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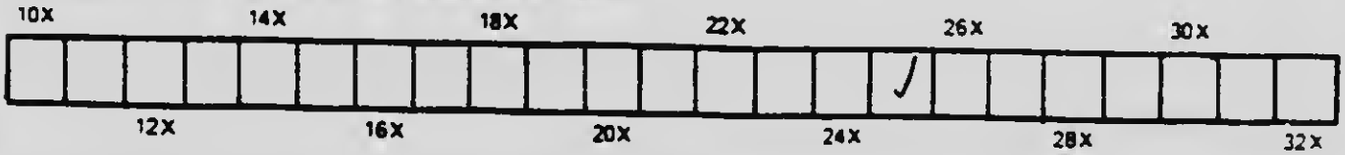

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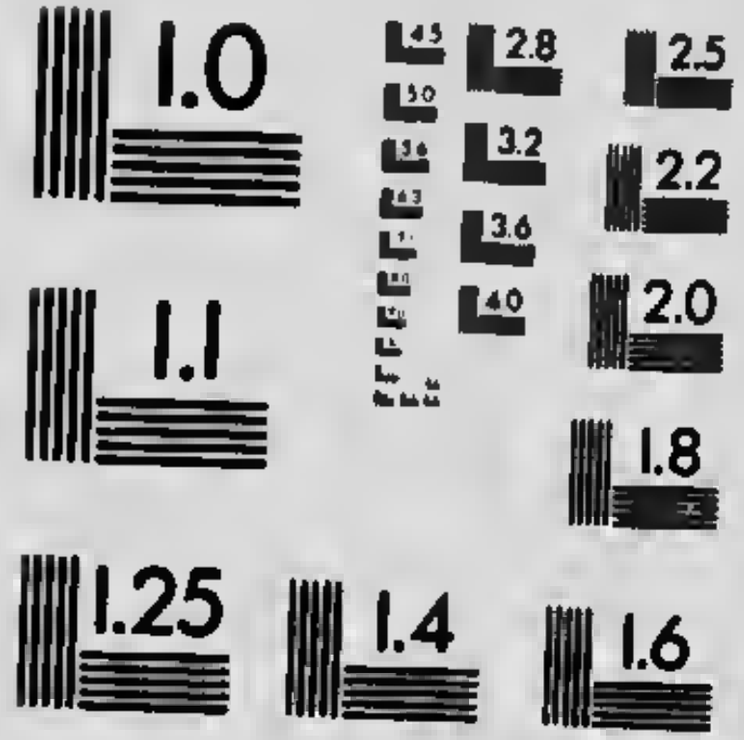

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BAILMENTS.

BOOK V.

BAILMENTS.

CHAPTER I.

VARIOUS RELATIONS.[1]

General.

We now enter upon the consideration of bailments.

The word bailment is derived from the Norman French *bailler*, and signifies to deliver.[2] It imports a contract resulting from delivery.[3] Signification of the term bailment.

Sir William Jones defines[4] a bailment as "a delivery of goods on a condition, expressed or implied, that they shall be restored by the bailee to the bailor, or according to his directions, as soon as the purpose, for which they were bailed, shall be answered." Sir William Jones's definition.

Story[5] objects to this definition, that it assumes that the goods are to be restored or re-delivered, which in the cases of consignment to a factor for sale is not the case; and substitutes a definition of his own, viz., "a delivery of a thing in trust for some special object or purpose and upon a contract, express or implied, to conform to the object or purpose of the trust." Story's objection.

Chancellor Kent, again, objects to this use of the word bailment as "extending the definition of the term beyond the ordinary acceptation of it in the English law," which draws a distinction between a consignment to a factor and a bailment; which latter is narrowed "to Kent's objection to Story's definition.

[1] There is a very learned article in the Law Quarterly Review, (1886) vol. ii. 188, entitled "Liabilities of Bailees according to German Law"—"Roman" might without impropriety have been substituted for "German"—wherein the law of bailments is most ably treated from the point of view of jurisprudence. Mr. Holmes's chapter on The Bailee at Common Law, in The Common Law, 164, is, like the rest of his book, admirable and original, though his conclusion is very disputable. *Post*, 734, 746. "No one who has read the treatise of Mr. Justice Story on Bailments, the essay of Sir William Jones, and the judgment of Lord Holt in *Coggs* v. *Bernard*," says Brett, J., in *Nugent* v. *Smith*, 1 C. P. D. 28, "can doubt that the common law of England as to bailments is founded upon, though it has not exactly adopted, the Roman Law." Cockburn, C.J., in the same case in the Court of Appeal, 1 C. P. D. 428, argues that "it is a misapprehension to suppose that the law of England relating to the liability of *common carriers* was derived from the Roman law"; and contends that this particular rule was introduced by custom as an exception to the general law of bailment, in the reign of Elizabeth and James I.

[2] 2 Bl. Comm. 451. Shep. Abr. Bailment, may be referred to for early cases.

[3] Story, Bailm. § 2. [4] Essay on the Law of Bailments, 1.

[5] Bailm. § 2, where in text and notes the whole discussion as to the exact meaning of a bailment is gone into.

cases in which no return or delivery, or re-delivery to the owner or his agent, is contemplated."[1]

Sergeant Sheppard in his Abridgment[2] adopts the meaning in *Termes de la ley*:[3] a bailment "is a delivery of things, whether it be of writings, cattel, goods or stuff to another, which is sometimes to be delivered back to the bailor, sometimes to the use of the bail, and sometimes to be delivered over to a third person." He adds: "And this delivery is sometimes upon condition to be re-delivered when money is paid, or something is done."

Distinction between a bailment properly so called and the possession of property by a servant or agent on behalf of the master.

A further distinction must also here be noted between bailment and the possession of property by a servant or agent on behalf of the master.[4] The latter is not a bailment; since the servant holds in the name of his master; a bailee properly so called holds in his own name. As Lord Ellenborough says:[5] "You cannot make my servant, whose possession is my possession, my bailee. He is not liable as a bailee. Where goods are delivered to another as a bailee, the special property passes to him; but here it does not."

Contract to deliver not a bailment.

A mere contract to deliver is not a bailment; for there must be a delivery of the thing bailed.

The person who delivers the thing is called the bailor; the person to whom it is delivered the bailee.

Delivery of the thing to be bailed.

Delivery of a bailment is either actual or constructive.[6] A constructive delivery is effected by the bailee acting on an authority given at a time and place different from that in which the possession of the goods is assumed; or in circumstances where, though no actual authority to assume possession of the goods is ever given, a presumption of authority is raised.[7]

Thing bailed a chattel.

The thing bailed must be a chattel,[8] and must be delivered for a special object or purpose; in the absence of which the delivery constitutes either a gift or a sale.

Duty of bailee.

A bailee, by virtue of the bailment, is bound to take care of the property committed to his hands. The degrees of care marked in law have already been generally examined.[9] But we must not lose sight of the consideration that in a contract of bailment the bailee may impose whatever terms he chooses, if he gives notice of them and the bailor has the means of knowing them.[10] Where terms are imposed the bailor and bailee are bound in the same way they would be in the case of any other contract.

Thing bailed presumably the thing to be returned.

The thing bailed is presumably the thing to be returned. Where this is certain one fruitful cause of difficulty is absent. Yet it happens sometimes that, either from the nature of the thing bailed, or from some act or default of the bailee, the thing bailed becomes mixed with the bailee's property. Then the rights of the bailor, as against the

1 2 Kent, Comm. 559 note (*a*).

2 Bailment.

3 *Termes de la ley*, (1579). The word "cattel" is an addition.

4 Y. B. 3 H. VII. 12, pl. 9. See Reeves, Hist. of Eng. Law (2nd ed.), vol. iv. 179.

5 *Hopkinson* v. *Gibson*, 2 Smith (K. B.) 202. The case determined that the colonel of a regiment who had purchased horses for Government had not such a special property as to maintain trover for one of them which was taken out of the possession of the sergeant who was taking them to the receiving depôt, as a distress for a turnpike-toll.

6 *The Queen* v. *McDonald*, 15 Q. B. D., per Lord Coleridge, C.J., 326; *The Queen* v. *Ashwell*, 16 Q. B. D. 223; *The Queen* v. *Flowers*, 16 Q. B. D. 643.

7 Doctor and Student, dial. 2, c. 38: "If a house by chance fall upon a horse that is borrowed, who shall bear the loss?"; Noy, Maxims, c. 43.

8 *Williams* v. *Jones*, 3 H. & C. 256; (Ex. Ch.) 602.

9 *Ante*, 19, *et seqq.*

10 Per Erle, C.J., *Van Toll* v. *S. E. Ry. Co.*, 12 C. B. N. S. 85.

bailee, may assume any of several aspects determined by the circumstance whether the confusion is the result of intent or of accident, or is a natural result, or a disposition thwarting the object of the bailment.

Confusion of property of bailor and bailee.

The general rule of law, as stated by Blackstone,[1] is: "If the intermixture be by consent, I apprehend that in both laws [*i.e.*, by the common law and the civil law] the proprietors have an interest in common in proportion to their respective shares.[2] But, if one wilfully intermixes his money, corn, or hay with that of another man without his approbation or knowledge, or casts gold in like manner into another's melting-pot or crucible, the civil law, though it gives the sole property of the whole to him who has not interposed in the mixture, yet allows a satisfaction to the other for what he has so improvidently lost.[3] But our law, to guard against fraud, gives the entire property, without any account, to him whose original dominion is invaded, and endeavoured to be rendered uncertain without his consent."

Old English law.

It was settled English law so far back as the year 1500,[4] that, despite alterations of form which property might have undergone, the owner might seize it in its new shape if he could identify the original materials—as leather made into shoes,[5] or cloth into a coat, or a tree into boards; it was held further, that if grain be taken and made into malt, or money into a cup, or timber into a house, the property is so changed as to alter the title.

Considered.

The case of a house on another man's land may be distinguishable in principle.[7] The other cases seem rather to differ from the difficulty of proving the identity of malt with particular grain, or a cup with particular silver, than from any different principle involved in the determination of ownership. Where the taking is fraudulent, the taker should stand in no better position than an express trustee.[8]

[1] 2 Comm. 405.

[2] Inst. 2, 1, 27, 28; *Jeffereys* v. *Small*, 1 Vern. 217; Ayliffe, Civil Law, bk. iii. tit. 3, 291.

[3] Inst. 2, 1, 28.

[4] Poph. 38, the case of mixing hay; *Fellowes* v. *Mitchell*, 2 Vern. 516, "as if another should blend his money with mine, by rendering my property uncertain he loses his own"; *Ward* v. *Eyre*, 2 Bulst. 323, the case of heaps of money wilfully mixed by the plaintiff at play, the whole of which the defendant kept; 1 Hale, Hist. of Pleas of the Crown, 513; *Colwill* v. *Reeves*, 2 Camp. 575; *Lupton* v. *White*, 15 Ves. 432. The rule of damages in an action of trover, where the defendant has added to the value of the property converted, is treated in an article on Accession. Am. Law Mag. vol. vi. 282, where the law as laid down by Blackstone is followed.

[5] Y. B. 5 H. VII., 15 b, pl. 6; a bailment of leather which the bailee parted with to one who made the leather into slippers, which were seized by the bailor. It was held that the property in the leather was not changed by the manufacture. This case is set out in part in *Harlopp* v. *Hoare*, 3 Atk. 48; Fitzh. Abr. Barre, 144; Bro. Abr. Propertie, 23.

[6] In *Duncomb* v. *Reeve*, Cro. Eliz. 783, it was held that if a man, having distrained raw hides, tan them, he becomes a trespasser *ab initio* by doing so; for his act, though at first sight a benefit, is an injury to the owner, as the nature of the hides is so changed that he can never be sure of getting them again. If, however, a man who has distrained armour, scour it to preserve it from rust, he does not become a trespasser thereby, for his act is beneficial to the owner.

[7] Code Civil, art. 552. In *Miller* v. *Michoud*, 11 Rob. (La.) 225, under the Louisiana Code it is held that where a lessee of ground constructs buildings or other works thereon, with his own materials, the owner of the soil may keep them on paying the value of the materials and the price of the workmanship. The law will not permit a man knowingly though passively to encourage another to lay out money under an erroneous opinion of title: *Dann* v. *Spurrier*, 7 Ves. 231. But a man is not to be deprived of his legal rights unless he has acted in such a way as to make it fraudulent for him to set up those rights. See per Fry, J., *Wilmott* v. *Barber*, (1880) 15 Ch. D. 105. The positions of a wilful intermeddler and of an innocent purchaser from him are very fully considered in *Silsbury* v. *Calkins*, 3 N. Y. 379.

[8] See per Jessel, M.R., *In re Hallett's Estate*, 13 Ch. D. 709; which case overrules *Brown* v. *Adams*, L. R. 4 Ch. 764; *In re Oatway*, [1903] 2 Ch. 300.

Where the taking is wilful but not fraudulent, the taker should be in no better position than if his act were due to his negligence or unskilfulness.[1]

"It is a principle settled as far back as the time of the Year Books that, whatever alteration of form any property may undergo, the true owner is entitled to seize it in its new shape if he can prove the identity of the original material." "But this rule is carried no further than necessity requires, and is applied only to cases where the compound is such as to render it impossible to apportion the respective shares of the parties."[2]

Accidental mixing.

Spence v. *Union Marine Insurance Co.*

The case of an accidental mixing, where identity is destroyed, is the subject of modern decision. In *Spence* v. *Union Marine Insurance Co.*[3] Bovill, C.J., said: "It has been long settled in our law, that, where goods are mixed so as to become undistinguishable by the wrongful act or default of one owner, he cannot recover,[4] and will not be entitled to his proportion, or any part of the property from the other owner; but no authority has been cited to show that any such principle has ever been applied, nor, indeed, could be applied, to the case of the accidental mixing of the goods of two owners; and there is no authority nor any sound reason for saying that the goods of several persons which are accidentally mixed together thereby absolutely cease to be the property of their several owners, and become *bona vacantia*. The goods being before they are mixed the separate property of the several owners, unless, which is absurd, they cease to be property by reason of the accidental mixture, when they would not so cease if the mixture were designed, must continue to be the property of the original owners; and as there would be no means of distinguishing the goods of each, the several owners seem necessarily to become jointly interested, as tenants in common, in the bulk." After citing several authorities,[5] the learned judge continues: "We are thus, by authorities in our own law, by the reason of the thing, and by the concurrence of foreign writers, justified in adopting the conclusion that by our own law the property in the cotton of which the marks were obliterated did not cease to belong to the respective owners; and that, by the mixture of the bales, and their becoming undistinguishable by reason of the action of the sea, and without the fault of the respective owners, these parties became tenants in common of the cotton, in proportion to their respective interests. This result would follow only in those cases where, after the adoption of all reasonable means and exertions to identify or separate the goods, it was found impracticable to do so."

Buckley v *Gross*

To the same effect is the judgment of Blackburn, J., in *Buckley* v. *Gross*,[6] in the case of tallow which was melted and flowed into the

1 See *post*, 733. *Lupton* v. *White*, 15 Ves. 432.

2 *In re Oatway*, [1903] 2 Ch., per Joyce, J., 359. 2 Sceph. Comm. (14th ed.), 20.

3 L. R. 3 C. P. 437. See *Harris* v. *Truman*, 7 Q. B. D. 358.

4 *Stock* v. *Stock*, Poph. 38; *Ward* v. *Ayre*, 2 Bulst. 323.

5 Mackeldey, Modern Civil Law (Eng. ed., 1845), 285; Story, Bailm. § 40; Pothier, Traité du Droit de Domaine de Propriété, Art. IV. § 2, De la Confusion, 166. Sheppard Abridg. Trespass, 133, citing 22 Car. at Gloucester Assizes by Serjeant Wild, has: "If one take my corn and put it to his corn so that it cannot be known which is his, and which is mine, and then I carry it away altogether; it seems this action will not lie against me for this."

6 3 B. & S. 574. See *In re Hallett's Estate, Knatchbull* v. *Hallett*, 13 Ch. D., per Jessel, M.R., 712: explained by the same learned judge, *Kirkham* v. *Peel*, 43 L. T. 172. The cases are considered, *National Bank* v. *Insurance Co.*, 104 U. S. (14 Otto) 54; also *First National Bank* v. *Hummel*, 20 Am. St. R. 257. See also per Lord Abinger, in the case of the mixture of oil by leakage on board ship: *Jones* v. *Moore*, 4 Y. & C.

sewers, and thence into the Thames, whence some of it was taken by different persons who sold it; from whom it was taken by the police and detained; and subsequently sold. The action was for conversion brought by one of the original purchasers against a purchaser from the police. "I dissent," says Blackburn, J.,[1] "from the doctrine that because the property of different persons is confused together, that entitles a third person to steal it with impunity. Probably the legal effect of such a mixture would be to make the owners tenants in common in equal portions of the mass, but at all events they do not lose their property in it."[2]

Judgment of Blackburn, J.

Where the mixing is the result of negligence or unskilfulness, the rule is laid down by Lord Eldon:[3] "If one man mixes his corn or flour with that of another [*i.e.*, negligently or unskilfully], and they were of equal value, the latter must have the given quantity; but if articles of different value are mixed, producing a third value, the aggregate of both, and, through the fault of the person mixing them, the other party cannot tell, what was the original value of his property, he must have the whole." In this view Chancellor Kent coincides,[4] holding that no court of justice is bound to make the discrimination for the wrongdoer.

Negligent or unskilful mixing. View of Lord Eldon, in *Lupton* v. *White*.

A more recent and, as to expression, somewhat varied statement of the law on this point is to be found in *The Idaho*:[5] "All the authorities agree, that if a man wilfully and wrongfully mixes his own goods with those of another owner, so as to render them undistinguishable, he will not be entitled to his proportion, or any part of the property. Certainly not, unless the goods of both owners are of the same quality and value. Such intermixture is fraud. And so, if the wrongdoer confounds his own goods with goods which he suspects may belong to another, and does this with intent to mislead or deceive that other, and embarrass him in obtaining his right, the effect must be the same."

The Idaho.

Both the bailor and bailee may maintain an action against a stranger for an injury to or conversion of the bailment[6]—the bailor by virtue of his general property, the bailee by virtue of his special property[7]

Right of action.

(Ex.) 351; *Henderson* v. *Lauck*, 21 Pa. St. 359, the case of mixing corn; also *Bo...t* v. *Diehl*, 117 Pa. St. 589, 2 Am. St. R. 706, and the note as to the distinction between sale and bailment. See further, *Woodward* v. *Semans*, 21 Am. St. R. 225; *Cloke* v. *Shafroth*, 31 Am. St. R. 375; and 2 Parsons, Contracts (8th ed.), 137. *Wilsons, &c. Line* v. *British, &c. Shipping Co.*, 23 Times L. R. 397.

[1] 3 B. & S. 575. [2] Cp. *The Queen* v. *Lushington, Ex parte Otto*, [1894] 1 Q. B. 420.

[3] *Lupton* v. *White*, 15 Ves. 442, from which case Stuart, V.C., in *Cook* v. *Addison*, L. R. 7 Eq. 466, deduces the rule that "if a trustee or agent mixes and confuses the property which he holds in a fiduciary character with his own property so as that they cannot be separated with perfect accuracy, he is liable for the whole." *Gray* v. *Haig*, 20 Beav. 219.

[4] *Hart* v. *Ten Eyck*, 2 Johns. (Ch. N. Y.) 62. See 2 Kent, Comm. 364, and Mr. Holmes's note to the 12th ed., 365. *McDonald* v. *Lane*, 7 Can. S. C. R. 462, is a case of "commingling of logs." *In re Oatway*, [1903] 2 Ch. 356, of mixing trust with private funds.

[5] 93 U. S. (3 Otto) 585.

[6] 2 Bl. Comm. 453; Bac. Abr. Bailm. (A) (B) (C).

[7] *Roberts* v. *Wyatt*, 2 Taunt. 268. In *Holliday* v. *Camsell*, 1 T. R. 658, it was held that one entrusted with a box containing the funds of a society of which he was a member, and bound by a bond to keep it safely, cannot maintain trover against another member who has taken it from him. This was on the ground that one tenant in common cannot maintain an action of trover against another. Detinue can be maintained by any person who has the immediate right to possession of personal chattels which are wrongfully detained from him, whether that right arises out of an absolute or special property: *Fenn* v. *Bittleston*, 7 Ex. 152, followed in *Nyberg* v. *Handley*, [1892] 2 Q. B. 202; cp. *Guillot* v. *Dossat*, 4 Martin (La.) 203. One tenant in common of a chattel cannot maintain trover against his co-owner, unless the latter has so disposed of it as to render the plaintiff's enjoyment of it impossible: *Fennings* v. *Lord*

Bailee's right to sue.

and actual possession.[1] This right of action is limited by the interests of the bailee in the bailment. If the bailee has been guilty of a conversion of the bailment or is an insurer of it, or has been guilty of negligence which has induced the injury in respect of which he sues the wrongdoer, the bailee may recover the full amount of the damage done to the bailment.

Right to sue, whether dependent on the bailee's chargeability over, considered.

But it has been said that, where the bailee has not been in default in the custody of the thing bailed, he can only recover to the extent that his interest has been affected; for he is not chargeable over. The phrase "because he is chargeable over" is of early and often occurrence[2] in this connection as pointing to the ground of the bailee's liability.

Heydon and Smith's case.

In *Heydon and Smith's case*[3] the law was laid down with some precision: "Clearly the bailee, or he who hath a special authority, shall have a general action of trespass against a stranger, and he shall recover all the damages because that he is chargeable over." The authority given for this is the Y. B. 21 H. VII. 14 b. pl. 23., an action of replevin. There Fineux, J., says: "In this case the bailee has a property in the thing against a stranger for he *is chargeable to the bailor*, and for the same reason he shall recover again[4] a stranger who takes the goods out of his possession."

Conclusion from it.

One possible explanation of the passage just cited from *Heydon and Smith's case* might be that the bailee who receives damages beyond what his interest in the bailment entitles him to retain is held liable to account to his bailor on the principle enunciated in *Moses* v. *Macferlan*[4] and to pay over the money as money had and received to the use of the bailor. But this meaning is excluded by a subsequent passage: "Without question he [the bailee] shall have an action of trespass *Quare clausum fregit* for the entry of the lessor, and for the cutting of the trees, but he shall not recover the value of the trees, because he is not chargeable over, but for the special loss which he hath, *scil*, for the loss of the pawnage [pannage] and of the shadow of the trees, &c."[5]

Grenville, 1 Taunt. 241. The law as to trover between tenants in common is considered in *Jacobs* v. *Seward*, L. R. 5 H. L. 464; see 2 Kent Comm. 350, note (*g*). The joint owner of a chattel is bound to bestow on it that care which a prudent man bestows ordinarily on his own property: *Guillot* v. *Dédsuc*, 4 Martin (La.) 203. An action against a wrongdoer to chattels can only be maintained by one who has either some property in, or possession of, the chattel injured. The same is true as to personal injuries. A doctor has an interest in his patient's safety, if he has a contract for a fixed sum per annum to attend to him; so has the manager of a theatre for that of an actor or singer bound to him by contract. But in none of these cases does the existence of a contract give a right of action; and, says Lord Penzance, *Simpson* v. *Thomson*, 3 App. Cas. 290, "no precedent or authority has been found or produced" "for an action against the wrongdoer except in the name, and, therefore, in point of law, on the part of one who had either some property in, or possession of, the chattel injured." For the different interest required to maintain trespass, trover, and replevin respectively, see per Parsons, C.J., *Waterman* v. *Robinson*, 5 Mass. 303. For the distinction between trespass and trespass upon the case, see Com. Dig. Action (M 2.).

1 Bac. Abr. Trespass (C), 2; *Nicolls* v. *Bastard*, 2 Cr. M. & R. 659. *Rooth* v. *Wilson*, 1 B. & Ald. 59.

2 Holmes, The Common Law, 167, who cites, *inter alia*, Beaumanoir (A.D. 1283). In Y. B. 9 Ed. IV. 34, pl. 9, Littleton, J., says: *Si biens soient bailles a un abbe, il avera action de transgressione si soient emportés, car il est charge oustre, mas son successor n'ava action, car il n'est my charge oustre.*

3 13 Co. Rep. 69.

4 2 Burr 1005.

5 In Mr. Holmes's ingenious, if paradoxical, essay on Bailments, The Common Law, 171, is this passage: "In general nowadays, a borrower or hirer of property is not answerable if it is taken from him against his will, and if the reason offered were a true one, it would follow that, as he was not answerable over he could not sue the wrongdoer. It would only be necessary for the wrongdoer to commit a wrong so gross as to free the bailee from responsibility in order to deprive him of his right of

There is no need to follow the cases in detail, till, in 1892, *Claridge* v. *South Staffordshire Tramway Co.*[1] was decided. An auctioneer had a horse delivered to him which he had permission to use pending the sale. While he was driving it the horse was injured, but in circumstances which excluded liability on the part of the auctioneer to his bailor; and on this ground, affirming the County Court judge, the Divisional Court held the bailee, the auctioneer, disentitled to recover, "for he was not an insurer and he had not been guilty of negligence." In *Meux* v. *G. E. Ry. Co.*,[2] which was not an action at all involving the point now being considered, Smith, L.J., went somewhat out of his way to observe that when the point did arise, *Claridge's case* "may possibly require at some future time further consideration." *Claridge v. South Staffordshire Tramway Co.*

The Winkfield[3] gave occasion for this revision. In a collision a ship carrying the mails was sunk and some of the mails lost. The Postmaster-General as bailee claimed against the fund brought into court by the owners of the colliding vessel in respect of the lost mails, the property of private owners. Sir Francis Jeune, confirming the report of the registrar and following *Claridge's case*, disallowed the claim.[4] The Court of Appeal reversed his decision and overruled *Claridge's case*. The proposition embodying the law which the Court of Appeal held to be established is thus worded: "The law is that in an action against a stranger for loss of goods caused by his negligence the bailee in possession can recover the value of the goods, although he would have had a good answer to an action by the bailor for damages for the loss of the thing bailed." *The Winkfield.* *Claridge's case.* Rule established by the Court of Appeal.

It is hard to believe that the broad accuracy of the proposition thus laid down has ever been in doubt in historic times. So far back as Y. B. 14 H. IV. 28 b., we find it asserted as beyond question, "*le possession est cause de action*": a proposition as familiar to Coke, C.J., and his *puisnes* as to lawyers happy to live subsequently to the enunciation of the proposition in *The Winkfield*. Some seventy years before that decision, Tindal, C.J., advising the House of Lords in *Giles* v. *Grover*,[5] had laid down that, "Any person who has the legal possession of goods, though not the property, may maintain this action against a wrongdoer, for a mere wrongdoer cannot dispute the title of the party who is in the possession of the goods with any colour of legal title." "The very same action is maintainable by the finder of goods against the person who wrongfully takes them from him, or by the carrier of goods for hire or by bailee of goods against a trespasser." This is, and apparently always was, elementary. A truism.

But this is not the proposition laid down in *Heydon and Smith's case*; nor yet that involved in *Claridge's case*; in neither of which does the party placing his case before the Court rest on his possession, as the finder or the trespasser does in the instances cited by the Court of Appeal. The proposition involved in *Heydon and Smith's case* is that where from the plaintiff's claim it appears that he does *not* rest on his possession, but shows that he has sustained no damages or only partial Necessary proposition in *Heydon and Smith's case.*

action." If Mr. Holmes had come across the passage cited in the text these sentences would possibly never have seen the light. But nowhere in his book does he indicate any consciousness of the existence of *Heydon and Smith's case*. The law also as to vindictive or punitive damages is such *ad rem*.

