it was committed in a locality or place subject to the criminal law of England, and to the jurisdiction of the Central Criminal Court. It was argued on the one side that the open sea within three miles of the coast of England is a part of the territory of England as much and as completely as if it were land a part of England; that the criminal law of England, unless expressly restricted, applies to every crime, by whomsoever committed, within the territory of England; that there is no express restriction as to the crime in question; that *the criminal law, therefore, is to be applied to the [*125] present case. It was further argued that at all events the crime was committed on board an English ship, and, therefore, although by a foreigner, it is by statute to be tried according to the criminal law of England. It was answered that the open sea within three miles of the coast of England is not in any sense a part of the territory of England or within the jurisdiction of the Crown of England; that if it be within the jurisdiction of the Crown, so that the Sovereign or Parliament of England might, by constituting a Court to do so, have properly taken cognizance of the crime; yet no such Court has been constituted, and,

therefore, the Central Criminal Court had no jurisdiction. It was further argued that even though the open sea within three miles be a part of the territory of England, yet the crime was committed on board a foreign ship, and, therefore, could not be tried in England.

The questions raised by these arguments seem to me to be — First, is the open sea within three miles of the coast a part of the territory of England as much and as completely as if it were land a part of England? Secondly, if it is, has the Central Criminal Court any jurisdiction to try alleged crimes there committed, by whomsoever committed? Thirdly, can the crime be properly said to have been committed on board of an English ship so as thereby to give jurisdiction to an English Court, although the sea in question be not a part of England? Fourthly, can it be properly said to have been committed on board of the German ship; and if so, is jurisdiction thereby ousted from an English Court, although the sea in question be a part of English territory? As to the first part the argument does not deny that it is an axiom of law that the criminal law of England runs everywhere within England, so as to be applicable to every crime by whomsoever therein committed. If the three miles of open sea are a part of the territory of England, it was not denied, — nay, it was expressly admitted, — that unless there be an exception in favour of a crime committed on board of a foreign passing ship, and this crime was committed on board of such a ship, the criminal law of England might of right be applied to the crime. What was denied upon this hypothesis, as to the three miles of open sea, was that the Central [* 126] Criminal Court, or indeed any Court hitherto * constituted by the sovereign authority, had had jurisdiction given to it to apply the criminal law to such a case. The great question argued was, whether the three miles of open sea next the coast are or are not a part of the territory of England, meaning thereby a territory in which its law is paramount and exclusive. Before examining this proposition, I should wish to observe that the question what is or is not a part of the realm is, in my opinion, not in general a question for Judges to decide. Their duty as to the administration of the criminal law is to administer it, as between the Crown and all persons within the realm, with regard to any crime alleged to have been committed within the realm, and as between the Crown and all the Queen's subjects, with regard to

No. 16. — The Queen v. Keyn, 2 Ex. D. 126, 127.

any crime alleged to have been committed by any subject of the Queen anywhere. What are the limits of the realm should in general be declared by Parliament. Its declaration would be conclusive, either as authority or as evidence. But in this case of the open sea there is no such declaration, and the question is in this case necessarily left to the Judges, and to be determined on other evidence or authority. Such evidence might have consisted of proof of a continuous public claim by the Crown of England, enforced, when practicable, by arms, but not consented to by other nations. I should have considered such proof sufficient for English Judges. In England it cannot be admitted that the limits of England depend on the consent of any other nation. But no such evidence was offered. The only evidence suggested in this case is, that by the law of nations every country bordered by the sea is to be held to have, as part of its territory, meaning thereby, a territory in which its law is paramount and exclusive, the three miles of open sea next to its coast; and, therefore, that England among others has such territory. The question on both sides has been made to depend on whether such is or is not proved to be the law of nations. On the one side it is said there is evidence and authority on which the Court ought to hold that such is the law of nations; on the other side it is said there is no such evidence or authority. The evidence relied on for the Crown is an alleged common acquiescence by recognised jurists of so many countries, as to be substantially of all countries, and declarations of statesmen, and similar declarations of English Judges in Court in the * course of administering the law. On the other [* 127] side it is said that the declarations cited of the Judges were opinions only, and not decisions; that there is no common acquiescence of jurists to the alleged effect or declarations of statesmen; and that if there were, such acquiescence or declarations are not sufficient; that there should be acquiescence by governments declared in treaties or evidenced by acts of government. It is admitted that there is no such acquiescence by any general treaty or by unequivocal acts of many, if of any, governments. Main reliance is placed by the one side on the alleged common agreement of jurists. Their acquiescence or agreement in fact is denied by the other side, and, further, their authority is denied, if such acquiescence or agreement is held to exist.

It seems, therefore, necessary to determine, first, what is the

authority of a common agreement or acquiescence of jurists; secondly, is there any such acquiescence or agreement with regard to three miles of open sea adjacent to countries? thirdly, if there is, what is the exact purport of such agreement? As to the first, the propositions in respect of which the testimony of jurists may be accepted, and the grounds of accepting their testimony, are stated by Grotius: —

"As the laws of each State are made with regard to its own particular advantage, so the *consent of all* States, or of the greater number, may *well make laws common between them all*. And it seems that in fact such laws have been made, which tend to the advantage, not of each State in particular, but of the whole assemblage of such States. These are what are called the law of nations as distinguished from the law of nature." Introduction, s. 18.

That is to say, that there is in fact a law of nations, enacted, as it were, by common consent. Again he says, —

"I have used in favour of this law the testimony of philosophers, historians, poets, and even of orators; not that they are to be indiscriminately relied on, &c., but because where many persons in different ages and countries concur in the same statement, it (*i. e.*, the sentiment or proposition) must be referred to some general cause. In the subject now in question, this cause must be either a just deduction from the principles of natural justice or universal consent. The first discovers to us the natural law, the second the law of nations. In order to distinguish these two branches of the same science we must consider not merely the terms which authors have used to define them (for they often confound the terms natural law and law of nations), but [* 128] the nature of the subject in question. For * if a certain maxim, which cannot fairly be inferred from admitted principles, is nevertheless found to be everywhere observed, there is reason to conclude that it derives its origin from positive institution." S. 41.

This latter citation seems to me to assert that the testimony of writers and statesmen is to be received, and that if they, being of different nations and living at different times, have agreed to a common proposition which is not unreasonable, such agreement may be received as evidence of a common consent of nations, forming thereby a law of nations.

No. 16. — The Queen v. Keyn, 2 Ex. D. 128, 129.

"To form an useful library," says Marten's Introduction, s. 8, "for the studying of the positive law of nations, the following classes of books are indispensably necessary." He then enumerates treaties, history, etc., and lastly, he says, "And above all, all the regular treatises on the science."

Wheaton (c. 1, s. 11) is still more distinct.

"The various sources of international law," he says, "are these: 1. Text-writers of authority showing what is the approved usage of nations, or the general opinion respecting their mutual conduct, with the definitions and modifications introduced by general consent. Without wishing to exaggerate the importance of these writers, or to substitute in any case their authority for the principles of reason, it may be affirmed that they are generally impartial in their judgment. They are witnesses of the sentiments and usages of civilised nations, and the weight of their testimony increases every time that their authority is invoked by statesmen, and every year that passes without the rules laid down in their works being impugned by the avowal of contrary principles."

Kent (Lecture 1, p. 2), says, —

"The most useful and practical part of the law of nations is, no doubt, instituted on positive law, founded on usage, consent, and agreement." At p. 16: "Grotius, therefore, went purposely into the details of history and the usages of nations; and he resorted to the works of philosophers, historians, orators, poets, civilians, and divines for the materials out of which the science of public morality should be formed; proceeding on the principle that when many men at different times and places unanimously affirmed the same thing for truth, it ought to be ascribed to some universal cause."

He then cites Puffendorf and Vattel as authorities for the proposition he has in hand. And then, at p. 18, he says, —

"We now appeal to more accurate, more authentic, more precise, and more commanding evidence of the rules of public law, by a reference to the decisions of those tribunals to whom in every country the administration of that branch of jurisprudence is specially intrusted," &c. "But in the absence of higher and more authoritative sanctions, the ordinances of foreign states, the opinions of eminent statesmen, and the writings of distinguished jurists, are regarded as of great consideration on questions not settled by conventional law. In cases where the * principal jurists agree, the presumption will [* 129] be very great in favour of the solidity of their maxims; and no civilised nation that does not arrogantly set all ordinary law and

justice at defiance will venture to disregard the uniform sense of the established writers on international law."

Story, in his Treatise on the Conflict of Laws (s. 3), says, after stating the use among commercial nations of a system of international justice: —

"The system thus introduced for the purposes of commerce has gradually extended itself to other objects," &c. "New rules, resting on the basis of general convenience and an enlarged sense of national duty, have from time to time been promulgated by jurists and supported by Courts of Justice, by a course of judicial reasoning which has commanded almost universal confidence, respect, and obedience without the aid either of municipal statutes, or of royal ordinances, or of international treaties."

This is a strong assertion of the respect due to the propositions of great jurists, though they may not have been adopted either in legislation or treaties. And Phillimore, summing up all these, says in chap. 5: —

"The next and only other source of international law is the consent of nations. This consent is expressed in two ways, 1, it is openly expressed by being embodied in positive conventions or treaties; 2, it is tacitly expressed by long usage, practice, and custom." And in chapter 6: — "Such being the influence of usage upon international law, it becomes of importance to ascertain where the repositories and what the evidence may be of this great source of international law."

He then enumerates history, treaties, proclamations, or manifestoes, marine ordinances, the decisions of prize courts. And then in chap. 7: —

"The consent of nations is further evidenced by the concurrent testimony of great writers upon international jurisprudence."

(Citing Ortolan, b. 1, c. iv. t. i. p. 74): —

"The works of some of them have become recognised digests of the principles of the science, and to them every civilised country yields great, if not implicit homage." In the note he says: "The English Courts of common law, and English commentators on that law, both in cases of public and private international law, have been in the habit of referring to other works of those foreign authors as containing evidence of the law to be administered in England." "Lord Mansfield," he says, "in fact built up the fabric of English commercial law upon

No. 16. — The Queen v. Keyn, 2 Ex. D. 129, 130.

the foundation of the principles contained in the works of foreign jurists. In the Admiralty and Ecclesiastical Courts these works have always been referred to as authorities." Speaking of Grotius, he says, — "He may be almost said to have himself laid the foundation of that great pillar of international law, the authority of international jurists."

*Such are the views expressed in the treatises of recog- [*130] nised writers. The same opinion seems to be affirmed in judgments of the greatest Judges. Lord STOWELL, in *The Maria*, 1 C. Rob. at p. 351, says: —

"If authority is required, I have authority, I mean, &c., Baron Puffendorf." Again — "All writers upon the law of nations unanimously acknowledge it." And again — "Vattel is here to be considered, not as a lawyer merely delivering an opinion, but as a witness asserting the fact, the fact that such is the existing practice of modern Europe."

Lord STOWELL then cites as authorities for the proposition he is enunciating, Valin, Vattel, and other known writers. I have cited these specific statements from this one judgment of Lord STOWELL, but I think that a perusal of his judgments throughout his judicial career, and of those of Dr. Lushington, will show that neither of those great masters ever treated of or decided a disputed proposition of international law without citing and relying on, as authority and evidence, the expressed opinions of recognised writers on the law of nations. In *Triquet* v. *Bath*, 3 Burr. 1478, Lord MANSFIELD says upon this very point, and in order to justify his own reliance on the writers: —

"I remember a case before Lord TALBOT, of *Buvot* v. *Barbut*, in which Lord TALBOT declared a clear opinion, that the law of nations in its full extent was part of the law of England, and that the law of nations was to be collected from the practice of different nations and the authority of writers. And accordingly he argued and determined from such instances, and the authority of Grotius, Barbeyrac, Bynkershoek, Wiquefort, &c., there being no English writers of eminence upon the subject. I was counsel in the case, says Lord MANSFIELD, and have a full note of it. I remember, too, Lord HARDWICKE's declaring his opinion to the same effect."

Here, therefore, we have the opinions and practice of Lord TALBOT, Lord HARDWICKE, Lord MANSFIELD, Lord STOWELL, and Dr. LUSHINGTON.

As to the opinions of statesmen, I will cite only that of Sir James Mackintosh, because, if any can be decisive, his must be. In his Discourse upon the Study of the Law of Nature and the Law of Nations, he says, —

"What we at the present time call the law of nations is become, as to many points, as precise and certain as positive law; the [*131] principles of it are more *particularly established in the writings of those who have treated on the science which I am about to treat." Speaking of Grotius he says, — "His mind was not so servile and stupid as that he used the opinions of poets and orators, of historians and philosophers, as the decisions of Judges without appeal. He cites them, as he himself says, as witnesses, whose unanimous consent or agreement, strengthened moreover by their differences on almost all other points, is conclusive proof of the general agreement of mankind upon the great rules of duty and the fundamental principles of morality."

This passage is styled by Hallam as "a noble defence of Grotius," whom he himself styles as "the founder of the modern law of nations:" Literature of Europe, part iii. c. 4, s. 3.

And Phillimore again, citing this, says (at p. 62), —

"In truth, a reference to the opinion of accredited writers upon public and international law has been a distinguishing characteristic of statesmen in all countries, and perhaps especially of those who have deserved that appellation in this kingdom. It has been felt and eloquently expressed by them, that though these writers were not infallible, nevertheless the methodised reasonings of the great publicists and jurists formed the digest and jurisprudence of the Christian world."

And in chapter 8 (Recapitulation of Sources of International Law) he says, —

"The sources, then, from which international jurisprudence is derived are these," &c., &c. He then enumerates many, and among them this: "The universal consent of nations, both as expressed by positive compact or treaty, and as implied by usage, custom, and practice, such usage, custom, and practice being evidenced in various ways: by precedents recorded in history, by being embodied and recorded in treaties, in public documents of states, in the decisions of international tribunals, in the works of eminent writers upon international jurisprudence."

No. 16. — The Queen v. Keyn, 2 Ex. D. 131, 132.

And he cites a remarkable adhesion to the same view by a great American statesman. In Mr. Webster's letter of the 28th of March, 1843, to the British Government, that statesman says: —

"If such well-known distinction exists, where are the proofs of it? What writers of authority on the public law, what adjudications in Courts of Admiralty, what public treaties recognise it?"

These authorities seem to me to make it clear that the consent of nations is requisite to make any proposition a part of the law of nations. Their consent is to be assumed to the logical application to given facts of the ethical axioms of right and wrong. Such an application is the foundation of every system of law, including necessarily the law of nations. Their consent must be proved by sufficient evidence to any other asserted proposition of international law. The question is, what is to be considered sufficient * proof of such consent. On the one side, it is said, that [* 132] among other heads of evidence of such consent the writings of recognised jurists of different nations are to be received, and that a common consent of them all, or of substantially all of them, to a reasonable proposition, may be accepted as proof of the common consent of nations, though the proposition has not yet been brought, for the purposes of action, before the governments of nations. On the other side, it is said, that the propositions of such writers are theories, not binding unless and until they have been adopted by governments; and that such adoption must be shown by some express declarations of governments, or by some acts of governments. If the latter be true, it is obvious that there can be no law on any particular point until it has arisen in fact for the treatment of governments. It cannot be raised by them and decided by anticipation, because there is no common tribunal or legislature, yet the latter contention is, as I understand, approved by high authority among us.

It is in deference to the weight of that authority that I have so elaborated the citations from great writers, Judges, and statesmen. And I feel obliged to say that, in my opinion, the long list of great authorities to which I have referred, and the constant practice of the English International Court, nay, I think, of all English Courts, show that it is considered that all countries have recognised that the consent of them all, as Sovereigns, may and should be inferred in favour of a reasonable proposition from a common consent to it

of all, or of such a considerable number as to amount substantially to all recognised writers on international law, although there be no other evidence of their sovereign assent.

The next questions are whether there is by reason of such or other evidence, proof of a common consent of nations to any propositions, and if to any, to what proposition with regard to the three miles of open sea which are adjacent to any country. And, first, let us consider the writers. It seems to me that Grotius assents to a right to the adjacent sea, and to the proposition that such right is a territorial right. It will be necessary hereafter to consider the sense in which that term "territorial" is used by the writers: —

"Videtur autem imperium in maris portionem eâdem ratione acquiri, qua imperia alia, id est ut supra diximus, ratione personarum [*133] et ratione teritorii. *Ratione personarum ut si classis, qui maritimus est exercitus, aliquo in loco maris se habeat: ratione territorii quatenus ex terra 'cogi possunt qui in proxima' maris parte versantur, nec minus quam si in ipsa terra 'reperirentur.'"

This seems to me to admit a territorial right in a country over the adjacent sea. It does not explicitly determine the limits of that sea, but it states, as the principle of limitation, the distance from land over which compulsion could be exercised from the land. There is no real difference, as it seems to me, between this and the proposition of Bynkershoek. The more general principle enunciated by him is: —

"Unde dominium maris proximi non ultra concedimus quam e terra 'illi imperari potest.'"

That is the same as the principle of Grotius. In order to carry this principle into practice, he lays down the other: —

"Quare omnino videtur rectius eo potestatem terræ extendi quousque tormenta exploduntur."

And then further to show that he is adopting the practical application of his principle to the times in which he lived, he says: —

"Loquor autem de his temporibus, quibus illis machinis utimur alioquin generaliter dicendum esset, potestatem terræ finiri ubi finitur armorum vis."

He gives the dominion of the adjacent sea to the adjacent land, and defines the limit of such sea to be the distance of a cannon

shot from the land. I do not think it useful to cite the words on this point of all the other writers. It is not, as I understand, denied that all, or substantially all, agree that there is a right of some kind over the adjacent open sea, and that none deny the extent of a marine league or three miles, although some claim more. As to the nature of that right, Puffendorf speak of it as —

"An accessory to the land as much as the ditch of a town is accessory to the town."

I apprehend his meaning to be, that it is a part of the town, that is, a part of the territory of the town. Wolfs is still more express. Speaking of the adjacent sea, he says: —

"Quoniam partes maris occupatæ ad territorium illius gentis pertinent, qua eas occupavit, quale jus Rector civitatis in suo territorio habet, tale etiam ipsi competit in partibus maris occupatis. Per consequens qui in iis versantur iisdem legibus subsunt quam qui in terris habitant aut commorantur, etiam peregrini admissi."

* This is to say that the adjacent sea is "territory," and [* 134] that a consequence of its being territory is that the country has its ordinary jurisdictions over all who are within that territory. Heubner calls this sea "an accessory." Moser says it is under the sovereignty of the adjacent land. Hautefeuille calls them "territorial waters," and declares that they are the property of the nation, and that consequently the nation has over them all the rights of sovereignty without exception. Ortolan has a chapter (chap. viii.) headed "De la mer Territoriale." He admits that there is a right in the adjacent country over the adjacent territorial water. As to its extent, he says: —

"La règle que donne Bynkershoek: Terræ potestas finitur ubi finitur armorum vis, est aujourd'hui la règle du droit des gens, et depuis l'invention des armes à feu cette distance a ordinairement été considérée comme de trois milles." As to the kind of jurisdiction, he says (p. 157), —"Ce n'est pas seulement la défense générale du pays et de ses intérêts publics contre toutes les attaques dont il pourrait être l'objet; c'est aussi la défense de ses nationaux, de ses habitants, de toute personne même étranger, qui y résident, dans leur sûreté, dans leur propriété, dans leurs intérêts individuels contre les délits de toute sorte qui pourraient y porter atteinte. Chargé de cette défense publique et particulière sur tout cet espace, l'État a le droit de faire les règlements, les lois

nécessaires à ce but, et d'employer la force publique pour les y faire exécuter. Ainsi les lois de police et de sûreté y sont obligatoires. En un mot, l'État a sur cet espace non la propriété, mais un droit d'empire; un pouvoir de législation, de surveillance et de juridiction, conformément aux règles de la juridiction internationale."

A right of sovereignty which gives a right of legislation, in order to protect the rights of property and to ensure the individual safety of all, even strangers, against offence of every kind, is, I think, as complete a sovereign right as any nation has on land. It is true that Ortolan denies that the nation has a right of property in this territorial sea: —

"Ainsi, le droit qui existe sur la mer territoriale n'est pas un droit de propriété; on ne peut pas dire que l'État, propriétaire des côtes, soit propriétaire de cette mer."

But this assertion, it must be observed, is made as a conclusion from a previous chain of reasons. Therefore, it says, the right is not a right of property. The previous reason is, the want of power properly to refuse a free passage to ships passing with harmless intent. The conclusion is not, to English lawyers, a [* 135] * satisfactory result of such a cause. There may be a right of property, subject to a prescriptive accorded free right of way. I cannot but think, therefore, that substantially all the foreign jurists are in accord in asserting that by the common consent of all nations, each which is bordered by an open sea has over the three adjacent miles of it a territorial right. And the sense in which they all use that term seems to me to be fully explained by Vattel (lib. i. c. 18, s. 205.) He says: —

"Lorsqu'une nation s'empare d'un pays qui n'appartient encore à personne, elle est censée y occuper l'empire ou la souveraineté en même temps que le domaine." "Tout l'espace dans lequel une nation étend son empire forme le ressort de sa juridiction et s'appelle son territoire." At lib. ii. s. 84: "L'empire uni au domaine établit la juridiction de la nation dans le pays qui lui appartient, dans son territoire."

This seems plain; sovereignty and dominion necessarily give or import jurisdiction, and do so throughout the territory. Applying this to the territorial sea (at lib. 1, c. 23, ss. 295) he says: —

"Quand une nation s'empare de certaines parties de la mer, elle y occupe l'empire aussi bien que le domaine, etc. Ces parties de la mer sont de la juridiction du territoire de la nation; le souverain y commande, il y donne des lois et peut reprimer ceux qui les violent; en un mot il y a tous les mêmes droits qui lui appartiennent sur la terre, etc."

It seems to me that this is in reality a fair representation of the accord or agreement of substantially all the foreign writers on international law; and that they all agree in asserting that by the consent of all nations, each which is bordered by open sea has a right over such adjacent sea as a territorial sea, that is to say as a part of its territory; and that they all mean thereby to assert that it follows, as a consequence of such sea being a part of its territory, that each such nation has in general the same right to legislate and to enforce its legislation over that part of the sea as it has over its land territory. With its own consent, given to all other nations in the same way as they have consented to its right of territory, consent from which neither it nor they can rightly depart without the consent of all, there is for all nations a free right of way to pass over such sea with harmless intent; but such a right does not derogate from the exercise of all its sovereign rights in other respects. As to the extent of this territory, it is impossible to say that all writers have been always agreed as to its *boundary [*136] seaward. Some nations have in the olden times claimed more than the three miles. The reasonings of some writers would now give more than three miles; but no nation is, I think, shown to claim less than three miles, and all nations and writers yield to three miles at least. If that be so, as I think it is, it may properly be said that all are agreed as to three miles. If one claims a debt of £1000, and the other admits a debt of £500, they are agreed that there is a debt of £500, though they are in dispute as to the other £500. Let us now proceed to the American and English writers. Wheaton (c. 4, s. 10) says —

"The controversy how far the open sea or main ocean beyond the immediate boundary of the coasts may be appropriated by one nation to the exclusion of others, &c., can hardly be considered open at this day. We have already seen that by the generally approved usage of nations which forms the basis of international law, the maritime territory of every nation extends (1), to the ports, harbours, bays, &c.; (2), to the distance of a marine league, or as far as a cannon shot will reach

from the shore, along all the coasts of the State." And afterwards — "The reasons which forbid the assertion of an exclusive proprietary right to the sea in general will be found inapplicable to the particular portions of that element included in the above designations."

In these passages the same expressions are used as are used by the foreign writers, namely, "maritime territory," and, as a paraphrase, "an exclusive proprietary right."

The passage in Kent (s. 2, p. 29) is said to be indistinct. I think it will be seen that the only portions of the received propositions which he declares to be indistinct are those which relate to the distance. I think he shows that he is clearly of opinion that for some distance there is an exclusive dominion. This meaning is certainly attributed to Kent by Sir R. Phillimore, who cites this passage of Kent, among other authorities, in support of the following statement: —

"Though the open sea be thus incapable of being subject to the rights of property or jurisdiction, yet reason, practice, and authority have firmly settled that a different rule is applicable to certain portions of the sea. And, first, with respect to that portion of the sea which washes the coast of an independent State, &c., the rule of law may be now considered as fairly established, namely, that this absolute property and jurisdiction does not extend unless by the specific provisions of a treaty, or an unquestionable usage beyond a marine league, &c. In the sea, out of reach of cannon shot, says Lord Stowell, universal use is presumed. This (*i. e.*, the reach of cannon shot or a marine league) is the limit fixed to absolute property and jurisdiction."

[* 137] * In *The Maria*, 1 C. Rob. 352, Lord Stowell says: —

"It might likewise be improper for me to pass over entirely without notice, as another preliminary observation, though without meaning to lay any particular stress on it, that the transaction in question took place in the British Channel close upon the British coast, a station over which the Crown of England has, from pretty remote antiquity, always asserted something of that special jurisdiction which the sovereigns of other countries have claimed and exercised over certain parts of the seas adjoining to their coasts."

This is not precise, but it could not have been written by Lord Stowell in such a judgment if he had intended to reject the proposition which asserts jurisdiction over the adjacent open sea within

some limit of distance. His view of the law, however, cannot be doubted. In the *Twee Gebroeders,* 3 C. Rob. 162, the Prussian consul claimed restitution of four Dutch ships seized by an English man-of-war, on a suggestion by the consul that the seizure was made within the protection of the Prussian territory, Lord STOWELL, in giving judgment, said, —

"This ship was taken on a voyage to Amsterdam, which was then under blockade. A claim has been given for the Prussian Government, asserting the capture to have been made within the Prussian territory. It has been contended that, although the act of capture itself might not have taken place within the neutral territory, yet that the ship to which the capturing boats belonged was actually lying within the neutral limits. The first fact to be determined is the character of the place where the capturing ship lay, whether she was actually stationed within those portions of land and water, or of something between water and land, which are considered to be within Prussian territory. She was lying within the eastern branch of the Eems, within what I think may be considered as a distance of three miles at most from East Friesland. I am of opinion that the ship was lying within those limits in which all direct operations are by the law of nations forbidden to be exercised. No proximate acts of war are in any manner to be allowed to originate on neutral ground, and I cannot but think that such an act as this, that a ship should station herself on neutral territory and send out her boats on hostile enterprises, is an act of hostility much too immediate to be permitted. The capture cannot be maintained."

This case seems to me to be of immense importance in the present discussion. The very ground of decision is, that the capturing ship was stationed within neutral territory. The only reason why she was held to be so was, that the three miles of sea was the territory of Prussia. The ground of that last decision is not that the water was *intra fauces* or otherwise. It is only on the ground that the ship was within three miles of the coast. Here,
* therefore, we have a claim based on this principle made [* 138]
by a Government, an opinion of Lord STOWELL, and a judicial decision by him in an international Court.

In the case of *The Leda,* Swa. Adm. 40, Dr. LUSHINGTON held that section 330 of the Merchant Shipping Act, 1864, which is limited in terms to the United Kingdom, "applied to the three miles of open sea round England."

"What, he says, are the limits of the United Kingdom? The only answer I can conceive to that question is, the land of the United Kingdom and three miles from the shore."

In *The General Iron Screw Colliery Company* v. *Schurmanns*, 1 J. & H. 180, there had been a collision between a British ship of the plaintiffs and a Dutch ship, two miles and a half off Dungeness. The British ship had in the Admiralty Court been held solely to blame. The plaintiffs, her owners, filed a bill in Chancery to declare a limitation of her liability according to the provisions of the Merchant Shipping Act. It was admitted that unless there was reciprocity, that is to say, that unless the statute might, in like case, have been relied on by the foreign ship, it could not have been relied on against her. The question therefore argued was, whether the statute applied to the locality of the collision, and therefore would have applied to the foreign ship. It was argued for the plaintiffs that the ninth part of the statute is general, and therefore applies to the whole of her Majesty's dominions. The statute must, therefore, be taken, it was said, to extend as far as jurisdiction could be asserted consistently with the law of nations. It has long been the settled law of nations that each country may exercise jurisdiction over the sea within three miles of the shore. The answering argument was: "The fallacy of the argument for the plaintiffs lies in the assumption that a country has by the law of nations a general territorial jurisdiction to the distance of three miles from its coast." The question as to jurisdiction and territorial jurisdiction, that is to say, jurisdiction on the ground of the locality being the territory of England, was precisely raised by the facts and arguments. Lord HATHERLEY's judgment is: —

[*139] "With respect to foreign ships, I shall adhere to the opinion which I expressed * in *Cope* v. *Doherty*, 4 K. & J. 367; 27 L. J. Ch. 600, that a foreign ship meeting a British ship on the open ocean cannot properly be abridged of her rights by an Act of the British Legislature. Then comes the question, how far our Legislature could properly affect the rights of foreign ships within the limits of three miles from the coast of this country. There can be no possible doubt that the water below low-water mark is part of the high sea. But it is equally beyond question that for certain purposes every country may, by the common law of nations, exercise jurisdiction over that portion of the high seas which lies within three miles from its shores."

He cites *The Leda*, and holds that the statute does apply to foreign as well as to British ships within the three miles. I can see no principle on which this application of the British statute can be founded other than the principle that a British statute in general terms is applicable to every part of British territory. The foundation of the judgment, therefore, is, that the three miles of high sea or open sea next to the coast is a part of the British territory, and by citing *The Leda* the learned Judge showed that he so intended.

In *The Free Fishers of Whitstable* v. *Gann*, 11 C. B. (N. S.) 387, Erle, C. J., says: —

"The soil of the sea shore to the extent of three miles from the beach is vested in the Crown."

In *Gann* v. *The Free Fishers of Whitstable*, 2 H. L. C. 192, this was not denied, though it was held that no toll can be taken from the mere fact of a ship anchoring, as part of her process of navigating through the three miles. Lord Chelmsford says: —

"The three-miles limit depends upon a rule of international law by which every independent State is considered to have territorial property and jurisdiction in the seas which wash their coast within the assumed distance of a cannon shot from the shore."

And in *Gammell* v. *The Commissioners of Woods and Forests*, 3 Macq. 419, it was held that salmon fishing in the open sea around the coast belongs to the Crown. Lord Wensleydale, at p. 465, says: —

"It may be worth while to observe that it would be hardly possible to extend it seaward beyond the distance of three miles, which by the acknowledged law of nations belongs to the coast of the country, is under the dominion of the country, by being within cannon range, and so capable of being kept in perpetual possession."

These expressions of great lawyers are, no doubt, not binding authority, but they disclose an intimate acquaintance with the writers, using their very terms of art, and show that these Judges * acquiesced in the authority and the law of those [* 140] writers. And the full meaning of so learned a Judge as Lord Wensleydale is to be gathered from the passage in Co. Litt s. 439. The section is: —

"In the same manner it seemeth where a man is out of the realm, &c., if such a one be disseised," &c. The comment is: "Out of the realm, *id est, extra regnum,* as much as to say as out of the power of the King of England, as of his crown of England; for if a man be upon the sea of England he is within the kingdom or realm of England, and within the liegeance of the King of England as of his crown of England. And yet *altum mare* is out of the jurisdiction of the common law, and within the jurisdiction of the Lord Admiral," &c.

Once let it be fixed what is the sea of England, — and this is high authority that such sea is within the kingdom and realm and dominion of the sovereign, — that is to say, once agree that the three miles are the sea of England, and then it follows that the rights of England within the sea are as if it were land territory, and are the same as in any other part of the kingdom and realm and dominion of the sovereign. The decision in *The Saxonia*, 15 Moo. P. C. 262, is not to the contrary. The statute, in the part of it in question, is in express terms confined to British ships, that is to say, to ships owned to a given extent by British subjects. In America there is the great authority of Mr. Justice STORY. In the brig *Ann*, 1 Gallison, 62, the case was that by statute a certain embargo was laid on all ships and vessels in the ports and places within the limits and jurisdiction of the United States, that is to say, an embargo against their sailing out of or away from such limits.

The *Ann* had arrived from Alexandria in Columbia off the port of Newburyport. She anchored between two and three miles from Newburyport bar, which, that is to say, the bar as the case states, is the limit of the port of Newburyport, and about the same distance from the neighbouring land. She afterwards sailed for Jamaica. The question made was whether, by sailing from her anchorage off Newburyport for Jamaica, she had broken a statutory embargo, which question depended on whether she was within the United States when at anchor off Newburyport. STORY, J., said: —

"As the *Ann* arrived off Newburyport, and within three miles of the shore, it is clear that she was within the acknowledged jurisdiction of the United States. All the writers upon public law
[* 141] agree that every nation has exclusive jurisdiction * to the distance of a cannon shot or marine league over the waters adja-

cent to its shores, and this doctrine has been recognised by the Supreme Court, &c. Indeed, such waters are considered as a part of the territory of the sovereign."

It is clear that he held that, because the brig was within the territory of the United States when anchored in the open sea off Newburyport, but within three miles of the shore, and because she sailed from the territory of the United States, for Jamaica, she broke the embargo, and was liable to forfeiture. In this case as in the case of *The Leda* there is a judicial decision, the foundation of which is the affirmation of the proposition, that the open sea, adjacent to a sovereign country, is, for a distance of three miles, a part of the territory of that country, and that it is so by virtue of a consent of all nations. I cited a passage from Vattel (lib. 1, c. 18, s. 205) to show what is, in the view of the foreign jurists, the extent of the sovereign jurisdiction consequent upon the national ownership of territory. I will add the view of MARSHALL, C. J. In *The Exchange*, he says (7 Cranch, 136): —

"The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself. Any restriction upon it, deriving validity from an external source, would imply a diminution of its sovereignty to the extent of the restriction, and an investment of that sovereignty to the same extent in that power which could impose such restriction. All exceptions, therefore, to the full and complete power of a nation within its own territories must be traced up to the consent of the nation itself. They can flow from no other legitimate source."

There remains one more piece of evidence. It is stated in Wheaton, at p. 344, thus: —

"In the negotiations which preceded the signature of the Treaty of Intervention of the 15th of July, 1840, the closing of the straits of the Dardanelles in the hands of Turkey was objected to by Russia. It was replied on the part of the British Government, that its opinion respecting the navigation of these straits by the ships of war of foreign nations rested upon a general and fundamental principle of international law." Every State is considered as having territorial jurisdiction "over the sea which washes its shores as far as three miles from low-water mark; and consequently any strait, which is bounded on both sides by the territory of the same sovereign, and which is not more than six miles wide, lies within the territorial jurisdiction of that sovereign."

No. 16. — The Queen v. Keyn, 2 Ex. D. 141, 142.

And the treaty was concluded in accordance with that proposition. And as further, and to my mind the strongest of all, evidence of what kind of right is recognised by all nations to [*142] be * in these three miles of adjacent open sea, I cite the admitted rules as to neutrality, — not merely the rights given to the adjacent state, but the duties imposed on such state. Such a duty has hitherto invariably been founded on an abuse or improper use of the territory of the neutral state. To found such duty on any other ground would be abnormal. To found it on territory is to act on the universal rule. The fact, therefore, of such duty being universally vouched in respect of the three miles of sea, is, as it seems to me, the strongest evidence that such sea is universally treated as a part of the territory of the adjacent state.

After citing this long list of authorities, I make the following observations. I have done so because it seems to me that the whole question depends entirely upon authority. There is no reason, founded on the axiomatic rules of right and wrong, why the three miles should or should not be considered as a part of the territory of the adjacent country. They may have been so treated by general consent; they might equally well have not been so treated. If they have been so treated by such consent, the authority for the alleged ownership is sufficient. The question is, whether such a general consent has in this case been proved by sufficient evidence. I have cited the assertions of a large number of writers, recognised as able writers on international law, of different countries and different periods. I have cited assertions of great Judges, and of statesmen, and the opinions and decisions of some Judges, and the assertion made on behalf of a great government. As there is no common Court of nations, and no common legislature, none of these are, in the usual sense, binding on this Court. As the opinions of the Judges are manifestly founded on the opinions of the writers, I think the principal evidence is that of the writers. I have already said that, in my opinion, a general consent of recognised writers of different times and different countries to a reasonable proposition is sufficient evidence of a general consent of nations to that proposition. Such a general consent establishes the proposition as one of international law. In this case I think there is a general consent to a proposition with regard to the three miles of

open sea adjacent to the shores of sovereign states. I do not think that such general consent, as to a distance of three miles, is impeached by showing that there has been a difference
* as to a claim by some with regard to a greater distance [* 143]
than three miles. The question is, what is the proposition to which such general consent as to the three miles is given? The dispute is whether, by the consent of all, certain limited rights are given to the adjacent country, such as a right that the waters should be treated as what is called a neutral zone, or whether the water is, by consent of all, given to the adjacent country as its territory, with all rights of territory, it being agreed by such country with all others, that all shall have a free right of navigation or way over such waters for harmless passage and some other rights. If the first be true, it is impossible, according to the reasoning of Vattel and MARSHALL, C. J., — which reasoning, I think, is irresistible, — that it can be properly said that the adjacent country has any proprietary right in the three miles, or any dominion, or any sovereignty, or any sovereign jurisdiction. If the latter be correct, the adjacent country has the three miles, as its property, as under its dominion and sovereignty. If so, that three miles are its territorial waters, subject to its rights of property, dominion, and sovereignty. Those are all the rights and the same rights which a nation has, or can have, over its land territory. If, then, such be its rights over the three miles of sea, that sea is as much a part of its country or territory as its land.

Considering the authorities I have cited, the terms used by them, wholly inconsistent, as it seems to me, with the idea that the adjacent country has no property, no dominion, no sovereignty, no territorial right; and considering the necessary foundation of the admitted rights and duties of the adjacent country as to neutrality, which have always been made to depend on a right and duty as to its territory, I am of opinion that it is proved that, by the law of nations, made by the tacit consent of substantially all nations, the open sea within three miles of the coast is a part of the territory of the adjacent nation, as much and as completely as if it were land a part of the territory of such nation. By the same evidence which proves this proposition, it is equally proved that every nation which possesses this water territory has agreed with all other nations that all shall have the right of free navigation to pass through such water territory, if such navigation be

with an innocent or harmless intent or purpose. This [*144] right of free *navigation cannot, according to ordinary principles, be withdrawn without common consent; but it by no means derogates from the sovereign authority over all its territory of the state which has agreed to grant this liberty, or easement, or right to all the world.

Every law, recognised or specifically enacted by the sovereign authority of a state, whether therefore written or unwritten, if such law be promulgated in general terms, must, of necessity, apply to the whole territory of such state. There is nothing to limit it to a less area. Every such English law, therefore, that is to say, every enactment of English law, common or statute law, which is not confined to a less area by express words or necessary inference, is as law applicable to the whole territory of England in the same way, that is to say, to the water territory just as much as to the land territory. This proposition is evidently an assumed premiss in the opinions I have cited of Lord CHELMSFORD, Lord WENSLEYDALE, and Sir WILLIAM ERLE, and in the judgments I have cited of Lord HATHERLEY. I think it therefore proved that the offence committed, though it was committed by a foreigner, was within the cognizance of the English criminal law, because it was committed within English territory, unless there be an exceptional privilege in favour of crimes committed on board foreign ships by foreigners as such ships are passing through the water territory of England, and this crime was committed on board the foreign ship. Now if this exception exists, it is alleged to be proved by the same evidence to the same effect as the right of territory and the right of free passage or navigation have been proved. They are proved, as I have said, by a common consent, found in the common consent of the great body of recognised writers, and in the opinions or decisions of great Judges of different nations. I can only say of this exception that, although there are one or two expressions by some writers which may be alleged in argument as in support of it, it is not expressed in clear terms by any one. I do not think there is really any evidence of a common assent to it. It follows that even if the offence could properly be said to have been committed on board the foreign passing ship, still it would be an offence committed within British territory, and therefore cognizable by the British criminal law.

The next question is, whether the Central Criminal Court

had *jurisdiction to administer to this offence the law [*145] of England, which was as a law applicable to it. This is a strictly municipal question, and has no regard whatever to international law. The only question is, whether the sovereign authority of England has in fact constituted a Court which, according to international law, it might properly constitute at any moment, and whether it has constituted the Central Criminal Court to be its organ to administer to such a case as this the criminal law of England. Now, taking it to be proved that the criminal law is applicable to that part of the Queen's territory which is open sea within three miles of her land, the presumption is, I apprehend, that there is some Court appointed to administer that law in that part of her territory. The first duty of the sovereign authority is to see that the law is administered. Story, in his Conflict of Laws, s. 529, says: —

"Considered in an international point of view, jurisdiction, to be rightfully exercised, must be founded either upon the person being within the territory, or upon the thing being within the territory," etc. *Vattel, he says, lays down the true doctrine in clear terms.* "The sovereignty united to domain establishes the jurisdiction of the nation in its territories or the country which belongs to it. It is its province, or that of its sovereign, to exercise justice in all places under its jurisdiction, to take cognizance of the crimes committed and the differences that arise in the country."

It is admitted that the common law Courts never were appointed according to the common law, and therefore never had jurisdiction by virtue of the common law to try crimes committed on the high or open seas, even though the crimes were committed by the Queen's subjects, because the commissions of the Judges applied in terms only to counties, and the juries were summoned only to try cases within counties, and the high or open sea is within no county. The question is, whether the Admiral had such jurisdiction. Now as to the quarrel which arose regarding prohibitions between the Admiral and the common-law Judges, which is described in the 4th Institute, title: — (The Court of Admiralty), it is manifest that it related to contracts, pleas, and quereles made or done upon a river, haven, or creek within a county. The answer of the Judges so states the matter in terms. There was no dispute raised about the extent of the Admiral's

jurisdiction on the seas outside any county. The ques-
[* 146] tion of the * extent of that jurisdiction is not touched by that dispute. The statute 13 Rich. II., c. 5, does not in any way restrict the jurisdiction of the Admiral on the sea not within a county. The Admirals and their deputies, it says, "shall not meddle from henceforth with anything done within the realm of England, but only with things done upon the sea." This is evidently pointed at the same dispute. It recognises the jurisdiction of the Admiral in respect of things done upon the sea. The term "realm," therefore, by the context means that part of the realm which is within counties. And so 15 Rich. II., c. 3, is a declaration against an alleged jurisdiction of the Admiral "within the bodies of counties either by land or water." The exception, therefore, in that statute as to death or mayhem done in great ships, &c., applies also to such crimes committed in such ships, though they are within the body of a county. The Commentary of Lord COKE says so: —

"This latter clause gives the admiral further jurisdiction in case of death and mayhem, but in all other happening within the Thames or in any other river, port, or water which are within any county of the realm, &c., by express words of this Act of Parliament, the admiral or his deputy hath now jurisdiction."

This statute therefore does not define, or restrain, or limit any jurisdiction which the Admiral had of things done on the seas. And the commentary seems to me to assume that the Admiral already had jurisdiction in respect of death and mayhem done and caused on the seas. I do not, of course, mean to say that it suggests that he had jurisdiction to administer the law of England in respect of things done to which the law of England was not applicable, but it does seem to me that it assumes that he had jurisdiction to administer the law of England to everything done on the seas to which the law of England was properly applicable.

The administration of the whole law of England is assumed to be divided between the land Courts and the Admiral's Court. He cites, but with a wrong reference, as acknowledging the jurisdiction of the Admiral, a statute of Elizabeth in these terms: —

No. 16. — The Queen v. Keyn, 2 Ex. D. 146, 147.

"All and every such of the said offences before mentioned as hereafter shall be done on the main sea, or coast of the sea being no part of the body of any county, &c."

So that, says Lord COKE, by the judgment of the whole Parliament the jurisdiction of the Lord Admiral is wholly confined to * the "main sea," or "coasts of the sea being [* 147] no parcel of the body of any county of this realm."

I cannot help thinking that the mention, both in the statute and the Commentary, of both the main sea "and the coasts of the sea," which latter must refer to sea no part of a county, *i. e.*, to sea which is below low-water mark and which is open sea, is pregnant with an assumption by Lord COKE that there is a difference between the open sea called the main sea and the open sea on the coast. And in the case of *The Admiralty*, 12 Co. Rep. 79, 80, Lord COKE says: —

"Upon which book I observe, &c. This proves directly that then the admiral had jurisdiction to adjudge things done upon the sea from whence no pais may come; and this did not begin then, but, without question, so long as there has been trade and traffic (which is the life of every land), there was marine jurisdiction to redress depredations, piracies, murders, and other offences upon the sea, &c.; and this does appear by the said BERESFORD, C. J., who speaketh in the voice of the Court, where he says that the King willeth that the peace be as well kept upon the sea as upon the land, and it is not possible that peace should be kept without jurisdiction of justice."

This is a strong assertion, that the jurisdiction of the sovereign authority, whatever that was, that is, to whatever it was applicable to preserve peace, was, in respect of things done upon the sea, given to the Lord High Admiral. I think that the cases cited by Lord HALE are consistent with the supposition that those which were criminal cases were cases of piracy, and therefore that they cannot be relied on as judicial decisions of the point now in question; but still, I think that the opinion of Lord HALE himself is of great weight, and that in favour of the view that either the Admiralty or the Queen's Bench had criminal jurisdiction in respect of treasons and felonies done on those seas which were claimed to be the seas of England, and that such jurisdiction existed on the ground of the locality of the crime. If so, such jurisdiction extended to the crime by whomsoever

there committed, for that is the meaning of jurisdiction by reason of locality. The charge of Sir LEOLINE JENKINS is unfortunately open to the remark that it is declamatory, and therefore inexact. Yet it is a statement of the law upon the very point of the jurisdiction of the Admiralty over crimes made by one of the most learned of English civilians and international [* 148] lawyers. It is reported by * Curteis as an authority for, and judicial exposition of, the law. It certainly seems to me to claim for the Admiral no less than all the jurisdiction over the sea as to criminal offences which the Sovereign might properly exercise. It claims, no doubt, also, something more. But the excess of the claim does not seem to me to derogate from the authority of the view of this great lawyer, that the King had deputed to the Admiral all the administration of criminal law in respect of crimes committed on the seas which the King could properly depute.

Considering, therefore, the presumption to be in favour of the constitution of a Court to administer the criminal law, which it was the first duty of the Sovereign to administer, and considering that all the authorities which speak of that Court speak of its jurisdiction without any terms of restriction, I think it is proved that the Admiral's Court was authorised by the sovereign authority to administer the criminal law in respect of all cases happening on the seas outside of counties to which the criminal law of England might properly be applied, and therefore to all offences, by whomsoever committed, which are committed within the three miles adjacent to the coast. There are no words of restriction in the statutes through which the jurisdiction of the Admiral is transferred to the Central Criminal Court. The phraseology of 9 Geo. IV., c. 31, s. 32, is of the largest capacity, and the crime of manslaughter is one mentioned at s. 9 in the Act.

It follows, therefore, in my opinion, that the Central Criminal Court has jurisdiction to try all crimes made cognisable in general terms by English law which may be committed by British subjects on any part of the sea, or which may be committed by any foreigner on board any British ship in any part of the sea, or which may be committed by any foreigner or British subject in any ship, British or foreign, on the open sea within three miles of the coast of Great Britain.

As to the question of whether the criminal offence charged in

this case, namely, the offence of manslaughter, was committed on board of the foreign ship or on board of the British ship, I agree entirely with the Lord Chief Justice that it was not committed on board of either. There was no jurisdiction, therefore, given, in respect of a complete offence committed locally within the British * ship. If there had been a complete offence [* 149] within the foreign ship, there would have been no exemption on that ground from liability to English law. The only jurisdiction in respect of locality which arises is that which arises from the fact of the foreign ship having been within the territory of Great Britain. Because she was, I am of opinion that the Central Criminal Court had jurisdiction to try the case, and that the prisoner was legally convicted.

The minority who substantially agreed with this judgment, were Lord Coleridge, C. J. (who assented without qualification to the reasoning of that judgment upon the first point), Amphlett, J. A., Grove, J., Denman, J., and Lindley, J. Lord Coleridge, C. J., and Denman, J., were also of opinion that — the prisoner's ship having run into a British ship and sunk it, causing the death of a passenger on board that ship — the offence was committed on board a British ship, and that the Central Criminal Court had therefore jurisdiction.

The majority of the Court consisted of Cockburn, C. J., Kelly, C. B., Bramwell, J. A., Lush, J., Field, J., Sir R. Phillimore, and Pollock, B., and the main ground of the decision, in which they all agreed, was — that prior to 28 Hen. VIII., c. 15, the Admiral had no jurisdiction to try offences by foreigners on board foreign ships whether within or without the limit of three miles from the shore of England; that that statute and subsequent statutes only transferred to the Common Law Courts and the Central Criminal Courts the jurisdiction formerly possessed by the Admiral, and that, therefore, in the absence of statutory enactment, the Central Criminal Court had no power to try such an offence.

ENGLISH NOTES.

In *Harris* v. *The Owners of The Franconia* (1877), 2 C. P. D. 173, 46 L. J. C. P. 363, it was held that the judgment of the majority in *The Queen* v. *Keyn* applied to Courts of civil as well as criminal jurisdiction, and was binding on all the Courts, so that a civil action for damages against the owners was (apart from express statutory enact-

ment) not within the jurisdiction. Lord Coleridge said (2 C. P. D. 177): "The *ratio decidendi* of that judgment (*The Queen* v. *Keyn*) is that, for the purpose of jurisdiction (except where under special circumstances and in special Acts, Parliament has thought fit to extend it) the territory of England and the sovereignty of the Queen stops at low-water mark."

By the preamble of the Act of 1878, 41 & 42 Vict. c. 73, it is stated that "the rightful jurisdiction of Her Majesty, her heirs and successors, extends and always has extended over the open seas adjacent to the coasts of the United Kingdom and of all other parts of Her Majesty's dominions to such a distance as is necessary for the defence and security of such dominion."

The Act then declares (s. 2), that an offence committed by a person, whether he is or is not a subject of Her Majesty, on the open sea within the territorial waters of Her Majesty's dominions, is an offence within the jurisdiction of the Admiral, although it may have been committed on board a foreign ship.

And, after certain provisions as to procedure, "the territorial waters of Her Majesty's dominions" are, in reference to the sea, defined to be "such part of the sea adjacent to the coast of the United Kingdom, or the coast line of some other part of Her Majesty's dominions, as is deemed by international law to be within the territorial sovereignty of Her Majesty; and for the purpose of any offence declared by this Act to be within the jurisdiction of the Admiral, any part of the open sea within one marine league of the coast measured from low-water mark, shall be deemed to be open sea within the territorial waters of Her Majesty's dominions."

In *The Queen* v. *Dudley* (1884), 14 Q. B. D. 273, 281, 54 L. J. M. C. 32, 52 L. T. 107, Lord Coleridge observes: "The opinion of the minority in *The Franconia case* (*The Queen* v. *Keyn*) has been since not only enacted but declared by Parliament to have been always the law."

So that if Lord Coleridge was right (which may well be questioned) in his observations in *Harris* v. *The Owners of the Franconia* as to the *ratio decidendi* of the majority in *The Queen* v. *Keyn*, there is the authority of the same Judge for saying that this *ratio decidendi* is overruled by the declaration of the statute. But if the *ratio decidendi* — which was certainly the case with the opinion of Cockburn, C. J. — was the narrower one relating to the special jurisdiction of the Admiral, the opinion of the minority may well be maintained for the purposes of civil jurisdiction in torts generally, consistently with the judgment of the majority (now superseded by the Act) as to the particular jurisdiction of the Central Criminal Court.

No. 16. — The Queen v. Keyn. — Notes.

AMERICAN NOTES.

The principal case is cited by Bishop (Criminal Law, § 104), with approval: "So much of ocean, therefore, the authorities agree, is within the territorial sovereignty which controls the adjacent shores."

A citizen of a foreign country, or of another State, may be convicted of manslaughter in Massachusetts, if he inflicts injuries upon another person upon the high seas, and the latter dies therefrom in that Commonwealth. *Commonwealth* v. *Macloon*, 101 Massachusetts, 1; 100 Am. Dec. 89.

The State of West Virginia has jurisdiction of a criminal offence committed on a vessel on the Ohio River, within low-water mark, opposite the territory of West Virginia, although moored to the bank within the boundaries of the State of Ohio. *State* v. *Plants*, 25 West Virginia, 119; 52 Am. Rep. 211.

A crime committed on a private vessel on the seas within the jurisdiction of another country is cognizable there. *People* v. *Tayler*, 7 Michigan, 161.

The principal case is cited in *Commonwealth* v. *Manchester*, 152 Massachusetts, 230, and distinguished on the ground that it does not involve the exclusive right to fisheries within two marine leagues of the coast, which was the right asserted in the Massachusetts case, and the Court observe: "It is obvious that by this decision the Court did not attempt to define the extent of the dominion of Great Britain over the open sea adjacent to the coast, but only the extent of the existing admiralty jurisdiction over offences committed on the open sea. . . . The case contains a great deal of learning," &c.

In *United States* v. *Palmer*, 3 Wheaton (U. S. Sup. Ct.), 610, it was held that the crime of robbery by a person who is not a citizen of the United States, on the high seas, on board a vessel belonging exclusively to subjects of a foreign State, is not punishable under the laws of the United States. And in *United States* v. *Kessler*, Baldwin (U. S. Circ. Ct.), 15, approved in the principal case, p. 77, it was held that it made no difference that the vessel was within a marine league of the shore of the sovereignty assuming cognizance of the crime. But this is changed by later acts of Congress.

As to enclosed waters: the Chesapeake bay (*Commonwealth* v. *Gaines*, 2 Virginia Cases, 172; *State* v. *Hoofman*, 9 Maryland, 28) is claimed to be within the territorial limits of the United States, although twelve miles across at the ocean.

END OF VOL. V

NOTES

ON

ENGLISH RULING CASES

CASES IN 5 E. R. C.

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5 E. R. C. 2, TWYNE'S CASE, 3 Coke 80b, 1 Smith, Lead Cas. 11th ed. 1.

Fraudulent conveyances.

Cited in Sumner v. Hicks, 2 Black, 532, 17 L. ed. 355, holding that assignment in trust to sell assigned property upon such terms and conditions as in judgment of assignee may appear best is fraudulent and void in Wisconsin, as against creditors; Clements v. Moore (Clements v. Nicholson) 6 Wall. 299, 18 L. ed. 786, holding that sale may be void as to creditors for bad faith, though buyer pays full value for property bought; Marine Ins. Co. v. Tucker, 3 Cranch, 357, 2 L. ed. 466, on the point that the government cannot be deprived of its forfeiture by any fraudulent alienation; Ex parte Dalby, 1 Low. Dec. 431, Fed. Cas. No. 3,540, holding that in absence of actual fraud, mortgage of chattels made by resident of Massachusetts is good against assignee in bankruptcy, though not duly recorded; Kettlewell v. Stewart, 8 Gill, 472, holding that statute against fraudulent conveyances does not annul every conveyance, which prefers particular creditor which debtor is legally obliged to pay; Cooke v. Cooke, 43 Ind. 522; Glenn v. Grover, 3 Md. Ch. 29; Anderson v. Tydings, 3 Md. Ch. 167; Tootle v. Dunn, 6 Neb. 93; Doughten v. Gray, 10 N. J. Eq. 331; Heintze v. Bentley, 34 N. J. Eq. 562; Squires v. Riggs, 4 N. C. (2 Car. Law. Repos.) 274, 6 Am. Dec. 564; Gans v. Renshaw, 2 Pa. St. 34, 44 Am. Dec. 152; Edrington v. Rogers, 15 Tex. 188; Coutts v. Greenhow, 2 Munf. 363, 5 Am. Rep. 472; Blennerhassett v. Sherman, 105 U. S. 100, 26 L. ed. 1080; Davis v. Schwartz, 155 U. S. 631, 39 L. ed. 289, 15 Sup. Ct. Rep. 237; Rogers v. Page, 72 C. C. A. 164, 140 Fed. 596; Kerr v. McCulley, 8 N. B. 508; Reid v. Kennedy, 21 Grant, Ch. (U. C.) 86; Moore v. Tarlton, 3 Ala. 444, 37 Am. Dec. 701,—holding to be valid as to creditors conveyance must be upon a valuable consideration and also in good faith; Kipp v. Hanna, 2 Bland. Ch. 26, as to validity of transfers as against creditors; Hathaway v. Brown, 18 Minn. 414, Gil. 373, holding that in action to set aside fraudulent conveyance, it is sufficient to show that purchaser from fraudulent vendor, had notice of fraud; Northern R. Co. v. Concord R. Co. 50 N. H. 166, holding that agreement by board of directors to transfer management of road to another company, for purpose of preventing such management to come into hands of incoming board of trustees, was void where company about to take over such management had notice; Robinson v. Holt, 39 N. H. 557, 75 Am. Dec. 233; Carter v. Grimshaw, 49 N. H. 100; Everett v. Read, 3 N. H. 54,—

holding every disposition of property not made bona fide and for a valuable consideration is absolutely void in respect to creditors; Re Toohey, 5 Kulp, 24, holding that upon application for discharge in bankrutpcy, where it appears that applicant put property out of his hands for purpose of avoiding payment of his indebtedness, court should commit him for trial and suspend proceedings in insolvency; Watson v. Rowley, 63 N. J. Eq. 195, 52 Atl. 160, holding that, under statute, chattel mortgage given by assignor, and void as against creditors for failure of holder to make affidavit required, is void as against assignee; Bald Eagle Valley R. Co. v. Nittany Valley R. Co. 171 Pa. 284, 29 L.R.A. 423, 50 Am. St. Rep. 807, 33 Atl. 239, as to rule in Twyne's Case being ancient and arbitrary; Streeper v. Eckart, 2 Whart. 302, 30 Am. Dec. 258, holding a sale and transfer of personal property, made for the purpose of preventing a creditor from obtaining execution of his judgment is void as against such creditor; Eastman v. Schettler, 13 Wis. 325, holding that whether judgment is lien on land previously conveyed by judgment debtor, depends upon whether conveyance was fraudulent or not as to creditors; Re Toohey, 5 Kulp, 24, as to liability of insolvent for making; Crawford v. Meldrum, 3 U. C. Err. & App. 101, holding that conveyance of all his property by insolvent for inadequate consideration, to relative who was aware of insolvency is void against creditors; McMaster v. Clare, 7 Grant, Ch. U. C. 550, holding that transfer of his property by insolvent debtor to bona fide creditor, with full intention that property should pass is not void under statute, because of intention in minds of parties to defeat other creditors.

Cited in note in 31 L.R.A. 609, on participation in fraudulent intent of debtor which will invalidate transfer to pay or secure debt as to other creditors.

Cited in Benjamin Sales, 5th ed. 495, on invalidity of alienations with intent to delay creditors.

Distinguished in Crump v. Chapman, 1 Hughes, 183, Fed. Cas. No. 3,455, holding that bill to set aside sale as fraudulent, under federal revised statutes, as amended in 1874, must charge that defendant knew that sale was in fraud of Bankruptcy Act, and this knowledge must be proved.

— Transfer of property previously conveyed.

Cited in Fowler v. Stoneum, 11 Tex. 478, 62 Am. Dec. 490, holding that subsequent sale for valuable consideration by one who had made voluntary conveyance is only prima facie evidence that former conveyance was fraudulent.

— Secret transfers.

Cited in Telescriptor Syndicate [1903] 2 Ch. 174, 72 L. J. Ch. N. S. 480, 51 Week. Rep. 409, 88 L. T. N. S. 389, 19 Times L. R. 271, as to secret gift by one insolvent being a mark of fraud.

— Transfers for past or voluntary consideration or in satisfaction of debt.

Cited in Thomas v. Fletcher, 153 Fed. 226, holding transfer of a merchant's stock and all his attachable property to his wife for a nominal consideration for the purpose of preventing the levy of attachments, more than four months prior to the filing of a bankruptcy petition against him was fraudulent and subject to be set aside at instance of trustee; Barnes v. Rettew, 8 Phila. 133, Fed. Cas. No. 1,019, holding a debtor's assignment of all his estate, in trust for distribution among all of his creditors equally tends necessarily to defeat and delay the operation of the Federal Bankruptcy Act and if executed after this act went into practical operation and within the prescribed limit of six months before commencement of proceedings against him is an act of bankruptcy; Globe Ins. Co. v. Cleveland

Ins. Co. 14 Nat. Bankr. Reg. 111, Fed. Cas. No. 5,486, holding a general assignment for the equal benefit of creditors is void as against an assignee in bankruptcy; Cannard v. Eslava, 20 Ala. 732, holding voluntary conveyance, though bona fide, and in consideration of natural love and affection, is void as to existing creditors of grantor; Hoole v. Atty. Gen. 22 Ala. 190, holding the dedication of a road to the public must, in absence of all testimony proving that value was paid for the grant, be regarded as voluntary and gratuitous; Baldwin v. Tuttle, 23 Iowa, 66, holding that conveyance by debtor to wife of all his real estate except homestead, in consideration of "natural love and affection," and "further sum of $5000," was void as to existing creditors as to part of property conveyed; Hartshorn v. Eames, 31 Me. 93, holding although one of the defendants, when purchasing the property, was a bona fide creditor of the other defendant, from whom he purchased it, yet if his real object was not the payment of his debt, but merely to give the colorable appearance of sale, when no real sale was intended the purchase would be fraudulent as against creditors of vendor; Filley v. Register, 4 Minn. 391, Gil. 296, 77 Am. Dec. 522, holding a voluntary conveyance will not be held void simply from the fact that the grantor was, at the time of executing it, indebted without regard to the relation his debts have to his property reserved no fraud appearing to have entered into the transaction; Loeschigk v. Addison, 19 Abb. Pr. 169, holding that gift of real estate to wife by trader deeply in debt, not proven to have at any time property sufficient to pay outstanding liabilities, is fraudulent act; Seward v. Jackson, 8 Cow. 406, holding a conveyance or settlement, in consideration of blood and natural affection though by one indebted at the time, is prima facie only, and not conclusively fraudulent; Loeschigk v. Addison, 3 Robt. 331; Manhattan Co. v. Osgood, 15 Johns. 162,—holding a voluntary conveyance by a grantor, who is, at the time of making it, insolvent, is void as respects creditors; M'Cree v. Houston, 7 N. C. (3 Murphy) 429, holding gifts of slaves, not void as to the creditors of the donor and purchasers from him must be in writing, attested and registered and made bona fide; Doe ex dem. O'Daniel v. Crawford, 15 N. C. (4 Dev. L.) 197, holding voluntary conveyance to children yields to prior debt so far as it is necessary to its satisfaction; Smith v. Reavis, 29 N. C. (7 Ired. L.) 341, holding under statutes of Elizabeth to render a voluntary conveyance to children void as to creditors it must be shown that the maker of the deed was indebted at the time, or so soon afterwards, as to connect the purpose of making the deed with that of contracting the debt and defeating it; Bratton v. Massey, 15 S. C. 277, on validity of deed made by husband to provide for separate maintenance of wife and for separation; DuRant v. DuRant, 36 S. C. 49, 14 S. E. 929, holding that conveyance, in consideration of love and affection, of all estate to another in trust for grantor for life, with remainder to A for life, is fraudulent as against existing creditors; Hall v. Feeney, 22 S. D. 541, 21 L.R.A.(N.S.) 513, 118 N. W. 1038, holding an insolvent debtor cannot dispose of his property to a stranger, without consideration and authorize him to select such creditors as he may deem proper as recipients of the proceeds of the property in payment of their debts; Gleason v. Day, 9 Wis. 498, holding that creditor who receives bona fide transfer of chattels from debtor in discharge of pre-existing debt, is purchaser in good faith; Davies v. Rogerson, 2 Has. & War. (Pr. Edw. Isl.) 168 (dissenting opinion), on right of debtor to prefer one creditor over another by making transfer of his property to one favored claimant to defeat other; Patulo v. Boyington, 4 U. C. C. P. 125, holding a deed by an heir at law to his mother of certain lands in lieu of dower is not to be considered voluntary and fraudulent against

subsequent purchasers for value, although the consideration expressed in such deed be money and no money in fact be proved to have been paid; Fleming v. McNaughten, 16 U. C. Q. B. 194, holding where the debtor mortgaged all his personal property to secure a debt very small in proportion to the value of the goods, although no evidence of value was given, and the bona fides of the debt was not disputed, it was for the jury to say, whether under the circumstances the mortgage was not made to shield the property from other creditors; Ex parte Chaplin, L. R. 26 Ch. Div. 319, 53 L. J. Ch. N. S. 732, 51 L. T. N. S. 345, holding assignment of property for past debt an act of bankruptcy; The Heart of Oak, 39 L. J. Prob. N. S. 15, 21 L. T. N. S. 727, holding where a debtor mortgaged to one creditor all his effects, with a colorable exception in view of bankruptcy and without any present equivalent the mortgages were invalid; Sheaffer v. Hershey, 21 Lanc. L. Rev. 385, holding that voluntary transfer of land by insolvent to children, followed by improvements and possession before actual ascertainment of his indebtedness as surety, is not sufficient to support conveyance against creditors.

Cited in note in 12 E. R. C. 348, on sufficiency of consideration to support settlement as against subsequent purchasers.

Distinguished in Taylor v. Heriot, 4 Desauss, Eq. 227, holding conveyances of property by husband in trust for his wife and her issue, and purchases made on their behalf will not be set aside as voluntary or fraudulent, where husband has received and applied to the payment of his debts, or other use, funds or property of his wife, even though the values be not exactly the same; Low v. Wortman, 44 N. J. Eq. 193, 7 Atl. 654, holding where a father was justly indebted to his two children in an amount exceeding the value of farm which he conveyed to them in order to satisfy such debt, the validity of the conveyance could not be successfully assailed by judgment creditor of the father, although it was made while the father was prosecuting an appeal from the judgment obtained against him by such creditor.

— Transfers for security.

Cited in Crawford v. Kirksey, 55 Ala. 282, 27 Am. Rep. 704, holding conveyance for indemnity of sureties against nominal liability void as to creditors; Balwin v. Rosseau, 1 N. Y. Leg. Obs. 391, Fed. Cas. No. 803, holding the giving a mortgage of the whole of the bankrupt's estate to hinder and delay the general creditors, is an act of bankruptcy within the express terms of the statute; Waters v. Comly, 3 Harr. (Del.) 117, holding that debtor in failing circumstances may give bond to creditor to secure payment of bona fide debt.

Distinguished in Cook v. Swan, 5 Conn. 140, holding deed from father to son to indemnify son for injuries sustained by undertaking to pay his father's debts, not fraudulent.

— Transfers for value but with fraudulent purpose.

Cited in Braley v. Byrnes, 20 Minn. 435, holding a mortgage may be fraudulent as against creditors, although founded on a valuable consideration; Van Nest v. Yoe, 1 Sandf. Ch. 4, as to sale being void when made with fraudulent intent when full consideration was paid; Smith v. Culbertson, 9 Rich. L. 106, holding conveyance of land for valuable consideration void the jury having found that it was made with the intent to defeat the cause of action in a suit pending.

Distinguished in Doolittle v. Lyman, 44 N. H. 608, holding a mortgage of personal property, executed in due form, and recorded, given to secure the debt described which was at the time of the execution of the mortgage justly due is not rendered void as against a subsequent purchaser, by the mere fact that the

parties to it may have also designed to hinder or delay the creditors of the mortgagor; Auburn Exch. Bank v. Fitch, 48 Barb. 344, holding transfer to an honest creditor is valid unless merely a sham to cover fraud.

— Secret trust in favor of vendor.

Cited in Coolidge v. Melvin, 42 N. H. 510, holding all conveyances, with a secret trust reserved to vendor, are fraudulent and void as to creditors; Pattison v. Letton, 56 Mo. App. 325, holding bill of sale, absolute on its face but made in fact to secure a debt, the vendee afterwards taking possession as absolute owner under bill of sale in effect embodies a secret trust and is void as to creditors.

— Transfers reserving benefit to transferror or revocative power.

Cited in Sumner v. Hicks, 2 Black, 532, 17 L. ed. 355, holding an assignment by an indebted party for the benefit of creditors in trust that the assignee shall sell the property "on such terms and conditions as in his judgment shall appear best and most for the interest of the parties concerned" fraudulent and void; Moore v. Wood, 100 Ill. 451, holding a debtor cannot, even for a valuable consideration convey real estate to another, to be held, wholly or in part, in secret trust for himself, so as to cut off the rights of existing creditors; Hapgood v. Fisher, 34 Me. 407, 56 Am. Dec. 663, holding a sale of property by a debtor is not necessarily fraudulent as to creditors, although a contract for his own future support be a part consideration of the sale; Pursel v. Armstrong, 37 Mich. 326, holding judgment creditors are entitled in aid of execution to a decree in equity avoiding a deed from their debtor to a third person by which his property is withdrawn to provide for himself and family; Doak v. Bank of State, 28 N. C. (6 Ired. L.) 309, as to validity of conveyance containing power of grantor to revoke it; Newell v. Wagness, 1 N. D. 62, 44 N. W. 1014, holding sale of goods in order to be considered as bona fide with respect to creditors must be made without any trust whatever either express or implied; Du Rant v. Du Rant, 36 S. C. 49, 14 S. E. 929, holding conveyance of estate to trustee for others retaining by grantor of enjoyment of the property during life void as to creditors; Baldwin v. Pett & Co. 22 Tex. 708, 75 Am. Dec. 806, holding that reservation of benefit to grantor inconsistent with terms and ostensible object of transfer renders transfer void.

— Badges of fraud.

Cited in Almy v. Wilbur, 2 Woodb. & M. 371, Fed. Cas. No. 256, on retention of possession, in case of absolute sale, being a badge of fraud; Baldwin v. Rosseau, Fed. Cas. No. 803, holding that retention of property by mortgagor of chattels is badge of fraud; Pearpoint v. Graham, 4 Wash. C. C. 232, Fed. Cas. No. 10,877, holding assignment of debtor of all his effects without a specification of the property an evidence of fraud; Hempstead v. Johnston, 18 Ark. 123, 65 Am. Dec. 458, holding that debtor in failing circumstances may by deed of trust prefer his own relations, and where one of beneficiaries purchases part of trust property and permits grantor to remain in possession, it is not indication of fraud; Peck v. Land, 2 Ga. 1, 46 Am. Dec. 368, holding that if creditor purchases property of his debtor in satisfaction of his own debt, and debts of other favored creditors, and also a large surplus over to exclusion of creditor whose suit is pending, it is badge of fraud; Hughes v. Cory, 20 Iowa, 399, holding that under statute, mere retention of possession by mortgagor of personal property when instrument is recorded, is neither per se fraudulent or badge of fraud in law; Berry v. Cutts, 42 Mo. 445, on English rule that the retention of personal property by vendor after sale amounted to conclusive fraud; Barr v. Hatch, 3 Ohio, 527, holding conveyance by a debtor of his whole estate, while a suit is pending against him is not fraud

per se, but so far as it is a badge of fraud, may be explained and justified by proof; Scott's Estate, 1 Cof. Prob. Dec. Anno. 271, to the point that clause in deed that it was made honestly, truly and bona fide, may lead to suspicion against integrity of deed; Redfield & R. Mfg. Co. v. Dysart, 62 Pa. 62, holding the sale of all a vendor's goods pending a suit against him is a mark of fraud; Briscoe v. Bronaugh, 1 Tex. 326, 46 Am. Dec. 108, holding conveyance by person indebted at time and while suit was pending bore badge of fraud; Olmsted v. Hoyt, 11 Conn. 376; Howerton v. Holt, 23 Tex. 51,—holding that assignment of much larger amount of property than is necessary to pay debt is badge of fraud; Thomas v. Turner, 87 Va. 1, 12 S. E. 149, as to the badges of fraud; Dearle v. Hall, 10 E. R. C. 474, 3 Russ. Ch. 1, 2 L. J. Ch. 62, on retention of possession as a badge of fraud.

Cited in 2 Mechem Sales, 816, on retention of possession by seller as badge of fraud.

Retention of possession of property by vendor or mortgagor.

Cited in United States v. Conyngham, Wall. Sr. 178, Fed. Cas. No. 14,850, holding where a creditor having levied on the personal property of his debtor instead of selling the property, as soon as it can be reasonably done, allows the debtor to remain in possession of it for an unreasonable length of time, such execution is fraudulent as respects a subsequent one; Meeker v. Wilson, 1 Gall. 419, Fed. Cas. No. 9,392, holding that fraud is presumed where assignees of a cargo on the seas for the benefit of creditor fail to take possession of it within a reasonable length of time after arrival; Re Thomas, 45 Fed. 784, holding that gift made by person largely indebted, where subject matter retained by donor, is void, under statute 13 Eliz.; Robinson v. Elliott, 22 Wall. 513, 22 L. ed. 758, holding that mortgage of stock of goods, containing provision authorizing mortgagor to retain possession for purpose of selling and replenishing stock is void; United States v. The Anthony Mangin, 2 Pet. Adm. 452, Fed. Cas. No. 14,461, holding a fraudulent alienation would not cut off the government's right of forfeiture of a ship possession being regarded as in the vendor; Fowler v. Merrill, 11 How. 375, 13 L. ed. 736, on validity of mortgage of chattels where mortgagor retains possession of property; Re Marine Constr. & Dry Dock Co. 135 Fed. 921, holding that mortgage given by ship-building company on its plant, and stock of material for money borrowed, which permits company to use stock, is void as to such material and as to boat made from it as against trustee in bankruptcy; Benedict v. Renfro, 75 Ala. 121, 51 Am. Rep. 429, holding that mortgage on $6,000 worth of merchandise to secure $3,600 debt, executed by one in failing circumstances, was void, where property was left with mortgagor; Tregear v. Etiwanda Water Co. 76 Cal. 537, 9 Am. St. Rep. 245, 18 Pac. 658, holding under statute mortgages of personal property not included in the chattel mortgage act are void as against creditors and subsequent purchasers if not accompanied by immediate delivery and actual and continued change of possession; Stevens v. Irwin, 15 Cal. 503, 76 Am. Dec. 500, holding that where vendee takes possession openly, and holds it in exclusive possession for year, and afterwards puts property into possession of vendor, as attorney in fact, this qualified possession, does not as matter of law show sale to be fraudulent; Swift v. Thompson, 9 Conn. 63, 21 Am. Dec. 718, holding if vendee of personal property, under a sale absolute or conditional, suffer the vendor to remain in possession, this is evidence of fraud as against the creditors of the vendor and bona fide purchasers, and unless there be sufficient excuse shown to and approved by the court, such evidence is conclusive; Jones v. Gott, 10 Ind. 240; Mumford v. Canty, 50 Ill. 370, 99 Am. Dec. 525,—as to whether it renders

sale fraudulent per se to keep possession; Bank v. Marchand, T. U. P. Charlt. (Ga.) 247, as to its being badge of fraud; Peck v. Land, 2 Ga. 1, 46 Am. Dec. 368, holding that intention of real or personal property by vendor after sale is a badge of fraud; Powers v. Green, 14 Ill. 386, holding that bill of sale of stock in trade, household furniture, etc., made by debtor in failing circumstances to creditor, by way of preference, is not conclusively fraudulent, because debtor is employed by creditor to manage business, and retains possession of furniture; Caldwell v. Williams, 1 Ind. 405, holding that exclusive possession must accompany or follow assignment of property for benefit of creditors, or it is void, unless sound reason is given for omission of such possession; Phillips v. Reitz, 16 Kan. 396, holding to support a sale of personal property, where there is no change of possession, as against a creditor or subsequent purchaser, proof of good faith is as essential as proof of a sufficient consideration; Frankhouse v. Ellett, 22 Kan. 127, 31 Am. Rep. 171 (dissenting opinion), as to necesssity of change of possession under chattel mortgage; Yoder v. Massie, 7 T. B. Mon. 478, holding possession of property purchased at sheriff's sale, remaining with the debtor, is evidence of an arrangement in fraud of creditors; Ludwig v. Fuller, 17 Me. 162, 35 Am. Dec. 245, holding payment of price of an article is sufficient to complete sale between seller and purchaser, but as it respects a second purchaser or creditor, a delivery is necessary; Leopold v. Silverman, 7 Mont. 266, 16 Pac. 580, holding under statute a chattel mortgage on a stock of merchandise the mortgaged property to be left in possession of mortgagors to be sold by them in the usual course of trade is void on its face; Shaw v. Thompson, 43 N. H. 130; Wilson v. Walrath, 103 Minn. 412, 24 L.R.A.(N.S.) 1127, 115 N. W. 203,—holding under statute a sale of personal property, the possession thereof remaining in the vendor is presumptively fraudulent and void as against creditors of vendor and purchasers in good faith; Jenness v. Wendell, 51 N. H. 63, 12 Am. Rep. 48, holding that the purchase of several articles of furniture singly at auction was an entire contract, and that the delivery of part of it took the whole purchase from the operation of the statute of frauds and that the title passed to vendee at time of sale; Pinkerton v. Manchester & L. R. Co. 42 N. H. 424, holding that upon pledge of stock there should be such delivery as nature of thing is capable of, and to be good against attaching creditor pledgee must be clothed with all usual muniments of title; Haven v. Low, 2 N. H. 13, 9 Am. Dec. 25; Coburn v. Pickering, 3 N. H. 415, 14 Am. Dec. 375; Miller v. Shreve, 29 N. J. L. 250; Beals v. Guernsey, 8 Johns. 446, 5 Am. Dec. 348; Hall v. Tuttle, 8 Wend. 375; Smith v. Acker, 23 Wend. 653; Callen v. Thompson, 3 Yerg. 475, 24 Am. Dec. 587; Davis v. Turner, 4 Gratt. 422; Almy v. Wilbur, 2 Woodb. & M. 371, Fed. Cas. No. 256; Leland v. The Medora, 2 Woodb. & M. 92, Fed. Cas. No. 8,237; Densmore v. Tomer, 11 Neb. 118, 7 N. W. 535,—holding the retention of the possession of goods by the seller in case of an absolute sale is as against creditors, only prima facie evidence of fraud; Maxwell v. Tufts, 8 N. M. 396, 33 L.R.A. 854, 45 Pac. 797, to the point at common law mortgagor might retain possession of chattels, without raising presumption of fraud; Bank of Perry v. Cooke, 3 Okla. 534, 41 Pac. 628, holding that agreement that mortgagor of chattels may sell and dispose of goods in ordinary course of trade renders mortgage void; Lyon v. Council Bluffs Sav. Bank, 29 Fed. 566; Putnam v. Osgood, 52 N. H. 148, 5 Legal Gaz. 260,—holding an agreement between mortgagor and mortgagee of chattels though made after the execution of the mortgage, that mortgagor may sell the mortgaged property or part of it on his own account renders the mortgage void as to creditors; Sands v. Codwise, 4 Johns. 530, 4 Am. Dec. 305; Bleakley v. Nelson, 56 N. J. Eq. 674, 39 Atl.