[1] [1892] 1 Q. B. 422. [2] [1895] 2 Q. B. 387. [3] [1902] P. 42, 54.

[4] Blackstone does not seem to have avoided the common error: 2 Comm. 453.

[5] 1 Cl. & F. 203. His opinion is accepted as unquestionable by the House; see per Lord Tenterden, 218. The Roman law is the same: *adversus extraneos vitiosa possessio prodesse solet*: D. 41. 2. 53.

damages, and further shows the right of some third party to the residue, he is not entitled to recover more than the damages he himself sustains.

Wrongdoer cannot defend by averring *jus tertii*.

It is clear that the law of England does not allow a wrongdoer to defend himself by showing a title in a third person. But the law of England does affirm "that if the plaintiff will himself discover to the Court anything wherehy it may appear that he had no cause of action when he commenced it, his writ shall abate (as if he will demand a debt or distrain for a rent before the day of payment) of his own showing it is against him."[1]

Mr. Holmes's assumption questioned.

Now no single case noticed in the judgment of the Court of Appeal in *The Winkfield* has any bearing on this view of the proposition enunciated in *Heydon and Smith's case*; and plainly the two propositions are not identical. The case law cited being thus out of the way, the decision of the King's Bench in *Heydon and Smith's case* is brought into direct conflict with Mr. Holmes's "proof that our law of bailments is of pure German descent," or rather with his assumption following from this that the "pure German" plant never took this particular graft from the civil law through all those centuries when the civil law was most influential, and in that department, bailments, where Holt, C.J., ultimately regarded the civil law to reign supreme.[2]

Civil law.

The doctrine of the civil law on the point is: *Furti autem actio ei competit cujus interest rem salvam esse, licet dominus non sit; itaque nec domino aliter competit quam si ejus intersit rem non perire.*[3] Again: *Hæc actio non solum domino sed etiam ei, cujus interest, competit; velut ei cui res commoda est, item fulloni; quia eo, quod tenentur, damnum videntur pati;*[4] and *et hoc jure utimur, ut ejus, quod interest, fiat æstimatio.*[5]

Law as laid down by the Court of Appeal concludes the question.

No modern critic has yet appeared who has challenged Coke's acquaintance with the Year Books, and from these he and his colleagues of the King's Bench have educed a rule which has at least obtained a very considerable currency. On the other hand, Mr. Holmes's paradox stands alone propounded apparently in ignorance of the King's Bench decision, and based on a most imperfect induction. Nevertheless, *The Winkfield*, which is approved and adopted by the Privy Council in *Glenwood Lumber Co.* v. *Phillips*,[6] must be accepted in the full breadth of its generalisation as the statement of the modern doctrine that the bailee with a mere bare possession may recover the whole damage done to the bailment by a wrongdoer for whose act he is not responsible over to his bailor.[7]

[1] *Brickhead* v. *Archbishop of York*, Hob. 197, 199. In *Addison* v. *Overend*, 6 T. R. 766, Lord Kenyon laid down that the defendant's objection to sufficiency of interest must be pleaded in abatement.

[2] *Coggs* v. *Bernard*, 1 Sm. L. C. (11th ed.) 173. Mr. Holmes's singularly unconvincing argument seems to be this: "The primitive conditions of society" among the uncivilised Anglo-Saxon tribes, "when cattle were the principal property known and cattle stealing the principal form of wrongful taking of property," are accompanied by certain very primitive forms of remedy directed to the redress of cattle stealing; *therefore*, in working out certain relations of property a thousand years later the analogies of the remedy against the cattle stealer should be looked to, and not those of the influences that civilised him. *Post*, 746. [3] Inst. 4, 1, § 13.

[4] D. 9, 1, 2. In Gaius, 3, §§ 205–208, the same principle of chargeability over is found. The passage ends: *Ejus nomine depositi non tenetur; nec ob id ejus interest rem salvam esse: furti itaque agere non potest; sed ea actio domino competit.* Cp. D. 16, 3, 1, § 39. Cp. L. Q. R. vol. vii. 224, Title to Chattels by Possession. [5] D. 9, 2, 21, § 2.

[6] [1904] A. C. 405. The decision in *The Winkfield* was anticipated in *Woodham* v. *Nottingham*, 49 N. H. 387. The benefit of the decision is not here called in question, only its historical and logical cogency.

[7] In this connection the *dictum* of Parke, B., in *Nicolls* v. *Bastard*, 2 C. M. & R. 660, must be noticed: "I think you will find the rule is that either the bailor or the bailee

Chancellor Kent's view.

Chancellor Kent, in his Commentaries,[1] states the law broadly— that a hailee having a special property[2] recovers only the value of his special property as against the owner, but the value of the whole property as against a stranger; and the balance beyond the special property he holds for the general owner. For this proposition he cites *White* v. *Webb*,[3] where the proposition was distinctly laid down and a number of cases were referred to as establishing the rule.

Whether in contract or tort.

The precise nature of the remedy given to the bailor against the bailee has been the subject of much discussion. As the relation constituted by the bailment is a contract, it has been contended that the remedy must be sought in contract; it has also been urged that where the injury complained of is a nonfeasance, an additional impediment exists to framing a claim in tort. Both these contentions have been negatived, and the law has been very clearly laid down by Tindal, C.J., in *Boorman* v. *Brown*,[4] in the Exchequer Chamber, reversing the judgment of the Queen's Bench: "That there is a large class of cases in which the foundation of the action springs out of privity of contract between the parties, but in which, nevertheless, the remedy for the breach, or non-performance, is indifferently either assumpsit or case upon tort, is not disputed. Such are actions against attorneys, surgeons, and other professional men, for want of competent skill or proper care in the service they undertake to render: actions against common carriers, against shipowners on bills of lading, against bailees of different descriptions: and numerous other instances occur in which the action is brought in tort or contract at the election of the plaintiff. And, as to the objection that the election is only given where the plaintiff sues for a misfeasance and not for a nonfeasance, it may be answered that in many cases it is extremely difficult to distinguish a mere nonfeasance from a misfeasance; as in the particular case now before us, where the contract stated in the declaration on the part of the broker is, in substance, to deliver the goods of the plaintiffs to the purchaser on payment of the price in ready money, and where, if the broker delivers without receiving the price, the breach of his direct undertaking is as much a wrongful act done by him, that is a misfeasance, as it is a nonfeasance, the distinction between the two being, in that case, very fine and scarcely perceptible. But, further, the action of case upon tort very frequently occurs where there is a simple non-performance of the contract, as in the ordinary instance of case

Law laid down by Tindal, C.J.

may sue, and whichever first obtains damages it is a full satisfaction." "No proposition can be more clear," says Parke, B., *Manders* v. *Williams*, 4 Ex. 344, "than that either the bailor or the bailee of a chattel may maintain an action in respect of it against a wrongdoer; the latter by virtue of his possession, the former by reason of his property"; *Flewellin* v. *Rave*, 1 Buls. 69; 2 Wms. Saund. 47 e, f. The circumstances in which two rights of action are available are discussed, *Beckham* v. *Drake*, 2 H. L. C. 587, 588. *Q.* What is the position of a wrongdoer who with knowledge communicated by the terms of the claim made upon him, and against the direction of the bailor, pays the full value of the article damaged to one with a right to nominal damages only? A hansom cabman in London, whose cab is smashed up, obtains the full value of it from the wrongdoer, though the owner warns him not to pay. How much of the value may the owner lose? As to payment under compulsion, *Lampleigh* v. *Brathwait*, 1 Sm. L. C. (11th ed.) 141, 163. The position of the owner of goods out of his possession is treated in Pollock and Maitland, Hist. of English Law (2nd ed.), vol. ii., 156–183. Ames, Hist. of Trover, Harvard. L. R. vol. xi. 277, 374.

[1] 2 Kent, Comm. 568 note (*e*).

[2] "It is laid down in many cases, that no one can have a special property in a personal chattel of which he has never had the actual possession": Bac. Abr. Trespass (C), 655.

[3] 15 Conn. 302.

[4] 3 Q. B. 525.

against shipowners, simply, for not safely and securely delivering goods according to their bill of lading; and, as in the case of *Coggs* v. *Bernard*,[1] where an undertaking is stated in the declaration as the ground of action: and, to give no further instance, the case of *Marzetti* v. *Williams*,[2] where the decision, that the plaintiff was entitled to nominal damages without proof of any actual damage, rests entirely on the consideration that the action, an action on the case, was founded on a contract, not on a general duty implied by law. The principle in all these cases would seem to be that the contract creates a duty, and the neglect to perform that duty, or the nonfeasance, is a ground of action upon a tort."[3]

Principle.

In the House of Lords,[4] Lord Campbell restates the law as laid down by Tindal, C.J.: "Wherever there is a contract, and something to be done in the course of the employment which is the subject of that contract, if there is a breach of a duty in the course of that employment, the plaintiff may either recover in tort or in contract."[5]

Lord Campbell in the House of Lords.

In *Turner* v. *Stallibrass*,[6] Collins, L.J., directs his attention to this point: "The relation of bailor and bailee must arise out of some agreement of the minds of the parties to it; but that agreement of minds is not the contract contemplated by that mode of expressing the rule to which I refer. Such an agreement of minds is presupposed in the case of any relation which brings about the common law liability of a bailee to his bailor. Where such a relation is established, the result of the cases appears to be that, if the plaintiff can maintain his action by showing the breach of a duty arising at common law out of that relation, he is not obliged to rely on a contract within the meaning of the rule; but if his cause of action is that the defendant ought to have done something, or taken some precaution, which would not be embraced by the common law liability arising out of the relation of bailor and bailee, then he is obliged to rely on a contract within the meaning of the rule. A distinction has been drawn between acts of misfeasance and nonfeasance which has given rise to some difficulty, but it seems to me that, whether the matter complained of is one of misfeasance or nonfeasance, the question really is whether it is embraced within the ambit of the common law liability arising out of the relation between bailor and bailee. If it is, then the plaintiff is not driven to rely on a contract within the meaning of the rule on the

Turner v. *Stallibrass*, failure to perform a duty raised by the common law from the relation of bailor and bailee may be treated as a tort.

[1] 2 Ld. Raym. 909. [2] 1 B. & Ad. 415.

[3] See *Burnett* v. *Lynch*, 5 B. & C., per Bayley, J., 604, per Littledale, J., 609; considered *Moule* v. *Garrett*, L. R. 5 Ex. 132, affd. L. R. 7 Ex. 101.

[4] 11 Cl. & F. 44; *Morgan* v. *Ravey*, 6 H. & N. 265.

[5] Cp. *Courtney* v. *Earle*, 20 L. J. C. P. 7. It has been supposed that the violation of a bare promise without any such general duty was the subject of an action in tort, but that is not so: *Bayliss* v. *Lintott*, L. R. 8 C. P. 345. See an examination of the law on "The right to maintain an action founded on tort," Law Mag. N. S. (1844) vol. i. 191. The conclusion is that an omission to perform one's duty or nonfeasance, seems as proper for the support of an action *ex delicto*, as an act of misfeasance. The distinction between misfeasance and nonfeasance has no place in the law of contracts, properly so called, and does not apply in covenant or assumpsit: Hare, Contracts, 166 *et seqq.* As to assumpsit, see *Slade's case*, 4 Co. Rep. 91 a; History of Assumpsit, by Prof. J. B. Ames, two papers in Harvard Law Review, vol. ii. 1, 53, reprinted (1900), 25 Law Magazine 120, 290. In Holmes, The Common Law, there is a very interesting history of assumpsit, 274–288, 290–297. The subject is also treated in Reeves, Hist. of the English Law (2nd ed.), vol. iii. 244, 394; vol. iv. 171, 380, 527; vol. v. 178, 215; see also 1 Spence Eq. Jur. 248; Hare, Contracts, 117; Com. Dig. Action upon the Case upon Assumpsit; Bac. Abr. Assumpsit; Vin. Abr. Actions [of Assumpsit]; Street, Foundations of Legal Liability, vol. iii. 171. As to an antecedent moral obligation, see note to *Wennall* v. *Adney*, 3 B. & P. 249; *Eastwood* v. *Kenyon*, 11 A. & E. 438.

[6] [1898] 1 Q. B. 59. *Sachs* v. *Henderson*, [1902] 1 K. B. 612; *Stiefel* v. *Ingram* 19 Times L. R. 534.

subject of costs. But if it is not, then the plaintiff must rely on a contract in order to show a cause of action, and the action is therefore one founded on contract."

For injury done to the property of another the wrongdoer is liable wholly apart from contract.

If an injury is done by the wrongful act of one to the property of another, the wrongdoer is liable to the owner quite apart from the existence of any contract, and notwithstanding the existence of any contract between the owner and any third person, or between any third person and the wrongdoer. If the act is a wilful one, the liability is clear; if an ignorant one not less so. The point is put by Bramwell, L.J., with his accustomed vigour.[1] "Where is the duty of care? I answer that duty that exists in all men not to injure the property of others. This is not a mere nonfeasance which is complained of, it is a misfeasance; an act and wrongful. Suppose A lets B a horse, B, with C's licence, puts up at C's stables for reward to C from B; C turns into the stables loose a vicious horse, known to be so, not to injure A's horse but not thinking of the matter; there cannot be a doubt that C would be liable to A if the horse was injured. So if he gave the horse bad oats which injured the horse he would be liable, though he would not be to A if he omitted to feed him; so here justice is done, though indirectly."

Bailee under a condition.

At common law and apart from the various Bankruptcy Acts, from 21 Jac. I. c. 19, downwards, a bailee of personal property subject to an agreement for a conditional sale cannot convey the title nor subject it to execution for his own debts until the condition on which the agreement to sell was made has been performed.[2] And where a bailment is upon the terms that the bailee is to be absolutely liable in case of fire, the effect has been held by Mellish, L.J., to be not to make the bailee an insurer, but to operate as a contract of bailment which may be thus expressed: "If the property is lost by fire, I will not put you to proof whether it is lost by carelessness or not, it is part of the contract of bailment that I am absolutely liable in the case of a fire."[3]

Division of bailments.

The division of bailments has elicited much display of critical power. The principle adopted by Holt, C.J., in *Coggs* v. *Bernard* has been excepted to by Sir William Jones;[4] defended by Mr. Smith in his notes to *Coggs* v. *Bernard*,[5] and rejected by Story, whose classification, based on that of Sir William Jones, I shall, in the main, follow.

Three kinds.

Bailments, says Story,[6] are properly divisible into three kinds:

First, those in which the trust is exclusively for the benefit of the bailor or of a third person.

Second, those in which the trust is exclusively for the benefit of the bailee.

Third, those in which the trust is for the benefit of both parties, or of both or one of them and a third person.

In the first class are deposits and mandates; in the second, gratuitous loan for use, called in the civil law *commodatum*; in the third, pawn; hiring; and letting to hire. This last falls into two subdivisions: (1) The hiring of a thing for use (*locatio rei*); (2) The hiring of work and

[1] *Hayn* v. *Culliford*, 4 C. P. D. 185. As to joint delinquents, *Palmer* v. *Wick and Pulteneytown Steam Shipping Co.*, [1894] A. C. 318. *Gerson* v. *Simpson*, [1903] 2 K. B. 197, is under 53 & 54 Vict. c. 64, s. 5.

[2] *Harkness* v. *Russell*, 118 U. S. (11 Davis) 663. *Ex parte White*, *In re Nevill*, L. R. 6 Ch. 397.

[3] *North British and Mercantile* v. *London, Liverpool, and Globe Insurance Co.*, 5 Ch. D., per Mellish, L.J., 584.

[4] Jones, Bailm. 35.

[5] 1 Sm. L. C. (11th ed.), 191.

[6] Bailm. § 3.

labour (*locatio operis*); this, in its turn, is again subdivided into (*a*) *Locatio operis faciendi*, or the hire of work and labour to be done, or care and attention to be bestowed on the goods bailed by the bailee for a compensation; (*b*) *Locatio operis mercium vehendarum*, or the hire of the carriage of goods from one place to another for a compensation.

Huber's statement of the rule of diligence.

This division is possibly derived from Huber,[1] whose statement of the rule of diligence is very neat. *Contractus vel ineuntur in utri, usque commodum, vel in alterutrius utilitatem duntaxat. Qui utriusque partis utilitatem continent, mediocri diligentiâ contenti sunt, levemque culpam recipiunt; qui unius saltem commodum spectant, hi vel continent utilitatem ejus qui de damno queritur, vel in ejus gratiam initi fuere, qui damnum fecit. Priori casu nil nisi lata culpa præstatur, posteriore levissima.*

Rule determining the amount of care required in the various classes of bailments in the civil law.

We now proceed to consider these different classes of bailments in their order. The civil law thus specifies the amount of care in each case requisite. *Nunc videndum est, quid veniat in commodati actione: utrum dolus, an et culpa? an vero et omne periculum? Et quidem in contractibus interdum dolum solum, interdum et culpam præstamus. Dolum in deposito; nam quia nulla utilitas ejus versatur apud quem deponitur, merito dolus præstatur solus, nisi forte et merces accessit; tunc enim (ut est et constitutum) etiam culpa exhibetur; aut si hoc ab initio convenit, ut et culpam et periculum præstet is penes quem deponitur. Sed ubi utriusque utilitas vertitur, ut in empto, ut in locato ut in dote, ut in pignore, ut in societate, et dolus et culpa præstatur. Commodatum autem plerumque solam utilitatem continet ejus cui commodatur; et ideo verior est Quinti Mucii sententia existimantis, et culpam præstandam et diligentiam.*[2] There is also the famous passage:[3] *Contractus quidam dolum malum duntaxat recipiunt; quidam, et dolum et culpam; dolum tantum depositum et precarium; dolum et culpam mandatum, commodatum, venditum, pignori acceptum, locatum, item dotis datio, tutelæ, negotia gesta (in his quidem, et diligentiam)*[4] *societas, et rerum communio et dolum et culpam recipit; sed hæc ita, nisi si quid nominatim convenit, vel plus, vel minus, in singulis contractibus; nam hoc servabitur, quod initio convenit; legem enim contractus dedit; excepto eo quod Celsus putat non valere, si convenerit, ne dolus præstetur; hoc enim bonæ fidei judicio contrarium est; et ita utimur. Animalium vero casus, mortes, quæque sine culpa accidunt, fugæ servorum, qui custodiri non solent, rapinæ, tumultus, incendia, aquarum magnitudines, impetus prædonum a nullo præstantur.*

I. Deposit.

Definition.

Depositum est, quod custodiendum alicui datum est. Dictum ex eo, quod ponitur; præpositio enim de, auget depositum, ut ostendat. totum fidei ejus commissum, quod ad custodiam rei pertinet.[5]

Deposit, says Sir William Jones,[6] is a bailment of goods to be kept for the bailor without a recompense.

1 Prælectiones Juris Civilis, 3, 15, 9 (g).

2 D. 13, 6, 5, § 2.

3 D. 50, 17, 23.

4 For an account of the controversy on the interpretation of this passage, see Jones, Bailm. 18 *et seqq.*

5 Dig. 16, 3, 1. *Le dépôt est un contrat par lequel l'un des contractants donne une chose à garder à l'autre, qui s'en charge gratuitement, et s'oblige de la rendre lorsqu'il en sera requis*: Pothier, Traité du Contrat de Dépôt, n. 1.

6 Bailm. 117, Definitions.

In the civil law, deposit is classified under the heading *re*;[1] that is, is reckoned one of those contracts where the obligation arises from an inference from the facts and not from express agreement.

Deposit is of two kinds—necessary and voluntary. A necessary deposit is such as is made by the party under some pressing necessity—*tumultus, incendium, ruina aut naufragium*—and thence is called *miserabile depositum*.[2] A voluntary deposit is such as arises from the mere consent and agreement of the parties. This distinction was of practical importance, because in cases of default in the care of voluntary deposits the action was only *in simplum*; in the case of the *miserabile depositum* it was *in duplum*[3] whenever the depositary was guilty of any default.[4] The common law does not recognise this distinction.[5] Deposit necessary and voluntary.

The duties of the *depositarius* are:

(1) To be answerable for *dolus; nam quia nulla utilitas ejus versatur apud quem deponitur*.[6] Duties of the depositaries.

(2) To return the deposit in as good condition as when he received it. He is not liable for deterioration caused by circumstances outside his control; although the *onus* is on him to show that deterioration which has happened has been thus caused.[7]

(3) To restore the deposit on demand with any fruits it may have borne whilst under his control.[8]

(4) Not to use the deposit unless with the depositor's special consent.[9]

A deposit can only be of personal or movable property, and is inapplicable to real or immovable property.[10] It is not necessary for the depositor's title to be absolute; a lawful possession will enable him to maintain his action.[11] Nature of a deposit.

[1] Contracts *re* were divided by the Roman jurists into—(1) *Mutuum*; (2) *Commodatum*; (3) *Pignus*; (4) *Depositum*. A loan for consumption was termed *mutuum* because *ex meo tuum fit*. *Commodatum* was a gratuitous loan; if the lender stipulated for a compensation, the agreement changed its character and became one of letting and hiring. *Pignus*: pawn. What the nature of *depositum* was appears in the text.

[2] If this division is to be regarded as other than partial it is necessary to include under it those deposits treated of by Pothier, Traité du Contrat de Dépôt, under his second article of ch. iv. Des dépôts judiciaires. *Post*, 752.

[3] Inst. 4, 6, 17, 23; D. 16, 3, 18. Huber's division is different: Prælectiones Juris Civilis, 3, 15, 11; so is that of Pothier, Traité du Contrat de Dépôt, 1. They divide deposit into simple and by stake-holder. *Le séquestre est le dépôt qui est fait par deux déposants qui ont des intérêts différents, à la charge de rendre la chose à qui il sera jugé qu'elle devra être rendue.* See Code Civil, arts. 1955–1963.

[4] Story, Bailm. § 44, citing Pothier, Traité du Contrat de Dépôt, n. 75. *Prætor ait: quod neque tumultus, neque incendii, neque ruinæ, neque naufragii causa depositum sit, in simplum, earum autem rerum quæ supra comprehensæ sunt, in ipsum in duplum . . . judicium dabo*: D. 16, 3, 1, § 1.

[5] Jones, Bailm. 49.

[6] D. 13, 6, 5, § 2. *Diligentia in suis rebus* is the test. *Nisi tamen ad suum modum curam in deposito præstat, fraude non caret: nec enim salva fide minorem iis quam suis rebus diligentiam præstabit*, D. 16, 3, 32. The English law does not follow the civil in this. If the depositor knows, or may be presumed to know, the general character of the depositary, the civil law rule is good; but if the depositor does not know this, the depositary is bound to bestow ordinary care on the deposit, though he does not on his own goods, and such care is to be ascertained without reference to the character of the depositary. See *The William*, 6 C. Rob. (Adm.) 316, the case of a capture lost through neglect to take a pilot on board; and *post*, 744.

[7] D. 16, 3, 1, § 16; Code 4, 34, 11.

[8] D. 22, 1, 38, § 10.

[9] *Si deposita pecunia is qui eam suscepit, unus est, non dubium est, etiam usuras debere præstare*, Code 4, 34, 4.

[10] Story, Bailm. § 51.

[11] *Armory* v. *Delamirie*, 1 Sm. L. C. (11th ed.) 356. *Ante*, 735. *Tadman* v. *Henman*, [1893] 2 Q. B. 168, is a decision which is "doubted"; 2 Sm. L. C. (11th ed.), 834. The possessor of land the title to which was in another, in distraining on his tenant, distrained the goods of a third person, who brought an action for the conversion. It was held that such third person was not estopped from denying the distrainor's title, and

Who may make a deposit.

A deposit may be made and received by all persons having contractual capacity. If an infant receives a deposit, he is bound to restore it on demand so long as it is in his possession or under his control; not under the law of bailments, for, from want of capacity, no bailment (*stricto sensu*) is made; but because the infant, by detaining the deposit, does a wrongful act.[1] On general principles of law an infant may make a deposit; yet if he does, difficult questions may arise whether he can recall the thing deposited, or whether in all circumstances the depositary is justified in surrendering it. Similar considerations apply with regard to other classes of people under disability.

Old law as stated in *Southcote's case.*

The old law of bailment as presented in *Southcote's case*[2] was that the bare acceptance of goods to keep implies a promise to keep them safely, or, as Coke, C.J., says, "to be kept and to be kept safe is all one," and the bailee is answerable at his peril, for if he is robbed he has his remedy over by trespass or appeal.

Law as stated by Blackstone.

Blackstone[3] states the modern law: "If a friend delivers anything to his friend to keep for him, the receiver is bound to restore it on demand; and it was formerly held that in the meantime he was answerable for any damage or loss it might sustain, whether by accident or otherwise; unless he expressly undertook to keep it only with the same care as his own goods, and then he should not be answerable for theft or other accidents. But now the law seems to be settled, that such a general bailment will not charge the bailee with any loss, unless it happens by gross neglect, which is an evidence of fraud:[4] but if he undertakes specially to keep the goods safely and securely, he is bound to take the same care of them as a prudent man would take of his own."

Amount of care.

The question of the amount of care which a prudent man would use in the custody of his own goods, we have seen,[5] is not to be determined

therefore could recover as for e conversion of the goods distrained. There does not appear to be any necessary connection between the two propositions. Assuming the relevancy of the proposition that there was no estoppel, whose title was the third person to set up? A right in herself to trespass, or a right in some one else who acquiesced in the possession of the distreinor? See *Catteris* v. *Cowper*, 4 Taunt. 547. The law is clear. "All the old law," says Cockburn, C.J., in *Asher* v. *Whitlock*, L. R. 1 Q. B. 5, "on the doctrine of disseisin was founded on the principle that the disseisor's title was good against all but the disseisee," and "Possession is good title against all the world" but the true owner. Lord Watson reiterates this in *Mussammat Sundar* v. *Mussammat Parbati*, L. R. 16 Ind. App. 193. "Actual possession" gives, says Lord Blackburn, in *Bristow* v. *Cormican*, 3 App. Cas. 661, "a title in itself." This is subject to what is said in *Doe dem. Carter* v. *Barnard*, 13 Q. B. 945; but which is not applicable where the plaintiff sues for a conversion: *Chambers* v. *Donaldson*, 11 East, 65, see also note at 70. See further Sir Frederick Pollock on Possession, Introduction, § 5. Charles, J., seems to have been under the impression that rights of property are dependent on title, not on possession. The possessor is *eo nomine* clothed with all the rights of an owner against all but the true owner, and not as against his tenant merely. The civil law doctrines of possession are well given and discussed in Moyle, Just. Inst. Excursus 3 (2nd ed.), 334. Mr. Holmes's 6th lecture is on Possession, The Common Law, 206–246. See a curious story about disputed possession among the Locri, in Polybius, 12, 16.

[1] *Mills* v. *Graham*, 1 B. & P. (N. R.) 140, 145; *Turner* v. *Stallibrass*, [1898] 1 Q. B. 59. *Ante*, 738.

[2] *Southcote's case*, 4 Co. Rep. 63 b, Cro. Eliz. 615. The transition from the law as expressed in *Southcote's case* to the modern doctrine is treated more at length, *post*, 746. *Kettle* v. *Bromsall*, Willes (C. P.), 118. See *Foster* v. *Essex Bank*, 17 Mass. 479.

[3] 2 Comm. 452.