912,—as to it being fraud upon creditors to keep possession; Reynolds v. Ellis, 103 N. Y. 115, 57 Am. Rep. 701, 8 N. E. 392, holding it renders sale void as to creditors; Lukens Iron & S. Co. v. Payne, 13 App. Div. 11, 43 N. Y. Supp. 376, holding fraudulent intent evidenced by an unfiled chattel mortgage and threats to use it to defeat a creditor's action sufficient to sustain attachment by creditor; Ludlow v. Sewall, 19 Johns. 218, as to whether it is ipso facto fraudulent or only a badge of fraud; Butler v. VanWyck, 1 Hill, 438, holding if there is evidence that a mortgage of chattels was given for a true debt, the question of fraud as to creditors, arising from continued possession in the mortgagor must be submitted to the jury; Stoddard v. Butler, 20 Wend. 507, holding where transfer to creditor has been made during pendency of suit by other creditors it is void as to them where vendor remains in possession disposing of the property as agent for vendee and receiving compensation therefor; Milne v. Henry, 40 Pa. 352, holding that where, in sale of personal property, possession does not follow transfer, it is fraud in law without regard to intent of parties, and is question for court; Graham v. McCreary, 40 Pa. 515, 80 Am. Dec. 591, holding that delivery of piano to vendee who has exclusive possession for several weeks, but which is afterwards used to some extent by vendor in house of vendee, is sufficient to repel presumption of fraud; McKibbin v. Kline, 64 Pa. 352; Cox v. Jackson, 2 N. C. (Haywood) 423,—holding where the possession of a chattel does not follow the conveyance it is a strong circumstance to show fraud, though it may be explained or rebutted; Kennedy v. Ross, 2 Mill, Const. 125; Monroe v. Hussey, 1 Or. 188, 75 Am. Dec. 552,—holding an absolute bill of sale, unaccompanied by delivery of the property, is void at common law as against creditors of vendor; Orton v. Orton, 7 Or. 478, holding that chattel mortgage is void as to creditors where mortgagor is given unlimited power to dispose of property for his use; Hower v. Geesaman, 17 Serg. & R. 251, holding an assignment, in trust to pay, in the first place, preferred debts, and then all other debts, absolute on the face of it, is null and void against creditors if the grantor retain and use and dispose of the property as his own: McKibbin v. Martin, 27 Phila. Leg. Int. 93, holding that retention of vendor as employee of vendee of personal property is not of itself sufficient to avoid sale: Wolff v. Farrell, 3 Brev. 68, as to validity of sale without change of possession: Jaudon v. Gourdin, Rich. Eq. Cas. 246, holding permission by one brother to another, to have possession of slaves for a number of years as a loan and hold them out to the world as his own, fraud upon creditor of bailee who gave him credit by reason of possession of slaves; Mills v. Walton, 19 Tex. 271, holding that presumption arising from continued possession by vendor, may be rebutted by proof showing that transaction was free from fraud; United States v. Church of Jesus Christ of L. D. S. 5 Utah, 538, 18 Pac. 35, holding where a transfer of corporate property was dated the 28th day of February, 1887, but no delivery took place prior to the 3rd day of March, 1887, and the act dissolving the corporation passed both houses of Congress prior to the date of the transfer and went into effect the day the delivery took place, the transfer was in fraud of the rights of the government and void as to the receiver; Davis v. Turner, 4 Gratt. 422; Mead v. Gardiner, 13 R. I. 257,—holding that retention of personal property by vendor after sale is, as against creditors presumptive but not conclusive evidence of fraud; Weeks v. Mead, 2 Aik. (Vt.) 64, holding in a sale of personal chattels where the conveyance is absolute the want of a change of possession is not merely prima facie evidence of fraud, but a circumstance per se, which renders the transaction fraudulent and void; Re Lorg, 7 Phila. 578, Fed. Cas. No. 8,477; Meeker v. Wilson, 1 Gall. 419, Fed. Cas. No. 9,392.—holding want of possession

by vendee evidence of fraud; Foster v. Edwards, 3 Luzerne Leg. Reg. 137, holding that transfer of personal property by insolvent debtor, unaccompanied by change of possession, is fraudulent as to creditors; Robson v. Suter, 1 B. C. (Pt. 2) 375; Re E. W. Newton & Co. 83 C. C. A. 23, 153 Fed. 841,—holding that contract under which vendor of goods is to retain possession with authority to resell in usual course of business was void; Traser v. Murray, 34 N. S. 186, holding that retention of possession by vendor of chattels sold is only prima facie evidence of fraud; Cookson v. Swire, L. R. 9 App. Cas. 653, 54 L. J. Q. B. N. S. 249, 52 L. T. N. S. 30, 33 Week. Rep. 181, 5 Eng. Rul. Cas. 10, as to it being evidence of fraud to keep possession.

Cited in notes in 18 L.R.A. 604, on effect upon validity of mortgage of merchandise of provision or agreement giving mortgagor possession with power of sale; 24 L.R.A.(N.S.) 1131, 1132, 1148, as to whether presumption of fraud flowing from retention of chattel by vendor may be overcome; 5 E. R. C. 26, 41, on necessity of change of possession on sale of chattels; 12 E. R. C. 348, on presumption of fraud from retention of possession of goods sold; 18 Eng. Rul. Cas. 66, on mortgagor retaining possession as a fraud on creditors.

Referred to as leading case and distinguished in Ryall v. Rall, 1 Atk. 165, 1 Ves. Sr. 348, holding rule not applicable to lands and applicable only as to property, whereof possession is a deceptive evidence of title.

Distinguished in Powers v. Green, 14 Ill. 386, holding where a debtor in failing circumstances by way of preference, makes a bill of sale of his stock in trade, furniture, etc., to one of his creditors and is thereupon employed by such creditor as his head clerk or agent to manage the business in the name of his principal, the purchaser, such transaction though calculated to raise a suspicion of collusion, is not conclusive of fraud and may be explained; Noyes v. Ross, 23 Mont. 447, 47 L.R.A. 400, 75 Am. St. Rep. 543, 59 Pac. 367, holding it not prima facie void under statute merely because of reservations of power of sale and possession under regular chattel mortgage on merchandise stock; Thompson v. Esty, 69 N. H. 55, 45 Atl. 566, holding under statute an assignee in insolvency cannot avoid a sale by the debtor made in good faith and for a sufficient consideration on the ground that it was fraudulent as to creditors because possession of the property was retained by vendor; Garrett v. Rhame, 9 Rich. L. 407, 67 Am. Dec. 557, holding if one not a creditor, bona fide purchases a chattel at sheriff's sale, and permits it to return into the debtor's possession, such possession is no fraud upon the creditors of the debtor; Ex parte Wilson, 29 L. T. N. S. 860, 22 Week. Rep. 241, holding where debtor executed assignment of business to his brother in satisfaction of moneys advanced and two years afterwards the debtor who retained possession of the business sold it and his brother obtained payment of the purchase money and debtor afterward became bankrupt, the payment of the purchase money to his brother was not a fraud upon the other creditors; Suiter v. Turner, 10 Iowa, 517, holding that retention of possession of real estate after conveyance, is not per se either conclusive or presumptive evidence of fraud in sale.

Disapproved in Hempstead v. Johnston, 18 Ark. 123, 65 Am. Dec. 458; Valley Distilling Co. v. Atkins, 50 Ark. 289, 7 S. W. 137; Reeves v. Harris, 1 Bail. L. 563; Pregnall v. Miller, 21 S. C. 385, 53 Am. Rep. 684; Peabody v. Landon, 61 Vt. 318, 15 Am. St. Rep. 903, 17 Atl. 781; Hobbs v. Bibb, 2 Stew. (Ala.) 54,—holding possession of personal property remaining in vendor is presumptive evidence of ownership in him but this presumption may be rebutted by proof.

— Declarations made while in possession after transfer.

Cited in Banks v. McCandless, 119 Ga. 793, 47 S. E. 332, holding that declara-

tions of debtor made after parting with formal paper title but while in possession of chattels, may be given in evidence in action by creditors to set aside sale as in fraud of creditors; Piedmont Sav. Bank v. Levy, 138 N. C. 274, 50 S. E. 657, 3 Ann. Cas. 785, holding that the declarations of a vendor of a stock of goods made after the sale but while still in possession are admissible to overcome the presumption of fraud from such possession.

— Void in part or in entirety.

Cited in Totten v. Douglas, 18 Grant, Ch. (U. C.) 341; Commercial Bank v. Wilson, 14 Grant, Ch. (U. C.) 473,—holding a judgment fraudulent against creditors as to part of the sum included therein is void as against such creditors in toto; Thompson v. Bickford, 19 Minn. 17, Gil. 1, holding that if there is actual fraud conveyance is considered void ab initio, and cannot stand as security to fraudulent grantee; Hutchison v. Kelly, 1 Rob. (Va.) 123, 39 Am. Dec. 250, holding that fraudulent intent of grantor against one or more creditors, is fraudulent as to all, prior and subsequent; Commercial Bank v. Wilson, 3 U. C. Err. & App. 257, holding that judgment fraudulent against creditors as to part of sum included therein, is void in toto; Stebbins v. O'Grady, 5 U. C. Q. B. O. S. 742, on invalidity of a contract whose void part offends statutory law.

Possession by vendee under conditional sale contract.

Cited in Re Morris, 156 Fed. 597, holding that where there is positive engagement on part of so-called bailee or lessee to pay stipulated sum, upon payment of which goods are to be his, and bill of sale to be executed therefor, this is nothing but sale, and not bailment, which trustee in bankruptcy may assert; Marvin Safe Co. v. Norton, 48 N. J. L. 410, 57 Am. Rep. 566, 7 Atl. 418, holding that reservation of title in vendor upon conditional sale is valid between parties, but is invalid as against creditors of vendee or bona fide purchasers from him; Re Morris, 16 Pa. Dist. R. 875, holding that written agreement, describing parties as "bailor" and "bailee" and providing for delivery of possession "on him" of furniture, upon payment of certain sum, and for payment of monthly sums upon completion of which bailor should give bill of sale creates conditional sale and not bailment fraudulent as to creditors.

Who may avoid fraudulent transfer.

Cited in Findley v. Cooley, 1 Blackf. 262; Springer v. Drosch, 32 Ind. 486, 2 Am. Rep. 356; Wright v. Meek, 3 G. Greene, 472 (dissenting opinion); Nellis v. Clark, 20 Wend. 24; Jackson v. Seward, 5 Cow. 67; Bryan v. Weems, 29 Ala. 423, 65 Am. Dec. 407,—as to who may avoid; Wright v. Keithler, 7 Iowa, 92, to the point that at common law fraud could only be avoided by him who had prior interest in estate affected by fraud; Prime v. Brandon Mfg. Co. 16 Blatchf. 453, Fed. Cas. No. 11,421; Dyer v. Homer, 22 Pick. 253,—as to fraudulent conveyances being valid between the parties; Boice v. Conover, 54 N. J. Eq. 531, 35 Atl. 402, holding that a creditor who takes a mortgage on personalty is a purchaser and not a creditor and cannot assail a prior mortgage as fraudulent against creditors; Washington Nat. Bank v. Beatty, 77 N. J. Eq. 252, 140 Am. St. Rep. 555, 76 Atl. 442, holding that statute relating to fraudulent sales extends to all persons having claims or suits for damages arising from torts, but tort claimant must reduce his claim to judgment; French v. Shotwell, 5 Johns. Ch. 555, holding that fraud could only be avoided by him, who had prior interest in estate affected by fraud; Scott v. Guthrie, 10 Bosw. 408, 25 How. Pr. 512, holding an assignment containing a provision calculated to hinder, delay or defraud some of the assignor's creditors, contrary to statute of frauds, is void only as to the creditors who are thus prejudiced; Moore v. Moore, 13 N. S. 525, holding purchaser for valuable

consideration may avoid; Dodson v. Cocke, 1 Overt. 314, 3 Am. Dec. 757, holding subsequent purchaser cannot avoid.

Cited in 2 Mechem Sales, 842, on claims for damages for tort as entitling claimants to set aside fraudulent conveyance.

Distinguished in Lightfoot v. Colgin, 5 Munf. 42, holding wife cannot avoid voluntary conveyance made by husband to children.

— Subsequent creditors or claims not liquidated.

Cited in Howe v. Ward, 4 Me. 195, holding a voluntary conveyance, without consideration, is good against subsequent creditors if made by one who is solvent and without any fraudulent intent; Spuck v. Logan, 97 Md. 152, 99 Am. St. Rep. 427, 54 Atl. 989, holding a conveyance of property, in form absolute but in reality upon a secret trust for benefit of grantor, no consideration having been paid by grantee and the purpose of the parties being to hinder and delay creditors of grantor is a continuing fraud voidable by subsequent as well as subsisting creditors of grantor; Webb v. Roff, 9 Ohio St. 430, holding voluntary conveyance can only be avoided by subsequent creditors by showing actual fraud or a secret trust for benefit of grantor; Savage v. Murphy, 8 Bosw. 75, holding that when deed is made with intent to defraud creditors by one at time in debt, and who continues to be in debt, it is void as to all subsequent as well as existing creditors; Reade v. Livingston, 3 Johns. Ch. 478, holding with regards to debts arising subsequent to a voluntary settlement the presumption of fraud arising in law from the grantor being indebted at the time may be repelled by circumstances; Land v. Jeffrees, 5 Rand. (Va.) 211 (dissenting opinion), on application of statute relating to fraudulent conveyances to subsequent creditors; Hutchison v. Kelly, 1 Rob. (Va.) 123, 39 Am. Dec. 250, on history of statute of Elizabeth on fraudulent conveyances and denying any distinction between prior and subsequent creditors except in regard to proof of fraud; Claytor v. Anthony, 6 Rand. (Va.) 285, as to right of subsequent creditors to impeach; Graham v. La Crosse & M. R. Co. 102 U. S. 148, 26 L. ed. 106; Hunter v. Waite, 3 Gratt. 26,—holding voluntary conveyance not void as to subsequent creditors.

— Subsequent judgment creditors for noncontractual liabilities.

Cited in Fox v. Hills, 1 Conn. 294, holding a voluntary conveyance to defeat the claim of a third person for damages arising from a tort, though not within statutes against fraudulent conveyances, is void at common law; Tobie & C. Mfg. Co. v. Waldron, 75 Me. 472, holding a tort feasor cannot defeat a prospective judgment by conveying away all his property in fraud; Morrison v. Morrison, 49 N. H. 69; Byrnes v. Volz, 53 Minn. 110, 54 N. W. 942,—holding voluntary conveyance operative to subsequent creditors intended to be defrauded; and wife becomes such upon recovery of judgment for alimony; Jackson v. Myers, 18 Johns. 425, holding a conveyance made with intent to defeat the recovery by a third person for damages in an action then pending for a tort, and before trial and judgment, is fraudulent and void within the statute of frauds.

Construction of statutes against fraudulent conveyances.

Cited in Allen v. Rundle, 50 Conn. 9, 47 Am. Rep. 599; Gibson v. Love, 4 Fla. 217; United States v. Bank of United States, 8 Rob. (La.) 262; Hildreth v. Sands, 2 Johns. Ch. 35; Hartley v. M'Anulty, 4 Yeates, 95, 2 Am. Dec. 396; Wagner v. Law, 3 Wash. 500, 15 L.R.A. 784, 28 Am. St. Rep. 56, 28 Pac. 1109; Volentine v. Hurd, 22 Blatchf. 489, 21 Fed. 749; United States v. Church of Jesus Christ, L. D. S. 5 Utah, 538, 18 Pac. 35; Hall v. Alabama Terminal & Improv. Co. 143 Ala. 464, 2 L.R.A.(N.S.) 130, 39 So. 285, 5 Ann. Cas. 363, holding statutes against fraud should be liberally construed; Fleming v. Townsend, 6 Ga. 103, 50 Am. Dec.

318, holding that purchasers fall within spirit of 13 Elizabeth, and personal property within spirit of 27 Elizabeth; Heath v. Page, 27 Phila. Leg. Int. 252, holding that usurious interest is debt accruing when act of usury is complete and claimant is creditor within statute of Elizabeth; Heath v. Page, 63 Pa. 108, 3 Am. Rep. 533, holding that statute of 13 Elizabeth embraces all cases where effect of voluntary conveyance is to hinder and delay as well as to defraud creditors; Whitworth v. Adams, 5 Rand. (Va.) 333, as to their construction; Totten v. Douglas, 18 Grant, Ch. U. C. 341, to the point that statute of 27 Elizabeth, chapter 4, and 13 Elizabeth, chapter 5 being in pari materia, decisions under one statute afford apt illustration of doctrine to be applied in construction of others.

Cited in 2 Sutherland Stat. Const. 2d ed. 1246, on liberal construction of statutes to prevent fraud.

Trust resulting from gift to relative.

Cited in Dow v. Jewell, 18 N. H. 340, 45 Am. Dec. 371, as to trust resulting to support donor.

Indirect and constructive frauds.

Cited in Brady v. Bartlett, 56 Cal. 350, as to definition of fraud; Conant v. Jackson, 16 Vt. 335; Owing's Case, 1 Bland, Ch. 370, 17 Am. Dec. 311,—as to obtaining deed from person of unsound mind being fraudulent.

Unusual or self-serving clauses of contract as badges of fraud.

Cited in Robertson v. Shepherd, 165 Mo. 360, 65 S. W. 573; Girard v. St. Louis Car-Wheel Co. 46 Mo. App. 79; Baldwin v. Whitcomb, 71 Mo. 651,—holding whenever fraud is the matter in issue any unusual clause in an instrument, or any unusual method of transacting business apparently done for effect and to give to the transaction an air of honesty is of itself a badge of fraud.

Fraud, effect of.

Cited in Barnes v. Rettew, 8 Phila. 133, 28 Phila. Leg. Int. 124, Fed. Cas. No. 1,019, holding that assignment for creditors, made after bankruptcy law of 1867, went into operation, and within prescribed period, was, in absence of actual fraud, not void but voidable; Northern R. Co. v. Concord R. Co. 50 N. H. 166, holding that fraud vitiates all contracts as against those parties who are attempted and intended to be defrauded thereby.

— Fraud as question for jury.

Cited in Sickman v. Abernathy, 14 Colo. 174, 23 Pac. 447, holding that question of fraud in fact should be determined by jury, on proper instructions from court.

Right to maintain action for money paid to use of another.

Cited in Logan v. Talbot, 59 Cal. 652, holding that one who is legally compelled to pay money which another is under legal obligation to pay, can maintain equitable action against him for money paid to his use.

5 E. R. C. 10, COOKSON v. SWIRE, L. R. 9 App. Cas. 653, 54 L. J. Q. B. N. S. 249, 52 L. T. N. S. 30, 33 Week. Rep. 181.

Effect of registration of bill of sale.

Cited in Wilson v. Walrath, 103 Minn. 412, 24 L.R.A.(N.S.) 1127, 115 N. W. 203, for discussion of bill of sale acts passed in consequence of the cited case; Belanger v. Menard, 27 Ont. Rep. 209, holding the due registration of a bill of sale prevents the inference of fraud from being drawn from the retention of possession of the goods by the bargainor.

Priorities between possessor under unregistered bills of sale or chattel mortgages and other creditors.

Cited in Parkes v. St. George, 10 Ont. App. Rep. 496, as to right of creditor to attack chattel mortgage under chattel mortgage act before he is in a position to impeach it by means of seizure under an execution; Smith v. Fair, 11 Ont. App. Rep. 755, holding a formal defect in a chattel mortgage may be cured by a conveyance at any time before an execution reaches the sheriff's hands; but such conveyance, whether effected by deed or by delivery only, has not retroactive operation and if void for intent to prefer under statute would not suffice to cure the defects; Banks v. Robinson, 15 Ont. Rep. 618, holding where possession is taken by vendee under an unrecorded agreement to sell future chattels his rights cannot be attacked by subsequent creditors; Meriden Britannia Co. v. Braden, 21 Ont. App. Rep. 352, holding sale of mortgaged goods by mortgagee before an election is made by the simple contract creditors commencing proceedings to attack the mortgage cannot be impeached; Manchester v. Hills, 34 N. S. 512, holding possession under bill of sale sufficient as against subsequent attacher; Antoniadi v. Smith [1901] 2 K. B. 589, 70 L. J. K. B. N. S. 869, 49 Week. Rep. 693, 85 L. T. N. S. 200, 8 Manson, 335, 17 Times L. R. 643, holding possession under subsequent registered mortgage sufficient to prevent creditors attacking prior unrecorded bill of sale.

Cited in notes in 5 Eng. Rul. Cas. 70, on what constitutes a bill of sale; 18 E. R. C. 526, on priority of mortgage acquiring legal estate; 18 E. R. C. 533, on mortgagee's forfeiture of priority by fraud, negligence, or notice of prior equity.

Cited in Benjamin Sales 5th ed. 496, on fraud of creditors as dependent on intention.

Distinguished in McKellar v. McGibbon, 12 Ont. App. Rep. 221, where there was no actual sale of the goods by creditor secured but merely an assignment of his rights under bill of sale; Heaton v. Flood, 29 Ont. Rep. 87, holding under statute the act of taking possession by mortgagee after time for renewal had expired must amount to a new delivery or a new transfer by mortgagor.

Possession taken under assignment for benefit of creditors.

Cited in McMullin v. Buchanan, 26 N. S. 146, holding it sufficient if change take place at any time before rights of persons protected by statute will accrue.

Property covered by statutes.

Cited in note in 12 E. R. C. 223, on whether fixtures are personal chattels so as to be within the Bills of Sales Acts.

5 E. R. C. 42, MANCHESTER, S. & L. R. CO. v. NORTH CENTRAL WAGON CO. L. R. 13 App. Cas. 554, 58 L. J. Ch. N. S. 219, 59 L. T. N. S. 730, 37 Week. Rep. 305, affirming the decision of the Court of Appeal, reported in L. R. 35 Ch. Div. 191, 56 L. J. Ch. N. S. 609, which reverses the decision of the Vice Chancellor, reported in L. R. 32 Ch. Div. 477, 55 L. J. Ch. N. S. 780.

Bill of Sale within "Bills of Sale Act."

Cited in Esnouf v. Gurney, 4 B. C. 144, holding verbal sales not prohibited by Bill of Sale Act; Claney v. Grand Trunk P. R. Co. 15 B. C. 497, holding that agreement by contractor that all plant, materials, etc., provided by him for work in constructing railroad, should be until completion of work property of railroad, but that on completion of work should revert to contractor, did not come under Bills of Sale Act; Re Watson, L. R. 25 Q. B. Div. 27, 59 L. J. Q. B. N. S. 394, 63 L. T. N. S. 209; 38 Week. Rep. 567, 7 Morrell, 155, holding substance of trans-

action and not form to be considered in determining when it is a hiring or sale of chattels; Bhagwan Sahai v. Bhagwan Din, L. R. 17 Ind. App. 98, holding absolute sale and distinct but contemporaneous agreement to resell on repayment of the price [called the "principal"] was not a security transfer but an absolute one.

Cited in note in 5 Eng. Rul. Cas. 70, on what constitutes a bill of sale.

The decision of the Court of Appeal was cited in Haydon v. Brown, 59 L. T. N. S. 330, 810; Re Yarrow, 59 L. J. Q. B. N. S. 18, 61 L. T. N. S. 642, 38 Week. Rep. 175; Grigg v. National Guardian Assur. Co. [1891] 3 Ch. 206, 61 L. J. Ch. N. S. 11, 64 L. T. N. S. 787, 39 Week. Rep. 684; Ramsay v. Margarett [1894] 2 Q. B. 18, 63 L. J. Q. B. N. S. 513, 9 Reports, 407, 70 L. T. N. S. 788, 1 Manson, 184; Jones v. Tower Furnishing Co. 61 L. T. N. S. 84; Re Yates, L. R. 38 Ch. Div. 112, 57 L. J. Ch. N. S. 697, 59 L. T. N. S. 47, 36 Week. Rep. 563; Redhead v. Westwood, 59 L. T. N. S. 293; French v. Bombernard, 60 L. T. N. S. 48,—holding an inventory and receipt constitute an assurance requiring registration when they are given in a transaction of such a character as to lead the court to believe that they were intended as documents of title and as evidence of title; Newlove v. Shrewsbury, L. R. 21 Q. B. Div. 41, 57 L. J. Q. B. N. S. 476, 36 Week. Rep. 835, holding where upon an oral agreement by which title to a personal chattel was given by the way of security for an advance the grantor of such chattel signed a receipt which was not intended to and did not express the contract between the parties such document was not a bill of sale and not within Bill of Sale Act.

The decision of the Vice Chancellor was cited in Beckett v. Tower Assets Co. [1891] 1 Q. B. 638, 60 L. J. Q. B. N. S. 493, 64 L. T. N. S. 497, 39 Week. Rep. 438, 55 J. P. 438, as to what constitutes sale under Bill of Sale Act.

Construction of contract of sale.

Cited in Shawinigan Water & Power Co. v. Shawinigan Falls, Rap. Jud. Quebec, 19 B. R. 546, on by-law for purchase of property hypothecated to third party for debt due by seller as in nature of by-law to borrow money.

5 E. R. C. 56, CHARLESWORTH v. MILLS [1892] 2 A. C. 231, 56 J. P. 628, 61 L. J. Q. B. N. S. 830, 66 L. T. N. S. 690, 41 Week. Rep. 129, reversing the decision of the Court of Appeal, reported in 59 L. J. Q. B. N. S. 530, L. R. 25 Q. B. Div. 421.

Bill of sale within "Bills of Sale Act."

Cited in Hogaboom v. Graydon, 26 Ont. Rep. 298, holding a sale of chattels consisting of household furniture in their residence, between a married woman and her husband living together without a duly registered bill of sale is void as to creditors; O'Connor v. Quinn, 12 C. L. R. (Austr.) 239, holding that if consideration is stated with sufficient accuracy in notice either as to legal effect or as to its mercantile and business effect, and substantially falls under heading under which it is placed, notice is in that respect good under Instruments Act; Ramsey v. Margarett [1894] 2 Q. B. 18, 63 L. J. Q. B. N. S. 513, 9 Reports, 407, 70 L. T. N. S. 788, 1 Manson, 184; Kennedy v. Whittie, 27 N. S. 460,—holding if bargain is complete without the document so that the property passes independently of it, it will not be deemed a bill of sale; Grigg v. National Guardian Assur. Co. [1891] 3 Ch. 206, 61 L. J. Ch. N. S. 11, 64 L. T. N. S. 787, 39 Week. Rep. 684; Syndicat Lyonnais du Klondyke v. McGrade, 36 Can. S. C. 251, as to what transfers are within "Bills of Sale Act:" Esnouf v. Gurney, 4 B. C. 144, holding Bills of Sale Act does not affect parol contracts of purchase and sale.

Distinguished in Morris v. Delobbel-Flipo [1892] 2 Ch. 352, 61 L. J. Ch. N. S. 518, 66 L. T. N. S. 320, 40 Week. Rep. 492, holding agreement making goods in

agent's hands security for his advances to principal not within Bills of Sale Act.

The decision of the Court of Appeals was cited in Archibald v. Hubley, 18 Can. S. C. 116, holding that assignment of personal property in trust to sell same and apply proceeds to payment of debts due certain creditors, is bill of sale within Nova Scotia Bills of Sale Act.

5 E. R. C. 74, RE STANDARD MFG. CO. [1891] L. R. 1 Ch. 627, 60 L. J. Ch. N. S. 292, 64 L. T. N. S. 487, 39 Week. Rep. 369.

Transfers within Bills of Sale Act.

Cited in Re Roundwood Colliery Co. [1897] 1 Ch. 373, 66 L. J. Ch. N. S. 186, 75 L. T. N. S. 641, 45 Week. Rep. 324, as to distress for rent, not reserved to secure some other debt, being outside Bills of Sale Act.

— Corporate contracts, transfers and hypothecations.

Cited in Richards v. Kidderminster [1896] 2 Ch. 212, 65 L. J. Ch. N. S. 502, 74 L. T. N. S. 483, 44 Week. Rep. 505, holding a deed of charge on the assets of a company registered under the companies act of 1862 to cover debentures is not a bill of sale within meaning of Bills of Sale Act; Johnston v. Wade, 17 Ont. L. Rep. 372, holding debentures of joint stock company not within act.

Distinguished in Great Northern R. Co. v. Coal Co-operative Soc. [1896] 1 Ch. 187, 65 L. J. Ch. N. S. 214, 73 L. T. N. S. 443, 44 Week. Rep. 252, 2 Manson, 621, holding debentures issued by a society registered under the Industrial and Provident Societies Act, and charging the society's personal chattels by way of security for payment of money are not exempted by Bills of Sale Act from statutory requirements in respect of bills of sale.

Priority between attaching creditors and bondholders or debenture holders of corporation.

Cited in Taunton v. Warwickshire [1895] 1 Ch. 734, [1895] 2 Ch. 319, 64 L. J. Ch. N. S. 497, 13 Reports, 363, 72 L. T. N. S. 460, 2 Manson, 238, 43 Week. Rep. 579, holding where the goods of a company are taken in execution and sold but the money is not handed over to the execution creditor the holder of a debenture constituting a charge by way of floating security upon all the property of the company may still intervene so as to oust the execution creditor; Re Opera [1891] 3 Ch. 260, 60 L. J. Ch. N. S. 839, 65 L. T. N. S. 371, 39 Week. Rep. 705, holding execution creditor takes subject to rights of debenture holders under debentures charging all the property of the company as security for the debenture debt; Re London Pressed Hinge Co. [1905] 1 Ch. 576, 74 L. J. Ch. N. S. 321, 53 Week. Rep. 407, 92 L. T. N. S. 409, 21 Times L. R. 322, 12 Manson, 219, as to execution creditor taking subject to equity of debenture holding; Duck v. Tower Galvanizing Co. [1901] 2 K. B. 314, 70 L. J. K. B. N. S. 625, 84 L. T. N. S. 847, holding the rights of a bona fide holder for value of a debenture, which is in proper form and charges all the property of the company as security for debenture debt, prevail on those of an execution creditor, even where the debenture is issued without authority; Davey v. Williamson [1898] 2 Q. B. 194, 67 L. J. Q. B. N. S. 699, 78 L. T. N. S. 755, 46 Week. Rep. 571, holding where the goods seized on execution were validly charged with the payment of debentures the rights of debenture holders prevailed over execution creditor: Simultaneous Colour Printing Syndicate v. Foweraker [1901] 1 K. B. 771, 70 L. J. K. B. N. S. 453, 8 Manson, 307, 17 Times L. R. 368, holding where a company contracts for consideration to issue debentures charging its property and before the debentures are actually

issued goods intended to be thereby charged and seized in execution of a judgment recovered against the company, the execution creditor is only entitled to the goods subject to a change in favor of the intended debenture holders.

Distinguished in National Electric Mfg. Co. v. Manitoba Electric & Gaslight Co. 9 Manitoba L. Rep. 212, holding where the company was a going concern trustees for bond holders had no equity to prevent the property being applied to claim of attaching creditor; Robson v. Smith [1895] 2 Ch. 118, 64 L. J. Ch. N. S. 457, 13 Reports, 529, 72 L. T. N. S. 559, 43 Week. Rep. 632, 2 Manson, 422, holding holder of a debenture constituting only a floating security while the company is carrying on business cannot, if the company has not here wound up and a receiver has not been appointed, require by notice that a particular debt owing the company shall be paid to him or not to the company.

5 E. R. C. 87, EX PARTE JAY, 43 L. J. Bankr. N. S. 122, L. R. 9 Ch. 697, 31 L. T. N. S. 260, 22 Week. Rep. 907.

Sufficiency of change of possession under "Bills of Sale Act."

Cited in Cook & Co. v. Corthell, 11 R. I. 482, 23 Am. Rep. 518 (dissenting opinion); Ontario Bank v. Wilcox, 43 U. C. Q. B. 460,—as to what constitutes sufficient change of possession; Ancona v. Rogers, L. R. 1 Exch. Div. 285, 46 L. J. Exch. N. S. 121, 35 L. T. N. S. 115, 24 Week. Rep. 1000; McKellar v. McGibbon, 12 Ont. App. Rep. 221,—holding vendee in unregistered bill of sale has no rights against creditors by reason of having endeavored to gain possession of the goods; Furber v. Finlayson, 34 L. T. N. S. 323, 24 Week. Rep. 370, holding from evidence jury might find that plaintiff was in actual possession under unregistered bill of sale.

5 E. R. C. 99, EX PARTE CHARING CROSS ADVANCE & DEPOSIT BANK, L. R. 16 Ch. Div. 35, 50 L. J. Ch. N. S. 157, 44 L. T. N. S. 113, 29 Week. Rep. 204.

Necessity of expression of true consideration in "bill of sale."

Cited in Ex parte Rolph, L. R. 19 Ch. Div. 98, 45 L. T. N. S. 482, 30 Week. Rep. 52, 46 J. P. 181, 51 L. J. Ch. N. S. 88, as to what constitutes expression of true consideration: Hamilton v. Chaine, L. R. 7 Q. B. Div. 1; Bathgate v. Merchants' Bank, 5 Manitoba, L. R. 210; Meighen v. Armstrong, 16 Manitoba, L. Rep. 5; Hamilton v. Harrison, 46 U. C. Q. B. 127; Marthinson v. Patterson, 20 Ont. Rep. 720,—holding under Bills of Sale Act true consideration must be expressed.

Cited in notes in 5 Eng. Rul. Cas. 110; 5 E. R. C. 132,—on requisites to validity of bill of sale.

Distinguished in Ex parte Challinor, L. R. 16 Ch. Div. 260, 44 L. T. N. S. 122, 29 Week. Rep. 205, holding a bill of sale is not vitiated under Bills of Sale Act because a part of the sum stated in it as the consideration is retained by the grantee to pay the solicitor's costs of preparing the deed and a further agreed sum for costs previously incurred, and the fee of an auctioneer for valuing the property with a view to the making of the loan.

5 E. R. C. 104, COUNSELL v. LONDON & W. LOAN & DISCOUNT CO. 56 L. J. Q. B. N. S. 622, L. R. 19 Q. B. Div. 512, 36 Week. Rep. 53.

Instruments of defeasance or otherwise parts of bill of sale requiring registration.

Cited in Edwards v. Marcus [1894] 1 Q. B. 587, 63 L. J. Q. B. N. S. 363, 9

Reports, 337, 70 L. T. N. S. 182, 1 Manson, 70, holding where unregistered mortgage forms part of transaction in which bill of sale was given it should have been written on same paper as bill of sale before registration and bill of sale was void under Bills of Sale Act.

Cited in note in 5 Eng. Rul. Cas. 111, 132, on requisites to validity of bill of sale.

Distinguished in Carpenter v. Deen, L. R. 23 Q. B. Div. 566, 61 L. T. N. S. 860, holding policy of assurance on life of grantor deposited with grantee as collateral security not a condition or defeasance required to be registered with bill of sale; Monetary Advance Co. v. Cater, L. R. 20 Q. B. Div. 785, 57 L. J. Q. B. N. S. 463, 59 L. T. N. S. 311, holding promissory note given as collateral security no part of bill of sale.

5 E. R. C. 112, DAVIS v. BURTON, 52 L. J. Q. B. N. S. 636, L. R. 11 Q. B. Div. 537, 32 Week. Rep. 423, affirming the decision of the High Court reported in L. R. 10 Q. B. Div. 414, 52 L. J. Q. B. N. S. 334.

Bill of sale — Form of under statute.

Cited in Long v. Hancock, 12 Ont. App. Rep. 137, on validity of mortgage given by company to secure pre-existing debt; Melville v. Stringer, L. R. 13 Q. B. Div. 392, 53 L. J. Q. B. N. S. 482, 50 L. T. N. S. 774, 32 Week. Rep. 890, holding a bill of sale which is in its terms so complicated as to substantially vary from the form of schedule in Bills of Sale Act is void; Roberts v. Roberts, L. R. 13 Q. B. Div. 794, 53 L. J. Q. B. N. S. 313, 50 L. T. N. S. 351, 32 Week. Rep. 605, holding bill of sale valid as there was a substantial compliance with form contained in schedule; Turner v. Culpan, 58 L. T. N. S. 340, 36 Week. Rep. 278, as to validity of bill of sale when grantee puts therein something which he cannot legally demand; Saunders v. White [1902] 1 K. B. 472, 71 L. J. K. B. N. S. 318, 50 Week. Rep. 325, 86 L. T. N. S. 173, 18 Times L. R. 280, holding bill of sale given by two persons jointly, the goods described not belonging to them jointly but part to one and part to the other, void as not being in accordance with form in the schedule in Bills of Sale Act.

Cited in note in 5 Eng. Rul. Cas. 134, on requisites to validity of bill of sale.

— Provisions as to interest taxes and charges.

Cited in Re Williams, L. R. 25 Ch. Div. 656, 53 L. J. Ch. N. S. 500, 49 L. T. N. S. 475, 32 Week. Rep. 187; Goldstrom v. Tallerman, L. R. 17 Q. B. Div. 80,— holding reservation of interest upon interest rendered bill of sale void; Hammond v. Hocking, L. R. 12 Q. B. Div. 291, 53 L. J. Q. B. N. S. 205, 50 L. T. N. S. 267, holding an agreement in a bill of sale of chattels, that the grantor will pay all premiums necessary for keeping chattels insured against loss by fire, and forthwith after every payment in respect of such insurance produce, and if required deliver to grantee receipt for same, does not contravene Bills of Sale Act; Barr v. Kingsford, 56 L. T. N. S. 861, holding covenant to produce receipts for rent and premium of insurance on demand in bill of sale or deviation from statutory form and renders bill of sale void.

Distinguished in Thorpe v. Cregeen, 55 L. J. Q. B. N. S. 80, 33 Week. Rep. 844, holding fact of interest having been stated as a lump sum did not render bill of sale void.

— Provisions as to prematurity if default be made.

Cited in Myers v. Elliott, L. R. 16 Q. B. Div. 526, 55 L. J. Q. B. N. S. 233, 54 L. T. N. S. 552, 34 Week. Rep. 338; Lumley v. Simmons, L. R. 34 Ch. Div. 698, 56

L. J. Ch. N. S. 329, 35 Week. Rep. 422; Roe v Mutual Loan Fund Asso. 56 L. T. N. S. 631,—holding provision in bill of sale making all installments due on default in any one renders it void.

Object of registration of bill of sale.

Cited in Hughes v. Little, L. R. 17 Q. B. Div. 204, as to object of Bills of Sale Act.

5 E. R. C. 117, THOMAS v. KELLY, L. R. 13 App. Cas. 506, 58 L. J. Q. B. N. S. 66, 60 L. T. N. S. 114, 37 Week. Rep. 353, affirming the decision of the Court of Appeal, reported in 57 L. J. Q. B. N. S. 330, L. R. 20 Q. B. Div. 569.

Bill of sale and chattel mortgage — Form of.

Cited in Traves v. Forrest, 42 Can. S. C. 514, holding that agreement creating equitable interest in ore to be mined is not instrument requiring registration under British Columbia Bills of Sale Act; Clancy v. Grand Trunk P. R. Co. 15 B. C. 497, holding that agreement by contractor that all plant, materials, etc., provided by him for work in constructing railway should be, until completion of work, property of railroad, but that on completion of work, such property would revert to contractor, did not come under Bills of Sale Act; Morse v. Phinney, 22 Can. S. C. 563; Rex v. Phillips, 14 B. C. 194,—to the point that instrument which purports to be bill of sale is not in accordance with statutory form, when it departs from statutory form in anything which is characteristic of that form; Marthinson v. Patterson, 19 Ont. App. Rep. 188, as to necessity of consideration being correctly stated; Smith v. McLean, 24 N. S. 127; Kirchhoffer v. Clement, 11 Manitoba L. Rep. 460; Reid v. Creighton, 27 N. S. 90; Phinney v. Morse, 25 N. S. 502; Morse v. Phinney, 22 Can. C. 563,—holding affidavit accompanying shall be as nearly as may be in form prescribed by statute.

Cited in note in 5 Eng. Rul. Cas. 132, on requisites to validity of bill of sale.

— After acquired property.

Cited in Canada Permanent Loan & Sav. Co. 22 Ont. App. Rep. 515 (dissenting opinion); Banks v. Robinson, 15 Ont. Rep. 618,—holding that the Bills of Sale and Chattel Mortgage Act, R. S. O. chap. 125, 1887, was not intended to cover agreements creating equitable interests in non-existing and future-acquired property; Horsfall v. Boisseau, 21 Ont. App. Rep. 663, as to sufficiency of description of after acquired goods.

Cited in note in 10 E. R. C. 474, on legal title of assignee under assignment of future chattels as security.

Cited in Benjamin, Sales, 5th ed. 136, on equitable assignment of after-acquired property.

Distinguished in Tailby v. Official Receiver, 10 E. R. C. 445, L. R. 13 App. Cas. 523, 58 L. J. Q. B. N. S. 75, 60 L. T. N. S. 162, 37 Week. Rep. 513, holding assignment in futuro of accounts receivable and not specifically described was good.

— Future debts and advances.

Cited in Reid v. Creighton, 24 Can. S. C. 69, holding mortgage given to secure both a present and future indebtedness and accompanied by single affidavit combining main features of both forms not in form required by statute.

5 E. R. C. 140, SWAN v. NORTH BRITISH AUSTRALASIAN CO. 2 Hurlst. & C. 175, 10 Jur. N. S. 102, 32 L. J. Exch. N. S. 273, 11 Week. Rep. 862, affirming the decision of the Court of Exchequer, reported in 7 Hurlst. & N. 603, 31 L. J. Exch. N. S. 425.

Effect of filling in blanks in written instruments after delivery.

Cited in Simmons v. Atkinson & L. Co. 69 Miss. 862, 23 L.R.A. 599, 12 So. 263, holding that filling blanks in note by insertion of words "or bearer" and name of bank after word "at" will avoid note in hands of innocent holder; Ray v. Wilson, 24 Ont. L. Rep. 122 (dissenting opinion), on liability of person who puts name to incomplete negotiable instrument, which is afterwards filled out to give effect to instrument; France v. Clark, L. R. 26 Ch. Div. 257, 53 L. J. Ch. N. S. 585, 50 L. T. N. S. 1, 32 Week. Rep. 466, holding that one who takes from another an instrument signed in blank by a third party, and fills up the blanks, cannot claim to be a purchaser for value without notice; Societe Generale de Paris v. Walker, L. R. 11 App. Cas. 20, 55 L. J. Q. B. N. S. 169, 54 L. T. N. S. 389, 34 Week. Rep. 662, 5 Eng. Rul. Cas, 157, holding that where the appellants received a blank transfer of shares, and filled in the blanks themselves, and the transfer was never redelivered afterward by the transferor, the transferees received no title.

Negotiable instrument indorsed in blank as being payable to bearer.

Cited in Storch v. McCain, 85 Cal. 304, 24 Pac. 639, holding that a negotiable instrument indorsed in blank is payable to bearer, and may be negotiated by delivery only.

Incomplete negotiable instrument as implying prima facie authority to fill in blanks.

Distinguished in Boston Steel & I. Co. v. Steuer, 183 Mass. 140, 97 Am. St. Rep. 426, 66 N. E. 646, holding that the delivery of an incomplete negotiable instrument implies the authority to complete it, but only prima facie so.

Estoppel.

Cited in Pepper v. State, 22 Ind. 399, 85 Am. Dec. 430, holding that sureties are not estopped to show condition upon which they were to become liable, where imperfect condition of bond was sufficient to put obligee upon inquiry; Whitfield v. Bonpariel Consol. Copper Co. 67 Wash. 286, 41 L.R.A.(N.S.) 187, 123 Pac. 1078, holding that one who takes corporate stock from officer having authority to issue same, in payment of his individual debt, cannot hold company estopped from questioning of issuance of such certificate; Palmer v. Miller, 13 Ont. Rep. 567, holding that a party became estopped from asserting the contrary after acquiescing for a time in a transaction; Doe ex dem. Green v. Higgins, 1 Has. & War. (Pr. Edw. Isl.) 495, to the point that man is not permitted to charge consequences of his own fault on others, and complain of that which he has brought about.

The decision of the Court of Exchequer was cited in Merchants' Nat. Bank v. State Nat. Bank, 10 Wall. 604, 19 L. ed. 1008, holding that estoppel in pais presupposes an error or fault and implies an act in itself invalid; Hall v. Hardaker, 61 Fla. 267, 55 So. 977, holding that person is not permitted to charge consequences of his own fault to others, and complain of that which he himself brought about; City Nat. Bank v. Kusworm, 88 Wis. 188, 26 L.R.A. 48, 43 Am. St. Rep. 880, 59 N. W. 564, on what constitutes estoppel.

The decision of the Court of Exchequer was distinguished in Skinner v. Franklin County, 3 Pa. Co. Ct. 424, holding that an officer of a county was not estopped from recovery for further fees by his receipt of a less sum than due, the position of the county not being thereby changed; Gordon v. Proctor, 20 Ont. Rep. 53, holding that where there was no false representation of existing facts or of facts not existing, or upon which no one acted to their injury there was no estoppel.

Acts creating estoppel to deny title or conferred authority.

Cited in Deardorff v. Foresman, 24 Ind. 481; State ex rel. McCarty v. Pepper, 31 Ind. 76; State to use of Bothrick v. Potter, 63 Mo. 212, 21 Am. Rep. 440,— holding that where the surety invested his principal with apparent authority to deliver the bond, he is estopped to deny his obligation to an innocent holder: White v. Duggan, 140 Mass. 18, 54 Am. Rep. 437, 2 N. E. 110, holding same, even though altered by the principal; Maclellan v. Davidson, 20 N. B. 338, holding that where the payee of a bill of exchange indorsed the same over to another after he became insolvent, and the drawer then accepted it, the latter was not estopped to assert the wrongful indorsement; Forristal v. McDonald, 9 Can. S. C. 12, on the right to claim ownership to property against one purchasing it from the person to whom it had been entrusted; Elliott v. Flanagan, 25 N. B. 154, holding that where the owners of land stood by and without objection saw the same sold on an illegal assessment, they were estopped to assert their title; Trueman v. Bain, 25 N. B. 298, holding that the painting of the purchaser's name on the front of an iron safe by the manufacturer did not estop the latter to show its ownership of the safe under a conditional sale contract, where same was sold by the purchaser; Henderson v. Vermilyea, 27 U. C. Q. B. 544, holding that where the party had laid by for years believing that he was bound by an altered instrument and telling others so, he was estopped to deny that he was; Hunter v. Walters, L. R. 11 Eq. 292, L. R. 7 Ch. 75, 41 L. J. Ch. N. S. 175, 25 L. T. N. S. 765, 20 Week. Rep. 218, on the signing of an instrument without reading it, as creating an estoppel against a person accepting an estate under it, who acts innocently and relies upon it.

Cited in note in 19 L.R.A. 333, on liability of corporation for fraud or forgery of officers in issue of stock.

Distinguished in Tome v. Parkersburg Branch R. Co. 39 Md. 36, 17 Am. Rep. 540, holding that officer of railroad company clothed with authority to issue certificates of stock may bind company by issue of spurious stock; McNeil v. Tenth Nat. Bank, 46 N. Y. 325, 7 Am. Rep. 341, holding that owner of personal property who confers upon another, an apparent title to it, is estopped to assert his title to it, as against one who has dealt with the property in reliance upon the apparent ownership; Ledwich v. McKim, 53 N. Y. 307, holding that the rule that the bona fide holder of negotiable paper may supply an omission in it, does not apply only where the maker has by his own act put the instrument into circulation; Mason v. Bickle, 2 Ont. App. Rep. 291, holding that where there was no misrepresentation inducing the party to act, to his damage, there was no estoppel.

The decision of the Court of Exchequer was cited in Tobias v. Morris, 126 Ala. 535, 28 So. 517, holding that a woman may be estopped by her conduct in allowing her husband to make a contract of deposit in a bank providing how the deposit should be kept and that it should be drawn upon by him, and the payment of checks thereon by the bank, from depositing her husband's authority to draw on the account; New York & N. H. R. Co. v. Schuyler, 34 N. Y. 30, holding that the doctrine of implied agency arising out of negligence has its basis in the principal of estoppel in pais; Devlin v. Pike, 5 Daly, 85, holding that where it was the act of the principal who enabled the agent to fraudulently sell property entrusted to him, the principal is estopped to deny the validity of the sale; Gifford v. White Plains, 25 Hun, 606, holding that where an agent does an act apparently within the scope of his authority, the principal is estopped by his representations from

denying his authority; Merchants' Bank v. Moffatt, 5 Ont. Rep. 122, on estoppel as arising through the execution of a deed through mistake.

—By filling in blank spaces in written instruments.

Cited in State ex rel. McCarty v. Pepper, 31 Ind. 76, holding that surety signing and delivering to principal obligor's bond before names of sureties have been inserted in body of instrument will be held as agreeing that blank for such names may be filled after he has executed it; R. v. Chesley, 16 Can. S. C. 306, holding that where the official bond was signed in blank, the official was estopped from denying that he had executed the bond; Ortigosa v. Brown, 47 L. J. Ch. N. S. 168, 38 L. T. N. S. 145, on an instrument, being in blank, as being made good by estoppel.

Cited in note in 21 L.R.A.(N.S.) 406, on duty to see spaces on commercial paper are filled so as to prevent raising.

Distinguished in Burton v. Goffin, 5 B. C. 454, holding that where a party indorsed a bill of exchange leaving the spaces for the name of payee and the rate of interest blank, and these were afterward filled in the indorser was estopped to allege the alteration.

—By representations.

Cited in R. v. Belleau, 7 Can. S. C. 53, on representations as creating an estoppel; Walker v. Hyman, 1 Ont. App. Rep. 345, on what must occur to create an estoppel by representations; Canadian Bank v. Wilson, 36 U. C. Q. B. 9 (dissenting opinion), on representations when acted upon as creating an estoppel.

Negligence of party as creating estoppel.

Cited in Hardy v. Chesapeake Bank, 51 Md. 562, 34 Am. Rep. 325, holding that, conduct by negligence or omission, where there is a duty cast upon a person, by usage, trade or otherwise to disclose the truth may create an estoppel; Merchants' Nat. Bank v. Baltimore, 102 Md. 573, 63 Atl. 108, holding that the neglect of the carrier to demand the bill of lading before delivering the goods, was not the proximate cause of the loss to the bank and did not estop them from making the defense of fraud; Manhattan Beach Co. v. Harned, 23 Blatchf. 494, 27 Fed. 484; Brown, L. & Co. v. Howard, 42 Md. 384, 20 Am. Rep. 90; Hill v. C. F. Jewett Pub. Co. 154 Mass. 172, 13 L.R.A. 193, 26 Am. St. Rep. 230, 28 N. E. 142; O'Herron v. Gray, 168 Mass. 573, 40 L.R.A. 498, 60 Am. St. Rep. 411, 47 N. E. 429,—holding that negligence which will work an estoppel must be the proximate cause and must enter into the transaction itself; Clark v. Eckroyd, 12 Ont. App. Rep. 425, holding that the negligence of the party which was not a part of the transaction but simply amounted to a delay, and did not create an estoppel; McArthur v. Eagleson, 43 U. C. Q. B. 406, holding that negligence alone, although it may have afforded the opportunity for the perpetration of a fraud upon another, is not of itself a ground of estoppel; Agricultural Invest. Co. v. Federal Bank, 45 U. C. Q. B. 214, holding that in order to create an estoppel, the person must be mislead by some act of the party in the transaction itself, not merely a neglect of what is prudent; Tome v. Parkersburg Branch R. Co. 39 Md. 36, 17 Am. Rep. 540 (dissenting opinion); dissenting opinion in Bank of England v. Vagliano Bros. [1891] A. C. 107, 60 L. J. Q. B. N. S. 145, 64 L. T. N. S. 353, 39 Week. Rep. 657, 55 J. P. 676, 3 Eng. Rul. Cas. 695 (reversing L. R. 22 Q. B. Div. 103); Farquharson Bros. v. King & Co. [1901] 2 K. B. 697, 70 L. J. K. B. N. S. 985, 49 Week. Rep. 673, 85 L. T. N. S. 264, 17 Times L. R. 689 (dissenting opinion); Union Credit Bank v. Mersey Docks & Harbour Board [1899] 2 Q. B. 205, 68 L. J. Q. B. N. S. 842, 81 L. T. N. S. 44, 4 Com. Cas. 227,—on estoppel by reason of negligence; Arnold v.

Cheque Bank, L. R. 1 C. P. Div. 578, 45 L. J. C. P. N. S. 562, 34 L. T. N. S. 729, 24 Week. Rep. 759; Coventry v. Great Eastern R. Co. L. R. 11 Q. B. Div. 776, 52 L. J. Q. B. N. S. 694, 49 L. T. N. S. 641; Merchants of the Staple v. Bank of England, L. R. 21 Q. B. Div. 160, 57 L. J. Q. B. N. S. 418, 36 Week. Rep. 880, 52 J. P. 580, 7 Eng. Rul. Cas. 334; Longman v. Bath Electric Tramways [1905] 1 Ch. 646, 74 L. J Ch. N. S. 424, 53 Week. Rep. 480, 92 L. T. N. S. 743, 21 Times L. R. 373,—holding that negligence which will work an estoppel must be the proximate cause of the loss and must enter into the transaction itself; Seton v. Lafone, L. R. 19 Q. B. Div. 68, 56 L. J. Q. B. N. S. 415, 57 L. T. N. S. 547, 35 Week. Rep. 749, holding same as to negligent misrepresentation; Bell v. Marsh [1903] 1 Ch. 528, 72 L. J. Ch. N. S. 360, 51 Week. Rep. 325, 88 L. T. N. S. 605, holding same and where such conduct did not affect the parties' actions, no estoppel arose.

Cited in note in 4 E. R. C. 646, on estoppel to deny liability to bona fide holder on commercial paper issued in blank and subsequently filled up.

Distinguished in Dickson v. Reuter's Teleg. Co. L. R. 3 C. P. Div. 1, 47 L. J. C. P. N. S. 1, 37 L. T. N. S. 370, 26 Week. Rep. 23, 24 Eng. Rul. Cas. 774, holding that the doctrine of negligence applies only to cases of estoppel, and where there was no misrepresentation there could be no estoppel.

The decision of the Court of Exchequer was cited in Western U. Teleg. Co. v. Davenport, 97 U. S. 369, 24 L. ed. 1047, on the estoppel of minors by reason of the negligence of their guardian; Ingalls v. Reid, 15 U. C. C. P. 490, on the question of estoppel arising from negligence.

— Negligence in putting out paper.

Cited in Citizens' Nat. Bank v. Smith, 55 N. H. 593, holding that where the maker of the note signed it without ascertaining what it was, being induced to do so by fraudulent representations, he is estopped by his negligence from setting up the fraud as against a bona fide purchaser; Harter v. Mechanics' Nat. Bank, 63 N. J. L. 578, 76 Am. St. Rep. 224, 44 Atl. 715, on what will constitute negligence so as to estop the depositor from asserting the invalidity of a forged check; Knox v. Eden Musee American Co. 148 N. Y. 441, 31 L.R.A. 779, 51 Am. St. Rep. 700, 42 N. E. 988, holding that where the canceled stock certificates were left in the safe to which the manager alone had access, and he fraudulently disposed of them, the corporation was not negligent so as to estop them from asserting their title; Millard v. Boston, 13 R. I. 601, 43 Am. Rep. 51, on negligence in the making of a note as constituting an estoppel: Beltz v. Molson's Bank, 40 U. C. Q. B. 253, holding that neglect in putting a cheque into circulation, which did not induce the bank to pay it was not a ground of estoppel, where the cheque was altered; Halifax Union v. Wheelright, L. R. 10 Exch. 183, 44 L. J. Exch. N. S. 121, 32 L. T. N. S. 802, 23 Week. Rep. 704, holding that negligence in drawing cheques disentitles the drawer to recover the excess paid by reason of an increase in amount; Foster v. Mackinnon, L. R. 4 C. P. 704, 38 L. J. C. P. N. S. 310, 20 L. T. N. S. 887, 17 Week. Rep. 1105, holding that estoppel by negligence in signing an instrument in blank applies to negotiable instruments only.

Distinguished in Greenfield Sav. Bank v. Stowell, 123 Mass. 196, 25 Am. Rep. 67, holding that the material alteration of a note without the makers consent, avoids it as to him, even as against a bona fide holder, where the latter is not negligent; Fordyce v. Kosminski, 49 Ark. 40, 4 Am. St. Rep. 18, 3 S. W. 892; Simmons v. Atkinson & L. Co. 69 Miss. 862, 23 L.R.A. 599, 12 So. 263,—holding that the maker of a note was not estopped to assert its invalidity because of material alterations in it after delivery, where he was not negligent; Schol-

field v. Londesborough [1894] 2 Q. B. 660, [1895] 1 Q. B. 536, [1896] A. C. 514, 65 L. J. Q. B. N. S. 593, 75 L. T. N. S. 254, 45 Week. Rep. 124, holding that the acceptor of a bill of exchange owes no duty to take precautions against fraudulent alterations in the bill, and is not estopped to assert its invalidity.

What constitutes negligence.

Cited in Baxendale v. Bennett, L. R. 3 Q. B. Div. 525, 47 L. J. Q. B. N. S. 624, 26 Week. Rep. 899, 4 Eng. Rul. Cas. 637; Johnson v. Credit Lyonnais Co. L. R. 3 C. P. Div. 32, 47 L. J. C. P. N. S. 241, 37 L. T. N. S. 657, 26 Week. Rep. 195; Rimmer v. Webster [1902] 2 Ch. 163, 71 L. J. Ch. N. S. 561, 50 Week. Rep. 517, 86 L. T. N. S. 491, 18 Times L. R. 548,—holding that the word negligence imports a neglect of some duty toward the person injured.

Th decision of the Court of Exchequer was cited in Henderson v. St. John, 14 N. B. 72, holding that where a city owed no duty to the plaintiff it was guilty of no negligence in not lighting the streets.

—As applying to negotiable instruments.

Cited in Leach v. Nichols, 55 Ill. 273, on the signing of a note without reading it, or ascertaining its contents being induced to do so by false representations, as negligence; Shepard & M. Lumber Co. v. Eldridge, 171 Mass. 516, 41 L.R.A. 617, 68 Am. St. Rep. 446, 51 N. E. 9, holding that a holder of a cheque is not negligent in entrusting it to a clerk, who, due care, would have shown was dishonest; Farmers' Bank v. Diebold Safe & Lock Co. 66 Ohio St. 367, 58 L.R.A. 620, 90 Am. St. Rep. 586, 64 N. E. 518, holding that the stealing of the stock certificate was not the natural result of leaving it in a drawer of the safe and therefore the plaintiff was not negligent.

Cited in 1 Thompson, Neg. 36, on negligence in leaving blank spaces in negotiable instrument as foundation for liability.

Proximate cause of loss.

Cited in Pepper v. State, 22 Ind. 399, 85 Am. Dec. 430, holding that where the obligee has notice of the conditions which would avoid it, his negligence in not making inquiries is the proximate cause of his loss; Scottish American Invest. Co. v. Hope, 26 Grant, Ch. (U. C.) 430, holding that where a valuator's report stated the conditions upon which it was made, which were not complied with, it was not the proximate cause of the loss; Dominion Permanent v. Morgan, 4 D. L. R. 331 (dissenting opinion), on nonliability of one who executes deed without inquiring into its character where his negligence is not the proximate cause of loss; Postmaster-General v. McCall, 31 U. C. C. P. 365, holding that sureties on a postmaster's bond were not liable where he opened letters and removed cheques, and cashed them, for the cheques, as the larceny was not the proximate cause of the loss to the bank.

Title to negotiable paper.

Cited in Union Invest. Co. v. Wells, 39 Can. S. C. 625, on the acquisition of a negotiable instrument as conferring title.

—Transfer by fraudulent act of agent.

Cited in Reynolds v. Witte, 13 S. C. 15, 36 Am. Rep. 678, holding that the fraudulent act of the agent in transferring negotiable securities transferred the title to a bona fide purchaser.

Negligence of party defrauded as affecting the fraud.

Cited in Montgomery v. Scott, 9 S. C. 20, 30 Am. Rep. 1, holding that if a person seeks to set aside a bond and mortgage on the ground that it was executed through fraud, he must show that he was not negligent.

Liability of surety upon altered instrument.

Cited in Henderson v. Vermilyea, 27 U. C. Q. B. 544, to the point that alteration of lease after execution and delivery by striking out name of cosurety avoids lease as to other surety.

Object of the law merchant.

Cited in Union Invest. Co. v. Wells, C. R. [1906] A. C. 497, on object of the law merchant regarding bills and notes payable to bearer being to secure their circulation.

Proximate cause of injury.

Cited in Toms v. Whitby Twp. 35 U. C. Q. B. 195, holding that failure to erect fence to guard embankment was proximate cause of injury to person caused by horse becoming frightened and backing buggy over embankment.

5 E. R. C. 157, SOCIETE GENERALE DE PARIS v. WALKER, L. R. 11 App. Cas. 20, 55 L. J. Q. B. N. S. 169, 54 L. T. N. S. 389, 34 Week. Rep. 662, affirming the decision of the Court of Appeal, reported in 54 L. J. Q. B. N. S. 177, L. R. 14 Q. B. Div. 424.

Validity of transfer of stock by deed executed in blank.

Cited in Baker v. Davie, 211 Mass. 429, 97 N. E. 1094, holding that, apart from custom, no completed transfer of certificate of stock takes place by indorsement in blank; R. v. Chesley, 16 Can. S. C. 306, on invalidity of deed delivered in blank; Magnus v. Queensland Nat. Bank, L. R. 36 Ch. Div. 25, holding that if the names of the transferees were not filled in to the deed before the deed was executed it passed no title to the stock; Powell v. London & P. Bank [1893] 1 Ch. 610 [1893] 2 Ch. 555, 62 L. J. Ch. N. S. 795, 2 Reports, 482, 69 L. T. N. S. 421, 41 Week. Rep. 545, holding that where the transfer of the stock was in blank, and was not redelivered after it was filled out and completed, that it conveyed no title.

Cited in notes in 66 L.R.A. 777; on priority rights of different assignees of fund in hands of third person; 67 L.R.A. 681, on validity of pledge or other transfer of stock when not made in books of corporation, as against attachments, executions, or subsequent transfers; 4 Eng. Rul. Cas. 646, on estoppel to deny liability to bona fide holder on commercial paper issued in blank and subsequently filled up.

The decision of the Court of Appeals was cited in Gibbs v. Craig, 58 N. J. L. 661, 33 Atl. 1052, to the point that when articles of association of company require transfers by deed of shares of stock, transfer under seal with blank for name of transferee is invalid.

— Effect of fraudulent transfer by agent.

Cited in Smith v. Rogers, 30 Ont. Rep. 256, on the right of the holder of a share certificate to retain the same as against the owner from whom it has been transferred by fraudulent act of agent.

Certificate of shares as evidence of title to stock.

Cited in Smith v. Walkerville Malleable Iron Co. 23 Ont. App. Rep. 95, holding that the right to have legal title perfected by having the transfer registered, does not depend upon possession of the share certificate; Union Bank v. Morris, 27 Ont. App. Rep. 396, holding that the certificate is not the title to the shares but is evidence of it and the assumed act of cancellation does not divest the title to the shares.

— Transferee without certificate as bona fide purchaser without notice.

Cited in Taliaferro v. First Nat. Bank, 71 Md. 200, 17 Atl. 1036, on the holder of stock after a transfer thereof without the certificate of shares, as being a purchaser for value without notice; Williams v. Colonial Bank, L. R. 38 Ch. Div. 388, 57 L. J. Ch. N. S. 826, 59 L. T. N. S. 643, 36 Week. Rep. 625, holding that where there appeared on the face of the certificate, facts sufficient to put a person on his guard that the holder was not the owner of the stock, he was not a bona fide purchaser without notice.

Cited in notes in 21 Eng. Rul. Cas. 812; 10 Eng. Rul. Cas. 505,—on inapplicability of the rule as to the effect of notice in determining priorities where shares are assignable only by deed; 21 Eng. Rul. Cas. 718, 747, 748, on rights of purchaser for value without notice.

Registration of transfer as perfecting title to stock.

Cited in Bradford Bkg. Co. v. Briggs, L. R. 31 Ch. Div. 19, L. R. 12 App. Cas. 29, 56 L. J. Ch. N. S. 364, 56 L. T. N. S. 62, 35 Week. Rep. 521, holding that where the articles made all shares of stock subject to a lien thereon for all debts due from the shareholder, the bank after giving the company notice of a transfer to them, had the first lien upon the stock for money advanced by them upon the security of the shares; Nanny v. Morgan, L. R. 35 Ch. Div. 598, holding that a transfer of the stock or certificate of shares, alone will not transfer the legal title; Colonial Bank v. Hepworth, L. R. 36 Ch. Div. 36, 56 L. J. Ch. N. S. 1089, 57 L. T. N. S. 148, 36 Week. Rep. 259, on the transfer of stock by a registration of the transfer on the books of the company; Ireland v. Hart [1902] 1 Ch. 522, 71 L. J. Ch. N. S. 276, 86 L. T. N. S. 385, 50 Week. Rep. 315, 9 Manson, 209, 18 Times L. R. 253; Roots v. Williamson, L. R. 38 Ch. Div. 485, 57 L. J. Ch. N. S. 995, 58 L. T. N. S. 802, 36 Week. Rep. 758; Moore v. North Western Bank [1891] 2 Ch. 599, 60 L. J. Ch. N. S. 627, 40 Week. Rep. 93, 64 L. T. N. S. 456, holding that as between two parties claiming title to shares in a company which are registered in the name of a third party, priority of title prevails, unless the claimant second in point of time, has a present, absolute, unconditional right to have the transfer registered before the company was informed of a better title.

— Right of holder of certificate to compel registration.

Cited in Colonial Bank v. Whinney, L. R. 30 Ch. Div. 261, L. R. 11 App. Cas. 426, 56 L. J. Ch. N. S. 43, 55 L. T. N. S. 362, 34 Week. Rep. 705, 3 Morrell, 207. 21 Eng. Rul. Cas. 162, on the right to maintain an action to compel a corporation to register a transfer of stock, without a surrender of the certificate of shares.

— Right of directors to a reasonable time to consider transfer before registration.

Cited in Re Cawley, L. R. 42 Ch. Div. 209, on the right of the directors to take a reasonable time in which to consider a transfer after notice of it and before registering it; Re Ottos Kopje Diamond Mines [1893] 1 Ch. 618, 62 L. J. Ch. N. S. 166, 2 Reports, 257, 68 L. T. N. S. 138, 41 Week. Rep. 258, holding that the directors of a corporation are entitled to a reasonable time for the consideration of every transfer before they register it.

Bona fide purchaser for value.

Cited in Duggan v. London & C. Loan & Agency Co. 18 Ont. App. Rep. 305, on the situation of persons who have acquired the legal title to goods for a valuable consideration.

Duty of corporation regarding its shares of stock.

Cited in Stewart v. Molsons' Bank, Rap. Jud. Quebec, 4 B. R. 11, holding that a bank was not bound to prevent a transfer of its shares simply because notice of a trust or equitable security was given to it.

5 E. R. C. 183, THE NEPTUNUS, 1 C. Rob. 170.

Egress as breach of a blockade.

Cited in The Circassian (Hunter v. United States), 2 Wall. 135, 17 L. ed. 796, holding that blockade of rebel front must be presumed to have continued until notification of discontinuance: The Hiawatha, Blatchf. Prize, Cas. 1, Fed. Cas. No. 6,451, holding that an act of egress is, as culpable as the act of ingress, when done in fraud of a blockade; Oldden v. M'Chesney, 5 Serg. & R. 71, holding that neutral, after notice of blockade, may export cargo on board ship, but not cargo purchased and deposited in store, before such notice.

What is evidence of proclamation of blockade.

Cited in note in 11 E. R. C. 517, on gazette as evidence of public notification of blockade.

5 E. R. C. 187, THE BETSEY. 1 C. Rob. 92a.

What constitutes a blockade.

Cited in The Olinde Rodrigues, 91 Fed. 274, holding that to constitute effective blockade, it must be maintained by sufficient number of vessels, and vessels of such character as to render danger to vessel attempting to enter evident and manifest.

What constitutes violation of blockade.

Cited in Conner v. Coosa, Newb. 393, Fed. Cas. No. 3,113, holding that to constitute a violation of a blockade there must be proven, the existence of the blockade, knowledge of the party offending, and so act of violation by coming out or going in with a cargo, loaded after blockade was declared; The Delta, Blatchf. Pr. Cas. 133, Fed. Cas. No. 3,777, holding that after knowledge of an existing blockade a neutral ship is subject to seizure if it approaches the fort even to make inquiry, whether or not the blockade has been raised.

—Affecting cargo and vessel.

Cited in The Hiawatha, Blatchf. Prize, Cas. 1, Fed. Cas. No. 6,451, holding that acts of the master in breach of the blockade will affect the cargo equally with the vessel.

Wrongful seizure of vessel.

Cited in The George, 1 Mason, 24, Fed. Cas. No. 5,328, holding that probable cause is a sufficient justification for a capture, but such protection may be forfeited by subsequent misconduct or negligence; Calhoun v. Insurance Co. 1 Binn. 293; Hooper v. United States, 22 Ct. Cl. 408,—holding that to justify seizure blockade must be effective, notice must be given, and there must be attempt to violate it.

Redress for wrongful seizure of vessel.

Cited in The Invincible, 2 Gall. 29, Fed. Cas. No. 7,054, on the method of seeking redress for wrongful capture of vessel.

Rights of strangers in prize cases.

Cited in Benedict's Adm. 4th ed. 423, on right of stranger to claim property in prize cases.

Jurisdiction of admiralty.

Cited in Simpson v. Nadeau, 3 N. C. (2 Hayw.) 141, holding that owner of foreign vessel who captures a United States vessel is suable only in admiralty although the ship had been sold and was not in its power.

5 E. R. C. 194, THE COLUMBIA, 1 C. Rob. 154.

Violation of blockade as commencing at time the vessel sails.

Cited in The Delta, Blatchf. Pr. Cas. 133, Fed. Cas. No. 3,777, holding that a neutral ship having knowledge of an existing blockade when it sails is subject to seizure if it approaches the port even to inquire if the blockade had been raised; The Circassian (Hunter v. United States) 2 Wall. 135, 17 L. ed. 796; The Circassian, 19 Phila. Leg. Int. 220, Fed. Cas. No. 2,727; The Dolphin, Fed. Cas. No. 3,975; The Peterhoff, Blatchf. Prize, Cas. 463, Fed. Cas. No. 11,024; The Stephen Hart, Blatchf. Prize, Cas. 387, Fed. Cas. No. 13,364; United States v. 129 Packages, Fed. Cas. No. 15,941; The Adula, 176 U. S. 361, 44 L. ed. 505, 20 Sup. Ct. Rep. 432; Ingraham v. Nayade, Newb. 366, Fed. Cas. No. 7,046,— holding that the act of sailing with the intention of going to a blockaded port with knowledge of the blockade, is a violation of the blockade, and the penalty immediately attaches; The Pearl, Fed. Cas. No. 10,874, holding same though bound to a neutral port before attempting to run the blockade; Liotard v. Graves, 3 Caines, 226, on the violation of the blockade as beginning from the time the vessel sails.

Acts of the master in violating the blockade as affecting the cargo.

Cited in The Hiawatha, Blatchf. Prize, Cas. 1, Fed. Cas. No. 6,451, holding that the acts of the master in breach of a blockade affect the cargo equally with the vessel, if the cargo is laden on board after the commencement of the blockade; The Springbok, Blatchf. Prize, Cas. 434, Fed. Cas. No. 13,264, on the act of the master in violating blockade as the act of the owner.

Right of ship ignorant of blockade to be warned.

Cited in The Empress, Blatchf. Pr. Cas. 175, Fed. Cas. No. 4,477, holding that the immunity and right to warning from capture applies only to ships approaching a port in ignorance of the existence of the blockade; Schmidt v. United Ins. Co. 1 Johns. 249, on the necessity of warning the vessel of the existence of the blockade.

5 E. R. C. 198, GORGIER v. MIEVILLE, 3 Barn. & C. 45, 4 Dowl. & R. 641, 2 L. J. K. B. 206, 27 Revised Rep. 290.

What constitutes a negotiable instrument.