[4] "And if there be such a gross neglect, it is looked upon as an evidence of fraud": per Holt, C.J., *Coggs* v. *Bernard*, 1 Sm. L. C. (11th ed.), 181.

[5] *Ante*, 730. The diligence required of a depositary in the Roman law is thus stated: *Nec enim salvâ fide minorem iis, quam suis rebus, diligentiam præstabit*, D. 16, 3, 32. *Nam quia nulla utilitas ejus versatur apud quem deponitur, merito dolus præstatur solus, nisi forte et merces accessit; tunc enim (ut est et constitutum) etiam culpa exhibetur; aut si hoc ab initio convenit, ut et culpam et periculum præstet is, penes quem deponitur:*

hy any hard-and-fast rule, hut must be the suhject of an inference drawn by the jury in each individual case; and is dependent on the nature and quality of the goods hailed, and the character and customs of the place where the bailment is effected. What would he gross negligence in the custody of a diamond bracelet might be very exceptional care in the custody of a tin pot; a ton of coals suggests a different standard from a heap of jewels, and a delicate microscope from an ordinary barometer.[1] A deposit of any of these articles ohliges the depositary to exert care proportioned to its kind; and in the case of any, if he is guilty of gross negligence—that is, the omission of that care which every man of common sense, how inattentive soever, takes of his owu property[2]—he will be liahle for injury or loss. The judge determines the law applicahle and directs the jury what test they are to apply. The duty of the judge is to non-suit,[3] though the facts proved would constitute evidence in some circumstances, if there is not enough evidence in the particular circumstances to warrant the inference required—*e.g.*, if there is evidence of slight negligence where ordinary negligence alone will raise the presumption, or if there is evidence of hut ordinary negligence where less than gross negligence is not sufficient.

What "gross negligence" means with reference to a deposit.

The rule that a depositary is liable only for gross negligence has been interpreted to mean gross negligence as manifested hy a comparison with the way that he keeps his own goods. "For if," says Holt, C.J., "he keeps the goods hailed to him but as he keeps his own, though he keeps his own hut negligently, yct he is not chargeable for them, for the keeping them as he keeps his own, is an argument of his honesty."[4] Sir William Jones,[5] Pothier,[6] Lord Mansfield,[7] and Chancellor Kent[8] adopt the same view. Nevertheless, it seems inconsistent with the modern authorities. The point was definitely raised in *Rooth* v. *Wilson*,[9] where A sent his horse for the night to B, who turned it out after dark into his pasture-field adjoining to, and separated from, a field of C's hy a fence which C was hound to repair. The horse, from the bad state of the fence, fell from one field into the other, and was killed. After verdict for the plaintiff, a rule for a new trial was ohtained on the ground that the defendant was a gratuitous hailee, and turned the horse into that pasture which his own cattle were in the constant hahit of using. Lord Ellenhorough said:[10] "The plaintiff certainly was a gratuitous hailee, hut, as such, he owes it to the owner

Rooth v. *Wilson*.

Lord Ellenborough's judgment.

D. 13, 6, 5, § 2. Among the Greeks the care of a deposit was a sacred trust, as is shown by the story of Glaucus (Herod. 6, 86), whose punishment for oven in thought doubting about restoring a deposit was the failure of his family line. The Pythoness replied to an inquiry whether restoration might be withheld, that it was as bad to have tempted the god as it would have been to have done the deed.

[1] *Batson* v. *Donovan*, 4 B. & Ald. 21. [2] Jones, Bailm. 118, *ante*, 38.

[3] *Moffatt* v. *Bateman*, L. R. 3 P. C. 115. *Ante*, 12, 131.

[4] *Coggs* v. *Bernard*, 2 Lord Ray. 909, 1 Sm. L. C. (11th ed.), 173. "As suppose," says Holt, C.J., "the bailee is an idle, careless, drunkard fellow, and comes home drunk and leaves all his doors open, and by reason thereof the goods happen to be stolen and his own: yet he shall not be charged, because it is the bailer's own folly to trust such an idle fellow": 2 Lord Raym. 914. On the other hand, if the bailee is preternaturally sharp in his own affairs, yet in the matter of the bailment he slightly relaxes his vigilance, so that the deposit is lost, in Pothier's opinion he is liable, for he is bound to the same kind of diligence which he uses in his own affairs: Pothier, Traité du Contrat de Dépôt, n. 27.

[5] Bailm. 46. [6] Traité du Contrat de Dépôt, n. 27.

[7] *Gibbon* v. *Paynton*, 4 Burr. 2300: "The latter [the bailee] is only obliged to keep the goods with as much diligence and caution as he would keep his own."

[8] 2 Comm. 563; also Lord Kenyon, *Finucane* v. *Small*, 1 Esp. (N. P.) 315.

[9] 1 B. & Ald. 59. [10] *L.c.* 61.

of the horse, not to put it into a dangerous pasture; and if he did not exercise a proper degree of care he would be liable for any damage which the horse might sustain. Perhaps the horse might have been safe during the daylight, but here he turns it into a pasture to which it was unused after dark. That is a degree of negligence sufficient to render him liable."

Doorman v. Jenkins.

Again, in *Doorman* v. *Jenkins*,[1] Lord Denman directed the jury [2] that it did not follow from the defendant's having lost his own money at the same time as the plaintiff's that he had taken such care of the plaintiff's money as a reasonable man would ordinarily take of his own; and that the fact relied on was no answer to the action, if they believed that the loss occurred from gross negligence. On motion for a new trial it was not contended that a gratuitous bailee, who keeps another person's goods as carefully as his own, cannot be liable for the loss or be guilty of gross negligence; all that was urged was that the plaintiff had not made out a *primâ facie* case. In discharging the rule, Taunton, J., said: [3] "The defendant receives money to be kept for the plaintiff. What care does he exercise? He puts it, together with money of his own (*which I think perfectly immaterial*), into the till of a public-house."

Taunton, J.'s, judgment.

Lord Stowell's judgment in *The William.*

In *The William*,[4] the case of a justifiable capture, Lord Stowell treats the same subject. "On questions of this kind," said he,[4] "there is one position sometimes advanced, which does not meet with my entire assent, namely, that captors are answerable only for *such care* as they would take of their own property. This, I think, is not a just criterion in such case; for a man may, with respect to his own property, encounter risks, from views of particular advantage, or from a natural disposition of rashness, which would be entirely unjustifiable, in respect to the custody of goods of another person, which have come to his hands by an act of force. Where property is confided to the care of a particular person, by one who is, or may be supposed to be, acquainted with his character, the care which he would take of his own property might, indeed, be considered as a reasonable criterion."

Test applicable.

A depositary's conduct with his own goods may be reckless, and then, unless the person committing goods to his care is aware of the fact or negligently oblivious of it, he can require a greater degree of care for his goods than the bailee bestows on his own. The test in general is not what any particular man does, but what men as a class do with similar property as a class.

Tracy v. *Wood.*

This is the rule laid down in *Tracy* v. *Wood*: [5] "The true way of considering cases of this nature is, to consider whether the party has omitted that care which bailees without hire or mandataries of ordinary prudence usually take of property of this nature. If he has, then it

[1] 2 A. & E. 256; Cp. *Wilkinson* v. *Coverdale*, 1 Esp. (N. P.) 74, decided by Lord Kenyon on the authority of a MS. note of Mr. Justice Buller in *Wallace* v. *Tellfair*; *Beauchamp* v. *Powley*, 1 Moo. & R. 38.

[2] 2 A. & E. 258. [3] *L.c.* 261.

[4] 6 Ch. Rob. (Adm.) 316. *Ante*, 7 , n. 6.

[5] 3 Mason (U. S.) 135. See *Palin* v. *Reid*, 10 Ont. App. 63, where a guest at an inn, when leaving, and after paying his bill, asked to be allowed to leave a box in the room of the inn used for storing luggage, intending to fetch it the following day. He was prevented, by illness, from fetching it then, and when able to, it was lost. It was held there must be proof of actual negligence, as the innkeeper was merely a gratuitous bailee. *Eldridge* v. *Hill*, 97 U. S. (7 Otto) 92, is an authority for the extent of responsibility of a gratuitous bailee of money for paying over the same to a third person in respect of the recovery of property, which on being handed over to the owner is found in a damaged condition.

constitutes a case of gross negligence. The question is not whether he has omitted that care, which very prudent persons usually take of their own property, for the omission of that would be but slight negligence; nor whether he has omitted that care which prudent persons ordinarily take of their own property, for that would be but ordinary negligence. But whether there be a want of that care, which men of common sense, however inattentive, usually take, or ought to be presumed to take of their property, for that is gross negligence. The contract of bailees without reward is not merely for good faith, but for such care as persons of common prudence in their situation usually bestow upon such property. If they omit such care, it is gross negligence."[1] We have here, then, a most authoritative statement—for it is Judge Story who speaks—that reference is to be made, not to the conduct of any particular man to fix a standard of care or negligence, but to the average to be expected from the generality of men.

The standard of care is the average to be expected from the generality of men.

In this connection Pothier gives an example that may be reproduced.[2] Depositary's house is on fire. He removes his own goods, leaving those of the bailor to be hurnt. If he had time to remove the burned goods, he is certainly liable. If he had not, Pothier thinks a breach of faith cannot be imputed to him for having saved his own goods in preference to his hailor's. If, however, the goods hailed were greatly more valuable than his own, and as easily to be got away, then he ought to rescue them and look to an average indemnity for the loss of his own.

Pothier's case of bailee saving his own goods in preference to those of the bailor.

To the principle that a depositary is answerable only for gross negligence, Sir William Jones[3] enumerates four exceptions; of which two only are strictly exceptions, the others being concerned with cases which are not properly deposit.

Four exceptions to depositary's responsibility.

First: A depositary is answerable for a different degree of care where he makes a special agreement. In so far as this is an assertion of the right of two people to attach incidents to a contract entered into by them, varying those implied hy law, it requires no particular notice.[4] Sir William Jones,[5] however, instances *Southcote's case* as an illustration of the hailee hy special agreement engaging to exert a greater care than ordinary. *Southcote's case*[6] asserts that, upon a general bailment to keep safely, the hailee is responsible for a loss occasioned hy theft, whether the theft was by his servants or by others. The report adds: "*Nota*, reader, it is good policy for him who takes any goods to keep, to take them in special manner, *scil*, to keep them as he keeps his own goods, or to keep them the best he can at the peril of the party; or if they happen to he stolen or purloined, that he shall not be answerable for them; for he who accepteth them, ought to take them in such or the like manner, or otherwise he may be charged hy his general acceptance." About the same time Sir Edward Coke states the law[7] to he that the

First exception; Where there is a special agreement.

[1] See *Batson* v. *Donovan*, 4 B. & Ald. 21; *Duff* v. *Budd*, 3 B. & B. 177.

[2] Traité du Contrat de Dépôt, n. 29.

[3] Bailm. 47–50. *Sed is apud quem res deposita est custodiam non præstat, tamtumque in eo obnoxius est, si quid ipse dolo fecerit:* Gaius, 3, § 297.

[4] This is still, with exceptions which multiply almost yearly, the law of England, *ante*, 725, and always was the rule of the civil law. *Si quid nominatim convenit, vel plus, vel minus, in singulis contractibus: nam hoc servabitur, quod initio convenit: legem enim contractus dedit:* D. 50, 17, 23.

[5] Bailm. 41.

[6] (1601) 4 Co. Rep. 83 b, 1 Cro. Eliz. 815.

[7] Co. Litt. 89 a. The first edition of Coke upon Littleton was published in 1628. *Southcote's case* was decided in 1601. Hargrave's note on the passage cited is: "This

engagement of the bailee is to keep safely, "and therefore he must keep them at his peril. So it is if goods be delivered to one to be kept, for to be kept and to be safely kept is all one in law." His conclusion is that, if goods are to be safely kept, and afterwards are stolen, the bailee shall not be excused; since by accepting the goods he undertook to keep them safely, to which obligation he must be held. If, however, the goods are delivered to him to keep as he would keep his own, then, if they are stolen without his default or negligence, he shall be discharged.[1]

Two points raised in *Southcote's case*.

In *Southcote's case* two main principles appear to have been insisted on.

(1) That between the duty to keep and to keep safely there is no difference.[2]

First, overruled by *Coggs* v. *Bernard*.

This was held not law by Holt, C.J., and the other judges of the Queen's Bench, in *Coggs* v. *Bernard*,[3] who distinguishes between bailees for reward and other bailees whose liability had up till then been identical, and who were alike bound absolutely to answer for the bailment.

Sir William Jones approves.

Sir William Jones[4] quotes Sir Edward Coke: "The reason of the judgment was because the plaintiff had delivered the goods to be safely kept, and the defendant had taken the charge of them upon himself, by accepting them on such a delivery"; and comments: "Had the reporter stopped here, I do not see what possible objection could have been made; but his exuberant erudition boiled over, and produced the frothy conceit which has occasioned so many reflections on the case itself; namely, 'that to keep and to keep safely are one and the same thing,' a notion which was denied to be law by the whole Court in the time of Holt, C.J."[5]

Mr. Holmes's contrary assertions.

Mr. Holmes on this says:[6] "The attempts of Lord Holt, in *Coggs* v. *Bernard*, and of Sir William Jones, in his book on Bailments, to show that *Southcote* v. *Bennet* was not sustained by authority were futile, as any one who will study the Year Books for himself may see. The same principle was laid down seven years before by Peryam, C.B., in *Drake* v. *Rowman*,[7] and *Southcote's case* was *followed as a leading precedent*

doctrine was denied by the Court in the great case of *Coggs and Barnard*; and it is now understood, that the acceptance of goods to be kept generally is merely an undertaking to keep them as the party receiving keeps his own: 2 Ld. Raym 911."

[1] Cp. 2 Bl. Comm. 452; *Armfield* v. *Mercer*, 2 Times L. R. 704.

[2] Cp. per Lord Halsbury, C., *East Indian Ry. Co.* v. *Kalidas Mukerjee*, [1901] A. C. 402.

[3] (1793) 2 Ld. Raym. 909, 910, 911, 914, 915. *The King* v. *Viscount Hertford*, 2 Show. (K.B.) 172. Brooke, Abr. Bailm. 7. Y. B. 21 Hen. VII. 29. 4. [4] Bailm. 42.

[5] Ld. Raym 911 margin. See an article, "Carriers' Liability," Harvard L.R. vol. xi., 158, also see vol. xiii., 43. [6] The Common Law, 179.

[7] Savile, 133, where the C.J.'s words are given: "*Mes autrement si jeo suffer un home de mitter ses biens en mon meison lou jeo inhabit et jeo suis conversant et de quel jeo ay le cliffe*; then there is a liability. It is manifest that the sense of this passage is dependent on the word *conversant*: dwelling habitually in the house"; if this means that I am liable if I lose goods which I have under my eye, there is negligence, and the inference from the passage is contrary to the meaning for which it is vouched. Whatever the meaning, an unqualified liability is certainly not asserted. A passage or two from the Year Books may be subjoined which do not appear in accord with Mr. Holmes's suggestion. Cotesmore, J. says: "*Si jeo grante byens a un home a garder a mon oeps, si les byens per son mesgarde sont embles, il sera charge a moy de mesmes les byens, mes s'il soit robbe de mesme les byens, il est excusable per le ley*": 10 H. VI. 21, pl. 69. If the law was as claimed by Mr. Holmes, why "*per son mesgarde*," for the defendant was liable over absolutely. In 40 Edw. III. f. 6, pl. 11, counsel arguing says: "*Si jeo vous acchate ou prist un cheval et il morge sodeinement, et nemy par voster default vous ne ferres charge de luy render le chival mort*"; and in 29 Ass. 28: "*Thorp dit, qui si un a moy bail ses biens a gard, et jeo les mettre enter les mains, et ceux soient emblées jeo ne ferre pas*

without question for a hundred years." Instead of contenting himself with these generalities Mr. Holmes would have done well to grapple at least with this passage from Holt, C.J.'s, judgment in *Coggs* v. *Bernard*:[1] "It is incumbent upon them, that advance this doctrine, [that to keep and to keep safely are one] 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 them show that there never was any such resolution given before *Southcote's case*. The 29 *Ass.* 28[2] 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. *Fitz. 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 Edw. 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 Genny for his client said the contrary. The case in 3 *Hen.* VII. 4 (*pl.* 16), is but sudden opinion, and that 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 sufficient evidence to charge the bailee. *And it was practised so before my time, all Chief Justice Pemberton's time,*[3] *and ever since, against the opinion of that case.*"

Holt, C.J.'s, statement of the law.

If Mr. Holmes's theory is assumed to be correct, the cases in the Year Books may possibly, though sometimes with great difficulty, be made to accord. But to one in search of a theory the law seems more or less indeterminate till *Southcote's case*, and after that Holt, C.J.'s,[4] judgmen in *Coggs* v. *Bernard* throws the *onus* very heavily on those

Presumption against Mr. Holmes's view.

charge." As to Mr. Holmes's last assertion, in Doctor and Student, published 1518, I find the law thus stated: "If a man have goods to keep to a certain day, for a certain recompence for the keeping, he shall stand charged or not charged after as a default or not default shall be in him, as before appeareth: and so it is if he have nothing for the keeping. But if he have for the keeping, and make a promise for the time of the delivery, to re-deliver them safe at his peril, then he shall be charged with all the chances that may fall. But if he make that promise, and have nothing for keeping, I think he is bound to no such casualties but that be wilful and his own default, for that is a nude or naked promise, whereupon, as I suppose, no action lieth." A new edition of Doctor and Student was published in 1687, whence the above extract is taken, 269, and there is no note whatever appended.

[1] Lord Raym. 913.

[2] Jones, Bailm. 78, where the case is summarised. Cp. Y. B. 10 H. VI. 21, pl. 69. This is the distinction of the Roman law: *Adversus latrones parum prodest custodia; adversus furem prodesse potest, si quis advigilet:* an annotation to D. 17, 2, 52, 3.

[3] 1681 A.D. *Southcote's case* was decided in 43 Eliz. Thus, eighty years after, if Holt, C.J., is credited, there was a firmly established practice contrary to the decision. In Sheppard's Abridgment (1675) Bailm. (3) the law is stated in the terms of *Southcote's case*. But see the quotation from Doctor and Student in note 7, *ante*, 746.

[4] Holt, C.J., cites Bracton 3, 2, 99, to the same effect.

maintaining a contrary opinion; and this Mr. Holmes[1] is far from discharging.

Second, confirmed.

(2) The second principle affirmed in *Southcote's case* and in respect of which that case must be specially noticed, is that, in accepting goods to be kept as the bailee would keep his own proper goods, if the goods are stolen, the bailee shall not answer.[2]

Sir William Jones's view.

"Robbery by force," says Sir William Jones,[3] "is considered as irresistible; but a loss by private stealth is presumptive evidence of ordinary neglect." This is undoubtedly the doctrine of the civil law,[4] but the common law has not followed the rule,[5] and does not view theft in any exceptional light, neither imputing it to the neglect of the bailee, nor yet exempting him from responsibility on that ground alone. Each case must be "clothed in circumstance," and on that the law decides whether there has or has not been the required degree of care.[6] For example, a man has valuable property, deposited with him, stolen through leaving an open door or window. There is presumptive evidence of negligence. The theft is, however, by a presumably responsible servant availing himself of facilities special to a servant. This is not presumptive evidence of negligence against him, for the theft is the wilful act of the servant, defeating his master's interest.[7] Still, if the master can be shown to have engaged a servant without taking proper precautions to secure an honest one, the presumption of negligence is raised; if, for example, he has hired a servant out of prison on ticket-of-leave to have the charge of goods, there was opportunity and temptation to steal. In the case of a bailee again, who has lost goods by theft, and who fails to give any such explanation of his neglect to restore the property entrusted to him as enables the bailor to test his good faith, or satisfies him of it, the *onus* lies on him of showing that he has exercised ordinary diligence. If, however, the case has come before a jury, and they have found, as an inference from the facts, that there has been a theft of the bailment, the finding will exculpate the bailee, unless they find further that he has not exercised ordinary care.[8]

The view approved by authority.

1 Mr. Holmes terms *Mosley* v. *Fosset*, Moore, 543, "an obscurely reported case," for no other reason that is obvious than that it is in antagonism to his theory.

2 Cp. *Bonion's case*, Y. B. 8 E. II. 275; Fitzh. Abr. Detinue, 59; jewels in a chest were deposited, the depositor keeping the key and not informing the depositary of the contents. The depositary's house being broken into and the chest stolen, an attempt was made to charge the bailee; but he was held not liable, since he used ordinary diligence and the loss was by a burglary.

3 Bailm. 119. See also 43, and note 16 to Theobald's edition.

4 *Si res vendita per furtum perierit, prius animadvertendum erit quid inter eos de custodia rei convenerat. Si nihil appareat convenisse, talis custodia desideranda est a venditore qualem bonus paterfamilias suis rebus adhibet; quam si præstiterit et tamen rem perdidit, securus esse debet ut tamen scilicet vindicationem rei et conditionem exhibeat emptori:* D. 18, 1, 35, § 4. *Quod si neque traditi essent, neque emptor in mora fuisset, quominus traderentur: venditoris periculum erit. Materia empta si furto perisset, postquam tradita esset, emptoris esse periculo:* D. 18, 6, 14, § 1. See further Moyle, Contract of Sale, *Periculum et Commodum rei*, 76. In the case of the theft of a deposit, the depositarius was not liable, not because he was not negligent, but "*qui, qui negligenti amico rem custodiendam tradit, suæ facilitati id imputare debet*": Inst. 3, 14, 3. But this, unless exceptionally, is as noted above, not the English law. *Ante*, 743.

5 *Finucane* v. *Small*, 1 Esp. (N. P.) 315.

6 Story, Bailm. § 27 *et seqq.*, 333–338; Jones, Bailm. 44 *et seqq.*; *Vere* v. *Smith*, 1 Ventr. 121. See *Clarke* v. *Earnshaw*, Gow (N.P.C.) 30, in a note to which the cases are considered; also, 1 Bell, Comm. (7th ed.) 499. The robbery by burglars of securities deposited for safe keeping in the vaults of a bank is no proof of negligence on the part of the bank: *Wylie* v. *Northampton Bank*, 119 U. S. (12 Davis) 361.

7 *Schmidt* v. *Blood*, 9 Wend. (N. Y.) 268.

8 *Woodruff* v. *Painter*, 150 Pa. St. 91, 30 Am. St. R. 786.

Where, then, a man accepts goods to keep as his own, he is not *thereby* made responsible for losses by theft. The modern law bases this principle, not upon a doctrine applicable to the general law of deposit, but on a special undertaking. The distinction, says Story,[1] may become of importance where the bailee is notoriously very careless and indifferent about his own affairs, in which case the depositor may fairly be presumed to know his habits and to trust to such care as the bailee takes of his own goods. If the goods are to be kept in a particular place, the depositor is not admitted to object that the place is not a safe one, since his assent amounts to a special agreement with reference to the place of their deposit.

Where a man accepts goods to keep as his own he is not thereby made responsible for losses by theft. Ground of this.

In the case of robbery, there was some vacillation as to the liability of the bailee.[2] Thus, in Y. B. 9 Ed. IV.,[3] Danby says: "If a bailee receives goods to keep as his proper goods, then robbery shall excuse him, otherwise not"; though, as Holt, C.J., points out, this was said at the bar in argument. In Y. B. 10 H. VII.,[4] robbery is not allowed to be an excuse. But in *Walker* v. *British Guarantee Association*,[5] the bailee was held discharged on showing that the bailment, in that case "specific ear-marked moneys," was taken from him by robbery or *vis major*—"which we translate irresistible violence."

Robbery.

In the case of an ordinary theft the bailee was unquestionably liable to answer for goods stolen. "If the goods are taken by a trespasser, of whom the bailee has conusance, he shall be chargeable to his bailor, and shall have his action over against his trespasser."[6]

Theft.

The question next arises whether a depositary is responsible for the loss of articles contained in a box, the contents of which are unknown to him.[7] This was a keenly debated question amongst the Roman lawyers.[8] Ulpian concluded that, although the box was sealed up, yet an action may be brought for its contents. In *Southcote's case*,[9] it is said: "If A delivers to B a chest locked to keep, and he himself carries away the key, in that case if the goods are stolen, B shall not be charged, for A did not trust B with them, nor did B undertake to keep them." This refers to *Bonion's case*.[10] Holt, C.J., in *Coggs* v. *Bernard*,[11] denies that the chest makes any difference; though the older authorities are said to agree that there is no delivery if the goods are under lock and key.[12]

How far a depositary is responsible for the loss of articles contained in a box whose contents are unknown to him.

Sir William Jones[13] expresses the opinion that, "Cases may be put in which the difference may be very material to the defence.

[1] Bailm. §§ 65, 66, 73.

[2] Y. B. 33 H. VI., 1, pl. 3. Y. B. 6 H. VII. 11, pl. 9 at 12. See the law discussed in *Bentley* v. *Vilmont*, 12 App. Cas. 471; see also The Larceny Act, 1861 (24 & 25 Vict. c. 96), s. 100; and *ante*, 730, n 6. *In re George and the Goldsmith's and General Burglary Insurance Association*, [1899] 1 Q. B. 595.

[3] Y. B. 9 E. IV. 40, pl. 22: "*S'il eux receiver pur gard sicome il gard ses propres biens, donques il excusera, ou autrement nemy.*" See per Holt, C.J., *Coggs* v. *Bernard*, 2 Ld. Raym. 914. Yet even an argument from counsel of such position (Danby had been Chief Justice) goes to show that at best the law was not established in the contrary sense.

[4] Y. B. 10 H. VII. 25, pl. 3 at 26.

[5] 18 Q. B. 277.

[6] Y. B. 3 H. VII. 4, pl. 16, referred to at the end of the report in the preceding case.

[7] Story, Bailm. § 75.

[8] D. 16, 3, 1, § 41. In Jones, Bailments, 38, there is a summary of the controversy.

[9] 4 Co. Rep. 83, 84 a.

[10] Y. B. 8 E. II. 275.

[11] 2 Ld. Raym. 914: "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."

[12] Holmes, The Common Law, 176.

[13] Bailm. 38.

Diamonds, gold and precious trinkets, ought, from their nature, to be kept with peculiar care under lock and key; it would, therefore, be gross negligence in a depositary to leave such a deposit in an open antichamber, and ordinary neglect at least, to let them remain on his table, where they might possibly tempt his servants; but no man can proportion his care to the nature of things without knowing them; perhaps, therefore, it would be no more than slight negligence to leave out of a drawer a box or casket, which was neither known nor could justly be suspected to contain diamonds."

In our law, Story,[1] says, the question admits of different determinations according to circumstances. The minimum of the depositary's responsibility goes "at least to the extent of what he might fairly presume to be the value of the contents."[2] Story concludes that:

Story's Propositions.

(1) If the bailee knows that the box or casket contains jewels, although the bailor takes away the key, he is bound to a degree of diligence proportioned to the preciousness of the contents.[3]

(2) If he has no ground to suppose that the box or casket contains valuables, he is bound only to such reasonable care as is required of depositaries in cases of articles of common value.[3]

(3) If there be meditated concealment of the contents of the box or casket from the bailee with a view to induce him to receive the bailment, and he would not have received it or have exposed it if he had been made acquainted with the facts, then the transaction will be deemed either a fraud on him or the loss will be set down to the bailor's own folly.[4]

The special agreement that the depositary makes may either narrow or enlarge his general responsibility; subject to the exception that an agreement not to take exception to fraud is void as being contrary to good morals and decency.[5]

Second exception: Where one solicits the custody of goods.

Second: Sir William Jones's second exception is that when a man spontaneously and officiously proposes to keep the goods of another he may prevent the owner from entrusting them to a person of more approved vigilance; for which reason he takes upon himself the risk of the deposit, and becomes responsible at least for ordinary neglect, though not for mere casualties.[6] For this, says Story,[7] the writer does not cite any other authority than the Roman law. "The rule is certainly *strictissimi juris*; and the incorporation into our law ought

[1] § 77.

[2] Cp. *Abrahams* v. *Bullock*, 18 Times L. R. 701; *Cheshire* v. *Bailey*, [1905] 1 K. B. 237. The distinction is between a lack of the amount of care bargained for and a felony done to the detriment of both bailor and bailee.

[3] Jones, Bailm. 38, 39; *Coggs* v. *Bernard*, 2 Ld. Raym. 909, 914, 915.

[4] *Batson* v. *Donovan*, 4 B. & Ald. 21; *Sleat* v. *Fagg*, 5 B. & Ald. 342. See *The Queen* v. *Ashwell*, 16 Q. B. D., per Cave, J., 203; and *The Queen* v. *Flowers*, 16 Q. B. D. 643.

[5] Jones, Bailm. 48, citing Doctor and Student, dial. 2, c. 38. *Non valere, si convenerit, ne dolus præstetur*: Dig. 50, 17, 23.

[6] This is undoubtedly the rule of the civil law: Dig. 16, 3, 1, § 35; 1 Domat, Bk. 1, tit. 7, § 3, art. 8; Pothier, Traité du Contrat de Dépôt, n. 30, 31, 32. (Sir William Jones's four exceptions now being noted are derived from this passage of Pothier). The Code Civil, arts. 1927, 1928, provides that the depositary must employ on the thing deposited the same care which he employs in the preservation of his own property. This rule is to be more rigorously applied: (1) If the depositary has volunteered to receive the deposit. (2) If he has contracted for payment of the custody of it. (3) If the deposit was made solely for the depositary's benefit. (4) If there is an agreement that the depositary is to be at the risk of mishaps.

[7] Bailm. § 81.

not readily to be admitted. A voluntary offer of kindness to a friend, even when importunately urged, ought hardly to carry with it such penal consequences; since it is generally the result of strong affection, and a desire to oblige, and often of a sense of duty, especially in cases of imminent peril or sudden emergency." [1]

Third exception: Where there is reward.

Third: The third exception is, when the bailee either directly demands and receives a reward for his care or takes the charge of goods in consequence of some lucrative contract.[2] But the presence of either of these incidents changes the nature of the bailment from a gratuitous deposit, into one in which the depositary is held to ordinary care and is answerable for ordinary neglect.

Fourth exception: Where the benefit is the bailee's alone.

Fourth: The fourth exception is where the bailee alone receives advantage from the deposit. Sir William Jones designates this as "rather a loan than a deposit," and adds: "such a depositary must answer even for slight negligence." [3]

Where one finds property. Doctrine in Bacon's Abridgment.

The right of a finder of property must not pass unnoticed. As to this, in Bacon's Abridgment it is said: "If a man finds goods and abuse them, or if he find sheep and kill them, this is a conversion; but if a man find butter, and by his negligent keeping it putrefy; or if a man find garments, and by negligent keeping they be moth-eaten, no action lies; so it is if a man find goods and lose them again; and the reason of the difference is this: where a man delivers goods to another, the bailee by acceptance of the goods undertakes for the safe custody of them, and it is to be presumed that the owner would not have parted with them but under confidence of that security; but where a man only finds the goods of another, the owner did not part with them under the caution of any trust or engagement, nor did the finder receive them into his possession under any obligation; and therefore the law only prohibits a man in this case from making an unjust profit of what is another's; but the finder is not obliged to preserve those goods safer than the owner himself did; for there is no reason for the law to lay such a duty on the finder in behalf of the careless owner, and it seems too rigorous to extend the charity of the finder beyond the diligence of the proprietor; it is, therefore, a good mean to punish an injurious act, viz., the conversion of the goods to his own use, but not to punish a negligence in him, when the owner is guilty of a much greater one." [4]

Criticised by Story. Coke C.J., in *Isaack* v. *Clark*.

This doctrine Story [5] criticises as "very unsatisfactory," and cites the opinion of Coke, C.J., in *Isaack* v. *Clark*: [6] "If a man finds goods, an action on the case lieth for his ill and negligent keeping of them, but no trover and conversion, because this is but a nonfeasance"; whose doctrine he approves. It is, moreover, in consonance with what is said in Doctor and Student: [7] "If a man finds goods of another,

Doctor and Student.

[1] Story, Bailm. § 82. Under this heading, Sir William Jones discusses the case of things deposited through necessity on any sudden emergency, as a fire or a shipwreck "I can hardly persuade myself," he says (Bailm. 49), "that more than perfect good faith is demanded in this case." *Ante*, 741. For the liability of a *negotiorum gestor*, see *post*, 768.

[2] Bailm. 49.

[3] Bailm. 50.

[4] Bac. Abr. Bailm. (D) 517. In *Mosgrave* v. *Ogden*, Owen 141, the Court of Common Pleas held, in an action for the conversion of six barrels of butter, that an action would not lie; "for he who finds goods is not bound to preserve them from putrefaction." If, however, "the goods were used, and by usage made worse, the action would lie."

[5] Bailm. § 86.

[6] 2 Bulst. 312.

[7] Dial. 2, c. 38. In *Hollins* v. *Fowler*, L. R. 7 H. L. 766, Blackburn, J., citing *Isaack* v. *Clark*, says that a refusal to deliver goods by a person who, having *a bonâ fide* doubt as to the title, detains them for a reasonable time for clearing up that doubt, is

if they be after hurt or lost by wilful negligence, he shall be charged to the owner. But if they be lost by other casualty, as if they be laid in a house that by chance is burned, or if he deliver them to another to keep, that runneth away with them, I think he be discharged."

Story's conclusion.

Chancellor Kent[1] considered that the same reasonable care is required in the case of goods coming to one's possession by finding as in the case of a gratuitous deposit, and coincides in opinion with Story, who says:[2] "There seems no just foundation in our law for any distinction as to responsibility, although there may be as to remedy, between cases of conversion and misfeasance by the finder of goods and cases of negligence, if the loss has arisen from that degree of negligence for which gratuitous bailees would ordinarily be liable."

Nicholson v. *Chapman.*

The same very learned writer is of opinion that the finder may charge the owner for necessary expense and labour in the care of what is found, which he terms salvage;[3] yet this has never been expressly decided. The nearest case in our reports is that of *Nicholson* v. *Chapman*,[4] where some timber belonging to the plaintiff was placed in a dock on the bank of a navigable river, and, being accidentally loosened was carried some considerable distance by the tide, and left on a tow-

not a conversion. A demand and refusal is evidence of a conversion: *Fouldes* v. *Willoughby*, 8 M. & W. 540; but not when qualified by a demand to deliver "in the same good plight" as when received: *Rushworth* v. *Taylor*, 3 Q. B. 699. Cp. *Scattergood* v. *Sylvester*, 15 Q. B. 506, and *Walker* v. *Matthews*, 8 Q. B. D. 109, on the revesting of stolen property under 24 & 25 Vict. c. 96, s. 100; *Winter* v. *Bancks*, 17 Times L. R. 446. See *Merry* v. *Green*, 7 M. & W. 623, for circumstances where a finding may amount to larceny: the case of discovering a purse in a secret drawer of a bureau purchased at a public auction. Cp. *Regina* v. *Thurborn*, 1 Den. C. C. 387; 1 Whart. Crim. Law, §§ 901–913, and *ante*, 749 n. 2. As to lost property and the rights of a finder, *Bridges* v. *Hawkesworth*, 21 L. J. Q. B. 75; *Deaderick* v. *Oulds*, 6 Am. St. R. 812. In Massachusetts it has been held that "a stranger in a shop who first sees a pocket-book which has been accidentally left by another upon a table there, is authorised to take and hold possession of it, as against the shopkeeper": *McAvoy* v. *Medina*, 93 Mass. 548. *Webb* v. *Fox*, 7 T. R. 391; *Giles* v. *Grover*, 9 Bing. 128, 6 Bligh, N. S. 277, 1 Cl. & F. 72. The common law has been trenched upon in London by 2 & 3 Vict. c. 71, s. 29. *King* v. *Milsom*, 2 Camp. 5, states the rule as to negotiable instruments, and that the *onus* is on defendant alleging that the note sued on is his property; and see *Lawson* v. *Weston*, 4 Esp. (N. P.) 56, 2 Kent, Comm. 356–357 note (*a*), as to finder of a chose in action, *e.g.*, a cheque. *Si prædo vel fur deposuerint, et hos Marcellus libro sexto digestorum putat recte depositi acturos: nam interest eorum, eo quod teneantur:* D. 16, 3, 1, § 39. The Roman law is curious. The maxim of possession is, *Non est enim corpore et actu necesse apprehendere possessionem sed etiam oculis et affectu:* D. 41, 2, 1, § 21; and this law as to a finder is illustrated by two passages of Latin poetry. In the *Rudens* of Plautus, Trachalion claims a share in a *vidulum*—a portmanteau—which Gripus, who has been fishing, has fished up and brought to land.

TRACHALION. *Non probare pernegando mihi potes, nisi pars datur*
Aut ad arbitrium redditur, aut sequestro ponitur.
GRIPUS. *Quemne ego excepi in mare?* TR. *At ego inspectavi e litore.*
Act 4, sc. 3, 60.

Then the pair discuss the law.

The second passage is from Phædrus's Fables, a bald man finds a comb, another sees him find it.

Invenit calvus in trivio pectinem
Accessit alter æque defectus pilis.
Eia, inquit, in commune quodcunque est lucri.
Fab. 5, 6.

The American authorities are collected in *Sovern* v. *Yoran*, 8 Am. St. R. 293, and the note.

[1] 2 Comm. 568. [2] Bailm. § 87. [3] Bailm. § 121 a.

[4] 2 H. Bl. 254; *Sutton* v. *Buck*, 2 Taunt. 302. In *Hingston* v. *Wendt*, 1 Q. B. D. 367, there was a putting of the plaintiff in possession by the captain. Eyre, C.J.'s, distinction between the saving of the goods by the plaintiff, in *Nicholson* v. *Chapman*, and salvage, is adopted by Lord Blackburn in *Aitchison* v. *Lohre*, 4 App. Cas. 755, 760; see also 2 Kent, Comm. 636.

path at low water. Here it was found by the defendant, who voluntarily took it to a safe place out of reach of the tide. When the plaintiff afterwards demanded the timber the defendant refused to give it up without payment for what had been done. In an action of trover the defendant was held not to have any lien. Eyre, C.J., considered that he might recover for his trouble and expense in some other form of action. There is a note to the report: "It seems probable that in such a case, if any action could be maintained, it would be an action of assumpsit for work and labour, in which the Court would imply a special instance and request as well as a promise. On a *quantum meruit* the reasonable extent of the recompense would come properly before the jury."[1] If the loser of a chattel offer a reward for its restoration, a lien is thereby created to the extent of the reward.[2]

This seems a convenient place to notice a case of *Howard* v. *Harris*,[3] tried before Watkin Williams, J., and which, as reported, seems irreconcilable with principle. The defendant, the manager of Drury Lane Theatre, received a letter from the plaintiff, stating that he had written a play, which he asked the defendant to assist him to produce. The defendant replied that if the plaintiff would send him the scene, plot, and sketch of the play he would look through it. Accordingly, the plaintiff sent the scene, plot, and sketch, and also the play. The plaintiff made numerous applications with reference to the play from time to time, and at last demanded its return; but it was not returned, as it could not be found. An action for the return of the play was then brought. The report goes on as follows: "Williams, J., held that there was no case to go to the jury, for the plaintiff had chosen voluntarily to send to the defendant what the defendant had never asked for, and no duty of any sort or kind was cast upon the defendant with regard to what was so sent." *Howard* v. *Harris.*

This result is surprising. As soon as the defendant received the deposit he became amenable to the rules of law regulating deposit; he was bound to slight diligence; he became liable for gross negligence. He might have avoided liability by a refusal to accept, by absolutely Criticised as reported.

[1] See *Baker* v. *Hoag*, 3 Barb. (N. Y.) 203, 7 Barb. (N. Y.) 113. In the American case of *Bartholomew* v. *Jackson*, 20 Johns. (Sup. Ct. N. Y.) 28, the point was raised. The action was on an assumpsit. J. owned a wheat stubble field in which B. had a stack of wheat, which he promised to remove in time to prepare the ground for the full crop. When the time for removal came, J. sent a message to B. requesting the immediate removal of the stack. The sons of B. said it should be removed by ten o'clock the next morning. At that hour J. set fire to the stubble. The fire threatening to burn the stack, which B. and his sons neglected to remove, J. set to work and removed it himself so as to secure it for B. The Court held J. not entitled to recover for the work and labour in its removal. "If," said the Court, "a man humanely bestows his labour, and even risks his life, in voluntarily aiding to preserve his neighbour's house from destruction by fire, the law considers the service rendered as *gratuitous*, and it therefore forms no ground of action." In the argument in *Falcke* v. *Scottish Imperial Insurance Co.*, 34 Ch. D. 239, it was said: "If a party adopts and enjoys the benefit of what has been done by another person, his request will be presumed"; upon which Bowen, L.J., is reported to have made the comment, "The law is so laid down in Smith's Leading Cases in the notes to *Lampleigh* v. *Brathwait* (8th ed. vol. 1, 158), but it seems to be stated too widely. If that were the law, salvage would prevail at common law as well as in maritime law, which it certainly does not." This is also the opinion of Chancellor Kent, 2 Comm. 356, note (*c*): "I beg leave to say that it appears to me that such findings have no analogy in principle to the cases of hazardous and meritorious sea or coast salvage under the Admiralty law, and that the rule of the common law as illustrated by Chief Justice Eyre in *Nicholson* v. *Chapman*, as to these mere land-findings is the better policy." See also per Bowen, L.J., *l.c.* 249, cited by Stirling, J., in *Blyth* v. *Fladgate*, [1891] 1 Ch. 358.

[2] *Wentworth* v. *Day*, 44 Mass. 352.

[3] Cababé and Ellis, 253.

ignoring the thing sent, or by immediately returning it. In the event of his acquiescing in the receipt, he could not be regarded as in any better position than a finder of the play, who, as we have seen, would have his choice to pass it by or to take it up; in the latter event he would be required to answer for gross negligence. The evidence only appears to prove a loss by the depositary. The ruling of Watkin Williams, J., then, probably was that loss without something to show the circumstances, is not evidence to leave to the jury in a case where nothing less than gross negligence would affix liability.[1] Moreover, the action was in trover for the recovery of the manuscript. In this form of action proof of demand and refusal constitutes an apparent conversion, and throws upon the defendant the burden of showing that the property was lost or stolen.[2] It was probably admitted that the property was lost. The *onus* in these circumstances on the plaintiff was to show the circumstances which point the negligence; since, in the words of the editor of the eighth edition of Story,[3] "mere proof of loss or injury to goods while in the hands of a bailee does not, *per se*, prove negligence in him. It may do so, or may not, according to the attending circumstances; but it is the circumstances which show the negligence, not the mere loss or absence of the property. Evidence, therefore, that the goods are missing, that they are not on hand when called for, does not, in and of itself, establish negligence in the bailee. The bailor must show that fact *affirmatively*[4] that the bailee has done something or omitted to do something which he ought not to have done or omitted." [5]

Actual ruling of the judge probably not as reported.

Where there is gross carelessness in the care of a gratuitous bailment the bailee will be held liable. Thus, where a gratuitous bailee—an innkeeper who took charge of luggage the property of one who had been staying at his house and who had paid his bill, given up his rooms and left—parted with the luggage he held as gratuitous bailee to an apparent stranger without an effort to verify his claim to it and without

Where there is gross carelessness with a gratuitous bailment.

1 See *Tobin* v. *Murison*, 5 Moo. P. C. C. 110, 128; *Tompkins* v. *Saltmarsh*, 14 Ser. & Rawle (Pa.) 275. As to an involuntary bailee, *Heugh* v. *L. & N. W. Ry. Co.*, L. R. 5 Ex. 51. Where defendant indorsed an order enabling one acting as broker for a third person and consigning to defendants goods by mistake, to possess himself of the goods and to deal with them in fraud of his principal, defendant was held liable for a conversion in having indorsed the order without occasion or authority to do so: *Hiort* v. *Bott*, L. R. 9 Ex. 86, and per Lord Halsbury, C., *New York Breweries Co.* v. *A.-G.*, [1899] A. C. 70.

2 *Crauch* v. *White*, 1 Bing. N. C. 414. Story, Bailm. § 107. In assumpsit or case founded on negligence the plaintiff must in the first instance make out his case as he charges it.

3 Bailm. § 410 a, citing as his authorities *Gilbart* v. *Dale*, 5 A. & E. 543, and *Midland Ry. Co.* v. *Bromley*, 17 C. B. 372.

4 In *Smith* v. *First National Bank of Westfield*, 99 Mass. 605, it was held that, to charge defendants for negligence in a case of gratuitous bailments, something must be shown affirmatively beyond that the package could not be found; and this was followed in *Pillock* v. *Wells*, 109 Mass. 452. The Queen's Bench Division decided the same point the same way in *Powell* v. *Graves*, 2 Times L. R. 663, where plaintiff deposited a picture, which was kept by defendants gratuitously; after three years, on his asking for it, it could not be found. Lord Coleridge said: "There must be affirmative evidence of negligence to make them [*i.e.*, the defendants], as gratuitous bailees, liable for the loss." This was followed in *Bullen* v. *Swan Electric Engraving Co.*, 22 Times L. R. 275, affd. 23 Times L. R. 258.

5 *Cotton* v. *Wood*, 8 C. B. N. S. 568; *Welfare* v. *L. B. & S. C. Ry. Co.*, L. R. 4 Q. B. 693. See *Mackenzie* v. *Cox*, 9 C. & P. 632, the case of a dog "received by the defendant for reward to be paid by the plaintiff," placed in defendant's stable and lost, "no evidence was given on the part of the plaintiff as to the manner in which the dog was lost, the *onus* being on the defendant to acquit himself by showing that he was not in fault with respect to the loss of it"; *Phippe* v. *New Claridge's Hotel Co.*, 22 Times L. R. 49.

inquiry as to the ownership, he was held liable to the owner for the full value of the property he so recklessly parted with.[1] On the other hand, where one lent a picture to another, who, wanting to show it to a third person, without any previous intimation of his intention, sent it to his house, where it was injured, such third person was held not liable, since he could not be made a bailee without his own consent.[2] This case was cited in *Neuwirk* v. *The Over Darwen Industrial Co-operative Society*,[3] where plaintiff left a valuable double-bass violin in a room attached to a hall where he had been rehearsing for a musical performance, and in which it appeared to be not unusual for the musicians performing at the hall to leave their instruments. When he went for it in the evening he found it broken. In an action for the negligent custody, it was held that the leaving the violin in the room did not constitute a bailment, and was "no evidence that it was entrusted to the care of any one, or that the owner was not quite content to leave it there at his own risk."

Lethbridge v. *Phillips*.

Neuwirk v. *The Over Darwen Industrial Co-operative Society*.

Persons are sometimes in the habit of making a special deposit at a bank of plate or jewels or title-deeds, or even of coin or monetary securities, where the very thing deposited is to be restored, and not an equivalent.[4]

Case of plate or jewels deposited with a banker.

Giblin v. *M'Mullen*[5] in the Privy Council deals with this. A customer placed in the care of a bank certain railway debentures, which were kept in a box (of which the customer kept the key) in the strong-room of the bank with the boxes of other customers. Access to this room was obtainable only by passing through a compartment where a cashier sat by day and a messenger slept at night, and other precautions were adopted. The owner of the box had free access to the room where his box was deposited during banking hours, in the presence of one of the bank clerks, when he had occasion to take coupons from his debentures for collection. While in the custody of the bank their cashier abstracted the debentures from the box and made away with them. The plaintiff had a verdict at the trial; but a rule to enter a nonsuit was made absolute by the full Court, and was upheld on appeal, on the ground[6] that, "It is clear, according to the authorities, that the bank in this case were not bound to more than ordinary care of the deposit entrusted to them, and that the negligence for which alone they could be made liable would have been the want of that ordinary diligence which men of common prudence generally exercise about their own affairs." The American case of *Foster* v. *Essex Bank*[7] was referred to with approbation. There the plaintiff

Giblin v. *M'Mullen*.

Rule of diligence.

Foster v. *Essex Bank*.

[1] *Wear* v. *Gleason*, 20 Am. St. R. 186. The distinction between neglecting to act, and acting negligently in the case of a gratuitous bailment, is brought out by Wright, J., in *Turner* v. *Merrylees*, 8 Times L. R. 695.

[2] *Lethbridge* v. *Phillips*, 2 Stark. (N. P.) 544. In *Shelbury* v. *Scotsford*, Yelv. 22, it was held that if a horse be taken *vi et armis et contra voluntatem* from a bailee of one not the owner by the owner, the depositary is not responsible to his bailor. *Post*, 761.

[3] 10 Times L. R. 282.

[4] In the Roman law, if money, unsecured by being locked up or otherwise placed in safety, were deposited, it was regarded as a *depositum irregulare—nam si quis pecuniam numeratam ita deposuisset, ut neque clausam neque obsignatam traderet, sed adnumeraret, nihil aliud eum debere, apud quem deposita esset, nisi tantundem pecuniæ solveret*: D. 19, 2, 31.

[5] L. R. 2 P. C. 317.

[6] *L.c.* 337.

[7] 17 Mass. 479. A similar case is *Scott* v. *National Bank of Chester Valley*, 72 Pa. St. 471. "We think it well settled that a bailee for safe keeping, without reward, is not responsible for the article deposited, without proof that the loss was occasioned by bad faith, or gross negligence": per Shaw, C.J., *Whitney* v. *Lee*, 49 Mass. 93. See also *Brown* v. *National Bank of Australasia*, 16 Viet. L. R. 475.

deposited with the bank for safe custody a cask containing a quantity of gold doubloons, which were placed in a vault of the bank, where the agent of the plaintiff was in the habit of coming to see that they were safe. The cashier and chief clerk of the bank fraudulently abstracted some of the contents of the cask and absconded. The plaintiff brought his action, but was held disentitled to recover, for "such deposits are indeed simply gratuitous on the part of the bank, and the practice of receiving them must have originated in a willingness to accommodate members of the corporation with a place for their treasures more secure from fire and thieves than their dwelling-houses or stores." "The rule to be applied to this species of bailment is, as has been stated, that the depositary is answerable in case of loss for gross negligence only, or fraud, which will make a bailee of any character answerable. Gross negligence certainly cannot be inferred from anything found by the verdict; for *the same care was taken of this as of other deposits, and of the property belonging to the bank itself.*" [1]

Cases compared.

On a cursory examination, there seems a discrepancy in the decision arrived at in these two very similar cases. In *Giblin's case* the degree of care is specified as "not more than ordinary," and the negligence, for which alone the defendants could be made liable, as "the want of that ordinary intelligence which men of common prudence generally exercise about their own affairs." This is almost the very wording of Sir William Jones's definition of ordinary negligence.[2] In *Foster's case* the defendants are stated to be answerable "for gross negligence only or fraud."

Standard of care, varying.

The test applied seems to be whether "the same care was taken of this as of other deposits and of the property belonging to the bank itself." [3] In *Giblin's case* the degree of care, in *Foster's case* the want of care, is the more prominent notion, and want of ordinary care is gross negligence.[4] In considering the character of the deposit again, a far greater amount of care is required to be exercised in the guarding of precious articles, than if the deposit were of iron or tin.[5] A man, careful, attentive, and intelligent in the management of his own affairs, would exercise very considerable caution in the care of bank-notes or bullion. Gross negligence [6] in matters of this kind is any intermission of that ordinary prudence which men generally exercise upon their own affairs, and the prudence they generally exercise is absolutely of very considerable amount, though relatively to the particular matter it is only ordinary care; and thus the apparent discrepancy again resolves itself into an identical expression.

National Bank v. *Graham.*

The United States case of *National Bank* v. *Graham* [7] appears to favour a stricter rule. A customer of a bank deposited bonds there for safe keeping, in accordance with a common practice between bankers and their customers, for which accommodation no compensa-

1 17 Mass. 507. 2 Bailm. 118.

3 The rule of *negligence crasse*, adopted by Pothier, Traité du Contrat de Dépôt, n. 27, from the civil law, is *Nec enim salvâ fide minorem iis, quam suis rebus, diligentiam præstabit*: D. 16, 3, 32.

4 Cp. Jones, Bailm. 118; Story, Bailm. § 17. *Ante*, 743.

5 *Mytton* v. *Cock*, 2 Str. 1099. *Ante*, 749.

6 *Latæ culpæ finis est non intelligere id quod omnes intelligunt*, D. 50. 16. 223, is the definition of gross negligence in the civil law. "Gross neglect," says Chancellor Kent (2 Comm. 560), quoting Parker, C.J., in *Foster's case*, 17 Mass. 499, "is the want of that care which every man of common sense under the circumstances takes of his own property."

7 100 U. S. (10 Otto) 699. The judgment is also set out in the note (at 592) to *Pattison* v. *Syracuse National Bank*, 36 Am. R. 582, a case itself deserving perusal.

tion was expected or received by the bank. The bonds were stolen. On action brought the jury were told that to justify a recovery against the bank they must be satisfied that the plaintiff's bonds were received for safe keeping with the knowledge and acquiescence of the officers and directors of the bank, (this was with reference to a point that the deposit was *ultra vires* of the bank), and if they were lost by the gross negligence of the bank or its officers the bank was liable. The jury found knowledge on the part of the officers, and also gross negligence. On the appeal to the Supreme Court, Swayne, J., said: [1] "It is now well settled that if a bank be accustomed to take such deposits as the one here in question, and this is known and acquiesced in by the directors, and the property deposited is lost by the gross carelessness of the bailee, a liability ensues in like manner as if the deposit had been authorised by the terms of the charter." Swayne, J.'s judgment.

In the later case of *Manhattan Bank* v. *Walker* [2] the existence of gross negligence was denied because it was contended that the relation of the parties failed to raise a legal duty. The facts showed that a bank gave a receipt stating that A as agent for B had placed certain bonds on deposit with them and sent the same on the request of A direct to B, making an entry in their books at the time to the same effect. Subsequently the bank permitted A to deal with the securities and he misapplied them. B thereupon sued the bank, who disputed the existence of any relationship of bailor and bailee between themselves and B. The execution of the receipt and the transmission to the plaintiff was nevertheless held to create the relation of bailor and bailee between the plaintiff and the bank, and, that being established, it was clearly gross negligence for the bank to deliver or dispose of or appropriate the securities without the authority of their bailor. *Manhattan Bank* v. *Walker.*

Preston v. *Prather*,[3] again, is a case where bankers were held liable for the loss of bonds deposited with them as gratuitous bailors. They were informed that their assistant cashier, who had free access to the vaults where the bonds were deposited, and who was a person of slender means, was speculating in stocks; notwithstanding this intimation, they neglected any precautions, and neither examined their securities nor removed their cashier. Ultimately he stole the bonds, and the bankers were rightly held liable. Their duty was described as being to take such measures "as will ordinarily secure the property from burglars outside and from thieves within." [4] Though the decision is unimpeachable, the statement of the duty is put too broadly, if the considerations already pointed out are just.[5] The utmost that can be said is that in the circumstances it was their duty to protect the bonds against the thief. *Preston* v. *Prather.*

Giblin v. *M'Mullen* [6] was considered and distinguished in *In re United Service Company, Johnston's claim.*[7] The owner of railway shares in two companies deposited the certificates for safe custody with a banking company, who undertook to receive the dividends for a small commission. On receiving certificates from the railway companies, J. gave his address in one instance at the office of the bank, and *Giblin* v. *M'Mullen* distinguished *In re United Service Co., Ex parte Johnston.*

[1] 100 U. S. (10 Otto) 702. [2] 130 U. S. (23 Davis) 267.