Cited in Cudahy Packing Co. v. State Nat. Bank, 67 C. C. A. 662, 134 Fed. 538, holding a mortgage which secures a negotiable instrument is negotiable so far as to passing free from equitable defenses, where held by a bona fide purchaser; Clapp v. Cedar County, 5 Iowa, 15, 68 Am. Dec. 678, holding that no particular words are necessary to make an instrument negotiable, but such intent must be shown, and there must be an undertaking to pay; Ellicott v. United States Ins. Co. 8 Gill. & J. 166, holding that policy of insurance guaranteeing to bearer on day named, sum of $5,000 on presenting same at office of company, was representative of money and passed by delivery; Winfield v. Hudson, 28 N. J. L. 255, on the negotiability of bills of exchange, bank notes, and promissory notes; City Bank v. Cheney, 15 U. C. Q. B. 400, on what constitutes a negotiable instrument; Neal v. Smith, 5 Ala. 568, holding that a note payable to bearer is a direct

promise from the maker to holder to pay the amount specified, and the holder is not an assignee of the claim.

Cited in notes in 8 E. R. C. 356, on usage to make instruments negotiable; 10 E. R. C. 408, on negotiability of bonds.

— National and public bonds and the like.

Cited in Northup v. First Nat. Bank, 3 Luzerne Leg. Reg. 178, holding that United States bonds are commercial paper, pass by delivery, and are subject to all its incidents; Meyers v. York & C. R. Co. 43 Me. 232, holding that interest coupons are not negotiable separate from the bonds unless made so on their face; Spooner v. Holmes, 102 Mass. 503, 3 Am. Rep. 491, holding that interest coupons of United States bonds are negotiable; Gould v. Venice, 29 Barb. 442, holding that bonds issued by a municipality under the corporate seal are negotiable; Goodwin v. Robarts, L. R. 10 Exch. 82, 341, L. R. 1 App. Cas. 476, 45 L. J. Exch. N. S. 748, 35 L. T. N. S. 179, 24 Week. Rep. 987, 5 Eng. Rul. Cas. 199, holding that script of a foreign government, issued in negotiating a loan, which promises to give to the bearer after all instalments are paid, a bond for the amount paid, with interest, is negotiable.

Cited in note in 61 L.R.A. 205, on negotiability of government bonds.

— Other bonds.

Cited in Morris Canal & Bkg. Co. v. Fisher, 9 N. J. Eq. 667, 64 Am. Dec. 423, holding that coupon bonds payable to bearer are negotiable and transferable by delivery; Beaver County v. Armstrong, 44 Pa. 63, 20 Phila. Leg. Int. 44, holding that the coupons of railroad bonds are negotiable instruments and may be sued on by a holder separate from the bonds; Bank of United States v. Macalester, 9 Pa. 475, holding same as to coupons of canal bonds; Clark v. Jamesville, 10 Wis. 136 (dissenting opinion), on the right of the owner of the bond to sue for the interest due, as shown by coupons; Green v. Sizer, 40 Miss. 530; Farmers' & M. Bank v. Butchers' & D. Bank, 14 N. Y. 623,—on the negotiable character of bonds.

Distinguished in Crouch v. Credit Foncier, L. R. 8 Q. B. 374, 42 L. J. Q. B. N. S. 183, 29 L. T. N. S. 259, 21 Week. Rep. 946, 10 Eng. Rul. Cas. 394, holding that an instrument to which conditions are annexed as to the issuing of the bonds, was not negotiable, even though such intention was shown, and it was the custom to treat them as such.

Negotiable instruments payable to bearer, as transferable by delivery.

Cited in Sayre v. Lucas, 2 Stew. (Ala.) 259, 20 Am. Dec. 33 (dissenting opinion), on right of holder of bill payable to bearer to sue in his own name without having assignment; Craig v. Vicksburg, 31 Miss. 216, holding that a note payable to bearer is payable to whomsoever lawfully holds it, and is transferable by delivery; Bramerd v. New York & H. R. Co. 10 Bosw. 332, holding that bonds payable to order, and indorsed in blank are payable to bearer and negotiable by delivery.

— Title of bona fide holder from one who has no title.

Cited in Johnson v. Way, 27 Ohio St. 374, holding that the holder of negotiable paper, before maturity, for valuable consideration without notice has good title thereto; Mechanics' Bank v. New York & N. H. R. Co. 4 Duer, 480, holding that a bank receiving an assignment of stock with the certificate and a power of attorney to transfer it as security for a loan in good faith is a bona fide holder for value although the certificate was fraudulently issued by an agent of the corporation, to the holder who was not entitled thereto; Cochran v. Fox Chase

Bank, 209 Pa. 34, 103 Am. St. Rep. 976, 58 Atl. 117, holding same where bonds were pledged as collateral security by the thief; Carpenter v. Rommel, 5 Phila. 34, holding same as to bonds when held by a bona fide purchaser after they were stolen from the owner; Greneaux v. Wheeler, 6 Tex. 515, holding that bills or notes payable to bearer may be negotiated by delivery and held by a bona fide purchaser as against the true owner from whom they were wrongfully obtained; Macnider v. Young, Rap. Jud. Quebec, 3 B. R. 539, holding that a bona fide acquisition of negotiable securities from one having no title to them, as from an agent, is valid as against the real owner; London & County Bkg. Co. v. London & R. P. Bank, L. R. 20 Q. B. D. 232, on the title acquired by a bona fide purchaser for value from one who has no title; London Joint Stock Bank v. Simmons [1892] A. C. 201, 61 L. J. Ch. N. S. 723, holding that one who takes a negotiable instrument in good faith and for value, takes a good title even though he takes from one who has none; Bechuanaland Exploration Co. v. London Trading Bank [1898] 2 Q. B. 658, 67 L. J. Q. B. N. S. 986, 3 Com. Cas. 285, 79 L. T. N. S. 270, 14 Times L. R. 587, holding that certain debentures, payable to bearer, which by reasons of conditions therein were not notes, were negotiable by custom and the holder without notice, for value, held title as against the true owner, whose agent had fraudulently transferred them.

Authority of agent as to bills of exchange.

Cited in Rodgers v. Bass, 46 Tex. 505, on the authority of the agent to receive bills of exchange as payment.

5 E. R. C. 199, GOODWIN v. ROBARTS, L. R. 1 App. Cas. 476, 45 L. J. Q. B. N. S. 748, 35 L. T. N. S. 179, 24 Week. Rep. 987, affirming the decision of the Court of Exchequer Chamber, reported in L. R. 10 Exch. 337, which affirms the decision of the Court of Exchequer, reported in L. R. 10 Exch. 76.

What constitutes a negotiable instrument.

Cited in Cudahy Packing Co. v. State Nat. Bank, 67 C. C. A. 662, 134 Fed. 538, holding that a mortgage given to secure negotiable paper so far partakes of the negotiable character as to pass free from all equities between the original parties; Willans v. Ayers, L. R. 3 App. Cas. 133, 47 L. J. P. C. N. S. 1, 37 L. T. N. S. 732, holding that bills of exchange drawn and accepted by the same party are negotiable as bills of exchange where such is the intention; Sheffield v. London Joint Stock Bank, L. R. 13 App. Cas. 333, 57 L. J. Ch. N. S. 986, 58 L. T. N. S. 735, 37 Week. Rep. 33, 3 Eng. Rul. Cas. 661 (reversing in part 34 Ch. Div. 95); London Joint Stock Bank v. Simmons [1892] A. C. 201, 61 L. J. Ch. N. S. 723, 66 L. T. N. S. 645, 41 Week. Rep. 108, 56 J. P. 644 (reversing [1891] 1 Ch. 270, 62 L. T. N. S. 427),—as to whether certain bonds were negotiable securities.

Cited in notes in 61 L.R.A. 205, on negotiability of paper in general; 10 E. R. C. 408, on negotiability of instruments; 4 Eng. Rul. Cas. 620; 5 E. R. C. 221, 222,—on negotiability of bonds; 3 Eng. Rul. Cas. 639, 677, on negotiability of instruments.

Cited in 2 Dillon Mun. Corp. 5th ed. 1350, on negotiability of municipal bonds.

—Negotiable by custom.

Cited in Union Invest. Co. v. Wells, C. R. [1906] A. C. 497, on rules governing currency of negotiable paper as originating in the custom of merchants, and as being ratified by the courts in the interest of trade; Edelstein v. Schuler & Co. [1902] 2 K. B. 144, 71 L. J. K. B. N. S. 572, 40 Week. Rep. 493, 87 L. T. N. S. 204, 18 Times L. R. 597, 7 Com. Cas. 172, holding that the courts will recognize

mercantile usage to treat bonds of an English or foreign company as negotiable; Easton v. London Joint Stock Bank, L. R. 34 Ch. Div. 95, holding that foreign bonds payable to bearer which were treated as negotiable securities, were to be considered as such; Bechuanaland Exploration Co. v. London Trading Bank [1898] 2 Q. B. 658, 3 Com. Cas. 285, 67 L. J. Q. B. N. S. 986, 79 L. T. N. S. 270, 14 Times L. R. 587, holding that certain debentures payable to bearer, which by reason of conditions therein were not promissory notes, were however negotiable by custom.

Distinguished in France v. Clark, L. R. 26 Ch. Div. 257, 53 L. J. Ch. N. S. 585, 50 L. T. N. S. 1, 32 Week. Rep. 466, holding that where bonds were not treated as negotiable by custom, the holder of them under a blank transfer could not use them for a purpose foreign to the contract by which they were deposited with him; London & County Bkg. Co. v. London & R. P. Bank, L. R. 20 Q. B. Div. 232, holding that where the instruments were intended to pass by transfer only, they could not become negotiable by custom.

— Law governing negotiability.

Cited in Continental Nat. Bank v. Eliot Nat. Bank, 7 Fed. 369, holding that the negotiability or transferable quality of stock of a national bank depends upon the laws of the United States; Picker v. London & County Bkg. Co. L. R. 18 Q. B. Div. 515, 56 L. J. Q. B. N. S. 299, 35 Week. Rep. 469, holding that an instrument negotiable by the law of a foreign country is not negotiable by the law of England unless made so by custom of merchants to treat it so.

— Transferable by indorsement.

Cited in Lee v. Bank of British North America, 30 U. C. C. P. 255, on the effect of indorsing a non-negotiable instrument as to passing title.

Title of bona fide purchaser to negotiable instrument from one having no title.

Cited in Morgan v. United States, 113 U. S. 494, 28 L. ed. 1051, 5 Sup. Ct. Rep. 588, on the protection of a bona fide purchaser for value of negotiable securities against unknown defects or equities; Walker v. Detroit Transit R. Co. 47 Mich. 338, 11 N. W. 187, holding that a bona fide holder of certificate of stock, properly indorsed acquires good title even against the true owner, and against equities existing; Young v. MacNider, 25 Can. S. C. 272 (affirming Rap. Jud. Quebec, 3 B. R. 539 which reversed Rap. Jud. Quebec 4 C. S. 208), holding that the bona fide acquisition of negotiable securities from one having no title to them is valid even as against the true owner, whether before or after maturity; Smith v. Rogers, 30 Ont. Rep. 256, holding that one who in good faith took a certificate of shares of stock from one having no title, got good title as against the true owner, where the certificates were negotiable by custom; Macnider v. Young, Rap. Jud. Quebec, 3 B. R. 539 (reversing 4 S. C. 208), holding that the bona fide acquisition of negotiable securities from one having no title is valid as against even the real owner; London Joint Stock Bank v. Simmons [1892] A. C. 201, 61 L. J. Ch. N. S. 723, 66 L. T. N. S. 645, 41 Week. Rep. 108, 56 J. P. 644 (reversing [1891] 1 Ch. 270, 62 L. T. N. S. 427), holding that a person taking a negotiable instrument in good faith and for value obtains a valid title though he takes from one who has none.

Cited in Benjamin Sales 5th ed. 28, on validity of sale of negotiable securities by one not the owner; Tiffany Ag. 317, on liability to principal of innocent third person to whom agent has paid money or negotiated securities belonging to principal.

— By estoppel.

Cited in Melnnis v. Getsman, 1 Sask. L. R. 172, holding that if person executes transfer with mind and intention to execute it, though his assent may have been obtained by fraud, he is estopped from denying its validity as against bona fide purchaser; Wellband v. Walker, 20 Manitoba L. Rep. 510, holding that person having equitable title to shares of stock is estopped from setting it up against bona fide purchaser from one having legal title and possession; Fitzpatrick v. Dryden, 30 N. B. 558; McArthur v. Eagleson, 43 U. C. Q. B. 406,—on title by estoppel to negotiable instruments in hands of bona fide holder; Rumball v. Metropolitan Bank, L. R. 2 Q. B. Div. 194, 46 L. J. Q. B. N. S. 346, 25 Week. Rep. 366, 36 L. T. N. S. 240, holding that script certificates, which were by usage negotiable and transferable by delivery, became the property of the purchaser from the broker with whom they had been deposited by the true owner, who was estopped to claim them; Bentinck v. London Joint Stock Bank [1893] 2 Ch. 120, 62 L. J. Ch. N. S. 358, 3 Reports, 120, 68 L. T. N. S. 315, 42 Week. Rep. 140, holding that where the owners executed transfers of negotiable securities and placed them in a broker's hands and he transferred them to secure his own debt the purchaser in good faith got good title as against the former owner because of estoppel.

Cited in notes in 29 L.R.A.(N.S.) 253, on effect of putting transferable paper or securities in another's possession, to estop owner as against purchaser in good faith; 11 Eng. Rul. Cas. 98, on estoppel by conduct.

Distinguished in Fine Art Soc. v. Union Bank, L. R. 17 Q. B. Div. 705, 56 L. J. Q. B. N. S. 70, 55 L. T. N. S. 536, 35 Week. Rep. 114, 51 J. P. 69, holding that where the plaintiff's secretary wrongfully disposed of some post office orders belonging to the plaintiff, the latter was not estopped to claim them from the holder; Colonial Bank v. Hepworth, L. R. 36 Ch. Div. 36, 56 L. J. Ch. N. S. 1089, 57 L. T. N. S. 148, 36 Week. Rep. 259, holding that no estoppel can be raised on a document, inconsistent with the document itself, and where the share certificate could be transferred by an indorsement only, no estoppel could arise, without the indorsement; Colonial Bank v. Cady, L. R. 15 App. Cas. 267, 60 L. J. Ch. N. S. 131, 63 L. T. N. S. 27, 39 Week. Rep. 17 (affirming L. R. 38 Ch. Div. 388, 57 L. J. Ch. N. S. 826, 59 L. T. N. S. 643, 36 Week. Rep. 625, which reversed L. R. 36 Ch. Div. 659), holding that though the parties had placed the bonds in the hands of brokers, and they wrongfully parted with them, the bonds not being negotiable, and the indorsement on them not being complete the owners were not estopped to claim them from the bona fide purchasers; Williams v. Colonial Bank, L. R. 38 Ch. Div. 388, 57 L. J. Ch. N. S. 826, 59 L. T. N. S. 643, 36 Week. Rep. 625 (reversing L. R. 36 Ch. Div. 659), holding that where the certificates on the face of them did not represent that the person holding them was the owner, as the indorsement was not complete, the owners were not estopped to claim them from bona fide purchasers from the broker.

— Where non-negotiable.

Cited in Shattuck v. American Cement Co. 205 Pa. 197, 97 Am. St. Rep. 735, 54 Atl. 785, holding that where the true owner of shares of stock places the certificate in the hands of another, and the latter sells it to a bona fide holder, the owner is estopped to claim them from the bona fide holder, though the certificate was not negotiable.

Title of a bona fide purchaser for value after maturity.

Cited in Union Invest. Co. v. Wells, 39 Can. S. C. 625, holding that the doctrine of constructive notice does not apply to bills and notes transferred for value.

Custom as changing rules of common law.

The decision of the Exchequer Chamber was cited in Johnson v. Credit Lyonnais Co. L. R. 3 C. P. Div. 32, 47 L. J. C. P. N. S. 241, 37 L. T. N. S. 657, 26 Week. Rep. 195, holding that where it was the custom of the business to leave the indicia of title with the agent, the owners were not estopped to claim the same from one to whom the agent wrongfully disposed of it; Dashwood v. Magniac [1891] 3 Ch. 306, 64 L. T. N. S. 99 (dissenting opinion), on custom sufficient to control common law.

5 E. R. 223, THORN v. LONDON, L. R. 1 App. Cas. 120, 45 L. J. Exch. N. S. 487, 34 L. T. N. S. 545, 24 Week. Rep. 932, affirming the decision of the Exchequer Chamber reported in 44 L. J. Exch. N. S. 62, which affirms the decision of the Court of Exchequer, reported in 43 L. J. Exch. N. S. 115.

Possibility of performance as an implied condition in a building contract.

Cited in Rowe v. Peabody, 207 Mass. 226, 93 N. E. 604, holding that one who contracts absolutely to do certain thing which is lawful is not to be excused for non-performance merely because performance was or has become impossible; Lonergan v. San Antonio Trust Co. 101 Tex. 63, 22 L.R.A.(N.S.) 364, 130 Am. St. Rep. 803, 104 S. W. 1061, holding that property owner is not bound as guarantor for sufficiency of plans for construction of building as legal consequence of submitting them for bids on work, and entering into contract therefor; Bentley v. State, 73 Wis. 416, 41 N. W. 338, holding that sufficiency of plans was warranted by state by building contract, and loss from falling of part of building and expense of restoring destroyed portion must be borne by state; Jones v. Reg. 7 Can. S. C. 570, holding that no stipulation can be implied in any contract at variance with express term of contract; Grace v. Osler, 21 Manitoba L. Rep. 641, holding that contractor assumes in absence of guarantee as to feasability of work in accordance with plans, risk of being able to perform it; McKenna v. McNamee, 15 Can. S. C. 311, on the implied condition in a contract that its performance is possible.

Cited in note in 6 E. R. C. 612, on impossibility as excuse for nonperformance of contract.

Distinguished in Byron v. New York, 22 Jones & S. 411, holding that where the plaintiffs were prevented from completing the contract by the acts of the defendants, they could recover for the work so far as completed; MacKnight Flintic Stone Co. v. New York, 160 N. Y. 72, 54 N. E. 661, holding same where the plans were insufficient; Robb v. Green [1895] 2 Q. B. 1, holding that where there were no express terms in the contract of service relative to the matter, one implied by law becomes a part of the contract.

Right to recover quantum meruit for extra work on contract.

Cited in Green v. Oxford Twp. 15 Ont. Rep. 506, holding that where the contract contained no express provisions for extra work, the contractor could recover quantum meruit for work done which was necessary to the completion of the work.

5 E. R. C. 244, MORSE v. SLUE, 1 Vent. 238, 3 Keble 112, 135, T. Raym. 220, 1 Mod. 85, on rehearing of 1 Vent. 190, 2 Keble 866, 3 Keble 72, 2 Lev. 69.

Common carrier, who is.

Cited in Fish v. Chapman, 2 Ga. 349, 46 Am. Dec. 393, holding a person contracting to carry goods from one point to another and deliver in good condition,

unavoidable accidents accepted, was not a common carrier; Hearle v. Rose, 15 U. C. Q. B. 259, holding the owners of ships engaged as general traders were liable as common carriers; Alexander v. Greene, 7 Hill, 533, on where one may be regarded as a common carrier; Liver Alkali Co. v. Johnson, L. R. 7 Exch. 267, L. R. 9 Exch. 338, 43 L. J. Exch. N. S. 216, 31 L. T. N. S. 95, 2 Asp. Mar. L. Cas. 332, holding a large owner letting out his vessels for the conveyance of a single customer's goods was a common carrier and liable as such; Nugent v. Smith, L. R. 1 C. P. Div. 19, 423, 45 L. J. C. P. N. S. 19, 697, 34 L. T. N. S. 827, 24 Week. Rep. 237, 3 Asp. Mar. L. Cas. 198, 1 Eng. Rul. Cas. 218, holding a ship owner holding himself out as a carrier between two particular places was liable as a common carrier for the loss of goods.

Ship master as a common carrier.

Cited in Elliott v. Rossell, 10 Johns. 1, 6 Am. Dec. 306, on when masters of ships are liable as common carriers.

Cited in 1 Hutchinson, Car. 3d ed. 71, on owners of ships as common carriers.

— Liability for theft of goods.

Cited in Schieffelin v. Harvey, 6 Johns. 170, 5 Am. Dec. 206, holding the master and owners of a ship were liable for goods stolen from on board ship although no negligence was imputable to them.

Liability of common carriers.

Cited in Wibert v. New York & E. R. Co. 12 N. Y. 245, holding a common carrier was not liable for a delay in the shipment of freight where no express agreement to ship within a limited time; New Jersey Steam Nav. Co. v. Merchants' Bank, 6 How. 344, 12 L. ed. 465; Cobban v. Canadian P. R. Co. 26 Ont. Rep. 732 (dissenting opinion); Readhead v. Midland R. Co. L. R. 4 Q. B. 379, 38 L. J. Q. B. N. S. 169, 9 Best & S. 519, 20 L. T. N. S. 628, 17 Week. Rep. 737, 5 Eng. Rul. Cas. 436; Louisville & N. R. Co. v. Warfield, 129 Ga. 473, 59 S. E. 234,—on the liability of a common carrier.

Cited in note in 5 E. R. C. 265, on extent of carrier's liability.

— Act of God or public enemies or vis major.

Cited in King v. Shepherd, 3 Story, 349, Fed. Cas. No. 7,804, on the act of God as excusing a carrier for the loss of goods; Pittsburgh, C. & St. L. R. Co. v. Hollowell, 65 Ind. 188, 32 Am. Rep. 63, holding that in action for delay in receiving and carrying livestock answer by carrier that delay was caused by multitude of people in rebellion against civil authority was sufficient; Hubbard v. Harnden Exp. Co. 10 R. I. 244, holding carrier was not liable for the value of goods which were seized while in their possession by officers of the Confederate government; Smith v. Whiting, 3 U. C. Q. B. O. S. 597, holding a forwarder of goods not liable where the loss thereof was due to a sudden gale; Coggs v. Bernard, 5 E. R. C. 247, Ld. Raym. 909, Smith, Lead. Cas. 8th ed. 199, on the duty of a public carrier to answer for the goods at all events but act of God and of the public enemies.

Cited in Porter Bills of L. 207, on what are perils of the sea; Porter Bills of L. 223, on what are not losses by the public enemy.

— Money or valuables not made known to carrier.

Cited in Cole v. Goodwin, 19 Wend. 251, 32 Am. Dec. 470, holding carrier was liable for money stolen from a trunk during journey, although not aware that the trunk contained such money.

— Causes excepted by contract of carriage.

Cited in The Gold Hunter, 1 Blatchf. & H. 300, Fed. Cas. No. 5,513, holding

that depredations on ship's stores by passengers or crew, in consequence of short allowance made necessary by length of voyage, is not peril of sea, within meaning of bill of lading; Hays v. Kennedy, 41 Pa. 378, 80 Am. Dec. 627, 41 Phila. Leg. Int. 116, holding the owners of a river boat were not liable for the loss of a cargo where the boat was run into and sunk without fault of master, the bill of lading excepting the unavoidable dangers of river navigation; Pandorf v. Hamilton, L. R. 17 Q. B. Div. 670, 55 L. J. Q. B. N. S. 546, 55 L. T. N. S. 499, 35 Week. Rep. 70, 6 Asp. Mar. L. Cas. 44, holding where goods were damaged by sea water escaping from a pipe on board the ship which had been gnawed by rats the damage was not within the excepted "dangers and accidents of the seas."

Cited in 1 Hutchinson, Car. 3d ed. 327, on who are public enemies within provision excepting carriers from liability for loss.

Right of common carrier to limit his liability.

Cited in Cooper v. Berry, 21 Ga. 526, 68 Am. Dec. 468; Dorr v. New Jersey Steam Nav. Co. 11 N. Y. 484, 62 Am. Dec. 125 (reversing 4 Sandf. 136),—holding a common carrier might restrict his common law liability; Moore v. Evans, 14 Barb. 524, holding same where carrier contracted to carry the goods at the risk of the owner; Sutherland v. Great Western R. Co. 7 U. C. C. P. 409, holding a railroad company was authorized to enter into a special contract with a person accepting a pass whereby he assumed the risk of accidents and damage; Robertson v. Grand Trunk R. Co. 24 Ont. Rep. 75; Leonard v. American Exp. Co. 26 U. C. Q. B. 533,—holding that common carrier is liable to action at common law for refusing to carry except upon conditions limiting its common law liability; Dodson v. Grand Trunk R. Co. 8 N. S. 405, holding that in absence of statute, railway company may impose such terms upon public as to exempt it from liability however caused; Fish v. Chapman, 2 Ga. 349, 46 Am. Dec. 393; Peek v. North Staffordshire R. Co. 5 E. R. C. 286, 10 H. L. Cas. 473, 32 L. J. Q. B. N. S. 241, 8 L. T. N. S. 768, 11 Week. Rep. 1023,—on right of common carriers specially to limit their liability.

Cited in note in 5 Eng. Rul. Cas. 340, 344, on special limitations of liability of carrier.

Cited in 1 Hutchinson, Car. 3d ed. 405, on limitation of carrier's liability by contract.

Distinguished in Cole v. Goodwin, 19 Wend. 251, 32 Am. Dec. 470; Hollister v. Nowlen, 19 Wend. 234, 32 Am. Dec. 455,—holding a common carrier could not by a general notice that the baggage of passengers is taken at the risk of the owners restrict his liability.

Duties and obligations of carrier.

Cited in Alsop v. Southern Exp. Co. 104 N. C. 278, 6 L.R.A. 271, 10 S. E. 297, holding a person tendering an agent of an express company money for shipment might maintain an action for the refusal of such company to receive the money for shipment; Kansas P. R. Co. v. Reynolds, 8 Kan. 623, on the duty resting on a common carrier to carry goods.

Liability of master for negligence of servant.

Cited in Mandeville v. Cookenderfer, 3 Cranch, C. C. 397, Fed. Cas. No. 9,010, holding the stage owners liable only where stage housekeeper through negligence allowed a slave to escape by means of a false certificate of freedom; Raney v. Weed, 3 Sandf. 577, on a sheriff as being alone responsible for the acts of subordinate officers.

— Shipowners for master's acts.

Cited in Kalleck v. Deering, 161 Mass. 469, 42 Am. St. Rep. 421, 37 N. E. 450, holding the owners of a ship were not liable for an injury to a seaman through the negligence of a mate left in charge of the ship.

— Co-liability of master with owners or others.

Cited in Boulston v. Sandiford, 1 E. R. C. 167, Skinner, 278, 1 Shower, 101, Comb. 116, Carth. 58, 2 Freem. 499, on right to sue the master alone or to join the ship owners in action on the case against them as carriers.

Distinguished in Blakie v. Stembridge, 24 E. R. C. 332, 6 C. B. N. S. 911, 6 Jur. N. S. 825, 29 L. J. C. P. N. S. 212, 2 L. T. N. S. 570, 8 Week. Rep. 239, holding master not liable for acts of a stevedore independently contracting.

Liability of a bailee for hire.

Cited in Collins v. Bennett, 46 N. Y. 490, holding a person taking a horse to board with instructions not to use him was liable for a conversion where he did so use the horse as to founder it; Lane v. Cotton, 12 Mod. 472 (dissenting opinion), on right to hold postmaster general liable for the loss of exchequer bills lost from the office where they were in a letter.

Innkeeper's liability.

Cited in Merritt v. Claghorn, 23 Vt. 177, on liability of inn keeper for the loss of property of a guest.

5 E. R. C. 247, COGGS v. BERNARD, 2 Ld. Raym. 909, 1 Smith, Lead. Cas. 11th ed. 173, 1 Comyn. 133, 1 Salk. 26, Holt (K. B.) 13, 131, 3 Salk. 11.

Breach of contract actionable as a tort.

Cited in Corry v. Pennsylvania R. Co. 10 Pa. Super. Ct. 232, holding that carrier may be sued in assumpsit for breach of contract or in tort for violation of public duty; People v. Willett, 26 Barb. 78, 6 Abb. Pr. 37, 15 How. Pr. 210, holding an action against an innkeeper for the loss of the baggage of a guest is founded on tort; Catlin v. Adirondacks Co. 20 Hun, 19; Burkle v. Ells, 4 How. Pr. 288,—holding in an action against a carrier for the loss of goods shipped the action may sound in tort; Spencer v. Pilcher, 8 Leigh, 565, holding an action of trover as for a wrongful conversion will lie where the accidental loss of a slave hired occurs in an employment which the bailee had no right to make; Southern Exp. Co. v. McVeigh, 20 Gratt. 264; Rich v. New York C. & H. R. R. Co. 87 N. Y. 382,—on when breach of contract is actionable as a tort.

Cited in note in 12 L.R.A.(N.S.) 931, on tort for negligent breach of contract between private parties.

Cited in 1 Cooley, Torts, 3d ed. 157, on right of action for tort or on contract for the same act.

Distinguished in Royce v. Oakes, 20 R. I. 418, 39 L.R.A. 845, 39 Atl. 758, holding that only an action in assumpsit or debt will lie where one acting as the agent or servant for another collects money and neglects to pay it over on demand.

Tort liability arising out of assumed duty.

Cited in De Rutte v. New York, A. & B. Electro Magnetic Teleg. Co. 30 How. Pr. 403, 1 Daly, 558, holding a telegraph company liable for damages caused by the transmission of an erroneous message; Campbell v. Canadian Coop. Invest. Co. 16 Manitoba L. Rep. 464, holding a mortgage company undertaking to keep up the insurance on the mortgaged property is liable whereby reason of its failure to do so the mortgagor is injured.

— Gratuitous assumption.

Cited in McGee v. Bast, 6 J. J. Marsh. 453, on a person as being liable for a misfeasance where he attempts to do that which without any consideration he agreed to do; Gregor v. Cady, 82 Me. 131, 17 Am. St. Rep. 466, 19 Atl. 108; La Brasca v. Hinchman, 81 N. J. L. 367, 79 Atl. 885,—holding that liability of landlord for negligence in making repairs on property leased, is based upon implied assumpsit to perform work, voluntarily undertaken, with due care; Benden v. Manning, 2 N. H. 289, on the point that in special action on case, misfeasance is gist of action; Wallace v. Casey Co. 132 App. Div. 35, 116 N. Y. Supp. 394, holding that one undertaking gratuitously to discharge duty is accountable for manner of its discharge, although fact that service is without reward may be considered on question of degree of care required; Byerly v. Kepley, 46 N. C. (1 Jones, L.) 35, on liability of person undertaking voluntarily and without compensation a particular employment; Lawall v. Groman, 180 Pa. 532, 57 Am. St. Rep. 662, 37 Atl. 98, 2 Am. Neg. Rep. 69, 40 W. N. C. 197, holding that one who undertakes to perform act, even without reward, is responsible for misfeasance, though not for nonfeasance; Western U. Teleg. Co. v. Snodgrass, 94 Tex. 284, 86 Am. St. Rep. 851, 60 S. W. 308, holding that it is not necessary for plaintiff seeking recovery for negligent delay in delivery of telegram to allege and prove payment or obligation of payment to defendant for transmission of message.

— Right to maintain action for breach of duty where no privity of contract exists.

Cited in Bickford v. Richards, 154 Mass. 163, 26 Am. St. Rep. 224, 27 N. E. 1014, holding a sub-contractor undertaking under a contract by a contractor to move and fit up a building, is liable to the owner for negligence in performing the work; Hammond v. Hussey, 51 N. H. 40, 12 Am. Rep. 41, holding defendant who at the request of school committee undertook to examine candidates for admission to the school was liable for damages where he falsely reported to the committee that plaintiff was not qualified for admission; New York & N. H. R. Co. v. Schuyler, 34 N. Y. 30, on privity of contract as not necessary to maintain an action for a wrongful act; Baxter v. Jones, 6 Ont. L. Rep. 360 (affirming 4 Ont. L. Rep. 541), holding an insurance agent in consideration of being given the insurance agrees to give the necessary notices of further insurance is liable where the insured is damnified by his failure to do so.

Cited in note in 2 L.R.A.(N.S.) 800, on liability of subcontractor for injury to property resulting from defective performance of work.

Tort arising out of a duty how pleaded.

Cited in Washburn Crosby Co. v. Boston & A. R. Co. 180 Mass. 252, 62 N. E. 590, on pleading tort arising out of contract as upon an assumpsit; Wright v. Geer, 6 Vt. 151, 27 Am. Dec. 538, holding a declaration in tort is sustainable in an action against defendants who undertook the erection of a mill and spoiled the work.

Sufficiency of averment of consideration for a contract.

Cited in Nisbet v. Lawson, 1 Ga. 275, holding in an action against an attorney employed to collect money, a consideration was sufficiently set out for the employment by averring that defendant was retained as an attorney.

Pleading bailment for reward.

Cited in Graves v. Smith, 14 Wis. 5, 80 Am. Dec. 762, holding a complaint averring that defendants were warehouse men and that they undertook to forward flour for plaintiffs imports a hiring.

Averments by necessary implication.

Cited in Pasley v. Freeman, 12 E. R. C. 235, 3 T. R. 51, 1 Revised Rep. 634, holding that when answer imported a fact, as insolvency, it needed no proof.

Creation of contract of bailment.

Cited in Beers v. Boston & A. R. Co. 67 Conn. 417, 32 L.R.A. 535, 52 Am. St. Rep. 293, 34 Atl. 541, holding a carrier was not liable for the loss of baggage checked over its line by one not a passenger where the train went through a bridge because of defendant's negligence in failing to repair; American Exp. Co. v. Pinckney, 29 Ill. 392, holding an averment of an employment to collect a draft for a reward to be paid and an acceptance of the duty, creates an obligation, the breach of which will sustain an action; Chase v. Washburn, 1 Ohio St. 244, 59 Am. Dec. 623, on when the deposit of grain with a warehouseman is a bailment; Keene v. Wheatley, 5 Clark (Pa.) 501, on what may constitute a bailment; Todd v. Figley, 7 Watts, 542, on a bailment as being founded upon a contract express or implied.

Nature and kinds of contracts of bailment.

Cited in Morris v. Lewis, 33 Ala. 53, holding an agreement between an infant's father and grandfather whereby the former delivered to the latter slaves belonging to the infant under a promise of the grandfather to provide for her and keep them for her constituted the grandfather a mere depositary of the the slaves for her benefit; Palmtag v. Doutrick, 59 Cal. 154, 43 Am. Rep. 245, on nature of bailment in a contract of leasing; Wiley v. First Nat. Bank, 47 Vt. 546, 19 Am. Rep. 122, 7 Legal Gaz. 116, on there being a substantial difference between a bailment to keep merely and one to keep safely.

Cited in 1 Hutchinson, Car. 3d ed. 2, on classification of bailment.

Liability of bailee.

Cited in Keene v. Wheatley, Fed. Cas. No. 7,644, on the point that a borrower of a book from the literary proprietor thereof, of which the contents are unknown to others, receives it in implied confidence, precluding its use for any other purpose; Bonham v. Laird, 4 B. Mon. 403, holding that one to whom bank note is sent, may maintain assumpsit against one who received and failed to deliver them, without good reason for failure; American Merchants' Union Exp. Co. v. Phillips, 29 Mich. 515, holding that express company could not complain because deemed liable as ordinary bailee for hire, where it accepted live birds for shipment without special contract.

— Of pledgee or pawnee.

Cited in Jenkins v. National Village Bank, 58 Me. 275, holding that bank is bound to take ordinary care only of United States bonds pledged to it as collateral security for payment of note discounted by bank; Forrester v. Spencer, 3 U. C. Q. B. O. S. 47, holding that pawnee may use moderately horse pawned to him, in recompense for his meat.

Cited in note in 17 L.R.A. 193, on duty of pledgee as to care of thing pledged.

— Of hirer.

Cited in Faucett v. Nichols, 64 N. Y. 377; Baltimore Refrigerating & Heating Co. v. Kreiner, 109 Md. 361, 71 Atl. 1066,—on the liability of a bailee of property for hire; Sims v. Chance, 7 Tex. 561, holding that hirer of slave must take ordinary precautions for his safety.

— Of borrower without hire.

Cited in Moore v. Westervelt, 27 N. Y. 234, on borrower of property as being liable for the slightest negligence.

— Of intending purchaser.

Cited in Nichols v. Balch, 8 Misc. 452, 28 N. Y. Supp. 667, holding that where person, with view to purchasing horse takes it out for trial and returns it in damaged condition, he must show that injury was without fault on his part.

— Of depository or custodian.

Cited in Smythe v. United States, 188 U. S. 156, 47 L. ed. 425, 23 Sup. Ct. Rep. 279, holding that the destruction of moneys in the custody of the superintendent of the mint at New Orleans by a fire occurring without his fault or negligence is no defense to a suit upon his official bond conditioned for the faithful discharge of his duties according to the laws of the United States, which require him safely to keep such moneys as come to his hands by virtue of his office; Sanford v. American Dist. Teleg. Co. 13 Misc. 88, 34 N. Y. Supp. 144, holding that messenger company having assumed to carry money to bank for plaintiff, was under imposed duty to do so with due care, aside from any duty which it might assume by contract; McLeod v. Eberts, 7 U. C. Q. B. 244, on gross negligence as necessary to render bailee liable for loss of property entrusted to his care; Gore Bank v. Hodge, 2 U. C. C. P. 359, on liability of agents for property entrusted to their care.

Liability of sub-pledgee.

Cited in Donald v. Suckling, 23 Phila. Leg. Int. 412, holding that if pledgee repledge original pledgor cannot maintain action of detinue against sub-pledgee without having paid original pledge.

— Of gratuitous bailee.

Cited in Mariner v. Smith, 5 Heisk. 203, 1 Am. Neg. Cas. 831, holding that the liability of a bailee without reward, is to be determined by the performance bona fide of the fairly understood terms of the contract, ascertained by the express contract, explained by the surrounding and attendant circumstances, or of the failure to perform the terms of the contract as it was understood by the parties at the time; Skelley v. Kahn, 17 Ill. 170; Hagebush v. Ragland, 78 Ill. 40; Knowles v. Atlantic & St. L. R. Co. 38 Me. 55, 61 Am. Dec. 234; Schermer v. Neurath, 54 Md. 491, 39 Am. Rep. 397; Miller v. Adsit, 16 Wend. 335; First Nat. Bank v. Graham, 79 Pa. 106, 21 Am. Rep. 49, 2 W. N. C. 141, 32 Phila. Leg. Int. 440; Scott v. National Bank, 72 Pa. 471, 13 Am. Rep. 711; Lacaze v. State, Addison (Pa.) 59; Stephens v. White, 2 Wash. (Va.) 260, 1 Am. Dec. 460; Movius v. Lee, 30 Fed. 298; Sayre v. Williams, 29 N. B. 531; Fitzgerald v. Grand Trunk R. Co. 4 Ont. App. Rep. 601; La Merced, Stewart, Vice-Adm. 219; Holmes v. Thompson, 38 U. C. Q. B. 292; Jenkins v. Bacon, 111 Mass. 373, 15 Am. Rep. 33, 1 Am. Neg. Cas. 78 (dissenting opinion); Rutgers v. Lucet, 2 Johns. Cas. 92,—on the liability of a gratuitous bailee of property; Dudley v. Camden & P. Ferry Co. 42 N. J. L. 25, 36 Am. Rep. 501, holding that where ferryman carries property gratuitously, he is liable only for gross negligence; Herzig v. Herzig, 67 Misc. 250, 122 N. Y. Supp. 440, holding that rule that gratuitous bailee is not liable for mere nonfeasance, is not applicable when subject of bailment has been actually delivered and accepted by him; Griffith v. Zipperwick, 28 Ohio St. 388, 1 Am. Neg. Cas. 545, holding that bailee of property, without reward is liable for loss only in case of gross negligence.

Cited in note in 9 Eng. Rul. Cas. 285, on liability of gratuitous bailee.

Liability of an innkeeper, or boarding house keeper.

Cited in Sasseen v. Clark, 37 Ga. 242; Lanier v. Youngblood, 73 Ala. 587,—holding that innkeeper is liable at common law for loss of goods of guest, unless

loss was caused by guest's contributory negligence; Taylor v. Downey, 104 Mich. 532, 29 L.R.A. 92, 53 Am. St. Rep. 472, 62 N. W. 716, holding that hotel keeper is not liable for theft by his night clerk from hotel safe of money of regular boarder, if ordinary care and diligence were used in employment of clerk; Hulett v. Swift, 33 N. Y. 571, 88 Am. Dec. 405, holding that innkeeper is insurer of property committed to his custody by guest, unless loss be due to culpable negligence or fraud of guest, or to act of God or public enemy; Siegman v. Keeler, 4 Misc. 528, 24 N. Y. Supp. 821, holding that boarding house keeper is liable for loss of goods belonging to boarder only if he has omitted to exercise ordinary care; Wilkins v. Earle, 3 Robt. 352 (dissenting opinion), on the liability of an innkeeper; Wilkins v. Earle, 19 Abb. Pr. 190 (dissenting opinion), on liability of innkeeper for loss of property of guest; Shultz v. Wall, 47 Phila. Leg. Int. 328, holding that liability of innkeeper is not founded upon negligence, but upon public policy, and he cannot defend by merely showing due care; Cook v. Kane, 13 Or. 482, 57 Am. Rep. 28, 11 Pac. 226, to the point that measure of innkeeper's responsibility for loss of goods of guest is extraordinary and exceptional.

Liability of bailee for deviating from terms of bailment.

Cited in Ferguson v. Porter, 3 Fla. 27, holding defendant who undertook to carry goods to a certain point and sell them on plaintiff's account was liable for the loss of the goods while carrying them to a place other than that designated; Sims v. Chance, 7 Tex. 561; Columbus v. Howard, 6 Ga. 213,—holding plaintiff might recover from defendant for the loss of a slave hired for a particular employment where he was killed while being employed in a task other than that hired for; Curry v. Gaulden, 17 Ga. 72, holding defendant who had hired a slave from plaintiff for a specific period with agreement to return at end of such period was liable for the loss of the slave who had escaped from defendant and had not been recaptured; Powers v. Davenport, 7 Blackf. 497, 43 Am. Dec. 100, holding a person undertaking to carry goods to a particular place is liable for the loss thereof where he unnecessarily deviates from the usual and ordinary route; Jenkins v. Bacon, 111 Mass. 373, 15 Am. Rep. 33, holding defendant was liable for the loss of a government bond which he undertook without reward to buy and keep for plaintiff where he without a request mailed it to plaintiff's wife and it was lost on the way; Brown v. Baker, 15 W. N. C. 60; Disbrow v. Tenbroeck, 4 E. D. Smith, 397,—holding defendant who hiring a horse to go to a certain place went to another and the horse having died on the return trip, he was liable for the value of the horse; M'Laughlin v. Lomas, 3 Strobh. L. 85 (dissenting opinion), on liability of hirer of personal chattel for use for different purpose than that mentioned in contract of hiring.

Cited in note in 26 L.R.A. 366, on liability of hirer driving team where not hired to go.

— For loss by superior force or without negligence.

Referred to as leading case in Taylor v. Caldwell, 6 E. R. C. 683, 32 L. J. Q. B. N. S. 164, 3 Best. & S. 826, 8 L. T. N. S. 356, holding that rule excusing bailee if redelivery becomes impossible without negligence is of common-law origin.

Cited in Chicopee Bank v. Seventh Nat. Bank, 8 Wall. 641, 19 L. ed. 422, holding the accidental loss in a bank of a bill sent to it to collect, from want of care in caring for letters raises a presumption of negligence on the part of the bank; Joy v. Allen, 2 Woodb. & M. 303, Fed. Cas. No. 7,552, holding the owners of a vessel in a whaling voyage where they and the crew are shareholders are not liable for the theft of part of the cargo without their fault; Reeves v. The Constitution, Gilpin, 579, Fed. Cas. No. 11,659, holding a person hiring a steamboat to tow a

vessel was not liable where in the course of the employment without his fault it was injured in a collision with another vessel; Watkins v. Roberts, 28 Ind. 167, holding a person borrowing a horse to go to a certain place and return was not liable for the loss of the horse where it was forcibly taken from his possession by a detachment of United States cavalry soldiers; Levering v. Union Transp. & Ins. Co. 42 Mo. 88, 97 Am. Dec. 320, holding that in action against carrier for loss of goods, plaintiff is not bound to show negligence; City Bank v. Young, 43 N. H. 457, to the point that bailee of goods is liable for lack of ordinary care or diligence in respect to them; Seymour v. Brown, 19 Johns. 44, holding defendant to whom plaintiff had sent wheat to be exchanged for flour, was not liable where such wheat was destroyed by a fire destroying the mill and for which defendant was not liable; Lyman v. Southern R. Co. 132 N. C. 721, 44 S. E. 550, holding that fact that goods in warehouse are destroyed by fire raises no presumption of negligence upon part of warehouseman; Charleston & C. S. B. Co. v. Bason, Harp. L. 262, holding that boat owner was liable for loss of books by water entering cabin as result of boat grounding and falling over while attempting to pass through inland passage; Nashville & C. R. Co. v. David, 6 Heisk. 261, 19 Am. Rep. 594, holding that carrier is not bound to provide against unprecedented emergency, such as greater flood than was ever known before in locality; Whitney v. First Nat. Bank, 55 Vt. 154, 45 Am. Rep. 598, holding where a deposit of bonds were made for safe keeping there would be no liability for their loss by robbery where no complicity or bad faith on the part of the bailee; Maslin v. Baltimore & O. R. Co. 14 W. Va. 180, 35 Am. Rep. 748, holding that railroad company is not liable for losses occasioned by cattle dying or being injured by heat, unless loss was occasioned by negligence, or misfeasance of company.

— For nondelivery at expiration of bailment.

Cited in Ware Cattle Co. v. Anderson, 107 Iowa, 231, 77 N. W. 1026, holding under contract of agistment the defendants were liable for the loss of cattle not returned at the close of the season; Arent v. Squire, 1 Daly, 347, holding defendants with whom plaintiff had stored a number of pipes of gin were liable where on a delivery of it there was a shortage in the contents of several of the pipes; Bolan v. Williamson, 2 Bay, 551, holding a postmaster is liable for the loss of money contained in a letter lodged in the postoffice, after its receipt in the office.

— For negligence in care and keeping.

Cited in Worthington v. Preston, 4 Wash. C. C. 461, Fed. Cas. No. 18,055, holding a gaoler who keeps a slave for safe keeping but not in his official capacity is not liable for the escape of the slave there being no gross negligence; St. Losky v. Davidson, 6 Cal. 643, holding that bailee of goods is liable for ordinary negligence in respect to goods; Adams v. Cost, 62 Md. 264, 50 Am. Rep. 211, holding the owners of a livery stable were not liable for the death of a horse placed there by plaintiff by reason of the immoderate riding by a servant who had been instructed by plaintiff to take out for exercise; American Dist. Teleg. Co. v. Walker, 72 Md. 454, 20 Am. St. Rep. 479, 20 Atl. 1, holding defendant company who had furnished a boy to plaintiff to take a team to a livery stable was liable for injuries to the team because of the unskillful driving of the team by the boy; Levine v. D. Wolff & Co. 78 N. J. L. 306, 138 Am. St. Rep. 617, 73 Atl. 73, holding that it was question of fact as to whether warehouseman bestowed care required, where he left goods on wagon in stable for two days until they were destroyed by fire; Scranton v. Baxter, 4 Sandf. 5, holding a person borrowing a horse is bound to use extraordinary diligence in the care of it and is responsible for the slightest neglect; Lockwood v. Bull, 1 Cow. 322, 13 Am. Dec. 539,

holding a person with whom property is placed for safe keeping is liable for conversion where he allows another than the owner to take possession of; Sprinkle v. Brimm, 144 N. C. 401, 12 L.R.A.(N.S.) 679, 57 S. E. 148, holding defendant who retained a quantity of brandy, which he had sold to plaintiff, under directions when to ship was liable upon the loss of the brandy through his negligence; Bellemire v. Bank of United States, 4 Whart. 105, 33 Am. Dec. 46, holding a bank receiving a note for collection and placing it in the hands of a notary when overdue, is not liable for the neglect of the notary to give notice to an indorser; Pearce v. Sheppard, 24 Ont. Rep. 167, holding agister liable where horse killed by falling into a well in pasture not securely covered.

Cited in 1 Thomas, Neg. 2d ed. 105, on liability of bailee for hire for negligence of his servants or those under his control; 1 Thompson, Neg. 18; 2 Cooley, Torts, 3d ed. 1327.—on degrees of negligence; 3 Elliott, Railr. 2d ed. 917, as to when railroad company is liable for negligence of surgeon in its hospital.

Common carrier, who is.

Cited in Wyatt v. Larimer & W. Irrig. Co. 1 Colo. App. 480, 29 Pac. 906, holding a canal company selling water to consumers for purposes of irrigation is not a common carrier; Christenson v. American Exp. Co. 15 Minn. 270, Gil. 208, 2 Am. Rep. 122, holding that express companies are common carriers; Gray v. Jackson, 51 N. H. 9, 12 Am. Rep. 1, 4 Legal Gaz. 366, on who is a common carrier; Moss v. Bettis, 4 Heisk. 661, 13 Am. Rep. 1, holding that person who undertakes to carry by river, for hire, without special contract, incurs responsibility of common carrier; Chevallier v. Strahan, 2 Tex. 115, 47 Am. Dec. 639, holding that all persons who transport goods from place to place for hire, for public generally, are common carriers; Pfaelzer v. Pullman Palace Car Co. 4 W. N. C. 240, holding that Palace car company is not common carrier, and cannot be responsible for safe-keeping of articles of great value; Lamont v. Canadian Transfer Co. 19 Ont. L. Rep. 291, holding that company whose business was to carry baggage to and from railways, etc., was liable for loss of trunk of passenger from steamboat who delivered check to company's agent.

Cited in 1 Hutchinson, Car. 3d ed. 71, on owners of ships as common carriers; 1 Hutchinson, Car. 3d ed. 16, on who are deemed to be carriers without hire.

Liability of common carriers.

Cited in Pendleton v. Kinsley, 3 Cliff. 416, Fed. Cas. No. 10,922, holding that a ship owner is liable in damages to a passenger for injuries inflicted upon him by a collector of fares because the passenger did not pay for two fares, the collector claiming he did not have change for a dollar bill proffered, and the fare being fifty cents; The Juniata Paton, 1 Biss. 15, Fed. Cas. No. 7,584, holding that master may enter harbor on dark night, with heavy sea and high wind, without incurring imputation of negligence; The Lady Pike (Germania Ins. Co. v. The Lady Pike), 21 Wall. 1, 22 L. ed. 499; The Niagara v. Cordes, 21 How. 7, 16 L. ed. 41,—holding that carrier by water is liable in all events and for loss, however sustained, unless it happen from act of God, or public enemy, or by act of shipper, or from some other cause expressly excepted in bill of lading; The Maggie Hammond (The Maggie Hammond v. Morland), 9 Wall. 435, 19 L. ed. 772, holding that master is bound to carry goods to their destination unless he is prevented by act of God or public enemy, or by act of shipper, or some peril excepted in contract of shipment; Jones v. Pitcher, 3 Stew. & P. (Ala.) 135, 24 Am. Dec. 716; Hale v. New Jersey Steam Nav. Co. 15 Conn. 539, 39 Am. Dec. 398; Hartwell v. Northern Pacific Exp. Co. 5 Dak. 463, 3 L.R.A. 342, 41 N. W. 732; Fish v. Chapman, 2 Ga. 349, 46 Am. Dec. 393; American Casualty Ins. Co's

Case (Boston & A. R. Co. v. Mercantile Trust & D. Co.), 82 Md. 535, 38 L.R.A. 97, 34 Atl. 778; Kiff v. Old Colony & N. R. Co. 117 Mass. 591, 19 Am. Rep. 429; McKee v. Owen, 15 Mich. 115; Collier v. Valentine, 11 Mo. 299, 49 Am. Dec. 81; Mercantile Mut. Ins. Co. v. Chase, 1 E. D. Smith, 115; Van Santvoord v. St. John, 6 Hill, 157; Alexander v. Greene, 7 Hill, 533; Binford v. The Virginia, Fed. Cas. No. 1,412; Elder Dempster Shipping Co. v. Pouppirt, 60 C. C. A. 500, 125 Fed. 732; The Caledonia, 157 U. S. 124, 39 L. ed. 644, 15 Sup. Ct. Rep. 537 (dissenting opinion): Jones v. Sims, 9 Port. (Ala.) 236, 33 Am. Dec. 313,—on the liability of a common carrier; Elkins v. Boston & M. R. Co. 23 N. H. 275; Parker v. Atlantic Coast Line R. Co. 133 N. C. 335, 63 L.R.A. 827, 45 S. E. 658; Poythress v. Durham & S. R. Co. 148 N. C. 391, 18 L.R.A.(N.S.) 427, 62 S. E. 515; Honeyman v. Oregon & C. R. Co. 13 Or. 352, 57 Am. Rep. 20, 10 Pac. 628; Pavitt v. Lehigh Valley R. Co. 32 W. N. C. 65; Atlantic Coast Line R. Co. v. Riverside Mills, 219 U. S. 86, 55 L. ed. 107, 31 L.R.A.(N.S.) 7, 31 Sup. Ct. Rep. 164; Hart v. Chicago & N. W. R. Co. 69 Iowa, 485, 29 N. W. 597,—on common carrier as an insurer of the safety of property; Steele v. McTyer's Adm'r, 31 Ala. 667, 70 Am. Dec. 516, holding that common carrier is liable for loss caused by wreck of flat-boat from running against concealed log or snag in river; Cox v. Peterson, 30 Ala. 608, 68 Am. Dec. 145, holding that carrier under contract to deliver certain goods at specified point is liable for loss of goods by fire in storehouse at intermediate point, where goods were stored because boat was unable on account of low water to reach agreed place; Colsch v. Chicago, M. & St. P. R. Co. 149 Iowa, 176, 34 L.R.A.(N.S.) 1013, 127 N. W. 198, Ann. Cas. 1912C, 915, holding that where owner accompanies livestock, he has burden of showing that injury to it by freezing was due to negligence of carrier; Plaisted v. Boston & K. S. Nav. Co. 27 Me. 132, 46 Am. Dec. 587, holding the owners of a vessel were liable for the loss of a cargo in a collision with another vessel, and without fault being imputable to either; Powell v. Mills, 37 Miss. 691, holding a public ferryman liable for damages where plaintiff's horses took fright and ran off into the river to the injury of plaintiff's property; Moses v. Boston & M. R. Co. 32 N. H. 523, 64 Am. Dec. 381, holding defendant railroad company was liable for the destruction of plaintiff's goods by fire in their warehouse where they arrived at warehouse too late for plaintiff to get that day; Rixford v. Smith, 52 N. H. 355, 13 Am. Rep. 42, holding a carrier was not liable for injury to cattle where the injury was either the result of their own fault or the way the owner loaded, the carrier not being at fault; Taylor v. Grand Trunk R. Co. 48 N. H. 304, 2 Am. Rep. 229, holding that carriers of passengers are bound to exercise of utmost care and diligence of very cautious persons and are responsible for even smallest negligence; Landers v. Staten Island R. Co. 13 Abb. Pr. N. S. 338, holding that carriers of passengers are liable for injury to passenger carried on Sunday; Alexander v. Greene, 7 Hill, 533, holding that person in business of towing canal boats on river is liable for loss caused by negligence in navigation; Hays v. Kennedy, 3 Grant, Cas. 351, holding that loss by collision without fault on part of carrier boat is covered by exception in bill of lading of "unavoidable dangers of river navigation;" Marable v. Southern R. Co. 142 N. C. 557, 55 S. E. 355, on a carrier of passenger as not being an insurer; Kremer v. Southern Exp. Co. 6 Coldw. 356, holding that carrier's liability as such ceases when goods arrive at destination and have been tendered and refused by consignee; State v. Goss, 59 Vt. 266, 59 Am. Rep. 706, 9 Atl. 829, holding that, in the absence of suspicious circumstances, a carrier is neither bound to know nor authorized to find

out, as a condition of receiving it, what a package contains that is offered to it for carriage.

Cited in notes in 37 L. ed. (U. S.) 295, on duty and liability as carrier of live stock; 5 E. R. C. 340, on special limitations of liability of carrier; 5 E. R. C. 262, 264, 265, on extent of carrier's liability.

Cited in 3 Hutchinson, Car. 3d ed. 1570, on original theory as to obligation of carrier of goods; 5 Thompson, Neg. 889, on origin of and reasons for doctrine making carrier of goods an insurer; Hollingsworth, Contr. 440, on carriers being liable except for acts of God and of the public enemies; 1 Hutchinson, Car. 3d ed. 27, on requisites of declaration against private carrier.

— Where carrier had been acting as warehouseman.

Cited in Heckel v. Brinker, 19 Pa. Dist. R. 777, 12 North. Co. Rep. 230, holding that where goods are on storage with warehousemen who are also carriers and owner makes contract for immediate shipment and during delay part of property is destroyed by fire in warehouse, liability is that of carrier.

— Departing from shipping instructions.

Cited in Hoffman v. Delaware, L. & W. R. Co. 11 North. Co. Rep. 93, holding that common carrier who departs from shipping instructions of consignor, in consequence of which merchandise is lost, is liable as insurer.

— Gratuitous carriage.

Cited in Philadelphia & R. R. Co. v. Derby, 14 How. 468, 14 L. ed. 502, 10 Am. Neg. Cas. 602, holding that railroad company is liable for injuries occasioned by gross negligence of employee to stockholder riding at president's invitation free and not on usual passenger car; Macon & W. R. Co. v. Holt, 8 Ga. 157, holding a railroad company undertaking to carry a slave on a general pass without the knowledge or consent of the owner was liable for an injury to where the slave was injured by jumping from the moving train; Perkins v. New York C. R. Co. 24 N. Y. 196, 82 Am. Dec. 281, on liability of railroad company for injury to passenger carried gratuitously; Nolton v. Western R. Corp. 15 N. Y. 444, 69 Am. Dec. 623, holding a railroad company was liable for an injury to a person it was carrying without compensation where guilty of gross negligence; Norfolk & W. R. Co. v. Tanner, 100 Va. 379, 41 S. E. 721; Prince v. International & G. N. R. Co. 64 Tex. 144,—holding that railway company is liable in damages for negligence which results in injury of passenger, whether he pays fare or not.

Common carrier as owing duties to the public.

Referred to as leading case in Readhead v. Midland R. Co. 5 E. R. C. 436, L. R. 2 Q. B. 412, L. R. 4 Q. B. 379, 36 L. J. Q. B. N. S. 181, 38 L. J. Q. B. N. S. 169, on reasons for absolute liability of common carriers.

Cited in Chicago & N. W. R. Co. v. People, 56 Ill. 365, 8 Am. Rep. 690, holding mandamus would lie to compel a railroad to deliver grain to an elevator against whom it was attempting to discriminate; Merritt v. Earle, 31 Barb. 38; Lamb v. Camden & A. R. & Transp. Co. 2 Daly, 454; Magnin v. Adams Exp. Co. 50 How. Pr. 457; Orange v. Brown, 3 Wend. 158; Bayles v. Kansas P. R. Co. 5 L.R.A. 480 (dissenting opinion); Magnin v. Dinsmore, 62 N. Y. 35, 29 Am. Rep. 442,—on liability of common carrier as arising from the public employment which he exercises; Bergheim v. Great Eastern R. Co. 5 E. R. C. 464, L. R. 3 C. P. Div. 221, 47 L. J. C. P. N. S. 318, 38 L. T. N. S. 160, 26 Week. Rep. 301, on rule and its reason charging carrier in all events save act of God and of public enemy.

— Duty to carry.

Cited in Dorr v. New Jersey Steam Nav. Co. 11 N. Y. 484, 62 Am. Dec. 125, on common carrier as being liable for a refusal to carry goods; Western & A. R. Co. v. McElwee, 6 Heisk. 208, holding that where railroad company receives goods marked and destined to point beyond its terminus, it by implication undertakes to carry such goods to destination.

Right of common carrier to limit liability.

Cited in New York C. R. Co. v. Lockwood, 17 Wall. 357, 21 L. ed. 627, 10 Am. Neg. Cas. 624, holding that common carrier cannot lawfully stipulate for exemption from responsibility when such exemption is not just and reasonable in eye of law; Michigan C. R. Co. v. Mineral Springs Mfg. Co. 16 Wall. 318, 21 L. ed. 297, holding that unsigned notice on back of receipt given by railroad company for goods to be transported, does not relieve company from its obligation as at common law; Mobile & O. R. Co. v. Hopkins, 41 Ala. 486, 94 Am. Dec. 607, holding that carrier cannot stipulate for release from injury caused by its negligence, even in case of passenger carried on pass; Berry v. Cooper, 28 Ga. 543; South & North Ala. R. Co. v. Henlein, 52 Ala. 606, 23 Am. Rep. 578,—holding that carrier cannot by special contract relieve himself from loss caused by his negligence, but may restrict common law liability in other respects; Steele v. Townsend, 37 Ala. 247, 79 Am. Dec. 49, holding that common carrier cannot limit common law liability by notice but may by special contract; Southern Exp. Co. v. Newby, 36 Ga. 635, 91 Am. Dec. 783, holding the giving of a receipt by an express company which contained a notice limiting their liability as a common carrier did not relieve them from such liability; Rose v. Des Moines Valley R. Co. 39 Iowa, 246, holding that railroad company was liable for causing death of passenger by negligence, although he was riding upon free pass, which stipulated release of company; Hill v. Sturgeon, 28 Mo. 323, holding that "dangers of river" in bill of lading, mean only natural accidents incident to river navigation, and does not include such as may be avoided by exercise of skill, judgment and foresight; Rogers v. Kennebec S. B. Co. 86 Me. 261, 25 L.R.A. 491, 29 Atl. 1069, holding a person accepting a free pass may be bound by conditions thereof by which he assumes all risk of personal injury; Burtis v. Buffalo & State Line R. Co. 24 N. Y. 269 (dissenting opinion), on common carrier as liable independent of contract; McNeill v. Durham & C. R. Co. 135 N. C. 682, 67 L.R.A. 230, 47 S. E. 765, holding that conditions on back of void pass are without effect upon rights of person who has it for transportation; Honeyman v. Oregon & C. R. Co. 13 Or. 352, 57 Am. Rep. 20, 10 Pac. 628, holding that carrier accepting dog for transportation for accommodation of passenger, can be charged only as bailee, where passenger was informed of rules; Hays v. Kennedy, 41 Pa. 378, 80 Am. Dec. 627, holding a clause in a bill of lading excepting the unavailable dangers of the river covered a loss where the boat was run into and sunk without fault of the master or crew; Michigan C. R. Co. v. Mineral Springs Mfg. Co. 30 Phila. Leg. Int. 337, holding that a carrier cannot restrict its liability by a general, unsigned notice printed on the back of a receipt for goods; Cole v. Goodwin, 19 Wend. 251, 32 Am. Dec. 470; Hollister v. Nowlen, 19 Wend. 234, 32 Am. Dec. 455,—holding the proprietor of a public stage coach was liable for the loss of the baggage of a passenger although there was a general notice that baggage of passengers was at the risk of the owners; Kimball v. Rutland & B. R. Co. 26 Vt. 247, 62 Am. Dec. 567, holding that general notice to public, limiting obligations as common carrier, will afford no evidence of such contract, even if existence and contents of such notice is brought home to party.

Regulation of carriers.

Cited in People v. Walser, 3 Ill. C. C. 58, holding that business of railroad companies is proper subject of police power, and nature and character of police regulations must be determined by legislature.

Liability of carrier for negligence resulting in injury to employee.

Cited in Lockhart v. Lichtenthaler, 46 Pa. 151, holding that a carrier is liable for injuries to a brakeman resulting from a collision with oil barrels due to mutual negligence of those in charge and of another person.

Warehouseman as exercising public employment.

Cited in Munn v. People, 69 Ill. 80 (dissenting opinion), on warehousemen as exercising public employment at common law; Ladd v. Southern Cotton Press & Mfg. Co. 53 Tex. 172, holding that business of warehousing and compressing cotton is not employment which common law declares public.

Rights of pledgee in property pledged.

Cited in Hall v. Page, 4 Ga. 428, 48 Am. Dec. 235, holding collateral securities pledged bona fide for the payment of a debt were not subject to garnishment at the suit of other creditors; Fidelity Sav. Bank & Safe Depository v. Shufeldt, 2 Ill. C. C. 36, holding that creditor is not obliged to sell securities which he holds as collateral to indebtedness, even though debtors request him to do so; Wadsworth v. Thompson, 8 Ill. 423, holding a creditor holding goods as collateral security for a debt cannot sell such goods in satisfaction of the debt until the expiration of the time for which the time of payment of the debt has been extended; Soule v. White, 14 Me. 436; Huntingdon v. Mather, 2 Barb. 538; Wolff v. Farrell, 3 Brev. 68; Baldwin v. Black, 119 U. S. 643, 30 L. ed. 530, 7 Sup. Ct. Rep. 326 (dissenting opinion); Union Nat. Bank v. Post, 55 Ill. App. 369,—on rights of pledgee in property pledged; Stief v. Hart, 1 N. Y. 20, holding that pledgee is entitled to hold possession of property pledged until purchaser at sale on execution redeems it; Raynolds v. Carter, 12 Leigh. 166, 37 Am. Dec. 642, on right of pledgee where pledge is lost without his fault.

Termination of pledge by tender of payment.

Cited in Weeks v. Baker, 152 Mass. 20, 24 N. E. 905, holding a mortgagor of personalty upon a tender of payment by him and a nonreturn of the property may retain replevin without bringing the money into court; Folsom v. Barrett, 180 Mass. 439, 91 Am. St. Rep. 320, 62 N. E. 723, on right of bailor to discharge lien by a tender of the amount due on the debt; Norton v. Baxter, 41 Minn. 146, 4 L.R.A. 305, 16 Am. St. Rep. 679, 42 N. W. 865, holding a tender of payment of debt after maturity which is refused without good reason discharges the lien of a creditor upon property held in pledge; Tiffany v. St. John, 65 N. Y. 314, 22 Am. Rep. 612; Farmers' Fire Ins. & Loan Co. v. Edwards, 26 Wend. 541; Kortright v. Cady, 21 N. Y. 343, 78 Am. Dec. 145,—holding a tender of money due upon a mortgage, before foreclosure, discharges the lien; Haskins v. Patterson, 1 Edm. Sel. Cas. 120, holding that upon tender to pledgee, he becomes divested of qualified property, and becomes wrongdoer if he persists in retaining article pledged.

Rights of mortgagor in property mortgaged.

Cited in Knollenberg v. Nixon, 171 Mo. 445, 94 Am. St. Rep. 790, 72 S. W. 41, holding that tender before sale by mortgagor, does not extinguish lien, but only stops running of interest and costs from day of tender; Dudley v. Hawley, 40 Barb. 397, holding that mere possession by mortgagor of personal property

for more than year after forfeiture of mortgage with assent of mortgagee does not enable former to give good title in absence of authority to sell.

Enforcement of lien for labor by sale of property.

Cited in Re Herbst, 63 Hun, 247, 17 N. Y. Supp. 760 (dissenting opinion), on right of person holding lien for work done to sell property.

Recognition of degrees of negligence.

Referred to as leading case in Giblin v. M'Mullen, 3 E. R. C. 613, 38 L. J. P. C. N. S. 25, L. R. 2 P. C. 318, 21 L. T. N. S. 214, 17 Week. Rep. 445, approving "gross negligence" as a term of common description but condemning it as a definitive term.

Cited in Valparaiso v. Schwerdt, 40 Ind. App. 608, 82 N. E. 923, as recognizing degrees of negligence.

Gross neglect, what constitutes.

Cited in Mark v. Hudson River Bridge Co. 103 N. Y. 28, 8 N. E. 243, on what constitutes gross neglect.

Ordinary prudence as test of care.

Cited in Bizzell v. Booker, 16 Ark. 308, on a person as not liable for damages where he was exercising the care and caution that a prudent man would observe; Vaughan v. Menlove, 18 E. R. C. 715, 3 Bing. N. C. 468, 3 Hodges, 51, 1 Jur. 215, 6 L. J. C. P. N. S. 92, 4 Scott, 244, on care of a supposed prudent man as practicable test of negligence.

Misfeasance and nonfeasance distinguished.

Cited in Southern R. Co. v. Rowe, 2 Ga. App. 557, 59 S. E. 462, distinguishing between nonfeasance and misfeasance.

Liability of principal for acts of agent.

Cited in New Orleans, J. & G. N. R. Co. v. Bailey, 40 Miss. 395, on the liability of principal for the acts of his agent.

Necessity of consideration for a contract.

Cited in Logan v. Lee, 10 Ark. 585, to the point that contract made without any consideration is wholly void.

Sufficiency of consideration for a contract.

Cited in Ferrill v. Brewis, 25 Gratt. 765; Robinson v. Threadgill, 35 N. C. (13 Ired. L.) 39,—holding where a man undertakes to collect notes for another without mention of consideration, there is a sufficient legal consideration for the engagement; Middlekauff v. Smith, 1 Md. 329; Folck v. Smith, 13 Md. 85; Hill v. Day, 108 Me. 467, 81 Atl. 581, Ann. Cas. 1913C, 971,—to the point that confidence induced by undertaking any service for another is sufficient legal consideration to create duty in performance of it; Farmer v. Stewart, 2 N. H. 97, on the suspension or forbearance of a right as being a sufficient consideration for a contract; Brown v. Ray, 32 N. C. (10 Ired. L.) 72, 51 Am. Dec. 379, holding that trust or confidence reposed, by reason of undertaking to do act, is sufficient consideration to support action on promise; Pollock v. Carolina Interstate Bldg. & L. Asso. 51 S. C. 420, 64 Am. St. Rep. 683, 29 S. E. 77, holding that receipt of money by cashier of bank on deposit to be held subject to instructions, is sufficient consideration to hold bank to performance of conditions; McDaniels v. Robinson, 26 Vt. 316, 62 Am. Dec. 574, on the delivery and acceptance of goods as being a sufficient consideration for any undertaking with regard to; Wills v. Browne, 1 D. L. R. 388, holding that mere acceptance of goods by mandatory is sufficient consideration for his promise to render service in respect to them.

Liability of agents.

Cited in Suerard v. The Lovspring, 42 Fed. 853, holding that unpaid agent in possession of property of another is only liable in action charging negligence; Liotard v. Graves, 3 Caines, 226, on the liability of an agent having a general discretion; Conner v. Winton, 8 Ind. 315, 65 Am. Dec. 761, holding that mandatory is responsible only for gross ignorance or gross negligence; Harris v. Sheffield, 10 N. S. 1, to the point that mandatory is liable only for gross negligence or breach of faith.

Cited in Tiffany, Ag. 410, 411, on duties of gratuitous agent to principal.

Act of God or public enemy as relieving one from liability.

Cited in Pollard v. Shaaffer, 1 Dall. 210, 1 L. ed. 104, 1 Am. Dec. 239, holding a tenant was not bound by a covenant to return the premises in good repair where it has been taken possession of and wasted by a public enemy; Central of Georgia R. Co. v. Sigma Lumber Co. 170 Ala. 627, 54 So. 205, Ann. Cas. 1912D, 965, holding that where goods are injured by providential causes while in possession of carrier who is in default, carrier is liable; Central of Georgia R. Co. v. Hall, 124 Ga. 322, 4 L.R.A.(N.S.) 898, 110 Am. St. Rep. 170, 52 S. E. 679, 4 Ann. Cas. 128, 19 Am. Neg. Rep. 116, holding that in order to avail himself of act of God as excuse, burden is on carrier to establish not only that act of God ultimately occasioned laws, but that his own negligence did not contribute thereto; Clyde S. S. Co. v. Burrows, 36 Fla. 121, 18 So. 349; Fish v. Chapman, 2 Ga. 349, 46 Am. Dec. 393; Alabama G. S. R. Co. v. Little, 71 Ala. 611,—holding that by common law common carrier is absolutely liable for safety of goods, and responsible for losses except such as are caused by act of God or public enemy; Fergusson v. Brent, 12 Md. 9, 71 Am. Dec. 582, holding that by "Act of God" is meant, natural necessity, which could not have been occasioned by intervention of man, but which proceeds from physical causes alone; New Brunswick S. B. & Canal Transp. Co. v. Tiers, 24 N. J. L. 697, 64 Am. Dec. 394, holding that common carrier is not excused from liability when loss is caused by act of God, unless act of God is proximate cause of injury; McKinley v. C. Jutte & Co. 230 Pa. 122, 79 Atl. 244, Ann. Cas. 1912A, 452, holding that loss by act of God is such irresistible disaster as results from natural causes and in no sense attributable to human agency; Friend v. Woods, 6 Gratt. 189, 52 Am. Dec. 119, holding that act of God, which will excuse common carrier, must be direct and violent act of nature; Smith v. Whiting, 3 U. C. Q. B. O. S. 597, holding that forwarder is common carrier, and is not liable for loss arising from act of God or king's enemy.

Cited in Porter, Bills of L. 128, on what is an act of God excusing liability of carrier; Porter, Bills of L. 223, on what are not public losses by the public enemy; 1 Hutchinson, Car. 3d ed. 326, on carrier's nonliability for losses arising from acts of public enemy; 4 Elliott, Railr. 2d ed. 136, 137, on liability of carrier for acts of public enemies; 2 Cooley, Torts, 3d ed. 1348, on carrier's liability for loss of goods otherwise than by act of God or public enemy; 5 Thompson, Neg. 896, on liability of common carrier for loss by public enemies.

Law as being reason perfected.

Cited in Hale v. Everett, 53 N. H. 9, 16 Am. Rep. 82 (dissenting opinion), on nothing being law that is not reason.

Construction of contracts.

Cited in Robinson v. United States, 13 Wall. 363, 20 L. ed. 653, holding that custom and usage is properly received to ascertain meaning and intention of parties to contract, meaning of which could not be ascertained without aid of

such extrinsic evidence; State v. Colonial Club, 154 N. C. 177, 31 L.R.A.(N.S.) 387, 69 S. E. 771, Ann. Cas. 1912A, 1079, to the point that in all matters of contract intention of parties given character and effect to transaction.

Non-recovery on contract where subject matter destroyed.

Cited in Chicago Edison Co. v. Huyett & S. Mfg. Co. 167 Ill. 233 (affirming 66 Ill. App. 222), holding that there can be no recovery on quantum meruit, or otherwise, where ventilating system which contractor is installing in building under contract by which payment is to be made in a lump sum 30 days after acceptance of work, is destroyed by fire before completion or acceptance of contract.

Alteration of reports by reporter.

Cited in Funk v. Holdeman, 53 Pa. 229, 7 Mor. Minn. Rep. 203, on impropriety of reporter improving upon cases and drawing unwarranted conclusions.

What is law.

Cited in Siegel v. New York C. & H. R. R. Co. 178 Fed. 873; Hale v. Everett, 53 N. H. 9, 16 Am. Rep. 82,—to the point that nothing is law that is not reason.

5 E. R. C. 266, LYON v. MELLS, 5 East, 428, 1 Smith, 478, 7 Revised Rep. 726.

Ship owner or master as common carrier.

Cited in Liver Alkali Co. v. Johnson, L. R. 9 Exch. 338, 43 L. J. Exch. N. S. 216, 31 L. T. N. S. 95, 2 Asp. Mar. L. Cas. 332, holding a ship owner who lets out his vessel for the conveyance of goods to any customer who applies to him is a common carrier.