[3] 137 U. S. (30 Davis) 604, followed in *Briggs* v. *Spaulding*, 141 U. S. (34 Davis), 132, 150. [4] 137 U. S. (30 Davis) 610.

[5] See *Wylie* v. *Northampton Bank*, 119 U. S. (12 Davis) 361.

[6] L. R. 2 P. C. 317.

[7] L. R. 5 Ch. 212. Cp. *Lancaster County National Bank* v. *Smith*, 62 Pa. St. 47, and *United Society of Shakers* v. *Underwood*, 15 Am. Rep. 731.

in the other at a club. The manager of the bank, who had the key of the safe where the certificates were kept, fraudulently sold the shares, and forged the name of J. to the transfer. The companies wrote to J., informing him of the transfers, and in one instance received no answer, and in another an answer in J.'s name, forged by the manager. They thereupon registered the transfer. The case came before the Court on a point relating to the disallowing of costs on account of remoteness of damage. James, L.J., held the case distinguishable from *Giblin* v. *M'Mullen*. There a box containing documents was placed at a bank for the purpose of convenient deposit, and the customer alone had access to it. In the present case the securities came into the custody of the bank in the ordinary course of their business as bankers, and so as to entitle the bank to a lien upon them for their general banking account, even though the possession of the documents was not essential to the collection of the money which the bank was authorised to collect. Further, the leaving the securities in the uncontrolled power of the manager was a gross neglect, neither excused nor justified by reason of the fact that the bank was equally negligent with its own securities.

Bank held liable.

Giblin v. *M'Mullen* examined.

In *Giblin* v. *M'Mullen*[1] the assumption is made that where securities are deposited with a banker for safe custody there is no payment for the accommodation, and so the banker is but a gratuitous bailee. This does not seem altogether an accurate view of the transaction. If a person not a customer were to take a box of the most costly jewels to a banker, it is extremely unlikely that they would be received gratuitously. Where plate, jewels, or securities are received by a banker there is invariably an account kept at the bank, the retention of which is an object with the banker. In the view of the ordinary man the advantage of being able to deposit his valuables with his banker is probably, if he turns his mind to the subject at all, one of the incidents attaching to his having an account with his banker. Lord Campbell touches on the point in *Brandao* v. *Barnett*:[2] "There is no finding that the Exchequer bills for which this action is brought, and on which the lien is claimed, were in the possession of the defendants in the course of their trade as bankers, or that it was their duty as bankers to perform these offices. I think that the transaction is very much like the deposit of plate in locked chests at a banker's. A special verdict might find that it is the custom of bankers, in the course of their trade as such, to receive such deposits from their customers, but I do not think that from that finding a general lien could be claimed on the plate chests. In both cases a charge might be made by the bankers if they were not otherwise remunerated for their trouble." Some day, perhaps, *Giblin* v. *M'Mullen* may be canvassed in so far as it lays down the gratuitous character of the banker's act. The point might have arisen in *Langtry* v. *Union Bank of London*,[3] but the case was not fought, the bankers paying £10,000; but they did this on the ground that they had wrongfully delivered jewellery, said to be of that value and in a locked box, to the wrong person; they were guilty of a conversion, and no question of negligence came to be involved.

Lord Campbell's suggestion in *Brandao* v. *Barnett*.

Nelson v. *Macintosh*[4] well illustrates how, the circumstances varying, different degrees of care may be exacted with regard to the

Nelson v. *Macintosh*.

1 L. R. 2 P. C. 317.
2 12 Cl. & F. 809.
3 Paget, Law of Banking, 179, 182.
4 1 Stark. (N. P.) 237; cp. *Tracy* v. *Wood*, 3 Mason (U. S.) 132.

very same articles. The action was for negligently carrying the plaintiff's box containing doubloons and other valuables, whereby they were lost. The plaintiff was to have worked his passage home on board a ship of which the defendant was captain; in the result the ship sailed without him, having on board the plaintiff's box stowed on the quarter-deck. Towards the end of the voyage the captain opened the trunk, and the doubloons and valuables were put in a canvas bag, and deposited in the captain's chest in the cabin in which his own valuables were kept. When the vessel reached Gravesend, the captain and a mate left the vessel, and a river pilot and an excise officer came on board. Two young men of the vessel were allowed to sleep in the cabin. Next morning the captain's trunk containing the valuables was missing. Lord Ellenborough charged the jury that every person who delivers goods to another to be carried for hire has a right to the utmost care, and that when a person does not carry for hire he is bound to take proper and prudent care of that which is committed to him. This would have been the rule applicable in the first instance; when, however, the captain opened the box, he became bound to replace it in its proper state of security, and to restore all the guards with which it had before been protected. The defendant's conduct exposed the property to peril and risk; and the value of the property accordingly imposed on him an enhanced duty of vigilance that his acts might not operate to the prejudice of the party. When he had ascertained the valuable nature of the property, it was a duty imperative upon him to restore it to at least its former degree of security. Having taken it wholly out of the box, he was bound to make his own trunk, in which he chose to deposit it, as secure as possible; since it was no longer the box of a seaman working his passage home that was being guarded, but an article of great value, which the defendant was bound to watch with great care and diligence. The act of the captain therefore greatly increased his responsibilities; since he became from custodian of a seaman's chest the depositary of money and valuables. It is in this regard that gross negligence becomes a quantity so difficult to apportion.

The Rendsberg.

Judgment of Sir William Scott.

The same point is illustrated in *The Rendsberg*,[1] which came before the Court on objection to the report of the registrar on charges exhibited by the marshal of the court against the ship and cargo for services. Sir William Scott there says: "The commissioner employed is *pro hâc vice* the servant of those who employ him. What is the obligation of a servant? If I send a servant with money to a banker, and he carries it with proper care, he would not be answerable for the loss if his pocket was picked in the way; but if, instead of carrying it in a proper manner and with ordinary caution, he should carry it openly in his hand, thereby exposing valuable property so as to invite the snatch of any person he might meet in the crowded population of this town, he would be liable, because he would be guilty of the *negligentia maliciosa* in doing that, from which the law must infer that he intended the event which has actually taken place."

Principle enunciated by Sir William Scott a general one and not confined to deposit.

The case put by Sir William Scott comes under that division of bailments called *locatio operis*, and not specially under that of *depositum*, which is the direct subject of our present consideration. Still the principle involved runs through the whole law of bailments, and is true alike of *depositum* and *locatio operis mercium vehendarum*, of the least as well as of the most onerous of these relations. In discussing the

[1] 6 C. Rob. (Adm.) 155.

matter in this place it must accordingly be clearly understood that the conclusions arrived at are not limited to the case of deposit, and are applicable in considering the relations that arise out of the law of bailments, throughout our examination of the subject.

Depositary no right to the use of thing deposited. Two exceptions.

As a general proposition it is correct to say that the depositary has no right to use the thing deposited.[1] Yet this is subject to exceptions — first, where the deposit requires use, as sporting dogs and horses; secondly, where the keeping the deposit is a charge to the depositary, as in the case of a cow or a horse;[2] there the pawnee may milk the cow and use the milk, and ride the horse, by way of recompense for the keeping.[3]

Assent of owner presumed where use benefits the deposit.

The best general rule on the subject[4] is to consider, whether there may, or may not, be an implied consent on the part of the owner to the use. If the use would be for the benefit of the deposit, the assent of the owner may well be presumed; if to his injury, or perilous, it ought not to be presumed; and if the use would be indifferent, and other circumstances do not incline either way, the use may be deemed not allowable.

Depositary no authority to sell or pledge. *Hartop* v. *Hoare*.

It follows that the depositary has no authority to sell or pledge the deposit; and if he does, the owner may reclaim it from any person who is found in possession of it. This was the effect of *Hartop* v. *Hoare*,[5] in which case certain jewels, sealed up, had been placed for safe custody in the hands of a jeweller, who broke the seal and pledged them. The owner brought an action for trover against the defendant, and the Court determined that the delivery of the jewels to the jeweller was a mere naked bailment for the use of the bailor, and that the jeweller was a mere depositary, with neither general nor special property in the jewels, and with the custody only, so that the rightful owner was entitled to recover. There could have been no recovery by the owner had the depositary himself had any property in the deposit, as in that case he would have transferred it, and the transferee would have been entitled to the possession; since there was no property, the transferee's holding was a mere conversion. *Hartop* v. *Hoare*, therefore, establishes that the interest of a depositary is no more than a rightful possession and custody without any right of property. This is in opposition to some earlier cases;[6] while Blackstone also says[7] that a bailee has "a special qualified property," and Sir William Jones[8] is of the same opinion. On the other hand, Coke, C.J., says, in *Isaack* v. *Clark*:[9] "Bailment makes a privity, if one hath goods as a bailee, where he hath only a possession and no property, yet he shall have an action for

Coke, C.J., in *Isaack* v. *Clark*.

1 Dig. 16, 3, 29: *Si saeculum, vel argentum signatum deposuero, et is, penes quem depositum fuit, me invito contrectaverit, et depositi et furti actio mihi in eum competit. Cujus interfuit non subripi, is actionem furti habet:* D. 47, 2, 10. See also Gaius, 3. §§ 196-198; Pothier, Traité du Contrat de Dépôt, n. 34; Bac. Abr. Bailm. (D); Jones, Bailm. 81, 82.

2 *Mores* v. *Conham*, Owen, 123, the test is whether the bailment is worse by usage; Anon, 2 Salk. 522.

3 Bac. Abr. Distress (D); Com. Dig. Distress (D 6).

4 Story, Bailm. § 90.

5 3 Atk. 44.

6 *E.g.*, Y. B. 21 H. VII. 14 pl. 23, an action of replevin, where defendant pleaded property in a stranger, and plaintiff replied that the stranger had bailed the goods to him to re-deliver them to the stranger, but before the re-delivery the defendant took them. On demurrer judgment was given for the plaintiff. In replevin, an action will only lie where the party bringing the action has a general or a special property in the thing. See Am. Jur. vol. xvi. 280-285, where Story's view is controverted: *Miles* v. *Cattle*, 6 Bing. 743; Story, Bailm. note to § 93 c; *Burton* v. *Hughes*, 2 Bing. 173.

7 2 Comm. 452.

8 Bailm. 80.

9 2 Bulst. 311.

them." The same view is approved by Story [1] and Kent; [2] and must be held that on which the balance of authority is, so long as the judgment of the King's Bench in *Hartop* v. *Hoare* is not judicially discredited.

Rule as stated in Bacon's Abridgment.

The rule as to a bailee's right of action whether with or without a property in the bailment is laid down in Bacon's Abridgment: [3] "Every bailee has a general right of action against mere wrongdoers to the property while in his possession; whether he has a special property therein or not, because he is answerable over to the bailor; for a man ought not to be charged with an injury to another without being able to resort to the original cause of that injury, and it amends there to do himself right."

Depositary bound to restore deposit, unless the rightful owner claims it.

The depositary is bound to restore the deposit upon demand to the bailor from whom he received it, unless another person appears to be the right owner,[4] yet he has a good defence against the bailor if the bailor has no valid title and he delivers the property bailed to the rightful owner.[5] When he delivers up the thing bailed it must be in

[1] Bailm. § 131 *et seqq.*
[2] 2 Comm. 568 note (c).
[3] 7 Bailm. (D). *Ante*, 733.
[4] 2 Kent, Comm. 567.

[5] *King* v. *Richards*, 6 Whar. (Pa.) 418; in this case the older English authorities are carefully collected and analysed in a most able judgment. See also *Wilson* v. *Anderton*, 1 B. & Ad. 450; *Ogle* v. *Atkinson*, 5 Taunt. 759. The bailee can only set up the title of another, "if he defends upon the right and title, and by the authority of that person," per Blackburn, J., in *Biddle* v. *Bond*, 6 B. & S. 234 (citing Pollock, C.B., in *Thorne* v. *Tilbury*, 3 H. & N. 537), explained by Lord Selborne, C., in *Kingsman* v. *Kingsman*, 6 Q. B. D. 129, distinguished in *Ex parte Davies, In re Sadler*, 19 Ch. D. 93, per Lush, L.J., and approved *Rogers* v. *Lambert*, [1891] 1 Q. B. 318. A bailee may, however, equally with a tenant, show that the title of his bailor to the goods has expired since the bailment: *Thorne* v. *Tilbury*, 3 H. & N. 534. In Roll. Abr. Detinue, (t') 5, citing Y. B. 9 H. VI. 58, pl. 4, it is laid down that if the bailee of goods deliver them to him who has the right thereto, he is still chargeable to the bailor; and the converse, if the bailee deliver to the bailor he is protected against the true owner, is also asserted, in the following passage, Detinue, (t') 7, on the authority of Y. B. 7 H. VI. 22, pl. 3. If ever law, this is no longer so. Where the true owner has, by legal proceedings, compelled a delivery to himself of the goods bailed, such delivery is a complete justification for non-delivery on account of the bailor: *Shelby* v. *Scotsford*, Yelv. 22; *Ogle* v. *Atkinson*, 5 Taunt. 759; *Wilson* v. *Anderton*, 1 B. & Ad. 450, citing as to the bailee's right to interplead, Com. Dig. Chancery (3 T). An actual delivery to the true owner, having a right to the possession on his demand of them, is also a justification for the bailee: *Hardman* v. *Willcock*, 9 Bing. 382 note; *Biddle* v. *Bond*, 6 B. & S. 225. A strong presumption in favour of the bailor arises from the bailment, though there is no absolute estoppel. The bailee's contract is to do with the property committed to him what his principal has directed, to restore it or *to account for it* (*Cheesman* v. *Exall*, 6 Ex. 341), and by yielding to title paramount he does account for it. If at any stage of the transaction the principles of estoppel are applicable, they cease to be so when the bailment is determined by what is equivalent to an eviction by title paramount, that is to say, by the reassertion of possession by the true owner: *Biddle* v. *Bond*, *supra*. It is true that it has sometimes been said that the bailee can only recognise the *jus tertii* where a legal decision has established it, or where fraud has been practised by the bailor as in the case of *Hardman* v. *Willcock*, *supra*. But the bailor himself cannot confer rights he is not possessed of, and if he cannot withhold possession from the true owner, neither can one claiming under him. The rule is that a bailee cannot avail himself of the *jus tertii* for the purpose of keeping the property for himself, even though the title he sets up is that of the true owner. If the law were otherwise, by such a pretext he might keep goods deposited with him without any pretence of ownership. If, however, the bailee has performed his legal duty by delivering the property to its true owner, at his demand, he is not answerable to the bailor, and there is no difference in this particular between a common carrier and other bailees: *The Idaho*, 93 U. S. (3 Otto) 575. See Mr. Holmes's note, Duty to return: 2 Kent, Comm. (12th ed.) 566; also 2 Parsons, Contracts (8th ed.), 94. In *Kohn* v. *Richmond and Danville Rd. Co.*, 34 Am. St. R. 726, it was held that the bailor is not bound to deliver to the true owner, but is bound to yield to process of law, and is therefore excused for doing so. In *Henderson* v. *Williams*, [1895] 1 Q. B. [illegible] warehouseman having attorned to a purchaser was estopped from impeach[illegible]; but may be permitted to interplead, *Ex parte Mersey Docks and Harbour* [illegible], 1 Q. B. 540.

the state in which he received it, and with the profit or increase which it has produced, for which he becomes liable if in default.[1] Where a third person intermeddles, the rule is that either the bailor or the bailee may sue, and whichever first obtains damages does so in full satisfaction.[2]

Joint deposit.

In the case of a joint deposit, the depositary is not in general bound to deliver the deposit without the consent of all the parties;[3] and, on the other hand, Story says,[4] that where there are two or more joint depositaries, they are each liable for the restitution of the whole deposit.

When depositary improperly refuses to deliver it.

When the depositary improperly refuses to deliver the deposit, the character of his holding becomes altered; and if it is afterwards lost, he is answerable for all defaults and risks;[5] indeed such a refusal amounts to a conversion.[6]

Articles sent to an exhibition.

Articles sent for exhibition, for example, to an agricultural society, are not a gratuitous bailment; for the undertaking to exhibit the article sent constitutes a consideration, as the exhibitor is induced by the expectation of deriving advantages from the exhibition of his goods to send them.

Valuable picture exhibited.

Even in the case of an exhibition of a rare picture from a private gallery, which the owner has no wish to sell, the greater notoriety it obtains by exhibition, and the prospect of its value being thus enhanced, may be deemed a consideration, of which the Courts will not look to the adequacy.[7] In most cases of exhibitions the terms on which articles are lent are specially provided for and must be construed as in the case of any other special contract.

Watch left with tailor while trying on clothes.

A curious American case[8] may be here noted; where a man going to a store to be fitted with a suit of clothes, preparatory to trying them on, deposited his watch in a drawer which the storekeeper's salesman pointed out as the fit receptacle. When the customer desired to

1 2 Kent, Comm. 567; citing *Game* v. *Harvie*, Yelv. 50; *Coggs* v. *Bernard*, 2 Ld. Raym. 909.

2 Per Parke, B., *Nicolls* v. *Bastard*, 2 C. M. & R. 660, and *ante*, 736 note. *Si bailee del biens port trespas, et bailor auter trespas, cestuy que primerment recover oustera l'auter d'action*, 2 Roll. Abr. Trespas. 569, pl. 5, referring to Y. B. 48 E. III. 20, pl. 8, and Y. B. 20 H. VII. 5, pl. 15, which was an action for battery of a servant, where it was held that the battery is no tort to the master, but only the loss of service. *Pain* v. *Whittaker*, Ry. & M. (N. P.) 99. See *Gordon* v. *Harper*, 7 T. R. 912, and *Wilbraham* v. *Snow*, 2 Wms. Saund. 47.

3 *Harper* v. *Godsell*, L. R. 5 Q. B. 422; *Brandon* v. *Scott*, 7 E. & B. 234; *May* v. *Harvey*, 13 East, 197; 2 Kent, Comm. 566. *Magnus* v. *Queensland National Bank*, 37 Ch. D. 466.

4 § 116. See the rule D. 16, 3, 1, §§ 36, 37, 43. Where there was a joint bailment, the remedy was by interpleader: *Crawshay* v. *Thornton*, 2 My. & Cr. 1; *Hoggart* v. *Cutts*, Cr. & Ph. 197; Story, Eq. Jur. §§ 800 824 b (Eng. ed.); Reeves, Hist. of the Eng. Law, vol. iii. 453, 454.

5 Story, Bailm. § 122. In Y. B. 39 Edw. III. 17, a sealed bag of deeds was bailed to J. to hand over. J. died and his wife held the bag as executrix. B. was held entitled to maintain detinue though he had never been in possession. So an heir has been held similarly entitled to an heirloom: Y. B. 39 Edw. III. 6. To prove that the article bailed has been lost is no answer in detinue: *Reeve* v. *Palmer*, 5 C. B. N. S. 84. In *Wilkinson* v. *Verity*, L. R. 6 C. P. 206, a service of communion plate was sold by the defendant, to whom it had been bailed for safe custody; more than six years after the sale it was demanded by the plaintiff, who was ignorant of the sale. The Statute of Limitations, 21 Jac. I. c. 16, was held to run from the date of the demand and refusal, and not from the date of the sale. *Wilkinson* v. *Verity* is considered in *Miller* v. *Dell*, [1891] 1 Q. B. 468. Cp. *Barton* v. *North Staffordshire Ry. Co.*, 38 Ch. D. 458; *In re Tidd*, *Tidd* v. *Overell*, [1893] 3 Ch. 154. As to a depositary on express trust, *Fells* v. *Read*, 3 Ves. 70.

6 *Marner* v. *Bankes*, 16 W. R. 62.

7 *Vigo Agricultural Society* v. *Brumfiel*, 52 Am. R. 657.

8 *Woodruff* v. *Painter*, 30 Am. St. R. 786.

resume possession the watch was gone, and no explanation of its disappearance was forthcoming. The Court held that the storekeeper became chargeable as a hailee; assuming that a jury would have found that a watch is such personal property as men of the class frequenting the store usually carry with them, and that in the selection of a suit of clothes it is necessary or usual to remove it from the person and lay it aside. The hailment being for the reciprocal benefit of the parties, ordinary care was necessary. If the watch were stolen, such an explanation would be a discharge; nevertheless, it was incumbent on the storekeeper to give such explanation of the disappearance of the watch as would enable the bailor to test his good faith.

II. MANDATE.

Definition.

"Mandate," says Chancellor Kent [1]—and his definition meets with the strong approval of Story [2]—"is when one undertakes, without recompense, to do some act for another in respect of the thing bailed."

[1] 2 Comm. 568; D. 17, 1.

[2] Bailm. § 137. A writer in American Jurist, vol. xvi. 253, devotes a dozen pages to show that the definition of Story is incorrect, and that mandate is not a contract, because there is no consideration, and it is therefore *nudum pactum*. In *Coggs* v. *Bernard*, 2 Ld. Raym. 919, Holt, C.J., touches upon this point: "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;" that is as distinguished from a consideration sufficient to oblige him to carry them, which the expressions used seem to discriminate. Cp. *Wheatley* v. *Low*, Cro. Jac. 668; *Hart* v. *Miller*, 4 C. B. N. S. 371; *Pillans* v. *Van Mierop*, 3 Bur. 1663. In *Symons* v. *Darknoll*, Palmer (K. B.) 523, Hydo, C.J., says, '*delivery fait le contract.*" In *Fisher* v. *Liverpool Marine Insurance Co.*, L. R. 8 Q. B. 476, Blackburn, J., speaking of an undertaking to use due skill and diligence, says, "for this undertaking, the mere fact that they were trusted with that duty would be a sufficient consideration." The writer in the American Jurist (at 274), decides that this is "a position which even the great name of Lord Holt cannot sustain for a moment." The consideration is sufficient to oblige to care, though possibly not to convey; but if they are conveyed, then the obligation to take care is not lessened thereby. See *Lane* v. *Cotton*, 1 Ld. Raym. 655; also Law Quarterly Review, (1886) vol. ii. 33, "A Difficulty in the Doctrine of Consideration"; and per Grier, J., *Philadelphia and Reading Rd.* v. *Derby*, 14 How. (U. S.) 485. The difficulty may be explained by considering the difference between the Roman conception of a contract and that of the common law. In the civil law a gratuitous promise to act for another or to carry his goods is regarded as a consensual contract; by our system a mere promise is not enforcible, and a recovery upon one must be on the ground of misfeasance. If a promise is executed it can then be sued on in English law, as a contract, not perhaps expressly constituted, but implied by law; which treats it as a contract preferentially to a breach of duty; in deference to the example of the Roman law, in which system such relations were always looked on as contracts rather than as mere duties: see Hare, Contracts, 150; Pollock, Contracts (7th ed.), 168; and plaintiff's argument in *Steinson* v. *Heath*, 3 Lev. 400, citing, *inter alia*, Y. B. 22 H. VI. 46, 47, "against a chaplain for not reading prayers" (cp. *Williams's case*, 5 Co. Rep. 72 b); Y. B. 1 E. III. 4, "against a champion *qui se retraxit.*" The reporter adds: "But note all those cases are for a tortious nonfeasance, but this here is *quasi* a debt, for which there lies rather debt or assumpsit." The reference to Y. B. 1 E. III. 4, is, however, not correct. Reeves, Hist. of the Eng. Law (2nd ed.), vol. iii. 89, says that the first instance of an action on the case is in the twenty-second year of the king. Mr. Finlason, however, disputes this in his edition of Reeves, vol. ii. 394, and says there are instances of the *action sur le case* in the reign of Edward I. This, I think, must be a misprint for Edward II. The earliest reference to an *action sur le case* that I can find is in Maynard's Edward II., Y. B. 3 E. II. 75, followed by Y. B. 6 E. II. 200; Y. B. 12 E. II. 369; Y. B. 18 E. II. 571. There is a report of an *action sur le case* in Y. B. 7 E. III. 17, pl. 19. In Bro. Abr. Accion sur le case, pl. 14–26, are a series of cases between the 41st and 48th of E. III. In Shep. Abr. Actions of the Case, 51, is a reference to a case in the 5 E. III. and in Fitzh. De Natura Brev. 92, one to Y. B. 7 E. III. 2 (neither recognisable by me). In *Wardell* v. *Mourillyan*, 2 Esp. (N. P.) 693, a custom was found for hoymen known to ply to some particular wharf to discharge their duty, by delivering the goods to the

Dr. Wharton [1] contests the gratuitous character of mandate. As a proposition of civil law his contention is opposed to Gaius,[2] the Institutes,[3] and the Digest.[4]

Meaning in English law.

As a proposition of English law Dr. Wharton is concluded by the expression of Holt, C.J., in *Coggs* v. *Bernard*:[5] "The sixth sort [*i.e.*, of bailment] is when there is a delivery of goods or chattels to somebody who is to carry them, or to do something about them, *gratis*, without any reward for such his work or carriage."[6]

Distinction between deposit and mandate.

Between deposit and mandate, says Sir William Jones,[7] the distinction is that the former lies in custody and the latter in feasance. It has been pointed out by Story[8] that in cases of deposit there is always something to be done, while in mandate there is commonly something to be guarded; so that in each contract there is custody and labour and service to be performed. He therefore amends the suggested distinction, and says: "The true distinction between them [*i.e.*, deposit and mandate] is, that in the case of a deposit the principal

wharf. On this, Erskine, for the plaintiff, said that if his client could not recover against the boyman who was suing, he was without remedy, as he could not maintain an action against the wharfinger; because there was no privity of contract between them. To this Kenyon, C.J., answered: "The delivery of the goods at the wharf by the boyman raised an implied contract on the part of the wharfinger to take care of them, or to deliver them according to the direction; for the breach of which an action would lie." In Langdell's Summary of the Law of Contracts, § 46, a consideration that gives rise to a debt and one that would only sustain an action in assumpsit are distinguished. To constitute a debt the thing given or done in exchange for the promise (1) must be done to or for the obligor directly; (2) must be in legal contemplation the sole motive for assuming the obligation; and (3) must be executed, not promised merely. To raise an assumpsit none of the foregoing elements is necessary; it is enough if anything be given or done in exchange for the promise. See also the note to *Edwards* v. *Davis*, 16 Johns. (Sup. Ct. N. Y.) 284, and the learned note to 2 Parsons, Contracts (8th ed.) 100. *Ante*, 738, and *post*, 768.

[1] Negligence, §§ 482, 491. Dr. Moyle, Just. Inst. 3, 26, 13 note, says: "The true test is whether the parties intended the remuneration to be recoverable by action; if not, it will be *mandatum*: *si remunerandi gratia honor intervenit, erat mandati* (not *locati* or *conducti*) *actio* D. 17, 1, 6, pr." See Walker, Selected Titles to the Digest, Introduction to Part I.

[2] 3, 162. [3] 3, 26, §§ 1, 13.

[4] D. 17, 1, 1, § 4: *Mandatum, nisi gratuitum nullum est; nam originem ex officia atque amicitia trahit; contrarium ergo est officio merces, interveniente enim pecunia, res ad locationem et conductionem potius respicit.* The only notice Wharton takes of this authority is, Negligence, § 486, summarising the opinion of a German author, Dr. J. Baron, "The opinion once was that the two [hiring and mandate] were distinguished by the fact that in the first case the labour was for reward, in the other case without reward. No doubt some passages in the Digest *suggest* such a distinction." Then in a footnote is a reference to the passage just set out, together with that cited, *supra*, from the Institutes, and also to D. 19, 5, 22. There is a limitation to be imposed on the statement as to the purely gratuitous character of *mandatum*. Severus and Antoninus provided that a promised honorarium might be exacted by appealing to the *extraordinaria cognitio* of the magistrate. *Adversus eum cujus negotia gesta sunt, de pecunia, quam, de propriis opibus, vel ab aliis mutuo acceptam erogasti, mandati actione pro sorte et usuris potes experiri. De salario autem quod promisit, apud præsidem provinciæ cognitio præbebitur:* Cod. 4, 35, 1. In connection with this must be considered the fact that the professors of a liberal art—that is advocates, physicians, oculists, aurists, dentists, librarii, notarii, accountants, schoolmasters, nurses, rhotoricians, grammarians, geometers, land surveyors, D. 50, 13—could recover a remuneration under the name of salarium or honorarium from the prætor. See Pothier, Traité du Contrat de Mandat, ch. i. sec. 2, art. iii., De la Gratuité du Mandat; Pothier, Pand. 17, 1, 1, art. 2, *Quo sensu ad substantiam mandati requiratur ut sit gratuitum?* Sohm, Inst. of Roman Law (2nd ed. Eng. trans.), 423; 1 Bell, Comm. (7th ed.), 506; Hare, Contracts, 93. When, however, a mandate has been entered upon it had to be performed: *Voluntatis est suscipere mandatum necessitatis consummare:* D. 13, 6, 17, § 3. But it might be abandoned (1) if the mandator were not prejudiced thereby, D. 17, 1, 22, § 11; and (2) *ob subitam valetudinem, ob necessariam peregrinationem, ob inimicitiam et inimicissimi actiones integro adhuc causa mandati:* Paul. Sent. Rect. 2, 15, 1.

[5] 2 Ld. Raym. 913.

[6] Jones, Bailm. 52, 117; Pothier, Traité du Contrat de Mandat, art. prélim., n. 1, 22.

[7] Bailm. 53. [8] Bailm. § 140.

object of the parties is the custody of the thing, and the service and labour are merely accessorial; in the case of a mandate the labour and services are the principal objects of the parties, and the thing is merely accessorial."

When the person to whom goods are entrusted—the mandatary—delivers them to another person, and they receive an injury, there does not seem to be any objection in principle to his right to recover for his own indemnity though he, no more than a depositary, has any property in the goods. The general principle of the common law is that possession with an assertion of right, or in many cases possession alone, is a sufficient title to enable the possessor to maintain a suit against a mere wrongdoer for any injury or wrong done to the thing injured.[1] Delivery by the mandatary.

Story enumerates the requisites of a contract of mandate;[2] Requisites of a contract of mandate.

(1) It must respect an act to be done *in futuro*, and not one already completed.[3]

(2) It must be gratuitous.[4]

(3) There must be a voluntary intention on the part of both parties to enter into the contract.[5]

(4) The act to be done should be lawful and not against sound morals.[6]

(5) It may be in any form.[7]

Pothier[8] states the obligations of the mandatary as threefold: Obligations of the mandatary.

(1) To do the act which is the object of the mandate, and with which he is charged.

(2) To bring to it all the diligence it requires.

(3) To give an account of his dealings with it.

(1) Sir William Jones[9] seeks to assimilate the doctrines of the civil and the common law, and contends that an action will lie for damage occasioned by the non-performance of a promise to become a mandatary, if special damage is shown. The doctrine of the Roman law is stated in the Institutes,[10] but the law of England is clearly established in an opposite sense. A mandatary, or one who undertakes to do an act for another without reward, is not answerable for omitting to do the act, and is only responsible when he attempts to do it and does it amiss.[11] In other words, he is responsible for a misfeasance though not (1) To do the act which is the object of the mandate. Nonfeasance. Only liable for misfeasance.

[1] Story, Bailm. § 152, and *ante*, 733.

[2] Bailm. §§ 145, 160.

[3] *Debere esse gerendum, non jam gestum:* Pothier, Pand. 17, 1, 1, art. 1.

[4] Bailm. § 153. Pothier, Pand. 17, 1, 1: *Mandatum est contractus quo quis negotium gerendum committit alicui gratis illud suscipienti, animo invicem contrahendæ obligationis.* Maynz (2ad ed.), vol. ii. 211, says: *Mandare signifie donner pouvoir, manum dare. Dans le sens spécial qui nous occupe ici, on entend par mandat, le contrat par lequel une personne s'oblige envers une autre à faire gratuitement une chose dont cette dernière la charge.* Maynz specifies three conditions as necessary to constitute this relation—(1) A person who commits something to another to do; (2) An acceptance of the charge by that person; (3) A gratuitous engagement.

[5] Bailm. § 155. Pothier, Pand. 17, 1, 1, § 1: *Ut animo contrahendæ invicem obligationis committatur et suscipiatur.* In Gothofred's edition of the Digest there is a note to D. 17, 1, 1, § 2: *Mandatum uno rogante, altero recipiente perficitur. Hæc duo verba Rogo et Recipio citra stipulationem perficiunt mandatum.*

[6] Bailm. § 158. *Rei turpis nullum mandatum est:* D. 17, 1, 6, § 3; Pothier, Traité du Contrat de Mandat, n. 11.

[7] Dig. 17, 1, 1: *Obligatio mandati, consensu contrahentium consistit.*

[8] Traité du Contrat de Mandat, n. 37. Cp. Code Civil, arts. 1991–1997.

[9] Bailm. 54–56.

[10] Inst. 3, 26, 11. The Digest is to the same effect, D. 17, 1, 5, § 1.

[11] *Elsee* v. *Gatward*, 5 T. R. 143; *Balfe* v. *West*, 13 C. B. 466; *Thorne* v. *Deas*, 4 Johns. (Sup. Ct. N. Y.) 84; 2 Kent, Comm. 569–573, on the distinction between a total omission to act and negligence in acting; *Wilkinson* v. *Coverdale*, 1 Esp. (N. P.) 75, is a case where positive injury resulted from the neglect to act—the plaintiff was misled. *Baxter* v. *Jones*, [1903] 6 Ont. L. R. 360.

for a nonfeasance, even if special damage be averred. The difficulty of the early cases was to explain how an action of trespass on the case could be brought for a nonfeasance; this was also the original difficulty in the way of the action of assumpsit as a branch of the action on the case.[1]

(2) To bring to bear the requisite amount of diligence.

(2) To bring to it all the diligence it requires.

Ulpian's famous rule states: *Dolum et culpam mandatum.*[2] Sir William Jones,[3] however, makes a great point of the want of agreement of the civilians on the subject of the degree of diligence requisite. By the common law, as the contract is wholly gratuitous and for the benefit of the owner, the mandatary is only liable for gross negligence.[4] Sir William Jones[5] takes a distinction between "a bailment without reward to *carry* from place to place" and "a mandate to perform a work." With reference to the former, he cannot "conceive that the bailee is responsible for less than gross neglect." With reference to the latter, "he is bound to use a degree of diligence adequate to the performance of it."[6] Story[7] does not accept this distinction, which he says is supported by reasoning "exclusively derived" from the civil law, which applies the rule "to all cases of mandates whatsoever, and by no means limits it to cases where work is to be performed." "To carry jewels safely may be a far more valuable service, and require far more vigilance, than to clean the gold which encbases them." "Where the act to be done requires skill, and the party who undertakes it either has the skill, or professes to have it, there he may be well made responsible for the want of due skill or for the neglect to exercise it." Of course if a man undertakes to perform a work in such circumstances that a representation of capacity is involved, he must act up to his representation or pay for the damage he causes. If the circumstances do not affect him with a special responsibility the law does not.

Sir William Jones's view.

Dissented from by Story in his treatise on Bailments.

Shiells v. *Blackburne*.

Shiells v. *Blackburne*[8] is in point here. A merchant having undertaken voluntarily and without reward to enter a parcel of goods belonging to the plaintiff at the custom-house for exportation, made an entry under a wrong denomination, whereby plaintiff's parcel, together with a similar one of his own, were seized and lost. The plaintiff having brought his action, it was held that, failing gross negligence, the defendant was not liable. "I agree with Sir William Jones," said Lord Loughborough, C.J.,[9] "that where a bailee undertakes to perform a gratuitous act, from which the bailor is alone to receive benefit, there the bailee is only liable for gross negligence; but if a man gratuitously undertakes to do a thing to the best of his skill, where his situation or profession is such as to imply skill, an omission of that skill is imputable to him as gross negligence. If in this case a shipbroker, or a clerk in the custom-house, had undertaken to enter the goods, a wrong entry

Judgment of Lord Loughborough.

1 Remarks upon the Law of Bailment, 16 Am. Jur. 253; Holmes, The Common Law, 275. Street, Foundations of Legal Liability, vol. ii. 29, 200, vol. iii. 172.

2 D. 50, 17, 23.

3 Bailm. 14, 15, 16.

4 *Doorman* v. *Jenkins*, 2 A. & E. 256.

5 Bailm. 62. See 2 Parsons, Contracts (8th ed.), 104, note (l.).

6 Bailm. 53; see also 22, 61, 98, 120.

7 Bailm. § 177.

8 1 H. Bl. 158. In *Moore* v. *Mourgue*, 2 Cowp. 479, an agent, having written orders to do so, procured a policy of insurance to be made. In the policy as executed, there was an exception of a risk, common in the policies of other offices, although not in those used by the office where the insurance was made. The loss arose from such risk. The Court held that the agent was not liable, as he had acted *bonâ fide* and without gross negligence. The probability is that this was a gratuitous undertaking, yet that it was so in fact is nowhere stated in the report.

9 1 H. Bl. 163.

would in them be gross negligence, because their situation and employment necessarily imply a competent degree of knowledge in making such entries; but when an application, under the circumstances of this case, is made to a general merchant to make an entry at the custom-house, such a mistake as this is not to be imputed to him as gross negligence." [1]

In *Dartnall* v. *Howard* [2] the element of a "situation or profession," from which special skill could be inferred, appears to have been absent; and the decision there consequently marks the other aspect of the principle we are now considering. The declaration alleged that in consideration that plaintiff should retain defendants to lay out a sum of money, they undertook to do their duty in the premisses. On motion in arrest of judgment, the count was held bad, as it did not state that any reward was to be paid to the defendants, or that they were employed in any particular character so as to be responsible for taking a bad security without negligence or fraud. Abbott, C.J., in delivering the judgment of the Court, said: [3] "I am of opinion that the count is bad. The only duty that is imposed under such a retainer and employment as is here mentioned is a duty to act faithfully and honestly, and not to be guilty of any gross or corrupt neglect in the discharge of that which he undertakes to do. But a man may, when acting most faithfully and most honestly, happen to take an insufficient security; [4] without gross or culpable negligence on his part, he may have been misled, he may have been deceived, he may have taken such care as an ordinary man would take with regard to the subject-matter entrusted to him, and yet, doing all that, his endeavours may have failed, and it may so happen the security may without his knowledge and against his will have turned out to be insufficient. For these reasons it appears to the Court that this count is not sustainable." *Coggs* v. *Bernard* [5] is an authority in the same direction, the undertaking to carry "safely" being regarded as a holding out by the defendant that he was skilled in the particular business.

Dartnall v. *Howard.*

Judgment of Abbott, C.J.

In the well-known case of *Thorne* v. *Deas*,[6] Kent, C.J., also disapproved Sir William Jones's view that a mandatary commissioned to perform work is bound "to use a degree of diligence to the performance of it." He said: "I have carefully examined all the authorities to which he refers.[7] He has not produced a single adjudged case; but only some *dicta* (and those equivocal) from the Year Books, in support of his opinion; and was it not for the weight which the authority of so respectable a name imposes, I should have supposed the question too well settled to admit of an argument." The learned Chief Justice expresses an opinion far from favourable to the portion of Sir William Jones's essay dealing with mandates, and, while recognising the correctness of its presentation of the civil law, altogether discredits its conclusions on the common law.[8]

Thorne v. *Deas.*

[1] Cp. *Bourne* v. *Diggles*, 2 Chitty (K. B.), 311; *O'Hanlon* v. *Murray*, 12 Ir. C. L. R. 161, and *Fish* v. *Kelly*, 17 C. B. N. S. 194; which are solicitor's cases, where *Shiells* v. *Blackburne* is cited and followed. See *Chapman* v. *Morley*, 7 Times L. R. 257.

[2] 4 B. & C. 345.

[3] *L.c.* 350.

[4] I have ventured to alter the punctuation of this passage.

[5] 2 Ld. Raym. 909, 1 Sm. L. C. (11th ed.), 173.

[6] 4 Johns. (Sup. Ct. N. Y.) 96. At 90 there is a translation of the case in Y. B. 3 H. VI. 36, pl. 33, on which Sir Wm. Jones comments, and which comments are discussed in the argument.

[7] These are set out and considered in the judgment as reported.

[8] The distinction between cases like *Smith* v. *Lascelles*, 2 T. R. 187, and *Webster*

(3) Duty to account.

(3) To give an account of his dealings with it.

The mandatary is bound to render to the mandator, upon request, a full account of his proceedings; to show that the trust has been duly performed; or if it has been ill-performed, to offer a justification or legal excuse for such ill-performance. The form and mode in which the remedies of the bailor are to be enforced, in case of any fault committed by the mandatary, for which he is responsible, will depend upon the municipal law of the particular country. In the Roman law, and the foreign law derived from it, the remedy would ordinarily be the *actio mandati directa;* in the common law it would be either an action founded on the contract, as assumpsit, or an action founded on the tort, as an action on the case for misfeasance or negligence or conversion.[1]

Rule of the common law as summed up by Story.

The rule of the common law as to the obligations attaching to a mandatary is stated thus:[2] "A mandatary, who acts gratuitously in a case, where his situation or employment does not naturally or necessarily imply any particular knowledge or professional skill, is responsible only for bad faith or gross negligence. If he has the qualifications necessary for the discharge of the ordinary duties of the trust which he undertakes and he fairly exercises them, he will not be responsible for any error of conduct or action into which a man of ordinary prudence might have fallen. If his situation or employment does imply ordinary skill, or knowledge adequate to the undertaking, he will be responsible for any losses or injuries resulting from the want of the exercise of such skill or knowledge. If he is known to possess no particular skill or knowledge, and yet undertakes to do the best which he can under the circumstances, all that is required of him is the fair exercise of his knowledge and judgment and capacity. This general responsibility may be varied by a special contract of the parties either enlarging or qualifying or narrowing it, and in such cases the particular contract will furnish the rule for the case."[3]

v. *De Tastet*, 7 T. R. 157, is also pointed out. *Cohen* v. *Kittell*, 22 Q. B. D. 680, was an attempt to recover against defendant for "having failed to make certain bets pursuant to the plaintiff's instructions." The development of the action of trespass on the case through assumpsit into a declaration for mere breach of agreement is well treated, Holmes, The Common Law, 275. Street, Foundations of Legal Liability, vol. iii., 223–277. *Ante*, 738, 753.

[1] Story, Bailm. § 191. [2] *Ibid.* § 182 a.

[3] *Jenkins* v. *Betham*, 15 C. B. 168. See 2 Kent, Comm. 571–574; *Shiells* v. *Blackburne*, 1 H. Bl. 158; *Rooth* v. *Wilson*, 1 B. & Ald. 59. Wharton cites this last case, Negligence, § 508, as an authority for the proposition that the defendant was bound to "apply the care of a good hostler." Neither the judgment nor the argument, as reported, goes nearly this length. The utmost the case decides is that the defendant "owes it to the owner of the horse not to put it in a dangerous pasture," which seems scarcely correlative with a duty to "apply the care of a good hostler." *Wilson* v. *Brett*, 11 M. & W. 113.

Negotiorum gestor.

The *quasi*-contract of a *negotiorum gestor* in the civil law must not pass without notice. A *negotiorum gestor* was a person who, of his own accord, and without the knowledge of the owner, intermeddled with property. As the intermeddling was without any mandate, a higher degree of skill was required from the *negotiorum gestor* than in other cases. *Si negotia absentis et ignorantis gerас et culpam et dolum præstare debes:* D. 3, 5, 11. *Is qui utiliter gesserit negotia habet obligatum dominum negotiorum, et ita et contra iste quoque tenetur, ut administrationis rationem reddat. Quo casu ad exactissimam quisque diligentiam compellitur reddere rationem: nec sufficit talem diligentiam adhibere, qualem suis rebus adhibere solet, si modo alius diligentior eo commodius administraturus esset negotia:* Inst. 3, 28, § 1. However, to this there was an exception: where the business undertaken was that of a friend in a case of apparent necessity, the liability attaching was only for bad faith and fraud: Pothier, Pand. 3, 5, 52. Pothier gives the reason: *Parcequ'il vaut mieux pour l'absent que ses biens soient administrés par un homme négligent, que s'ils étaient vendus.* Story considers (Bailm. § 190) the case of *Nelson* v. *Macintosh*, 1 Stark. (N. P.) 237, already set out in the text (*ante*, 758), to approach very near to that of a *negotiorum gestor*; *Drake* v. *Shorter*, 4 Esp. (N. P.) 165, seems undistinguishable. Defendant, who was employed in an

Nelson v. *Macintosh.*

Drake v. *Shorter.*

With this may be conjoined Dr. Hare's statement of the civil law. After pointing out that the usual test of the degree of care requisite in the case of bailments is whether the bailment was made in the interest of the bailor or bailee, or for an end beneficial to both, and after enunciating the rules applicable in the respective cases, he says:[1] "In mandate, the obligation was not deduced from the law, but arose from the express or implied undertaking of the mandatary to do all that was requisite and practicable for the fulfilment of the trust; and he was consequently answerable for any loss or failure that might have been averted by due care, or such skill as might reasonably be expected from a man of his training or profession. One who engaged to carry the goods of another to a given point, or to expend labour or skill upon them for the benefit of the owner, was therefore answerable for exact diligence, and could not rely on the gratuitous nature of the undertaking as an excuse for a loss that might have been foreseen and avoided."[2]

Mandatary's duty by the civil law.

When property is remitted voluntarily by the owner to another with a direction to apply it for the benefit of a third person, or when the owner gives such a direction about property already in the possession of the person he addresses, he, whose benefit is intended, cannot

Third person for whose benefit a mandate is given as no direct remedy against the mandatary.

invention for making a vessel sail against wind and tide, employed the plaintiff to work on her. While working, the vessel took fire, and the defendant used a boat belonging to the plaintiff to endeavour to extinguish the fire, with the result of sinking and losing it.' The defence was, that the interference was to prevent the fire spreading. Lord Ellenborough, C.J., held that this amounted to a good defence. "What," he said, "might be a tort under one circumstance, might, if done under others, assume a different appearance. As, for example: if the thing for which the action was brought, and which had been lost, was taken to do a work of charity, or to do a kindness to the person who owned it, and without any intention of injury to it, or of converting it to his own use; if, under any of these circumstances, any misfortune happened to the thing, it could not be termed an illegal conversion; but as it would be a justification in an action of trespass, it would be a good answer to an action of trover." Espinasse is not reckoned an accurate reporter, and it is difficult to accept fully the wording of this principle. Something more would be required than the taking "to do a work of charity, or to do a kindness to the party who owned it, and without any intention of injury to it, or of converting it to his own use." Probably Lord Ellenborough, C.J., laid down the law in accordance with Labeo: *Interdum in negotiorum gestorum actione dolum solummodo versari. Nam si affectione coactus, ne bona mea distrahantur, negotiis te meis obtuleris æquissimum esse dolum duntaxat te præstare:* Pothier, Pand. 3, 5, 52. A less necessity than this would not seem properly to excuse. The suggestion involved in the contrary view, *Culpa est immiscere se rei ad se non pertinenti* (D. 50, 17, 36), will commend itself to the cautious man; D. 3, 5, *De negotiis gestis.* The subject of *negotiorum gestio* is very fully treated in Maynz, Éléments de Droit Romain (2nd ed.), vol. ii. 410, De la gestion d'affaires; Sohm, Inst. of Roman Law (2nd Eng. ed.), 427; Pothier: Du quasi contrat negotiorum gestorum, App. to Traité du Contrat de Mandat. See note, Moyle, Just. Inst. 3, 27, 1; and note (c) 2 Kent Comm. 616; also Livermore Agency, vol. i. 8, 12, 50–52. See, too, *Dunbar* v. *Wilson and Dunlop's Trustee*, 15 Rettie, 210; and for the case of the claim for salvage of one saving a ship believing it to be his own which turned out to be another's property, *The Liffey*, 58 L. T. 351. *Keighley Maxted & Co.* v. *Durant*, [1901] A. C., per Lord Robertson, 260.

[1] Contracts, 77. Dr. Hare refers to two cases: (1) *Tompkins* v. *Saltmarsh*, 14 Ser. & R. (Pa.) 275, where it is held that where one has undertaken to perform a gratuitous act, from which he was to receive no benefit (in the case in question, to deliver a letter containing money), "the bailee is only liable for *gross negligence, dolo proximus*, a practice equal to a fraud"; (2) *Beardslee* v. *Richardson*, 11 Wend. (N. Y.) 25, where a person received a sealed letter, which he engaged to deliver, and where the rule of diligence was laid down in the same way as in the earlier case.

[2] The Roman rule is stated by Cicero, pro Roscio Amerino, c. 38: *In privatis rebus si qui rem mandatam non modo malitiosius gessisset, sui quæstûs aut commodi causâ, verum etiam negligentius: eum majores summum admisisse dedecus existimabant. Itaque mandati constitutum est judicium, non minus turpe, quam furti. . . . Ergo idcirco turpis hæc culpa est, quod duas res sanctissimas violat, amicitiam et fidem. Nam neque mandat quisquam fere, nisi amico; neque credit, nisi ei quem fidelem putat. Perditissimi est igitur hominis, simul et amicitiam dissolvere, et fallere eum, qui læsus non esset, nisi credidisset.*

enforce his claim by legal proceedings; and the mandate is revocable by the owner at any time before it is executed, or at least before any engagement is entered into with the third person to execute it for his benefit.[1]

III. Gratuitous Loan.

Roman contracts *re*.

The Roman jurists divided contracts *re*—that is, where one received property from another in circumstances which rendered it his duty to return it or a thing of a like kind—into *mutuum*, *commodatum*, *pignus*, and *depositum*.[2] We have already considered the case of *depositum*. We are now come to *commodatum*, which Sir William Jones, translating Pothier's Prêt à Usage,[3] has called loan for use. This distinguishes it from *mutuum*, which is a loan for consumption. *Commodatum* differs from *mutuum* in two principal particulars:

Distinction between *commodatum* and *mutuum*.

First, it is necessarily gratuitous; for, if the lender receives compensation, the agreement becomes one of *locatio conductio*.

Secondly, the goods remain the property of the lender.[4]

If, then, they are destroyed or perish through causes outside any failure to exercise the due care and diligence required of the *commodatarius*, all liability on his part ceases, and the *commodans* is not entitled to damages.[5] The destruction of a *mutuum*, on the other hand, does not discharge the borrower, though not due to his fault. This is an effect of the principle expressed in the maxim, *Res perit domino*.[6]

Definition of gratuitous loan.

"Lending for use," says Sir William Jones,[7] "is a bailment of a thing for a certain time to be used by the borrower without paying for it." Pothier's definition is: *Le prêt à usage est un contrat par lequel un des contractants donne gratuitement à l'autre une chose, pour s'en servir à un certain usage; et celui qui la reçoit, s'oblige de la lui rendre*

1 *Scott* v. *Porcher*, 3 Meriv. 652; *Williams* v. *Everett*, 14 East, 582. See *Malcolm* v. *Scott*, 3 Hare, 39, 51, affd. 14 L. J. Ch. 57. Cp. *Fleet* v. *Perrins*, L. R. 3 Q. B., per Blackburn, J., 542; in Ex. Ch. L. R. 4 Q. B., per Channell, B., 512. *Ante*, 294, n. 4.

2 Sanders, Justinian (8th ed.), 327. As to *commodatum*, see D. 13, 6, *Commodati vel contra*. *Duncan* v. *Town of Arbroath*, Morison Dict. of Dec. 10075, is a curious case on *commodatum*. A man lent three cannon to the town of Arbroath, which gave a bond to restore them within twenty-four hours after they were required, "without hurt, skaith, or damage," in case of which the town obliged itself to make payment of £500. The cannon were captured by Cromwell at the battle of Dunbar. In 1668, the owner sued for their return or the £500. The town pleaded loss "*casu fortuito et vi majori*." The pursuer admitted that "in *commodatum* the borrower hath not the peril, yet there is an exception—*si commodatum sit æstimatum*—when the peril is the borrower's and it is no proper loan but rather sale"; for this he quoted D. 13, 6, 5, § 1. He also urged that by the bond the peril was undertaken: "likewise they" (the town) "were negligent, that they buried the cannon to the knowledge of their whole town; whereas they should have entrusted some few to have done it in the night." The decision was that the town was not liable. This decision, however, appears to be wrong, as by their bond the town was bound to return the cannon or to pay £500 if unable to do so through "hurt, skaith, or damage." The contract was special.

3 Bailm. 64. See Maynz, Éléments de Droit Romain (2nd ed.), vol. ii. 264.

4 *Rei commodatæ et possessionem et proprietatem retinemus*: D. 13, 6, 8. *Nemo enim commodando rem facit ejus cui commodat*: D. 13, 6, 9.

5 *Eum, qui rem commodatam accepit, si in eam rem usus est, in quam accepit, nihil præstare, si eam in nulla parte culpa sua deteriorem fecit, verum est; nam si culpa ejus fecit deteriorem tenebitur*: D. 13, 6, 10.

6 Posto, Gaius (4th ed.), 399; Inst. 3, 14, 2; Hare, Contracts, 74. As to what is sufficient to fix a vendor with the risk of the destruction or injury of the thing sold, see note to *Bailey* v. *Culverwell*, 2 Man. & R. 564. *Post*, 795 *et seqq.*

7 Bailm. 118.

après qu'il s'en sera servi.[1] To constitute this contract there are required: Constituents:

(*a*) A thing which is lent, and which must be personal property; since, according to the definition of Holt, C.J.,[2] "the borrower is bound to the strictest care and diligence to keep the *goods* so as to restore them back again to the lender." (*a*) A thing lent.

(*b*) A *gratuitous* lending; otherwise, as Pothier[3] points out, it becomes a letting, if the consideration is money, or an innominate contract, when it is anything else given or work done. (*b*) Gratuitously.

(*c*) A lending for the use of the borrower.[4] (*c*) For the use of the borrower.

(*d*) A lending where the thing lent must be itself returned at the determination of the bailment.[5] (*d*) But to be returned.

The obligations of the borrower are: Obligations of the borrower.

(1) To take proper care of the thing borrowed.

(2) To use it according to the expressed or known intention of the lender.

(3) To restore it in a proper condition.

Of these in their order.