Liability of common carriers.

Cited in Jones v. Pitcher, 3 Stew. & P. (Ala.) 135, 24 Am. Dec. 716, on common carrier as liable for all losses except those sustained by the act of God or the Kings' enemies.

Liability of carrier by sea.

Cited in Charleston & C. S. B. Co. v. Bason, Harp. L. 262, holding the owners of a boat were liable where property was damaged by sea water coming aboard when the vessel grounded from the reflex of the tide; Smith v. Whiting, 3 U. C. Q. B. O. S. 597, holding the owners of a ship were not liable where the boat was lost by reason of a sudden and unusual gale; Re Sinclair, Fed. Cas. No. 12,895, on liability of ship owners for loss of cargo because of the unseaworthiness of the vessel; Weston v. Minot, 3 Woodb. & M. 437, Fed. Cas. No. 17,453, on defects in a ship as defeating right of ship owners to recover for freight; Kopitoff v. Wilson, L. R. 1 Q. B. Div. 377, 45 L. J. Q. B. N. S. 436, 34 L. T. N. S. 677, 24 Week. Rep. 706, 3 Asp. Mar. L. Cas. 163, holding the owners of a ship were liable for the loss of a cargo of armor plate where during rough weather the plates broke loose and went through the side of the ship causing its loss; Nugent v. Smith, 1 C. P. Div. 19, 423, 45 L. J. C. P. N. S. 697, 34 L. T. N. S. 827, 24 Week. Rep. 237, 3 Asp. Mar. L. Cas. 198, 1 Eng. Rul. Cas. 216, holding a ship owner carrying a horse for hire was liable for its loss where without any negligence on his part the animal was so injured during rough weather as to die.

Distinguished in Bell v. Pidgeon, 5 Fed. 634, holding the owner of a scow who hired his boat to carry a cargo of chalk was not liable where through no fault of defendants the scow was caught in the swell of a passing vessel and part of cargo rolled overboard.

Right of carrier to relieve himself from liability.

Cited in The Svend, 1 Fed. 54, holding exceptions in a bill of lading against breakage, leakage and rust did not relieve the carrier where cargo was injured by salt water owing to improper storage and defective condition of the vessel; Perkins v. New York C. R. Co. 24 N. Y. 196, 82 Am. Dec. 281; New Jersey Steam Nav. Co. v. Merchants' Bank, 6 How. 344, 12 L. ed. 465; Dixon v. Richelieu & O. Nav. Co. Cameron (Can.) 66; Mobile & O. R. Co. v. Weiner, 49 Miss. 725,—on right of common carrier to restrict his liability; Hamilton v. Grand Trunk R. Co. 23 U. C. Q. B. 600; Fitzgerald v. Grand Trunk R. Co. 4 Ont. App. Rep. 601,—holding defendants were not excused from liability by a reservation to the effect that the goods were carried at the risk of the shipper, where the defendant failed to provide suitable cars; Harris v. Great Western R. Co. L. R. 1 Q. B. Div. 515, 45 L. J. Q. B. N. S. 729, 34 L. T. N. S. 647, 25 Week. Rep. 63; Sager v. Portsmouth, S. & P. & E. R. Co. 31 Me. 228, 50 Am. Dec. 659,—holding an assumption by owner of goods, of the risk of all damages that might happen in the course of transportation did not relieve the carrier from liability for damage resulting from his negligence; Peek v. North Staffordshire R. Co. 5 E. R. C. 286, 10 H. L. Cas. 473, 32 L. J. Q. B. N. S. 241, 8 L. T. N. S. 768, 11 Week. Rep. 1023, as one of the decisions on limitation of liability which preceded and led up to the Railway and Canal Traffic act.

Cited in note in 8 L.R.A.(N.S.) 200, on applicability of stipulation abrogating or limiting carrier's liability for baggage, to losses due to negligence.

— By general notice.

Cited in Cole v. Goodwin, 19 Wend. 251, 32 Am. Dec. 470, holding the owner of a stage coach could not by a public notice that all baggage was carried at the risk of the owner exempt himself from liability for loss of a passenger's trunk.

Duty of carrier to provide suitable and safe means of conveyance.

Cited in Potts v. Wabash, St. L. & P. R. Co. 17 Mo. App. 394, holding a contract signed by the shipper releasing the carrier will not relieve carrier of his duty to furnish suitable means of conveyance.

Cited in note in 37 L. ed. U. S. 293, on duty and liability as carrier of live stock.

Cited in 2 Hutchinson Car. 3d ed. 543, on carrier's duty to provide safe and suitable vehicles; 4 Elliott Railr. 2d ed. 167, on duty of carrier as to cars and equipments.

— Safe and seaworthy ship and proper stowage.

Cited in Werk v. Leathers, 1 Woods, 271, Fed. Cas. No. 17,415, holding the charterer of a ship will be liable for damages to cargo by reason of defects in ship of which he was unaware and which were not apparent on examination: Humphreys v. Reed, 6 Whart. 435; The Hadji, 22 Blatchf. 235, 20 Fed. 875; Lyon v. Alvord, 18 Conn. 66,—on it being the duty of the owners of a ship to see that it is competent to perform the service for which freighted; Suerard v. The Lovspring, 42 Fed. 853, on it being the duty of ship owner to provide staunch and seaworthy vessels; Pendleton v. Kinsley, 3 Cliff. 416, Fed. Cas. No. 10,922, on whether common carriers of passengers are insurers of the seaworthiness of the vessel; The Edwin I. Morrison, 153 U. S. 199, 38 L. ed. 688, 14 Sup. Ct. Rep. 823, on owner of a ship as not excused from liability because the defects were latent.

Cited in note in 5 E. R. C. 272, on implied contract by carrier of seaworthiness and fitness of vessel.

Cited in Hughes Adm. 58, on seaworthiness as implied condition of marine insurance on vessel, cargo or freight.

— Implied contracting to provide a suitable and safe conveyance.

Cited in Wilson v. Griswold, 9 Blatchf. 267, Fed. Cas. No. 17,806; Steel v. State Line S. S. Co. L. R. 3 App. Cas. 72, 37 L. T. N. S. 333, 3 Asp. Mar. L. Cas. 516, 4 Eng. Rul. Cas. 697; Stanton v. Richardson, L. R. 7 C. P. 421, 5 Eng. Rul. Cas. 632, L. R. 9 C. P. 390, 41 L. J. C. P. N. S. 180, 43 L. J. C. P. N. S. 230, 45 L. J. C. P. N. S. 78, 33 L. T. N. S. 193, 24 Week. Rep. 324, 3 Asp. Mar. L. Cas. 23; Cheraw & S. R. Co. v. Broadnax, 109 Pa. 432, 58 Am. Rep. 733, 1 Atl. 228, 16 W. N. C. 529, 42 Phila. Leg. Int. 522,—holding in a contract of affreightment there was an implied contract on the part of the ship owner that the ship is tight and seaworthy; The Caledonia, 157 U. S. 124, 39 L. ed. 644, 15 Sup. Ct. Rep. 537, holding the implied warranty of seaworthiness extended to a propellor shaft broken during ordinary weather because of latent defects; The Glenfruin, L. R. 10 Prob. Div. 103, 54 L. J. Prob. N. S. 49, 52 L. T. N. S. 769, 33 Week. Rep. 826, 5 Asp. Mar. L. Cas. 413, holding same where crank shaft broke because of latent defects; The Southwark, 191 U. S. 1, 48 L. ed. 65, 24 Sup. Ct. Rep. 1; The Casco, 2 Ware, 84, Fed. Cas. No. 2,486; Trainor v. Black Diamond S. S. Co. 16 Can. (S. C.) 156; Union S. S. Co. v. Drysdale, 32 Can. S. C. 379 (dissenting opinion); Readhead v. Midland R. Co. L. R. 2 Q. B. 412, L. R. 4 Q. B. 379, 38 L. J. Q. B. N. S. 169, 9 Best. & S. 519, 20 L. T. N. S. 628, 17 Week. Rep. 737, 5 Eng. Rul. Cas. 436; Ye Seng Co. v. Corbitt, 9 Fed. 423,—on owner of vessel as impliedly contracting that vessel is fit for the purpose used.

Exemption from liability brought on by act of other party.

Cited in Standard Marine Ins. Co. v. Nome Beach, Lighterage & Transp. Co. 1 L.R.A.(N.S.) 1095, 67 C. C. A. 602, 133 Fed. 636; Chandler v. Worcester Mut. F. Ins. Co. 3 Cush. 328,—questioning personal default of insured as defense to insurer.

5 E. R. C. 273, DAVIS v. GARRETT, 6 Bing. 716, 8 L. J. C. P. 253, 4 Moore & P. 540, 31 Revised Rep. 524.

Liability of common carrier.

Cited in Caldwell v. Southern Exp. Co. 1 Flipp. 85, Fed. Cas. No. 2,303, on when act of God or public enemy will excuse carrier from liability; Taylor v. Great Northern R. Co. L. R. 1 C. P. 385, 35 L. J. C. P. N. S. 210, 12 Jur. N. S. 372, 14 L. T. N. S. 363, 14 Week. Rep. 639, 1 Harrison & R. 471; Fish v. Chapman, 2 Ga. 349, 46 Am. Dec. 393,—on common carrier as an insurer of goods entrusted to his care; Scovill v. Griffith, 12 N. Y. 509, on delay in delivering goods as rendering carrier liable where there has been a deterioration and loss; Fitzgerald v. Grand Trunk R. Co. 28 U. C. C. P. 586, on liability of common carrier for loss of goods.

Cited in 4 Elliott Railr. 2d ed. 176, on what constitutes unreasonable delay by carrier; 4 Elliott Railr. 2d ed. 244, on time of delivery by carrier; 1 Hutchinson Car. 3d ed. 315, on carrier's liability for loss which would not have occurred but by carrier's unreasonable delay; 2 Hutchinson Car. 3d ed. 717, on carrier's giving preference to preservation of human life rather than protection of property; 2 Hutchinson Car. 3d ed. 724, on circumstances making delay by carrier a duty.

Liability of a common carrier by water.

Cited in Devillers v. The John Bell, 6 La. Ann. 544, holding the original carrier was liable for the loss of goods where they were reshipped in an unseaworthy

vessel; Smith v. Whiting, 3 U. C. Q. B. O. S. 597, holding owner of a ship were not liable for the loss of a cargo where a collision resulting in the sinking of the vessel was caused by an extraordinary and sudden gale; Grill v. General Iron Screw Collier Co. L. R. 1 C. P. 600, 35 L. J. C. P. N. S. 321, 12 Jur. N. S. 727, 14 Week. Rep. 893, 4 Eng. Rul. Cas. 680, holding ship owners liable for the loss of a cargo by reason of a collision which was negligent, although bill of lading exempted carrier from liability for accidents.

— Deviation from route or terms of carriage.

Referred to as leading case in Crosby v. Fitch, 12 Conn. 410, 31 Am. Dec. 745, holding ship owners liable for the loss of a cargo where the master without reasonable necessity deviated from the usual route of vessels for that particular voyage; Powers v. Davenport, 7 Blackf. 497, 43 Am. Dec. 100, holding carrier liable where person carrying goods for hire deviated from the usual route and was precipitated into a stream by a bridge giving way.

Cited in Maghee v. Camden & A. R. Transp. Co. 45 N. Y. 514, 6 Am. Rep. 124; Phillips v. The Sarah, 38 Fed. 252; Taylor v. Moran, 11 Can. S. C. 347; Trainor v. Black Diamond S. S. Co. 16 Can. S. C. 156; Svensden v. Wallace, 10 App. Cas. 404, 54 L. J. Q. B. N. S. 497, 52 L. T. N. S. 901, 34 Week. Rep. 369, 5 Asp. Mar. L. Cas. 453, L. R. 13 Q. B. Div. 69, 24 Eng. Rul. Cas. 445; Collier v. Valentine, 11 Mo. 299, 49 Am. Dec. 81,—on deviation from course as rendering carrier liable for the loss of cargo; Wright v. Holcombe, 6 U. C. C. P. 531; Burns v. Cassells, 26 N. B. 20; Scaramanga v. Stamp, L. R. 4 C. P. Div. 316, L. R. 5 C. P. Div. 295, 49 L. J. C. P. N. S. 674, 42 L. T. N. S. 840, 28 Week. Rep. 691, 4 Asp. Mar. L. Cas. 295,—holding ship owner liable if deviation was not reasonably necessary; Royal Exch. Shipping Co. v. Dixon, L. R. 12 App. Cas. 11, 56 L. J. Q. B. N. S. 266, 56 L. T. N. S. 206, 35 Week. Rep. 461, 6 Asp. Mar. L. Cas. 92, holding where a cargo was carried in a manner in breach of the contract of carriage the carrier would not set up that the loss was within the exception of the perils of the sea.

Distinguished in Coady v. Newfoundland, Newfoundland Rep. (1884–96) 588; holding the state of the weather delaying a charter party could be pleaded as a defense for action for demurrage.

Duty of carrier to deliver goods at particular place or by particular route.

Cited in The Indrapura, 171 Fed. 929, holding that it is duty of owner of vessel to proceed in course agreed upon, or if note is designated in contract in customary or usual track of sea to point of delivery; Cox v. Peterson, 30 Ala. 608, 68 Am. Dec. 145, holding owners of a steam boat who contracted to carry goods to a certain point were liable for the loss of the goods by fire though they carried them as far as the low stage of water would permit and placed them in a warehouse; McKahan v. American Exp. Co. 209 Mass. 270, 35 L.R.A.(N.S.) 1046, 95 N. E. 785, Ann. Cas. 1912B, 612, holding that carrier of animals who makes material departure from method of transportation, avoids express contract of carriage.

Cited in notes in 35 L.R.A.(N.S.) 1048, on deviation as affecting carrier's right to avail itself of special contract; 37 L.R.A.(N.S.) 223, on duty of carrier as to route; 2 B. R. C. 589, 608; on effect of deviation upon carrier's rights and liabilities.

Cited in 4 Elliott Railr. 2d ed. 90, on liability of initial carrier for deviation or failure to obey instructions; 1 Thomas Neg. 2d. ed. 300, on effect of deviation by carrier on liability for loss; 1 Hutchinson Car. 3d ed. 309, on

liability of carrier for loss where he has deviated from the usual course; 2 Hutchinson Car. 3d ed. 682, on carrier's duty to transport by usual route; Porter Bills of L. 136, on liability of carrier for loss in case of deviation and act of God concurring in loss.

Effect on insurance policy of deviation from route.

Cited in Constable v. National S. S. Co. 154 U. S. 51, 38 L. ed. 903, 14 Sup. Ct. Rep. 1062, holding that deviation which is customary incident of voyage, neither avoids policy of insurance nor subjects carrier to responsibility of insurer.

Liability of carrier for loss of goods by act of God, or public enemy.

Cited in Wald v. Pittsburg, C. C. & St. L. R. Co. 162 Ill. 545, 35 L.R.A. 356, 53 Am. St. Rep. 332, 44 N. E. 888, holding that carrier which, without sufficient reason, fails to ship trunk of passenger upon limited train taken by passenger is liable for its loss by flood which comes upon later train on which it is shipped; Henry v. Atchison, T. & S. F. R. Co. 83 Kan. 104, 28 L.R.A.(N.S.) 1088, 109 Pac. 1005, holding that railway company is liable for loss of goods at station by unprecedented flood where it wrongfully refused to deliver them to consignee; Read v. Spaulding, 5 Bosw. 409, holding that carrier is liable for injury to goods caused by act of God, if by his culpable negligence or unexcused and unreasonable delay, in transportation, he unnecessarily exposes goods to peril.

Cited in 4 Elliott Railr. 2d ed. 180, on liability of carrier for destruction of goods by fire while awaiting transportation; 4 Elliott, Railr. 2d ed. 129, on what constitutes an act of God exonerating carrier from liability; 4 Elliott, Railr. 2d ed. 136, on liability of carrier where its negligence precedes act of God; 4 Elliott Railr. 2d ed. 132, on burden resting on carrier of proof that act of God caused loss; 1 Hutchinson, Car. 3d ed. 330, 331, on carrier's liability where loss by public enemy is caused by its negligence or deviation; Porter, Bills of L. 134, on liability of carrier in case of act of God and concurring negligence.

Liability of bailee exceeding terms of bailment.

Cited in Kelly v. White, 17 B. Mon. 124; King v. Shanks, 12 B. Mon. 410,—holding a person hiring a slave for a particular purpose was liable for his death where he was accidentally killed while engaged in another employment; Lilley v. Doubleday, L. R. 7 Q. B. Div. 510, 51 L. J. Q. B. N. S. 310, 44 L. T. N. S. 814, 46 J. P. 708, holding a warehouseman placing goods left with him for storage was liable for their destruction by fire without any negligence on his part where he placed the goods in a different place than he contracted to put them.

Distinguished in Harris v. Great Western R. Co. L. R. 1 Q. B. Div. 515, 45 L. J. Q. B. N. S. 729, 34 L. T. N. S. 647, 25 Week. Rep. 63, holding bailees of property were not liable for the loss thereof where they left the property in vestibule of station instead of in the baggage room.

Liability of servant to master for negligence.

Cited in Zuekee v. Wing, 20 Wis. 408, 91 Am. Dec. 425, holding that servant is liable to master for injuries caused by negligence to property of master although negligence of another servant not made defendant, concurred in producing such injury.

Cited in 5 Thompson, Neg. 249, on liability of servant to master.

Proximate cause of injury where natural forces co-operate with breach of duty.

Cited in Selleck v. Lake Shore & M. S. R. Co. 93 Mich. 375, 18 L.R.A. 154, 53 N. W. 556; Lawrence v. Heidbreder Ice Co. 119 Mo. App. 316, 93 S. W. 897; Gilman v. Noyes, 57 N. H. 627 (dissenting opinion); Lamb v. Camden & A. R. & Transp. Co. 2 Daly, 454; Atkinson v. Goodrich Transp. Co. 60 Wis. 141, 50 Am. Rep. 352, 18 N. W. 764; Marble v. Worcester, 4 Gray, 395 (dissenting opinion),—on where omission of duly or negligent acts may be said to be the proximate cause of an injury; Denver & R. G. R. Co. v. Bedell, 11 Colo. App. 139, 54 Pac. 280, holding the negligence of defendant's servants in failing to keep the doors of a coach closed in cold weather was the direct and proximate cause of plaintiff's injury caused by the sudden lurching of the train while he was closing the door; Cole Bros. v. Wood, 11 Ind. App. 37, 36 N. E. 1074, holding a master was liable for injuries to a servant through the acts of a fellow servant where the master was at fault in placing the injured servant in an unsafe position; Baltimore & P. R. Co. v. Reaney, 42 Md. 117, holding defendants were liable for the injury of plaintiff's house by reason of the construction of a tunnel although but for the peculiar construction of the house there would have been no injury; McDonald v. Snelling, 14 Allen, 290, 92 Am. Dec. 768, holding a person who by his negligent driving causes the horses of another to run away and collide with the rig of a third party is liable for the injury so caused; Ferris v. Board of Education, 122 Mich. 315, 81 N. W. 98, holding a board of education liable for injury to a person by his falling on ice which fell off of roof of school house onto his premises; Browning v. Wabash Western R. Co. 124 Mo. 55, 27 S. W. 644, holding the negligence of defendants in leaving cars in a dangerous position without brakes rendered them liable for the death of an employee in a wreck caused by act of another employee which would not have occurred but for the absence of brakes.

Cited in 1 Cooley, Torts 3d ed. 105, on proximate and remote cause of injury.

— In cases of common carriage.

Referred to as leading case in Smith v. Whitman, 13 Mo. 352, holding a carrier was liable for damages where by reason of his delay in shipping navigation was closed and on the delivering of the cargo on the reopening of navigation the prices had dropped.

Cited in Wald v. Pittsburg, C. C. & St. L. R. Co. 162 Ill. 545, 35 L.R.A. 356, 53 Am. St. Rep. 332, 44 N. E. 888, holding common carrier could not excuse the destruction of a passenger's baggage by a flood caused by the bursting of a dam where there would have been no loss except for their delay in sending the baggage; Bibb Broom Corn Co. v. Atchison, T. & S. F. R. Co. 94 Minn. 269, 69 L.R.A. 509, 110 Am. St. Rep. 361, 102 N. W. 709, 3 Ann. Cas. 450; Read v. Spaulding, 30 N. Y. 630, 86 Am. Dec. 426 (affirming 5 Bosw. 395); Green-Wheeler Shoe Co. v. Chicago, R. I. & P. R. Co. 130 Iowa, 123, 5 L.R.A.(N.S.) 882, 106 N. W. 498, 8 Ann. Cas. 45,—holding carrier was liable for the destruction of a shipment of goods during an unprecedented flood where there was a delay in shipping the goods; Terra Haute & I. R. Co. v. Buck, 96 Ind. 346, 49 Am. Rep. 168, holding negligence of carrier resulting in injury to passenger was the proximate cause of his death where it left him in such an enfeebled condition as to be unable to resist the inroads of disease; New Brunswick S. B. & Canal Transp. Co. v. Tiers, 24 N. J. L. 697, 64 Am. Dec. 394, holding a carrier leaving vessel in an exposed position could not set up that no loss would have occurred but for the fact that the storm produced an un-

usually low tide causing the vessel to strike on a projecting timber of the wharf; The Ontario, 37 Fed. 220, holding where a vessel that was stranded was scuttled to save her from a total loss, a storm coming on, the negligent stranding was the proximate cause of the loss.

Distinguished in Rodgers v. Missouri P. R. Co. 75 Kan. 222, 10 L.R.A.(N.S.) 658, 121 Am. St. Rep. 416, 88 Pac. 885, 12 Ann. Cas. 441 holding the negligent delay of a carrier in carrying goods to point of destination will not render it liable where the goods are destroyed at point of destination by an unprecedented flood before delivery.

Actionable breach of instructions by agent.

Distinguished in State Ins. Co. v. Richmond, 71 Iowa, 519, 32 N. W. 496, where nominal damages only were held allowable against an agent who effected an insurance binding his principal but on a proper risk and at the regular rate.

Right of negligent person to set up that injury might have resulted in any event.

Cited in Boucher v. Larochelle, 74 N. H. 433, 15 L.R.A.(N.S.) 416, 68 Atl. 870, holding a person charged with causing the death of a person by the negligent use of chloroform during an operation could not set up that death might have resulted in any case; Harvey v. Epes, 12 Gratt. 153; Wallace v. Swift, 31 U. C. Q. B. 523; Grant v. Acadia Coal Co. 34 N. S. 319; Moore v. Central R. Co. 24 N. J. L. 268,—on no right as existing on part of person charged with negligent act to set up that injury might have resulted anyhow.

Cited in 2 Kinkead, Torts 905, on what defenses may be made to action for death by wrongful act.

Contribution to injury by third person as not relieving one from liability.

Cited in Meade v. Chicago, R. I. & P. R. Co. 68 Mo. App. 92, holding that where plaintiff has been injured by wrongful act of defendant, fact that third party by his wrong contributed to injury, does not relieve defendant.

Measure of damages.

Cited in Kent v. Hudson River R. Co. 22 Barb. 278, holding in an action against a common carrier for a delay in transporting sheep to market the carrier was liable for the loss caused by the fall in the market; Monteith v. Merchants' Despatch & Transp. Co. 9 Ont. App. Rep. 282, holding the same in the case of a shipment of seed grain.

Distinguished in Jones v. New York & E. R. Co. 29 Barb. 633; Wibert v. New York & E. R. Co. 19 Barb. 36,—holding for a delay of carrier in conveying a stock of butter to market, the difference in market prices could not be recovered as damages.

Questioned in McCurdy v. Wallblom Furniture & Carpet Co. 94 Minn. 326, 102 N. W. 873, 3 Ann. Cas. 468, where doubt is expressed as to its being an authority on the measure of damages.

Remote and proximate damages.

Cited in Milton v. Hudson River, S. B. Co. 37 N. Y. 210, as an authority on the nearness of damages caused by breach of contract.

5 E. R. C. 281, SKINNER v. UPSHAW, 2 Ld. Raym. 752.

Carrier's lien for charges.

Cited in Everett v. Coffin, 6 Wend. 603, 22 Am. Dec. 551, holding that action

of trover cannot be maintained against assignee of lien of master of vessel for freight, until lien is satisfied; Jordan v. James, 5 Ohio, 88, holding that carrier's right to hold goods against consignee, extends no further than until he is paid for carriage; Gurney v. Mackay, 37 U. C. Q. B. 324; McMillan v. Byers, 4 Manitoba L. R. 76; Gregg v. Illinois C. R. Co. 147 Ill. 550, 37 Am. St. Rep. 238, 35 N. E. 343,—on carrier's having lien on goods transported for his charges.

Cited in 2 Hutchinson, Car. 3d. ed. 958, on carrier's lien for freight.

—Necessity of possession.

Cited in Perkins v. Hill, 2 Woodb. & M. 158, Fed. Cas. No. 10,987, on lien of carrier as lost by a delivery of the goods to consignee.

5 E. R. C. 286, PEEK v. NORTH STAFFORDSHIRE R. CO. 10 H. L. Cas. 473, 9 Jur. N. S. 914, 32 L. J. Q. B. N. S. 241, 8 L. T. N. S. 768, 11 Week. Rep. 1023, Rev'g the decision of the Exchequer Chamber reported in El. Bl. & El. 986, which reverses the Court of Exchequer reported in El. Bl. & El. 958.

Duty of carrier to carry for a reasonable compensation.

Cited in Camblos v. Philadelphia & R. R. Co. 9 Phila. 411, 30 Phila. Leg. Int. 149, holding that a carrier can only charge a reasonable sum for service; Ex parte Benson, 18 S. C. 38, 44 Am. Rep. 564, holding carrier is bound to transport at reasonable rates to all but not for same rate of compensation to all; Dickson v. Great Northern R. Co. L. R. 18 Q. B. Div. 176, 56 L. J. Q. B. N. S. 111, 55 L. T. N. S. 868, 35 Week. Rep. 202, 51 J. P. 388, 5 Eng. Rul. Cas. 358, holding common carrier must carry logs at reasonable terms and that 5 per cent extra charge for insurance on valuation was too much.

Right of common carrier to limit its liability by special contract.

Cited with special approval in Pennsylvania R. Co. v. Henderson, 51 Pa. 315, 23 Phila. Leg. Int. 284, holding indorsement on drawer's ticket relieving from all liability for any loss to person or property however occasioned is no excuse for negligence; Virginia & T. R. Co. v. Sayers, 26 Gratt. 328, holding railroad cannot by express contract exonerate itself from liability for negligence, whether gross or ordinary; New York C. R. Co. v. Lockwood, 17 Wall. 357, 21 L. ed. 627, 5 Legal Gaz. 415, holding carrier, either of goods or passengers, cannot stipulate for exemption from liability for negligence of itself or its servant.

Cited in Compania de Navigacion v. Brauer, 168 U. S. 104, 42 L. ed. 398, 18 Sup. Ct. Rep. 12, on the right of a carrier to limit its liability for loss by negligence; Heineman v. Grand Trunk R. Co. 31 How. Pr. 430, holding that common carriers may by special contract relieve themselves from responsibility for loss of property, occasioned by negligence, fraud or felony of their employees or servants; Heineman v. Grand Trunk R. Co. 1 Sheldon, 95, holding that carriers may by special contract relieve themselves from all responsibility for injury to or loss of property entrusted to them for carriage; Johnson v. West Jersey & S. R. Co. 78 N. J. L. 529, 138 Am. St. Rep. 625, 74 Atl. 496, 20 Ann. Cas. 228, holding that under bill of lading excusing carrier from loss by fire or flood, in order to recover against carrier for loss by fire plaintiff must show that fire was attributable to carrier's negligence; Squire v. New York C. R. Co. 98 Mass. 239, 93 Am. Dec. 162, holding in absence of statute, carriers may by special contract limit liability, at least against all risks but their own negligence or misconduct; Maslin v. Baltimore & O. R. Co. 14

W. Va. 180, 35 Am. Rep. 748, holding carrier for hire by special contract, based on a consideration, may exempt itself in case of inevitable accident though contra if there was negligence in any degree; Richardson v. Chicago & N. W. R. Co. 61 Wis. 596, 21 N. W. 49, on extent to which carrier may limit its liability for injury caused by its own negligence; Dodson v. Grand Trunk R. Co. 8 N. S. 405, holding that in the absence of statute, a carrier can impose conditions upon the carriage of goods, so as to excuse itself from liability even for gross negligence of itself or servants; Fitzgerald v. Grand Trunk R. Co. 4 Ont. App. Rep. 601, on the right of a common carrier to exempt itself from liability for negligence, by special contract; Vogel v. Grand Trunk R. Co. 10 Ont. App. Rep. 162, holding that a carrier by special contract could not exempt itself from liability for its own negligence; Robertson v. Grand Trunk R. Co. 21 Ont. App. Rep. 204 (affirming 24 Ont. App. Rep. 75), holding that where the shipper signed a special contract whereby in consideration of a lower rate for transportation the carriers' liability was limited in kind and amount, the contract was good; Hood v. Grand Trunk R. Co. 20 U. C. C. P. 361; Hamilton v. Grand Trunk R. Co. 23 U. C. Q. B. 600; Alexander v. Canadian P. R. Co. Rap. Jud. Quebec, 38 S. C. 357, on right of carrier to evade by contract liability liability by special contract; Manufacturers Paper Co. v. Cairn Line S. S. Co. Rap. Jud. Quebec, 38 C. S. 357, on right of carrier to evade by contract liability for its own fault; Aldridge v. Great Western R. Co. 33 L. J. C. P. N. S. 161, 15 C. B. N. S. 582, holding that any condition in a contract limiting the carrier's liability must be just and reasonable, and must be set out in a written contract, signed by or in behalf of the shipper; Robinson v. Great Western R. Co. 35 L. J. C. P. N. S. 123, 1 Harr. & R. 97, 12 Jur. N. S. 692, 14 Week. Rep. 206; Lewis v. Great Western R. Co. L. R. 3 Q. B. Div. 195, 47 L. J. Q. B. N. S. 131, 37 L. T. N. S. 774, 26 Week. Rep. 255; Foreman v. Great Western R. Co. 38 L. T. N. S. 851,—holding that if the shipper has the option of shipping at a lower rate at his own risk or a higher rate at the carrier's risk, and he takes the first, then a contract limiting the carrier's liability is valid; Ashendon v. London, B. & S. C. R. Co. L. R. 5 Exch. Div. 190, 42 L. T. N. S. 586, 28 Week. Rep. 511, 44 J. P. 202, holding that a clause in a special contract of carriage that the company will not be liable in any case for loss or damage to horse or dog above a certain specified value, unless the value is declared invalid or unreasonable; Hill v. London & N. W. R. Co 42 L. T. N. S. 513, on the liability of a carrier where there is no special contract; Manchester, S. & L. R. Co. v. Brown, L. R. 8 App. Cas. 703, 53 L. J. Q. B. N. S. 124, 50 L. T. N. S. 281, 32 Week. Rep. 207, 48 J. P. 388 (reversing 10 Q. B. Div. 250), holding that where in consideration of a lower rate a fishmonger agreed to release the carrier from all claims for damages whatever the cause, the contract covered the loss of market arising from delay in transit; Great Western R. Co. v. McCarthy, L. R. 12 App. Cas. 218, 56 L. J. P. C. N. S. 33, 56 L. T. N. S. 582, 35 Week. Rep. 429, 51 J. P. 532, on the right of a common carrier to limit its liability within reasonable bounds, by special contract; Shaw v. Great Western R. Co. [1894] 1 Q. B. 373, holding that a common carrier could protect itself from liability for injury to property shipped, except that caused by its own negligence; Murphy v. Midland G. W. R. Co. [1903] I. R. 5, holding that where the contract contained a condition that no loss would be allowed, unless the claim was made within three days from the time the goods were received or seven days from the time they should have been received, the condition was void as unreasonable.

Cited in notes in 43 L. ed. (U. S.) 689, on validity and construction of contracts exempting from liability for negligence; 5 E. R. C. 341, on special limitations of liability of carrier.

Cited in 2 Cooley Torts 3d ed. 1483, on validity of contracts against liability for negligence.

Disapproved in Doyle v. Fitchburg R. Co. 166 Mass. 492, 33 L.R.A. 844, 55 Am. St. Rep. 417, 44 N. E. 611, holding carrier cannot contract for exemption from consequences of its own negligence or that of its employees.

— Condition that shipper must insure.

Cited in Willock v. Pennsylvania R. Co. 166 Pa. 184, 27 L.R.A. 228, 45 Am. St. Rep. 674, 30 Atl. 948, 35 W. N. C. 545, 25 Pittsb. L. J. N. S. 349, holding contract requiring shipper to protect carrier against consequences of its own negligence by insuring property was invalid; Constable v. National S. S. Co. 154 U. S. 51, 38 L. ed. 903, 14 Sup. Ct. Rep. 1062 (dissenting opinion), on extent to which contracts requiring shipper to insure will be sustained.

— Changes in English ruling as to special contracts.

Cited in Camblos v. Philadelphia & R. R. Co. 4 Brewst. (Pa.) 563, 9 Phila. 411, Fed. Cas. No. 2331; Ohio & M. R. Co. v. Selby, 47 Ind. 471, 17 Am. Rep. 719,—on history of change in ruling in England as to contracts exempting carriers from any negligence.

— Object of railway traffic acts in England and America.

Cited with special approval in South & North Ala. R. Co. v. Henlein, 52 Ala. 606, 23 Am. Rep. 578 (dissenting opinion); Virginia & T. R. Co. v. Sayers, 26 Gratt. 328; New York C. R. Co. v. Lockwood, 17 Wall. 357, 21 L. ed. 627, 5 Phila. Legal Gaz. 415,—on fact that companies took advantage of decisions to evade policy of common law as cause of enactment.

Cited in Mynard v. Syracuse, B. & N. Y. R. Co. 71 N. Y. 180, 27 Am. Rep. 28, on tendency of courts to relax rule that carriers cannot stipulate against negligence as cause of enactment.

— Construction of "act."

Cited in Maslin v. Baltimore & O. R. Co. 14 W. Va. 180, 35 Am. Rep. 748, on construction of traffic act of England; Doolan v. Midland R. Co. L. R. 2 App. Cas. 792, 37 L. T. N. S. 317, 25 Week. Rep. 882, on the construction of the English Railway and Canal Traffic act.

Right of carrier to impose conditions.

Cited in Farewell v. Grand Trunk R. Co. 15 U. C. C. P. 427, holding that a condition on a round trip ticket requiring the return check to be used within two days was a reasonable one, and valid.

— Burden upon carrier to show condition is reasonable.

Cited in May v. Standard F. Ins. Co. 30 U. C. C. P. 51, on the necessity of pleading the reasonableness of conditions; Ballagh v. Royal Mut. F. Ins. Co. 44 U. C. Q. B. 70 (dissenting opinion), on the burden, being upon the carrier to show conditions were just and reasonable.

Limitation of liability contracts under railway and canal traffic acts.

Cited in Rixford v. Smith, 52 N. H. 355, 13 Am. Rep. 42, on requirement that conditions not only be, in opinion of court, just and reasonable, but also, that they be embodied in a special contract signed by bailor; Robertson v. Grand Trunk R. Co. 24 Ont. Rep. 75, holding that railroad may by special contract, under Railway act, limit its liability to amount named, for injury to horse in course of transportation.

— Other contracts.

Cited in Squire v. New York C. R. Co. 98 Mass. 239, 93 Am. Dec. 162; Nelson v. Great Northern R. Co. 28 Mont. 297, 72 Pac. 642,—holding statute provides that carrier shall make such special contracts only as shall be judged to be just and reasonable by court in which question arises.

Existence of contract as question for the court.

Cited in Ellis v. Abell, 10 Ont. App. Rep. 226; Harris v. Great Western R. Co. L. R. 1 Q. B. Div. 515, 45 L. J. Q. B. N. S. 729, 34 L. T. N. S. 647,—on question as one for court.

Contract contained in two separate writings or letters.

Cited in Rahm v. Klerner, 99 Va. 10, 37 S. E. 292, holding a letter must either set out the writing referred to or so clearly refer to it that reference becomes a part thereof; Acme Silver Co. v. Perret, 4 Manitoba L. Rep. 501 (dissenting opinion), on sufficiency of separate writings to make completed contract of sale.

Cited in Benjamin Sales, 5th ed. 240, on inadmissibility of parol evidence to connect separate papers.

The decision of the Exchequer Chamber cited in Oliver v. Hunting, L. R. 44 Ch. Div. 205, 59 L. J. Ch. N. S. 255, 62 L. T. N. S. 108, 38 Week. Rep. 618, holding that two papers could be treated together as a sufficient memorandum under the statute of frauds, if they referred to each other and they could be connected by parol evidence.

Conditions of sale extended by statements before bidding commences.

Cited in Johnson v. Buck, 35 N. J. L. 338, 10 Am. Rep. 243, holding that conditions of sale read before biddings commenced but not annexed to catalogue on which purchaser's name was entered or referred to therein cannot be held to supply terms of sale omitted from catalogue.

Costs on appeal.

The decision of the Court of Exchequer was cited in Gann v. Johnson, L. R. 6 C. P. 461, 40 L. J. C. P. N. S. 227, 24 L. T. N. S. 753, 19 Week. Rep. 952, on the awarding of costs on appeal, where decision of lower court is constructively affirmed.

Construction of statutes.

Cited in Robertson v. McLeod, 17 N. B. 21, to the point that when meaning of legislature is clear from langague of statute, courts should not depart from ordinary meaning of precise words in order to avoid injustice.

Wrongful act of insured as affecting right to recover.

Cited in Tilton v. Hamilton F. Ins. Co. 1 Bosw. 366 (dissenting opinion), on liability of insurer for loss as affected by unlawful acts of owner of property.

Right of insured to insist upon unreasonableness of provision in contract.

Cited in Morrow v. Waterloo County Mut. F. Ins. Co. 39 U. C. Q. B. 441, holding that plaintiff might insist that condition in mutual insurance policy requiring a certificate of tort signed by a magistrate or notary public nearest the fire was unreasonable without specially pleading it.

Proof where passenger suing for wrongful ejection.

Cited in Farewell v. Grand Trunk R. Co. 15 U. C. C. P. 427, holding that passenger suing for ejection from train, is not obliged to show that he had ticket or that he offered to pay fare.

5 E. R. C. 329, RICHARDSON v. NORTH EASTERN R. CO. L. R. 7 C. P. 75, 41 L. J. C. P. N. S. 60, 26 L. T. N. S. 131, 20 Week. Rep. 461.

Liability of common carrier of animals.

Cited in Rixford v. Smith, 52 N. H. 355, 13 Am. Rep. 42, holding that a common carrier of cattle is governed by the general rules applicable to carriage of other goods.

Cited in notes in 29 L.R.A.(N.S.) 1215, on liability of carrier accepting property improperly packed or crated; 40 L.R.A. 509, on property rights in dogs; 3 Eng. Rul. Cas. 142, on liability of carrier of livestock; 5 Eng. Rul. Cas. 377, on carrier's duty as to accepting and carrying goods.

Cited in Porter Bills of L. 159, on carrier's neglect to provide against escape of live stock; 4 Elliott Railr. 2d ed. 309, on contributory negligence of owner of live stock defeating recovery against carrier.

5 E. R. C. 351, LONDON & N. W. R. CO. v. EVERSHED, L. R. 3 App. Cas. 1029, 39 L. T. N. S. 306, 26 Week. Rep. 863, 48 L. J. Q. B. N. S. 22, affirming the decision of the Court of Appeal, reported in 47 L. J. Q. B. N. S. 284, L. R. 3 Q. B. Div. 135, which affirms the decision of the Queen's Bench Division, reported in 46 L. J. Q. B. N. S. 289, L. R. 2 Q. B. Div. 254.

Duty of common carrier to extend to all, the same rates.

Cited in Louisville, E. & St. L. R. Co. v. Wilson, 119 Ind. 352, 4 L.R.A. 244, 21 N. E. 341, holding that where a bill of lading omits to state the rate it is presumed that it is the customary rate charge to others for like service.

Cited in 2 Hutchinson Car. 3d ed. 892, on amount of compensation for carriage of goods; 4 Elliott Railr. 2d ed. 336, on amount of compensation for carriage of freight.

The decision of the Queen's Bench Division was cited in State ex rel. Atwater v. Delaware L. & W. R. Co. 48 N. J. L. 55, 57 Am. Rep. 543, 2 Atl. 803, on the duty of a common carrier to carry all alike for a reasonable compensation.

— Preferential discriminations.

Cited in Detroit, G. H. & M. R. Co. v. Interstate Commerce Commission, 21 C. C. A. 103, 43 U. S. App. 308, 74 Fed. 803, holding that the carting and hauling at the end of the transportation are subject to the rules as to discrimination as the transportation itself, whether done by the carrier itself or others: Texas & P. R. Co. v. Interstate Commerce Commission, 162 U. S. 197, 40 L. ed. 940, 5 Inters. Com. Rep. 405, 16 Sup. Ct. Rep. 666 (reversing 20 U. S. App. 1, which affirmed 52 Fed. 187, 4 Inters. Com. Rep. 114), on what circumstances are to be considered in determining if there is undue preference; Pennsylvania R. Co. v. International Coal Min. Co. 97 C. C. A. 383, 173 Fed. 1, holding that under statute railroad is not authorized to charge one shipper of coal lower rate than is charged another shipper between same terminals, because former is shipping under contract had on lower rates which were in force when contract was made; Interstate Commerce Commission v. Delaware, L. & W. R. Co. 220 U. S. 235, 55 L. ed. 448, 31 Sup. Ct. Rep. 392, holding that forwarding agent is person within meaning of interstate commerce act of 1887 forbidding preferences and discrimination in rates; Western U. Teleg. Co. v. Call Pub. Co. 44 Neb. 326, 27 L.R.A. 622, 48 Am. St. Rep. 729, 62 N. W. 506, holding that if there is a difference in rates under substantially the same conditions as to the performance of the service, there is unjust preference; Hilton Lumber Co. v. Atlantic Coast Line R. Co. 141 N. C. 171, 6 L.R.A.(N.S.) 225, 53 S. E. 823, holding that common carrier is guilty of unlawful discrimination when it

charges one person for service rendered larger sum than is charged another for like service, under substantially similar circumstances; Vickers Exp. Co. v. Canadian P. R. Co. 13 Ont. App. Rep. 210, on the right of a carrier to prefer one party over another; Manchester, S. & L. R. Co. v. Denaby Main Colliery Co. L. R. 13 Q. B. Div. 374, L. R. 14 Q. B. Div. 209, L. R. 11 App. Cas. 97, holding that where a railroad company charged the same price to all collieries situated along the line, there was no undue preference in favor of the one at the furtherest distance; Phipps v. London & N. W. R. Co. [1892] 2 Q. B. 229, 61 L. J. Q. B. N. S. 379, 66 L. T. N. S. 721, 8 Ry. & C. T. Cas. 83, on what constitutes an undue preference under the Traffic act.

Cited in notes in 18 L.R.A. 105, on carrier's right at common law to discriminate between passengers or shippers; 12 L.R.A.(N.S.) 511, on carrier's right to discriminate as to special or unusual service.

Cited in 4 Elliott Railr. 2d ed. 342, on rights and remedies of shipper where excessive charges are demanded; 4 Elliott Railr. 2d ed. 683, 689, on what is undue preference or discrimination by carrier.

The decision of the Queen's Bench Division was cited in Interstate Commerce Commission v. Texas & P. R. Co. 4 Inters. Com. Rep. 114, 52 Fed. 187 (see 162 U. S. 197, 4 L. ed. 940, 5 Inters. Com. Rep. 405, 16 Sup. Ct. Rep. 666), holding that the charging of a lower rate under substantially similar circumstances was undue preference even though done on a through shipment to gain business; Hilton Lumber Co. v. Atlantic Coast Line R. Co. 136 N. C. 479, 48 S. E. 813, 1 Ann. Cas. 52, holding that a carrier could not grant lower rates to one than it could to another under the same circumstances, though to induce them to give them traffic which would otherwise go elsewhere; Budd v. London & N. W. R. Co. 36 L. T. N. S. 802, 25 Week. Rep. 752, 4 R. & C. T. Cas. 393, holding that where the railroad charged less to haul a farther distance in order to compete with water transportation, it was a preference over those located farther inland.

— Adjustment of rates.

Cited in Schofield v. Lake Shore & M. S. R. Co. 43 Ohio St. 571, 54 Am. Rep. 846, 3 N. E. 907, holding that where a carrier grants special rates to a favored shipper, others similarly situated may require an equal rate.

— Action to recover over charges.

Cited in Hilton Lumber Co. v. Atlantic Coast Line R. Co. 141 N. C. 171, 6 L.R.A.(N.S.) 225, 53 S. E. 823, holding that when a railroad company charged one shipper forty cents a thousand more than the other for transporting lumber, and the former may recover the excess; Murray v. Glasgow & S. W. R. Co. 11 Sc. Sess. Cas. 4th series, 205, on the right to recover for overcharges under the Traffic act where one person was preferred.

Cited in note in 18 L.R.A.(N.S.) 125, on recovery of excessive payments to public service corporation.

Distinguished in Killmer v. New York C. & H. R. R. Co. 100 N. Y. 395, 53 Am. Rep. 194, 3 N. E. 293, holding that where there has been no violation of statute, no action could be maintained to recover back an overcharge, fixed by contract, which was acted upon for many years.

The decision of the Queen's Bench was cited in Lough v. Outerbridge, 143 N. Y. 271, 25 L.R.A. 674, 42 Am. St. Rep. 712, 38 N. E. 292, holding that common carrier is liable to action at law for damages in case of refusal to perform its duties to public for reasonable compensation.

Duty of carrier to deliver goods.

Cited in Atchison, T. & S. F. R. Co. v. Interstate Commerce Commission, 188 Fed. 229, holding that railroads are bound only to carry goods to depot and there hold them in warehouse ready for delivery whenever consignee calls for them.

Right of carrier to refuse to enter into special arrangements with express companies.

Cited in Vickers Exp. Co. v. Canadian P. R. Co. 13 Ont. App. Rep. 210, on right of railway companies to refuse to enter into special arrangements with express companies, and do all the business themselves.

5 E. R. C. 358, DICKSON v. GREAT NORTHERN R. CO. 51 J. P. 388, 56 L. J. Q. B. N. S. 111, 55 L. T. N. S. 868, L. R. 18 Q. B. Div. 176, 35 Week. Rep. 202.

What constitute reasonable conditions in contract limiting carrier's liability.

Cited in Robertson v. Grand Trunk R. Co. 21 Ont. App. Rep. 204, holding that special contract limiting liability for loss of horse carried by railway company, to certain amount, is valid; Murphy v. Midland Great Western R. Co. [1903] 2 Ir. K. B. 5, holding that a condition in a contract of carriage which limited the liability for loss unless the claim was made within an unreasonably short time was void.

Cited in note in 18 E. R. C. 657, on liability of carrier under special contract of carriage.

Right of carrier to choose what it shall carry.

Cited in Glamorganshire County Council v. Great Western R. Co. 8 R. & C. T. Cas. 196, on the right of a carrier to choose what it shall carry.

— Jurisdiction of court to compel it to carry other things.

Cited in Winsford Local Board v. Cheshire Lines Committee, L. R. 24 Q. B. Div. 456, 59 L. J. Q. B. N. S. 372, 62 L. T. N. S. 268, 38 Week. Rep. 511, holding court had jurisdiction to require a railroad to resume passenger traffic on a part of its line on which passenger traffic had been discontinued.

Distinguished in Darlaston Local Board v. London & N. W. R. Co. [1894] 2 Q. B. 694, 63 L. J. Q. B. N. S. 826, 9 Reports, 712, 71 L. T. N. S. 461, 43 Week. Rep. 29, 8 R. & C. T. Cas. 216, where question as to right of railroad to close its line or station or part of its line or a particular station was involved.

Liability for loss of animals.

Cited in McCormack v. Grand Trunk R. Co. 6 Ont. L. Rep. 577, holding that under Railway's act, railroad company was liable for loss of dog received by it for carriage.

Cited in note in 40 L.R.A. 508, 519, on property rights in dogs.

Right of carrier to exclude vessels from use of wharf.

Cited in West Coast Naval Stores Co. v. Louisville & N. R. Co. 57 C. C. A. 671, 121 Fed. 645, holding that railroad company owning wharf cannot permit its use by vessels and carrying lines as it may select, and exclude others.

Powers of railroad commissioners.

Cited in 2 Elliott Railr. 2d ed. 46, on powers of railroad commissioners.

5 E. R. C. 381, HOBBS v. LONDON & S. W. R. CO. 44 L. J. Q. B. N. S. 49, L. R. 10 Q. B. 111, 32 L. T. N. S. 252, 23 Week. Rep. 520.

Damages for breach of contract.

Cited in Daughtery v. American U. Teleg. Co. 75 Ala. 168, 51 Am. Rep. 435,

on the measure of damages for failure to deliver a telegram; Tribune Co. v. Bradshaw, 20 Ill. App. 17, on the measure of damages for breach of contract to sell personal property; Chisholm & M. Mfg. Co. v. United States Canopy Co. 111 Tenn. 202, 77 S. W. 1062, holding that the measure of damages for breach of executory contract of sale of personalty is the difference between the contract price and the market value of the goods at the time and place of delivery; McNamara v. Clintonville, 62 Wis. 207, 51 Am. Rep. 722, 22 N. W. 472, on the measure of damages for breach of contract; Shadbolt & B. Iron Co. v. Topliff, 85 Wis. 513, 55 N. W. 854, on the measure of damages for breach of an executory contract for the sale and delivery of personal property; Hendrie v. Neelon, 3 Ont. Rep. 603 (dissenting opinion), on the measure of damages for breach of contract; McLean v. Dun, 39 U. C. Q. B. 551, to the point that amount of damages recoverable in action for breach of contract may be governed by notice of special circumstances.

Cited in note in 5 Eng. Rul. Cas. 525, on measure of damages for carrier's breach of contract.

— Within the contemplation of the parties.

Cited in Lynch v. Wright, 94 Fed. 703, holding where the vendor knew of the intention to resell, loss of profits arising from loss of the resale, can be recovered as damages for breach of the contract to sell; Hyatt v. Hannibal & St. J. R. Co. 19 Mo. App. 287; Moffatt Commission Co. v. Union P. R. Co. 113 Mo. App. 544; Gilman v. Noyes, 57 N. H. 627,—holding that those damages are recoverable for breach of contract as were reasonably supposed to have been in the minds of the parties as the probable result of the breach; Boulin v. Rudd, 27 C. C. A. 526, 53 U. S. App. 525, 82 Fed. 685, holding same, and if special circumstances are known to both parties damages from these were within the minds of the parties; Jones v. National Printing Co. 13 Daly, 92, holding that the measure of damages for failure to complete contract to furnish paper, was the loss of the use of the presses, but not any damage arising from a collateral contract of which the defendants knew nothing; McLean v. Dun, 39 U. C. Q. B. 551, on the measure of damages for breach of contract as affected by notice of special circumstances.

Distinguished in Alabama & V. R. Co. v. Hanes, 69 Miss. 160, 13 So. 246, holding that the rule of contemplated injuries does not apply in actions of tort.

— For breach of contract of carriage.

Cited in Baltimore & O. R. Co. v. Carr, 71 Md. 135, 17 Atl. 1052, holding the hotel expenses, inconvenience, and actual loss sustained in matters of business may be recovered; Murdoek v. Boston & A. R. Co. 133 Mass. 15, 43 Am. Rep. 480, holding a passenger, who was arrested by conductor, could not recover for detention during night discomforts, and cold caused by dampness of cell in action for breach of contract; Spade v. Lynn & B. R. Co. 168 Mass. 285, 38 L.R.A. 512, 60 Am. St. Rep. 393, 47 N. E. 88, holding that there can be no recovery for bodily injury sustained through the negligence of another, caused by mere fright and mental disturbance; Serwe v. Northern P. R. Co. 48 Minn. 78, 50 N. W. 1021, holding that injury to health and the indignity attendant upon an expulsion from a train are proper elements of damage for wrongful expulsion; Tragg v. St. Louis, K. C. & N. R. Co. 74 Mo. 147, 41 Am. Rep. 305, holding that a passenger who is carried beyond his destination may recover for inconvenience, loss of time and labor, and the expense of getting back, but not for anxiety or suspense of mind, nor the effect upon health: Costello v. St. Louis Transit Co. 119 Mo. App. 391, 96 S. W. 425, holding an instruction correct

authorizing damages for personal injuries, for pain of body, and mind, and physical inconvenience; Miller v. King, 88 Hun, 181, 34 N. Y. Supp. 425, holding that where no special damages were alleged or proven the plaintiff should recover the reasonable expense of completing his journey; Williams v. Carolina & W. R. Co. 144 N. C. 498, 12 L.R.A.(N.S.) 191, 57 S. E. 216, 12 Ann. Cas. 1000, holding that damages arising from personal annoyance, inconvenience, discomfort and physical effort, could be allowed for breach of contract to carry to his destination; Turner v. Great Northern R. Co. 15 Wash. 213, 55 Am. St. Rep. 883, 46 Pac. 243, holding that damages for anxiety and suspense of mind in consequence of delay by negligence of carrier, cannot be recovered; Walsh v. Chicago, M. & St. P. R. Co. 42 Wis. 23, 24 Am. Rep. 376, on the elements of damage for breach of contract to carry; Boehm v. Duluth, S. S. & A. R. Co. 91 Wis. 592, 65 N. W. 506, holding that personal inconvenience was an element of damage for wrongful ejection from train; Clarry v. Grand Trunk, 29 Ont. Rep. 18, on the measure of damages for breach of contract to carry; Le Blanche v. London & N. W. R. Co. L. R. 1 C. P. Div. 286, 5 Eng. Rul. Cas. 392, 45 L. J. C. P. N. S. 521, 34 L. T. N. S. 667, 24 Week. Rep. 808, on the measure of damages for breach of contract to carry.

Disapproved in International & G. N. R. Co. v. Terry, 62 Tex. 380, 50 Am. Rep. 529, holding that a railroad company which has carried a passenger beyond his destination is responsible for his discomfort, inconvenience, sickness, expenses and charges which are the natural and probable result of the breach.

Damages for mental suffering or inconvenience arising out of breach of contract.

Cited in Western U. Teleg. Co. v. Ford, 8 Ga. App. 514, 70 S. E. 65; Rowan v. Western U. Teleg. Co. 149 Fed. 550,—holding that damages for mental suffering unaccompanied by physical injury is not allowable for mere failure to delivery of telegraph company to deliver death message to plaintiff; Western U. Teleg. Co. v. Ferguson, 157 Ind. 64, 54 L.R.A. 846, 60 N. E. 674, holding an action cannot be maintained against a telegraph company for damages for mental suffering alone resulting from negligence as to telegram; Western U. Teleg. Co. v. Rogers, 68 Miss. 748, 13 L.R.A. 859, 24 Am. St. Rep. 300, 9 So. 823, holding that there could be no recovery for mental pain and suffering resulting from failure to deliver a telegram announcing death of a relative; Trout v. Watkins Livery & Undertaking Co. 148 Mo. App. 621, 130 S. W. 136, holding that where liveryman knew passenger was sick, he will be liable for damages caused by unnecessary delay and exposure to inclement weather resulting from breach of contract to transport passenger; Western U. Teleg. Co. v. Chouteau, 28 Okla. 664, 49 L.R.A.(N.S.) 664, 115 Pac. 879, Ann. Cas. 1912D, 824, holding that in absence of statute, damages not recoverable for mental distress alone, caused by negligent delay in delivering telegram; Boehm v. Duluth, S. S. & A. R. Co. 91 Wis. 592, 65 N. W. 506, holding that it was error to charge in action for wrongful ejection from train, that in assessing damages jury might take into consideration plaintiff's personal inconvenience; Grinsted v. Toronto R. Co. 21 Ont. App. Rep. 578 (affirming 24 Ont. Rep. 683), upholding award of damages where there was some evidence that serious illness from which plaintiff had suffered had resulted from exposure to cold upon illegal expulsion from street car.

Cited in 3 Hutchinson Car. 3d ed. 1717, on right to consider inconvenience of passenger in determining extent of carrier's liability.

Explained in Mentzer v. Western U. Teleg. Co. 93 Iowa, 752, 62 N. W. 1,

holding damages for mental suffering without physical injury can be recovered from telegraph company knowing nature of message, but not in ordinary actions.

Remoteness of damages.

Cited in Birmingham Waterworks Co. v. Ferguson, 164 Ala. 494, 51 So. 150, holding that accidental consequences not likely to ensue upon wrongful act, and generally too remote to be foundation for recovering on breach of contract; Knox v. McFerran, 4 Colo. 344, holding that where the illness was the result of the physical condition at the time of the accident, there could be no recovery, though aided by the accident; Pullman Palace Car Co. v. Taylor, 65 Ind. 153, 32 Am. Rep. 57, on too remote damages from breach of contract; Indianapolis Street R. Co. v. Wilson, 161 Ind. 153, 100 Am. St. Rep. 261, 66 N. E. 950 (dissenting opinion), on damages recoverable for injury to passenger as not too remote; Evans v. St. Louis, I. M. & S. R. Co. 11 Mo. App. 463, holding that where passenger is unlawfully put off train at midnight and, in endeavoring to walk to next station, falls through cattle guard, and is injured, jury should determine whether injury was proximate consequence of wrong done in putting passenger off train, and as to whether conductor acted recklessly; Delahanty v. Michigan C. R. Co. 7 Ont. L. Rep. 690, holding that damages resulting from death of intoxicated passenger who was ejected from train and fell over bridge was not too remote; McKelvin v. London, 22 Ont. Rep. 70, holding where the plaintiff was injured while trying to raise his horse after it had been thrown by a boulder in the road, the damages were too remote to be recovered; Lilley v. Doubleday, 51 L. J. Q. B. N. S. 310, L. R. 7 Q. B. Div. 510, 44 L. T. N. S. 814, 46 J. P. 708, holding that where the defendant contracted to warehouse goods at a certain place, but did so at another, and they were destroyed, without his fault, he was liable.

Cited in notes in 16 L.R.A. 270, on effect of previous disease of person injured on liability for causing injuries; 18 Eng. Rul. Cas. 708, on alleged negligent act as not being proximate cause of injury.

Cited in 3 Hutchinson Car. 3d ed. 1722, 1726, on necessity that damages against carrier be proximate and natural consequence of injury; 1 White Pers. Inj. Railr. 48, on cases where negligence of railroad company is considered remote cause of injury; 6 Thompson Neg. 269, on recovery of direct and remote damages for injury to passenger.

Distinguished in Baltimore City Pass. R. Co. v. Kemp, 61 Md. 74, holding that where a wife was injured through the negligence of the defendant, and cancer resulted, there could be a recovery for injury to health.

Disapproved in Ehrgott v. New York, 96 N. Y. 264, 48 Am. Rep. 622, holding that illness resulting from exposure after an accident was not too remote an injury for which to recover damages; McMahon v. Field, L. R. 7 Q. B. Div. 591, 50 L. J. Q. B. N. S. 311, 552, 45 L. T. N. S. 381, 46 J. P. 245, holding that where a man contracted for stable room, but because the other refused to complete his contract, the plaintiff's horses were exposed to the weather and became ill and thereby depreciated in value, the illness was the direct result of the breach of contract to furnish the stable room.

— Landing passenger at wrong place.

Cited in Cincinnati, H. & I. R. Co. v. Eaton, 94 Ind. 474, 48 Am. Rep. 179, holding that in action for tort for being carried beyond destination evidence is admissible to show passenger was obliged to walk five miles in night and got her clothing and feet wet and became ill in consequence thereof; Lewis v.

Flint, 54 Mich. 55, 52 Am. Rep. 790, 19 N. W. 744, on the failure of the railway to land a passenger at his destination as the proximate cause of injury.

Cited in note in 7 L.R.A.(N.S.) 1180, on injuries proximately resulting from discharging passenger at improper place.

Distinguished in Toronto R. Co. v. Grinsted, 24 Can. S. C. 570 (affirming 21 Ont. App. Rep. 578 which affirmed 24 Ont. Rep. 683), holding that where a person, properly clothed, was ejected from a street car, without cause, illness resulting from exposure is not too remote an injury for which to recover damages.

Disapproved in Evans v. St. Louis, I. M. & S. R. Co. 11 Mo. App. 463, holding that where a passenger was unlawfully put down at a flag station at midnight of a stormy winter's night, and was injured in seeking shelter, that injury was not too remote.

Remoteness of damages as a question of law.

Cited in Lauterer v. Manhattan R. Co. 63 C. C. A. 38, 128 Fed. 540, on the question of remoteness of damage as one for the court; Johnston v. Faxon, 172 Mass. 466, 52 N. E. 539, holding whether under given circumstances upon an ascertained contract certain damages are within scope of risk undertaken is always a question of law; Stone v. Boston & A. R. Co. 171 Mass. 536, 41 L.R.A. 794, 51 N. E. 1, holding case should not be left to jury where court can see that resulting injury was not probable, but remote result of defendant's negligence; Glassey v. Worcester Consol. Street R. Co. 185 Mass. 315, 70 N. E. 199, holding, where material facts and inferences to be derived from them are not in dispute, question of remote or proximate cause is one of law for court.

Action for expulsion from public conveyance as ex contractu or in tort.

Cited in Indianapolis Street R. Co. v. Wilson, 161 Ind. 153, 100 Am. St. Rep. 261, 66 N. E. 950 (dissenting opinion), on an action for wrongful ejection from street car as an action ex contractu or in tort.

Carriers duty to carry passenger without delay.

Cited in notes in 32 L.R.A. 544, on liability to passenger for default or delay in running train; 5 E. R. C. 428–430, on carrier's duty to carry passenger to destination within schedule time.

Cited in 2 Hutchinson Car. 3d ed. 1294, on liability of carrier for detention of passenger.

Duty of railroad to erect safe passenger stations.

Cited in Lauterer v. Manhattan R. Co. 63 C. C. A. 38, 128 Fed. 540, holding that railroad company is bound to exercise only such degree of care in construction of stations and platforms as is sufficient to protect passengers using ordinary care from injury.

Proximate cause of injury.

Cited in Loomis v. Bidard, Rap. Jud. Quebec 20 B. R. 28, holding that the failure of an employer to furnish boats or life buoys or ropes for the protection of masons employed in the construction of a pier in a river was not the proximate cause of the death of a workman who fell in the river and was drowned.

Decisions of courts of co-ordinate jurisdiction as precedents.

Cited in Geraldi v. Provincial Ins. Co. 29 U. C. C. P. 321, on following decisions of courts of co-ordinate jurisdiction.

5 E. R. C. 392, LE BLANCHE v. LONDON & N. W. R. CO. L. R. 1 C. P. Div. 286, 45 L. J. C. P. N. S. 521, 34 L. T. N. S. 667, 24 Week. Rep. 808.

Damages for breach of contract.

Cited in Hendrie v. Neelon, 3 Ont. Rep. 603 (dissenting opinion), on amount of damages recoverable for breach of contract to deliver quantity of timber at certain place; McLean v. Dun, 39 U. C. Q. B. 551, holding circumstances allowed customer of mercantile agency to recover full amount for which credit was extended pursuant to report though amount of credit was not stated on making the inquiry.

Cited in notes in 32 L.R.A. 544, on liability to passenger for default or delay in running train; 5 E. R. C. 427, 428, on carrier's duty to carry passenger to destination within schedule time.

Cited in 4 Elliott Railr. 2d ed. 495, on liability of carrier for failure to stop at station.

Right to fulfil contract at cost of other party.

Cited in Crane Co. v. Columbus Constr. Co. 20 C. C. A. 233, 46 U. S. App. 52, 73 Fed. 984, holding an instruction as to absence of right to recover for unnecessary and unreasonable expenditure in changing pipe to conform to contract should have been given; Thomas China Co. v. C. W. Raymond Co. 67 C. C. A. 629, 135 Fed. 25, holding purchaser of warranted machinery could remedy defects or procure new parts from other parties and recover reasonable cost and expense, though seller agreed to replace parts; Ward's Central & P. Lake Co. v. Elkins, 34 Mich. 439, 22 Am. Rep. 544, holding on breach of contract to carry ordinary merchandise by vessel, shipper will not be justified in procuring shipment by rail, if railroad prices would render it unprofitable; McEwan v. McLeod, 9 Ont. App. Rep. 239 (dissenting opinion), on right to fulfill contract and recover expense incurred provided it was reasonable; Sharpe v. White, 25 Ont. L. Rep. 298, on right of recovery of reasonable expenses of performance of contract against person who has failed to perform; Millen v. Brash, L. R. 8 Q. B. Div. 38, holding in action against railroad for loss of trunk that re-purchase of other articles at enhanced price in place of those lost was a reasonable act.

— Hiring special train to complete carriage.

Cited in Great Western R. Co. v. Lowenfeld, 8 Times L. R. 230, holding that the plaintiff was not entitled to recover the cost of a special train, where through the negligence of the railroad company he was delayed in reaching home, though the cost of the train to him was not extravagant, yet the purpose of the journey and not his means was to determine the reasonableness of hiring a special train.

Conditions in printed time table as part of the contract of carriage.

Cited in McDonald v. Central R. Co. 72 N. J. L. 280, 2 L.R.A.(N.S.) 505, 111 Am. St. Rep. 672, 62 Atl. 495, on whether terms of published timetable become by mere fact of publication a part of the contract; Woodgate v. Great Western R. Co. 51 L. T. N. S. 826, 33 Week. Rep. 428, 1 Times L. R. 133, 49 J. P. 196, holding that conditions in a timetable and a ticket became combined in one contract and the railroad company was not liable for delay where exempted by the conditions of the contract.

Cited in Hollingsworth Contr. 12, on contract by advertisements in railroad time table.

Distinguished in McCartan v. North Eastern R. Co. 54 L. J. Q. B. 441, holding that where the time tables did not disclose an intent to be bound by the times for the departure of the trains, they were not liable for delays.

Conditions limiting carriers' liability.

Cited in Duckworth v. Lancashire & Y. R. Co. 84 L. T. N. S. 774, 49 Week. Rep. 541, 65 J. P. 517, 17 Times L. R. 454, holding that where the ticket provided that the railroad company would not be liable for delay no matter what the cause, a person could not recover for the loss incurred by delay through the defendant's negligence.

What constitutes breach of contract to deliver at a certain time.

Cited in Roberts v. Midland R. Co. 25 Week. Rep. 323, holding that a delay of three hours was sufficient to constitute a breach of carrier's contract to deliver promptly.

5 E. R. C. 431, BLAKE v. GREAT WESTERN R. CO. 7 Hurlst. & N. 987, 8 Jur. N. S. 1013, 31 L. J. Exch. N. S. 346, 10 Week. Rep. 388.

Liability of railroads beyond their own line.

Cited in Baltimore & O. R. Co. v. Harris, 12 Wall. 65, 20 L. ed. 354, holding, even if it be held that one line of railroad was operated by two corporations in different states, that joint liability would be assumed, unless passenger knew of limitations on coupons; Barkman v. Pennsylvania R. Co. 89 Fed. 453, holding a railroad selling ticket between two points cannot relieve itself from responsibility of exercising reasonable care by placing passenger in charge of another company; Ohio & M. R. Co. v. McCarthy, 96 U. S. 258, 24 L. ed. 693, holding that unless forbidden by charter, railroad company may contract for shipment over connecting lines; and having done so is liable in all respects upon them as upon its own line; Kerrigan v. Southern P. R. Co. 81 Cal. 248, 22 Pac. 677, holding where there are several connecting lines and plaintiff seeks to recover of one for an injury received on line of another, he must establish a contract or interest of defendant; Georgia, S. & F. R. Co. v. Pearson, 120 Ga. 284, 47 S. E. 904, holding a railroad, which sells and issues to a passenger a ticket for transportation over its own and other lines, is liable for safe transportation to destination; Florida C. & P. R. Co. v. United States, 43 Ct. Cl. 572, holding that where railroad agrees to convey troops from one designated place to another and wreck occurs while train is running on track of another road, agreement may be treated as through contract of carriage; White v. Fitchburg R. Co. 136 Mass. 321, holding a railroad liable to passenger for negligence of a third person or corporation over whose tracks the defendant's train was running at time of injury; Knight v. Portland, S. & P. R. Co. 56 Me. 234, 96 Am. Dec. 449, holding that ticket over three several distinct lines, issued in form of three tickets on one piece of paper, is to be regarded as distinct ticket for each line and liability is same as if purchase had been made at ticket office of respective lines; Cherry v. Kansas City, Ft. S. & M. R. Co. 61 Mo. App. 303, holding, if a railroad contracts to carry passengers, not only over their own line, but also over another line, either in whole or in part, liability exists as if on own line; Chollette v. Omaha & R. Valley R. Co. 26 Neb. 159, 4 L.R.A. 135, 41 N. W. 1106, holding fact that accident occurred on another line and off that of company, which sold ticket, is immaterial, where ticket was without coupons and for continuous passage; Dunn v. Pennsylvania R. Co. 71 N. J. L. 21, 58 Atl. 164, 16 Am. Neg. Rep. 511; Little v. Dusenberry, 46 N. J. L. 614, 50 Am. Rep. 445,—holding that sale of ticket to passenger is undertaking that due care for his safety shall be used during whole course of his journey over that and other roads, both in management of trains and construction and maintenance of lines; Record v. Pennsylvania R. Co. 76 N. J. L. 800, 72 Atl. 62,

to the point that responsibility of carrier of passengers where it used its line in common with another railway company, is same as if it alone used line and bound company to exercise due care as to whole line; Harden v. North Carolina R. Co. 129 N. C. 354, 55 L.R.A. 784, 85 Am. St. Rep. 747, 40 S. E. 184 (dissenting opinion), on extent of liability of a railroad selling tickets for points beyond its own line; Smith v. Grand Trunk R. Co. 35 U. C. Q. B. 547, holding, when a railroad sells a ticket to a passenger to a point on connecting lines, and receives full fare, and no conditions are imposed, a jury may infer a through contract.

— Contract as basis of liability.

Disapproved in Frazier v. New York, N. H. & H. R. Co. 180 Mass. 427, 62 N. E. 731, holding liability rests on ground that it is immaterial what arrangements are made by carrier for transportation within points between which it is operating a railroad.

— Questions of law and fact as to through contract.

Cited in Gray v. Jackson, 51 N. H. 9, 12 Am. Rep. 1, 4 Legal Gaz. 366, holding question whether a carrier undertook to carry a package to a point beyond its own line was one of fact; Gordon v. Great Western R. Co. 6 Ont. Pr. Rep. 300, holding question whether carrier undertakes to carry beyond its own line is certainly a question of fact where there is no writing and where there is a writing, it is so to a great extent.

Duty of carriers of passengers as to condition of line.

Cited in O'Gara v. St. Louis Transit Co. 204 Mo. 724, 12 L.R.A.(N.S.) 840, 103 S. W. 54, 11 Ann. Cas. 850, holding a street railway was bound to exercise that high degree of care in keeping its tracks free from obstructions that a very prudent man would use; Macdonald v. St. John, 25 N. B. 318 (dissenting opinion), on the undertaking by a railroad that its line is in fit condition for travel.

Actionable negligence in condition of railroad over which another has running rights.

Cited in Littlejohn v. Fitchburg R. Co. 148 Mass. 478, 2 L.R.A. 502, 20 N. E. 103, as an instance where declaration alleged negligence on part of the defendant only; Canadian P. R. Co. v. Fleming, 22 Can. S. C. 33 (dissenting opinion), on whether railroad exercising running powers over line of another company is liable for injury to stranger as well as to passengers.

Cited in note in 68 L.R.A. 809, on presumption and burden of proof as to carrier's negligence when passenger is injured by collision with vehicle under control of third person.

Cited in 2 Hutchinson Car. 3d ed. 1027, on liability of passenger carrier having running powers over another road.

5 E. R. C. 436, READHEAD v. MIDLAND R. CO. 38 L. J. Q. B. N. S. 169, L. R. 4 Q. B. 379, affirming the decision of the Court of Queen's Bench which is reported in 36 L. J. Q. B. N. S. 181, L. R. 2 Q. B. 412.

Duty of carriers of passengers.

Cited in Bate v. Canadian P. R. Co. 15 Ont. App. Rep. 388, holding railroad does not insure passenger against defects in permanent works but is bound to use due care and diligence; Libby v. Maine C. R. Co. 85 Me. 34, 20 L.R.A. 812, 26 Atl. 943, holding railroads are bound to construct roadbed and culverts so as to avoid dangers reasonably to be foreseen but they are not insurers;

McPadden v. New York C. R. Co. 44 N. Y. 478, 4 Am. Rep. 705, holding earlier decisions that engines and cars must be free from defects, irrespective of negligence would not be extended to roadbed; John v. Bacon, L. R. 5 C. P. 437, 39 L. J. C. P. N. S. 365, 22 L. T. N. S. 477, 18 Week. Rep. 894, holding obligation is for due care and that warranty is that due care shall be used both by contracting carrier and others assisting in performance of contract; Pounder v. North Eastern R. Co. [1892] 1 Q. B. 385, 61 L. J. Q. B. N. S. 136, 65 L. T. N. S. 679, 40 Week. Rep. 189, 56 J. P. 247, holding railroad bound to take reasonable care for safety of passengers measured by reference to ordinary incidents of a railroad journey and what must be taken to have been contemplated at time contract was entered into.

Cited in 3 Thompson Neg. 212, on duty of passenger carrier to exercise ordinary care for protection of passenger.

The decision of the Court of Queen's Bench was cited in Dodge v. Boston & B. S. S. Co. 148 Mass. 207, 2 L.R.A. 83, 12 Am. St. Rep. 541, 19 N. E. 373, holding carriers of passengers are bound to duty of utmost care in everything that concerns the safety of passengers; Farrell v. Great Northern R. Co. (Farrell v. Chicago G. W. R. Co.) 100 Minn. 361, 9 L.R.A.(N.S.) 1113, 111 N. W. 388, holding that carriers are held to highest degree of care for safety of passengers and passengers are held to exercise ordinary degree of care to protect themselves; Buckland v. New York, N. H. & H. R. Co. 181 Mass. 3, 62 N. E. 955; Ladd v. New Bedford R. Co. 119 Mass. 412, 20 Am. Rep. 331,—holding railroad bound to use utmost care in providing a proper switch, but they were not liable for hidden defects, not discoverable by careful search; Carroll v. Staten Island R. Co. 58 N. Y. 126, 17 Am. Rep. 221, denying that carriers of passengers were insurers of safety; Canadian P. R. Co. v. Chalifoux, 22 Can. S. C. 721, holding railroad was not liable to passenger injured by breaking of a rail by action of frost or changing temperature, where there was utmost care; dissenting opinion in Brown v. Great Western R. Co. 2 Ont. App. Rep. 64 (affirming 40 U. C. Q. B. 333), on duties owed by carriers to passengers on trains.

—As to safety and fitness of carriages.

Cited with special approval in Wright v. Midland R. Co. L. R. 8 Exch. 137, 42 L. J. Exch. N. S. 89, 29 L. T. N. S. 436, 21 Week. Rep. 460, holding railroad is not an insurer but merely required to use due diligence in providing materials, engines and carriages and other equipment.