As to the proper care of the thing borrowed. In *Vaughan* v. *Menlove*,[6] Tindal, C.J., quoting and adopting Holt, C.J., in *Coggs* v. *Bernard*, lays down the rule as follows: "It has been urged that the care which a prudent man would take, is not an intelligible proposition as a rule of law, yet such has always been the rule adopted in cases of bailment, as laid down in *Coggs* v. *Bernard*.[7] Though in some cases a greater degree of care is exacted than in others, yet in '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 put his 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.' The care taken by a prudent man has always been the rule laid down; and as to the supposed difficulty of applying it, a jury has always been able to say whether, taking that rule as their guide, there has been negligence on the occasion in question."[8] (1) To use proper care

This has been so to the extent of holding the loan to be strictly personal, unless a more extensive use could be implied from the circumstances, as in *Bringloe* v. *Morrice*,[9] the case of overriding a horse. *Bringloe* v. *Morrice*.

[1] Cp. Code Civil, art. 1875.

[2] 2 Ld. Raym. 915; 1 Sm. L. C. (11th ed.), 182. By all consents, it is said in *Duncan* v. *Town of Arbroath*, Morison, Dict. of Dec. 10075, *commodatarius tenetur pro levissima culpa et summa diligentia.*

[3] Prêt à Usage, n. 3.

[4] Story, Bailm. §§ 225, 227.

[5] *Non potest commodari id, quod usu consumitur; nisi forte ad pompam vel ostentationem quis accipiat:* D. 13, 6, 3, § 6.

[6] 3 Bing. N. C. 475.

[7] 2 Ld. Raym. 909. Compare the rule of the civil law in the case—*In rebus commodatis talis diligentia præstanda est, qualem quisque diligentissimus paterfamilias suis rebus adhibet:* D. 13, 6, 18. *Is, qui utendum accepit, sane quidem exactam diligentiam custodiæ rei præstare jubetur; nec sufficit ei, tantam diligentiam adhibuisse, quantam suis rebus adhibere solitus est:* Inst. 3, 14, 2, and this because *Commodatum autem plerumque solam utilitatem continet ejus, cui commodatur; et ideo verior est Quinti Mucii sententia, existimantis, et culpam præstandam et diligentiam:* D. 13, 6, 5, § 2.

[8] 1 Stair, Inst. 1, 11, § 8; Ersk. Inst. 3, 1, §§ 20, 21.

[9] 1 Mod. 210, reported also *sub. nom. Bringloe* v. *Morison*, 3 Salk. 271.

There, North, C.J., took a distinction between a loan for a stated time and one for an indefinite time. In the former case, the borrower has an interest in the horse, and the borrower's servant may ride it; in the other case, not. A difference was also pointed out between hiring a horse to go to York, and borrowing a horse. In the first place, the servant may ride it to its destination; in the latter case, not. In *Lord Camoys* v. *Scurr*,[1] where a mare was for sale, and A asked the agent of the vendor for a trial, Coleridge, J., held that he was entitled to depute the trial to a competent person.

Lord Camoys v. Scurr.

Wilson v. *Brett*[2] is a somewhat similar case. Plaintiff entrusted a horse to ride to the defendant, a competent person; while defendant was riding it, the horse fell down and was injured. The jury were directed that "the defendant, being shown to be a person skilled in the management of horses, was bound to take as much care of the horse as if he had borrowed it." Parke, B., thus explains the ruling:[3] "The whole effect of what was said by the learned judge as to the distinction between this case and that of a borrower was this: that this particular defendant, being in fact a person of competent skill, was in effect in the same situation as that of a borrower who in point of law represents to the lender that he is a person of competent skill. In the case of a gratuitous bailee, where his profession or situation is such as to imply the possession of competent skill, he is equally liable for the neglect to use it." That is, a gratuitous bailee, with competent skill, is required to use the skill he has; but a borrower is required to have competent skill; for, as Alderson, B., puts it in the same case, "the party bargains for the use of competent skill, which here becomes immaterial, since it appears that the defendant has it."

Wilson v. Brett.

Onus if loan not returned.

The *onus* of proof lies on the borrower, if the thing is not returned on a loan to use; for the borrower must account satisfactorily for the loss or pay the value.[4]

Borrower not an insurer.

Though the diligence required from a borrower is exact, he is not an insurer. The article lent is subject to the kind and mode of use for which it is designed; and the risk of such losses as are fairly incident thereto is with the owner, unless the bailee has failed in any particular of his duty with regard to it. *Beller* v. *Schultz*[5] illustrates this. The owner of a flag lent it to be hoisted on the bailee's building, and, having assisted to hoist it, left it flying when he went away; the flag was afterwards injured by a hailstorm. The Court held that the owner could not recover for the damage, on the ground that the thing lent was made on purpose to be used as a flag, and the propriety of exposing it in the situation in which it was injured could not be questioned by the plaintiff, as it was in substance his own act, and the bailment was not shown to have been abused.

Beller v. Schultz.

Two exceptions: (*a*) Where there is a special contract.

To the rule of diligence just stated there are two exceptions:

(*a*) Where there is a special contract; when the obligations of the bailment are, of course, determined by the terms of it. To this head may be referred a case put by Story:[6] "If the lender is aware of the incapacity of the borrower, he has no right to insist upon such rigorous diligence. He has a right to insist on that degree of diligence only which belongs to the age, the character, and the known habits of the borrower." A

1 9 C. & P. 383. 2 11 M. & W. 113. 3 *Lc.* 115.

4 *Bain* v. *Strang*, 16 Rettie, 186; *Sutherland* v. *Hutton*, 23 Rettie, 718; Pothier, Prêt à Usage, n. 40 *et seqq.* If the article perish through neglect or imprudent conduct, the borrower must pay the value: *Niblett* v. *White's Heirs*, 7 La. Rep. 253, the case of borrowing a slave. See *post*, Carriers for Hire. 5 38 Am. R. 280. 6 Bailm. § 237.

loan in these circumstances would seem to be in the nature of a contract, made with reference to the peculiarities of age, character, and habit of the borrower. Thus, the loan of a valuable horse to a notoriously reckless rider would be on special terms applicable to such rider.

(*b*) Where the loan is not for the benefit of the borrower alone; for, if it is for the mutual benefit of the borrower and lender, only ordinary diligence is required.[1]

(*b*) Where the loan is for the mutual benefit of borrower and lender.

The borrower is exempted from liability for losses by inevitable accident or the act of God. Still there must be no default on the part of the borrower, otherwise his responsibility remains.[2] So it does if he is guilty of fraud *vel suppressione veri vel allegatione falsi*.[3]

In the case of a conflict of duty, as where the borrower's goods and the goods borrowed are both jeopardised by fire in circumstances where one set of goods can be saved, though not both, Story,[4] differing from Pothier[5] and Sir William Jones,[6] considers the true test of liability to be, whether there is any negligence in not saving the borrowed goods; and whether there is any superior duty of the borrower to save them and sacrifice his own. By superior duty the learned commentator, of course, means a duty arising out of the facts and circumstances, which would be the proper material for the inferences of a jury, and not a general duty by law, the existence of authority to support which he denies.

Conflict of duty.

Another controversy under this head of law is whether, in the case of a valued loan, or where the goods are estimated at a certain price, the borrower must be considered as bound in all events to restore either the things lent or the value.[7] Story is of opinion[8] that at common law the solution turns wholly on the construction of the words of the particular contract. The mere estimation of a price will not settle the point, whether the borrower takes upon himself every peril, or any additional perils beyond those provided for by the common rules of law; for it will be considered as a mere precaution to avoid dispute in case of a loss, unless some circumstances raise a presumption that the parties intend something more.[9]

On what principle compensation is fixed in case of loss.

(2) The obligation of the borrower is to use the loan according to the expressed or known intention of the lender.

(2) The borrower to use the loan according to the intention of the lender.

This use is strictly confined to what is expressed or implied in the particular transaction. The illustration of this given by Sir William Jones[10] is: "If William, instead of coming to London, for which purpose the horse was lent, go towards Bath, or, having borrowed him for a week, keep him for a month, he becomes responsible for any accident that may befall the horse in his journey to Bath, or after the expiration of the week."[11]

[1] Bailm. § 237.
[2] Jones, Bailm. 67, 68, 69, 104, 105.
[3] Jones, Bailm. 70.
[4] Story, Bailm. § 249 b.
[5] Prêt à Usage, 56. See *ante*, 745.
[6] Bailm. 69.
[7] The controversy has grown from two texts of the Roman law—one, D. 13, 6, 5, § 3: *Et si forte res æstimata data sit, omne periculum præstandum ab eo, qui æstimationem se præstaturum recepit*; the other, D. 19, 3, 1, § 1: *Æstimatio autem periculum facit ejus, qui suscepit; aut igitur ipsam rem debebit incorruptam reddere, aut æstimationem de qua convenit.*
[8] Bailm. § 273 a.
[9] The Code Civil, art. 1883, has settled that in such a case the loss shall be the borrower's if he can show no agreement to the contrary.
[10] Bailm. 68.
[11] Cp. 2 Lal. Raym. 915. The rule of the Roman law was, *Qui jumenta sibi commodata longius duxerit, aliendve re, invito domino, usus sit, furtum facit*: D. 47, 2, 40. In D. 13, 6, 23, the case is put of the horse being lent for a purpose for which it is unfit: *Si commodavero tibi equum, quo uti queris usque ad certum locum, si nulla culpa tua interveniente, in ipso itinere deterior equus factus sit, non teneris commodati; nam ego*

In Doctor and Student [1] the distinction is pointed between the case of the borrower of a horse riding by a ruinous house in manifest danger of falling; where, if the house fall and kill the horse, the lender is entitled to have the value; and the case of the house being in good condition and overthrown by a sudden tempest with the same result, when the borrower is held discharged.

If the borrower is put to any expense in using the thing, he must bear this himself; though any expense incurred upon the thing lent not arising out of his use of it, the borrower is entitled to be recouped by the lender.[2]

(3) The borrower must restore the thing lent in a proper condition.

(3) The obligation of the borrower is to restore the thing lent in a proper condition.[3]

This must be when demanded at the common law; for, as the bailment is merely gratuitous, the lender may terminate it whenever he pleases. If he does so unreasonably, and occasions injury or loss to the borrower thereby, the latter may, perhaps, have a suit for damages where the object of the bailment has been only partly accomplished and there has not been any laches of the bailee. If the bailee retains the thing, and a suit is brought by the lender, he may insist upon the unreasonableness of the demand or the injury to himself, and thus, perhaps, he may have brought whatever he has lost into account in the damages.

Is liable for all casualties resulting during his wrongful detention of the thing lent.

If the borrower do not on demand return the thing lent, he is responsible for all losses and injuries, and even for all accidents, subsequently resulting.[4]

But is not liable for the negligence of third persons not his agents.

In general the borrower's liability is limited to his own negligence or to that of persons for whom he is responsible.[5] So that, if loss arises from the wrongful act of a third person which the borrower could neither foresee nor prevent, he is not responsible; and his immunity is not lost if the deterioration is the result of the use he makes of the loan, provided that the use is reasonable and within the contemplation of the parties.[6]

Obligation of the lender set out by Coleridge, J.

The obligations of the lender are lastly to be considered. "It is surprising how little in the way of decision in our Courts is to be found in our books upon the obligations which the *mere* lender of a chattel for use contracts towards the borrower. Pothier, in his Traité du Prêt à Usage, to be found in the 4th volume of his works by Dupin, part 3, pp. 37 to 42, enters into the subject at some length; and Story also treats of it; Bailment, § 275. The principles, which these two writers draw mainly from the Roman law, may be the more safely relied on as being engrafted into the common law, considering that the whole of this

in culpa ero qui in tam longum iter commodavi, qui eum laborem sustinere non potuit. In the Roman law, if the borrower used the commodatum for a purpose other than that for which it was lent, he was liable to an *actio furti*: Inst. 4, 1, 6–8.

1 Dial. 2, c. 38. Jones Bailm., 68.

2 Story, Bailm. § 256. *Nam cibariorum impensæ . . . ad eum pertinent qui utendum accepisset*: D 13, 6, 18, § 2. *Quidquid in rem commodatam ob morbum, vel aliam rationem impensum est, a domino recipi potest*: Paulus, Sent. Rec. 2, 4, 1.

3 Story, Bailm. § 257. *Si reddita quidem sit res commodata, sed deterior reddita, non videbitur reddita, quæ deterior facta redditur, nisi quod interest, præstetur; proprie enim dicitur res non reddita, quæ deterior redditur*: D. 13, 6, 3, § 1.

4 Jones, Bailm. 70; Noy, Maxims, c. 43. He is liable to hand over all gains made by him by it, which are acquired by using the *commodatum* in a way not authorised by the contract: D. 13, 6, 13, § 1: *Si quem quæstum fecit is, qui experiendum quid accepit, velut si jumenta fuerint eaque locata sint, idipsum præstabit, qui experiundum dedit: neque enim ante eam rem quæstui cuique esse oportet, priusquam periculo ejus sit.*

5 Jones, Bailm. 68; 2 Kent, Comm. 576.

6 Pothier, Traité du Prêt à Usage, n. 38. Cp. D. 13, 6, 23.

branch of our law is so mainly built on the Roman, as the judgment in *Coggs* v *Bernard*[1] demonstrates. It may, however, we think, be safely laid down that the duties of the borrower and lender are, in some degree, correlative. The lender must be taken to lend for the purposes of a beneficial use by the borrower; the borrower, therefore, is not responsible for reasonable wear and tear; but he is for negligence, for misuse, for gross want of skill in the use; above all, for anything which may be qualified as legal fraud. So, on the other hand, as the lender lends for beneficial use, he must be responsible for defects in the chattel, with reference to the use for which he knows the loan is accepted, of which he is aware, and owing to which directly the borrower is injured. *Adjuvari quippe nos, non decipi, beneficio oportet*, is the maxim which Story borrows from the Digest; and Pothier is express to the same effect, citing, as Story does also, the instance, *Qui sciens vasa vitiosa commodavit, si ibi infusum vinum, vel oleum corruptum effusumve est, condemnandus eo nomine est.* This is so consonant to reason and justice that it cannot but be part of our law. Would it not be monstrous to hold that, if the owner of a horse, knowing it to be vicious and unmanageable, should lend it to one who is ignorant of its bad qualities, and conceal them from him, and the rider, using ordinary care and skill, is thrown from it and injured, he should not be responsible? The principle laid down in *Coggs* v. *Bernard*,[2] and followed out by Lord Kenyon and Buller, J., and by Lord Tenterden in the *Nisi Prius* cases cited in the note,[3] that a gratuitous agent or bailee may be responsible for gross negligence or great want of skill, gets rid of the objection that might be urged from want of consideration to the lender. By the necessarily implied purpose of the loan a duty is contracted towards the borrower not to conceal from him those defects known to the lender which may make the loan perilous or unprofitable to him."[4]

Coleridge, J.'s view was adopted in *Coughlin* v. *Gillison*.[5] Knowledge of the defect in the article lent must be brought home to the lender before any right of the borrower to recover can arise. If there are any defects in the article known to the lender it is his duty to communicate them to the borrower, and if either deliberately or by gross negligence[6] he fails to do so he is liable for injury resulting to the borrower. The doctrine of Dalloz[7] that the lender's liability arises when there is in fact a latent defect which he ought to have known and disclosed "is not consonant with English law."[8]

[1] 2 Ld. Raym. 909; 1 Sm. L. C. (11th ed.), 173; but see Holmes, The Common Law, 180 *et seqq.*

[2] 2 Ld. Raym. 909.

[3] *I.c.*, in 1 Sm. L. C. (4th ed.) 163; citing *Wilkinson* v. *Coverdale*, 1 Esp. (N. P.) 75; *Beauchamp* v. *Powley*, 1 Moo. & Rob. 38; *Doorman* v. *Jenkins*, 2 A. & E. 256; *Collett* v. *L. & N. W. Ry. Co.*, 16 Q. B. 984.

[4] *Blakemore* v. *Bristol and Exeter Ry. Co.*, 8 E. & B., per Coleridge, J., 1050, discussed per Cotton, L.J., *Heaven* v. *Pender*, 11 Q. B. D. 516. Most of the passage extracted in the text is quoted by Wilde, B., delivering the judgment of the Court of Exchequer, in *MacCarthy* v. *Young*, 6 H. & N. 336. See per Willes, J., *Indermaur* v. *Dames*, L. R. 1 C. P. 286. There is a case given in the civil law that may be noted. *Si rem inspectori dedi, an similis sit ei, cui commodata est quæritur. Et si quidem mea causa dedi, dum volo pretium exquirere, dolum mihi tantum præstabit. Si sui, et custodiam: et ideo furti habebit actionem. Sed et si dum refertur, periit, si quidem ego mandaveram per quem remitteret periculum meum erit. Si vero ipse cui vendit, commisit, neque mihi culpam præstabit, si sui causa accepit. Qui non tam idoneum hominem elegerit ut recte id perferri posit. Si mei causa dolum tantum:* D. 13, 6, 10, § 1, 11, 12.

[5] (1899) 1 Q. B. 145.

[6] Pothier, Traité du Prêt à Usage, 80–84.

[7] Jurisprudence Générale, Supplément, vol. xiii. 614.

[8] Per Rigby, L.J., [1899] 1 Q. B. 149.

IV. Pawn or Pledge.[1]

Of the kinds of bailments we have so far considered, deposit and mandate come under Story's first class—those in which the trust is exclusively for the benefit of the bailor or of a third person; while a gratuitous loan for use is to be referred to the second class, in which the bailment is exclusively for the benefit of the bailee. The bailment of pawn or pledge is referred to his third class—where the trust is for the benefit of both parties, or of both or one of them and a third party.

Third class—Where the trust is for the benefit of both parties. Pawn—definition.

A pawn, says Sir William Jones, is "a bailment of goods by a debtor to his creditor to be kept by him till his debt is discharged."

The contract of pledging, says Kent,[2] is "a bailment or delivery of goods by a debtor to his creditor, to be kept till the debt be discharged; or, to use the more comprehensive definition of Story, it is a bailment of personal property, as security for some debt or engagement."[3]

The term "pledge" is used indifferently to denote the contract and the property which constitutes the security.

Pledge is the *pignus* of the Roman law;[4] and it is from this source that most of the principles governing the subject are derived.

What may be the subject of pawn.

All kinds of personal property that are vested and tangible, and also negotiable paper, may be the subject of pledge; and *choses in action*, resting on written contract, may be assigned in pledge.[5] It is not necessary that the pledge should belong to the pledgor; it is sufficient if it is pledged with the consent of the owner,[6] or if the pledgor have an interest in it.[7]

By the civil law.

In the civil law certain things, such as the necessary apparel and

1 There is a history of pawnbroking in Beckmann, History of Inventions, vol. iii. (2nd ed., 1814), 11, under the title Lending Houses. See 2 Bell. Comm. (7th ed.), 19, where the law of pledge is briefly, that of hypothec, fully treated. The terms pawn and pledge, pledgor and pledgee, pawnor and pawnee, are used interchangeably throughout the pages that follow on the subject of pawnor or pledge.

2 2 Comm. 578. Turner, The Contract of Pawn (2nd ed.), has a chapter, 25–30, on the definition of pawn.

3 § 286. Cp. *Isaack* v. *Clark*, 2 Bulst. 306.

4 *Pignus*, in the civil law, is one of the three *jura in re aliena, superficies, emphyteusis,* and *pignus*, which are not reckoned amongst servitudes. The doctrines of the civil law are to be found in the titles, *De pignoribus, et hypothecis, et qualiter ea contrahantur, et de pactis eorum*, D. 20, 1, and the five following titles; in the title *De pigneratitia actione vel contra*, D. 13, 7; and see Pothier, Pandects, lib. 20, tit. 1–6. *Pignus est quod propter rem creditam obligatur, cujusque rei possessionem solum ad tempus consequitur creditor, ceterum dominium penes debitorem est:* Isidor, Etymologarium, lib. v. 22. *Proprie pignus dicimus, quod ad creditorem transit; hypothecam cum non transit, nec possessio ad creditorem:* D. 13, 7, 9, § 2. *Pignus appellatum a pugno; quia res quæ pignori dantur manu traduntur; unde etiam videri potest, verum esse, quod quidam putant, pignus propriæ rei mobilis constitui:* D. 50, 16, 238. See Maynz, Éléments de Droit Romain, vol. ii. 279; Du contrat de gage Pignus; Pothier, Traité du Contrat de Nantissement, n. 5. The civil law is, however, not wholly consistent with the foregoing definition; it says: *Pignus contrahitur non sola traditione, sed etiam nuda conventione, etsi non traditum est. Si igitur contractum sit pignus nuda conventione, videamus, an si quis aurum ostenderit, quasi pignori daturus, et æs dederit, obligaverit aurum pignori? Et consequens est ut aurum obligetur, non autem æs; quia in hoc non consenserint:* D. 13, 7, 1, § 1. This does not appear to be the law of England: *Donald* v. *Suckling*, L. R. 1 Q. B. 585.

5 2 Kent, Comm. 578, citing (*inter alia*) *Roberts* v. *Wyatt*, 2 Taunt. 268. See an article on the pledge of shares in Joint Stock Companies, Law Mag. (1838) vol. xix. 389.

6 Story, Bailm. § 291.

7 *Donald* v. *Suckling*, L. R. 1 Q. B. 585. The general rule applicable to such cases is that of the Civil Law: *Nemo plus juris ad alium transferre potest quam ipse haberet:* D. 50, 17, 54. *Non plus habere creditor potest, quam habet, qui pignus dedit:* D. 20, 1, 3, § 1. Pothier, Traité du Contrat de Nantissement, n. 27. Code Civil, art. 2279, *et seqq.*

furniture, heds, utensils, and tools of the debtor, his ploughs and other utensils for tillage, the pension or bounty of the monarch, and the pay and emoluments of officers and soldiers were not allowed to he pawned.[1]

By the common law the pay—whether full or half pay—of soldiers and sailors is exempted.[2] By statute there are a variety of exceptions for different purposes,[3] tbe detailed consideration of which is remote from the suhject of negligence. By the common law.

The rules applicahlo to contracts generally determine the capacity of persons to enter into the contract of pawn.[4] Capacity to enter into the contract of pawn.

The duty of the pledgor hy the civil law is : Duty of pledgor by the civil law.

(1) To indemnify the pledgee against all liahilities which he incurs in trying to sell the property at the best price.[5]

(2) To deliver up the pledge when required for salo if it has been left in his hands on hire or as a *precarium*.[6]

(3) In some cases to pay compensation, *e.g.*, when he has pledged a *res aliena*.[7]

The duty of the pledgee is : Duty of the pledgee by the civil law.

(1) To return the property pledged when the pledge is determined.[8]

(2) To give up to the pledgor all fruits derived from the pledge, or to deduct their value from the amount of the deht.[9]

(3) To answer for any negligence in the custody of the pledge, and if it has been sold, to account for anything received heyond principal and interest.[10]

The duty of the pledgee to the pledgor by English law is expressed in a sentence by Blackburn, J.:[11] "In general, all that the pledgor requires is the personal contract of the pledgee that on hringing the money the pawn shall he given up to him, and that in the meantime the pledgee shall he responsihle for due care heing taken for its safe custody." Duty of the pledgee to the pledgor by the English law.

The common law draws a distinction hetween a mortgage and a pledge. By a mortgage the whole legal title passes to the mortgagee, suhject to be divested on a contingency. By a pledge[12] only a special property passes while the general property remains in the pledgor,[13] or, as it is expressed in *Casey* v. *Cavaroc*:[14] "The difference ordinarily Distinction between mortgage, pledge, hypothecation, and lien.

[1] Domat, bk. 3, tit. 1, § 1, arts. 24–27.

[2] *McCarthy* v. *Goold*, 1 Ball & Beat. (Ir.) 387; *Barwick* v. *Reade*, 1 H. Bl. 627; *Liddendale* v. *Montrose*, 4 T. R. 248, where an action by the assignee against the assignor on his covenant is suggested. Cp. *Lucas* v. *Harris*, 18 Q. B. D. 127; followed *In re Saunders*, [1895] 2 Q. B. 117, and considered in C. of A. 424; *Crowe* v. *Price*, 22 Q. B. D. 429.

[3] See them cited, Turner, Contracts of Pawn (2nd ed.), pp. 41–44.

[4] Pollock, Contracts (7th ed.), 52.

[5] D. 13, 7, 22, § 4.

[6] D. 13, 7, 22, § 3. As to *precarium*, see Hunter, Roman Law (3rd ed.), 380.

[7] D. 13, 7, 1, § 2.

[8] D. 13, 7, 9, § 3; D. 13, 7, 20, § 2; D. 13, 7, 40, § 2.

[9] D. 13, 7, 22, pr.; Code 4, 24, 1; Codo 4, 24, 3. In the case of an estate or building an agreement might be made that the creditor *eo usque retinet possessionem pignoris loco, donec illi pecunia solvatur, cum in usuras fructus percipiat, aut locando, aut ipse percipiendo habitandoque*: D. 20, 1, 11, § 1. This was called *antichresis, id est mutuus pignoris usus pro credito*; as to which see Domat, bk. 3, tit. 1, § 1, art. 28.

[10] Moyle, Just. Inst. 3, 14, 4.

[11] *Donald* v. *Suckling*, L. R. 1 Q. B. 615.

[12] A mere pledge of chattels personal, though in writing, need not bear a mortgage stamp: *Harris* v. *Birch*, 9 M. & W. 591; *In re Attenborough and the Commissioners of Inland Revenue*, 11 Ex. 461. See what is said of *Harris* v. *Birch* in *Sewell* v. *Burdick*, 10 App. Cas., per Lord Selborne, C., 80.

[13] *Ryall* v. *Rowles*, 2 Wh. & T. L. C. in Eq. (6th ed.), 799; 4 Kent, Comm. 138; Story, Bailm. § 287. In the Roman law, however, *inter pignus autem et hypothecam tantum nominis sonus differt*: D. 20, 1, 5, § 1. See 2 Spence, Eq. Jur. 771.

[14] 96 U. S. (6 Otto) 467, 477.

recognised between a mortgage and a pledge is, that title is transferred by the former, and possession by the latter."

Hypothecation.

Hypothecation is where a pledge is held without possession by the pledgee.[1] The power of a master to bind a ship, says Lord Hardwicke, is called hypotheca, yet there is no delivery of possession.[2] In the common law, says Story,[3] the nearest approach to an hypothecation is found in the cases of holders of bottomry bonds,[4] of material men, and of seamen for wages in the merchant service, who have a claim against the ship *in rem*.

Pledge and lien distinguished.

Lastly, a pledge differs from a lien in that a lien does not convey the right to sell, which attaches to a pawn when redeemable at a day certain or after notice,[5] but only to retain till the debt in respect of which the lien was created has been satisfied.[6]

Pledge requires possession.

Possession is of the essence of a pledge, and if possession be once given up, the pledge as such is extinguished.[7] This possession need not be actual, and may be merely constructive; as where the key of a warehouse containing the goods pledged is delivered, or a bill of lading is assigned.[8] There are cases where constructive delivery draws with it a transfer of the property; as, for instance, the assignment of a bill of lading which is necessary to give constructive possession, yet which transfers the title also. The effect of this is to unite two different forms of security—mortgage and pledge. There is a mortgage by virtue of the title, a pledge by virtue of the possession. The same is the case with the transfer of notes and bills.

Effect of temporary resumption of possession by the owner for a special purpose.