Cited in The Olympia, 52 Fed. 985, holding that injury caused by breaking of tiller rope is not chargeable to vessel owner where he purchased it from reputable chandler, and nothing appeared to indicate weakness in rope; The Caledonia, 157 U. S. 124, 39 L. ed. 644, 15 Sup. Ct. Rep. 537, holding that under bill of lading exempting carrier from loss from delays, steam boilers and machinery, does not relieve him from liability for injury happening to cattle through unexpected prolongation of voyage caused by breaking of shaft owing to latent defect in it, which existed before voyage was commenced; Blackmore v. Toronto Street R. Co. 38 U. C. Q. B. 172, on liability of railroad company for injury to passenger caused by patent defects in means of carriage; Whalen v. Consolidated Traction Co. 61 N. J. L. 606, 41 L.R.A. 836, 68 Am. St. Rep. 723, 40 Atl. 645, 4 Am. Neg. Rep. 422, holding that where passenger is injured through defect in appliance which might have been prevented by high degree of care, jury have right to infer negligence attributable to carrier; Cleveland, C. C. & I. R. Co. v. Walrath, 38 Ohio St. 461, 43 Am. Rep. 433, 10 Am. Neg. Cas. 23, holding that on proof of injury to passenger by fall of berth in sleeping

car, and that passenger was without fault, presumption arises, that railroad was negligent; Richardson v. Great Eastern R. Co. L. R. 10 C. P. 486, holding, though a railroad was not bound to examine cars coming on line from other companies, still failure to satisfy itself that proper examination was had by someone was culpable negligence.

Cited in notes in 66 L.R.A. 150, on nonliability of carrier to passenger for latent defects in carriage or equipment; 41 L.R.A. 38, on liability of carrier to passenger for injuries due to latent defects in carriage or appliances; 15 L.R.A.(N.S.) 791, on liability of railroad to passenger injured by latent defect in car; 1 E. R. C. 208, on liability for injury by inevitable accident.

Cited in 2 Hutchinson Car. 3d ed. 1011, on carrier's responsibility for latent defects in means of conveyance; 2 Hutchinson Car. 3d ed. 1018, on carrier's responsibility for negligence of manufacturer; 3 Thompson Neg. 279, on liability of passenger carrier for injury by derailment caused by breaking of wheel through secret defect; 2 Cooley Torts, 3d ed. 1368 on carrier's duty to furnish safe, suitable, and sufficient vehicles for conveyance of passengers; 2 Cooley Torts 3d ed. 1141, on duty of master as to machinery, tools appliances, etc.; 2 Thomas Neg. 2d ed. 1376, on liability of manufacturers and vendors for injury to purchaser due to defects; 2 White Pers. Inj. Railr. 989, on liability of railroad company for condition of car wheels; 4 Elliott Railr. 2d ed. 398, on duty of carrier of passengers as to engines, cars, equipments, and appliances.

Distinguished in Steel v. State Line S. S. Co. L. R. 3 App. Cas. 72, 37 L. T. N. S. 333, 3 Asp. Mar. L. Cas. 516, 4 Eng. Rul. Cas. 697; The Caledonia, 157 U. S. 124, 39 L. ed. 644, 15 Sup. Ct. Rep. 537, where the liability of a common carrier of goods in reference to seaworthiness was involved.

The decision of the Queen's Bench was cited in The Rover, 33 Fed. 515, holding that only reasonable fitness for service designed is required in order to fulfil carrier's duty to shipper; Treadwell v. Whittier, 80 Cal. 574, 5 L.R.A. 498, 13 Am. St. Rep. 175, 22 Pac. 266, holding carriers of passengers are bound to use utmost care and diligence in providing safe, suitable, and sufficient vehicles for conveyance of passengers; Simmons v. New Bedford, V. & N. S. B. Co. 97 Mass. 361, 93 Am. Dec. 99, holding owners of steamboat were required to use utmost care to prevent falling of a boat suspended over deck, but they are not insurers; Marshall v. Boston & W. Street R. Co. 195 Mass. 284, 81 N. E. 195, holding street railway which purchased an axle and wheels from a reputable manufacturer, is bound to use every reasonable test before use; Kingsley v. Delaware, L. & W. R. Co. 81 N. J. L. 536, 35 L.R.A.(N.S.) 338, 80 Atl. 327, holding that mere proof that other railroads constructed car steps and platforms of different type, without proof of recognized standard, will not charge defendant with negligence, in action by person for injuries caused by falling between car step and platform in attempting to alight; Snyder v. Natchez, R. R. & T. R. Co. 42 La Ann. 302, 7 So. 582, on duty of carriers of passengers as to safety of vehicles and appliances; Pendleton v. Kinsley, 3 Cliff. 416, Fed. Cas. No. 10,922, on extent of carrier's liability for latent defects in cars or ships.

— As to operation of trains.

The decision of the Queen's Bench was cited in Great Western R. Co. v. Brown, 3 Can. S. C. 159 (affirming 40 U. C. Q. B. 333), holding that railway company was guilty of negligence in not applying air brakes at sufficient distance from crossing where injury occurred, to enable train to be stopped by handbrakes in case air brakes did not work.

Implied warranty of fitness of thing for purpose intended.

Cited in Taylor v. Reed, 18 N. B. 58, holding that where the parties leased a warehouse for the purpose of storing salt, there was no implied warranty that the building was strong enough to hold the salt; Grocer's Wholesale Co. v. Bostock, 22 Ont. L. Rep. 130, holding that express warranty does not exclude warranty implied by law that goods should be reasonably fit for purpose for which they were intended; Hyman v. Nye, L. R. 6 Q. B. Div. 685, 44 L. T. N. S. 919, 45 J. P. 554, holding person, who lets out carriages is not an insurer against all defects, but only those which care and skill can guard against: Searle v. Laverick, L. R. 9 Q. B. 122, 43 L. J. Q. B. N. S. 43, 30 L. T. N. S. 89, 22 Week. Rep. 367, holding livery stable keeper who takes coach into his building, does not impliedly warrant that building is absolutely safe, and obligation is only to use reasonable care; Francis v. Cockrell, L. R. 5 Q. B. 184, 501, 39 L. J. Q. B. N. S. 113, 291, 10 Best. & S. 850, 22 L. T. N. S. 203, 23 L. T. N. S. 466, 18 Week. Rep. 668, 1205, holding person, receiving money for a place in building to view a public exhibition, does not absolutely warrant the stand, but only that due care had been used in construction by himself or those employed by him; Randall v. Newson, L. R. 2 Q. B. Div. 102, 46 L. J. Q. B. N. S. 259, 36 L. T. N. S. 164, 25 Week. Rep. 313, 23 Eng. Rul. Cas. 480, holding on sale of an article for a specific purpose there is a warranty that it is reasonably fit for the purpose, and there is no exception as to latent defects; Robertson v. Amazon Tug & Lighterage Co. L. R. 7 Q. B. Div. 598, 51 L. J. Q. B. N. S. 68, 46 L. T. N. S. 146, 4 Asp. Mar. L. Cas. 196, 30 Week. Rep. 308 (dissenting opinion), on requirement, where there is an undertaking to furnish an article not specific, that it be as fit for the purpose hired as care and skill can make it.

Cited in 2 Mechem Sales, 1164, on implied warranty of fitness for intended use.

The decision of the Court of Queen's Bench was cited in Copeland v. Draper, 157 Mass. 558, 19 L.R.A. 283, 34 Am. St. Rep. 314, 32 N. E. 944, holding one, who lets a horse, does not warrant that it is free from defects which he does not know of, and could not have discovered by due care; Marshall v. Widdicomb Furniture Co. 67 Mich. 167, 11 Am. St. Rep. 573, 34 N. W. 541 (dissenting opinion), on absence of warranty by master that machinery and appliances will be safe; Madden v. Chesapeake & O. R. Co. 28 W. Va. 610, 57 Am. Rep. 695, holding master does not guaranty safety of servant, but is only required to use ordinary care to have a safe plant.

— As to seaworthiness.

Cited in the Virgo, 35 L. T. N. S. 519, 3 Asp. Mar. L. Cas. 285, 25 Week. Rep. 397, holding that where one vessel was injured through the breaking down of the machinery in another, caused by an inherent latent defect, the owners of the latter were not liable in the absence of negligence; Stanton v. Richardson, L. R. 7 C. P. 421, 41 L. J. C. P. N. S. 180, 27 L. T. N. S. 513, 21 Week. Rep. 71, 9 L. J. C. P. N. S. 390, 43 L. J. C. P. N. S. 230, 45 L. J. C. P. N. S. 78, 5 Eng. Rul. Cas. 632, holding ship owner is bound to supply a ship reasonably fit to carry the cargo stipulated for in the charter party; Kopitoff v. Wilson, L. R. 1 Q. B. Div. 377, 45 L. J. Q. B. N. S. 436, 34 L. T. N. S. 677, 24 Week. Rep. 706, 3 Asp. Mar. L. Cas. 163, holding in every contract for conveyance of merchandise by sea there is, in absence of express provision to contrary, an implied warranty by ship owner that vessel is seaworthy.

Cited in note in 4 E. R. C. 722, on implied warranty in bill of lading that vessel is seaworthy and fit to carry the goods.

Duty of inspection.

Cited in Western Maryland R. Co. v. State, 95 Md. 637, 53 Atl. 969, holding that it is duty of railway company to ascertain by inspection whether freight cars of another road delivered to it for movement over its lines are safe and free from defects; Gaiser v. Niagara, St. C. & T. R. Co. 19 Ont. L. Rep. 31, holding that where the carrier had failed to make any examination of the car wheels, a person injured because of the breaking of one of them could recover for injuries.

Distinguished in Burrell v. Tuohy [1898] 2 Ir. Q. B. 271, holding that a failure to take reasonable precautions was actionable negligence, where the party was bound to exercise reasonable care.

The decision of the Court of Queen's Bench was cited in Boyce v. Nova Scotia Steel Co. 40 N. S. 558, on the necessity of testing for latent defects.

Reliability of early reports.

Cited in Powell v. M'Glynn [1902] 2 Ir. K. B. 154, on the reliability of the early English reports.

Extent of liability of carriers of passengers.

Cited in Gordon v. Manchester & L. R. Co. 52 N. H. 596, 13 Am. Rep. 97; Meier v. Pennsylvania R. Co. 64 Pa. 225, 3 Am. Rep. 581; Marable v. Southern R. Co. 142 N. C. 557, 55 S. E. 355; Grand Rapids & I. R. Co. v. Huntley, 38 Mich. 537, 31 Am. Rep. 321,—holding that carriers of passengers are liable only for injuries resulting from their actual negligence or that of their employees; Gracie v. Canada Shipping Co. Rap. Jud. Quebec 8 C. S. 472 (dissenting opinion), on common carrier not being an insurer of the safety of passengers.

Cited in note in 1 E. R. C. 232, on liability of carrier to passengers.

Cited in 2 Hutchinson Car. 3d ed. 993, on carrier of passengers not being insurer of their safety; 4 Elliott Railr. 2d ed. 390, on nature of liability as a carrier of passengers; 3 Thompson Neg. 188, on nonliability of passenger carrier as insurer; 6 Thompson Neg. 615, on presumption of negligence from happening of accident; 1 Elliott Railr. 2d ed. 641, on joint liability of lessor and lessee of railroad for negligence where lease unauthorized.

— For loss of baggage.

The decision of the Queen's Bench was cited in Carlisle v. Grand Trunk R. Co. 25 Ont. L. Rep. 372, 1 Dom. L. R. 130, holding that railroad company was liable only for gross negligence where baggage was checked day before passenger started on journey and reached destination before passenger and was destroyed by explosion in baggage room.

Duty of warehouseman to furnish safe building.

Cited in Moulton v. Phillips, 10 R. I. 218, 14 Am. Rep. 663, holding that persons storing goods for consideration are bound to furnish building that is reasonably safe, and are liable if it injures goods because it is unsafe, unless defect was one which could not have been discovered by use of ordinary care.

Liability of railroad to employees for injuries due to employment.

Cited in Rostrom v. Canadian Northern R. Co. 3 D. L. R. 302, holding that railroad company was not liable for injury to employee in wrecking gang caused by unexpected plunge of twisted rail on its release by cutting bolts on fish plate.

Liability of carrier to passenger for delay due to loss of equipment.

Cited in Neal v. Allan, 18 N. S. 449, holding that passenger could not recover damages for delay caused by carrying away of rudder post of boat, where defect in post could not be discovered before leaving port.

5 E. R. C. 464, BERGHEIM v. GREAT EASTERN R. CO. L. R. 3 C. P. Div. 221, 47 L. J. C. P. N. S. 318, 38 L. T. N. S. 160, 26 Week. Rep. 301.

Liability of railroads for baggage in custody of passenger.

Cited in Kinsley v. Lake Shore & M. S. R. Co. 125 Mass. 54, 28 Am. Rep. 200, holding though railroad is not liable as a carrier for baggage in exclusive custody of passenger it is liable for negligence in case passenger was not at fault; Voss v. Wagner Palace Car. Co. 16 Ind. App. 271, 43 N. E. 20 (dissenting opinion), on extent of railroad's liability for baggage retained in custody of passenger on train.

Cited in 4 Elliott Railr. 2d ed. 610, 611, on liability of carrier for loss of baggage where passenger retained custody.

Explained in Bunch v. Great Western R. Co. L. R. 17 Q. B. Div. 215, L. R. 13 App. Cas. 31, 55 L. J. Q. B. N. S. 427, 55 L. T. N. S. 9, 34 Week. Rep. 574, 5 Eng. Rul. Cas. 471, holding as long as passenger's baggage intended to be taken in train with passenger is in custody of porter for purpose of transit, the railroad are liable as carriers, but when it is in carriage partially in control of passenger, they are liable for negligence only.

Liability of railroads for baggage in their custody.

Cited in Bate v. Canadian P. R. Co. 15 Ont. App. Rep. 388, holding as a general rule that railroad would be liable as a carrier for baggage regularly placed in baggage car, whether fire was due to their negligence or to some cause for which they were not to blame.

Cited in 4 Elliott Railr. 2d ed. 621, on liability of carrier for loss of baggage while in its custody.

Liability of carriers of goods.

Cited in Dixon v. Richelieu Nav. Co. 15 Ont. App. Rep. 647 (dissenting opinion), on liability of carriers of goods for losses not caused by dangers of navigation or other perils excepted by statute, there being no special contract.

5 E. R. C. 471, GREAT WESTERN R. CO. v. BUNCH, L. R. 13 App. Cas. 31, 52 J. P. 147, 57 L. J. Q. B. N. S. 361, 58 L. T. N. S. 128, 36 Week Rep. 785, affirming the decision of the Court of Appeal, reported in 55 L. J. Q. B. N. S. 427, L. R. 17 Q. B. Div. 215.

Liability of common carrier for baggage left on station platform.

Cited in Nicholls v. North Eastern R. Co. 59 L. T. 137, on the liability of a common carrier for goods brought to them for carriage, within a reasonable time before forwarding.

Cited in note in 9 E. R. C. 284, on liability of railway company for baggage left on platform pending departure of train.

Cited in 4 Elliott Railr. 2d ed. 609, on delivery of baggage to company as essential to liability; 3 Hutchinson Car. 3d ed. 1504, on effect of passenger's contributory negligence on carrier's liability for baggage.

Distinguished in Welch v. London & N. W. R. Co. 34 Week. Rep. 166, holding that where the passenger missed his train and intended to take the next train, in an hour, and left his luggage with a porter on the platform while he amused

himself by playing billiards, the company was not liable for the loss of the luggage.

— Taken with passenger.

Cited in Bate v. Canadian P. R. Co. 15 Ont. App. Rep. 388, on the liability of a common carrier of passengers for baggage taken with the passenger.

Cited in 4 Elliott Railr. 2d ed. 611, on liability of carrier for loss of baggage where passenger retained custody.

— In carrier's custody.

Cited in Voss v. Wagner Palace Car Co. 16 Ind. App. 271, 43 N. E. 20, holding that sleeping car company is liable as common carrier for safe delivery of baggage, where porter takes possession and undertakes to deliver it in reception room of depot.

5 E. R. C. 502, HADLEY v. BAXENDALE, 9 Exch. 341, 18 Jur. 358, 23 L. J. Exch. N. S. 179, 2 Week. Rep. 302.

Measure of damages for breach of contract.

Cited in Fisher Hydraulic Stone & Machinery Co. v. Warner, 188 Fed. 465, holding that damages for failure to take patented machinery according to contract was difference between cost of manufacture and actual value at time and place of delivery, where plaintiff was to retain title to machinery until paid for and machinery had limited market value; Mott v. Chew, 137 Fed. 197, holding that defendant's negligence in failing to promptly transmit tug as agreed was proximate cause of damage, where because of such negligence bulkhead was destroyed by storm owing to lack of protection by stone ballast which was to be carried in tug; Pendleton v. Knickerbocker L. Ins. Co. 7 Fed. 169, to the point that failure of drawee to accept and pay draft renders him liable for consequential damages; Benjamin v. Hillard, 23 How. 149, 16 L. ed. 518, holding that amount that would have been received, if contract had been kept, is measure of damages if contract is broken; Bixby-Thorson Lumber Co. v. Evans, 167 Ala 431, 29 L.R.A.(N.S.) 194, 140 Am. St. Rep. 47, 52 So. 843, holding that measure of damages for breach of special contract to pay money which refers to other objects than mere discharge of debt, is actual injury suffered; Eckington v. Soldiers' Home R. Co. v. McDevitt, 18 App. D. C. 497; Henderson Bridge Co. v. O'Connor, 88 Ky. 303, 11 S. W. 18; Beaulieu v. Great Northern R. Co. 103 Minn. 47, 19 L.R.A.(N.S.) 564, 114 N. W. 353, 14 Ann. Cas. 462; Wall v. Continental Casualty Co. 111 Mo. App. 504, 86 S. W. 271; Ellison v. Albright, 41 Neb. 93, 29 L.R.A. 737, 59 N. W. 703; Hubbard v. Gould, 74 N. H. 25, 64 Atl. 668; McDonald v. Unaka Timber Co. 88 Tenn. 38, 12 S. W. 420; McNamara v. Clintonville, 62 Wis. 207, 51 Am. Rep. 722, 22 N. W. 472; Cook v. Minneapolis, St. P. & S. Ste. M. R. Co. 125 Wis. 528, 103 N. W. 1097; American Bridge Co. v. Camden Interstate R. Co. 68 C. C. A. 131, 135 Fed. 323; Wood v. LeBlanc, 3 N. B. Eq. 116; Langdon v. Robertson, 13 Ont. Rep. 497; St. Thomas v. Credit Valley R. Co. 15 Ont. Rep. 673; Larios v. Gurety, L. R. 5 P. C. 346; Saudon v. Andrew, 30 L. T. N. S. 723; Irvine v. Midland G. W. R. Co. Ir. L. R. 6 C. L. 55; Smith v. Day, L. R. 21 Ch. Div. 421, 48 L. T. N. S. 54, 31 Week. Rep. 187,— on the measure of damages for breach of contract; Bell v. Reynolds, 78 Ala. 511, 56 Am. Rep. 52, holding same, with interest except where there is no market value; Buckley v. Holmes, 19 Ill. App. 530, holding that the measure is the difference in the contract and the market price of the chattel contracted to be delivered; Paine v. Sherwood, 21 Minn. 225, holding that where the party contracted to deliver bridge timbers at a certain price but failed to do so, the

measure of damages is the difference between what it cost to procure others and the contract price; McCurdy v. Wallblom Furniture & Carpet Co. 94 Minn. 326, 102 N. W. 873, 3 Ann. Cas. 468, holding that where goods are stored in warehouse agreed upon and are removed therefrom without notice to bailor, and those goods are destroyed by fire bailee is liable for market value in action for conversion; McGuire v. J. Neils Lumber Co. 97 Minn. 293, 107 N. W. 130, on the recovery of damages for the breach of contract: Uhlig v. Barnum, 43 Neb. 584, 61 N. W. 749; Chicago, B. & Q. R. Co. v. Spirk, 51 Neb. 167, 70 N. W. 926,—on the measure of damages in an action for breach of contract; Rochester Lantern Co. v. Stiles & P. Press Co. 135 N. Y. 209, 31 N. E. 1018, holding that the measure of damages for a failure to deliver certain dies contracted for was the difference between the contract price and what they could be procured for, elsewhere; Todd v. Gamble, 148 N. Y. 382, 52 L.R.A. 225, 42 N. E. 982, holding that the measure of damages for breach of contract of sale for a commodity that has no market value, is the difference between the contract price and the cost of manufacture; May v. Georger, 21 Misc. 622, 47 N. Y. Supp. 1057, holding that the measure for breach of contract to alter a coat, is the value of the coat as it would have been if altered according to the contract less the value as it was as altered; Huyett & S. Mfg. Co. v. Gray, 124 N. C. 322, 32 S. E. 718, on the measure of damages for breach of warranty; Tillinghast Styles Co. v. Providence Cotton Mills 143 N. C. 268, 55 S. E. 621, holding that probable loss occasioned by breach of contract of sale of article having market value and usually procurable, would be sum required to buy other goods of like kind and at market price; Keystone Drilling Co. v. Stahl, 26 Pittsb. L. J. N. S. 419, holding that special damages cannot be recovered for breach of contract of sale unless it is alleged and proved that defendant was aware of existence of such circumstances; Givens v. North Augusta Electric & Improv. Co. 91 S. C. 417, 74 S. E. 1067; Towles v. Atlantic Coast Line R. Co. 83 S. C. 501, 65 S. E. 638,—holding that special damages cannot be recovered in action ex contractu unless defendant had notice of circumstances out of which they might reasonably be expected to result at time contract was made; Glasscock v. Shell, 57 Tex. 215, on the measure of damages for breach of promise to marry; Shepard v. Milwaukee Gaslight Co. 15 Wis. 318, 82 Am. Dec. 679, holding that in action against gas company for wrongfully refusing to furnish supply of gas for store, evidence that failure to supply gas made his store less attractive and tended to diminish business was admissible; Smith v. Goldberg, 139 Wis. 423, 121 N. W. 173, holding that on breach of contract on sale of stallion, agreement being on failure of warranty to replace him with another equally good or refund purchase price, "and take horse back" no proof of damages is necessary; Crockett v. Campbellton, 39 N. B. 160, on amount of damages recoverable upon breach of contract; Behan v. Grand Trunk R. Co. 11 Quebec L. Rep. 61, 62, holding that damages allowable for breach of contract of carrier to convey goods are loss of profit, but not of custom, where carrier was aware goods were intended for immediate sale; Natrass v. Nitingale, 7 U. C. C. P. 266, on the measure of damages for breach of warranty; Lilley v. Doubleday, L. R. 7 Q. B. Div. 510, 44 L. T. N. S. 814, on the measure of damages for breach of contract of warehouseman; South African Territories v. Wallington [1897] 1 Q. B. 692, 66 L. J. Q. B. N. S. 551, 76 L. T. N. S. 520, 45 Week. Rep. 467, holding that the damages for breach of a contract to take debentures are measured by the loss sustained through the breach, not by the sum agreed to be lent.

Cited in notes in 6 E. R. C. 618, 620, 622, 624, on damages recoverable for

breach of contract; 15 E. R. C. 737, on measure of damages for breach of covenant for quiet enjoyment; 2 E. R. C. 495, on measure of damages for breach of implied warranty of authority by agent; 23 E. R. C. 565, on measure of damages from seller's failure to deliver goods.

Cited in Benjamin, Sales, 5th ed. 972; 2 Mechem, Sales, 1417, 1418,—on measure of damages for seller's breach of contract; Benjamin, Sales, 5th ed. 1023, 1025, on measure of damages for seller's breach of warranty where the inferiority of the goods should have been detected by the buyer before use; 3 Page, Contr. 2402, on measure of damages for breach of contract with reference to special course of things; Benjamin, Sales, 5th ed. 806, on presumptive rule of damages for non-acceptance of goods by buyer; Benjamin, Sales, 5th ed. 982, on right of buyer who has resold to recover special damages; 3 Page, Contr. 2396, on compensatory damages for breach of contract.

— Contracts affecting use or right to property.

Cited in Lynch v. Wright, 94 Fed. 703, holding that on breach of contract for sale of land, special damages resulting to purchaser from failure to make resale are only recoverable where contract for resale was brought to knowledge of defendant at time contract was made; Wallace v. Ah Sam, 71 Cal. 197, 60 Am. Rep. 534, 12 Pac. 46, holding that loss of possible profits which might have accrued to plaintiff under lease of land executed by him, without defendant's knowledge, after breach of contract is not recoverable for breach of contract to construct levee around swamp land; Bernhard v. Curtis, 75 Conn. 476, 54 Atl. 213, on the measure of damages for withholding leased premises; Hagan v. Rawle, 143 Ill. App. 543, holding that when at time contract of sale was made resale of property was in contemplation of parties, proper measure of damages in difference between contract price is original contract and contract price on such resale; Baltimore Permanent Bldg. & L. Soc. v. Smith, 54 Md. 187, 39 Am. Rep. 374, on the measure of damages for breach of parol contract to convey lands; Ironton Land Co. v. Butchart, 73 Minn. 39, 75 N. W. 749, holding that where a bonus mortgage was given, and in an action to foreclose it was alleged that there was a breach of contract, the measure of damages would be the value of the land with the contract performed less the value so far as it was performed; Shoemaker v. Crawford, 82 Mo. App. 487, holding that damages for breach of agreement to furnish land to be cultivated on shares is such injury as follows in natural course of things and is reasonably supposed to have been in contemplation of parties as probable result of breach; Cape Girardeau & C. R. Co. v. Wingerter, 124 Mo. App. 426, 101 S. W. 1113, holding that the measure of damages for breach of contract to convey is the value of the land to be conveyed, at the time contracted to be conveyed; Mack v. Patchin, 29 How. Pr. 20, 1 Sheldon, 67, on the measure of damages for breach of contract for title; Welborn v. Dixon, 70 S. C. 108, 49 S. E. 232, 3 Ann. Cas. 407, on the measure of damages for breach of contract to convey lands; Paposkey v. Munkwitz, 68 Wis. 322, 60 Am. Rep. 858, 32 N. W. 35, holding that if lessor knew he could not give possession of store, difference between rent reserved and rent which lessee would be compelled to pay for another store adapted to his business, would be measure of damages; Engel v. Fitch, L. R. 3 Q. B. 314, L. R. 4 Q. B. 659, 37 L. J. Q. B. N. S. 147, 38 L. J. Q. B. N. S. 304, 10 Best & S. 738, 17 Week. Rep. 894, holding that the measure of damages for breach of contract to convey land was the difference between the contract price and value at the time of contract; Bain v. Fothergill, L. R. 7 H. L. 158, 43 L. J. Exch. N. S. 243, 31 L. T. N. S. 387, 23 Week. Rep. 161, on the measure of damages for breach of contract for sale of land; Ebbetts

v. Conquest [1895] 2 Ch. 377, 64 L. J. Ch. N. S. 702, 12 Reports, 430, 73 L. T. N. S. 69, 44 Week. Rep. 56 (affirmed in [1896] A. C. 490, 75 L. T. N. S. 36, 65 L. J. Ch. N. S. 808, 45 Week. Rep. 50), holding that the measure of damages for breach of covenant to keep premises in repair contained in a sublease is the difference in the value of the reversion with the covenant performed and without.

Cited in note in 9 E. R. C. 486, on elements considered in ascertaining liability of tenant who has agreed to keep and leave premises in repair.

Cited in 2 Underhill, Land. & T. 695, on measure of damages for failure of landlord to give possession.

— For nondelivery of machines or mill equipment.

Cited in Hooks Smelting Co. v. Planters' Compress Co. 72 Ark. 275, 79 S. W. 1052, on the measure of damages for failure to deliver a machine when contracted for; Benton v. Fay, 64 Ill. 417, holding that purchaser of particular machine to be delivered on certain day is entitled to show what would have been fair rent for use of building and machinery during time they lay idle in consequence of delay on part of vendor, but not for any longer time than was necessary to supply another machine after notice from vendor; Pender Lumber Co. v. Wilmington Iron Works, 130 N. C. 584, 41 S. E. 797, holding in an action for failure to deliver a machine, the vendor is liable only for such damages as are incidental to the breach as a natural consequence and contemplated by both parties when contract was made; Fleming v. Beck, 48 Pa. 309, holding that loss of profits or custom by reason of defective performance of contract to dress mill-stones, is not recoverable by injured party, without express stipulation to that effect; Colvin v. McCormick Cotton Oil Co. 66 S. C. 61, 44 S. E. 380, holding that injury to cotton seed by heating and expense incurred in cooling them may be recovered as within the reasonable contemplation of the parties as a result of a failure to deliver cotton mill machinery; Eichbaum v. Caldwell Bros. Co. 58 Wash. 163, 108 Pac. 434, holding that loss of rentals cannot be recovered because of failure to deliver pumps within specified time, where there is nothing to show that such damage was within contemplation of parties or actually sustained; Hydraulic Engineering Co. v. McHaffie, G. & Co. 23 E. R. C. 558, L. R. 4 Q. B. Div. 670, 27 Week. Rep. 221, holding that recovery could be had for loss of profits for failure to furnish a part of a pile driver as required, and expenditure made in involving other parts of machine, painting machine to preserve it, but not for cost of warehousing machine; Bruhm v. Ford, 33 N. S. 323, holding in an action for damages for failure to complete a mill in time, the plaintiff could recover only that which was contemplated by the parties at the time the contract was made which would result from the breach; Corbet v. Johnson, 10 Ont. App. Rep. 564, holding that amount of damages recoverable for failure to complete contract to install machinery by certain day, was loss of profits, in addition to rental of mill and interest on value of machinery.

— Tort actions and torts arising out of contract.

Cited in Griffith v. Burden, 35 Iowa, 138, on the measure of damages for the conversion of a municipal bond; Thompson v. Clemens, 96 Md. 196, 60 L.R.A. 580, 53 Atl. 919, on the measure of damages in actions, nominally in tort, but treated as ex contractu; Russell v. Stoops, 106 Md. 138, 66 Atl. 698, on the measure of damages for deceit and fraud; Virginia-Carolina Peanut Co. v. Atlantic Coast Line R. Co. 155 N. C. 148, 71 S. E. 71, holding that in action in tort growing out of contract, plaintiff can only recover such damages as were in contemplation of parties at time contract was entered into; Brown v. Chicago, M. & St. P. R. Co. 54 Wis. 342, 41 Am. Rep. 41, 11 N. W. 356, 7 Am. Neg. Cas.

203, holding that in action for tort wrongdoer is liable for all injuries resulting directly from wrongful act, whether they could or could not have been foreseen by him; McLean v. Dun, 39 U. C. Q. B. 551, holding that a mercantile agency furnishing reports as to the financial condition of merchants was liable for negligence in making a report although the amount of credit on the report was not disclosed; Smith v. Green L. R. 1 C. P. Div. 92 45 L. J. C. P. N. S. 28, 33 L. T. N. S. 572, 24 Week. Rep. 142, holding that in an action for a breach of warranty in the sale of a cow, where the cow was infected with disease, and being placed with other cows, they became infected, the person injured could recover for all the loss: Knowles v. Nunns, 14 L. T. N. S. 592, holding same where the buyer said that the cattle were to be placed with others and loss resulted from disease, seller having stated they were sound.

Cited in note in 52 L.R.A. 40, on damages for tort as affected by loss of profits.

Distinguished in McCurdy v. Wallblon Furniture & Carpet Co. 94 Minn. 326, 102 N. W. 873, 3 Ann. Cas. 468, holding that where goods left with a bailee are wrongfully removed, the rules as to the measure of damages in tort apply.

— Remote and proximate damages.

Cited in Mott v. Chew, 137 Fed. 197, holding that where the defendant delayed in his contract to have stones to ballast a brakewater and the same was injured thereby the breach was the proximate cause of the loss; Nashua Iron & Steel Co. v. Brush, 33 C. C. A. 456, 50 U. S. App. 461, 91 Fed. 213, holding that damages to be recoverable must be the natural and proximate consequence of the act complained of; Cassells' Mill v. Strater Bros. Grain Co. 166 Ala. 274, 51 So. 969, holding that profits from resale of property purchased or from sale of products manufactured therefrom, is too remote to be recovered as damages for breach of contract of sale, unless contemplated by parties as result of breach: Brock v. Gale, 14 Fla. 523, 14 Am. Rep. 356; Stewart v. Lanier House Co. 75 Ga. 582; Letts v. Hackett, Fed. Cas. No. 8,283; Waycross Air Line R. Co. v. Offerman & W. R. Co. 114 Ga. 727, 40 S. E. 738,—holding that damages which may reasonably be considered as within the contemplation of the parties when the contract was made would result upon breach are not too remote to be recovered; O'Conner v. Nolan, 64 Ill. App. 357, holding that damages, however proximately they follow breach of contract, cannot be recovered unless, under circumstances, they are natural result of breach; Lowe v. Turpie, 147 Ind. 652, 37 L.R.A. 233, 44 N. E. 25, holding that damages which are remote and speculative can not be recovered; Creamery Package Mfg. Co. v. Benton County Creamery Co. 120 Iowa, 584, 95 N. W. 188, holding that mere delay in furnishing machinery which does not interrupt an established business will not sustain an action for damages for loss of patronage; Paducah Lumber Co. v. Paducah Water Supply Co. 89 Ky. 340, 7 L.R.A. 77, 25 Am. St. Rep. 536, 12 S. W. 554, holding that a water company was liable for loss by fire caused by turning off of water from hydrants rented by plaintiff; Goddard v. Barnard, 16 Gray, 205, holding that the injury to household goods because of leaky roof could not be recovered for in an action for breach of contract to provide a good roof; Carnegie P. & Co. v. Holt, 99 Mich. 606, 58 N. W. 623, holding that where by reason of a delay in furnishing materials the building was delayed so that stores which came later, injured the foundation, the breach of contract to deliver was not the proximate cause of the injury; McAlister v. Chicago, R. I. & P. R. Co. 74 Mo. 351, holding that where the carrier removed cattle from the car to reload them, which was against the statute, and they were seized to pay the fine for

such unloading, damages therefor were too remote to be recovered; Delafield v. J. K. Armsby Co. 131 App. Div. 572, 116 N. Y. Supp. 71, holding that damages recoverable for breach of contract are such as naturally flow from nonperformance; Allen v. McConihe, 124 N. Y. 342, 26 N. E. 812, holding that the measure is the amount that is the natural, or to be apprehended, and direct and immediate results of the breach; Coppola v. Kraushaar, 102 App. Div. 306, 92 N. Y. Supp. 436, holding that where the defendant failed in his contract to furnish a gown for a bride, which was ordered by the groom, and as a consequence the marriage "was broken," such damages were too remote to be recoverable for in action on the contract; Flynn v. Hatton, 43 How. Pr. 333, on injury to person as a proximate result of the landlord's failure to keep premises in repair; Milton v. Hudson River S. B. Co. 37 N. Y. 210; Huyett & S. Mfg. Co. v. Gray, 111 N. C. 92, 15 S. E. 940,—on the recovery of remote damages for breach of contract; Herring v. Armwood, 130 N. C. 177, 57 L.R.A. 958, 41 S. E. 96, holding that damages resulting from a failure of the landlord to furnish fertilizers to his tenant are too remote for consideration; Cherokee Tanning Extract Co. v. Western U. Teleg. Co. 143 N. C. 376, 118 Am. St. Rep. 806, 55 S. E. 777, holding that damages for breach of contract must not be speculative or remote but the proximate consequence of the breach, to be recoverable; Hayes v. Cooley, 13 N. D. 204, 100 N. W. 250, holding that rule for measuring damages which are recoverable for breach of contract, under Rev. Codes, is compensation for all detriment proximately and naturally caused by breach; Daniels v. Ballantine, 23 Ohio St. 532, 13 Am. Rep. 264, holding that where a barge was destroyed by a storm, which but for the defendant's delay in towing the barge, would not have affected the boat, the storm was the proximate cause and not the delay; Pegram v. Stortz, 31 W. Va. 220, 6 S. E. 485, on the necessity of the damages being the proximate result of the breach of contract; Prescott v. Connell, 22 Can. S. C. 147 (dissenting opinion), on the breach of contract as the proximate cause of the injury; Price v. Wright, 35 N. B. 26, holding that the loss of marriage arising from a permanent disfigurement caused by the bite of a dog was too remote to be allowed for in damages; Leggo v. Welland Vale Mfg. Co. 2 Ont. L. Rep. 45, holding that the plaintiffs could not recover for a destruction of tools by an accidental fire, while they were in the hands of a gratuitous bailee under a contract, which had been broken by failure to return the tools; Stewart v. Shannorp, 25 Ont. Rep. 544, holding that where seeds were delivered to a party to be sown and the produce returned, the injury to the land by reason of injurious seed being sown was too remote to be recovered for; Wilson v. Newport Dock Co. L. R. 1 Exch. 177, 35 L. J. Exch. N. S. 97, 4 Hurlst. & C. 232, 12 Jur. N. S. 233, 14 L. T. N. S. 230, 14 Week. Rep. 558, holding that where a ship was grounded and wrecked because the dockowners were unable to allow the ship to be docked as agreed, the damages therefor were too remote to be recovered; McMahon v. Field, L. R. 7 Q. B. Div. 591, 50 L. J. Q. B. N. S. 552, 45 L. T. N. S. 381, 46 J. P. 245, holding that where the defendant broke his contract to stable the plaintiff's horses, whereby they were taken sick because exposed to the weather, and depreciated in value, such depreciation may be recovered as the direct result of the breach of contract; The Notting Hill, L. R. 9 Prob. Div. 105, 53 L. J. Prob. N. S. 56, 51 L. T. N. S. 66, 32 Week. Rep. 764, 5 Asp. Mar. L. Cas. 241, holding that loss of profits resulting from a delay in reaching a market, caused by a collision, cannot be recovered as damages for the collision; The Argentino, L. R. 13 Prob. Div. 191, 58 L. J. Prob. N. S. 1, 58 L. T. N. S. 643, 36 Week. Rep. 814, holding that loss of profits cannot be recovered for a collision resulting in injury to a vessel,

but only that sum which a ship of that size and description would ordinarily earn.

Cited in note in 8 Eng. Rul. Cas. 414, on remoteness of damages.

Distinguished in Caledonia R. Co. v. Colt, 22 E. R. C. 296, 7 Jur. N. S. 475, 3 L. T. N. S. 252, 3 Macq. H. L. Cas. 833, 1 Paterson S. E. App. Cas. 977, 32 Scot. Jur. 707, holding that the owner of clay property, could not recover against a railroad company the damages which he was forced to pay a lessee as a result of the failure of the railroad to make a substituted road to the property as required by law where he had himself agreed to build the road if the company did not; Marsh v. Joseph [1897] 1 Ch. 213, 66 L. J. Ch. N. S. 128, 75 L. T. N. S. 558, 45 Week. Rep. 209, holding that the same rule of proximate and remote damages does not apply in an action of tort for neglect of duty as in action on contract.

Disapproved in Boyd v. Fitt, 14 Ir. C. L. Rep. 43, holding that damages to plaintiff's business and loss of the agency of another could be recovered as damages for breach of a contract of agency.

— Damages within contemplation of both parties when contract was made.

Cited in Globe Ref. Co. v. Landa Cotton Oil Co. 190 U. S. 540, 47 L. ed. 1171, 23 Sup. Ct. Rep. 754, holding that in case of a breach of contract, a person can only be held responsible for such consequences as may reasonably be supposed to be in contemplation of the parties at the time of making the contract; Vilter Mfg. Co. v. Abeel, 111 C. C. A. 650, 191 Fed. 272, holding that value of building which had to be torn down in consequence of breach of warranty of defendant to install ice plant, was proper element of damage recoverable as being one within contemplation of parties; Dickerson v. Finley, 158 Ala. 149, 48 So. 548; Birmingham Waterworks Co. v. Ferguson, 164 Ala. 494, 51 So. 150; Southern R. Co. v. Lewis, 165 Ala. 451, 51 So. 863; Hunt Bros. Co. v. San Lorenzo Water Co. 150 Cal. 51, 7 L.R.A.(N.S.) 913, 87 Pac. 1093; Williams v. Atlantic Coast Line R. Co. 56 Fla. 735, 24 L.R.A.(N.S.) 134, 131 Am. St. Rep. 169, 48 So. 209; Mitchell v. Henry Vogt Mach. Co. 3 Ga. App. 542, 60 S. E. 295; Albany Phosphate Co. v. Hugger Bros. 4 Ga. App. 771, 62 S. E. 533; Cooper v. National Fertilizer Co. 132 Ga. 529, 64 S. E. 650; Ramsey v. Tully, 12 Ill. App. 463; Goodkind v. Rogan, 8 Ill. App. 413; Chicago Sanitary Dist. McMahon & M. Co. 110 Ill. App. 510; Acme Cycle Co. v. Clarke, 157 Ind. 271, 61 N. E. 561; Gibson v. Fischer, 68 Iowa, 29, 25 N. W. 914; Skinner v. Gibson, 86 Kan. 431, 121 Pac. 513; Milford v. Bangor R. & Electric Co. 104 Me. 233, 30 L.R.A.(N.S.) 531, 71 Atl. 759; True v. International Teleg. Co. 60 Me. 9, 11 Am. Rep. 156; Hopkins v. Sanford, 38 Mich. 611; Paine v. Sherwood, 19 Minn. 315, Gil. 270; Frohreich v. Gammon, 28 Minn. 476, 11 N. W. 88; Sloggy v. Crescent Creamery Co. 72 Minn. 316, 75 N. W. 225; American Exp. Co. v. Jennings, 86 Miss. 329, 109 Am. St. Rep. 708, 38 So. 374; Sycamore Marsh Harvester Mfg. Co. v. Sturm, 13 Neb. 210, 13 N. W. 202; Aultman v. Stout, 15 Neb. 586, 19 N. W. 464; Berg v. Rapid Motor Vehicle Co. 78 N. J. L. 724, 75 Atl. 933; Hamilton v. McPherson, 28 N. Y. 72, 84 Am. Dec. 330; Flynn v. Hatton, 43 How. Pr. 333; Landsberger v. Magnetic Teleg. Co. 32 Barb. 530; Hecla Powder Co. v. Signa Iron Co. 91 Hun, 429, 36 N. Y. Supp. 838; Sloan v. Hart, 150 N. C. 269, 21 L.R.A.(N.S.) 239, 134 Am. St. Rep. 911, 63 S. E. 1037; Wolf v. Studebaker, 65 Pa. 459; Billmeyer v. Wagner, 91 Pa. 92; Jones v. Gilmore, 38 Phila. Leg. Int. 43; Christiernson v. Hendrie & H. Mfg. & Supply Co. 26 S. D. 519, 128 N. W. 608; Livermore Foundry & Mach. Co. v. Union Compress & Storage Co. 105 Tenn. 187, 53 L.R.A. 482, 58 S. W. 270; El Paso & N. E. R. Co. v. Sawyer, 54 Tex. Civ. App. 387, 119 S. W. 110; Jones v. George, 61 Tex. 345, 48 Am. Rep. 280;

Pacific Exp. Co. v. Darnell, 62 Tex. 639; King v. Watson, 2 Tex. App. Civ. Cas. (Willson) 213; Slaughter v. Denmead, 88 Va. 1019, 14 S. E. 833; Humphreysville Copper Co. v. Vermont Copper Min. Co. 33 Vt. 92; Kelley v. LaCrosse Carriage Co. 120 Wis. 84, 102 Am. St. Rep. 971, 97 N. W. 674; Gross v. Heckert, 120 Wis. 314, 97 N. W. 952; Wahl v. Tracy, 139 Wis. 668, 121 N. W. 660 (dissenting opinion); Malueg v. Hatten Lumber Co. 140 Wis. 381, 122 N. W. 1057; Loehr v. Dickson, 141 Wis. 332, 30 L.R.A.(N.S.) 495, 124 N. W. 293; Foss v Heineman, 144 Wis. 146, L.R.A.—, —, 128 N. W. 881; Central Trust Co. v. Clark, 34 C. C. A. 354, 92 Fed. 293; Northwestern Steam Boiler & Mfg. Co. v. Great Lakes Engineering Works, 104 C. C. A. 52, 181 Fed. 38; Bulmer v. R. 3 Can. Exch. 184; Smith v. Green, 23 E. R. C. 566, L. R. 1 C. P. Div. 92, 45 L. J. C. P. N. S. 28, 33 L. T. N. S. 572, 24 Week. Rep. 142; Thompson v. Leach, 18 U. C. C. P. 141,—holding that the measure of damages for the breach of contract is such as arises naturally from the breach itself or such as may be supposed to have been contemplated by the parties when making the contract; Milford v. Bangor R. & Electric Co. 106 Me. 316, 30 L.R.A.(N.S.) 526, 76 Atl. 696, 20 Ann. Cas. 622, holding that water company contracting to furnish water for fire protection is not liable for municipal property burned through company's failure to furnish adequate supply, in absence of express undertaking; Harper Furniture Co. v. Southern Exp. Co. 148 N. C. 87, 30 L.R.A. (N.S.) 483, 128 Am. St. Rep. 588, 62 S. E. 145, holding that special facts of such character that parties may fairly be supposed to have them in contemplation in making contract become relevant in determining damages in suit against carrier for wrongful delay when they naturally follow from breach of contract; Cockburn v. Ashland Lumber Co. 54 Wis. 619, 12 N. W. 49; Shadbolt & B. Iron Co. v. Topliff, 85 Wis. 513, 55 N. W. 854,—holding same as to damages for the breach of an executory contract of sale; Illinois C. R. Co. v. Johnson, 116 Tenn. 624, 94 S. W. 600, holding same and he must show notice to company of special circumstances which give rise to special damages; Choctaw, O. & G. R. Co. v. Jacobs, 15 Okla. 493, 82 Pac. 502; Keystone Drilling Co. v. Stahl, 17 Pa. Co. Ct. 498,—holding same but if special circumstances are made known to the party, they are within the contemplation of the parties; Gibbs v. Gildersleeve, 26 U. C. Q. B. 471; Fraser v. Grand Trunk R. Co. 26 U. C. Q. B. 488,—holding that only damages such as were within the contemplation of both of the parties as the result of a breach at the time the contract was made could be recovered, for the breach; Mitchell v. Clarke, 71 Cal. 163, 60 Am. Rep. 529, 11 Pac. 882, holding that damages which do not naturally flow from the breach are special damages and must be pleaded together with the circumstances warranting them: Weaver v. Penny, 17 Ill. App. 628, holding that where a party sold diseased sheep, not knowing them to be such, and the plaintiff lost other cattle because they were placed with his, he could not recover for such as he lost; Tower v. Pauly, 67 Mo. App. 632, holding that it was error to strike from the complaint a claim for damages which were reasonably within the contemplation of the parties, and neither too remote nor speculative; Burr v. Redhead, 52 Neb. 617, 72 N. W. 1058, holding that all damages in contemplation of the parties to the contract, or which naturally may result from a breach of warranty, accrue in favor of the party injured; Hoye v. Pennsylvania R. Co. 114 App. Div. 821, 100 N. Y. Supp. 190, on the recovery of only such damages as were within the contemplation of the parties, for the breach of contract; Hockersmith v. Hanley, 29 Or. 27, 44 Pac. 497; Leesville Mfg. Co. v. Morgan Wood & Iron Works, 75 S. C. 342, 55 S. E. 768,—holding that a seller who fails to carry out his contract of

sale, is liable for the difference between the contract price and the market price at time and place of delivery as being the damages within the contemplation of the parties; Ellison v. Johnson, 74 S. C. 202, 5 L.R.A.(N.S.) 1151, 54 S. E. 202, holding that damages for breach of contract of sale, are such as may fairly and reasonably be considered as naturally arising from breach of the contract according to the usual course of things; Houston & T. C. R. Co. v. Hill, 63 Tex. 381, 51 Am. Rep. 642, holding that where the company repudiated its contract to carry a number of people at certain rates, the measure was the damages as were incidental to the breach, and such as might reasonably have entered the minds of the parties when making the contract: Montgomery v. Boucher, 14 U. C. C. P. 45, holding that interest should be allowed on a note after maturity at the rate specified in the note, as being that which was contemplated by the parties; Behan v. Grand Trunk R. Co. 11 Quebec L. R. 60, holding that damages for loss of custom arising from nondelivery of goods are too remote to be held within the contemplation of the parties and cannot be recovered; Wilson v. Lancashire & Y. R. Co. 30 L. J. C. P. N. S. 232, 9 C. B. N. S. 632, 7 Jur. N. S. 862, 3 L. T. N. S. 859, 9 Week. Rep. 635; Horne v. Midland R. Co. L. R. 7 C. P. 583, L. R. 8 C. P. 131, 42 L. J. C. P. N. S. 59, 28 L. T. N. S. 312, 21 Week. Rep. 481, 6 Eng. Rul. Cas. 617,—holding that the measure of damages for breach of contract to deliver goods is the damage reasonably considered as arising naturally from the breach of contract, or such as might be considered as reasonably within the contemplation of both parties when contract was made.

Cited in 2 Mechem, Sales, 1415, on measure of damages for seller's breach of contract where special circumstances were in contemplation.

Distinguished in Green-Wheeler Shoe Co. v. Chicago, R. I. & P. R. Co. 130 Iowa, 123, 5 L.R.A.(N.S.) 882, 106 N. W. 498, 8 Ann. Cas. 45; Heiser v. Loomis, 47 Mich. 16, 10 N. W. 60; Christianson v. Chicago, St. P. M. & O. R. Co. 67 Minn. 94, 69 N. W. 640; Johnson v. Atlantic Coast Line R. Co. 140 N. C. 574, 53 S. E. 362; Bowas v. Pioneer Tow Line, 2 Sawy. 21, Fed. Cas. No. 1713; Hudson v. Atlantic Coast Line R. Co. 142 N. C. 198, 55 S. E. 103,—holding that in an action for tort, it is not necessary that the result and the injury received should have been contemplated to make the tort feasor liable; Cate v. Cate, 50 N. H. 144, 9 Am. Rep. 179, holding that the rule as to damages being within the contemplation of the parties does not apply in an action of tort; Hodgins v. Hodgins, 13 U. C. C. P. 146, holding that the measure of damages in an action for breach of covenant for quiet possession was not to be governed by the consideration paid, but the party was to be allowed substantial damages.

— Effect of knowledge of special damnatory conditions.

Cited in New Orleans & N. E. R. Co. v. Meridian Waterworks Co. 18 C. C. A. 519, 30 U. S. App. 749, 72 Fed. 227, holding that for a breach of contract to furnish water for fire fighting purposes, which use was known to both, the party would be entitled to recover for loss by fire occasioned by the breach; McDonald v. Kansas City Bolt & Nut Co. 8 L.R.A.(N.S.) 1110, 79 C. C. A. 298, 149 Fed. 360, holding that the measure are those damages which are the natural and probable result of a breach, those which the parties may reasonably anticipate as the result of a breach under the particular circumstances known to both parties; Port Blakely Mill Co. v. Sharkey, 42 C. C. A. 329, 102 Fed. 259, holding that where at time of agreement to deliver horses on certain day, defendant was informed that horses were to be used in freighting goods, and also were informed as to earnings that could be made, jury might consider what might have been earned by horses during time of delay in delivering;

Philadelphia, W. & B. R. Co. v. Lehman, 56 Md. 209, 40 Am. Rep. 415; Maryland Ice Co. v. Arctic Ice Mach. Mfg. Co. 79 Md. 103, 29 Atl. 69; Webster v. Woolford, 81 Md. 329, 32 Atl. 319; Shouse v. Neiswaanger, 18 Mo. App. 236; Skirm v. Hilliker, 66 N. J. L. 410, 49 Atl. 679; Starbird v. Barrons, 38 N. Y. 230,—holding that the special circumstances under which a contract is made must be known to both parties, in order that special damages arising from a breach of the contract, as a result of these circumstances may be recovered; Silver v. Kent, 60 Miss. 124; Rogan v. Wabash R. Co. 51 Mo. App. 665,—holding same as to contract with carrier to deliver goods; Crutcher v. Choctaw, O. & G. R. Co. 74 Ark. 358, 85 S. W. 770, holding that if there are special circumstances augmenting the damages from delay, which are known to both parties, the carrier will be liable for the special damages; Boutin v. Rudd, 27 C. C. A. 526, 53 U. S. App. 525, 82 Fed. 685, holding same where party delayed in towing in a schooner; Chicago, R. I. & P. R. Co. v. Planters' Gin & Oil Co. 88 Ark. 77, 113 S. W. 352, on the necessity of notice of special circumstances to render carrier liable for delay in shipments; Hale Bros v. Milliken, 5 Cal. App. 344, 90 Pac. 365, holding that where all the circumstances are known to both parties, such damages may be recovered as the parties contemplated would probably result, at the time of making of the contract; Cohn v. Norton, 57 Conn. 480, 5 L.R.A. 572, 18 Atl. 595, holding that where the nature of the business is such that a promise is implied to use utmost diligence, the importance of the business need not be disclosed to render special damages recoverable; Fairbanks, M. & Co. v. Hooper, 147 Ky. 154, 143 S. W. 1025; Schleuter v. Sherman Bros. & Co. 169 Ill. App. 386,—holding that if special damages for breach of contract of sale are claimed because property was used for particular purpose, it must be shown that vendor at time of making sale knew that such property was designed for such special use; Price v. Art Printing Co. 112 Ill. App. 1, on the notice of all peculiar circumstances as making the other party liable for all consequential damages resulting from a breach; Union Foundry Works v. Columbia Iron & Steel Co. 112 Ill. App. 183, holding that special and consequential damages for breach of contract can only be recovered where defendant at time of making of contract, has been informed of purchases for which property ordered was desired; Bushnell v. Geo. E. King Bridge Co. 140 Iowa, 405, 118 N. W. 407, holding that purchaser of lumber, in absence of any indication in contract that lumber was to be used in building bridge, under another contract, cannot recover damages for failure to complete bridge in time by failure of seller to furnish lumber as agreed; Feland v. Berry, 130 Ky. 328, 113 S. W. 425, holding that where defendant was notified, when contract was made, that it was made with reference to subcontract, on defendant's breach plaintiff could recover damages caused by his being compelled to break subcontract, because of defendant's breach of original contract; Pulaski Stove Co. v. Miller's Creek Lumber Co. 138 Ky. 372, 128 S. W. 96, holding that where special circumstances showing that breach of contract will involve special damages are communicated to party when contract is made, such special damages may be recovered, though not result of ordinary breach; Thems v. Dingley, 70 Me. 100, 35 Am. Rep. 310, holding that the ordinary measure of damages for a breach of warranty is the difference between the value of the property as warranted and what it was, but additional damages are recoverable, if contemplated by both parties; South Gardiner Lumber Co. v. Bradstreet, 97 Me. 167, 53 Atl. 1110, on the measure of damages where the special circumstances affecting the subject matter of the contract are known to both parties; Camden

Consol. Oil Co. v. Schlens, 59 Md. 31, 43 Am. Rep. 537, holding that the measure, where the article is contracted for, for a foreign market, and such is disclosed on the contract for its delivery, is the difference in market price of article contracted for at date of arrival, and the price realized with costs and expenses; Swift River Co. v. Fitchburg R. Co. 169 Mass. 326, 61 Am. St. Rep. 288, 47 N. E. 1015, holding that damages could not be recovered for causing a mill to remain idle, by reason of a delay in shipping and delivering certain boilers, unless the company was notified to be prompt; Wilson v. Reedy, 32 Minn. 256, 20 N. W. 153, holding that the parties could not recover for injury to grain by delay in harvesting, because of a failure of the harvesting machine to work as warranted; Francis v. Western U. Teleg. Co. 58 Minn. 252, 25 L.R.A. 406, 49 Am. St. Rep. 507, 59 N. W. 1078, on the necessity of knowlege of the company of the special circumstances surrounding the sending of the message to make them liable for special damages; Olson v. Schultz, 67 Minn. 494, 36 L.R.A. 790, 64 Am. St. Rep. 437, 70 N. W. 779 (dissenting opinion), on the knowledge of special circumstances as affecting a recovery in tort; Crowley v. Burns Boiler & Mfg. Co. 100 Minn. 178, 110 N. W. 969, holding that the measure of damages where one party contracted to furnish a boiler to another so as to enable him to complete his contract with a third, was the difference between the contract price and price paid for another boiler, where the parties knew of both contracts; Chalice v. Witte, 81 Mo. App. 84, holding that the vendor who fails to deliver an article according to contract is liable for such damages as were reasonable within the contemplation of the parties, and would result naturally under special circumstances known to both parties when contract was made; Wall v. St. Joseph Artesian Ice & Cold Storage Co. 112 Mo. App. 659, holding that where the damage is such that the party occasioning the breach, from their knowledge of facts and circumstances might have anticipated as a natural result of the breach, they are liable therefor; Wolcott v. Mount, 38 N. J. L. 496, 20 Am. Rep. 425, holding that the measure is the difference in the value of the produce sold and what the value of the product would have been if the seed was as warranted where the vendor of the seed knew of the use to which it was to be put; Jones v. National Printing Co. 13 Daly, 92, holding that where the buyers notified the seller that they must have the paper contracted for by a certain date, they were entitled to recover for the loss incurred by leaving their presses idle; Brauer v. Oceanic Steam Nav. Co. 34 Misc. 127, 69 N. Y. Supp. 465, holding that damages arising naturally, but from circumstances peculiar to special case, are not recoverable unless circumstances were known to person who has broken contract; Passinger v. Thorburn, 34 N. Y. 634, 90 Am. Dec. 753, holding that where there is a special warranty and a breach the plaintiff is entitled to such damages as were the natural and necessary consequence thereof; Reilly v. Connors, 65 App. Div. 470, 72 N. Y. Supp. 834, holding that loss of rent could not be recovered for failure to complete a house in time unless notice of intention to rent was given the contractor; Champion Ice Mfg. & Cold Storage Co. v. Pennsylvania Iron Works Co. 68 Ohio St. 229, 67 N. E. 486, holding that the owner of a plant may recover for the use of a machine which is an essential part of the plant where there is a failure to deliver on time, if the circumstances are known to both parties; Booth v. Spuyten Duyvil Rolling Mill Co. 60 N. Y. 487, holding same where the manufacturer had notice of the special circumstances surrounding the use of the article ordered; Stranahan Bros. Catering Co. v. Coit, 55 Ohio St. 398, 4 L.R.A.(N.S.) 506, 45 N. E. 634, holding that where one party contracted to deliver pure milk and cream to a cheese factory

which he knew was to be used for manufacturing purposes was liable if he delivered impure milk; Lewis v. Rountree, 79 N. C. 122, 28 Am. Rep. 309; Greene v. Creighton, 7 R. I. 1,—holding that where a party purchased an estate for a particular purpose, known only to himself, he could not recover of his grantor damages for an easement existing upon the estate, which made it inadaptable to this special use; Spears v. Fields, 72 S. C. 395, 52 S. E. 44, holding that in an action in claim and delivery by mortgagee against mortgagor, the mortgagor can not set up damages, not ordinarily arising out of the transaction, unless he shows that the mortgagee had notice of the peculiar circumstances; Reese v. Miles, 99 Tenn. 398, 41 S. W. 165, holding that for breach of warranty of quality of a commodity brought with the vendor's knowledge that it is to be sold in another market, the measure is the losses actually sustained and loss of profits, if the article had been as warranted; Hooper v. East, 19 Tex. Civ. App. 531, 48 S. W. 764, holding that damages arising from failure of lessor to furnish lessee quality of rice seed called for by contract is difference between value of crop raised and crop which would have been raised, if seed had been furnished according to contract; Hammer v. Schoenfelder, 47 Wis. 455, 2 N. W. 1129, holding that where the special purpose for which goods are wanted is known to the vendor, he is liable on the contract for such special damage resulting from a failure to deliver, such being within the contemplation of the parties; Northern Supply Co. v. Wangard, 123 Wis. 1, 107 Am. St. Rep. 984, 110 N. W. 1066, holding that injury to old potatoes with which the new ones were placed, could be recovered for, if the vendor had reason to know that they would be placed together; Feehan v. Hallenan, 13 U. C. Q. B. 440, holding that it is only the immediate injury following the contract broken which is to be compensated for, unless both parties are acquainted with special circumstances connected with the contract; Gee v. Lancashire & Y. R. Co. 30 L. J. Exch. N. S. 11, 6 Hurlst & N. 211, 6 Jur. N. S. 1118, 3 L. T. N. S. 328, 9 Week. Rep. 103, holding that wages of working men kept idle because of delay in delivering goods, can not be recovered as damages because too remote; Cory v. Thames Ironworks & Ship Bldg. Co. L. R. 3 Q. B. 181, 37 L. J. Q. B. N. S. 68, 17 L. T. N. S. 495, 16 Week. Rep. 475, holding that the measure of damages for breach of contract for delivery of a chattel, which the vendee intended for one purpose, and which the vendor supposed was for another more obvious reason, is the loss of profit which might have been made by the use supposed by the seller provided there has been that much damage; Elbinger Actien-Gesellschafft v. Armstrong, L. R. 9 Q. B. 473, 43 L. J. Q. B. N. S. 211, 30 L. T. N. S. 871, 23 Week. Rep. 127, holding that for breach of contract for the delivery of articles intended to be used to fill a subcontract, the party could not recover for damages resulting from the breach of the subcontract unless the other knew of it; Skinner v. London M. Ins. Corp. L. R. 14 Q. B. Div. 882, 54 L. J. Q. B. N. S. 437, 53 L. T. N. S. 191, 33 Week. Rep. 628, holding that a corporation was not liable for special damages arising from a refusal to register stock unless they knew of the special circumstances; Bostock v. Nicholson [1904] 1 K. B. 725, 73 L. J. K. B. N. S. 524, 20 Times L. R. 342, 9 Com. Cas. 200, 53 Week. Rep. 155, 91 L. T. N. S. 626, holding that where the parties did not make known the use to which acid was to be put, they could recover the value of the acid if it was not according to contract, but not for damage to the goodwill of the plaintiff's business or damages paid to others for selling impure acid; Hamilton v. Magill, Ir. L. R. 12 C. L. 186, holding that where the parties had notice that the goods contracted for were purchased with a

view to carry out a contemplated subcontract, the measure of damages for a breach is the difference between the amount he would have received under the sub-contract and what he did receive; Thol v. Henderson, L. R. 8 Q. B. Div. 457, 46 L. T. N. S. 483, 46 J. P. 422, holding that the plaintiffs could not recover for loss of profits on resale under a contract therefor, where the contract of sale was unknown to both parties, though it was known that they were intended for resale; Hammond v. Bussey, L. R. 20 Q. B. Div. 79, 57 L. J. Q. B. N. S. 58, holding that where in an action for breach of warranty, the party had to pay damages for a breach of warranty on a resale because of this breach, the amount recovered in that action is the measure of damages in this, together with costs and expenses, where the contract for resale was known to both parties; Finlay v. Chirney, L. R. 20 Q. B. Div. 494, 57 L. J. Q. B. N. S. 247, 58 L. T. N. S. 664, 36 Week. Rep. 534, 52 J. P. 324, holding that special damages resulting from breach of promise to marry, such as the giving up of a position by one party cannot be recovered unless known to both parties when the promise was made; Couper v. Richards 3 Times L. R. 739, holding that for the loss of the sale of a cargo of nitro-phosphate, the ship owners were not liable unless they had notice of the special consequences attending the failure to deliver same on time; Lepla v. Rogers [1893] 1 Q. B. 31, 5 Reports, 57, 68 L. T. N. S. 584, 57 J. P. 55, holding that where leased premises were not to be sublet without permission, but they were sub-let for purpose of manufacturing turpentine, and a fire resulted therefrom, the loss by fire was a natural and direct result of the breach of covenant; Agius v. Great Western Colliery Co. [1899] 1 Q. B. 413, 68 L. J. Q. B. N. S. 312, 47 Week. Rep. 403, 80 L. T. N. S. 140, holding that where a contract to supply coal to the plaintiff to be furnished to some ships under another contract, was broken, the plaintiff could recover the amount of damages and costs that he was compelled to pay the ship owners, if both parties knew of the contract of resale; Die Elbinger Actien-Gesellschafft Fur Fabrication von Eisenbahn Material v. Armstrong, 23 E. R. C. 551, L. R. 9 Q. B. 473, 43 L. J. Q. B. N. S. 211, 30 L. T. N. S. 871, 23 Week. Rep. 127, holding that recovery could be had of penalties purchaser was obliged to pay where purchaser notified seller that he was obliged to make delivery to a third person under penalty and seller had agreed to make delivery at specified dates; Grebert-Borgnis v. Nugent, L. R. 15 Q. B. Div. 85, 54 L. J. Q. B. N. S. 511, holding same where the party failed to furnish goods contracted for, knowing them to be intended to fill another contract of resale.

Cited in Benjamin, Sales 5th ed. 994, on necessity for buyer's communication to seller of special consequences that will result from a breach of the contract; 3 Page, Contr. 2404, on measure of damages for breach of contract by party ignorant of special circumstances.

Distinguished in Booth v. Spuyten Duyvil Rolling Mill. Co. 60 N. Y. 487, holding that where parties to contract of sale have such knowledge of special circumstances affecting question of damages as that it may be fairly inferred they contemplated particular rule for estimating them, that rule will be adopted.

— Enhanced expense or diminished profits.

Cited in Hitchcock v. Anthony, 28 C. C. A. 80, 54 U. S. App. 439, 83 Fed. 779, holding that profits which are reasonably certain may be recovered for breach of contract; Ye Seng Co. v. Corbitt, 9 Fed. 423, holding that where the parties chartered a vessel to carry certain persons, and the owners broke their contract, the former were entitled to recover the profit which they lost by reason of having to pay a higher rate to another to carry them; The Henry Buck,

39 Fed. 211, holding that for breach of contract to tow a raft of lumber, the party could not recover demurrage incurred because the ship was not loaded on time because of the wrecking of the raft; Taylor Mfg. Co. v. Hatcher Mfg. Co. 3 L.R.A. 587, 39 Fed. 440, holding that where one party has broken a contract which the other has partly performed, the latter may recover his expenditures properly made and the profit he would have made but not speculative and remote; United States v. Beham, 110 U. S. 338, 28 L. ed. 168, 4 Sup. Ct. Rep. 81; Kelly v. Fahrney, 38 C. C. A. 103, 97 Fed. 176,—on the measure of damages for breach of contract to loan money; De Ford v. Maryland Steel Co. 51 C. C. A. 59, 113 Fed. 72, holding that the measure of damages for a delay in completing vessels is the interest on the payments made prior to time of delivery for the time of delay; Howard v. Stilwell & B. Mfg. Co. 139 U. S. 199, 35 L. ed. 147, 11 Sup. Ct. Rep. 500, holding that profits which are lost because of a delay in furnishing mill machinery necessitating the closing down of the mill, are not recoverable as damages for the breach of contract; Erie City Iron Works v. Tatum, 1 Cal. App. 286, 82 Pac. 92, holding that the measure for a breach of warranty is the excess in value of the boiler as it would have been if as warranted over the value as it was and added to the loss incurred in attempting to use it; Hubbard v. Rowell, 51 Conn. 423, holding that where a party contracted for certain advertising space, and the other contracting party knew that he intended to resell the space to others, he could recover the profit he would have made by such resale; Curly v. MacLannan, 17 App. D. C. 170, on the loss of profits as the measure of damages for breach of contract; Atlanta & St. A. B. R. Co. v. Thomas, 60 Fla. 412, 53 So. 510, holding that expense of hauling to more distant point may be recovered for failure to locate depot at agreed point, if character of losses is such that they plainly should have been contemplated by parties as probable result of breach of contract; Savannah, F. & W. R. Co. v. Pritchard, 77 Ga. 412, 4 Am. St. Rep. 92, 1 S. E. 261, on the measure of damages for delay in delivering goods shipped; Olmstead v. Burke, 25 Ill. 86, holding that loss of probable profits constitutes no part of general damages for breach of contract: Finnegan v. Allen, 60 Ill. App. 354, holding that probable profits of business, cannot as general rule be recovered because they cannot be proved; Rhea Thielens Implement Co. v. Racine Malleable & Wrought Iron Co. 89 Ill. App. 463, holding that the loss of profits was not the measure of damages unless the party had notice that the contract of purchase was made for the purpose of resale under an existing contract, or in advance of the delivery to the purchaser; Ryan Car Co. v. Gardner, 154 Ill. App. 565, holding that loss of sale and consequent loss of profits are not competent to be shown in connection with breach of contract which it does not appear was made by parties in contemplation of such sale; Connersville Wagon Co. v. McFarlan Carriage Co. 166 Ind. 123, 3 L.R.A.(N.S.) 709, 76 N. E. 294, holding that for breach of contract whereby the other party is deprived of the use of a machine, the measure of damages is the reasonable value of the use of the machine, and not conjectural profits; Ilichhorn v. Bradley, 117 Iowa, 130, 90 N. W. 592, on the recovery or profits as within the contemplation of the parties; Elizabethtown & P. R. Co. v. Pottinger, 10 Bush, 185, holding that loss of profits which are the natural and proximate consequence of the breach and which may reasonably be inferred to have been contemplated by the parties, may be recovered; Harvey v. Connecticut & P. River R. Co. 124 Mass. 421, 26 Am. Rep. 673, holding that facts that owner informed carrier that he wished to make contracts for sale

of goods, and that he did make such contracts afterwards, do not entitle him to recover of carrier profits which he would have made, but for breach of contract of carriage; Gagnon v. Sperry & H. Co. 206 Mass. 547, 92 N. E. 761, holding that loss of propective profits may be recovered where it appears such loss was natural result of breach of contract, and within contemplation of parties, and such profits are certain and capable of proof; Equitable Gaslight Co. v. Baltimore Coal Tar & Mfg. Co. 65 Md. 73, 3 Atl. 108, on the recovery of remote and contingent profits; Winslow Elevator Co. v. Hoffman, 107 Md. 621, 17 L.R.A.(N.S.) 1130, 69 Atl. 394, holding that loss of rents caused by breach of contract to erect suitable elevator in office building is not recoverable; McGaw v. Acker, M. & C. Co. 111 Md. 153, 134 Am. St. Rep. 592, 73 Atl. 731, holding that when wrongful act of defendant involved plaintiff in litigation with others, expense incurred in such litigation is to be regarded as natural consequence of wrongful act, and may be recovered as damages; McKinnon v. McEwan, 48 Mich. 106, 42 Am. Rep. 458, 11 N. W. 828, holding that loss of profits can not be made the measure of damages, where the profits are conjectural, speculative, and depend on chance, or have no reference to the nature of the contract; Industrial Works v. Mitchell, 114 Mich. 29, 72 N. W. 25, holding that where one party contracted to deliver a dredge, knowing that the other party needed it to complete a contract with some third party, and failed to do so, the profits that the second party would have made from his second contract, may be recovered; Mississippi & R. River Boom Co. v. Prince, 34 Minn. 71, 24 N. W. 344, holding that profits that would have been made but for the breach of the contract may be recovered as damages; Cargill v. Thompson, 57 Minn. 534, 59 N. W. 638, holding that as damages for a breach of covenant to furnish a specific water power to propel a mill, profits lost by the reason of failure to do so may be recovered; Vicksburg & M. R. Co. v. Ragsdale, 46 Miss. 458, holding that speculative profits expected to arise out of a new business but which were prevented by the breach of contract can not be recovered; Connoble v. Clark, 38 Mo. App. 476, holding that profits which are contingent and uncertain can not be recovered as damages for breach of warranty; Dill v. Crum, 39 Mo. App. 508, holding that where one party gave his note to another under a contract whereby the latter was to pay the former's debts and prevent a judgment being recovered thereon, the measure of damages where he allowed a judgment to be recovered, was the amount of the judgment and costs; Wilson v. Russler, 91 Mo. App. 275, holding that instruction that measure of damages for failing to deliver logs according to contract, was net profit purchaser could have made had logs been delivered, was fatally bad; French v. Ramge, 2 Neb. 254, holding that allowance of damage sustained by reason of failure to ship goods, according to contract, upon basis of calculation of profits to arise from trade in goods, is inadmissible; Violet v. Rose, 39 Neb. 660, 58 N. W. 216, holding that the profit to be made on a resale of land, was not to be the measure of damages for a failure to complete a contract for the sale of land, where the contract for resale was not known to both parties; Wolcott v. Mount, 36 N. J. L. 262, 13 Am. Rep. 438, holding that loss of profits may be recovered for breach of contract if they are the direct and necessary result thereof, and probably within the contemplation of the parties as a result of non-performance; Hamilton v. McPherson, 28 N. Y. 72, 84 Am. Dec. 330, holding that speculative profits, or accidental or consequential losses are not recoverable for breach of contract; Sledge v. Reid, 73 N. C. 440, on the recovery of prospective profits, in action for breach

of covenant; American Pure Food Co. v. Elliott & Co. 151 N. C. 393, 31 L.R.A. (N.S.) 910, 66 S. E. 451, holding that profits that would have been made had goods come up to samples shown at time of sale, cannot be recovered when they are too speculative or remote; Blagen v. Thompson, 23 Or. 239, 18 L.R.A. 315, 31 Pac. 647, holding that the loss of profits may be recovered as damages where they would have accrued out of the purchase of land, although the amount of the profit is uncertain; Clyde Coal Co. v. Pittsburg & L. E. R. Co. 226 Pa. 391, 26 L.R.A.(N.S.) 1191, 75 Atl. 596, holding that profits arising from subsequent contract though made on faith of original contract and capable of ascertainment, are not recoverable in action for breach of original contract; Sitton v. Macdonald, 25 S. C. 68, 60 Am. Rep. 484, holding that the loss of stock on hand resulting from a failure to deliver machinery on time is the measure of damages but not the profits which might have been received; Chisholm & M. Mfg. Co. v. United States Canopy Co. 111 Tenn. 202, 77 S. W. 1062, holding that profits which would have been realized from the contract had it been completed, may be allowed where they are not uncertain, or arise from special undisclosed circumstances; Fraser v. Echo Min. & Smelting Co. 9 Tex. Civ. App. 210, holding that profits for the use of a machine in a business that was new and uncertain could not be recovered for failure to deliver machine on time; Kendall Bank Note Co. v. Sinking Fund Comrs. 79 Va. 563, holding that the person is entitled to prospective profits when prevented from doing the work by the other party, but such profits should be such as he was likely to have realized as the direct fruits of the contract; Duke v. Norfolk & W. R. Co. 106 Va. 152, 55 S. E. 548, holding that where a railroad company refused to take ties contracted for, the measure of damages was the difference between the cost of making and delivering and the contract price; Sedro Veneer Co. v. Kwapil, 62 Wash. 385, L.R.A.—, —, 113 Pac. 1100, holding that loss of prospective profits on contemplated resales of eggs is sufficiently shown where it appeared that bona fide sales thereof were made to customers; Ingalls v. Beall, 68 Wash. 247, 122 Pac. 1063, holding that measure of damages for breach of covenant to erect building being diminished market rental value of premises, same may be recovered under delegation of general damages; Revett v. Globe Nav. Co. 68 Wash. 300, 123 Pac. 459, holding that upon breach of charter party, by failure to make voyage, sailing date being essence contract because of necessity of performance of contract to build dredge by shipper, measure of damages is shipper's expense incurred in retaining idle employees during period of delay; Guetzkow Bros. Co. v. A. H. Andrews & Co. 92 Wis. 214, 52 L.R.A. 209, 53 Am. St. Rep. 909, 66 N. W. 119, holding that loss of profit, if it be reasonable may be recovered for, if the party selling the goods knew that they were to be used to complete a contract with a third party; Lloy v. Dartmouth, 30 N. S. 208, holding that loss of the profits arising from the use of land cannot be made the measure of damages in an action for damages for overflowing the land; Pictou Foundry & Mfg. Co. v. Archibald, 30 N. S. 262, holding that the party was not entitled to recover for loss of profits because of failure of the other to furnish machinery where if there had been no breach, the machinery could not have been used; Lowe v. Robb Engineering Co. 37 N. S. 326, holding that in an action for damages for breach of contract the measure is the profit which the party would have made had he not been prevented from performing the contract; Thompson v. Corbin, 41 N. S. 386 (dissenting opinion); Corbet v. Johnson, 10 Ont. App. Rep. 564,—on the right to recover for loss of profits arising from breach of contract to furnish

certain machinery; Crosby v. Yarmouth Street R. Co. 45 N. S. 330, holding that prospective profits upon verbal contracts will not be allowed as damages for obstruction of mill by backing water; Hendrie v. Neelon, 3 Ont. Rep. 603, holding that loss of profits could not be recovered for breach of contract for sale of timber; Marrin v. Graver, 80 Ont. Rep. 39, holding that loss of profits cannot be recovered for failure of landlord to deliver possession to the tenant; Watrous v. Bates, 5 U. C. C. P. 366, holding that profits which were lost as a direct and immediate result of breach of contract could be recovered; Shaver v. Great Western R. Co. 6 U. C. C. P. 321, holding that loss of profits could not be recovered for breach of contract, where the special circumstances were not known to both parties; Horne v. Midland R. Co. 5 E. R. C. 506, L. R. 8 C. P. 131, 42 L. J. C. P. N. S. 59, 28 L. T. N. S. 312, 21 Week. Rep. 481, holding that although seller of military shoes to French Army notified railroad company that delivery would have to be made at a certain date, still there could be no recovery for the lose of special profits, but only of ordinary profits where consignee refused to accept goods because of delay and cessation of the Franco-Prussian war; De Mattos v. Gibson, 30 L. J. Ch. N. S. 145, 1 Johns. & H. 79, 7 Jur. N. S. 282, 3 L. T. N. S. 121, holding that loss of profits which are remote and speculative cannot be recovered; Woodger v. Great Western R. Co. L. R. 2 C. P. 318, 36 L. J. C. P. N. S. 177, 15 L. T. N. S. 579, 15 Week. Rep. 383, holding that hotel expenses while waiting for a parcel of samples which were delayed, were too remote damages to be recovered for the breach of contract to deliver on time, in the absence of knowledge of special circumstances; Prehn v. Royal Bank, L. R. 5 Exch. 92, 39 L. J. Exch. N. S. 41, 21 L. T. N. S. 830, 18 Week. Rep. 463, holding that the measure of damages for breach of contract contained in letter of credit was the commission paid in covering the bills drawn and the notarial, and telegraphic expenses of protesting the bills, Williams v. Peel River Land Co. 55 L. T. N. S. 689, on the loss of profits by reason of a wrongful detention of the property as the measure of damages.

Cited in notes in 53 L.R.A. 42, 43, 51, 87, 90, on lost profits on contract as damages; 22 L.R.A.(N.S.) 590, on loss of profits as element of damages for cutting off heat, water, or gas; 52 L.R.A. 40, on lost profits from tort as damages.

Cited in Benjamin, Sales 5th ed. 976, on profits of ordinary use of chattel as measure of damages for seller's breach of contract; Benjamin, Sales 5th ed. 984, on buyer's right to recover loss of profits of subsale of goods for which there is no market; Benjamin, Sales 5th ed. 986, on effect of buyer's general intention to resell on measure of damages for seller's breach of contract.

Distinguished in Scott v. Rogers, 4 Abb. App. Dec. 157, holding that where the article has a fixed market value at a certain time and place, and through a breach of contract a lesser price is received, the owner can recover the difference; Lalor v. Burrows, 18 U. C. C. P. 321, holding that the plaintiff was entitled to recover the expense of completing the contract in a reasonable manner made necessary by defendant's failure to do so; Anger v. Cook, 39 U. C. Q. B. 537, holding that loss of profits were sometimes recoverable in an action of tort; Bradshaw v. Lancashire & Y. R. Co. L. R. 10 C. P. 189, 44 L. J. C. P. N. S. 148, 31 L. T. N. S. 847, 23 Week. Rep. 310, holding that the administrator of the estate could recover for loss resulting during the life of the deceased, to his estate because of his inability to attend to business because of his injuries resulting from accident on the railroad; Phillips v. London & S. W. R. Co. L. R. 5 C. P. Div. 280, 49 L. J. C. P. N. S. 233, 42 L. T. N. S. 6, 44 J. P. 217, holding that loss of profits sustained through inability to continue

a lucrative trade or profession may be recovered in an action for personal injury.

— Loss of use of property.

Cited in Levinski v. Middlesex Bkg. Co. 34 C. C. A. 452, 92 Fed. 449, holding that loss of rents because the party was unable to build the houses on account of a breach of contract to loan money was too remote to be recovered as damages for the breach; Washington & G. R. Co. v. American Car Co. 5 App. D. C. 524, holding that the measure of damages for failure to deliver cars according to a contract, when time is of the essence of the contract, is the rental value of the car for the time withheld; Berkey & G. Furniture Co. v. Hascall, 123 Ind. 502, 8 L.R.A. 65, 24 N. E. 336, holding that the measure was the difference in value of the rooms furnished and unfurnished for the length of time the party delayed in delivering hotel furnishings to a hotel keeper, thus depriving of the use of several rooms; Alexander v. Bishop, 59 Iowa, 572, 13 N. W. 714 (dissenting opinion), on the measure of damages for withholding leased premises; Furstenburg v. Fawsett, 61 Md. 184, holding that for a breach of contract to remove timber from land the measure of damages is the value of the land to him for a reasonable time to complete the contract; Winslow Elevator Co. v. Hoffman, 107 Md. 621, 17 L.R.A.(N.S.) 1130, 69 Atl. 394, holding that loss of rents by removal of tenants from an office building, because of the failure of the defendant company to furnish a safe passenger elevator as contracted for, is too remote to be recovered as damages; Mark v. H. D. Williams Cooperage Co. 204 Mo. 242, 103 S. W. 20, holding that vendor of pipe to be used for particular purpose is liable for damage caused by its unfitness for that purpose; Bridges v. Lanham, 14 Neb. 369, 45 Am. Rep. 121, 15 N. W. 704, holding that where the parties were prevented from building and operating a mill by a failure of the others to complete their contract to build a flume, damages resulting from the loss of the use of the mill were too remote; Nye & S. Co. v. Snyder, 56 Neb. 754, 77 N. W. 118, holding that where the party sold plastering, which was unfit for the purposes intended, he was liable for damages resulting from the loss of the use of the house while the plaster was being replaced, and the cost of replacing; Jones v. Gilmore, 91 Pa. 310, holding that detention of coal barges caused by extraordinary accident did not give rise to action for damages, under agreement to return them within sixty days or within reasonable time; Kellogg v. Malick, 125 Wis. 239, 103 N. W. 1116, 4 Ann. Cas. 893, holding that in the absence of circumstances, special or otherwise, the measure of damages recoverable for breach of the covenants of a lease is the difference between value of the use of the premises as contracted for, and the rental value in their true condition; Smith v. Tennant, 20 Ont. Rep. 180, holding that loss of rent because of failure to complete house under the contract, was the proper measure of damages where both parties knew that the house was intended to be rented; Wilson v. General Iron Screw Colliery Co. 47 L. J. Q. B. N. S. 239, 37 L. T. N. S. 789, holding that where the defendant furnished useless repairs for a ship, whereby the use of the ship was lost for those days, the measure of damages is the value of the use of the ship during that time; White v. Peto, 58 L. T. N. S. 710, holding that loss of rent caused by injury to a building resulting from the negligence in building another alongside, is too remote to be recovered.

— For breach of contract of carriage by common carrier.

Cited in St. Louis, I. M. & S. R. Co. v. Mudford, 48 Ark. 502, 3 S. W. 814, holding that the measure of damages for failure to deliver on time is the dif-

ference between the value when and where they should have been delivered and when they were, unless there are special circumstances which are known to the carrier; Chicago, R. I. & P. R. Co. v. Miles, 92 Ark. 573, 123 S. W. 775, holding that where carrier had notice that cattle were shipped with view to auction sale at destination on particular day, it is liable for damage caused by negligence whereby cattle fail to reach destination by agreed time; Freeman v. Dempsey, 41 Ill. App. 554; Illinois C. R. Co. v. Cobb, 64 Ill. 128,—holding that where article is destined for special purpose, that fact should be communicated to carrier if it is to be made foundation of special damage against him; Euston v. Erie R. Co. 147 Ill. App. 594, holding that if goods are forwarded by carrier in pursuance of contract of sale between consignor and consignee, measure of damages is difference between contract price and value of goods when delivered; Smith Bros. v. New Orleans & N. E. R. Co. 106 La. 11, 54 L.R.A. 923, 87 Am. St. Rep. 285, 30 So. 265, holding that for a breach of contract of carriage, the carrier is liable for such damages as might have been foreseen; Grindle v. Eastern Exp. Co. 67 Me. 317, 24 Am. Rep. 31, holding that where money was sent by express to pay the premium on an insurance policy and was delayed so that the policy lapsed, the insured could recover of the carrier the net value of the policy on the day it lapsed; Baltimore & O. R. Co. v. Pumphrey, 59 Md. 390, holding that the measure of damages for breach of contract to carry is the value of the goods at their destination, with compensation for actual loss; Cutting v. Grand Trunk R. Co. 13 Allen, 381; Scott v. Boston & N. O. S. S. Co. 106 Mass. 468,—holding that the measure of damages for delay in delivering goods is the decline in the market value of the goods between time when they should have been delivered and when they were, where there was no notice of special circumstances; Harvey v. Connecticut & P. Rivers R. Co. 124 Mass. 421, 26 Am. Rep. 673, holding that the measure of damages for the breach of an executory contract of carriage is the difference between the value of the material at the place to which they should have been carried and their value, where carrier agreed to receive them plus the freight: Mather v. American Exp. Co. 138 Mass. 55, 52 Am. Rep. 258, holding that damages for delay in constructing a house cannot be recovered for a loss of the plans by a common carrier, but only the price of new plans can be recovered; Weston v. Boston & M. R. Co. 190 Mass. 298, 4 L.R.A.(N.S.) 569, 112 Am. St. Rep. 330, 76 N. E. 1050, 5 Ann. Cas. 825, holding that where the properties and scenery of a theatrical troupe were delayed so that performance was prevented, the company can recover the ordinary gross earnings of the company, less cost of producing the exhibition; Hutchings v. Ladd, 16 Mich. 493, holding that where the express company failed to obey instructions as to delivering goods to consignee without collecting the amount required, whereby the consignor lost his goods, the company was liable for the value of the goods; Wilson v. St. Louis & S. F. R. Co. 129 Mo. App. 347, 108 S. W. 612, holding that measure of damages to shipper by failure of carrier to deliver hogs at destination because of quarantine, was difference between price realized from sale of hogs and reasonable value of hogs at destination; Trout v. Watkins Livery & Undertaking Co. 148 Mo. App. 621, 130 S. W. 136, holding that liveryman who knew passenger was sick, is liable for damage caused by unnecessary delay and exposure, resulting from breach of contract to transport passenger; Deming v. Grand Trunk R. Co. 48 N. H. 455, 2 Am. Rep. 267, holding that where goods are contracted to be sold at a certain price, and the carrier knows of this contract, he is liable for the loss occurring from a delay in transportation and

whereby the contract is lost; Liman v. Pennsylvania R. Co. 4 Misc. 539, 24 N. Y. Supp. 824, holding that where the company was acquainted with the circumstances, they were liable for a failure to transmit a ticket to the plaintiff's employee, whereby he lost his services; Briggs v. New York C. R. Co. 28 Barb. 515, on the measure of damages for delay in carrying goods; Cooley v. Pennsylvania R. Co. 40 Misc. 239, 81 N. Y. Supp. 692, holding that a passenger who has not informed the carrier of the special circumstances which made it imperative that he arrive on time, cannot recover for a delay except merely compensatory damages; Brauer v. Oceanic Steam Nav. Co. Ltd. 66 App. Div. 605, 73 N. Y. Supp. 291 (modifying 34 Misc. 127, 69 N. Y. Supp. 465), holding that under a contract for cattle space on a ship, the party could not recover for loss upon a collateral contract, unless the same is brought to the knowledge of the carrier; Lewark v. Norfolk & S. R. Co. 137 N. C. 383, 49 S. E. 882, holding that for a failure to deliver ice on time, the consignee could not recover for the loss of fish thereby, where the carrier did not know of the use for which the ice was intended; Lambert-Murray Co. v. Southern Exp. Co. 146 N. C. 321, 59 S. E. 991, holding that an express company from the nature of its business is liable for a delay in delivering a box though it did not know its contents and their character; Devereux v. Buckley, 34 Ohio St. 16, 32 Am. Rep. 342, holding that where the carrier has knowledge that the goods consigned are intended for the market, the measure of damages for delay in delivery is the depreciation in the market value when it was delivered and when it should have been; Wyler Ackerland & Co. v. Louisville & N. R. Co. 83 Ohio St. 293, 94 N. E. 423, holding that shipper may recover, as general damages, decline in market value of merchandise between times when it should have been and when it was delivered, in case of carrier's breach of contract to deliver it in reasonable time; Traywick v. Southern R. Co. 71 S. C. 82, 110 Am. St. Rep. 563, 50 S. E. 549, holding that the consignee could not recover for loss of the use of a machine where the carrier had no notice of the use to which it was to be put; Illinois C. R. Co. v. Southern Seating & Cabinet Co. 104 Tenn. 568, 50 L.R.A. 729, 78 Am. St. Rep. 933, 58 S. W. 303, holding that where the carrier was notified to ship promptly the carrier was liable for such special damages as the shipper may incur by delay; Bourland v. Choctaw, I. & G. R. Co. 99 Tex. 407, 3 L.R.A.(N.S.) 1111, 122 Am. St. Rep. 647, 90 S. W. 483, holding that carrier was liable for damages to cattle caused by negligent delay in delivering food, after being notified that owner of cattle was out of fodder for such cattle; Gulf, C. & S. F. R. Co. v. Godair, 3 Tex. Civ. App. 514, 22 S. W. 777, holding that where cattle were injured in transit, the measure of damages was the actual damage caused by improper treatment and the extra expense of keeping them till in shape again to sell; International & G. N. R. Co. v. Hatchell, 22 Tex. Civ. App. 498, 55 S. W. 186, holding that a carrier was not liable for a delay in the carriage of cattle so that a sale was lost, where the carrier had no notice of the sale as being the result of a prompt delivery; Texas & P. R. Co. v. Hassell, 23 Tex. Civ. App. 681, 58 S. W. 54, holding that the consignee could not recover for loss of profits for a delay in delivering a machine unless he knew of the special circumstances surrounding its use; Gorham v. Dallas, C. & S. W. R. Co. 41 Tex. Civ. App. 615, 95 S. W. 551, holding that to entitle the consignee to recover for a delay in delivering the material, the carrier must have had notice of the special use for which it was intended or he cannot recover the special damage; Norfolk & W. R. Co. v. Wilkinson, 106 Va. 775, 56 S. E. 808, holding that measure of damages in

action against carrier for delay in transportation of goods is loss which fulfillment of contract would have prevented or which breach of it has entailed; Ransberry v. North American Transp. & Trading Co. 22 Wash. 476, 61 Pac. 154, holding that a party could recover for loss of time, and the expense of completing his journey, if the carrier broke its contract of carriage; Walsh v. Chicago, M. & St. P. R. Co. 42 Wis. 23, 24 Am. Rep. 376, holding in an action for breach of special contract of carriage the court erred in not charging that the parties could recover for disappointment of the mind, sense of wrong, and injury to feeling, and could not recover for loss of time, mental distress, etc.; Badgley v. Wabash, 62 Wis. 642, holding that damages for the loss of the use of a machine which was injured in transit could not be recovered from the carrier, where the latter was not informed as to what use the machine was intended for; Morrison v. European & N. A. R. Co. 15 N. B. 295, holding that where the plaintiff's luggage had been lost by the defendants he could recover only for the reasonable expense of searching for it, and not for his loss of time and hotel expenses; Monteith v. Merchants' Despatch & Transp. Co. 1 Ont. 47 (dissenting opinion), on measure of damages for breach of contract of carriage by carrier; McEwan v. McLeod, 9 Ont. App. Rep. 239, on the measure of damages for nondelivery of goods by carrier; Ruthven Woollen Co. v. Great Western R. Co. 18 U. C. C. B. 316, holding that where no notice had been given to the carrier of the necessity of prompt delivery the consignee could not recover for loss of profits by reason of nondelivery; Crawford v. Grand Trunk R. Co. unreported but referred to in 18 U. C. C. B. 527, on the measure of damages for failure of common carrier to deliver goods: Collard v. South Eastern R. Co. 30 L. J. Exch. N. S. 393, 7 Hurlst. & N. 79, 7 Jur. N. S. 950, 4 L. T. N. S. 410, 9 Week. Rep. 697, holding that the measure of damages was the difference between the market value on the day when the hops should have been delivered and when they were sold, and the amount of depreciation because of being allowed to be wetted; Hobbs v. London & S. W. R. Co. L. R. 10 Q. B. 111, 44 L. J. Q. B. N. S. 49, 32 L. T. N. S. 352, 23 Week. Rep. 520, 5 Eng. Rul. Cas. 381, holding that illness from exposure because of ejection from a train, was too remote an injury to entitle the person to damages for the breach of contract; Baxendale v. London, C. & D. R. Co. L. R. 10 Exch. 35, 44 L. J. Exch. N. S. 20, 23 Week. Rep. 167, 32 L. T. N. S. 330, holding that where one carrier contracted with another to carry the goods over a part of the distance, and the latter failed to do so, rendering the former responsible to the consignee, the former could not recover the costs of litigating the former suit; The Parana, L. R. 2 Prob. Div. 118, 36 L. T. N. S. 388, 25 Week. Rep. 596, 3 Asp. Mar. L. Cas. 399, on the measure of damages for delay in shipment of goods; Rodoconachi v. Milburn Bros. L. R. 17 Q. B. Div. 316, holding that the measure of damages for breach of contract to deliver at a certain time in a certain place, was the price which the goods had been contracted to be sold for, and not the market value when they should have been delivered; Schulze v. Great Eastern R. Co. 56 L. J. Q. B. N. S. 442, L. R. 19 Q. B. Div. 30, 57 L. T. N. S. 438, 35 Week. Rep. 683, holding that for failure to deliver a case of samples on time, when the special circumstances were made known to the carrier, the value of the samples to the consignee at the time they should have been delivered is the measure of damages; Hobbs v. London & S. W. R. Co. 5 E. R. C. 380, L. R. 10 Q. B. 111, 44 L. J. Q. B. N. S. 49, 32 L. T. N. S. 352, 23 Week. Rep. 520, holding that a carrier of passengers, upon failure to carry passengers to their

destination is liable for damages measured by the inconvenience and loss which are the natural consequences.

Cited in note in 5 Eng. Rul. Cas. 525, on measure of damages for carrier's breach of contract.

Cited in 4 Elliott Railr. 2d ed. 823, on measure of damages for carrier's breach of contract to carry; 4 Elliott Railr. 2d ed. 837, on measure of damages for carrier's nondelivery of shipment; 4 Elliott Railr. 2d ed. 827, on measure of damages for delay by carrier; 1 Thomas Neg. 2d ed. 829, on carrier's liability for failure to duly carry passengers; 3 Thompson Neg. 706, on acts subsequent to wrongful expulsion of passenger as affecting carrier's liability for damages.

Distinguished in Bourland v. Choctaw, O. & G. R. Co. 99 Tex. 407, 3 L.R.A. (N.S.) 1111, 122 Am. St. Rep. 647, 90 S. W. 483, holding that a common carrier was liable for injury to cattle by want of feed where the consignor told the carrier of the necessity of the prompt delivery of the feed shipped; Brown v. Chicago, M. & St. P. R. Co. 54 Wis. 342, 41 Am. Rep. 41, 11 N. W. 356, holding that the carrier was liable for all injuries resulting from the wrongful act, whether or not foreseen, where the action is for tort.

Disapproved in International & G. N. R. Co. v. Terry, 62 Tex. 380, 50 Am. Rep. 529, holding that where a carrier has carried a passenger beyond his destination, it is liable for damages for his discomfort, inconvenience, sickness, expense and charges resulting naturally and proximately from the breach.

— For nondelivery or delay in transmission, as of a telegram.

Cited in Primrose v. Western U. Teleg. Co. 154 U. S. 1, 38 L. ed. 883, 14 Sup. Ct. Rep. 1098, holding that the measure of damages for mistakes in sending a cipher message where the company is not informed of the nature or importance of it, is the price paid for its transmission; Bodkin v. Western U. Teleg. Co. 31 Fed. 134, holding that for a delay in delivering a telegram notifying the party of the arrival of a barge to load the staves, the party could not recover for the loss of staves by flood but could for the usual rental value of the barge for the time delayed; Whitehill v. Western U. Teleg. Co. 136 Fed. 499, on the measure of damages for failure to deliver a telegram; Purdom Naval Stores Co. v. Western U. Teleg. Co. 153 Fed. 327, holding that where a telegram was not delivered the measure of damages was the difference in the offer made by it and the value of the other's business at the time the acceptance was attempted; Western U. Teleg. Co. v. Lawson, 105 C. C. A. 451, 182 Fed. 369, holding that in action ex delicto for failure to deliver telegram plaintiff is not limited to such damages as might reasonably be supposed to be in contemplation of parties when public service was undertaken by defendant; Western U. Teleg. Co. v. Short, 53 Ark. 434, 9 L.R.A. 744, 14 S. W. 649; Western U. Teleg. Co. v. Cornwell, 2 Colo. App. 491, 31 Pac. 393; Western U. Teleg. Co. v. Hyer, 22 Fla. 637, 1 Am. St. Rep. 222, 1 So. 129; Erb v. Western U. Teleg. Co. 162 Ill. App. 494; Western U. Teleg. Co. v. Henley, 23 Ind. App. 14, 54 N. E. 775; Kagy v. Western U. Teleg. Co. 37 Ind. App. 73, 117 Am. St. Rep. 278, 76 N. E. 792; Beaupre v. Pacific & A. Teleg. Co. 21 Minn. 155; Melson v. Western U. Teleg. Co. 72 Mo. App. 111; Strahorn-Hutton-Evans Commission Co. v. Western U. Teleg. Co. 101 Mo. App. 500, 74 S. W. 876; Fitch v. Western U. Teleg. Co. 150 Mo. App. 149, 130 S. W. 44; Smith v. Western U. Teleg. Co. 80 Neb. 395, 114 N. W. 288; Clark Mfg. Co. v. Western U. Teleg. Co. 152 N. C. 157, 27 L.R.A.(N.S.) 643, 67 S. E. 329; Kennon v. Western U. Teleg. Co. 126 N. C. 232, 35 S. E. 468; First Nat. Bank v. Western U. Teleg. Co. 30 Ohio St. 555, 27 Am. Rep. 485; Western U. Teleg. Co. v. Edsall,

63 Tex. 668; McAllen v. Western U. Teleg. Co. 70 Tex. 243, 7 S. W. 715; Western U. Teleg. Co. v. Sheffield, 71 Tex. 570, 10 Am. St. Rep. 790, 10 S. W. 752; Western U. Teleg. Co. v. Weiting, 1 Tex. App. Civ. Cas. (White & W.) 444; Western U. Teleg. Co. v. Connelly, 2 Tex. App. Civ. Cas. (Willson) 99; Western U. Teleg. Co. v. Reynolds Bros. 77 Va. 173, 46 Am. Rep. 715; Hibbard v. Western U. Teleg. Co. 33 Wis. 558, 14 Am. Rep. 775; Western U. Teleg. Co. v. Hall, 124 U. S. 444, 31 L. ed. 479, 8 Sup. Ct. Rep. 577; Cahn v. Western U. Teleg. Co. 46 Fed. 40; Candee v. Western U. Teleg. Co. 34 Wis. 471, 17 Am. Rep. 452,—holding that for a failure to deliver a telegram, the measure of damages was such damages as were within the contemplation of the parties as a probable result of such failure; Western U. Teleg. Co. v. Way, 83 Ala. 542, 4 So. 844, holding same though the message was in cipher; Western U. Teleg. Co. v. Wilson, 32 Fla. 527, 22 L.R.A. 434, 37 Am. St. Rep. 125, 14 So. 1; Western U. Teleg. Co. v. Merritt, 55 Fla. 462, 127 Am. St. Rep. 169, 46 So. 1024; Western U. Teleg. Co. v. Martin, 9 Ill. App. 587; Wheelock v. Postal Teleg. Cable Co. 197 Mass. 119, 83 N. E. 313, 14 Ann. Cas. 188; Abeles v. Western U. Teleg. Co. 37 Mo. App. 554; Ferguson v. Anglo-American Teleg. Co. 178 Pa. 377, 35 Atl. 979, 4 Pa. Dist. R. 88, 16 Pa. Co. Ct. 101; Daniel v. Western U. Teleg. Co. 61 Tex. 452, 48 Am. Rep. 305; Western U. Teleg. Co. v. McKinney, 2 Tex. App. Civ. Cas. (Willson) 562,—holding same, but where message was in cipher the company did not have notice from the character of the message, and they must be given express notice of its importance; Western U. Teleg. Co. v. Ford, 8 Ga. App. 514, 70 S. E. 65, holding that telegraph company is liable for physical or bodily injury or pecuniary loss, directly traceable to its negligence in failing to deliver telegrams; Western U. Teleg. Co. v. Ferguson, 157 Ind. 64, 54 L.R.A. 846, 60 N. E. 674, holding that damages for mental anguish cannot be recovered for a negligent delay in delivering a telegram, as they are too remote and conjectural; Hendershot v. Western U. Teleg. Co. 106 Iowa, 529, 68 Am. St. Rep. 313, 76 N. W. 828, holding that a message to a veterinary surgeon to come at once, not being delivered, was the proximate cause of the horse's death; Hughes v. Western U. Teleg. Co. 79 Mo. App. 133, holding same where statute makes the company liable for special damages; Marriott v. Western U. Teleg. Co. 84 Neb. 443, 133 Am. St. Rep. 633, 121 N. W. 241, holding that damages recoverable for failure to deliver telegram is difference between net sum received by plaintiff in unfavorable market and what he would have realized in market to which he would have shipped stock except for defendant's said failure; Newsome v. Western U. Teleg. Co. 153 N. C. 153, 69 S. E. 10, holding only such damages are recoverable as flow directly from negligence of telegraph company in sending message, and they must be certain in their nature and in respect to cause from which they proceed; Western U. Teleg. Co. v. Chouteau, 28 Okla. 664, 49 L.R.A.(N.S.) 206, 115 Pac. 879, Ann. Cas. 1912D 824, holding that in absence of statute, damages are not recoverable for mental distress alone, caused by negligent delay in delivering telegram; Ferguson v. Anglo-American Teleg. Co. 4 Pa. Dist. R. 88, 16 Pa. Co. Ct. 101, holding that profits that might be made on resale of goods ordered to be purchased by telegram cannot be recovered in action for failure to deliver telegram; Postal Teleg. Cable Co. v. Schaefer, 110 Ky. 907, 62 S. W. 1119, holding that where through a mistake in transmitting a message the price offered was changed, the measure of damages is the difference between the price offered by the telegram and the market value where shipped; Western U. Teleg. Co. v. Clifton, 68 Miss. 307, 8 So. 746, holding that an attorney could not recover for fees which he would have made if the telegram had not been delayed,

unless such appeared from the face of the message or special notice was given the company; Bryant v. American Teleg. Co. 1 Daly, 575 (dissenting opinion); Hays v. Western U. Teleg. Co. 70 S. C. 16, 67 L.R.A. 481, 106 Am. St. Rep. 731, 48 S. E. 608, 3 Ann. Cas. 424 (dissenting opinion); Stevenson v. Montreal Teleg. Co. 16 U. C. Q. B. 530,—on measure of damages for failure to deliver a telegram on time; Baldwin v. United States Teleg. Co. 1 Lans. 125, holding that damages recoverable, for breach of contract to send telegram, are such damages as parties had opportunity to know, and should have expected would be probable loss entailed by default; Mackay v. Western U. Teleg. Co. 16 Nev. 222, holding that a telegraph company is liable for actual damages sustained for delay in transmitting a telegram, the importance of which is manifest upon its face or made so by explanation; Barnes v. Western U. Teleg. Co. 27 Nev. 438, 65 L.R.A. 666, 103 Am. St. Rep. 776, 76 Pac. 931, 1 Ann. Cas. 346, holding that where at the time of sending the message to send a ticket for transportation the sender informed the telegraph agent that he had no means of staying over, the company was liable for a failure to delivery, causing him to remain over and sleep out in the cold; Darlington v. Western U. Teleg. Co. 127 N. C. 448, 37 S. E. 479, holding that where there is negligence in sending a telegram the company is liable for actual damages to the sender; Helms v. Western U. Teleg. Co. 143 N. C. 386, 8 L.R.A. (N.S.) 249, 118 Am. St. Rep. 811, 55 S. E. 831, 10 Ann. Cas. 643, holding that damages are not recoverable for nondelivery of a telegram where the result of the failure to deliver is not known or not apparent from the face of the message, to the company; Western U. Teleg. Co. v. Crawford, 29 Okla. 143, 35 L.R.A. (N.S.) 930, 116 Pac. 925, holding that in action for failure to deliver telegram damages caused by exposure of pregnant woman to inclement weather because of failure of husband to meet her at station, are recoverable; Postal Teleg.-Cable Co. v. Street Constr. Co. 102 Tex. 148, 114 S. W. 98, holding that profits which owner would have made out of contract work which he could not undertake because of having shipped outfit elsewhere in consequence of defendant's failure to deliver telegram, not being within contemplation of parties, were not recoverable; Sanders v. Stuart, L. R. 1 C. P. Div. 326, 45 L. J. C. P. N. S. 682, 35 L. T. N. S. 870, 24 Week. Rep. 949, holding that the measure of damages for delay in transmitting a cipher message is nominal damages unless informed of the nature of the message.

Cited in notes in 30 L.R.A.(N.S.) 1133, 1134, on right of addressee of telegram to sue for delay in delivery; 35 L.R.A.(N.S.) 930, on damages for nondelivery or mistake in telegram preventing traveler from being met.

Cited in 2 Thompson Neg. 996, on direct or proximate damages alone being recoverable from telegraph companies.

Distinguished in Cashion v. Western U. Teleg. Co. 124 N. C. 459, 45 L.R.A. 160, 32 S. E. 746, holding that the company was liable for damages for mental anguish caused by a negligent delay in delivering a telegram although the relationship of the parties was unknown to it; Cordell v. Western U. Teleg. Co. 149 N. C. 402, 22 L.R.A.(N.S.) 540, 63 S. E. 71, holding that in an action of tort for refusing to receive a message for transmission the company is liable for all the injuries that reasonably and naturally arise therefrom, though not contemplated; Fisher v. Western U. Teleg. Co. 119 Wis. 146, 96 N. W. 545; Barker v. Western U. Teleg. Co. 134 Wis. 147, 14 L.R.A.(N.S.) 533, 126 Am. St. Rep. 1017, 114 N. W. 439,—holding that under the statute making a telegraph company liable for all damages for failure to deliver a telegram, it is not necessary that the damages should have been within the contemplation of the parties.

— **Where subject or message discloses on its face the probability of loss if delayed.**

Cited in Pacific Postal Teleg. Cable Co. v. Fleischner, 14 C. C. A. 166, 29 U. S. App. 227, 66 Fed. 899, holding that for a delay in transmitting a message ordering the levy of an attachment the company was liable for the loss of the debt; Western U. Teleg. Co. v. Coggin, 15 C. C. A. 231, 32 U. S. App. 245, 68 Fed. 137, holding that where a message was such that it did not import any necessary resulting injury if delayed, the sender could not recover special damages, unless he gave notice to the company to hasten it; Western U. Teleg. Co. v. Northcutt, 158 Ala. 539, 132 Am. St. Rep. 38, 48 So. 553, holding that in order to recover for delay in delivery of telegram it is not necessary that circumstances requiring dispatch be brought to company's knowledge, since sending of message is notice that expedition is required; Western U. Teleg. Co. v. Griffin, 92 Ark. 219, 122 S. W. 489, holding that sender of message addressed to father-in-law announcing the death of his wife, may recover damages for mental anguish caused by failure of telegraph company to deliver message; Hildreth v. Western U. Teleg. Co. 56 Fla. 387, 47 So. 820, holding that damages that may be recovered for failure of telegraph company to deliver message, and for such injurious consequences as proximately result from negligence which should have been contemplated by company from character of message or from other information; Illinois Smelting & Ref. Co. v. Western U. Teleg. Co. 146 Ill. App. 163, holding that damages are not recoverable for failure to promptly deliver telegram which does not show on its face that it relates to commercial transaction; Postal Teleg. Cable Co. v. Lathrop, 131 Ill. 575, 7 L.R.A. 474, 19 Am. St. Rep. 55, 23 N. E. 583, holding that the company is liable for all direct damages resulting from a delay in sending a message, which from its face showed the necessity for promptness; Providence-Washington Ins. Co. v. Western U. Teleg. Co. 247 Ill. 84, 30 L.R.A.(N.S.) 1170, 139 Am. St. Rep. 314, 93 N. E. 134, holding that where loss to insurance company from policy being in force at time insured property was burned is direct result of telegraph company's negligence, in not delivering message to cancel policy, telegraph company is liable for amount of insurance company's loss; Bierhaus v. Western U. Teleg. Co. 8 Ind. App. 246, 34 N. E. 581, holding that if telegraphic message shows that it relates to commercial transaction of value, it is sufficient to apprise company of its character, and for failure to use due diligence, it must respond in all special proximate damages; Hadley v. Western U. Teleg. Co. 115 Ind. 191, 15 N. E. 845, holding that in determining what was within the contemplation of the parties so as to fix the damages, the contents of the message may be considered; Mentzer v. Western U. Teleg. Co. 93 Iowa, 752, 28 L.R.A. 72, 57 Am. St. Rep. 294, 62 N. W. 1, holding that damages for mental anguish are recoverable for failure to deliver telegram announcing time of funeral of the addressee's mother, preventing him from attending where the relationship of the parties was known; McMillan v. Western U. Teleg. Co. 60 Fla. 131, 29 L.R.A.(N.S.) 891, 53 So. 329, holding that message, reading "we want some brick, When are you going to ship?" puts telegraph company on notice that substantial business loss to addressee may follow non-delivery; Western U. Teleg. Co. v. Glover, 138 Ky. 500, 49 L.R.A.(N.S.) 308, 128 S. W. 587, holding that damages for mental suffering because of failure to deliver telegraph message are not recoverable where message was insufficient to give notice to company of probable result of non-delivery; Western U. Teleg. Co. v. Lehman, 105 Md. 442, 66 Atl. 266, holding that where the telegram showed on its face that it involved a commercial transaction the sender or receiver may recover his

actual damages; Western U. Teleg. Co. v. Lehman, 106 Md. 318, 67 Atl. 241, 14 Ann. Cas. 736, holding that where the message was plain upon its face that it was an order for goods, the sender may recover for loss of profits from resale if there had been one made, but not for a prospective resale; United States Teleg. Co. v. Gildersleve, 29 Md. 232, 96 Am. Dec. 519; Western U. Teleg. Co. v. Van Cleave, 107 Ky. 464, 92 Am. St. Rep. 366, 54 S. W. 827,—holding that damages for mental anguish can be recovered by a son for the failure of the telegraph company to deliver a message telling him of his mother's death; Barnes v. Western U. Teleg. Co. 27 Nev. 438, 65 L.R.A. 666, 103 Am. St. Rep. 776, 76 Pac. 931, 1 Ann. Cas. 346, holding that where on delivering to telegraph company message requesting sender's brother to send him ticket by telegram, sender informed agent that he had no means to lay over, his suffering from cold and hunger, resulting from failure to deliver telegram, was recoverable; Leonard v. New York, A. & B. Electro Magnetic Teleg. Co. 41 N. Y. 544, 1 Am. Rep. 446, holding that the company was liable for all damages resulting from a failure to deliver a telegram which were within the contemplation of the parties when it was sent, as a probable result of such failure, either by express notice, or disclosed by message itself; Cashion v. Western U. Teleg. Co. 124 N. C. 459, 45 L.R.A. 160, 32 S. E. 746, holding that it is not necessary to disclose relation of parties in message in order to recover damages for mental anguish, in consequence of negligence in its delivery; Battle v. Western U. Teleg. Co. 151 N. C. 629, 66 S. E. 661, holding that in action for damages caused father for failure to deliver telegram announcing sickness of child, with request to come at once by which he was prevented from seeing child alive, evidence was competent, upon measure of damages, that boy was 17 months old, could walk and talk, and could recognize plaintiffs; Western U. Teleg. Co. v. Sullivan, 82 Ohio St. 14, 137 Am. St. Rep. 754, 91 N. E. 867, holding that special damages cannot be recovered for failure of telegraph company to deliver message, unless for injuries of such nature as terms of message, or some circumstances attending its transmission would suggest as likely to result from such failure; Joshua L. Bailey & Co. v. Western U. Teleg. Co. 227 Pa. 522, 43 L.R.A.(N.S.) 502, 76 Atl. 736, 19 Ann. Cas. 895, holding that if telegraph message shows that it relates to commercial or legal transaction of value it is sufficient to hold company liable for damages caused by failure to deliver it; Western U. Teleg. Co. v. Moxley, 80 Ark. 554, 98 S. W. 112; Baldwin v. United States Teleg. Co. 45 N. Y. 744, 6 Am. Rep. 165 (reversing 1 Lans. 125); Williams v. Western U. Teleg. Co. 136 N. C. 82, 48 S. E. 559, 1 Ann. Cas. 359; Butler v. Western U. Teleg. Co. 77 S. C. 148, 57 S. E. 757,—holding same but company must have notice of the peculiar circumstances giving rise to special damages unless apparent from face of message; Roach v. Jones, 18 Tex. Civ. App. 231, 44 S. W. 677, 3 Am. Neg. Rep. 618, holding that damages for mental anguish because of delay in transmission of message stating that husband would come on the first train in response to a telegram announcing death of the wife, and asking him to come.

Cited in 2 Thompson Neg. 1026, on disclosure of relationship of parties as not essential to recovery for mental suffering from delay or nondelivery of telegram; 2 Thompson Neg. 993, on recovery from telegraph company for delay in or nondelivery of message of damages in contemplation of the parties; 2 Thompson Neg. 1008, on measure of damages against telegraph company for delay of messages accepting offers of sale; 2 Thompson Neg. 1010, on notice to telegraph company of nature and importance of telegram; 2 Thompson Neg. 1014, 1015, on telegram itself giving notice of the nature and importance of the message.

Disapproved in Daughtery v. American U. Teleg. Co. 75 Ala. 168, 51 Am. Rep. 435, holding that though a message is in cipher, the company is liable for a drop in the market price, occasioning a loss by reason of a delay in telegram telling agent to sell.

Measure of damages as a question of law.

Cited in Baltimore Belt R. Co. v. Sattler, 102 Md. 595, 62 Atl. 1125; Carroll Springs Distilling Co. v. Schnepke, 111 Md. 420, 74 Atl. 828; Western Maryland R. Co. v. Martin, 110 Md. 554, 73 Atl. 267; Baltimore & O. R. Co. v. Carr, 71 Md. 135, 17 Atl. 1052,—holding that the rule by which damages are to be estimated is as a general principle, a question of law for the court, and the court must decide and instruct as to what elements and within what limits damages may be estimated in that action; Wilburn v. St. Louis, I. M. & S. R. Co. 36 Mo. App. 203, holding that measure of damages for breach of contract is question of law, and is never to be submitted to jury as question of fact; Omaha Coal, Coke & Lime Co. v. Fay, 37 Neb. 68, 55 N. W. 211, holding that where law provides definite measure of damages the court should instruct jury specifically how damages should be assessed.

5 E. R. C. 506, HORNE v. MIDLAND R. CO. 42 L. J. C. P. N. S. 59, L. R. 8 C. P. 131, 28 L. T. N. S. 312, 21 Week. Rep. 481, affirming the decision of the Court of Common Pleas, reported in L. R. 7 C. P. 583.

Measure of damages for breach of contract.

Cited in Dalrymple v. Scott, 19 Ont. App. Rep. 477; Eckington & Soldiers Home R. Co. v. McDevitt, 18 App. D. C. 497,—on the measure of damages for breach of contract; Monteith v. Merchants' Despatch & Transp. Co. 1 Ont. Rep. 47 (dissenting opinion), on amount of damages recoverable for delay in delivery of goods where purchaser refused to accept them because of delay; Elbinger Actien-Gesellschafft v. Armstrong, L. R. 9 Q. B. 473, 43 L. J. Q. B. N. S. 211, 30 L. T. N. S. 871, 23 Week. Rep. 127, on the measure of damages for breach of contract to deliver article to be manufactured; Larios v. Gurety, L. R. 5 P. C. 346, on the measure of damages for breach of special contract.

Cited in Benjamin Sales 5th ed. 973; Hollingsworth Contr. 530,—on measure of damages for breach of contract; Benjamin Sales 5th ed. 978, on measure of damages for seller's breach of contract in case of subcontract at a special price; 3 Hutchinson Car. 3d ed. 1636, on measure of damages when carrier refuses to perform his contract to accept and carry goods.

— Profits and expenses.

Cited in Davidson Development Co. v. Southern R. Co. 147 N. C. 503, 61 S. E. 381, holding that damages for loss of rent of store building due to unreasonable delay in shipment of brick for construction purposes could not be recovered against carrier, but that interest on money invested in brick could be recovered; Corbet v. Johnson, 10 Ont. App. Rep. 564, holding that amount of damages recoverable for failure to complete contract to instal machinery by certain day was loss of profits in addition to rental of mill and interest on value of machinery; Corbin v. Thompson, 39 Can. S. C. 575, 2 B. R. C. 70, holding that anticipated profits from operation of saw-mill should not be allowed because of failure to install boiler in mill as agreed.

Cited in notes in 53 L.R.A. 90, on loss of profits as element of damages for breach of contract; 52 L.R.A. 220, on loss of profits of sale or purchase as damages.

Cited in Benjamin Sales, 5th ed. 988, on buyer's right to recover special profits of subsale in absence of seller's knowledge of amount thereof.

— Contracts of carriage or transmission.

Cited in Western U. Teleg. Co. v. Hall, 124 U. S. 444, 31 L. ed. 479, 8 Sup. Ct. Rep. 577, on the measure of damages for failure to deliver a telegram; Harvey v. Connecticut & P. Rivers R. Co. 124 Mass. 421, 26 Am. Rep. 673, holding that the measure for breach of contract to transport is the difference between the market value of the goods where they should have been delivered less the sum of the market value where they were to be shipped from, and the freight; Steffen v. Mississippi River & B. T. R. Co. 156 Mo. 322, 56 S. W. 1125, holding profits lost by inability to fill a contract of sale were not recoverable by breach of agreement to carry stone at a fixed rate, terms of contract being unknown to carrier; Lindley v. Richmond & D. R. Co. 88 N. C. 547, holding that the measure of damages for delay in transportation in the absence of notice of special circumstances, is the difference in market value when delivered and when they should have been delivered; McEwan v. McLeod, 9 Ont. App. Rep. 239, holding that where a party failed to transport salt as agreed, the measure of damages was the difference between the contract price carriage, and what had to be paid; Monteith v. Merchants Despatch & Transp. Co. 9 Ont. App. Rep. 282 (affirming 1 Ont. Rep. 47), holding that where seed was delayed in transit until too late for sale for that spring planting, the party could recover the difference between the market value when delivered and when it should have been delivered; The Parana, L. R. 1 Prob. Div. 452, L. R. 2 Prob. Div. 118, 35 L. T. N. S. 32, 24 Week. Rep. 264, 36 L. T. N. S. 388, 25 Week. Rep. 596, 3 Asp. Mar. L. Cas. 399, on the measure of damages for breach of contract by delay in the transportation of goods.

— Within the contemplation of the parties.

Cited in Daughtery v. American U. Teleg. Co. 75 Ala. 168, 51 Am. Rep. 435, holding that the sender of a message can recover the actual loss resulting from a failure to deliver a telegram though the message was in cipher; Albany Phosphate Co. v. Hugger Bros. 4 Ga. App. 771, 62 S. E. 533; Wolcott v. Mount, 36 N. J. L. 262, 13 Am. Rep. 438; McNamara v. Clintonville, 62 Wis. 207, 51 Am. Rep. 722, 22 N. W. 472; Acme Cycle Co. v. Clarke, 157 Ind. 271, 61 N. E. 501,— holding that such damages as may fairly and reasonably be considered as arising according to the natural course of things from the breach, and such as may reasonably be supposed to have been contemplated by the parties may be recovered.

The decision of the Court of Common Pleas was cited in Skirm v. Hilliker, 66 N. J. L. 410, 49 Atl. 679; Shadbolt & B. Iron Co. v. Topliff, 85 Wis. 513, 55 N. W. 854,—holding that the measure of damages for breach of an executory contract of sale of personal property is those damages as naturally arise from the breach of the contract itself, or committed under circumstances contemplated by the parties when making the contract.

— As affected by special circumstances, or notice thereof.

Cited in Lonergan v. Waldo, 179 Mass. 135, 88 Am. St. Rep. 365, 60 N. E. 479, holding that where special circumstances exist and are known to both contracting parties, special damages arising as a result of a breach may be recovered; Weston v. Boston & M. R. Co. 190 Mass. 298, 4 L.R.A.(N.S.) 569, 112 Am. St. Rep. 330, 76 N. E. 1050, 5 Ann. Cas. 825, holding that for failure to deliver scenery for a theatrical production the ordinary gross earnings of the concern

could be recovered, as the nature of the goods gave notice of the special circumstances making a prompt delivery necessary; Silver v. Kent, 60 Miss. 124, holding that in action for special damages for failure of carrier to deliver goods, it must appear that defendant knew of circumstances or contracted in reference thereto; Louisville & N. R. Co. v. Mink, 126 Ky. 337, 103 S. W. 294; Philadelphia, W. & B. R. Co. v. Lehman, 56 Md. 209, 40 Am. Rep. 415; Wilson v. St. Louis & S. F. R. Co. 129 Mo. App. 347, 108 S. W. 612; Missouri, K. & T. R. Co. v. Belcher, 89 Tex. 428, 35 S. W. 6,—holding that in order to recover special damages arising from delay in transportation the carrier must have notice of the special circumstances giving rise to special damages; Steffen v. Mississippi River & B. T. R. Co. 156 Mo. 322, 56 S. W. 1125, holding same as to recovery of profits; Central Trust v. Savannah & W. R. Co. 69 Fed. 683, on the effect of notice of necessity of prompt delivery on the measure of damages for delay; Sanders v. Sutcliffe, 38 N. S. 352, holding that for breach of contract to finish a building by a certain time, the loss of rent under a lease could not be recovered, unless the contractor had notice of the lease; dissenting opinion in McLean v. Dun, 1 Ont. App. Rep. 153 (reversing 39 U. C. Q. B. 551), on the measure of damages for breach of contract for special purpose; Marrin v. Graver, 8 Ont. Rep. 39, holding that the measure of damages for breach of contract to lease premises, is the difference between what the tenant agreed to pay, and what they were actually worth, but not their worth in some special business unless the landlord knew of it; Langdon v. Robertson, 13 Ont. Rep. 497, on the measure of damages for breach of contract as affected by notice of special circumstances.

Cited in 3 Hutchinson Car. 3d ed. 1624, on necessity of giving notice of special circumstances to carrier when contract is made.

Distinguished in Booth v. Spuyten Duyvil Rolling Mill Co. 60 N. Y. 487, holding that where the parties to a contract have notice of such special circumstances affecting the damages, that it may be fairly inferred that they contemplated a particular rule for estimating them, that rule will be adopted.

The decision of the Court of Common Pleas was cited in Cannon v. Western U. Teleg. Co. 100 N. C. 300, 6 Am. St. Rep. 590, 6 S. E. 731, holding that loss of profits arising because of failure to deliver a telegram cannot be recovered unless from the face of the telegram, the importance of the message appears; Corbin v. Thompson, 39 Can. S. C. 575, holding that for failure to furnish a boiler as contracted for, the party could recover all immediate losses, such as wages of men who had to remain idle because of the nonoperation of the mill, but could not recover anticipated profits; Corbet v. Johnson, 10 Ont. App. Rep. 564, holding that damages for loss of profits arising out of special circumstances can not be recovered unless notice is brought home to all parties.

— Necessity of contracting with reference to special circumstances.

Cited in Globe Ref. Co. v. Landa Cotton Oil Co. 190 U. S. 540, 47 L. ed. 1171, 23 Sup. Ct. Rep. 754; Hooks Smelting Co. v. Planters' Compress Co. 72 Ark. 275, 79 S. W. 1052; Holland v. 725 Tons of Coal, 179 Mass. 135, 88 Am. St. Rep. 365, 60 N. E. 479; Silver v. Kent, 60 Miss. 124,—holding that not only is knowledge of the special circumstances necessary, but assent to the contract with reference to them is also necessary; Holland v. 725 Tons of Coal, 36 Fed. 784, holding that notice of special circumstances must be given under such circumstances as to make it a condition of the contract so that special damages may be recovered.

Nature of a contract at common law.

Cited in Brown v. Eastern Slate Co. 134 Mass. 590, on the nature of a contract at common law.

5 E. R. C. 527, ANONYMOUS, 1 Vent. 33.

5 E. R. C. 528, REX v. SETON, 4 Revised Rep. 466, 7 T. R. 373.

Review of judgment by writ of error or certiorari.

Cited in Re Cooke, 15 Pick. 234, holding proceeding, pursuant to statute, upon an information filed for the purpose of causing a convict in the State prison to be sentenced to additional punishment by reason of his being imprisoned upon a second or third conviction, and according to course of common law, and the remedy to reverse a judgment rendered upon such an information is by writ of error and not by certiorari; Marinan v. Baker, 12 N. M. 451, 78 Pac. 531; Borrego v. Territory, 8 N. M. 446, 46 Pac. 349—holding at common law the review of a judgment in a criminal case could be by a writ of error and in no other way; R. v. Crabbe, 11 U. C. Q. B. 447, holding there can be no certiorari after judgment; Barnes v. Cox, 16 U. C. C. P. 236, holding that certiorari must be delivered to proper officer before entry of final judgment, or procedendo will be ordered; Re Sproule, 12 Can. S. C. 140 (dissenting opinion); Wingfield v. Crenshaw, 3 Hen. & M. 245,—as to when certiorari will lie.

Cited in notes in 70 E. R. C. 170, on matters reviewable by certiorari, 8 E. R. C. 133, on review of record after judgment by writ of error; 8 E. R. C. 145, on change of venue of criminal prosecution by certiorari.

— Highway and nuisance proceedings.

Cited in R. v. Grover, 23 Ont. Rep. 92, holding certiorari will lie from order made by general sessions to sheriff to abate a nuisance; Wilt v. Philadelphia & L. Turnp. Co. 1 Brewst. (Pa.) 411, holding a writ of certiorari will lie to remove proceedings against a turnpike company for neglect to repair their road.

5 E. R. C. 532, REX v. JUKES, 5 Revised Rep. 445, 8 T. R. 542.

Remedy by certiorari.

Cited in Com. v. Balph, 16 Pittsb. L. J. N. S. 367, holding that writ of certiorari is writ of common right and can only be taken away by express words in law; Lynd v. Noble, 20 Johns. 80, holding it will not be granted without their having lien order, judgment or trial in court below.

— Statutory restriction of remedy.

Cited in Ex parte Montgomery, 8 N. B. 149; Ex parte Nowlin, 11 N. B. 141; Re Ruggles, 35 N. S. 57; R. v. Watson, 7 U. C. C. P. 495; Re Bates, 40 U. C. Q. B. 284; Com. v. Balph, 17 W. N. C. 53, 43 Phila. Leg. Int. 162,—holding writ of certiorari is a writ of common right to be taken away, not by implication, but only by express words.

— Coexistence with error or appeal.

Cited in Rayner v. State, 52 Md. 368, holding fact that statute gives an appeal from judgment of magistrate does not deprive party of right to writ of certiorari for purpose of testing validity of statute; Mauch Chunk v. Nescopeck, 21 Pa. 46, holding as the statute allowed a bill of exception to evidence in the Quarter Sessions the evidence was not brought up on a certiorari to the Sessions on a question of settlement; Slipp v. Morris, 41 N. S. 87, as to it being granted after an appeal has been taken.

— To review summary conviction for crime.

Cited in Com. v. Burkhart, 23 Pa. 521; Tierney v. Dodge, 9 Minn. 166, Gil. 153,—holding it will lie from a summary connection where there is no legislative restriction.

Cited in note in 15 E. R. C. 207, on sufficiency of form of summary conviction.

— To review inferior judicatories.

Cited in Le Roy v. New York, 20 Johns. 430, 11 Am. Dec. 289, holding court has power to award certiorari not only to inferior courts but to persons invested by legislature with power over the property and rights of others for the purpose of supervising their proceedings even in cases where they are authorized finally to hear and determine.

Distinguished in Peters v. Peters, 8 Cush. 529, holding it will not lie to probate court; Simon v. Portland, 9 Or. 437, holding legal errors committed by inferior tribunal within its jurisdiction cannot be reversed by certiorari.

Necessity of indictment negativing exception in statute.

Cited in Marmora Foundry Co. v. Boswell, 1 U. C. C. P. 175, as to distinction between exception in enacting clause and a separate proviso; R. v. White, 21 U. C. C. P. 356; R. v. Morgan, 5 Manitoba L. R. 63,—holding it necessary when exception is contained in enacting clause; Pugh v. United States, 5 Ct. Cl. 113; Townley v. State, 18 N. J. L. 311; R. v. Breen, 36 U. C. Q. B. 84; R. v. Herrell, 12 Manitoba L. R. 522; Com. v. Hart, 11 Cush. 130,—holding it not necessary when exception is not part of enacting clause.

Certainty in records of summary conviction.

Cited in People v. Phillips, 1 Edm. Sel. Cas. 386, 1 Park Crim. Rep. 95, holding greater certainty is required than in indictments, and nothing will be presumed in favor of the commitment.

5 E. R. C. 536, EX PARTE BRADLAUGH, 47 L. J. Mag. Cas. N. S. 105, 38 L. T. N. S. 680, L. R. 3 Q. B. Div. 509, 26 Week. Rep. 758.

Construction of statutes abrogating certiorari.

Cited in R. v. McKenzie, 23 N. S. 6, as to application of act taking away right to remedy by certiorari; Reg. v. Walsh, 2 Ont. Rep. 206, holding that to deprive party accused of offense of right to certiorari great strictness in showing jurisdiction of court is required; Reg. v. Wallace, 4 Ont. Rep. 127, holding that Canada Temperance Act, section 161, taking away right to certiorari, applies to convictions for all offenses against preceding sections of act; Reg. v. Elliott, 12 Ont. Rep. 524, holding that right to writ of certiorari is not by section 111 of Temperance Act taken away from any person convicted of alleged offense against such provision, if no such offense could have existed.

Cited in note in 5 Eng. Rul. Cas. 536, on certiorari as remedy for review of conviction before a magistrate.

Reviewing decision of court which goes beyond jurisdiction by appeal.

Cited in Central R. & Electric Co's. Appeal, 67 Conn. 197, 35 Atl. 32, holding that decision of judge under statute confirming street railway extension, which goes beyond his jurisdiction is reviewable by appeal.

5 E. R. C. 543, REX v. DAVIES, 2 Revised Rep. 683, 5 T. R. 626.

Certiorari at instance of prosecution.

Cited in People v. Bradley, 60 Ill. 390; Barry v. Traux, 13 N. D. 131, 65

L.R.A. 762, 112 Am. St. Rep. 662, 99 N. W. 769, 3 Ann. Cas. 191,—on the saving of remedy to state under acts taking it away generally; People v. Baker, 3 Park. Crim. Rep. 181, 3 Abb. Pr. 42, holding a certiorari to remove an indictment from oyer and terminer to the supreme court, before trial, may be issued on the application of the prosecution.

Cited in notes in 8 Eng. Rul. Cas. 273, on right of Crown to name court in which proceedings against it shall be had; 8 E. R. C. 167, on statute not applying to government.

5 E. R. C. 548, MORICE v. BISHOP OF DURHAM, 10 Ves. Jr. 521, 7 Revised Rep. 232, affirming the decision of the Master of the Rolls, reported in 9 Ves. Jr. 399.

Charitable trusts — What constitutes.

Cited in Drury v. Natick, 10 Allen, 169, holding gift to town to establish a library a charitable gift; Sanderson v. White, 18 Pick. 328, 29 Am. Dec. 591, holding statute of 43 Eliz. C. 4, is in force so far as to determine what are gifts to charities; Saltonstall v. Sanders, 11 Allen, 446, holding bequest for furtherance and promotion of the cause of piety and good morals, or in aid of the objects of benevolence or charity, public or private, or temperance or the education of deserving youths, a good charitable trust; Jackson v. Phillips, 14 Allen, 539; Ayres v. Methodist Episcopal Church, 3 Sandf. 351,—as to what constitutes gift to charitable uses; Dole v. Lincoln, 31 Me. 422, holding that statute of charitable uses enumerates devises and bequests, for which it provides, and such as are not comprehended in that enumeration, are not aided by that statute; Crow ex rel. Jones v. Clay County, 196 Mo. 234, 95 S. W. 369, holding that gift to county to use interest to pay tuition of orphans under 16 years of age at and within two miles of county seat created valid charity; Green v. Allen, 5 Humph. 170, holding that devise to Methodist Episcopal Church, for benefit of institutions of learning, under superintendence of missionary society, and to be otherwise disposed of as Tennessee annual conference may deem best is void; R. v. Income Tax Comrs. L.R. 22 Q. B. Div. 296, 58 L. J. Q. B. N. S. 196, 60 L. T. N. S. 446, 37 Week. Rep. 294, 53 J. P. 198, as to meaning of term "charity;" Perry v. Tuomey, Ir. L. R. 21 Eq. 480, as to necessity of trust being for charitable purpose; Morrow v. M'Conville, Ir. L. R. 11 Eq. 236, holding gift for masses not charitable gift: Yeap Cheah Neo v. Ong Cheng Neo, L. R. 6 P. C. 381, holding a direction "that a house for performing religious ceremonies to late husband and myself be erected," is void as not being for a charitable use; Hunter v. Atty. Gen. [1899] A. C. 309, 68 L. J. Ch. N. S. 449, 47 Week. Rep. 673, 80 L. T. N. S. 732, 15 Times L. R. 384, holding a bequest to trustees to expend the income or any portion of the trust funds "in grants for or towards the purchase of advowsons or presentations" is not a good charitable bequest; R. ex rel. Pemsel v. Income Tax Comrs. 58 L. J. Q. B. N. S. 196, L. R. 22 Q. B. Div. 296, 59 L. T. N. S. 832, 37 Week. Rep. 294, 5 Times L. R. 12, as to interpretation of "charitable purposes."

Cited in notes in 14 L.R.A.(N.S.) 75, 84, 86 87, 89, on enforcement of general bequest for charity or religion; 37 L.R.A.(N.S.) 684, on creation of trust by precatory words in will.

Cited in 1 Thomas Estates, 848, on necessity that charitable gift be for charitable or pious uses and for a mere benevolent purpose.

Distinguished in Re Darling [1896] 1 Ch. 50, 65 L. J. Ch. N. S. 52, 13

Reports, 834, 73 L. T. N. S. 382, 44 Week. Rep. 75, holding a gift by will "to the poor and the service of God" is a good charitable gift.

The decision of the Master of the Rolls was cited in Henckley's Estate, 58 Cal. 457, as to what constitutes charity and as to gift to private persons not being such; American Academy v. Harvard College, 12 Gray, 582, holding a gift designed to promote the public good, by the encouragement of learning, science and the useful arts, without any particular reference to the poor is a charity, Crow ex rel. Jones v. Clay County, 196 Mo. 234, 95 S. W. 369, holding a gift to a county of money to be loaned on real estate of ample value and free from all incumbrances, at the highest rate of legal interest, and to be continued at interest perpetually, the interest accruing thereon to be applied under the direction of the county court, to pay the tuition or education of orphans or poor children under the age of sixteen and within two miles of county seat, created a charity; Re Shattuck, 193 N. Y. 446, 86 N. E. 455, holding word "educational" in a bequest, does not necessarily describe a public charitable institution within meaning of act relating to charitable trusts; Fire Ins. Patrol v. Boyd, 120 Pa. 624, 1 L.R.A. 417, 6 Am. St. Rep. 745, 15 Atl. 553, 22 W. N. C. 248, 45 Phila. Leg. Int. 444, holding a corporation which in the performance of its corporate duties is acting, without gain or profit, in aid and ease of the municipal government in the preservation of life and property at fires, whether volunteer or not, is a public charity.

— Gifts for "benevolence" "liberality" or the like.

Cited in Re Cunningham, 76 Misc. 120, 136 N. Y. Supp. 922, to the point that benevolent purpose did not necessarily fall within uses termed charitable.

Cited in note in Brightly (Pa.) 405, on legacy to Quaker meeting for relief of poor as being a valid charitable gift.

Distinguished in Kronshage v. Varrell, 120 Wis. 161, 97 N. W. 928, holding under will trustees did not have discretion to disburse the income to persons subjected merely to some pecuniary loss but to persons who were subjects of public charity, and bequest was valid.

The decision of Master of Rolls was cited in Dulles's Estate, 15 Pa. Dist. R. 518, as to trusts for objects of benovolence being void for indefiniteness.

The decision of the Master of the Rolls was distinguished in Pell v. Mercer, 14 R. I. 412, holding a bequest of personalty in trust for such works of religion or benevolence as the executors of the will may select is a good gift to charitable uses, when it appears from the will that benevolence is used in the legal sense of charity.

— Trusts for mixed public and private object.

Cited in Goodale v. Mooney, 60 N. H. 528, 49 Am. Rep. 334, holding following disposition of property "I place the remainder of my property in the hands of my executors, to be distributed by them after my decease among my relatives and for benevolent objects, in such sums as in their judgment shall be for the best" a valid bequest in trust; Re Douglas, L. R. 35 Ch. Div. 472, 56 L. J. Ch. N. S. 913, 56 L. T. N. S. 786, 35 Week. Rep. 740, holding where objects which are not charitable are included in trust the whole trust fails; Re Macduff [1896] 2 Ch. 451, 65 L. J. Ch. N. S. 700, 74 L. T. N. S. 706, 45 Week. Rep. 154, holding bequest for "purposes charitable philanthropic" not a good charitable bequest.

The decision of the Master of the Rolls was cited in Abrey v. Duffield, 149 Mich. 248, 112 N. W. 936 (dissenting opinion); Wright v. Methodist Episcopal Church, Hoffm. Ch. 202, as to what constitutes a charity; Stratton v. Physio-

Medical College, 149 Mass. 505, 5 L.R.A. 33, 14 Am. St. Rep. 442, 21 N. E. 874,—holding if the will allows the fund to be applied to purposes not charitable, the gift fails as a charity; Pell v. Mercer, 14 R. I. 412, holding that testamentary gift for purposes both public and benevolent, when will shows it to have been inspired by philanthropy and aimed at permanent good, is charitable gift.

Jurisdiction and powers of equity over charities.

The decision of the Master of the Rolls was cited in Re Flaherty, 2 Pars. Sel. Eq. Cas. 186, as to the doctrine of cy pres; Spalding v. St. Joseph's Industrial School, 107 Ky. 382, 54 S. W. 200, as to the extent of jurisdiction.

The decision of the Master of the Rolls was disapproved in Holland v. Peck, 37 N. C. (2 Ired. Eq.) 255, holding the doctrine of the English courts of chancery in relation to charities by which, in certain cases, they direct such bequests to be executed cy pres unsound in principle and cannot be adopted by courts of equity in this state.

"Charitable institutions."

Cited in State ex rel. Olsen v. Board of Control, 85 Minn. 165, 88 N. W. 533, holding under law creating state board of control the term applied to state normal schools.

Words necessary to create trust.

Cited in Gordon v. Green, 10 Ga. 534, holding it sufficient to create a trust if the intention be manifest that donee shall not have the sole beneficial interest in the property; Pratt v. Sheppard & E. P. Hospital, 88 Md. 610, 42 Atl. 51, holding the use of words of recommendation and desire in a will, in connection with a devise of property, should not be construed to create a binding precatory trust unless it appears that the testator intended to create a trust: Coats's Appeal, 2 Pa. St. 129, holding words of desire, expectation, or confidence, create a trust, whether the subject be real or personal estate; Gibbs v. Rumsey, 2 Ves. & B. 294, 13 Revised Rep. 88, as to distinction between express trust for an indefinite purpose, and that where from the indefinite nature of the purpose the court concludes, that a proper trust could not be intended although the words import a trust.

— Definiteness of object or purpose.

Cited in Moseley v. Smiley, 171 Ala. 593, 55 So. 143, holding that where trustees of charitable trust may apply trust estate to other than strictly charitable purposes trust is invalid for indefiniteness; Tappan v. Deblois, 45 Me. 122, holding a bequest of property to trustees to be by them paid over to the executive committee of the American Peace Society, to be expended in the cause of peace, is sufficiently definite; Maught v. Getzendanner, 65 Md. 527, 57 Am. Rep. 352, 5 Atl. 471, holding a trust to be upheld, must be of such a nature that the cestuis que trust are defined and capable of enforcing its execution by proceedings in a court of chancery; Nichols v. Allen, 130 Mass. 211, 39 Am. Rep. 445, holding a trust which by its terms may be applied to objects which are not charitable in the legal sense, and to persons not defined by name or by class, is too indefinite to be carried out; Owens v. Missionary Soc. 14 N. Y. 380, 67 Am. Dec. 160, holding bequest whose object was "to diffuse more generally the blessings of education, civilization and christianity throughout the United States and elsewhere" could not be sustained on account of generality of the object; Bridges v. Pleasants, 39 N. C. (4 Ired. Eq.) 26, 44 Am. Dec. 94, holding bequest in trust for "foreign missions and to the poor saints" too indefinite; North Carolina Inst. for Deaf & Dumb v. Norwood, 45 N. C. (Busbee, Eq.) 65,

holding where testator bequeathed sum to the "Deaf and Dumb Institution" and no persons of that corporate name could be found but persons were found by the corporate name of "President and Directors of the North Carolina Institute for the Education of the Deaf and Dumb" the legatee could be identified by parol evidence; St. James v. Bagley, 138 N. C. 384, 70 L.R.A. 160, 50 S. E. 841, holding recital in deed that it was made "for the purpose of aiding in the establishment of a Home for Indigent Widows or Orphans, or in the promotion of any other charitable or religious objects to which the property may be appropriated" created no trust; Carpenter v. Miller, 3 W. Va. 174, 100 Am. Dec. 744, holding whenever the prior dispositions of the property are complete, and the words of the codicil are precatory or expressing hope, desire or request and the object of the hope, desire or request be uncertain or indefinite, the words will not be held to create a trust; Leonard v. Leonard, 1 N. B. Eq. 576, as to necessity of definiteness of object; Clancarty v. Clancarty, Ir. L. R. 31 Eq. 530; Odell v. Odell, 10 Allen, 1,—as to necessity of definiteness of object; Murdock v. Bridges, 91 Me. 124, 39 Atl. 475; Runchordas Vandrawandas v. Parvatibhai, L. R. 26 Ind. App. 71; Ellis v. Selby, 5 L. J. Ch. N. S. 214, 1 Myl. & C. 286, 7 Sim. 352; Grimes v. Harmon, 35 Ind. 198, 9 Am. Rep. 690,—holding a vague bequest the object of which is indefinite cannot be established in a court of equity; Beaumont v. Oliveira, L. R. 6 Eq. 534, 38 L. J. Ch. N. S. 62, 19 L. T. N. S. 330, holding a bequest of pure personalty to the Royal Society or to the Royal Geographical Society or to the Royal Humane Society, is a charitable legacy.

Cited in 1 Beach Trusts, 85, on certainty as to beneficiary as essential to valid trust; 1 Beach Trusts, 254, on trust resulting to grantor from indefiniteness of declared trust; Gray Perpet. 2d ed. 604, 605, on validity of gift to indefinite persons for noncharitable purposes; 1 Thomas Estates, 855, on validity of charitable trust in case there is a certain donee or beneficiary, though there is no trustee or one incapable of taking.

Distinguished in Power v. Cassidy, 79 N. Y. 602, 35 Am. Rep. 550, holding as there were organizations of the class specified capable of taking, and which could be ascertained, the provision as to them was not void for uncertainty; De Camp v. Dobbins, 29 N. J. Eq. 36, holding if the character of the gift can be definitely determined, and it appears that it is charitable in a legal sense, the use of terms which would, if unexplained, render the gift void, will not defeat the donor's purpose; Charitable Soc. of Evangelical Asso.'s Appeal, 35 Pa. 316, holding a charitable bequest is not void because given simply to an unincorporated association, and not upon any defined charity, or for any specified charitable use; Lloyd-Greame v. Atty.-Gen. 10 Times L. R. 66, holding gift for "religious and benevolent societies or objects," valid; Dolan v. Macdermot, L. R. 5 Eq. 60, holding bequest of pure personalty for "such charities and other purposes as lawfully might be in the parish of T" a good charitable gift; Re Sir Robert Peel's School, L. R. 3 Ch. 543, holding gift by testator in trust to apply income to school which he had founded, good charitable gift; Re Sutton, L. R. 28 Ch. Div. 464, 54 L. J. Ch. N. S. 613, 33 Week. Rep. 519, holding gift to "charitable and deserving objects" a good charitable gift; Atty-Gen. v. Hall [1897] 2 Ir. Q. B. 426, holding a bequest to a Roman Catholic priest, to be applied for masses to be celebrated publicly in a specified Roman Catholic Church in Ireland for repose of testator's soul, is a valid charitable bequest; Re Allen [1905] 2 Ch. 400, 74 L. J. Ch. N. S. 593, 93 L. T. N. S. 597, 54 Week. Rep. 91, 21 Times L. R. 662; Toronto General Trusts Co. v. Wilson, 26 Ont. Rep. 671; Staines v. Burton, 17 Utah, 331, 70 Am. St. Rep. 788, 53 Pac. 1015,—

holding under will in question charitable beneficiaries were sufficiently designated; Nightingale v. Goulburn, 16 L. J. N. S. Ch. 270, 5 Hare, 484, aff'd in 2 Phill. Ch. 594, 12 Jur. 317, holding bequests of residue of personal estate to Queen Chancellor of the Exchequer for the time being "to be by him appropriated to the benefit and advantage of my beloved country Great Britain," a valid charitable bequest.

The decision of the Master of the Rolls was cited in Philadelphia Baptist Asso. v. Hart, 4 Wheat. 1, 4 L. ed. 499, holding charitable bequests, where no legal interest is vested, and which are too vague to be claimed by those for whom the beneficial interest was intended cannot be established by a court of equity; Carskadon v. Torreyson, 17 W. Va. 43, holding the want of clearly recognized beneficiaries and indefinite character of charities rendered trust void; Knox v. Knox, 9 W. Va. 124, holding indefinite trust to charity will not be enforced; Green v. Allen, 5 Humph. 170, holding if a charity be created either by devise or deed it must be in favor of a person having sufficient capacity to take as devisee or donee, or if it be not such a person, it must be definite in its object, and lawful in its creation; Hood v. Dorer, 107 Wis. 149, 82 N. W. 546 (dissenting opinion); Harrington v. Pier, 105 Wis. 485, 50 L.R.A. 307, 76 Am. St Rep. 922, 82 N. W. 345 (dissenting opinion); Gibson v. M'Call, 1 Rich. L. 174; Mannix v. Purcell, 46 Ohio St. 102, 2 L.R.A. 753, 19 N. E. 572,—as to necessity of definiteness of object; Atty. Gen. v. Soule, 28 Mich. 153, holding will directing setting aside of sum of money "for establishment of a school at Montrose for education of children" too indefinite to create a charitable trust; Alter's Estate, 45 Phila. Leg. Int. 5, holding that charitable legacy is void where object was not in existence at death of testatrix; People ex rel. Atty. Gen. v. Dashaway Asso. 84 Cal. 114, 12 L.R.A. 117, 24 Pac. 277, holding trust "to promote cause of temperance" too indefinite; Brewster v. Foreign Mission Board, 2 N. B. Sup. Eq. 172, holding bequest directing executor to sell a part of testator's property "and the proceeds to be placed so as to be conveniently drawn to assist in aiding good and worthy objects," void for uncertainty.

The decision of the Master of the Rolls was distinguished in Dye v. Beaver Creek Church, 48 S. C. 444, 59 Am. St. Rep. 724, 26 S. E. 717, holding a devise to an unincorporated society "for poor children, for their tuition" is not so vague and uncertain that it is void; Burr v. Smith, 7 Vt. 241, 29 Am. Dec. 154, holding a gift to a charitable use, may be decreed, notwithstanding the objects are vague and indefinite, and notwithstanding the persons who are to carry into effect the intent of the testator, are a society unincorporated; Magill v. Brown, Fed. Cas. No. 8,952, holding a devise to a society, with whose constitution and purposes the testator is familiar, for the purposes of such society, such purposes being proper objects of charitable uses, is a good devise for such charitable use; Re Hunter [1897] 2 Ch. 105, 66 L. J. Ch. N. S. 545, 76 L. T. N. S. 725, 45 Week. Rep. 610, holding under the will in question gift to promote the spread of evangelical principles was sufficiently definite.

— Selection of purposes left to trustees.

Cited in Re Sutro, 155 Cal. 727, 102 Pac. 920, holding that will which provides for application of funds for such charities institutions of learning and science, as shall be directed by executors within three years, or in case of failure to do so, as shall be directed by official board of trustees provided for in will is void; White v. Fisk, 22 Conn. 31, holding a bequest in the following words "any surplus income that may remain to the extent of one thousand dollars per annum, I direct to be expended by my trustees, for the support of indigent pious young men preparing for the ministry in New Haven, Con-

necticut" is void for uncertainty; Adye v. Smith, 44 Conn. 60, 26 Am. Rep. 424, holding a residuary devise and bequest to a trustee "for any and all benevolent purposes that he may see fit" is void for uncertainty and not within statute authorizing grants for charitable uses; Power v. Cassidy, 16 Hun, 294, holding bequest as follows "the balance I give to my executors to be divided by them amongst such Roman Catholic Charities, institutions, schools or churches in the city of New York, as a majority of my executrix and executors shall decide, and in such proportions as they may think proper" created a valid trust; Wheeler v. Smith, 9 How. 55, 13 L. ed. 44, holding a bequest to trustees for such purposes as they considered might promise to be most beneficial to the town and trade of Alexandria, void; Norris v. Thomson, 19 N. J. Eq. 307, holding a power of appointment given to one by will, to give or devise certain property among such "benevolent, religious or charitable institutions as she may think proper" void for indefiniteness; Kinike's Estate, 1 Pa. Dist. R. 172, 30 W. N. C. 22, 11 Pa. Co. Ct. 232, holding that testamentary direction to executors to distribute residuum among such charitable institutions, and in such proportions as they shall deem proper, is valid; Dulles's Estate, 15 Pa. Dist. R. 518, on validity of trust where trustees were given discretion in distribution for religious, charitable and benevolent purposes; Re Hewitt, 53 L. J. Ch. N. S. 132, 49 L. T. N. S. 587, holding bequest of fund to mayor of corporation to expend interest in acts of hospitality or charity, void for uncertainty; Reid v. Atkinson, Ir. Rep. 5 Eq. 373, holding where testator left his real and personal property to his wife for her life, with power to dispose of all the property, as she might judge best and wisest, he relying with confidence on her discretion, and that she would make such a distribution or disposal of it as would accord with his wishes on the subject with all of which she was perfectly acquainted, the trust was void for uncertainty; Williams v. Kershaw, 5 L. J. Ch. N. S. 84, holding where testator directed his trustees to apply residue to and for such benovolent, charitable and religious purposes, as they, in their discretion should think most advantageous and beneficial, such bequest was void for uncertainty; Copinger v. Crehane, Ir. Rep. 11 Eq. 429, holding residuary gift by will to a Roman Catholic bishop "to be applied by him in his discretion for such charitable purposes as he might think fit, for the purpose of promoting the glory of God, and the advancement and benefit of the Roman Catholic religion" a valid charitable gift.

Cited in note in 37 L.R.A.(N.S.) 401, 405, on bequest to one to divide as he thinks best.

Distinguished in St. Paul's Church v. Atty. Gen. 164 Mass. 188, 41 N. E. 231, holding where trustees are given discretion to apply a fund either to a legal or illegal object the trust is valid for the legal object; Anderson v. Kilborn, 22 Grant, Ch. (U. C.) 385, holding where testator directed the residue of his estate to "be distributed at the discretion of his executors to the support of Christianity throughout the world such as Bible, tract, missionary societies and institutions of learning of the Baptist denomination," a valid trust was created; Richardson v. Murphy [1903] 1 Ir. Ch. 227, holding a bequest of "residue of estate to Roman Catholic archbishop of Dublin for the time being to be applied by him in such charities as he shall select for the repose of myself, my wife and my parents," valid charitable gift.

The decision of the Master of the Rolls was cited in Taylor v. Keep, 2 Ill. App. 368, holding where there was a clear and manifest intention to vest the trustees with a discretion to devote the fund to a charitable or non-charitable

purpose, such bequest, so far as the trustees are concerned is void for uncertainty; Doe ex dem. Vancott v. Read, 3 U. C. Q. B. 244, holding where trustees are directed by a will to dispose of an estate "as the ministers of a certain church may see fit," the devise is good, not being necessarily a devise to charitable uses; James v. Allen, 3 Meriv. 17, 17 Revised Rep. 4, holding bequest in trust for such "benevolent" purposes as the trustees in their integrity and discretion may unanimously agree on, void.

The decision of the Master of the Rolls was distinguished in Kinike's Estate, 9 Lanc. L. Rev. 180, 11 Pa. Co. Ct. 232, 1 Pa. Dist. R. 172, 30 W. N. C. 22, holding a provision in a will directing the executors to distribute testator's residuary estate" among such charitable institutions and in such proportion as they in their discretion deem proper" is valid; Webster v. Morris, 66 Wis. 366, 57 Am. Rep. 278, 28 N. W. 353, holding bequest to testator's two grandsons to be paid when they both should reach a certain age, provided that in case they should both die before reaching that age without leaving an heir, the sums bequeathed should be "given to any of my heirs who are in need or not in very comfortable circumstances, as to my executors seems fit and proper," created a valid trust; Baker v. Sutton, 5 L. J. Ch. N. S. 264, 1 Keen, 224, holding a bequest of the residue of personal estate for such religious and charitable institutions and purposes within the kingdom of England as in the opinion of the testator's trustees should be deemed fit and proper, a valid charitable bequest.

The decision of the Master of the Rolls was disapproved in Witman v. Lex, 17 Serg. & R. 88, 17 Am. Dec. 644, holding a bequest of money to trustees, with directions to invest it, so that the interest may be applied from time to time towards the education of young students in the ministry of a congregation under the direction of the vestry, valid.

Indefinite trusts.

Cited in Lines v. Darden, 5 Fla. 51, holding to constitute a trust there must be sufficient words to raise it, a definite subject, and a certain and ascertained object.

Entire and partial invalidity of trusts.

Cited in Browne v. King, Ir. L. R. 17 Eq. 448, holding where principal part of trust fails by reason of uncertainty it all fails.

Cited in note in 5 Eng. Rul. Cas. 578, on invalidity of charitable bequest for indebtedness.

Cited in Gray Perpet. 2d ed. 210, on invalidity of trust other than charitable in absence of cestui que trust with standing in court to enforce it.

Property given under void trust.

Cited in Young v. Vass, 1 Patton & H. (Va.) 167, as to who will take if trust fails; McCaw v. Galbraith, 7 Rich. L. 74; Ralston v. Telfair, 17 N. C. (2 Dev. Eq.) 255,—as to who takes under; O'Conner v. Gifford, 117 N. Y. 275, 22 N. E. 1036, holding property which is given to trustees by will upon a void trust or one which cannot be executed is held by them for those persons to whom the law or other provisions of the will give property which is undisposed of.

Trust for heirs on failure of trust for charity or other specific purpose.

Cited in Snowden v. Crown Cork & Seal Co. 114 Md. 650, 80 Atl. 510, Ann. Cas. 1912A, 679 (dissenting opinion), on effect of devise to charity void as against statute as vesting property in heirs or next of kin; Townsend v. Wilson, 77 Conn. 411, 59 Atl. 417; Ingram v. Fraley, 29 Ga. 553; Sheedy v. Roach, 124 Mass. 472, 26 Am. Rep. 680; Robinson v. McDiarmid, 87 N. C. 455; Fair-

field v. Lawson, 50 Conn. 501, 47 Am. Rep. 669,—holding if testator expresses a trust but does not sufficiently express it or expresses a trust that cannot be executed, the next of kin will take; Williams v. Williams, 8 N. Y. 525; Colton v. Colton, 10 Sawy. 325, 21 Fed. 594; Schmucker v. Reel, 61 Mo. 592,—holding where a bequest is for the purposes of benevolence or private charity and is so general and undefined as to be incapable of execution by the court. it fails altogether, and the heir at law or next of kin becomes entitled to the property; Fitzsimmons v. Harmon, 108 Me. 456, 37 L.R.A.(N.S.) 400, 81 Atl. 667, holding that where character of trust is impressed upon gift, and it fails, because ineffectually declared, trustee is not entitled to gift for his own benefit; Stout's Estate, 4 Pa. Co. Ct. 471, 45 Phila. Leg. Int. 5, holding that under will giving residue of estate to executors "to be devoted and given by them to such institution as they may determine upon" residue passed to next of kin; Briggs v. Penny, 3 De G. & S. 525, 13 Jur. 909, holding there was not sufficient expression of intention that executrix should take the residue beneficially, and she therefore held in trust for next of kin; Fable v. Brown, 2 Hill, Eq. 378; Vezey v. Jamson, 1 Sim. & S. 69; Fenton v. Nevin, Ir. L. R. 31 Eq. 478; Atty-Gen. v. Dillon, 13 Ir. Ch. Rep. 127; Willis v. Jolliffe, 11 Rich. Eq. 447,—holding where trust has been imposed, and no beneficial interest is designed for the trustee, if the trust fail for any cause, the trustee shall not hold for his own benefit, and a trust results to grantor or his next of kin; Ford ex rel. Ferguson v. Dangerfield, 8 Rich. Eq. 95, holding where the words of a will are not merely those of advice or request, but declare a trust which is void or unlawful, the legatee holds the property for the next of kin and if there be none, then for the state; Gordon v. Blackman, 1 Rich. Eq. 61, holding if testator makes no disposition of his property, or if the bequests of his will are void his next of kin will not be excluded by a clause providing that they shall not enjoy any part of his property; Paice v. Canterbury, 14 Ves. Jr. 364, holding bequest to executors in trust where the trust is not declared, or fails, is a trust for the next of kin.

The decision of the Master of the Rolls was cited in Kelly v. Nichols, 17 R. I. 306, 19 L.R.A. 413, 21 Atl. 906; Levy v. Levy, 33 N. Y. 97; Dashiell v. Atty-Gen. 5 Harr. & J. 392, 9 Am. Dec. 572; LePage v. McNamara, 5 Iowa, 124, holding if there is in a will an uncertainty as that it cannot be known who is to take as beneficiary the trust is void, and the heir, by operation of law, will take the legal estate stripped of the trust; Elliott v. Morris, Harp, Eq. 281; holding reversion in heir of testator and not in devisees in trust.

Discretionary power of trustees to dispose of property.

Cited in Bacon v. Bacon, 55 Vt. 243, holding where trustee is given discretion in the disposal of the residue he cannot exercise that discretion and judgment from fraudulent, selfish or improper motives; Byrne v. Dunne, 11 C. L. R. (Austr.) 637 (dissenting opinion), on validity of charitable gift where trustee may use discretion in distribution.

The decision of the Master of the Rolls was distinguished in Stouts' Estate, 21 W. N. C. 185, 4 Pa. Co. Ct. 471, holding a gift of "all my estate, of whatsoever kind, which does not or cannot pass under the aforesaid provisions of my will, to my executors, to be devoted and given by them to such institutions, and uses as they, in their best judgment may consider most compatible with the views and instructions I have given them" did not warrant executors appropriating residue to their own use; McCurdy's Appeal, 124 Pa. 99, 10 Am. St. Rep. 575, 16 Atl. 626, holding by provisions of the will a trust was created as to the residuary estate, and what was given to executors was not a discretion

to distribute estate according to their judgment, but a discretion to carry out the views and instructions received from the testator.

Avoidance of illegal trust.

Distinguished in Joyce v. Gunnels, 3 Rich. Eq. 259; Carmille v. Carmille, 2 McMull, L. 454,—where the right of a settlor or his successor to attack an illegal trust was denied.

Power coupled with a trust.

Cited in Taylor v. Benham, 5 How. 233, 12 L. ed. 130, as to what constitutes; Withers v. Yeadon, 1 Rich. Eq. 324, holding that where property is given to one, enabling him to execute power in discretionary manner he is trustee, and if he does not execute power, class of persons among whom bounty was to be distributed, shall take equally.

5 E. R. C. 563, MILLER v. ROWAN, 5 Clark & F. 99.

Charitable trust — Definiteness of object.

Cited in Sears v. Chapman, 158 Mass. 400, 35 Am. St. Rep. 502, 33 N. E. 604, holding charitable trust valid although terms apply to particular locality.

Cited in notes in 14 L.R.A.(N.S.) 86, on enforcement of general bequest for charity or religion; 5 E. R. C. 573, on invalidity of charitable bequest for indebtedness.

— General description of purpose as "charitable" or "benevolent."

Cited in Henckley's Estate, 58 Cal. 457, as to distinction between "benevolent" and "charity;" Saltonstall v. Sanders, 11 Allen, 446, holding bequest in trust for "objects and purposes of benevolence or charity, public or private," created valid charitable trust; Goodale v. Mooney, 60 N. H. 528, 49 Am. Rep. 334, holding "I place the remainder of my property in the hands of my executors, to be distributed by them after my decease, among my relatives, and for benevolent objects, in such sums as in their judgment shall be for the best" a valid bequest in trust; De Camp v. Dobbins, 29 N. J. Eq. 36, holding "the residue of my estate I give and devise to the North Reformed Church of Newark; that they may use the same to promote the religious interests of said church, and to aid the missionary educational and benevolent enterprises to which said church is in the habit of contributing," etc., is a good charitable bequest; People v. Powers, 8 Misc. 628, 29 N. Y. Supp. 950, 83 Hun, 449, holding a devise to an executor or individual accompanied by a statement that it is made "upon trust and confidence reposed in" him "that he will dispose of said property among charitable and benevolent institutions or corporations as he shall choose and such sums and proportions as he shall deem proper," is sufficient to create a trust if the beneficiaries are sufficiently defined.

Distinguished in Chamberlain v. Stearns, 111 Mass. 267, holding a devise in trust, to be applied "solely for benevolent purposes" in the discretion of trustees, is not a charity, and is void.

Allowance of costs out of estate.

Cited in Atty. Gen. ex rel. Abbot v. Dublin, 41 N. H. 91, as to when whole costs of suit allowed out of residuary portion of estate.

Equitable conversion.

Cited in 1 Thomas, Estates, 861, on equitable conversion of real estate into personalty.

5 E. R. C. 580, PHILPOTT v. ST. GEORGE'S HOSPITAL, 6 H. L. Cas. 338, 3 Jur. N. S. 1269, 27 L. J. Ch. N. S. 70, 5 Week. Rep. 845, reversing the decision of the Master of the Rolls, reported in 21 Beav. 134, 25 L. J. Ch. N. S. 33, 4 Week. Rep. 41, 1 Jur. N. S. 1102.

Invalidity resting in mere tendency to violate statutes.

Cited in Atlantic Coast Line R. Co. v. Beazley, 54 Fla. 311, 45 So. 761; Ex parte Reaves, 121 Fed. 848; Brooks v. Cooper, 50 N. J. Eq. 761, 21 L.R.A. 617, 35 Am. St. Rep. 793, 26 Atl. 978,—as to contract being void which opposes general policy of statute; Union Bank v. Douglass, 1 Manitoba L. R. 135; Barrett v. Winnipeg, 7 Manitoba L. Rep 273; Ex parte Renaud, 14 N. B. 273; Smith v. McEachern, 9 N. S. 35; Durand v. Kingston, 14 U. C. C. P. 439; Wagner v. Jefferson, 37 U. C. Q. B. 551; Macdonald v. Crombie, 2 Ont. Rep. 243; Paget v. Fauquier, 1 Ont. Elect. Cas. 197; Rodden v. McIntyre, 1 Ont. Elect. Cas. 182; Cotton v. Imperial & Foreign Agency & Invest. Co. [1892] 3 Ch. 454, 61 L. J. Ch. N. S. 684, 67 L. T. N. S. 342,—as to "tendency" of act to violate statute not sufficient to render it invalid; American Abell Co. v. McMillan, 19 Manitoba L. Rep. 97 (dissenting opinion), on right of party to do indirectly that which he is prohibited from doing directly.

Cited in 2 Beach, Contr. 1882, on invalidity as against public policy of contracts in violation of statute.

Charitable trust — Gifts in mortmain or tending thereto.

Cited in Davidson v. Boomer, 15 Grant, Ch. (U. C.) 218; Sewell v. Crewe-Read, L. R. 3 Eq. 60, 36 L. J. Ch. N. S. 136; Cresswell v. Cresswell, L. R. 6 Eq. 69, 37 L. J. Ch. N. S. 521, 18 L. T. N. S. 392, 16 Week. Rep. 699,— holding trust in favor of a corporation for erection of a building valid provided the land on which the building is to be erected cannot consistently with the terms of the trust be acquired by means of any portion of the bequest, but either has been or is to be lawfully dedicated for the purpose; Re Cox, L. R. 7 Ch. Div. 204, 47 L. J. Ch. N. S. 72, 47 L. T. N. S. 457, 26 Week. Rep. 74, holding a bequest to corporation of T. of sum of £3000 consols, of which £1000 were to be expended "in the erection of a dispensary, which is so urgently needed there," and the remaining £2000 to be invested as "an endowment fund for said dispensary," void, although the corporation held land in mortmain at T. which was available for the purposes of the bequest; Davidson v. Boomer, 15 Grant, Ch. (U. C.) 1; Re Watmough, L. R. 8 Eq. 272, 38 L. J. Ch. N. S. 727, 17 Week. Rep. 959,—holding a charitable legacy to be applied in building is void under Statute of Mortmain, unless testator, by his will, indicates an intention that no part of the money shall be applied in the purchase of a site for the building; Re Holburne, 53 L. T. N. S. 212, holding the tendency of the gift to induce other persons to bring land into mortmain is no ground for holding gift invalid; Sinnett v. Herbert, L. R. 12 Eq. 201, 40 L. J. Ch. N. S. 509, 24 L. T. N. S. 778, 19 Week. Rep. 946, 37 to gift having tendency to bring land into mortmain not being void; Re Christmas, L. R. 30 Ch. Div. 544, 54 L. J. Ch. N. S. 1164, 53 L. T. N. S. 530, 34 Week. Rep. 8, as to statute of mortmain not to be construed according to its tendency.

— Accumulation.

Cited in Odell v. Odell, 10 Allen, 1, holding a bequest of an annual sum out of the income from real estate for fifty years, to trustees, to be invested by them and accumulated during that time, and then applied to establish a charity, is a valid bequest, even if the accumulation cannot be allowed for so long a period.

— Construction of.

Cited in Jackson v. Phillips, 14 Allen, 539, holding they are to be construed to support the charity if possible.

Cited in 2 Sutherland, Stat. Const. 2d ed. 754, on construction of words having both popular and technical meaning; 2 Sutherland, Stat. Const. 2d ed. 748, on general rule for interpretation of words and phrases.

— Intention of testator.

The decision of Master of Rolls was cited in Re Campden Charities, L. R. 18 Ch. Div. 310, 49 L. J. Ch. N. S. 676, 50 L. J. Ch. N. S. 646, L. T. N. S. 152, 30 Week. Rep. 496 (opinion of Vice Chancellor), as to duty of courts to give effect to.

— Definiteness of object indicated in futuro.

Cited in Ould v. Washington Hospital, 95 U. S. 303, 24 L. ed. 450, as to validity of trust when the charity is not in being at time of bequest.

Validity of limitation upon gift void for mortmain.

The decision of Master of Rolls was disapproved in Hall v. Warren, 9 H. L. Cas. 420, 10 Week. Rep. 66, 7 Jur. N. S. 1089, 5 L. T. N. S. 190, holding where prior limitation became abortive by statute of mortmain the limitation over took effect; Warren v. Rudall, 4 Kay & J. 603, 3 Jur. N. S. 822, 6 Week. Rep. 847, 28 L. J. Ch. N. S. 50, 4 Jur. N. S. 653, holding a gift over to one of the trustees as individual was good notwithstanding the particular estate full under Mortmain Acts.

Construction of statutes.

Cited in Reg. v. Todd, 10 N. S. 62 (dissenting opinion), on duty of court to construe statute in accordance with its terms, notwithstanding that it is arbitrary and liable to abuse.

5 E. R C 606, MOGG v. HODGES, 1 Cox, Ch. Cas. 9, Reg. Lib. 1750, B. fol. 611, 2 Ves. Sr. 52.

Charitable gifts — Marshalling assets.

Cited in State Sav. Bank v. Harbin, 18 S. C. 425, as to assets not being marshalled in favor of a charity; Atkins v. Kron, 37 N. C. (2 Ired. Eq.) 423; Re Oliver [1905] 1 Ch. 191, 74 L. J. Ch. N. S. 62,—holding assets will not be marshalled in favor of a charity.

Distinguished in Biggar v. Eastwood, Ir. L. R. 19 Eq. 49, holding in absence of statute of mortmain assets will be marshalled to support a charity.

— Mortmain or tendency thereto.

Cited in McCartee v. Orphan Asylum Soc. 9 Cow. 437, 18 Am. Dec. 516; Whitby v. Liscombe, 22 Grant, Ch. (U. C.) 203; Price v. Maxwell, 28 Pa. 23,—as to charitable devices of money arising from sale of land being void; Green v. Allen, 5 Humph. 170; Whitby v. Liscombe, 23 Grant, Ch. (U. C.) 32 (affirming 22 Grant Ch. 203),—holding money arising from sale of land was an interest in land and not subject of charitable bequest under statute of mortmain; Webster v. Southey, L. R. 36 Ch. Div. 9, 56 L. J. Ch. N. S. 785, 56 L. T. N. S. 879, 35 Week. Rep. 622, 52 J. P. 36, holding statutes which remove disability of grantee by authorizing corporation or other public body to acquire land, do not, unless expressly so worded, interfere with disability of grantor to grant.

Fund for payment of debts of estate.

Cited in Hammond v. Hammond, 2 Bland, Ch. 306; Phipps v. Phipps, 3 Clark (Pa.) 275; Wolf's Estate, 9 W. N. C. 260,—holding personal estate of deceased a primary and mutual fund for payment of his debts and it must be so applied,

unless it be expressly or by plain implication exonerated and discharged by will of testator.

Marshalling of assets.

Cited in Alston v. Munford, 1 Brock, 266, Fed. Cas. No. 267; Fenwick v. Chapman, 9 Pet. 461, 9 L. ed. 193,—as to general doctrine of; Thompson v. Clay, 1 J. J. Marsh. 413, holding purchaser who paid off a vexatious incumbrance may be subrogated thereto against vendor.

Property descending to heirs or residuary legatees.

Cited in McDonell v. Bank of Upper Canada, 7 U. C. Q. B. 252, holding that property devised or attempted to be devised, contrary to statute of uses, descends to heirs or to residuary legatee.

5 E. R. C. 609, NEWBERRY v. COVIN, 6 Bligh, N. R. 167, 1 Clark & F. 283, affirming the decision of the court of Exchequer Chamber reported in 7 Bing. 190, 1 Comp. & J. 192, 4 Moore & P. 876, 1 Tyrw. 55, which reverses the court of King's Bench reported in 8 Barn. & C. 166, 2 Man. & R. 47.

Charter party as affecting change of ownership for the voyage.

Cited in Richardson v. Winsor, 3 Cliff. 395, Fed. Cas. No. 11,795, holding where owner retains the possession and navigation of the ship and contracts to carry the freight, the charter party is a mere covenant for the performance of stipulated services; Morgan v. United States, 5 Ct. Cl. 182, on change of ownership by reason of charter party; Burpee v. Carvill, 16 N. B. 141, holding when a ship is chartered for a voyage with intention that the charterer shall employ the ship as a general ship for his own profit the master in signing bills of lading does so as his agent; Waddell v. Macbride, 7 U. C. C. P. 382, holding by a writing embodying a contract for the use of a schooner with the services of the captain and crew for a voyage the ownership has not been changed; Weir & Co. v. Union S. S. Co. [1900] 1 Q. B. 28, 81 L. T. N. S. 553, 9 Asp. Mar. L. Cas. 13, on the construction of charters as amounting to a demise of a ship; Baumvoll Manufactur von Scheibler v. Gilchrest [1891] 2 Q. B. 310, holding where the owner, through his master, retains possession, with a reservation of the cabin and deck and charterer is to pay certain rates of freight mentioned in the charter party there is not a demise of the ship; Wagstaff v. Anderson, L. R. 4 C. P. Div. 283, L. R. 5 C. P. Div. 171, 49 L. J. C. P. N. S. 485, 44 L. T. N. S. 720, 28 Week. Rep. 856, holding where by the terms of the charter party the responsibility of the master and owners is expressly reserved the charterers cannot be held as virtual owners of the ship during the voyage; Sandeman v. Scurr, L. R. 2 Q. B. 86, 36 L. J. Q. B. N. S. 58, 8 Best & S. 50, 15 L. T. N. S. 608, 15 Week. Rep. 277, holding it necessary to look to the charter party to see whether it operates as a demise of the ship itself, or whether the charterer acquires only the use of the vessel and the services of the master and crew; Baumwoll Manufactur von Carl Scheibler v. Furness, [1893] A. C. 8, 62 L. J. Q. B. N. S. 201, 68 L. T. N. S. 1, 1 Reports, 59, 7 Asp. Mar. L. Cas. 263, holding the owner of a chartered ship not liable where captain pledged his credit, the charter party providing that charterer should for a term of four months have entire possession, appoint and pay the captain, officers and crew, and pay for insurance on vessel.

Distinguished in The Nathaniel Hooper, 3 Sumn. 542, Fed. Cas. No. 10,032, holding the mere fact that the vessel sails under a charter party does not divest the absolute owner of his right to salvage; Wheeler v. Curtis, 11 Wend. 653, holding there was no change of ownership by a charter party whereby a schooner is let for six months at the rate of $300 per month, the owner to keep vessel in

repairs and manned; Annett v. Foster, 1 Daly, 502, holding where owner selects the master under an agreement to run vessel upon shares contracting for her employment, and receiving the freight, the ownership is not changed; Annett v. Foster, 1 Daly, 502, holding where general owner agrees with a master to divide the freight receipts and the expenses but he contracts for her employment, the master is not constituted owner of the vessel pro hac vice.

Disapproved in Re Certain Logs of Mahogany, 2 Sumn. 589, Fed. Cas. No. 2,559; Eames v. Eavaroe, Newb. 528, Fed. Cas. No. 4,238,—holding where the owner retains the possession, command and navigation of the ship, the charterer where contract is to carry freight on a voyage is not clothed with character of ownership.

The decision of the King's Bench was cited in The Volunteer, 1 Sumn. 55, Fed. Cas. No. 16,991; Robinson v. Chittenden, 69 N. Y. 525,—holding where owners equipped, manned and victualled the ship which sailed at their expense, the possession and management of vessel was retained by owners, notwithstanding the charter party.

Rights and liabilities of vessel owner under charter party.

Cited in Scull v. Raymond, 18 Fed. 547, on liability of owners for acts of captain in case of charter parties; The Karo, 29 Fed. 652, holding where charter-party gives the owners a lien on any part of cargo for freight and other named charges, goods under a fraudulent bill of lading may be made subject to such lien; The David Wallace v. Bain, 8 Can. Exch. 205, holding that where owner divests himself of possession and control of ship by charter-party, ship is not liable for necessaries furnished servant of charterer.

Cited in note in 24 Eng. Rul. Cas. 359, on termination of ship owner's liability from charter party or bill of lading.

Cited in 1 Thompson, Neg. 539, on ship owner or master and charterer is liable as master for acts of crew.

Distinguished in Perkins v. Hill, 2 Woodb. & M. 158, Fed. Cas. No. 10,987, holding no implied obligation to pay freight to the owner arises by reason of contracts with the charter party returning from trip to Cuba who was under contract to pay owner $400 per month for use of ship, the owner furnishing crew and provisions.

— Effect of master's signing bills of lading.

Distinguished in Gilkison v. Middleton, 2 C. B. N. S. 134, 26 L. J. C. P. N. S. 209, holding where the captain was still the agent of the ship owners and they sanctioned the signing of bills of lading by him, they cannot as against the consignees, rely upon the charter-party; Manchester Trust v. Furness [1895] 2 Q. B. 539, 64 L. J. Q. B. N. S. 766, 14 Reports 739, 73 L. T. N. S. 110, 44 Week. Rep. 178, 8 Asp. Mar. L. Cas. 57, holding the master the servant of the owner in signing bills of lading though a special clause in the charter party provided that the charterers should indemnify the owners against all liabilities resulting from signing of bills of lading; Turner v. Haji Goolam Mahomed Azam [1904] A. C. 826, 74 L. J. P. C. N. S. 17, 91 L. T. N. S. 216, 9 Asp. Mar. L. Cas. 588, 20 Times L. R. 599, holding where sub-charterer paid part of freight to agents of shipowners and the captain signing the bills of lading had authority from the ship owners to sign them, the goods named in the bills of lading were not subject to charter lien for such amount as was paid.

Necessity of notice of charter party to relieve ship from maritime liens.

Cited in The Karo v. Two Hundred Tons of Sulphur, 19 W. N. C. 549, on liability of one ignorant of charter party under fraudulent bills of lading.

Distinguished in The David Wallace v. Bain, 8 Can. Exch. 205, holding where general owner divests himself wholly of the possession and control of the ship the want of notice is not material.

The decision of the King's Bench was cited in Upson Walton Co. v. The Brian Boru, 10 Can. Exch. 176, holding no maritime lien attaches to the ship for supplies furnished to the charterer with knowledge of the charter party though no notice be given of change of possession.

Shipowner's personal liability.

Cited in Scull v. Raymond, 18 Fed. 547, holding personal liability of a part owner does not necessarily attach as an incident to naked legal ownership, but depends upon the possession, use and control of the ship.

5 E. R. C. 632, STANTON v. RICHARDSON, 3 Asp. Mar. L. Cas. 23, 45 L. J. C. P. N. S. 78, 33 L. T. N. S. 193, 24 Week. Rep. 324, affirming the decision of the Exchequer Chamber, reported in 43 L. J. C. P. N. S. 230, L. R. 9 C. P. 390, which affirms the decision of the Court of Common Pleas, reported in 41 L. J. C. P. N. S. 180, L. R. 7 C. P. 421.

Implied warranty under charter of fitness from nature of use of ship.

The decision of the Exchequer Chamber was cited in Ye Seny Co. v. Corbitt, 9 Fed. 423, holding the law will imply a covenant that the vessel is "fit" to do what they undertake to do with her under the charter party; Trainor v. Black Diamond S. S. Co. 16 Can. S. C. 156, holding it the duty of the shipowner to provide a fit and proper ship, and proper stowage accommodations for the goods: Union S. S. Co. v. Drysdale, 32 Can. S. C. 379 (dissenting opinion), on liability incurred in furnishing an unseaworthy ship.

— Extent of warranty of fitness.

Cited in The Vesta, 6 Fed. 532, holding where the vessel under the charter party was warranted to be fit in every way to carry a cargo of wheat, the charterer was entitled to have the vessel in reasonable condition for carriage of wheat in bulk.

The decision of the Exchequer Chamber was cited in Card v. Hine, 39 Fed. 818, holding the ship not "in every way fitted" for the contemplated voyage if by reason of an accident her insurable quality was greatly diminished; Kopitoff v. Wilson, L. R. 1 Q. B. Div. 377, 45 L. J. Q. B. 436, 34 L. T. N. S. 677, 24 Week. Rep. 706, holding the shipowner impliedly warrants the ship in good condition to perform the voyage then about to be undertaken.

The decision of the Court of Common Pleas was cited in The Southwark, 191 U. S. 1, 48 L. ed. 65, 24 Sup. Ct. Rep. 1, holding vessels carrying dressed meats to be seaworthy must carry refrigerating apparatus necessary for preservation of meat during the voyage; Queensland Nat. Bank v. Peninsula & O. Steam Nav. Co. [1898] 1 Q. B. 567, 8 Asp. Mar. L. Cas. 338, 3 Com. Cas. 51, 67 L. J. Q. B. N. S. 402, 78 L. T. N. S. 67, 14 Times L. R. 166, 46 Week. Rep. 324, holding there was an implied warranty that the bullion-room provided was reasonably fit to resist thieves.

Warranty of fitness where chattel is sold for particular purpose.

The decision of the Exchequer Chamber was cited in Reynolds v. Roxburgh, 10 Ont. Rep. 649, holding if a chattel be sold for a particular purpose there is an implied warranty it is fit for that purpose.

What constitutes a warranty.

Cited in Benjamin, Sales, 5th ed. 657, on what constitutes a warranty;

Benjamin, Sales, 5th ed. 562, on changing conditions precedent into warranty by acceptance of partial performance.

5 E. R. C. 650, JACKSON v. UNION MARINE INS. CO. 2 Asp. Mar. L. Cas. 435, 44 L. J. C. P. N. S. 27, L. R. 10 C. P. 125, 31 L. T. N. S. 789, 23 Week. Rep. 169, affirming the decision of the Court of Common Pleas, reported in 42 L. J. C. P. N. S. 284, L. R. 8 C. P. 572, 22 Week. Rep. 79.

Termination of voyage by unavoidable delay.

Cited in Ruger v. Firemen's Fund Ins. Co. 90 Fed. 310, holding where there is a time condition, delay in entering upon a voyage beyond the time fixed would make it practically and commercially a different voyage; Turnbull, M. & Co. v. Hull Underwriters' Asso. [1900] 2 Q. B. 402, 69 L. J. Q. B. N. S. 588, 82 L. T. N. S. 818, 5 Com. Cas. 248, 9 Asp. Mar. L. Cas. 93, 16 Times L. R. 359, on a delay due to the perils insured against as entitling ship owners to recover for a total loss.

Cited in note in 5 E. R. C. 688, on discharge of charterer by detention of ship.

Cited in Porter, Bills of L. 206, on what perils of the sea.

Destruction of voyage by delay in departure or completion.

Cited in Musgrave v. Mannheim Ins. Co. 32 N. S. 405, holding where the cargo was one which from its character must be carried without delay, the object of the voyage was frustrated by the necessary delay for repairs.

Cited in note in 1 E. R. C. 111, on right to claim total loss under marine policy without abandonment.

Distinguished in Re Jamieson & N. S. S. Freight Ins. Asso. [1895] 1 Q. B. 510, [1895] 2 Q. B. 90, 64 L. J. Q. B. N. S. 222, 560, 14 Reports, 444, 72 L. T. N. S. 195, 648, 43 Week. Rep. 530, 7 Asp. Mar. L. Cas. 593, holding insurers of freight not liable where the vessel on her way to port of loading was so delayed by storms as to render the contemplated voyage impossible, there being a condition in the policy that "no claim arising from the cancelling of any charter shall be allowed."

— Right to abandon or release charter party.

Cited in Singer Mfg. Co. v. Western Assur. Co. Rap. Jud. Quebec 10 C. S. 379, holding it not obligatory on the plaintiff to prosecute the adventure the next spring, after repairing, as the adventure was broken by the delay, the goods shipped being of a commercial nature; Card v. Hine, 39 Fed. 818, holding when a vessel contracts to carry a cargo, and actually receives it, and during the voyage meets with an accident—no time being limited—she must repair and continue, if repairs can be made within a reasonable time; Owen v. Outerbridge, 26 Can. S. C. 272, holding a contract to carry seed potatoes at an end where ship was disabled from completing the voyage within time necessary to effect purpose of shipment; Hudson v. Hill, 43 L. J. C. P. N. S. 273, 30 L. T. N. S. 555, on contract of charter party as being unenforceable where the delay from the perils of the sea from a commercial point of view frustrates the object of the parties; Inman S. S. Co. v. Bischoff, L. R. 7 App. Cas. 670, 52 L. J. Q. B. N. S. 169, 47 L. T. N. S. 581, 31 Week. Rep. 141, 5 Asp. Mar. L. Cas. 6, holding defendants were not liable on a policy "on freight outstanding" where charterers under a charter party contract for time, containing a provision that if at any time it should appear to the charterers that the ship was inefficient they might put her out of pay, refuse to pay freight after a certain date; The Alps [1893] P. 109, 62 L. J. Prob. N. S. 59, 1 Reports, 587, 68 L. T. N. S. 624, 41 Week. Rep. 527, 7 Asp. Mar. L. Cas. 337, holding defendants under a contract of insurance of the "chartered freight" were liable where the vessel was laid up for repairs by reason of a fire and under the charter

party contract the charterers had a right to refuse to pay for hire during such period; Dahl v. Nelson, L. R. 6 App. Cas. 38, 50 L. J. Ch. N. S. 411, 44 L. T. N. S. 381, 29 Week. Rep. 543, 4 Asp. Mar. L. Cas. 392, 9 Eng. Rul. Cas. 234, on delay in carrying out as giving right to terminate contract of charter party.

Cited in Benjamin, Sales, 5th ed. 560, on whether or not a representation in a charter party is a condition; Benjamin, Sales, 5th ed. 561, on what are dependent conditions; Hughes Adm. 161, on implied condition in charter party of seaworthiness and against deviation.

The decision of the Court of Common Pleas was cited in Carvill v. Schofield, 9 Can. S. C. 370 (affirming 21 N. B. 558), holding there was no condition that ship must be at destination at a fixed time, and repairs were made within a reasonable time, the charterers were not excused from continuing the carriage.

Loss of freight without loss of ship.

Cited in Great Western Ins. Co. v. Jordan, Cameron (Can.) 86, holding where chartered freight is insured, and lost through any of the perils insured against, damage to the vessel is not necessary to be shown; Marmaud v. Melledge, 123 Mass. 173, holding there was no total loss of freight because of an actual or constructive total loss of the ship.

Necessity of notice where ship is total loss.

Cited in Patch v. Pitman, 19 N. S. 298; Jordan v. Great Western Ins. Co. 24 N. B. 421,—on notice of abandonment where ship is total loss.

Impossibility as excuse for performing contract.

Cited in Poussard v. Spiers, L. R. 1 Q. B. Div. 410, 45 L. J. Q. B. N. S. 621, 34 L. T. N. S. 572, 24 Week. Rep. 819, holding plaintiff's contract with defendants to take a leading part in an opera to be produced by them was terminated by the inability of the plaintiff because of illness to attend the first performance of the opera; Krell v. Henry [1903] 2 K. B. 740, 72 L. J. K. B. N. S. 794, 89 L. T. N. S. 328, 19 Times L. R. 711, 52 Week. Rep. 246, on the fact that parties might have anticipated an event rendering the performance of contract impossible as not excusing performance thereof; Herne Bay S. B. Co. v. Hutton, 72 L. J. K. B. N. S. 879 [1903] 2 K. B. 683, 89 L. T. N. S. 422, 52 Week. Rep. 183, 9 Asp. Mar. L. Cas. 472, on the eventual nonexistence of the subject matter of a contract as excusing the parties from performance.

Cited in 1 Beach, Contr. 284, on sickness as excusing from performance of contract of service.

— Stipulated causes of excuse.

Distinguished in King v. Parker, 34 L. T. N. S. 887, holding a contract to purchase a certain quantity of coal, part of which was to be delivered every day except in the case of a colliers' strike was not terminated where no deliveries were made for four months because of a strike brought about by the plaintiffs reducing the wages of the colliers.

5 E. R. C. 689, ATTY. GEN. v. PEARSON, 3 MERIV. 353, 17 Revised Rep. 100.

Judicial investigation of religious matters.

Cited in Ramsey v. Hicks, 44 Ind. App. 490, 87 N. E. 1091, holding that where property interests are in controversy, decision of majority of highest tribunal of church that certain part of church membership constitutes true church, is not binding on civil courts; Park v. Chaplin, 96 Iowa, 55, 31 L.R.A. 141, 59 Am. St. Rep. 353, 64 N. W. 674, holding when the courts have jurisdiction of the con-

troversy, they may inquire as to the purpose of institution and rules by which they are governed, and so far as practicable, they will be given effect: Klix v. Polish Roman Catholic St. Stanislaus Parish, 137 Mo. App. 347, 118 S. W. 1171, holding that civil authorities are concerned with points of faith only when they must be ascertained in order to know where property belongs; Boyles v. Roberts, 222 Mo. 613, 121 S. W. 805 (dissenting opinion), on right of civil courts to determine true doctrine of church as limited to cases where property interests are in controversy; Hendrickson v. Shotwell, 1 N. J. Eq. 577, holding the courts may take notice of religious opinions as facts, pointing out the ownership of property; Sutter v. Dutch Church, 3 Grant, Cas. 336, holding the faith of a religious body can only be passed upon by secular courts, when incidental to a question of property; Kelly v. Nichols, 18 R. I. 62, 19 L.R.A. 425, 25 Atl. 840 (dissenting opinion), on power of courts to notice religious opinions; Bishop of Columbia v. Cridge, 1 B. C. pt. 1, p. 5, on the extent religious beliefs will be passed upon by the courts.

Cited in note in 22 L.R.A. 353, on blasphemy or a malicious and wanton attack on the Christian religion individually for the purpose of exposing its doctrines to contempt and ridicule as an indictable offense.

Distinguished in Robertson v. Bullions, 9 Barb. 64, holding all interference must be referred to the rights of property; Dunnet v. Forneri, 25 Grant, Ch (U.C.) 199, holding that court had no jurisdiction to restrain Episcopal minister from refusing to lay member right to partake of Lord's Supper, as no civil right of plaintiff had been invaded.

— Settlement of schismatic disputes.

Cited in Lamb v. Cain, 129 Ind. 486, 14 L.R.A. 518, 29 N. E. 13; Smith v. Pedigo, 145 Ind. 361, 19 L.R.A. 433, 33 N. E. 777,—holding it the duty of the court to inquire whether the party accused of violating the trust is teaching a doctrine so far at variance as to defeat the object of the trust; Field v. Field, 9 Wend. 394, holding a court of equity does not attempt to enforce the faith or doctrine of either party where there is dissension though incidentally involved in settlement of property rights; Bowden v. M'Leod, 1 Edw. Ch. 588, holding it may be the duty of the court to inquire into the doctrines taught with a view to ascertain whether there has been a departure; Brewster v. Hendershot, 27 Ont. App. Rep. 232, holding where it is proper that trust property be administered by trustee holding the opinions of those for whose benefit the trust was intended, the court has power to intervene.

Power in dealing with controversies affecting charities.

Cited in Magill v. Brown, Fed. Cas. No. 8,952, holding courts of chancery act under an obligation to effectuate charitable donations by all the means in their power more favorable than in private trusts; Crockett v. Green, 3 Del. Ch. 466, on the opinions of the founder of a charity as a legitimate subject of inquiry; Stevens v. Stevens, 24 N. J. Eq. 77, holding in case of charities the practice is to determine the real question between the parties in the readiest and least expensive manner; Green v. Allen, 5 Humph. 170, holding, in case of an abuse, or misemployment of a bequest for charity, or an invasion of the rights created by the trust, a court of equity will afford relief.

Cited in 1 Beach, Trusts, 732, on trusts for religious purposes.

— Preservation of property given to prescribed form of worship.

Cited in Watson v. Jones, 13 Wall. 679, 20 L. ed. 666, holding the court has the right to enforce a clearly defined trust and to restrain the teaching or using a form of worship so far variant as to defeat the declared objects of the trust;

Schmidt v. Hess, 60 Mo. 591, holding though the language of the conveyance is not free from obscurity where the theological beliefs of the founder show the intent equity will interpose in favor of those having equitable claims; Kuhl v. Meyer, 42 Mo. App. 474, holding the court will not allow the majority to deflect the trust property from the purpose of the original donors; Atty. Gen. ex rel. Abbot v. Dublin, 38 N. H. 459, holding when the terms used in the instrument are broad enough, to include the religious opinions in question it will be inferred that the intention was to leave it to the discretion of the trustees; McDougal v. Hawes, Russell (N. S.) 146, holding the court must carry out plain intention of parties and where such intention shows that land and building was given for use as Presbyterian church, such intention cannot be defeated by majority of congregation; Miller v. Gable, 2 Denio, 492 (dissenting opinion), on duty of court to restrain the use of funds from promotion of another faith; Calkins v. Cheney, 29 Phila. Leg. Int. 269, 4 Legal Gaz. 257, holding that courts will not permit a majority of the members of a church which is under control of a superior church to secede and take the church property with them; Nance v. Busby, 91 Tenn. 303, 15 L.R.A. 801, 18 S. W. 874, holding the court will even go so far as to prevent the diversion of the property by the action of a majority of the beneficiaries; Doe ex dem. Methodist Episcopal Church v. Bell, 5 U. C. Q. B. O. S. 344, holding that trustees who adhered to church organization as it existed at time real property was given by deed of trust to Methodist Episcopal Church, were entitled to possession as against trustees appointed by conference; Atty. Gen. v. St. John's Hospital, L. R. 2 Ch. Div. 554, 45 L. J. Ch. N. S. 420, 34 L. T. N. S. 563, 24 Week. Rep. 913, holding where there is a charity for the purpose of education in particular religious opinions it must be governed by trustees whose opinions are in conformity with those opinions.

Cited in note in 3 L.R.A.(N.S.) 868, on enjoining control, use of, or interference with, church property.

Cited in 2 Washburn, Real Prop. 6th ed. 470, on nonenforcement in equity of an illegal trust.

— Loss of church property by departure in faith.

Cited in Kelly v. Steele, 9 Idaho, 141, 72 Pac. 887, on controversy over right to church property between separate religious associations; Mt. Zion Baptist Church v. Whitmore, 83 Iowa, 138, 13 L.R.A. 198, 49 N. W. 81, holding property given to a religious association for its use and promulgation of its teachings is held in trust by the association, and may not be diverted, by less than the whole association; Immanuel's Gemeinde v. Keil, 61 Kan. 65, 58 Pac. 973, holding where church was built from funds solicited and contributed by adherents of the Iowa synod, it was a perversion to use the property to advance doctrines of the Missouri synod fundamentally different; Princeton v. Adams, 10 Cush. 129, holding funds given to support the Unitarian faith and principles are forfeited if changed to the Trinitarian faith; Rottman v. Bartling, 22 Neb. 375, 35 N. W. 126, holding that where members of Evangelical Lutheran Church, without giving notice required by constitution, joined another church, they were not entitled to possession of property of such church; Lutheran Cong. v. St. Michael's Evangelical Church, 48 Pa. 20, holding title to church property is not forfeited by change of synodical connections; Koehler v. Roshi, 28 Phila. Leg. Int. 373, holding that the title to church property of a divided congregation is in that part of it which is acting in harmony with its own law, and the ecclesiastical laws, usages, customs, and principles which were accepted among them before the dispute began are the standards for determining which

party is right; Schnorr's Appeal (Miller v. Schnorr) 67 Pa. 138, 28 Phila. Leg. Int. 29, holding the majority cannot depart from the sect on which the gift is settled and carry the property with them and having forfeited it cannot reinstate themselves by mere resolve; Suter v. Spangler, 4 Phila. 331, 18 Phila. Leg. Int. 60, holding the court must support the trust for those who adhere to the original design of the persons who established it without regard to members; Jones v. Wadsworth, 11 Phila. 239, 33 Phila. Leg. Int. 390, 4 W. N. C. 514, holding those who adhere and submit to the regular order of the church, local and general, though the minority, are the true congregation and corporation, if incorporated and entitled to the property; Trustees v. Sturgeon, 9 Pa. 321, holding that property donated to religious society, should be awarded in controversy between members, to those who are adhering to ecclesiastical government which was in operation at time trust was declared; Landrith v. Hudgins, 121 Tenn. 556, 120 S. W. 783, holding that land conveyed to church cannot be diverted to different faith without valid change of faith of such church; Morgan v. Jones, 9 Kulp, 503, holding the courts uniformly hold that the original organization is entitled, in case schism has arisen in a church, to retain the property and enjoy the advantages of the association; Doe ex dem. Methodist Episcopal Church v. Bell, 5 U. C. Q. B. O. S. 344, holding the majority at a general conference had no power to do away with Episcopacy against wishes of the minority where property was deeded in trust to the Methodist Episcopal Church; Jones v. Wadsworth, 4 W. N. C. 514, holding that where denominational connection is one of condition of charitable trust for maintenance of church, trust is violated by severance of denominational relations, though doctrinal belief continues identical; Free Church v. Overtoun [1904] A. C. 515, 91 L. T. N. S. 395, 20 Times L. R. 730, holding where the free church accepted gifts secured by trust deed for the church which held to the establishment, principles and the Westminster confession of faith, it had no power later to vary that doctrine so as to leave out these cardinal principles; Atty. Gen. v. Anderson, 57 L. J. Ch. N. S. 543, 58 L. T. N. S. 726, 36 Week. Rep. 714, holding a resolution for purpose of changing congregation into the Presbyterian Church of England against the wishes of any single dissenter, would not bind where the trust deed called for a use as a meeting house for Protestant dissenters.

Cited in note in 32 L.R.A. 96, on power of local society to withdraw from church.

Cited in 1 Beach Trusts, 798, 801, on breach of ecclesiastical trust by change of doctrine.

Distinguished in Atty.-Gen. v. Bunce, L. R. 6 Eq. 563, 37 L. J. Ch. N. S. 697, 18 L. T. N. S. 742, holding a gift where the Presbyterians appear as sole recipients may be held by Baptist to the exclusion of Congregation formed solely to take over the property, where the original Presbyterian Congregation gradually changed their views becoming Baptists.

Burden of proof of religious departure.

Cited in Itter v. Howe, 23 Ont. App. Rep. 256, holding the burden rests on those asserting such a departure from the fundamental principles of the society, as in effect to cause them to be no longer members thereof.

Title to gift for charity.

Cited in State v. Griffith, 2 Del. Ch. 392, holding the equitable interest in a charitable use vests precisely in the same manner as a use under a private power of appointment; Smith v. Nelson, 18 Vt. 511, holding that legacy to voluntary society for purpose of supporting religious worship to be paid annually to their

minister for ever, is grant to society, and is payable to minister elected by majority; Dorland v. Jones, 12 Ont. App. Rep. 543, on power of altering the purpose for which trust was founded.

Usage as an aid to the interpretation of doubtful intent.

Cited in Sommerville v. Morton, 5 N. S. 50, holding where intention of giver is doubtful evidences of the circumstances surrounding the author of the instrument were admissible in evidence; Wilson v. Presbyterian Church, 2 Rich. Eq. 192, holding usage against usage, utterly irreconcilable appearing, the intention of the testator must be gathered from the will itself.

Distinguished in State ex rel. Trimble v. Nashville, 2 Tenn. Ch. 755, holding where terms of the deed, in case of an educational charity, is clear, no evidence aliunde is admissible; Presbyterian Cong. v. Johnston, 1 Watts & S. 9, holding when neither the usage nor the purpose could possibly have existed at the time material to the question subsequent usage cannot add to that which testator intended.

Disapproved in Smith v. Nelson, 18 Vt. 511, holding where the intention of the testator is plain it is not necessary to revert to any source to ascertain that intent.

— In religious and charitable matters.

Cited in McGinnis v. Watson, 2 Pittsb. 220, 8 Pittsb. L. J. 321, holding usage of congregation and denominational connections may be resorted to where the nature of the worship intended cannot be ascertained by the writing conveying the trust property; Greek Catholic Church v. Orthodox Greek Church, 195 Pa. 425, 46 Atl. 72, holding court is unable to discover what particular form of worship was intended, such intention is to be supplied from the usage of the congregation.

Disapproved in Robertson v. Bullions, 11 N. Y. 243, holding where the use is expressed in general and not in specific terms, it cannot be inferred from the tenets, faith and practice of the creator of the fund, that the use was limited to such tenets and faith.

Construction of word "religious."

Cited in Hale v. Everett, 53 N. H. 9, 16 Am. Rep. 82, holding the terms Unitarian Christians and Theists represent antagonistic systems; Grimond v. Grimond, 6 Sc. Sess. Cas. 5 Series (Fraser) 286, note [1905] A. C. 603, appx. holding where the trustee held no peculiar views upon the matters of religion, the word "religious" must be construed as referring to the Christian religion.

Certainty as to beneficiaries necessary to charitable trust.

Cited in Barkley v. Donnelly, 112 Mo. 561, 19 S. W. 305, holding a devise "for a home and place for maintenance of poor children" will be enforced.

Validity of charitable gift upon condition.

Cited in MacKenzie v. Presbytery of Jersey City, 67 N. J. Eq. 652, 3 L.R.A (N.S.) 227, 61 Atl. 1027, holding a charitable trust as a gift for religious purposes upon condition that instrumental music shall not be used is good.

Cited in note in 6 L.R.A.(N.S.) 324, on validity of trust to propagate particular religious belief as a charity.

Meaning of assets.

Cited in Gardiner v. Gardiner, 2 U. C. Q. B. (O. S.) 554 (dissenting opinion), on the meaning of assets.

Legal recognition of Christian religion.

Cited in State v. Chandler, 2 Harr. (Del.) 553, holding blasphemy against the Deity, or a malicious and wanton attack against the Christian religion is in-

dictable and punishable as a temporal offense; Pringle v. Napanee, 43 U. C. Q. B. 285, holding by the common law of England it is an indictable offense to libel christianity by attacking any of its cardinal principles; R. v. Ramsay, 48 L. T. N. S. 733, 1 Cab. & El. 126, 15 Cox, C. C. 231, on the present law as to penalties and disabilities for religious belief or non-belief in the Trinity.

Tenure of ministers and faculties of learning.

Cited in Weir v. Mathieson, 11 Grant, Ch. (U. C.) 383, holding professors in Queen's College held their appointments ad vitam aut culpam.

Right of religious dissent.

Cited in State v. Griffith, 2 Del. Ch. 392, to the point that Declaration act established right of religious dissent.

Right of deviation of fund for specified charitable objects.

Cited in Blenon's Estate, Brightly (Pa.) 406, 407, on a devise by way of contribution to a fund devoted to specific objects, by a society who make it up, being, in law, a devise for such purposes only.

5 E. R. C. 703, HARVEY v. FARNIE, L. R. 8 App. Cas. 43, 47 J. P. 308, 52 L. J. Prob. N. S. 33, 48 L. T. N. S. 273, 31 Week. Rep. 433.

Domicile of the husband as the legal domicile of the wife.

Cited in Conger v. Kennedy, 2 Terr. L. Rep. 186, holding that the domicile of the husband is the legal domicile of the wife.

Cited in note in 9 Eng. Rul. Cas. 727, on domicil of married woman.

— As fixing the matrimonial domicile for purposes of divorce.

Cited in R. v. Brinkley, 14 Ont. L. Rep. 434, 10 Ann. Cas. 407, holding that where the wife obtained a divorce under the laws of Michigan, the husband always being a domiciled citizen of Canada, she having separated from him and gone to Michigan the divorce was void, no personal service, being made; Magurn v. Magurn, 11 Ont. App. Rep. 178 (affirming 3 Ont. Rep. 570), holding that the jurisdiction to divorce depends upon the domicile of the husband.

Jurisdictional domicile of husband and wife for divorce.

Cited in Cheely v. Clayton, 110 U. S. 701, 28 L. ed. 298, 4 Sup. Ct. Rep. 328, holding that a divorce obtained by the husband upon notice by publication insufficient under the statutes of the territory to confer jurisdiction over the absent wife, is no bar to an action to recover the land of the husband after his death, by the widow; Hilton v. Guyot, 159 U. S. 113, 40 L. ed. 95, 16 Sup. Ct. Rep. 139, on a judgment affecting the status of persons as being recognized as valid in all countries, unless contrary to policy of its own law; Atherton v. Atherton, 181 U. S. 155, 45 L. ed. 794, 21 Sup. Ct. Rep. 544, holding that a decree of divorce obtained by the husband in Kentucky where he had always resided, was valid in New York as against the petition of the wife for a divorce, where she had gone to New York to reside, and had been notified of the divorce proceedings; Haddock v. Haddock, 201 U. S. 562, 50 L. ed. 867, 26 Sup. Ct. Rep. 525, 5 Ann. Cas. 1, holding that where the husband left his wife, who at all times remained in New York, and went to Connecticut and after acquiring a domicil obtained a decree of divorce upon constructive service upon the wife, such divorce was not entitled to credit in New York under the constitution; Stevens v. Fisk, Cameron (Can.) 392, holding that a decree rendered by a foreign court, valid by the laws of the forum, which is the matrimonial domicile, is valid in another country; Magurn v. Magurn, 3 Ont. Rep. 570, holding that all questions as to dissolubility of marriage of domiciled Canadian living in United States with Ameri-

can woman depend upon Canadian law, so long as domicil continues to be Canadian; R. v. Woods, 6 Ont. L. Rep. 41, holding that where both parties were married in Canada and both domiciled there, a decree of divorce obtained in a foreign country where they were temporarily residing, was void; Allen v. Allen, 15 Ont. Pr. Rep. 458, holding that where the defendant in an action for alimony resided in the Northwest Territory for a number of years as customs collector, and had sold his residence in Ontario, his domicil was in Northwest Territory and service on him to give jurisdiction to Ontario courts must be in person within Ontario; Rex v. Hamilton, 22 Ont. L. Rep. 484, holding that courts will recognize validity of divorce granted by court of country where parties were legally domiciled at time when proceedings were taken; Turner v. Thompson, L. R. 13 Prob. Div. 37, 57 L. J. Prob. N. S. 40, 58 L. T. N. S. 387, 36 Week. Rep. 702, 52 J. P. 151, holding that where a domiciled English woman married an American citizen and lived with him for several years, when the marriage was annulled on the ground of incapacity by the courts of the United States, and she returned to England, the decree would be recognized, as she had acquired an American domicile; Green v. Green [1893] P. 89, holding that the courts of England would not recognize a divorce granted by the courts of another country, where the husband was a domiciled citizen of England, and the wife, who obtained the divorce, was a citizen of the country granting the divorce, previous to her marriage and had returned there to live; Bater v. Bater [1906] P. 209, 4 Ann. Cas. 854, 75 L. J. Prob. N. S. 60, 94 L. T. N. S. 835, 22 Times L. R. 408, holding that the court of the bona fide existing domicile has jurisdiction over persons originally domiciled in another country to undo a marriage solemnized in that other country, even though the divorce was obtained on grounds not recognized in the latter country.

Cited in notes in 19 L.R.A. 517, on validity of foreign divorce decree; 59 L.R.A. 153, on conflict of laws on divorce; 5 Eng. Rul. Cas. 745, on conclusiveness and enforceability of judgment of foreign court having jurisdiction.

5 E. R. C. 726, GODARD v. GRAY, 40 L. J. Q. B. N. S. 62, L. R. 6 Q. B. 139, 24 L. T. N. S. 89, 19 Week. Rep. 348.

Conflict of laws as to jurisdiction.

Cited in Nicholson v. Baird, N. B. Eq. Cas. 195, on the jurisdiction of the court of bankruptcy of England over a Canadian who was a member of an English firm, though still a resident of Canada.

Enforcement of a foreign judgment.

Cited in Fisher v. Fielding, 67 Conn. 91, 32 L.R.A. 236, 52 Am. St. Rep. 270, 34 Atl. 714 (dissenting opinion); Mellin v. Horlick, 31 Fed. 865; Gault v. McNabb, 1 Manitoba L. R. 35; Shearer v. McLean, 36 N. B. 284,—on the enforcement of foreign judgments; Fowler v. Vail, 4 Ont. App. Rep. 267 (affirming in part 27 U. C. C. P. 417), on the general law concerning the enforcement of foreign judgments; Huntington v. Attrill, 18 Ont. App. Rep. 136, holding that a court will not enforce a foreign judgment recovered under a penal law of the foreign state; Martime Bank v. Stewart, 13 Ont. Pr. Rep. 491, holding that the judgment of the High Court in England awarding an injunction should be enforced in Canada; Schibsby v. Westerholz, 40 L. J. Q. B. N. S. 73, L. R. 6 Q. B. 155, 24 L. T. N. S. 93, 19 Week. Rep. 587, 5 Eng. Rul. Cas. 734, holding that a judgment of a foreign court, obtained in default of appearance against a defendant, cannot be enforced in an English court, where the defendant at the time the suit was commenced, was not a subject of or a resident

in the country; Vioret v. Barret, 54 L. J. Q. B. N. S. 521, 53 L. J. Q. B. N. S. 39, holding that the judgment of a foreign court was binding where the defendant had voluntarily appeared in answer to the summons, and the judgment would be enforced: Pemberton v. Hughes [1899] 1 Ch. 781, 68 L. J. Ch. N. S. 281, 47 Week. Rep. 354, 80 L. T. N. S. 369, 15 Times L. R. 211, holding that foreign judgment is recognized as binding unless they offend English views of substantial justice: Nouvion v. Freeman, L. R. 15 App. Cas. 1, 59 L. J. Ch. N. S. 337, 62 L. T. N. S. 189, 38 Week. Rep. 581, holding that "remote" judgment of court of Spain was not final judgment which could be made foundation of action in this country.

— Grounds for collateral impeachment.

Cited in Baker v. Palmer, 83 Ill. 568, holding that a judgment of a foreign court having jurisdiction of both parties and subject matter is conclusive except that it may be impeached for fraud; Moch v. Virginia F. & M. Ins. Co. 4 Hughes, 61, 10 Fed. 696, holding that where a foreign court has passed on the question of its own jurisdiction when expressly raised by the pleadings it is binding upon the parties in an action on the judgment in a local court; McMullen v. Ritchie, 8 L.R.A. 268, 41 Fed. 502, holding same where he appeared by attorney, though judgment was rendered in his absence; Hilton v. Guyott. 42 Fed. 249 (see 159 U. S. 113, 40 L. ed. 95, 16 Sup. Ct. Rep. 39), holding that the judgment of a foreign court is conclusive where the party appeared and defended although he was not given the benefit of the rules of evidence prevailing in this country; Star Kidney Pad Co. v. McCarthy, 26 N. B. 107; Beaty v. Cromwell, 9 Ont. Pr. Rep. 547,—holding that a plea of want of jurisdiction of the foreign court was good in an action upon a judgment rendered by that foreign court; Ochsenbein v. Papelier, L. R. 8 Ch. 695, 42 L. J. Ch. N. S. 861, 28 L. T. N. S. 459, 21 Week. Rep. 516, 30 Phila. Leg. Int. 275, holding that a plea of fraud is a good defense at law to an action upon a foreign judgment; Abouloff v. Oppenheimer, L. R. 10 Q. B. Div. 295, 52 L. J. Q. B. N. S. 1, 47 L. T. N. S. 325, 31 Week. Rep. 57, holding that a judgment of a foreign court obtained through fraud of one of the parties, would not be enforced in a domestic court, though the foreign court had passed on the question of fraud.

Right to examine into foreign judgment.

Cited in McMullen v. Richie, 8 L.R.A. 268, 41 Fed. 502, holding that judgment of court of foreign country in suit in which defendant appeared by counsel, is conclusive, in absence of fraud; Law v. Hansen, 25 Can. S. C. 69, holding that a judgment of a foreign court having the force of res judicata in the foreign country, has like force in Canada; British Linen Co. v. McEwan, 8 Manitoba L. Rep. 99, on the right to set up the statute of limitations as a defense to a foreign judgment; Corse v. Moon, 22 N. S. 191, on the conclusiveness of a foreign judgment.

Cited in notes in 20 L.R.A. 675, 678, 680, on conclusiveness of judgment rendered in foreign country; 5 E. R. C. 741, 742, 745, on conclusiveness and enforceability of judgment of foreign court having jurisdiction.

— Errors of law in foreign judgments.

Cited in Fauntleroy v. Lum, 210 U. S. 230, 52 L. ed. 1039, 28 Sup. Ct. Rep. 641, holding a foreign judgment is conclusive though based on a misapprehension of the law of the state where sought to be enforced; MacDonald v. Grand Trunk R. Co. 71 N. H. 448, 59 L.R.A. 448, 93 Am. St. Rep. 550, 52 Atl. 982, holding that a judgment upon the merits in a foreign court, is a bar to a suit

upon the same cause of action between the same parties in this state, though contrary to the established policy of this state; Meyer v. Ralli, L. R. 1 C. P. Div. 358, 45 L. J. Q. B. N. S. 741, 35 L. T. N. S. 538, 24 Week. Rep. 963, holding that where it is admitted by the parties that the law of a foreign tribunal has not been correctly declared by its judgment, such judgment is not binding upon the courts of England; Re Trufort, L. R. 36 Ch. Div. 600, 57 L. J. Ch. N. S. 135, 57 L. T. N. S. 674, 36 Week. Rep. 163, holding that foreign judgment cannot as between two parties, be impeached here, on ground that it proceeded on mistake as to English law.

Foreign judgment as a prima facie debt.

Cited in Hilton v. Guyot, 159 U. S. 113, 40 L. ed. 95, 16 Sup. Ct. Rep. 139 (see 42 Fed. 249), holding that a judgment of a foreign court is prima facie evidence only, and not conclusive, on the merits of the case, if by the law of that country a judgment of the domestic courts is not conclusive; Mitchell v. Garrett, 5 Houst. (Del.) 33, holding that a judgment of a foreign court is not prima facie evidence of legal indebtedness, where it appears by the record that the defendants in it resided at the time, outside of the state; Whitla v. McCuaig, 7 Manitoba L. Rep. 454, holding that a foreign judgment is a liquidated demand within the meaning of the statute, authorizing plaintiff to sign judgment upon appearance, where suit is on liquidated demand; Fowler v. Vail, 27 U. C. C. P. 417 (affirmed in part in 4 Ont. App. Rep. 267), holding that a foreign judgment is prima facie a debt and conclusive on its merits, and as such is assignable so as to enable the assignee to sue on it in his own name.

Foreign law as question of fact.

Cited in Hazelton v. Valentine, 113 Mass. 472, holding that when the law of a foreign country is in dispute, it becomes a question of fact as to what that law is and it may be shown by evidence.

Applicability of law of mother country to colony.

Cited in Nicholson v. Baird, N. B. Eq. Cas. 195, holding that English Bankruptcy Act does not apply to Canada so as to vest in trustee appointed in England, either real estate situate in Canada as personal property of person domiciled in Canada though he is member of English firm and joined in bankruptcy petition.

5 E. R. C. 734, SCHIBSBY v. WESTENHOLZ, 40 L. J. Q. B. N. S. 73, L. R. 6 Q. B. 155, 24 L. T. N. S. 93, 19 Week. Rep. 587.

Enforcement of a foreign judgment.

Cited in Fisher v. Fielding, 67 Conn. 91, 32 L.R.A. 236, 52 Am. St. Rep. 270, 34 Atl. 714 (dissenting opinion): Gault v. McNabb, 1 Manitoba L. R. 35,—on the enforcement of foreign judgments; Corse v. Moon, 22 N. S. 191, on the principles on which foreign judgments are enforced in other countries: Fowler v. Vail, 4 Ont. App. Rep. 267, on general law concerning foreign judgments; Huntington v. Attrill, 18 Ont. App. Rep. 136, holding that the courts of the province would not enforce a judgment of a foreign country founded upon the penal laws of that country; Barned Bkg. Co. v. Reynolds, 36 U. C. Q. B. 256 (see 40 U. C. Q. B. 435), on the grounds for enforcing a foreign judgment; Copin v. Adamson, L. R. 9 Exch. 345, 22 Week. Rep. 658, 43 L. J. Exch. N. S. 161, 31 L. T. N. S. 242, holding that a judgment of a court of France against an English shareholder in a French corporation, having its domicile at Paris, which under the laws of France and also by the articles of incor-

poration, was to be the jurisdiction in which all disputes were to be tried, unless the shareholder elected another place, which he had not done, would be enforced in an English court; Meek v. Wendt, L. R. 21 Q. B. Div. 126, 59 L. T. N. S. 558, 6 Asp. Mar. L. Cas. 331, on the enforcement of foreign judgments: Nouvion v. Freeman, L. R. 15 App. Cas. 1, 59 L. J. Ch. N. S. 337, 62 L. T. N. S. 189, 38 Week. Rep. 581 (affirming 37 Ch. Div. 244, 35 Ch. Div. 715), holding that a judgment of a foreign court cannot be enforced in a domestic court unless it is a final and conclusive judgment so as to become res judicata between the parties.

Cited in notes in 5 E. R. C. 745, 746, on conclusiveness and enforceability of judgment of foreign court having jurisdiction; 2 Eng. Rul. Cas. 496, on non-enforceability of foreign judgment.

— Defenses.

Cited in Shearer v. McLean, 36 N. B. 284, on sufficient defense to the enforcement of the foreign judgment; Ochsenbein v. Papelier, L. R. 8 Ch. 695, 42 L. J. Ch. N. S. 861, 28 L. T. N. S. 459, 21 Week. Rep. 516, holding that a plea of fraud is a good defence at law to an action on a foreign judgment; Abouloff v. Oppenheimer, L. R. 10 Q. B. Div. 295, 52 L. J. Q. B. N. S. 1, 47 L. T. N. S. 325, 31 Week. Rep. 57, holding a foreign judgment obtained by fraud of a party in the foreign court can not enforce the judgment in an action in the domestic court, though the foreign court passed upon the question of fraud in rendering the judgment; Meyer v. Ralli, L. R. 1 C. P. Div. 358, 45 L. J. C. P. N. S. 741, 35 L. T. N. S. 838, 24 Week. Rep. 963, holding that where it is admitted by the parties that the law of a foreign tribunal had not been correctly declared by its judgment, such judgment is not binding upon an English court; Re Trufort, L. R. 36 Ch. Div. 600, 57 L. J. Ch. N. S. 135, 57 L. T. N. S. 674, 36 Week. Rep. 163, holding that even though the judgment is based on mistake of foreign law it will be enforced in other countries.

Credit to which a foreign judgment is entitled.

Cited in Ouseley v. Lehigh Valley Trust & S. D. Co. 84 Fed. 602, holding that a default judgment of a foreign country, rendered by a court of competent jurisdiction, and having jurisdiction of the parties and subject matter, is valid and enforceable though the defendants were out of the country and were not served personally; Van Norman v. Gordon, 172 Mass. 576, 44 L.R.A. 840, 70 Am. St. Rep. 304, 53 N. E. 267, holding that a judgment of a foreign court by confession under a warrant of attorney, upon a note, is entitled to full faith and credit, where there is no charge of fraud; McEwan v. Zimmer, 38 Mich. 765, 31 Am. Rep. 332, holding that a judgment of a foreign court made upon service of process of that court outside of its territorial jurisdiction is not binding on a defendant who refused to recognize its jurisdiction and will not be enforced; Wilbur v. Abbot, 60 N. H. 40, holding that a judgment rendered in another state is not valid in New Hampshire unless it would have been valid if rendered in that state, though it is valid by the laws of the state in which it was rendered; Gibbs v. Queen Ins. Co. 63 N. Y. 114, 20 Am. Rep. 513, on the credit to which a foreign judgment is entitled in another country: Hunt v. Hunt, 72 N. Y. 217, 28 Am. Rep. 129, holding that a judgment of divorce against a domiciled citizen of the state, upon substituted service, as provided by the law of the state, is conclusive upon the courts of another state, though the party was absent from the state and did not appear; Maritime Bank v. Stewart, 13 Ont. Pr. Rep. 491, holding that a judgment of the High Court in England awarding an injunction should be enforced in Canada the same as

other foreign judgments; London & C. Loan & Agency Co. v. Merritt, 32 U. C. C. P. 375, holding a judgment founded on a notice of sequestration served upon one trustee but not on the others, who resided in another province, was not enforceable in the latter province.

Conclusiveness of foreign judgments.

Cited in Moch v. Virginia F. & M. Ins. Co. 4 Hughes, 61, 10 Fed. 696, holding that where the foreign court has passed upon the question of its own jurisdiction in rendering judgment, when the question is expressly raised by the pleadings, its judgment is conclusive upon the parties in the home court; Hilton v. Guyot, 159 U. S. 113, 40 L. ed. 95, 16 Sup. Ct. Rep. 139, holding that a judgment upon the merits is conclusive unless some special ground is shown for impeaching it, as by showing that it was affected by fraud or prejudice or that by the principles of international law or comity, it is not entitled to full credit and effect; Mitchell v. Garrett, 5 Houst. (Del.) 33, holding that the judgment of a foreign court may be impeached or denied, and inquired into or disproved, by evidence that the foreign court had no jurisdiction, for various reasons; MacDonald v. Grand Trunk R. Co. 71 N. H. 448, 59 L.R.A. 448, 93 Am. St. Rep. 550, 52 Atl. 982, holding a judgment upon the merits, by a foreign court, is a conclusive defense to a local action on the same cause of action between the same parties if the court had jurisdiction of the parties and subject matter; Law v. Hansen, 25 Can. S. C. 69, holding that a judgment of a foreign court having the force of res judicata in the foreign country, has the like force in Canada; Pemberton v. Hughes [1899] 1 Ch. 781, 68 L. J. Ch. N. S. 281, 47 Week. Rep. 354, 80 L. T. N. S. 369, 15 Times L. R. 211, holding that a decree of divorce of a foreign state will be held conclusive if the court rendering it had jurisdiction over the parties and the subject matter, notwithstanding irregularities of procedure.

Cited in notes in 20 L.R.A. 678, 679, on conclusiveness of judgment rendered in foreign country; 11 Eng. Rul. Cas. 235, on impeachment of judgment record of another state for fraud or lack of jurisdiction.

Validity of a foreign judgment against one not domiciled within jurisdiction.

Cited in Hart v. Sansom, 110 U. S. 151, 28 L. ed. 101, 3 Sup. Ct. Rep. 586, holding that a decree of a state court of one state for the removal of a cloud upon title to land within the state against a citizen of another state, is not a bar, where notice was by publication only, to an action in a Federal court, to recover the land against the plaintiff in the former suit; Raher v. Raher, 150 Iowa, 511, 35 L.R.A.(N.S.) 292, 129 N. W. 494, Ann. Cas. 1912D, 680, to the point that personal judgment against nonresident could not be sustained; McCann v. Randall, 147 Mass. 81, 9 Am. St. Rep. 666, 17 N. E. 75 (dissenting opinion), on the duty of one not a citizen of a state to submit himself to the jurisdiction of the courts of that state, when served with process; Star Kidney Pad Co. v. McCarthy, 26 N. B. 107; McLean v. Shields, 9 Ont. Rep. 699; Beaty v. Cromwell, 9 Ont. Pr. Rep. 547,—holding a plea good which stated that the defendant was not at the time of the commencement of the action or at any time domiciled in the foreign country or a subject of that country, and that he was not served with process, nor had chance to defend; Nicholson v. Baird, N. B. Eq. Cas. 195, holding that an English bankruptcy court has no jurisdiction to render an adjudication against a domiciled resident of Canada though he was a member of an English trading company; Gifford v. Calkin, 45 N. S. 277, holding that judgment recovered in foreign country against alien who has

not in any way submitted to jurisdiction, and was not resident when action was commenced, does not create any obligation against him to satisfy it; British Linen Co. v. McEwan, 8 Manitoba L. Rep. 99; Fowler v. Vail, 4 Ont. App. Rep. 267 (affirming in part 27 U. C. C. P. 417),—holding a plea bad which was interposed as a defense to a foreign judgment, that defendant was not a resident or domiciled in the foreign country and had no notice, where he did not plead that he was not a subject thereof and not amenable to its jurisdiction: Deacon v. Chadwick, 1 Ont. L. Rep. 346, holding a judgment of the court of one province against a domiciled citizen of another by service out of the jurisdiction is of no validity outside of the province, where the party has not attorned to the jurisdiction; Fowler v. Vail, 27 U. C. C. P. 417, on the validity of a foreign judgment against one who was not a citizen or domiciled in such foreign country; Sirdar Gurdyal Singh v. Faridcote [1894] A. C. 670, 11 Reports, 340, holding that a judgment of a court against a foreigner who is absent, and who owes no allegiance or obedience to the country whose courts render it, is a nullity; Rousillon v. Rousillon, L. R. 14 Ch. Div. 351, 49 L. J. Ch. N. S. 338, 42 L. T. N. S. 679, 28 Week. Rep. 623, 44 J. P. 663, holding that a judgment rendered by a French court against a Swiss subject who was domiciled in England, on a contract entered into while he was on a temporary visit to France, would not be enforced by English courts, where he was not in France when judgment was rendered and was not served with process; Turnbull v. Walker, 5 Reports, 132, 67 L. T. N. S. 767, 9 Times L. R. 99, holding that the judgment of a foreign court, obtained in default of appearance, cannot be enforced in a domestic court, if the defendant was at the time residing and domiciled in another country, though he was served with notice.

Cited in note in 50 L.R.A. 587, on service of process sufficient to constitute due process of law as against nonresident.

Distinguished in Lyon v. Marriott, 5 B. C. 157, holding where the question was as to whether a foreign court had jurisdiction over a person by reason of an unauthorized appearance by an attorney, as to whether his testimony could be used to prove the unauthorized appearance; Vionet v. Barrett, 54 L. J. Q. B. N. S. 521, 55 L. J. Q. B. N. S. 39, holding that where the defendants appeared in answer to the process of the foreign court but not to protect property as none has been seized, the appearance was voluntary and they cannot object to the enforcement of such foreign judgment then rendered.

—Against one without notice.

Cited in Bugbee v. Clergue, 27 Ont. App. Rep. 96, holding that an action upon a foreign judgment must fail if it is shown that such judgment was obtained without notice to the defendant, either actual or constructive.

Laws of country where contract was made as binding upon the parties.

Cited in Shannon v. Georgia State Bldg. & L. Asso. 78 Miss. 955, 57 L.R.A. 800, 84 Am. St. Rep. 657, 30 So. 51, holding that in construing foreign contract, court looks to lex loci, only so far as to determine what contract is, and whether it shall be enforced, if at all, according to intention of parties; Barned's Bkg. Co. v. Reynolds, 40 U. C. Q. B. 435 (see 36 U. C. Q. B. 256), on the laws of the country where the obligation was entered into, as binding upon the parties.

Cited in notes in 5 Eng. Rul. Cas. 928, on law governing validity of transfer of property; 5 Eng. Rul. Cas. 782, on law governing testamentary capacity and rights of succession to personalty.

What is comity.

Cited in Crippen, L. & Co. v. Laighton, 69 N. H. 540, 46 L.R.A. 467, 76

Am. St. Rep. 192, 44 Atl. 538; Shannon v. Georgia State Bldg. & L. Asso. 78 Miss. 955, 57 L.R.A. 800, 84 A. S. R. 657, 30 So. 51,—on what is comity.

Right of sovereignty to control its courts.

Cited in Continental Nat. Bank v. United States Book Co. 74 Hun, 632, 26 N. Y. Supp. 956, holding that every sovereignty has power to regulate the procedure in its courts and the rights which plaintiffs may acquire, and the liabilities which may be imposed on resident defendants by judgment of its tribunals.

Substituted service upon nonresident as conferring jurisdiction over him.

Cited in Wisconsin v. Pelican Ins. Co. 127 U. S. 265, 32 L. ed. 239, 8 Sup. Ct. Rep. 1370, on substituted service as conferring jurisdiction over a nonresident.

5 E. R. C. 747, LAUDERDALE PEERAGE CASE, L. R. 10 App. Cas. 692,
See s. c. 11 E. R. C. 349.

5 E. R. C. 748, DOE EX DEM. BIRTWHISTLE v. VARDILL, 6 Bing. N. C. 385, 7 Clark & F. 895, 4 Jur. 1076, 1 Scott, N. R. 828, West, 500, Reaffirming on rehearing, 2 Clark & F. 571, 9 Bligh, N. R. 32, re-reporting 6 Bligh, N. R. 479, which affirms the decision of the Court of King's Bench, reported in 5 Barn. & C. 438, 4 L. J. K. B. 190, 8 Dowl. & R. 185.

Laws determining the legitimacy of children.

Cited in Fenton v. Livingstone, 3 Macq. H. L. 497, 5 Jur. N. S. 1183, 7 Week. Rep. 671, on the legitimacy of a person as being determined by the law of his birthplace and his parents' domicile; Re Wright, 25 L. J. Ch. N. S. 621, 2 Kay & J. 595, 2 Jur. N. S. 465, 4 Week. Rep. 541, holding that the legitimacy of a child is determined by the law of the country where its parents are domiciled at the time of its conception and birth and not by the law of the place where it is born.

Cited in notes in 5 Eng. Rul. Cas. 762–770, on law governing status of legitimacy; 65 L.R.A. 178, 180, on conflict of laws as to legitimacy.

The decision of the Court of King's Bench was cited in Barnum v. Barnum, 42 Md. 251; Jackson v. Jackson, 82 Md. 17, 34 L.R.A. 773, 33 Atl. 317,—on law which makes legitimate an illegitimate child or a child born out of wedlock, as having extra territorial obligation.

The decision of the Court of King's Bench was distinguished in Scott v. Key, 11 La. Ann. 232, holding that a statute making a person, a legitimate child, was a personal statute and had extra-territorial effect and accompanied him where ever he went, under the civil law.

Right of adopted child to inherit property.

Cited in Re Susman, 28 Pittsb. L. J. N. S. 101, on right of child adopted in Holland to share in distribution as child under laws of this state.

The decision of the Court of King's Bench was cited in Brown v. Finley, 157 Ala. 424, 21 L.R.A.(N.S.) 679, 131 Am. St. Rep. 68, 47 So. 577, 16 Ann. Cas. 778, holding that adoption under statutes of foreign state does not confer right of inheritance in this state.

Legitimation by marriage.

Cited in Marr v. Marr, 3 U. C. C. P. 36, on the marriage of the parents as determining the legitimacy of the child.

— For purposes of succession or inheritance.

Cited in Gregg v. Tesson, 1 Black, 150, 17 L. ed. 74, on the right of a child born before the marriage of its parents while domiciled in one state to inherit in another state; Blythe v. Ayres, 96 Cal. 532, 19 L.R.A. 40, 31 Pac. 915, holding that an illegitimate child, whose mother was domiciled in England and the father in California, and who was legitimated by public acknowledgment by the father according to laws of California, was capable of inheriting his land in California, though she always resided in England till her father's death; Williams v. Kimball, 35 Fla. 49, 26 L.R.A. 746, 48 Am. St. Rep. 238, 16 So. 783, holding that no person can take real property by descent, unless he is recognized as legitimate heir by the laws of the country where the land lies; Smith v. Derr, 34 Pa. 126, 75 Am. Dec. 64, holding that a child born out of wedlock and legitimated by the laws of another state, can not inherit land in Pennsylvania; Bollermann v. Blake, 24 Hun, 187, holding same as to New York; Re Goodman, L. R. 17 Ch. Div. 266, 50 L. J. Ch. N. S. 425, 44 L. T. N. S. 527, 29 Week. Rep. 586, holding that where the children were legitimated by the subsequent marriage of the parents according to the laws of Holland where the parents were domiciled, were legitimate so as to entitle them to share in the personal estate of an intestate dying in England; Re Andros, L. R. 24 Ch. Div. 637, 52 L. J. Ch. N. S. 793, 49 L. T. N. S. 163, 32 Week. Rep. 30, holding that a person legitimate according to the law of the domicile of the father is legitimate everywhere for the purpose of succeeding to personal property.

Cited in note in 9 E. R. C. 288, on right of illegitimate to inherit.

Disapproved in Finley v. Brown, 122 Tenn. 316, 25 L.R.A.(N.S.) 1285, 123 S. W. 359, holding that where illegitimate child has by subsequent marriage of parents, becomes legitimated by virtue of law of state where marriage took place, it is legitimate everywhere, and entitled to right of inheritance.

The decision of the Court of King's Bench was cited in Lingen v. Lingen, 45 Ala. 410, holding that the descent of real property is governed by the law of the place where situated, which determines all questions of legitimacy, primo-geniture, proximity of blood, and the like.

Right to inherit as having extra-territorial effect.

Cited in Miller v. Miller, 18 Hun, 507, holding that foreign statute, or status created by it, does not control our statutes regulating descent of real property.

The decision of the Court of King's Bench was cited in Brown v. Finley, 157 Ala. 424, 21 L.R.A.(N.S.) 679, 131 A. S. R. 68, 47 So. 577, 16 Ann. Cas. 778, holding that a statute of a foreign state conferring the right of inheritance upon an adopted child has no extra-territorial operation and does not confer a right of inheritance in another state.

Laws of owner's domicile as governing disposition of personal property.

The decision of the Court of King's Bench was cited in Garland v. Rowan, 2 Smedes & M. 617, holding that the law of the owner's domicile governs the distribution of his personal estate, upon his decease; Bethlem v. Roxbury, 20 Conn. 298 (dissenting opinion); Anderson v. Poindexter, 6 Ohio St. 623,—on the law of the domicile of the owner as governing the distribution of personal property; Russell v. Tunno, P. & Co. 11 Rich. L. 303; Willis v. Jolliffe, 11 Rich. Eq. 447,—holding that the law of the owner's domicile determines in all cases the validity of every transfer alienation or disposition of personal property, either inter vivos or post mortem.

Land as exclusively subject to the law of the place where it is situated.

Cited in Clarke's Appeal, 70 Conn. 195, 39 Atl. 155, on the succession to land as

being governed by the law of the situs; Bentley v. Whittemore, 18 N. J. Eq. 366, holding that the transfer and descent of real property is governed by the law of the place where it lies; Boyce v. St. Louis, 29 Barb. 650, 18 How. Pr. 125, holding that the law of the place where the land is situated, governs the capacity to take and hold same.

Cited in 1 Devlin Deeds 3d ed. 103, on capacity to transfer realty as governed by the law rei sitae.

The decision of the Court of King's Bench was cited in Depas v. Mayo, 11 Mo. 314, 49 Am. Dec. 88, holding that the law of the place where the land is situated governs the transfer of the land; Heydock's Appeal, 7 N. H. 496, holding that real estate is exclusively subject to laws of government within whose territory it is situated; Fellows v. Heermans, 8 Luzerne Leg. Reg. 35, holding that conveyance of land must be construed in accordance with laws of place where land is situated; Eyre v. Storer, 37 N. H. 114, holding that the validity of every disposition of real estate must depend upon the law of the country in which that estate is situate; Lamar v. Scott, 3 Strobh. L. 562, holding that the law of the situs of real estate governs as to the capacity of persons to take and transfer, to the forms and solemnities to passing title, to the extent of the interest to be transferred, or to the subject matter; Macdonald v. Georgian Bay Lumber Co. 2 Can. S. C. 364, holding that land is exclusively subject to the law of the place where it is situated.

Laws governing the personal capacity or relation.

Cited in Ross v. Ross, 129 Mass. 243, 37 Am. Rep. 321, holding that an adopted child capable of inheriting by the law of the domicil of the parties, and who afterward acquires a domicile in another state, his status given him by the first state follows him, so that he may inherit.

The decision of the Court of King's Bench was cited in Corrie's Case, 2 Bland, Ch. 488, holding that the law of the domicile governs the personal capacity.

Laws governing the marital rights and obligations.

Cited in Harris v. Cooper, 31 U. C. Q. B. 182, on the marriage, valid where performed, as affecting real estate in another country.

The decision of the Court of King's Bench was cited in Vischer v. Vischer, 12 Barb. 640, on the law of the domicil as governing the marital obligation.

Birth in wedlock as a condition precedent to inheritance of land.

Cited in Re Don, 27 L. J. Ch. N. S. 98, 4 Drew. 193, 3 Jur. N. S. 1192, 5 Week. Rep. 836, holding that where the son died unmarried, he having been born out of wedlock, but subsequently legitimized by the marriage of his parents while domiciled in Scotland, the father could not inherit the son's real estate; Skottowe v. Young, L. R. 11 Eq. 474, 40 L. J. Ch. N. S. 366, 24 L. T. N. S. 220, 19 Week. Rep. 583, holding that children legitimated according to French law, while living in France, were not "strangers to the blood," and were liable for legacy duty on proceeds of land devised to them by their father.

Distinguished in Re Grey [1892] 3 Ch. 88, 61 L. J. Ch. N. S. 622, 41 Week. Rep. 60, holding that the rule that a child, born out of wedlock, though legitimated by subsequent marriage of his parents, can not inherit land in England, relates only to cases of descent upon intestacy and not to a case of a devise of real estate to children.

Disapproved in Dayton v. Adkisson, 45 N. J. Eq. 603, 4 L.R.A. 488, 14 Am. St. Rep. 763, 17 Atl. 964, holding that a child born out of wedlock in one state, and rendered legitimate by a subsequent marriage of his parents in that state, may

inherit lands in another; Miller v. Miller, 91 N. Y. 315, 43 Am. Rep. 669 (reversing 18 Hun, 507), holding that a person legitimate by the law of his parents domicile, by their marriage subsequent to his birth, and by the law of the place where marriage was contracted, is legitimate everywhere, and has right to inherit.

The decision of the Court of King's Bench was cited in Escallier v. Escallier, L. R. 10 App. Cas. 312, 54 L. J. P. C. N. S. 1, 53 L. T. N. S. 884, on the birth in wedlock as a condition precedent to inheritance of land in England.

5 E. R. C. 772, ABD-UL-MESSIH v. FARRA, L. R. 13 App. Cas. 431, 57 L. J. P. C. N. S. 88, 59 L. T. N. S. 106.

Laws governing power of testacy.

Cited in Ross v. Ross, 25 Can. S. C. 307 (dissenting opinion), on the law of the domicile of the testator as determining the validity of his will.

Cited in note in 2 L.R.A.(N.S.) 409, on conflict of laws as to wills.

Laws governing distribution of personal estate of deceased domiciled but not naturalized.

Cited in Roberts v. Atty.-Gen. [1903] 1 Ch. 821, 72 L. J. Ch. N. S. 682, 51 Week. Rep. 444, 88 L. T. N. S. 161, 19 Times L. R. 309, holding that where a person has acquired a domicile of choice, but was not naturalized, in a country which does not recognize domicile, the personal property which was left in England, must be distributed according to the law of the domicile of origin and not the law of England, though he was an English subject.

Cited in note in 9 Eng. Rul. Cas. 805, on maintenance of original domicil until establishment of new domicil.

5 E. R. C. 783, BROOK v. BROOK, 9 H. L. Cas. 193, 7 Jur. N. S. 422, 4 L. T. N. S. 93, 9 Week. Rep. 461, affirming the decision of the Vice Chancellor, reported in 4 Jur. N. S. 317, 27 L. J. Ch. N. S. 401, 3 Smale & G. 481, 6 Week. Rep. 110 and 451.

Laws determining the marriage capacity.

Cited in Jackson v. Jackson, 82 Md. 17, 34 L.R.A. 773, 33 Atl. 317, on the capacity to marry as being determined by the law of the domicil; State v. Madden, 81 Mo. 421, on the capacity to marry as being determined by the country of which they are subjects; Kerrison v. Kerrison, 8 Abb. N. C. 444, to the point that marriage valid where contracted is valid everywhere; Re Chase, 26 R. I. 351, 69 L.R.A. 493, 58 Atl. 978, 3 Ann. Cas. 1050, holding that capacity to marry depends upon the law of the place where the marriage is performed, and will be recognized as valid in the place of domicile unless contrary to the public policy of the domicile; S.——— v. S.———, 1 B. C. (pt. 1) 25, on the point that lex loci contractus governs marriage contract; Re Alison, 31 L. T. N. S. 638, 23 Week. Rep. 226, holding that a marriage which was void according to the law of the domicile of the parties because of incapacity, was void everywhere; Re De Wilton [1900] 2 Ch. 481, 69 L. J. Ch. N. S. 717, 48 Week. Rep. 645, 83 L. T. N. S. 70, 16 Times L. R. 507, holding that the capacity of persons professing the Jewish religion, who are domiciled British subjects, to contract marriage is regulated by the law of England; Re Bozzelli, [1902] 1 Ch. 751, 71 L. J. Ch. N. S. 505, 86 L. T. N. S. 445, 50 Week. Rep. 447, 18 Times L. R. 365, holding that the law of the common domicile is sufficient to determine marriage capacity, except in cases of marriages stamped as incestuous by the general consent of Christendom.

Cited in notes in 57 L.R.A. 161, 162, 166; 5 Eng. Rul. Cas. 829, 831,—on law governing validity of marriage; 12 E. R. C. 736, on law governing marriage; 17 E. R. C. 160, on what constitutes a valid marriage.

Validity of marriage performed in one state, contrary to the law of the common domicile.

Cited in Roth v. Roth, 104 Ill. 35, 44 Am. Rep. 81, holding that a marriage in the state, between persons domiciled here, and who are competent under the law to marry, is valid, though forbidden by the law of the country of which they are subjects; Schofield v. Schofield, 20 Pa. Dist. R. 805, 59 Pittsb. L. J. 567, holding that marriage of first cousins, domiciled here, solemnized in another state where such marriages are legal, will be recognized here; Pennegar v. State, 87 Tenn. 244, 2 L.R.A. 703, 10 Am. St. Rep. 648, 10 S. W. 305, holding that a marriage, void as against the public policy of the state, is not valid even though performed in another state, which would recognize its validity; State v. Shattuck, 69 Vt. 403, 40 L.R.A. 428, 60 Am. St. Rep. 936, 38 Atl. 81, holding that where a party was forbidden by the laws of Vermont, to marry, was married while in New Hampshire, the marriage is valid in Vermont if valid where performed; Re Wilbur, 8 Wash. 35, 40 Am. St. Rep. 886, 35 Pac. 407, holding that where the law prohibited marriages between Indians and whites, a marriage between two such is void, though the statute is soon after repealed and they continue to cohabit after the act is repealed, although the marriage is contracted on the reservation.

Disapproved in Re Wood, 137 Cal. 129, 69 Pac. 900, holding that a marriage in another state within the year after divorce, which is prohibited by the law of California, is valid if valid by the law of the state where performed.

—Evasive marriage outside of domicile.

Cited in Ex parte Kinney, 3 Hughes, 9, Fed. Cas. No. 7,825, on the right to disregard a marriage between two of its citizens, performed while in a foreign state, in order to evade the laws of their domicil; Marshall v. Marshall, 48 How. Pr. 57; Stull's Estate, 183 Pa. 625, 39 L.R.A. 539, 63 Am. St. Rep. 776, 39 Atl. 16, 41 W. N. C. 481, 28 Pittsb. L. J. N. S. 291; Georgia v. Tutty, 7 L.R.A. 50, 41 Fed. 753; Lanham v. Lanham, 136 Wis. 360, 17 L.R.A.(N.S.) 804, 128 Am. St. Rep. 1085, 117 N. W. 787,—holding that where two persons forbidden by law to marry, go to another state for the purpose of evading that law and are married, the former state need not recognize such marriage upon their return; Marshall v. Marshall, 2 Hun, 238, holding that if citizens leave their own country and contract marriage abroad, such marriage being forbidden by law of their residence, and being celebrated with intent to resume their old residence, validity of contract is to be determined by law of domicil of parties; Kerrison v. Kerrison, 60 How. Pr. 51, on invalidity of marriage performed in another state, but in violation of law of domicil; State v. Fenn, 47 Wash. 561, 17 L.R.A.(N.S.) 800, 92 Pac. 417, holding same but if the persons before marriage acquired a domicil in the latter state or country it is valid, if valid by their laws; Greenhow v. James, 80 Va. 636, 56 Am. Rep. 603, holding that a marriage between two persons, performed in a foreign country while they are domiciled in this, is void if forbidden by the laws of their domicil; Sottomayor v. De Barros, L. R. 2 Prob. Div. 81, 46 L. J. Prob. N. S. 43, 36 L. T. N. S. 746, 25 Week. Rep. 541, L. R. 3 Prob. Div. 1, 47 L. J. Prob. N. S. 23, 37 L. T. N. S. 415, 26 Week. Rep. 455, holding that where two persons, subjects of, and domiciled in Portugal, they being first cousins, who are forbidden to marry by Portuguese law, came to England and resided, and went through a form of marriage, the marriage was void by the law of their domicil; Kinney v. Com. 30 Gratt. 858, 32 Am. Rep. 690, holding that where by the laws of Virginia, whites

and negroes are forbidden to marry, a marriage between two such is void though performed in the District of Columbia, the parties being domiciled in Virginia.

Distinguished in Com. v. Lane, 113 Mass. 458, 18 Am. Rep. 509, holding that where persons are forbidden to marry, but are married while in another state, they are not indictable on their return, unless it is shown that both were citizens of the state and went to the other state for the purpose of evading the law; Kerrison v. Kerrison, 8 Abb. N. C. 444, 60 How. Pr. 51, holding that a court would not annul a marriage upon the petition of one of the parties, on the ground that it was contracted in another state in order to avoid the laws of their domicil; State v. Ross, 76 N. C. 242, 22 Am. Rep. 678, holding that where a negro and white woman were married in South Carolina, where such a marriage was permitted, they not intending to return to North Carolina, by whose laws they were forbidden to marry, it was a valid marriage when some time later they did return.

Validity of marriage between persons within the prohibited degrees of affinity.

Cited in Berea College v. Com. 123 Ky. 209, 124 Am. St. Rep. 344, 94 S. W. 623, 13 Ann. Cas. 337, on invalidity of marriages within prohibited degrees or between prohibited races; Howarth v. Mills, L. R. 2 Eq. 389, 12 Jur. N. S. 794, 14 L. T. N. S. 544, on the validity of a marriage between the husband and the deceased wife's sister; Pawson v. Brown, L. R. 13 Ch. Div. 202, 49 L. J. Ch. N. S. 193, 41 L. T. N. S. 339, 28 Week. Rep. 652, holding that marriage between man and deceased wife's sister, is invalid whether ceremony is performed here or abroad.

Cited in note in 12 E. R. C. 744, on validity of marriage within prohibited degrees.

Enforcement of contracts contrary to public policy of state where sought to be enforced.

Cited in Logan v. Postal Teleg. & Cable Co. 157 Fed. 570, holding that a country has the right to refuse to enforce a contract, valid by the law of the place where entered into, if contrary to the law of the state where it is sought to be enforced.

— Contrary to express statute.

Cited in Nehring v. Nehring, 164 Ill. App. 527, holding that courts will not enforce foreign contract which is void under statutes of this state.

Acquirement by wife of separate domicile for purposes of divorce.

Cited in note in 16 L.R.A. 499, on domicil of wife for purpose of divorce suit.

Power of legislature to forbid or restrict marriage.

Cited in note in 2 L.R.A.(N.S.) 531, on legislative power to forbid marriage.

Words in will to carry estate in fee.

Cited in note in 10 E. R. C. 686, on what words are necessary to carry estate in fee by will.

5 E. R. C. 814, SOTTOMAYOR v. DE BARROS, L. R. 3 Prob. Div. 1, 47 L. J. Prob. N. S. 23, 37 L. T. N. S. 415, 26 Week. Rep. 455, Reversing the decision of the Probate Division, reported in L. R. 2 Prob. Div. 81. Opinion in Probate Division after remittitur reported in 49 L. J. Prob. N. S. 1, 41 L. T. N. S. 281, L. R. 5 Prob. Div. 94, 27 Week. Rep. 917.

Law determining the capacity to contract.

Cited in Nichols & S. Co. v. Marshall, 108 Iowa, 518, 79 N. W. 282, holding that contract of suretyship by married woman domiciled in Iowa, made while temporarily in Indiana, cannot be enforced in Iowa, since such contract is void in

Indiana; Hammerstein v. Sylva, 66 Misc. 550, 124 N. Y. Supp. 535, holding that capacity of operatic singer domiciled in United States to contract for services to be rendered in United States, is to be governed by laws of that country, though contract was made in France.

Disapproved in Milliken v. Pratt, 125 Mass. 374, 28 Am. Rep. 241, holding that the validity of a contract even as regards the capacity of the parties is to be determined by the law of the place where it was made.

The decision of the Probate Division upon remittitur was cited in Ross v. Ross, 129 Mass. 243, 37 Am. Rep. 321; Campbell v. Crampton, 8 Abb. N. C. 363,—on the law governing the capacity to contract.

— Contracts of, or pertaining to, marriage.

Cited in Greenhow v. James, 80 Va. 636, 56 Am. Rep. 603, holding that the law of the place of its celebration governs as to forms of ceremony which constitute marriage, while the law of the domicile governs as to the capacity to marry; Re Cooke, 56 L. J. Ch. N. S. 637, 56 L. T. N. S. 737, 35 Week. Rep. 608, holding that an ante-nuptial contract between a Frenchman and an Englishwoman as to dealing with her property according to the law of France, must be decided as to its validity according to the law of England, which was her domicil.

Validity of a marriage as determined by the law of the place where performed.

Cited in Hay v. Northcote, 69 L. J. Ch. N. S. 586, [1900] 2 Ch. 262, 82 L. T. N. S. 656, 48 Week. Rep. 615, 16 Times L. R. 418, holding that a marriage between a Frenchman and an Englishwoman, solemnized in France, is valid as regards form in England, though declared invalid as regards form by a French Court, where performed by the English consul under the Consular Marriage Act.

Cited in notes in 19 L.R.A. 821, on validity of decree of divorce obtained on publication or service out of state where defendant did not appear; 28 L.R.A (N.S.) 754, 755; 57 L.R.A. 163, 167–172; 12 E. R. C. 735, 736; 5 Eng. Rul. Cas. 828, 831, 832,—on law governing validity of marriage; 9 E. R. C. 288; 12 E. R. C. 745,—on validity of marriage within prohibited degrees.

The decision of the Probate Division upon remittitur was cited in Re Bozzelli [1902] 1 Ch. 751, 71 L. J. Ch. N. S. 505, 86 L. T. N. S. 445, 50 Week. Rep. 447, 18 Times L. R. 365, holding that a marriage valid where performed is valid everywhere; Ogden v. Ogden [1908] P. 46, 77 L. J. Prob. N. S. 34, 97 L. T. N. S. 827, 24 Times L. R. 94 (affirming [1907] P. 107, 76 L. J. Prob. N. S. 9, 96 L. T. N. S. 505, 23 Times L. R. 158), holding that the law of the place of marriage controlled, and a marriage between a person who had procured a divorce in France for a reason wholly unknown to English law, was bigamous, and would be annulled.

Marriage as a civil contract.

The decision of the Probate Division upon remittitur was cited in Moss v. Moss [1897] P. 263, 66 L. J. Prob. N. S. 154, 77 L. T. N. S. 220, 45 Week. Rep. 635, on marriage as a civil contract.

5 E. R. C. 833, HYDE v. HYDE, 12 Jur. N. S. 414, 35 L. J. Prob. N. S. 57, L. R. 1 Prob. & Div. 130, 14 L. T. N. S. 188, 14 Week. Rep. 517.

Validity of a polygamous or non-Christian marriage in country other than where performed.

Cited in Robb v. Robb, 20 Ont. Rep. 591, on the validity of a polygamous marriage, in another country, where valid in the country where performed.

Cited in notes in 5 E. R. C. 846, 847, on validity in other countries of polyga-

mons marriage valid where performed; 17 E. R. C. 160, on what constitutes a valid marriage.

Distinguished in Brinkley v. Atty.-Gen. L. R. 15 Prob. Div. 79, 59 L. J. Prob. N. S, 51, 62 L. T. N. S. 911, 53 J. P. 425, upholding a Japanese marriage because monogamous though non-Christian.

Law governing validity of marriage.

Cited in Marshall v. Marshall, 2 Hun, 238, 48 How. Pr. 57 (dissenting opinion), on validity of marriage contract made in foreign country where such marriage is forbidden by laws of domicil of parties; Ross v. Ross, 129 Mass. 243, 37 Am. Rep. 321, to the point that marriage valid where celebrated is valid everywhere.

Cited in notes in 57 L.R.A. 159, 160, on law governing validity of marriage; 9 E. R. C. 288; 12 E. R. C. 735, 736,—on law governing marriage.

What constitutes a marriage at common law.

Cited in Riddle v. Riddle, 26 Utah, 268, 72 Pac. 1081, holding that marriage at common law does not arise unless parties mutually agree to live together as husband and wife for life, to exclusion of all others; Re Sheran, 4 Terr. L. R. 83, holding that contract of marriage of white man and Indian woman in North-West Territories in 1878, without ceremony of any kind, was not valid marriage.

Construction of statutes.

Cited in 2 Sutherland, Stat. Const. 2d ed. 748, on general rule for interpretation of words and phrases in a statute.

What law governs validity of marriage.

Cite in notes in 57 L.R.A. 161; 5 Eng. Rul. Cas. 827; 9 E. R. C. 288,—on law governing validity of marriage; 12 E. R. C. 736; 5 E. R. C. 847,—on validity in other countries of polygamous marriage valid where performed.

5 E. R. C. 841, BRINKLEY v. ATTY.-GEN. 53 J. P. 425, 59 L. J. Prob. N. S. 51, 62 L. T. N. S. 911, L. R. 15 Prob. Div. 76.

5 E. R. C. 848, GUEPRATTE v. YOUNG, 4 De G. & S. 217.

Enforcement of contract made outside the domicile.

Cited in Hammerstein v. Sylva, 66 Misc. 550, 124 N. Y. Supp. 535, holding that capacity of operatic singer domiciled in United States to contract for services to be rendered in United States, is to be governed by laws of that country, though contract was made in France.

Cited in note in 57 L.R.A. 516, on conflict of laws as to capacity of married woman to contract.

Disapproved in Nichols & S. Co. v. Marshall, 108 Iowa, 518, 79 N. W. 282, holding contract void in place of domicil if void where made.

Construction of contract where domicile is changed after execution.

Cited in Re Barnard, 56 L. T. N. S. 9, holding it will be construed according to law of place where made.

5 E. R. C. 870, LLOYD v. GUIBERT, 6 Best & S. 100, 35 L. J. Q. B. N. S. 74, L. R. 1 Q. B. 115, 13 L. T. N. S. 602, affirming the decision of the Court of Queen's Bench, reported in 10 Jur. N. S. 949, 12 Week. Rep. 953.

Law governing liability of vessel on contract of affreightment.

Cited in Liverpool & G. W. Steam Co. v. Phenix Ins. Co. 129 U. S. 397, 32 L. ed. 788, 9 Sup. Ct. Rep. 469, holding contract of affreightment made in American port by American shipper with English steamship company doing business there,

governed by law of place where made where intention does not appear to be governed by law of England; Card v. Hine, 39 Fed. 818, holding rights on contract made with agent of vessel determined by law of country of vessel: The Titania, 19 Fed. 101, holding law of flag governs; The Avon, Adm. Brown, 170, Fed. Cas. No. 680, on construction of contract by law of vessels country; Inverness R. & Coal Co. v. Jones, 40 Can. S. C. 45, 87, on law of vessel's flag as determining rights of hirer under charter party; Melady v. Jenkins S. S. Co. 18 Ont. L. Rep. 251, holding contract of shipment completed in one country governed by law of place of such shipment that being place of contract; Moore v. Harris, 2 Quebec L. Rep. 147, holding that a bill of lading made in England by the master of an english ship is a contract to be governed and interpreted by English law; Re Missouri S. S. Co. L. R. 42 Ch. Div. 321, 58 L. J. Ch. N. S. 721, 61 L. T. N. S. 316, 37 Week. Rep. 696, 6 Asp. Mar. L. Cas. 423, holding contract of shipment by citizen of one country with shipowner of another country for carriage in vessel of latter, will be governed by law of latter; Moore v. Harris, L. R. 1 App. Cas. 318, 45 L. J. P. C. N. S. 55, 34 L. T. N. S. 519, 24 Week. Rep. 887, 3 Asp. Mar. L. Cas. 173, holding bill of lading made in one country by master of ship of that country, for delivery of goods in another, governed by law of former; Charterer Mercantile Bank v. Netherlands India Steam Nav. Co. L. R. 9 Q. B. Div. 122, L. R. 10 Q. B. Div. 521, 52 L. J. Q. B. N. S. 220, 48 L. T. N. S. 546, 31 Week. Rep. 445, 5 Asp. Mar. L. Cas. 65, 47 J. P. 260, holding where citizens of same country contract regarding shipment from port belonging to that country although in vessel sailing under foreign flag, law of such port governs as to construction and effect of contract as between parties; Nugent v Smith, L. R. 1 C. P. Div. 19, 45 L. J. C. P. N. S. 19, 33 L. T. N. S. 731, 1 Eng. Rul. Cas. 216, on inference of submission to laws of country to which ship belongs in contract for shipment.

— Other maritime contracts and rights.

Cited in Force v. Providence Washington Ins. Co. 35 Fed. 767, holding law of home of vessel will determine rights on bottomry obligation, it being presumed parties contracted with reference thereto; The Woodland, 14 Blatchf. 499, Fed. Cas. No. 17,977, holding right to lien on vessel for repairs in foreign port determined by law of country under whose flag vessel sailed; Miller v. O'Brien, 35 Fed. 779, on liability of shipowner on bottomry bond executed by master; The Scotia, 35 Fed. 907, holding lien for supplies furnished foreign vessel depends on law of place and not of vessel's flag; Re Clyde S. S. Co. 134 Fed. 95, to the point that law governing liability in respect to merchant vessels is dependent upon contract; Dupont v. Quebec S. S. Co. Rap. Jud. Quebec, 11 S. C. 188, holding contract of hiring for service on board ship, made at place of residence of employe, where most of services were to be performed, governned by law of such place; The San Roman, L. R. 3 Adm. & Eccl. 583, 41 L. J. Prob. N. S. 72, 26 L. T. N. S. 948, on law determining liability of master for delay in sailing under apprehension of capture; The August [1891] P. 328, 60 L. J. Prob. N. S. 57, 66 L. T. N. S. 32, 7 Asp. Mar. L. Cas. 110, holding conduct of master of ship, sailing under flag of country other than that of shipper, in selling portion of cargo to pay for repairs, to be governed by law of country of vessel's flag in action for breach of contract and conversion; The Gaetano & Maria, L. R. 7 Prob. Div. 137, 51 L. J. Prob. N. S. 67, 46 L. T. N. S. 835, 30 Week. Rep. 766, 4 Asp. Mar. L. Cas. 476, holding bottomry bond construed by law of country whose flag vessel flies; The M. Moxham, L. R. 1 Prob. Div. 43, 45 L. J. Prob. N. S. 38, 33 L. T. N. S. 463, 3 Asp. Mar. L. Cas. 95, on liability of owner of vessel in contract for act of servant in foreign port.

Cited in notes in 14 E. R. C. 428, on law governing adjustment of general average by owner of ship against cargoes; 24 E. R. C. 318, on authority of master to sell ship.

Cited in 1 Beach, Contr. 739, on law governing maritime contracts.

Disapproved in The Brantford City, 29 Fed. 373, holding law of flag has no application to torts committed in country where contract is made.

— Authority of master of vessel, determination of.

Cited in Droege v. Stuart, L. R. 2 P. C. 505, 38 L. J. Prob. N. S. 57, 6 Moore, P. C. C. N. S. 136, 21 L. T. N. S. 159, 17 Week. Rep. 1028, holding extent of authority of master of vessel to bind owner of vessel or cargo governed by law of flag.

Contract, by what law governed.

Cited in Hammerstein v. Sylva, 66 Misc. 550, 124 N. Y. Supp. 535, holding that capacity of operatic singer domiciled in United States to contract for services to be rendered in United States, is to be governed by laws of that country, though contract was made in France; Mayer v. Roche, 77 N. J. L. 681, 26 L.R.A.(N.S.) 763, 75 Atl. 235, holding that note dated in New York and payable in New York is, in absence of facts evincing another intention, governed by New York law, although maker resided in New Jersey and signed note there; Abdul Aziz Khan Sahib v. Commercial Bank, 20 Times L. R. 46, holding parties to contract bound by law in force at time of contract.

Cited in notes in 63 L.R.A. 522, on conflict of laws as to carrier's contracts; 5 E. R. C. 886, 888, on presumption that parties to contract intended to adopt law of place where contract was made.

Cited in 4 Elliott, Railr. 2d ed. 187, on law governing liability of carrier of goods; 1 Beach, Contr. 695, on law of place of contract.

Law governing construction of contract.

Cited in Manchester Liners v. Virginia-Carolina Chemical Co. 194 Fed. 463, holding that charter of English ship to German company for carriage of cargo from Germany to United States, is governed as to its construction by law of Germany where general presumption that such was intention of parties was strengthened by express provisions to that effect in bill of lading; Gibson v. Connecticut F. Ins. Co. 77 Fed. 561, on determination of intention of parties from subject matter and contract itself; Mutual Ben. L. Ins. Co. v. Robison, 54 Fed. 580, holding where policy of insurance is to take effect upon payment of premium which is in state where application is made, policy governed by law of such state although issued in another; Pinney v. Nelson, 183 U. S. 144, 46 L. ed. 125, 22 Sup. Ct. Rep. 52, holding liability of corporation created in one state for express purpose of doing business in another determined by law of latter; Liverpool & G. W. Steam Co. v. Phenix Ins. Co. (The Montana) 129 U. S. 397, 32 L. ed. 788, 9 Sup. Ct. Rep. 469, holding that law of place where contract is made governs its nature and interpretation, unless it appears that parties, when entering into contract, intended to be bound by law of some other country; Pritchard v. Norton, 106 U. S. 124, 27 L. ed. 104, 1 Sup. Ct. Rep. 102, holding contract governed by law with view to which it is made; Lamar v. Micou, 114 U. S. 218, 29 L. ed. 94, 5 Sup. Ct. Rep. 857, holding guardian appointed in state not domicil of ward accountable by law of ward's domicil; Meuer v. Chicago, M. & St. P. R. Co. 11 S. D. 94, 74 Am. St. Rep. 774, 75 N. W. 823, holding law of place where contract is made governs, though one party is non-resident, unless intention appears to make law of another place govern;

Central Trust Co. v. Burton, 74 Wis. 329, 43 N. W. 141, holding note executed and payable in one state, although money is to be used in another by maker who resides there, governed by law of place where note made; Robin v. Hart, 23 N. S. 316, holding on assignment for benefit of creditors contract governed by law of place where property is situate; German Sav. Bank v. Tetrault, Rap. Jud. Quebec, 27 C. S. 447, holding guarantee bond executed in favor of mortgagee on consideration of forbearance to foreclose, and entered into at place where property is situate, governed by law of such place; Ellis v. M'Henry, L. R. 6 C. P. 228, 40 L. J. C. P. N. S. 109, 23 L. T. N. S. 861, 19 Week. Rep. 503, holding contract made and to be performed in one place governed by law of such place; Jacobs v. Credit Lyonnais, L. R. 12 Q. B. Div. 589, 53 L. J. Q. B. N. S. 156, 50 L. T. N. S. 194, 32 Week. Rep. 761, 1 Eng. Cas. 338, holding where contract is made between residents of same country for sale of goods to be shipped from foreign port in foreign vessel, to be paid for at place of contract on arrival of vessel at destination, contract is governed by law of place of contract; Chamberlain v. Napier, L. R. 15 Ch. Div. 614, 49 L. J. Ch. N. S. 628, 29 Week. Rep. 194, holding contract made in one country containing trust affecting real estate situate in another is as to such real estate governed by law of its location; Krell v. Henry [1903] 2 K. B. 740, 72 L. J. K. B. N. S. 794, 89 L. T. N. S. 328, 19 Times L. R. 711, 52 Week. Rep. 246, on purpose for which contract is made as affecting obligations of parties thereunder; The Patria, L. R. 3 Adm. & Eccl. 436, 41 L. J. Prob. N. S. 23, 24 L. T. N. S. 849, 1 Asp. Mar. L. Cas. 71, on construction of contract where provision is made therein for certain contingencies.

Construction of contract in court not of domicile of parties thereto.

Cited in Grand v. Livingston, 4 App. Div. 589, 38 N. Y. Supp. 490, holding it will be construed according to law of place where made in absence of clearly manifested intention that contract was to be governed by law of another place; King v. Sarria, 69 N. Y. 24, 25 Am. Rep. 128, on liability of co-partner as determined by law of place where partnership agreement is made.

Presumption as to foreign law.

Cited in State v. Morrill, 68 Vt. 60, 54 Am. St. Rep. 870, 33 Atl. 1070, holding courts will assume that certain general principles, consonant to natural justice and reason and of universal applicability are recognized by all civilized nations; Archer v. Society of the Sacred Heart of Jesus, 9 Ont. L. Rep. 474, holding presumption exists that laws are same; The Empire of Peace, 39 L. J. Prob. N. S. 12, 21 L. T. N. S. 763, on presumption of same construction of statute by court of another country.

Judicial notice of foreign law.

Cited in Winter v. Latour, 35 App. D. C. 415; Goodyear Tire & Rubber Co. v. Rubber Tire Wheel Co. 164 Fed. 869; Liverpool & G. W. Steam Co. v. Phenix Ins. Co. 129 U. S. 397, 32 L. ed. 788, 9 Sup. Ct. Rep. 469; Carpenter v. Grand Trunk R. Co. 72 Me. 388, 39 Am. Rep. 340,—holding that foreign law must be pleaded and proved; Cuba R. Co. v. Crosby, 95 C. C. A. 539, 170 Fed. 369, holding that in action for personal injury received in foreign country court will apply law of forum, in absence of proof of foreign law; Peabody v. Maguire, 79 Me. 572, 12 Atl. 630, holding in absence of proof of law of place where contract was made, court will assume it the same as law of place where remedy is sought.

Cited in notes in 67 L.R.A. 58, on how case determined when proper foreign

law not proved; 34 L.R.A.(N.S.) 271, 273, on determination of case properly governed by unproved foreign law.

French law on wreck and abandonment.

Cited in James v. London & S. W. R. Co. L. R. 7 Exch. 287, 41 L. J. Exch. N. S. 186, 27 L. T. N. S. 382, 21 Week. Rep. 25, 1 Asp. Mar. L. Cas. 226, on law of France on right of ship-owner to abandon his vessel.

Effect of impossibility of performance of contract.

Cited in Job v. Boe, N. F. (1897–1903) 405, holding that if party binds himself to perform contract he must do so, notwithstanding any accident by inevitable necessity.

Cited in Benjamin, Sales, 5th ed. 571, on effect of impossibility of performance of thing possible in itself because of forces beyond control.

5 E. R. C. 891, CAMMELL v. SEWELL, 5 Hurlst. & N. 728, 6 Jur. N. S. 918, 29 L. J. Exch. N. S. 350, 2 L. T. N. S. 799, 8 Week. Rep. 639, affirming the decision of the Court of Exchequer, reported in 4 Jur. N. S. 978, 27 L. J. Exch. N. S. 447, 3 Hurlst. & N. 617.

Conflict of laws as to title in personalty.

Cited in Humphreys v. Hopkins, 81 Cal. 551, 6 L.R.A. 794, 15 Am. St. Rep. 76, 22 Pac. 892 (dissenting opinion), on validity of title to personalty in another jurisdiction where title is valid in place where personalty is located; Jenkins v. Purcell, 29 App. D. C. 209, 9 L.R.A.(N.S.) 1074, holding title of receiver to property which is good in state of his appointment binding in another state; Dubois v. Jackson, 49 Ill. 49, holding title to personalty vested by laws of country of domicil of parties upon their marriage, binding where they remove to another state; Chicago, M. & St. P. R. Co. v. Keokuk N. L. Packet Co. 108 Ill. 317, 48 Am. Rep. 557, holding title to personalty vested by law of state where situated will be recognized everywhere; Cooper v. Philadelphia Worsted Co. 68 N. J. Eq. 622, 60 Atl. 352, holding that contract, with reference to title of chattels, situated in another state, is made in that state between resident thereof and New Jersey corporation, and to be performed there, law of that state governs; Bonin v. Robertson, 2 Terr. L. Rep. 21, holding valid chattel mortgage made in foreign country on goods there is binding in another country though not according to statutes of latter; Sawyer & M. Co. v. Boyce, 1 Sask. L. R. 230, holding that laws in force where property is situate and parties reside at time contract is made must govern; Burn v. Bletcher, 23 U. C. Q. B. 28, holding attachment of property valid under laws where property is, binding everywhere; Alcock v. Smith [1892] 1 Ch. 238, 61 L. J. Ch. N. S. 161, 66 L. T. N. S. 126, holding title to negotiable instrument validly acquired under law of place of negotiation, valid elsewhere.

— Where personalty is not in owner's domicile.

Cited in Lathe v. Schoff, 60 N. H. 34, holding mortgage on chattels valid by law of state where they are used from day to day and stored when not in use, binding elsewhere though not according to law of domicil of debtor; Dulaney v. Merry & Son [1901] 1 K. B. 536, 70 L. J. Q. B. N. S. 377, 49 Week. Rep. 331, 84 L. T. N. S. 156, 17 Times L. R. 253, 8 Manson, 152, holding trustee under deed of assignment which is valid in county of debtor's domicil can establish title to property in foreign county although deed has not been registered as required by law of latter country, as against execution creditors in latter.

Distinguished in Edgerly v. Bush, 81 N. Y. 199, holding as between citizens

of same state title to personal property cannot be acquired in foreign state where it is brought there without consent of owner domiciled in former.

—As to vessels and maritime property.

Cited in Clark v. Wilson, 103 Mass. 219, 4 Am. Rep. 532, on validity of title to vessel acquired under barratrous sale; Cahoon v. Morrow, 5 N. S. 148, on effect on sale of ship on execution of registry of adverse interest.

Cited in 2 Hutchinson, Car. 3d ed. 872, on absolute necessity as justifying sale of goods by master.

The decision of Court of Exchequer was cited in Mason v. Marine Ins. Co. 54 L.R.A. 700, 49 C. C. A. 106, 110 Fed. 452, on validity of title of insurer on abandonment of vessel for constructive total loss.

Laws governing rights of parties in actions on contract made elsewhere than place of trial.

Cited in Waydell v. Provincial Ins. Co. 21 U. C. Q. B. 612, holding law of place of forum governs as to matters of evidence.

Rights given by general maritime law as affected by local laws.

Cited in The Avon, Brown, Adm. 170, Fed. Cas. No. 680, holding lien given by maritime law not divested by sale to bona fide purchaser without notice unless by virtue of judicial proceeding in rem; Lloyd v. Guibert, L. R. 1 Q. B. 115, 35 L. J. Q. B. N. S. 74, 13 L. T. N. S. 602, 6 Best & S. 100, 5 Eng. Rul. Cas. 870, on validity of sale by necessity in foreign country.

Conclusiveness of judgment in rem of court of competent jurisdiction.

Cited in Van Every v. Grant, 21 U. C. Q. B. 542, holding judgment in rem by court of competent jurisdiction in foreign country binding everywhere; Castrique v. Imrie, L. R. 4 H. L. 414, 39 L. J. C. P. N. S. 350, 23 L. T. N. S. 48, 19 Week. Rep. 1, 5 Eng. Rul. Cas. 899, holding judgment which in country rendering it is one in rem is binding elsewhere.

Cited in notes in 20 L.R.A. 679, on conclusiveness of judgment rendered in foreign country against nonresidents; 11 Eng. Rul. Cas. 47, on conclusiveness of judgment in rem.

Distinguished in Vadala v. Lawes, L. R. 25 Q. B. Div. 310, 63 L. T. N. S. 128, 38 Week. Rep. 594, holding under later decisions where foreign judgment is obtained by fraud it may be opened and case retried on its merits.

The decision of Court of Exchequer was cited in Michaels v. Post, 21 Wall. 398, 22 L. ed. 520, on procedure to attack domestic judgment; Hilton v. Guyot, 159 U. S. 113, 40 L. ed. 95, 16 Sup. Ct. Rep. 139, on right to open judgment for fraud; Mandeville v. Reynolds, 68 N. Y. 528, holding judgment not conclusive if obtained by fraud; Bruff v. Thompson, 31 W. Va. 16, 6 S. E. 352 (dissenting opinion), as to conclusiveness of judgment in rem.

Foreign laws.

Cited in The Empire of Peace, 39 L. J. Prob. N. S. 12, 21 L. T. N. S. 763, on presumption of similarity of foreign law to law of forum.

Powers of master of vessel to sell or pledge.

The decision of the Court of Exchequer was cited in Astsrup v. Lewy, 19 Fed. 536, holding under English maritime law notice to owner, where notice is easy and practicable, essential condition of master's authority to sell or hypothecate ship or cargo.

Conclusiveness of license to sell land granted by probate court.

Cited in Doe ex dem. Elston v. Thompson, 9 N. B. 483, holding that license

to sell land granted by probate court may be shown to have been obtained by fraud or without complying with provisions of statute.

5 E. R. C. 899, CASTRIQUE v. IMRIE, 39 L. J. C. P. N. S. 350, L. R. 4 H. L. 414, 23 L. T. N. S. 48, 19 Week. Rep. 1, affirming the decision of the Exchequer Chamber, reported in 8 C. B. N. S. 405-7, Jur. N. S. 1076, 4 L. T. N. S. 143, 30 L. J. C. P. N. S. 177, 9 Week. Rep. 455, which reverses the decision of the Court of Common Pleas, reported in 8 C. B. N. S. 1.

Impeachability of sale of vessel by order of court of competent jurisdiction.

Cited in The Trenton, 4 Fed. 657, holding sale may be impeached for fraudulent collusion to which purchaser at sale was party; The Garland, 16 Fed. 283, holding in absence of fraud sale by maritime court in foreign country valid; Meagher v. Ætna Ins. Co. 20 Grant, Ch. (U. C.) 354, on conclusiveness of sale of vessel by maritime court.

The decision of Exchequer Chamber, was cited in Van Every v. Grant, 21 U. C. Q. B. 542, 545, holding title under sale upon judgment in rem conclusive; Cahoon v. Morrow, 5 N. S. 148, on effect of registry on sale under judicial decree.

Conclusiveness of foreign judgment.

Cited in Baker v. Palmer, 83 Ill. 568, holding judgment of court having jurisdiction conclusive and can be impeached only for fraud; Hilton v. Guyot, 159 U. S. 113, 40 L. ed. 95, 16 Sup. Ct. Rep. 139, holding foreign judgment impeachable for fraud; Fowler v. Vail, 4 Ont. App. Rep. 267, holding judgment binding everywhere if court rendering it had jurisdiction; Michado v. The Ship Hattie & Lottie, 9 Can. Exch. 11, holding foreign judgment conclusive where court had jurisdiction; Bauron v. Davies, Rap. Jud. Quebec, 6 B. R. 547, on conclusiveness of judgment of foreign court; Ellis v. M'Henry, L. R. 6 C. P. 228, 40 L. J. C. P. N. S. 109, 23 L. T. N. S. 861, 19 Week. Rep. 503, holding judgment of foreign court having and exercising due jurisdiction not subject to impeachment; Pemberton v. Hughes [1899] 1 Ch. 781, 68 L. J. Ch. N. S. 281, 80 L. T. N. S. 369, 47 Week. Rep. 354, 15 Times L. R. 211, holding decree of divorce by court having jurisdiction of parties and of subject matter cannot be impeached in foreign country for mere error in procedure; Messina v. Petrococchino, L. R. 4 P. C. 144, 41 L. J. P. C. N. S. 27, 26 L. T. N. S. 561, 20 Week. Rep. 451, 29 Phila. Leg. Int. 333, holding that the foreign judgment in rem of a competent court may not be impeached in the absence of fraud or error plainly appearing on its face.

Cited in notes in 5 Eng. Rul. Cas. 742, on conclusiveness and enforceability of judgment of foreign court having jurisdiction; 20 L.R.A. 679, 680, on conclusiveness of judgment rendered in foreign country.

The decision of Exchequer Chamber was cited in Moch v. Virginia F. & M. Ins. Co. 4 Hughes, 61, 10 Fed. 696, holding decision by court of competent jurisdiction as to extent of jurisdiction, where question is expressly raised and necessarily considered in giving judgment, conclusive in another state; Fisher v. Fielding, 67 Conn. 91, 32 L.R.A. 236, 52 Am. St. Rep. 270, 34 Atl. 714 (dissenting opinion), on right to enforce foreign judgment where not repugnant to policy of our law or unjust and prejudicial to our own subjects; Cahoon v. Morrow, 5 N. S. 148, holding judgment in personam not conclusive.

The decision of Court of Common Pleas was cited in Burn v. Bletcher, 23 U.

C. Q. B. 28, holding judgment in personam may be impeached for want of jurisdiction.

— In rem.

Cited in The Trenton, 47 Fed. 657, holding judgment in rem binding though foreign court took erroneous view of law of country in which judgment is questioned; Minna Craig S. S. Co. v. Chartered Mercantile Bank [1897] 1 Q. B. 55, holding judgment in rem by court having jurisdiction binding everywhere; De Mora v. Concha, L. R. 29 Ch. Div. 268, 33 Week. Rep. 846, holding decree by probate court admitting will to probate not a judgment in rem as to domicil.

The decision of the Exchequer Chamber was cited in Bruff v. Thompson, 31 W. Va. 16, 6 S. E. 352 (dissenting opinion), on conclusiveness of judgment in rem; Cahoon v. Morrow, 5 N. S. 148, on effect of foreign judgment against owner of ship and sale thereof under execution.

— Impeachment for error of law.

Cited in Moch v. Virginia F. & M. Ins. Co. 4 Hughes, 61, 10 Fed. 696, holding foreign judgment not impeachable because made on erroneous view of law where issues were between same parties and decided by other court; Hilton v. Guyot, 159 U. S. 113, 40 L. ed. 95, 16 Sup. Ct. Rep. 139, holding judgment for payment of money rendered by court of competent jurisdiction after due appearance by party, not conclusive in court of foreign country but prima facie evidence of claim, though assertion is made judgment is erroneous for mistake of law or fact; Barned Banking Co. v. Reynolds, 36 U. C. Q. B. 256, on effect on judgment of error as to law of foreign country on which it is based; Re Trufort, L. R. 36 Ch. Div. 600, 57 L. J. Ch. N. S. 135, 57 L. T. N. S. 674, 36 Week. Rep. 163, holding judgment of foreign court of competent jurisdiction based on foreign law, affecting title to estate of deceased person, conclusive though based on mistake as to that law; Godard v. Gray, L. R. 6 Q. B. 139, 40 L. J. Q. B. N. S. 62, 24 L. T. N. S. 89, 19 Week. Rep. 348, 5 Eng. Rul. Cas. 726, holding in action on judgment in personam of foreign court having jurisdiction of cause and of parties it is no bar to action that such court put wrong construction on contract made in another country, according to law of such country.

Distinguished in Boyle v. Victoria Yukon Trading Co. 9 B. C. 213, holding on default judgment from another state, court may challenge its validity for manifest error; Meyer v. Ralli, L. R. 1 C. P. Div. 358, 45 L. J. C. P. N. S. 741, 35 L. T. N. S. 838, 24 Week. Rep. 963, holding judgment of foreign tribunal not binding where it is admitted by parties that law of foreign tribunal had not been correctly declared by its judgment.

Conclusiveness of judgment.

Cited in Loomis v. Carrington, 18 Fed. 97, holding on removal of cause from state to United States court, latter will accept all decrees and orders prior to removal as adjudications, if state court acted within its jurisdiction; Re Stinson, 22 Ont. L. Rep. 627, holding that acquittal of person charged with crime is not binding upon Council of College of Physicians, upon hearing of charges against registered practitioner; Cole v. Hubble, 26 Ont. Rep. 279, holding acquittal on indictment for one crime not a bar to action for another crime; Ballantyne v. Mackinnon [1896] 2 Q. B. 455, 65 L. J. Q. B. N. S. 616, 75 L. T. N. S. 95, 45 Week. Rep. 70, 8 Asp. Mar. L. Cas. 173, holding judgment not conclusive as to point not adjudicated.

Cited in notes in 11 L.R.A.(N.S.) 655, 657, on judgment in criminal action as res judicata in civil action; 11 E. R. C. 44, 45, on conclusiveness of judgment in rem; 14 E. R. C. 169, on conclusiveness of judgment of prize court.

The decision of the Exchequer Chamber was cited in Michaels v. Post, 21 Wall. 398, 22 L. ed. 520, holding that decree adjudging debtor bankrupt and if court has jurisdiction it is only assailable by direct proceedings in competent court; Carr v. Tannahill, 30 U. C. Q. B. 217, as to conclusiveness of former judgment in action between same parties.

— Decrees quasi in rem.

Cited in Arndt v. Griggs, 134 U. S. 316, 33 L. ed. 918, 10 Sup. Ct. Rep. 557, as to conclusiveness of judgment against real property where service of process is had on nonresident defendant by publication; Brigham v. Fayerweather, 140 Mass. 411, 5 N. E. 265, holding person not party to proceeding in probate court in sense that he may be heard not concluded by order admitting will to probate on collateral issue attacking mental capacity of testator; Watson v. Ulbrich, 18 Neb. 186, 24 N. W. 732, holding judgment affecting lands conclusive until vacated or set aside, where court had jurisdiction though service was constructive; Groves v. McArdle, 33 U. C. Q. B. 252, on conclusiveness of adjudication of bankruptcy by insolvency court.

Proceedings in rem, what constitute.

Cited in Law v. Hansen, 25 Can. S. C. 69, as to what constitutes judgment in rem; The City of Mecca, L. R. 5 Prob. Div. 28, holding proceeding to enforce maritime lien one in rem; Meyer v. Ralli, L. R. 1 C. P. Div. 358, 45 L. J. C. P. N. S. 741, 35 L. T. N. S. 838, 24 Week. Rep. 963, on what constitutes proceedings in rem.

Cited in McGehee, Const. 109, on what is a proceeding in rem.

The decision of Exchequer Chamber was cited in Fisher v. Fielding, 67 Conn. 91, 32 L.R.A. 236, 52 Am. St. Rep. 270, 34 Atl. 714 (dissenting opinion), on distinction between judgment in rem and in personam.

Essentials of jurisdiction in rem.

Cited in The D. C. Whitney v. St. Clair Nav. Co. 38 Can. S. C. 303, on facts sufficient to confer jurisdiction in proceeding in rem; The Nautik [1895] P. 121, 64 L. J. Prob. N. S. 61, 11 Reports, 716, 72 L. T. N. S. 21, 43 Week. Rep. 703, 7 Asp. Mar. L. Cas. 591, holding property must be within the lawful control of state under authority of which court sits; The Dictator [1892] P. 304, 61 L. J. Prob. N. S. 73, 67 L. T. N. S. 563, 7 Asp. Mar. L. Cas. 251, on jurisdiction of court of admiralty in proceedings in rem.

Validity of foreign transfer of personal property.

Cited in Cooper v. Philadelphia Worsted Co. 68 N. J. Eq. 622, 60 Atl. 352, holding that where contract, with reference to title of tangible chattels situated in another state, is made in that state between resident thereof and New Jersey corporation, and to be performed there, law of that state governs; Nicholson v. Baird, N. B. Eq. Cas. 195, on validity of title of assignee in bankruptcy appointed in another jurisdiction; Parkinson v. Higgins, 40 U. C. Q. B. 274, on validity of title acquired under paramount right; Alcock v. Smith [1892], 1 Ch. 238, 61 L. J. Ch. N. S. 161, 65 L. T. N. S. 335, on conclusiveness of title to personalty which is valid at place where property is acquired.

Cited in note in 5 E. R. C. 928, on law governing validity of transfer of property.

The decision of Court of Common Pleas was cited in Burn v. Bletcher, 23 U. C. Q. B. 28, holding transfer good at situs is good everywhere.

— Under erroneous decree.

Cited in Henderson v. 300 Tons of Iron Ore, 38 Fed. 36, holding sale by

maritime court pendente lite, where it had jurisdiction, binding though original suit is dismissed or is reversed on appeal on grounds other than of jurisdiction.

Priority of maritime liens and transfers.

The decision of Court of Common Pleas was cited in Scotia, 35 Fed. 907, on priority of maritime liens if valid at place where right to lien arises.

Doctrine of Stare Decisis.

Cited in Randolph v. Taylor, 20 N. B. 585, on effect of long adherence to rules of practice.

Admissibility of expert testimony.

Cited in Dashiell v. Griffith, 84 Md. 363, 35 Atl. 1094, holding admissibility within discretion of trial judge.

Payment into court.

Cited in King v. Duncan, 9 Ont. Pr. Rep. 61, on procedure for paying money into court on appeal.

5 E. R. C. 930, DON v. LIPPMANN, 5 Clark & F. 1.

Law governing remedy in suit on contract.

Cited in Cox v. Adams, 2 Ga. 158, holding law of state where action is brought governs; Scobey v. Gibson, 17 Ind. 572, 79 Am. Dec. 490 (dissenting opinion), on law governing remedies; McClees v. Burt, 5 Met. 198, holding form of action for breach of contract governed by law of forum; Martin v. Hill, 12 Barb. 631; Claflin v. Frenkel, 29 Hun, 288, 3 N. Y. Civ. Proc. Rep. 109,—holding remedy governed by law of forum; Suydam v. Barber, 6 Duer, 34, holding that remedies for enforcing contract are those of place in which suit is brought; Bigelow v. Old Dominion Copper Min. & Smelting Co. 74 N. J. Eq. 457, 71 Atl. 153, to the point that law of country when contract is to be enforced must govern its enforcement; Brown v. Canadian P. R. Co. 4 Manitoba L. R. 396, holding law where contract is sought to be enforced must prevail; Warrener v. Kingsmill, 8 U. C. Q. B. 407, holding remedy and procedure governed by law of forum; Peek v. Shields, 31 U. C. C. P. 112, holding procedure to enforce contract governed by law of forum; Brown v. Winning, 43 U. C. Q. B. 327, holding contract governed by law where it is sought to be enforced; Rice v. Holmes, Rap. Jud. Quebec, 16 C. S. 492; The Monark, 9 Quebec L. R. 214, Cook Vice Adm. Rep. 345,—holding remedy governed by law of forum; Liverpool Marine Credit Co. v. Hunter, L. R. 3 Ch. 479, 37 L. J. Ch. N. S. 386, 18 L. T. N. S. 749, 16 Week. Rep. 1090, holding law of forum governs; Hamlyn v. Talisker Distillery [1894] A. C. 202, 71 L. T. N. S. 1, 58 J. P. 540, 6 Reports, 188, holding rules of procedure governed by law of forum.

Cited in note in 2 Eng. Rul. Cas. 88, on remedy being governed by lex loci.

Cited in 4 Elliott, Railr. 2d ed. 186, on law governing liability of carrier of goods; 1 Beach Contr. 710, on law of place of performance as governing contract.

— Evidence and proof.

Cited in Downer v. Chesebrough, 36 Conn. 39, 4 Am. Rep. 29, holding rules of evidence governed by law of forum; Seely v. Manhattan L. Ins. Co. 72 N. H. 49, 55 Atl. 425, holding admission of evidence and modes of proof governed by law of forum; Lewis v. San Antonio, 7 Tex. 288, holding rules of evidence governed by law of forum.

— Statute of limitations.

Cited in Howell v. Hair, 15 Ala. 194, on effect in court where action is brought

of statute of limitations of foreign state; Robinson v. Peyton, 4 Tex. 276; Townsend v. Jemison, 9 How. 407, 13 L. ed. 194; Morgan v. Camden & A. R. Co. 18 Phila. 384, 43 Phila. Leg. Int. 152, 2 Pa. Co. Ct. 97, 18 W. N. C. 128,—holding it determined by law of forum; Wynn v. Lee, 5 Ga. 217, holding where statute of limitations affects only remedy, its operation is governed by law of forum; Brown v. Parker, 28 Wis. 21, holding if by law of state where contract was made the right as well as remedy on contract was extinguished court would vacate judgment on contract rendered in another state; British Linen Co. v. McEwan, 6 Manitoba L. Rep. 292; Bryson v. Graham, 3 N. S. 271; Hervey v. Pridham, 11 U. C. C. P. 329; Davis v. Isaacs, 26 N. B. 292,—holding where statute affected only remedy, its operation would be determined by law of forum; Shiriff v. Holcomb, 2 U. C. Err. & App. 516, holding if statute of limitations in state where contract was made and to be performed extinguished debt as well as remedy, that statute would govern.

Cited in note in 48 L.R.A. 629, as to when statute of limitations will govern action in another state or country.

Cited in 2 Sutherland, Stat. Const. 2d ed. 1211, on conflict of laws as to statute of limitations; 1 Hutchinson, Car. 3d ed. 217, on lex loci contractus governing carriers' contracts.

Statute of limitations as forming element of contract.

Cited in Moore v. State, 43 N. J. L. 203, 39 Am. Rep. 558, holding it is not an element of contract; Brady v. Western Ins. Co. 17 U. C. C. P. 597, holding that ordinary defense of statute of limitations, which may be made to enforce claim, forms no part of contract between parties fixing different limitation.

Effect of vestment of title under statute of limitations.

Cited in Moore v. State, 43 N. J. L. 203, 39 Am. Rep. 558, holding it will be recognized and upheld in tribunals of other states.

Territorial extent of laws affecting remedy.

Cited in Lowry v. Inman, 37 How. Pr. 153, 6 Abb. Pr. N. S. 394, holding laws affecting remedy a nullity outside of state prescribing them.

Law governing construction of contract.

Cited in Duerson v. Alsop, 27 Gratt. 229, on construction of contract according to laws in existence when contract was made; Smith v. Weguelin, 1 Legal Gaz. 38, holding that when a sovereign state negotiates a loan in a foreign country the contract is to be construed according to the law of the state negotiating the loan, and not according to the law of the foreign country where the loan is negotiated.

Cited in Porter, Bills of L. 69, on conflict of laws in construction of bills of lading.

Law governing contract where no place of performance is specified.

Cited in Pritchard v. Norton, 106 U. S. 124, 27 L. ed. 104, 1 Sup. Ct. Rep. 102, holding validity of contract determined by place of contract; Merchants' Bank v. Griswold, 72 N. Y. 472, 28 Am. Rep. 159; Hicks v. Skinner, 71 N. C. 539, 17 Am. Rep. 16; Desmazes v. Mutual Ben. L. Ins. Co. Fed. Cas. No. 3,821; Green v. Collins, 3 Cliff. 494, Fed. Cas. No. 5,755; Cook v. Moffat, 5 How. 295, 12 L. ed. 159; First Nat. Bank v. Shaw, 61 N. Y. 283,—holding contract governed by law of place where made; Morris v. Hockaday, 94 N. C. 286, 55 Am. Rep. 607, holding bond dated in one state with no place specified for payment governed by law of state where made; Harrison v. Smith, 2 Sweeney, 669, holding bill of exchange which on its face is payable generally

is governed by law of place where made; Hill v. Spear, 50 N. H. 253, 9 Am. Rep. 205, holding where contract is made in one place to be performed in another, its validity, nature, obligation and interpretation governed by law of latter place; Arrington v. Gee, 27 N. C. (5 Ired. L.) 590, holding contract payable generally bears interest as of place where made; Niagara Falls International Bridge Co. v. Great Western R. Co. 22 U. C. Q. B. 592; Souther v. Wallace, 11 N. S. 548,—holding where no place of performance is specified it is to be governed by law of place where made; Hooker v. Leslie, 27 U. C. Q. B. 295, holding note payable generally governed by law of place where made.

Conclusiveness of foreign judgment.

Cited in Wilbur v. Abbot, 60 N. H. 40, holding judgment valid in state where rendered not valid in another state if by laws of latter judgment would have been invalid if rendered there.

Cited in note in 20 L.R.A. 674, on conclusiveness of judgment rendered in foreign country.

Conclusiveness of foreign judgment in personam.

Cited in Hilton v. Guyot, 159 U. S. 113, 40 L. ed. 95, 16 Sup. Ct. Rep. 139, holding judgment for sum of money only prima facie evidence of claim and not conclusive as to merits; Pennywit v. Foote, 27 Ohio St. 600, 22 Am. Rep. 340, holding judgment may be impeached for want of jurisdiction; Com. v. Kirkbride, 7 Phila. 8, 25 Phila. Leg. Int. 189, 2 Brewst. (Pa.) 419, holding judgment of court of one state as to lunacy without notice a nullity in court of another state.

Effect of fraud in rendition of foreign judgment.

Cited in Hilton v. Guyot, 159 U. S. 113, 40 L. ed. 95, 16 Sup. Ct. Rep. 139, holding it may be impeached therefor.

Validity of default judgment in personam.

Cited in Dearing v. Bank of Charleston, 5 Ga. 497, 48 Am. Dec. 300, holding judgment by default against non-resident where service is by publication, a nullity; Latine v. Clements, 3 Ga. 426, as to conclusiveness of judgment in personam; Sirdar Gurdyal Singh v. Faridkote [1894] A. C. 670, 11 Reports, 340, holding ex parte money decree against non-resident nullity by international law.

Essentials to acquiring of jurisdiction.

Cited in Sadlier v. Fallon, 2 Curt. C. C. 579, Fed. Cas. No. 12,210, on acquisition of jurisdiction where no personal service is had; Gibbs v. Queen Ins. Co. 63 N. Y. 114, 20 Am. Rep. 513, on necessity of service to give court jurisdiction.

Suits or defenses by aliens.

Cited in Miller v. Gittings, 85 Md. 601, 37 L.R.A. 654, 60 Am. St. Rep. 352, 37 Atl. 372, on rights of alien plaintiffs in courts of domicile of defendants.

Rate of interest on bills of exchange.

Cited in Ross v. Winans, 5 U. C. C. P. 185, on rate of interest on bill of exchange drawn on person in certain colonies.

5 E. R. C. 946, THE QUEEN v. KEYN, 13 Cox, C. C. 403, L. R. 2 Exch. Div. 63, 46 L. J. Mag. Cas. N. S. 17.

Extent of jurisdiction over territorial waters, or ports.

Cited in Humboldt Lumber Mfrs. Asso. v. Christopherson, 46 L.R.A. 264, 19 C. C. A. 481, 44 U. S. App. 434, 73 Fed. 239, holding that where by state's

constitution and laws, her boundaries and those of her counties and three miles from shore, her statutes giving action for death by negligence are operative within such boundaries; Com. v. Manchester, 152 Mass. 230, 9 L.R.A. 236, 23 Am. St. Rep. 820, 25 N. E. 113; United States v. Banister Realty Co. 155 Fed. 583,—on regulation of admiralty jurisdiction in England by statute; The Hungaria, 41 Fed. 109, holding that every nation has right to control so much of seas adjacent to its shores as is necessary for all purposes of revenue or of defense; Manchester v. Massachusetts, 139 U. S. 240, 35 L. ed. 159, 11 Sup. Ct. Rep. 559, holding that as between nations, minimum limit of territorial jurisdiction over tide waters is marine league from coast; Concord Mfg. Co. v. Robertson, 66 N. H. 1, 18 L.R.A. 679, 25 Atl. 718, holding that how far marine territory of nation extends from high water mark, is question which courts may be compelled to determine on other evidence than written law; Lennan v. Hamburg-American S. S. Co. 73 App. Div. 357, 77 N. Y. Supp. 60, holding that territorial jurisdiction of state of New Jersey extends over waters of ocean within three miles of shore of that state; The Frederick Gerring Jr. v. R. 27 Can. S. C. 271, holding jurisdiction extends to marine league from shore; The D. C. Whitney v. St. Clair Nav. Co. 38 Can. S. C. 303, on right to cause arrest of foreign vessel in waters which by treaty with such country are open for free passage; Nash v. Newton, 30 N. B. 610, on right of sovereign in inlets and arms of sea; Rhodes v. Fairweather, N. F. (1884–1896) 321 (dissenting opinion), on territorial jurisdiction of courts of Newfoundland, as extending to three miles outside of line drawn from headland to headland; Rex v. Meikleham, 11 Ont. L. Rep. 366, holding that Ontario legislature had authority to provide that no liquor shall be sold on vessel navigating great lakes, as Province of Ontario extends to middle line of Lake Huron; Carr v. Francis Times & Co. [1902] A. C. 176, 85 L. T. N. S. 144, 17 Times L. R. 657, 71 L. J. K. B. N. S. 361, 50 Week. Rep. 257, holding courts of one country will not allow action for act committed by citizen of such country in territorial waters of another country permitted by laws of latter country; Davidson v. Hill [1901] 2 K. B. 606, 70 L. J. K. B. N. S. 788, 49 Week. Rep. 630, 85 L. T. N. S. 118, 17 Times L. R. 614, 9 Asp. Mar. L. Cas. 223, holding representative of foreigner killed by negligence of British ship on high seas has right of action against ship owner in English court; Dugnay v. North American Transp. Co. Rap. Jud. Quebec, 22 C. S. 524 (dissenting opinion), on extent of jurisdiction.

Cited in notes in 46 L.R.A. 266, 268, 269, 272, on jurisdiction over seas and territorial waters; 5 E. R. C. 973, 974, on jurisdiction over waters within 3-mile limit.

Cited in 1 Farnham Waters, 14, on ownership of 3-mile belt; 1 Farnham Waters, 15, on extension of statutes over 3-mile belt.

— Crimes on foreign ships.

Cited in Wildenhus's Case, 120 U. S. 1, 30 L. ed. 565, 7 Sup. Ct. Rep. 383, holding local government has jurisdiction over homicide in affray between foreigners in ship of their own country in port of former.

Cited in note in 8 Eng. Rul. Cas. 11, on jurisdiction of offenses committed within territorial limits of government.

— Crimes on high seas.

Cited in Pouppirt v. Elder Dempster Shipping, 122 Fed. 983, holding that court of admiralty of United States has jurisdiction of action in personam against owner of ship to recover for injuries sustained by American passenger on high seas; United States v. Lewis, 36 Fed. 449, holding that assault with

dangerous weapon on high seas is not crime against United States unless committed on board American vessel, as provided in section 5346 Revised Statute: Couture v. Dominion Fish Co. 19 Manitoba L. Rep. 71 (dissenting opinion), on law governing punishment for crime committed on high seas; Harris v. The Franconia, L. R. 2 C. P. Div. 173, 46 L. J. C. P. N. S. 363, holding ordinary courts have no jurisdiction over acts done by foreigners on high seas below low-water mark.

Cited in 1 Farnham Waters, 44, on jurisdiction of courts over crimes on high seas.

Distinguished in R. v. Dudley, L. R. 14 Q. B. Div. 273, 54 L. J. Mag. Cas. N. S. 32, 52 L. T. N. S. 107, 33 Week. Rep. 347, 15 Cox, C. C. 624, 49 J. P. 69, holding, under statute, courts have jurisdiction of crime committed on high seas by subjects of such country.

Law fixing liability for action arising on high seas.

Cited in Thomassen v. Whitwell, 118 U. S. 520, 6 Sup. Ct. 1172, affirming 12 Fed. 891, affirming 9 Ben. 403, Fed. Cas. No. 13,929, holding that the maritime law to be applied by the Federal courts furnishes the rule of liability for a collision upon the high seas of two foreign vessels; Dupont v. Quebec S. S. Co. Rap. Jud. Quebec, 11 C. S. 188, holding ship is part of territory of government whose flag it flies; Chartered Mercantile Bank v. Netherlands India Steam Nav. Co. L. R. 10 Q. B. Div. 521, 52 L. J. Q. B. N. S. 220, 48 L. T. N. S. 546, 31 Week. Rep. 445, 5 Asp. Mar. L. Cas. 65, 47 J. P. 260, holding maritime law of England and not of flags applicable in England to cases of collision on high seas.

Jurisdiction over crimes.

Cited in Re Palliser, 136 U. S. 257, 34 L. ed. 514, 10 Sup. Ct. Rep. 1034, holding that offence of tendering contract for payment of money in letter mailed in one district and addressed to public officer in another, to induce him to violate his official duty, may be tried in district in which letter is received by officer; Wilcox v. Nolze, 34 Ohio St. 520, on question as to whether obtaining goods by false pretenses while absent from state where goods were obtained, is offense against laws of state where goods were obtained; Ex parte Ellis, 17 N. B. 593 (dissenting opinion), on right to try person in summary manner for offense against criminal laws of another country; Badische Anilin und Soda Fabrik v. Johnson [1897] 2 Ch. 322, 66 L. J. Ch. N. S. 497, 76 L. T. N. S. 434, 45 Week. Rep. 481 (dissenting opinion), on acquisition of jurisdiction in criminal case.

Rights upon and ownership of high seas.

Cited in Lee v. Logan, Rap. Jud. Quebec, 31 C. S. 469 (dissenting opinion) on ship carrying on board laws of its own nation.

Cited in 1 Farnham, Waters, 5, on rights upon the high seas; 1 Farnham, Waters, 8, on ownership of the high seas.

Judicial inquiry of legislative policy.

Cited in R. v. Brierly, 14 Ont. Rep. 525, on right of legislature to consider manner of legislation best adapted to advance well-being of country.

International law, by what courts determined.

Cited in West Rand Central Gold Min. Co. v. R. [1905] 2 K. B. 391, 74 L. J. K. B. N. S. 753, 53 Week. Rep. 660, 93 L. T. N. S. 207, 21 Times L. R. 562, on consideration of questions of international law in connection with questions of municipal law.

Measurement of distances on sea at common law.

Cited in Rockland, Mt. D. & S. S. Co. v. Fessenden, 79 Me. 140, 8 Atl. 550, to the point that in common law courts distances on sea may be spoken of and measured as land miles.