A re-delivery for a mere temporary purpose, as for shoeing a horse which has been pledged and is owned by the farrier, or for repairing a carriage which has been pledged and is owned by the carriage-maker, does not amount to an interruption of the pledgee's possession. The owner is but a mere special bailee for the creditor.[9] The possession of the pledge remains in the eye of the law in the pledgee, although actually delivered back to the pledgor.[10] Thus when the debtor who

1 D. 13, 7, 9, § 2, *supra*, 776, note 4; Inst. 4, 6, 7.

2 *Ryall* v. *Rowles*, 2 Wh. & T. L. C. in Eq. (6th ed.), 810. *Sewell* v. *Burdick*, 13 Q. B. D., per Bowen, L.J., 175; 10 App. Cas. per Lord Blackburn, 95.

3 Bailm. § 288.

4 *The Gratitudine*, 3 C. Rob. (Adm.) 240, Tudor, L. C. Mere. Law (3rd ed.), 34.

5 *Tucker* v. *Wilson*, 1 P. Wms. 261; in H. L. 5 Bro. P. C. 193, *sub nom. Wilson* v. *Tooker*. *Post*, 781.

6 "A lien is a personal right, and cannot be transferred to another": per Buller, J., *Daubigny* v. *Duval*, 5 T. R. 606. See also *M'Combie* v. *Davies*, 7 East, per Lord Ellenborough, 6; *Mulliner* v. *Florence*, 3 Q. B. D. 484; *Jones* v. *Pearle*, 1 Str. 557; where it was held that, except by the custom of London, an innkeeper has no right to sell horses on which he has a lien for their keeping. In *Lickbarrow* v. *Mason*, 6 East, 27, Buller, J., having distinguished the owner of goods from one having a lien on them, says: "he who has a lien only on goods has no right so to do [*i.e.*, sell or dispose of the goods as he pleases]; he can only retain them till the original price be paid."

7 Pothier, De Nantissement, n. 8. "Possession," says Erle, C.J., *Martin* v. *Reid*, 11 C. B. N. S. 735, "is an equivocal term; it may mean either actual manual possession or the mere right of possession." See 2 Kent, Comm. 581, with Mr. Holmes's note to 12th ed., Pledge.

8 *Pignus manente proprietate debitoris, solam possessionem transfert ad creditorem: potest tamen et precario et pro conducto debitor re sua uti:* D. 13, 7, 35, § 1. *Si pignus mihi traditum locavsem domino, per locationem retineo possessionem: quia, antequam conduceret debitor, non fuerit ejus possessio; eam et animus mihi retinendi sit, et conducenti non sit animus possessionem apiscendi:* D. 13, 7, 37. For a series of French decisions on the proposition that possession by the creditor is not incompatible with a certain co-operation of the debtor for the conservation of the pledgor, see *Casey* v. *Cavaroc*, 96 U. S. (6 Otto) 467. *Babcock* v. *Lawson*, 5 Q. B. D. 284, is a case of possession obtained by fraud of the pledgor. *Nash* v. *De Fréville*, [1900] 2 Q. B. 72.

9 *Casey* v. *Cavaroc*, 96 U. S. (6 Otto) 467; 2 Bell, Comm. (7th ed.) 22.

10 *North Western Bank* v. *Poynter, Son & Macdonalds*, [1895] A. C. 56. The law

is also the pledgor, is employed in the service of the creditor, who is at the same time the pledgee, the pledgor's temporary use of the pledged article in the pledgee's business, does not effect a restoration of the possession to the pledgor. This is very clearly put in *Reeves* v. *Capper*.[1] Wilson, captain of a ship, pledged his chronometer, then in the possession of the makers, to defendants, the owners of the ship, in consideration of their advancing him £50, and allowing him the use of the instrument during a voyage on which he was about to depart. After the voyage he placed it at the makers, and while there pledged it to plaintiff, for whom the makers, being ignorant of the pledge to defendants, agreed to hold it. The money advanced by defendants not having been repaid, it was held that the property in the instrument was in the defendants, the shipowners. Tindal, C.J., thus explains the principle applicable: "We agree entirely with the doctrine laid down in *Ryall* v. *Rolle*,[2] that in the case of a simple pawn of a personal chattel, if the creditor parts with the possession he loses his property in the pledge; but we think the delivery of the chronometer to Wilson under the terms of the agreement itself was not a parting with the possession, but that the possession of Captain Wilson was still the possession of Messrs. Capper"; "just as the possession of plate by a butler is the possession of the master; and the delivery over to the plaintiff was, as between Captain Wilson and the defendants, a wrongful act, just as the delivery over of the plate by the butler to a stranger would have been; and could give no more right to the bailee than Captain Wilson had himself."[3]

Reeves v. Capper.

A delivery to the pledgor with a power of substituting (where the debtor is in possession) other securities is not such a delivery as will prevail against the rights of third persons. The presumption of law is that those who deal with the pledgor do so on the faith of his being the unqualified owner of the goods. Bad faith will thus defeat a pledge, though coupled with possession; yet want of possession is equally fatal, though the parties have acted in good faith. To constitute a valid pledge, both possession, and possession in good faith, are requisite.[4]

Delivery with power of substituting other securities.

Delivery, we have seen, is essential to the constitution of a pledge; and may be effected without physical change of the possession of the goods.[5]

Delivery effected without physical change of possession.

of Scotland is the same. According to the law of Scotland, to constitute a valid pledge of movables, there must be a delivery of them to the pledgee. A joint possession is not enough. When the movables intended to form the subject of the security are stored in the premises of the pledgee, a simple averment of possession by the pledgee is insufficient. An allegation must be made that these goods were placed in a particular room, that the door had then been locked, and the key given to the pledgee so as to show facts equivalent to an assertion of actual possession: *Mess* v. *Hay*, [1899] A. C. 233, 240.

[1] 5 Bing. N. C. 136. See *Bateman* v. *Green*, Ir. R. 2 C. L., per O'Brien, J., 191; in Ex. Ch., per Monahan, C.J., 611, affd. H. L. June 18, 1872 (not reported), *sub nom. London Financial Association Ltd.* v. *Bateman*. [2] 1 Atk. 165.

[3] By the civil law, where property is already in the hands of the pledgee, as on a loan or on deposit, a species of tradition known as *brevis manus* is feigned, the effect of which is that the pledgee is taken to have yielded up his possession by way of loan or deposit, and simultaneously to have received it again as pledge: Pothier, Traité du Contrat de Nantissement, n. 8.

[4] *Casey* v. *Cavaroc*, 96 U. S. (6 Otto) 490. "The requirement of possession is an inexorable rule of law, adopted to prevent fraud and deception; for, if the debtor remains in possession, the law presumes that those who deal with him do so on the faith of his being the unqualified owner of the goods."

[5] *Mills* v. *Charlesworth*, 25 Q. B. D. 421; *Grigg* v. *National Guardian Insurance Co.*, [1891] 3 Ch. 206.

Till possession is given the intended pledgee has only a right of action on the contract and no interest in the thing itself.[1] Constructive or symbolical delivery of possession is, however, sufficient when actual possession cannot be given.[2] By the civil law, a contract to deliver operated on the property; and property of which a man had neither a present possession not a present title, and which might be acquired by him *in futuro*, might be the subject of a valid pledge, and the same principle applies in the English law.[3]

Incidents of pawn.

A pawn may be sold to defray the debt for which it is a security,[4] subject to certain restrictions; if the pledge is for an indefinite time the pawnor has his whole lifetime in which to redeem,[5] unless the creditor exercises his right of calling on the pledgor to redeem, which he may do by giving him reasonable notice to redeem on a certain day; then, if, after a proper demand and notice,[6] he fail to redeem, the pledgee may sell the pledge.[7] If he dies without such call being made, the right to recover descends to his personal representatives.[8] When the pawn is for a stipulated time, and the debt is not paid at the time, the absolute property does not pass to the pledgee. At the expiration of the time stipulated for, he has his right to sell; if he does not exercise this right he retains the property as a pledge, and upon a tender of the debt he may at any time be compelled to restore it (for the Statute of Limitations does not apply to the case of a pawn [9]), because the creditor holds not in his own but in another's right.[10] It follows that if the creditor puts up the pawn for sale and purchases it himself, the pledgor has a right to treat the sale as invalid.[11] The sale being voidable merely, there must be some period within which the pledgor must make his election to avoid it or not. He will not be allowed to wait and to speculate upon the changes of the market; his intention will have to be declared with reasonable promptitude;[12] and this is a matter which the Court will supervise.

The principle has been extended to the mortgagee of shares where, though no power of sale is expressly given, one has been implied on default by the mortgagor at the time named for payment; or if no time has been named after the expiration of the time specified in a reasonable notice requiring payment on a named day.[13]

1 *Howes* v. *Ball*, 7 B. & C. 481.

2 Per Bowen, L.J., *Burdick* v. *Sewell*, 13 Q. B. D. 174. For what is constructive delivery, *Hilton* v. *Tucker*, 39 Ch. D. 669. See also *Donald* v. *Suckling*, L. R. 1 Q. B. per Blackburn, J., 613.

3 D. 20, 1, 15. *Holroyd* v. *Marshall*, 10 H. L. C. 191.

4 *Pothonier* v. *Dawson*, Holt (N. P.), per Gibbs, C.J., 385; *Burdick* v. *Sewell*, 10 Q. B. D., per Field, J., 367; *Ex parte Hubbard*, 17 Q. B. D., per Bowen, L.J., 698.

5 *Kemp* v. *Westbrook*, 1 Ves. Sen. 278; *Cortelyou* v. *Lansing*, 2 Caines (Cases in Error), 200; *Garlick* v. *James*, 12 Johns. (Sup. Ct. N. Y.) 146. As to the benefit of a bonus, *Vaughan* v. *Wood*, 1 My. & K. 403.

6 *Pigot* v. *Cubley*, 15 C. B. N. S., 701: a notice demanding payment of an excessive sum has been held bad.

7 *Deverges* v. *Sandeman, Clark & Co.*, [1902] 1 Ch. 579.

8 See the authorities reviewed by Kent, J., in *Cortelyou* v. *Lansing*, 2 Caines (Cases in Error), 200.

9 *Kemp* v. *Westbrook*, 1 Ves. Sen. 278; *Cage* v. *Bulkeley*, Ridg. Cas. temp. Hard. 278. It would seem that the pawnor may be debarred by acquiescence: *Jones* v. *Higgins*, L. R. 2 Eq. 538. See *Spears* v. *Hartly*, 3 Esp. (N. P.) 81.

10 D. 41, 3, 13, pr.: *Pignori rem acceptam usu non capimus; quia pro alieno possidemus.*

11 *Henderson* v. *Astwood*, [1894] A. C. 150.

12 *Hayward* v. *National Bank*, 96 U. S. (6 Otto) 611; *Hill* v. *Finigan*, 11 Am. St. R. 270.

13 *Deverges* v. *Sandeman, Clark & Co.*, [1902] 1 Ch. 579.

An equitable mortgage by deposit of deeds, we may here note, does not involve a pawn of the deeds; if it did "the equitable mortgagee would have not merely the right to hold the deeds until his debt was paid, but also the right to sell those deeds"—an absurd conclusion.[1]

Pawn a collateral security.

The pawn is only a collateral security. After the debt is due, and without selling the pawn,[2] the pawnee may proceed personally against the pawnor for his debt.

How pawn may be realised.

If the pawnee prefer to assert his right in the pawn, he may do so in one of two ways. He may either commence proceedings in Chancery and obtain a decree of foreclosure—and this has frequently been done in the case of stocks, bonds, plate, and other chattels pledged for the payment of the debt; or he may sell without judicial process, upon giving reasonable notice to the debtor to redeem. But the pawnee cannot be compelled to sell, except by process in equity;[3] nor, according to an American case,[4] if the subject of the pledge is divisible, may he sell more than is necessary to satisfy his debt.

Pawnor may sell his interest in the pawn at any time.

The pawnor can, at any time while the pawn remains with the pawnee, sell his interest in the pawn, subject, of course, to the rights of the pawnee;[5] for he continues to have a property in the article pledged that he can convey to a third person, though he has no right to the goods without paying off the debt. Until the debt is paid off the pawnor has no present interest. Even before the Judicature Acts an assignment by the pawnor gave to the assignee the full rights of the pawnor both in law and equity.[6] If, however, a tenant for life pawns plate, on his death with the pawn unredeemed, the pawnbroker has no right to it as against the remainder-man, although the pawnbroker has no notice of any settlement.[7]

When pawnor can maintain trover.

The contract of pledge being only collateral to the contract to pay the debt, the promise is to return the property pledged when the debt is paid. The pawnee accordingly can maintain an action for money lent, even after he has converted the property pledged by an unlawful sale; and if the defendant plead this in set-off,[8] can recover the amount of the debt, less the amount realised by the sale. Therefore, if the lien created by the pawn has not been discharged, to enable the pawnor to maintain trover for a conversion of property pledged, a tender of payment of the debt is requisite. Though the point has never definitely been decided, the inclination of opinion seems to be to require a tender good at common law.[9]

Tender of payment of debt requisite.

1 *In re Richardson*, 30 Ch. D., per Fry, L.J., 403.
2 *Dobree* v. *Norcliffe*, 23 L. T. (N. S.) 552; *Jones* v. *Marshall*, 24 Q. B. D. 269.
3 Story, Bailm. § 320.
4 *Fitzgerald* v. *Blocher*, 29 Am. R. 3.
5 *Tucker* v. *Wilson*, 1 P. Wms. 261, in H. L. *sub nom. Wilson* v. *Tooker*, 5 Bro. P. C. 193; *Lockwood* v. *Ewer*, 2 Atk. 303; 2 Kent Comm. 581; Story, Bailm. §§ 308, 310, 314, 315, 316, 318, 319; Turner, Pawns (2nd ed.), 169, 170. Under the Code Civil, art. 2078, a judicial order is required as in the case of an English mortgage of land.
6 *Kemp* v. *Westbrook*, 1 Ves. Sen. 278; *Franklin* v. *Neate*, 13 M. & W. 481.
7 *Hoare* v. *Parker*, 2 T. R. 376.
8 *Fay* v. *Gray*, 124 Mass. 500.
9 *Cumnock* v. *Newburyport Savings Institution*, 142 Mass. 342, where the authorities are reviewed. "A conditional tender is not an effectual tender in law, but a tender under protest is quite right. A man has a right to tender money reserving all his rights, and such a tender is good provided he does not seek to impose conditions": per Bowen, L.J., *Greenwood* v. *Sutcliffe*, [1892] 1 Ch. 11. "I take it to be clear beyond a doubt, that if the debtor tenders a larger sum of money than is due, and asks for change, this will be a good tender, if the creditor does not object to it on that account, but only demands a larger sum": per Lord Kenyon, C.J., *Black* v. *Smith*, Peake (N. P.), 89; see also *Cole* v. *Blake*, Peake (N. P.) 180. Tender by cheque was held good in *Jones* v. *Arthur*, 8 Dowl. P. C. 442. A receipt was asked for, but the cheque was returned and a demand made for a larger sum. No objection was made on the

Pawnee's unauthorised dealing with pawn.

If the pawnee deals with the pawn in an unauthorised manner, to the prejudice of the pawnor, he commits an actionable wrong.[1] But he does not (as bas been contended, on the analogy of a factor pledging goods entrusted to him at common law) invalidate his title, and render his possession of the goods wrongful[2]—so that the pledgor, witbout any tender of the debt may maintain an action for the whole value of the chattel without allowance for the special property.

Distinction between irregular dealings with pawn and inconsistent dealings.

The distinction between the case of a pawnee dealing irregularly with the pawn, and the case of a pawnee dealing with a pawn inconsistently, as by destroying it or selling it, has been pointed out by Blackburn, J., in *Donald* v. *Suckling*,[3] to be between "these cases where the act complained of is one wholly repugnant to tbe holding," and those cases "where the act, though unauthorised, is not so repugnnnt to the contract as to show n disclaimer."

In a Massacbusetts case [4] the question was raised wbether a pawn could be detainod for any otber debt than that for which it was made. Tbe weight of opinion, and also, it would seem, of reason, is against such a power of retention in the absence of agreement or such circumstances as make the retention of the pawn an inducement fostered by the borrower for further advances. Nevertheless, the rule of the civil law and the law of Scotland seem to permit this retention, or, at least, throw the *onus* on the pledgor of showing tbat the pledge was for a particular debt.[5]

Sale by pawnee.

If the pawnee sell, and there is a surplus, it belongs to the pawnor; if a deficiency, it is chargeable to the pawnor.[6]

Goods pawned exempt from distress.

Goods, says Williams, J., in *Swire* v. *Leach*,[7] entrusted to a "pawnbroker to be taken care of and dealt witb by him in the way of his trade, like goods deposited with a wharfinger to he kept,[8] or with an auctioneer for sale,[9] or beasts sent to a carcase-butcher to be slaughtered and dressed," [10] are privileged from distress for rent." The ground of this exemption is that they are delivered to him in tbe way of his trade, and his duty is "to keep safely all goods pledged with him, and to restore them on demand to the owner, on being paid the money he has advanced upon them, and interest."

Not liable to be taken in execution.

Goods pawned are not liable to be taken in execution in an action against the pawnor; at least until the sum for which they are pawned is paid.[11] Tbe converse case is of some interest—whether, in the case

score of the tender. Tender is considered at length in the American case, *Loughborough* v. *McNevin*, 5 Am. St. R. 435. See Bullen and Leake, Prec. of Plead. (3rd ed.) 693; *Birks* v. *Trippel*, 1 Wms. Saund. 33 d.

[1] *Lee* v. *Atkinson*, Yelv. 172.

[2] *Halliday* v. *Holgate*, L. R. 3 Ex. (Ex. Ch.) 299; *Mulliner* v. *Florence*, 3 Q. B. D. 484.

[3] L. R. 1 Q. B. 615.

[4] *Jarvis* v. *Rogers*, 15 Mass. 389. Cp. *First National Bank* v. *O'Connell*, 35 Am. St. R. 313, where the duty in regard to collateral securities is considered.

[5] 2 Bell, Comm. (7th ed.), 22, referring to 1 Bell, Comm. 725, where the principle is more plainly stated. The view expressed in the text is that of 2 Kent, Comm. 585. Code, 8, 27; Pothier, Traité du Contrat de Nantissement, n. 47, is clear as to the Roman law.

[6] *South Sea Co.* v. *Duncomb*, 2 Str. 919.

[7] 18 C. B. N. S. 493.

[8] *Thompson* v. *Mashiter*, 1 Bing. 283.

[9] *Adams* v. *Crane*, 1 C. & M. 380. This privilege is confined to goods on the auctioneer's premises for the purpose of sale; *Lyons* v. *Elliott*, 1 Q. B. D. 210.

[10] *Brown* v. *Shevill*, 2 A. & E. 138.

[11] Story, Bailm. § 353. Vin. Abr. Pawn (A), 3. Bro. Abr. Pledges, 28. *Rogers* v. *Kennay*, 15 L. J. Q. B. 381. *Stief* v. *Hart*, 1 N. Y. 20, which is cited in an editor's note to Story as contrary, is really a strong authority in favour of the proposition in the text; see judgment of Jewett, C.J., 28; of Gray, J., 36; of Wright, J., 39. The actual decision in that case turned on the modifications of the common law effected by the Revised Statutes of New York. Tho principle applied was that enunciated

of a pawn, the property can be levied on under an execution by a creditor of the pledgee. "The general rule of law," says Parke, B., in *Legg* v. *Evans*,[1] "is that the sheriff can seize only such things as he can sell." The particular case of which he was speaking was that of a lien. "It is clear, therefore," he continues, "that the sheriff cannot sell an interest of this description, which is a mere personal interest in the goods. The case is quite different from those referred to, in which goods were let on hire for a certain period, because there the person hiring has the absolute use of the goods for a particular term, and that interest may be disposed of." The question, then, resolves itself into an inquiry to which class a pledge belongs. Thus tested, there appears to be a property in the goods in the pawnee *to the extent of the amount* of the pawn, and subject to the repayment of the amount, which is analogous to the interest *to the extent of a time certain*, in the case of goods hired.[2] The conclusion, therefore, is that they may be taken in execution, subject to the pawnor's interest and right of redemption; and Northb, J., has held accordingly *In re Rollason, Halse's claim*.[3]

Statutory enactments.

So far we have considered the subject of pawns apart from statute. Various regulations, however, are made by the Pawnbrokers Act, 1872,[4] which applies to every loan by a pawnbroker of forty shillings or under, and to every loan by a pawnbroker of above forty shillings and not above ten pounds, except as in the Act is otherwise provided.[5] These regulations, very important with regard to the law of pawns, have no special reference to negligence, and may, therefore, safely here be thus slightly referred to.

Use of pawn by pawnee.

The questions, whether the pawnee may make use of the pawn in any and what circumstances, and what degree of care is to be exercised by him if he does use it, have been already considered with regard to Deposit,[6] and the conclusions there arrived at generally hold good here also; as Holt, C.J.,[7] explains, "because the pawn is in the nature of a deposit, and, as such, is not liable to be used. And to this effect is Owen, 123."[8]

Degree of diligence.

We now come to consider the degree of diligence imposed upon the pawnee in respect to the preservation of the pawn.

Holt, C.J., in *Coggs* v. *Bernard*.

As to this point, says Holt, C.J.,[9] "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 gratiâ, scilicet debitoris, quo magis ei pecunia crederetur, et creditoris quo magis ei in tuto sit creditum, sufficit ad ejus rei custodiam diligentiam exactam adhibere, quam si præstiterit et rem casu amiserit, securus esse possit nec impedietur creditum petere.*[10] In effect, if a creditor takes a pawn, he is bound to

in 1 Kent, Comm. 464: whenever a power is given by a statute everything necessary to the making of it effectual or requisite to attain the end is implied. *Quando lex aliquid concedit, concedere videtur et id, per quod devenitur ad illud.* Kent's rules for the interpretation of statutes, 1 Kent, Comm. 460–469, may with advantage be referred to. In 12 Co. Rep., Oath expressed before Justices, 131, the maxim is expressed *quando lex aliquid alicui concedit, conceditur et id sine quo res ipsa esse non potest.* Cp. per Parke, B., *Clarence Ry. Co.*, v. *Great North of England, &c. Ry. Co.*, 13 M. & W. 721; Craies, Statutes (4th ed.), 229.

[1] 6 M. & W. 41.

[2] 2 Kent, Comm. 578.

[3] 34 Ch. D. 495.

[4] 35 & 36 Vict. c. 93. By the Act there is nothing to exclude the common law right of the pawnbroker to recover whatever sum he may have advanced beyond the value of the pledge: *Jones* v. *Marshall*, 24 Q. B. D. 269.

[5] Sec. 10.

[6] *Ante*, 760. *Post*, 785.

[7] Ld. Raym. 917.

[8] *Mores* v. *Conham*.

[9] Ld. Raym. 917.

[10] This is almost in the words of the Institutes, 3, 14, 4. *Venit autem in actione*

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 wrongdoer, 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 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."

Responsibility for theft.

Under this head, Sir William Jones discusses the question how far theft, as contradistinguished from robbery, is a valid excuse for bailees; a point we have already considered under Deposit.[1] The conclusion there reached that theft is not in itself evidence of negligence, though the circumstances may infer negligence is good also here.[2] A pawnee who is not negligent is not liable for the theft of his servant.[3]

Pawnee liable for non-feasance as well as for misfeasance.

The pawnee is liable for negligence by omission as well as by commission. For he is bound actively to do everything that is expected of a prudent man and necessary for the preservation of the pledge.[4] "He is not, therefore, less liable if by his neglect he suffers a mirror which is pawned to him to be ruined or lost, than he would be if he had broken it by an improper use or even by a mere wilful act." A person holding property or securities in pledge occupies the relation of trustee for the owner, and is bound to proceed as a prudent owner would with his own. Therefore, it is said when a promissory note is pledged, the pledgee must collect it at maturity, and is not entitled to sell it.[5] This language of an American case is perhaps not unexceptionable if the working standard of English law is applied, where, whatever the theory, the degree of care required of trustees is greater than what an ordinary prudent owner is expected to attain with his own property—

et dolus et culpa, ut in commodato; venit et custodia: vis major non venit. Ea igitur quæ diligens paterfamilias in suis rebus præstare solet, a creditore exiguntur: D. 13, 7, 13, § 1, 14. *Sed videndum est, ne et culpa præstanda sit: ut ita culpæ fiat æstimatio, sicut in rebus pignori datis et dotalibus æstimari solet:* D. 13, 6, 18. Jones, Bailm. 75. See Theobald's note (37).

[1] *Ante*, 748.

[2] See 2 Kent, Comm. 580; Bro. Abr. Bailment, 7, on the authority of the case cited by Holt, C.J. *supra*, from Lib. Ass. 29, E. III. pl. 28; *White's case*, Dyer, 158 b; *Vere* v. *Smith*, 1 Vent. 121; *Clarke* v. *Earnshaw*, Gow (N. P.), 30.

[3] *Armfield* v. *Mercer*, 2 Times L. R. 764. Cp. Vin. Abr. Pawn (G), Lost or Damaged; Com. Dig. Mortgage (A), Mortgage by Pledge of Goods.

[4] Story, Bailm. § 342, adopting the illustration used by Pothier, Traité du Contrat de Nantissement, n. 33. In n. 34, treating of the degree of care exacted of the pawnee, Pothier says: *On ne doit pas exiger de lui exactissimam diligentiam, dont peu de personnes sont capables, et il n'est tenu que de la faute qu'on appelle legire, de levi culpa; il n'est pas tenu de levissimâ culpâ.* And at the end of the section he adds: *et qu'au contraire les autres contrats parmi lesquels le contrat de nantissement est rapporté, ne demandent qu'un soin ordinaire, et que le débiteur n'y est en conséquence tenu que de levi culpâ, et non de levissimâ culpâ.*

[5] *Joliet Iron Co.* v. *Scioto Fire Brick Co.*, 25 Am. R. 341; but see Story, Bailm. § 321 n. 4, the conclusions of which seem preferable.

is, in fact, what a specially careful and prudent owner would be expected to use; else the rules for trustees' investments would not be strict as they are.[1]

Pledge taken away by superior force.

In an American case,[2] where securities were taken from a bank in the course of carrying out measures necessitated by the Civil War, and for which the pledgor sued, the pledgees were exonerated and their liability thus expressed: "It was the duty of the bank to return the pledge, or show a good reason why it could not be returned. This it has done by proof, that without any fault on its part, and against its protest, the pledge was taken from it by superior force. Where this is the case, the common as well as the civil law holds that the duty of the pledgee is discharged."

We have already noted generally how far the bailee may use the thing deposited.[3] But Story more particularly formulates the rules applicable as follows:

Rules as to use of a pawn by the pawnee.

(1) If the pawn is of such a nature that the due preservation of it requires some use, such use is not only justifiable, but is indispensable to the faithful discharge of the duty of the pawnee.[4]

(2) If the pawn is of such a nature that it will be worse for the use, such, for instance, as the wearing of clothes which are deposited, the use is prohibited to the pawnee.[5]

(3) If the pawn is of such a nature that the keeping is a charge to the pawnee, as if it is a cow or a horse, the pawnee may milk the cow and use the milk, and ride the horse by way of recompense (as it is said) for the keeping.[6]

(4) If the use will be beneficial to the pawn, or is indifferent, it seems, that the pawnee may use it.[7]

(5) If the use will be without injury, and yet the pawn will thereby be exposed to extraordinary perils, the use is impliedly interdicted.[8]

Wearing jewels pawned.

Holt, C.J.,[9] says that jewels, earrings, or bracelets pawned to a lady may be used by her; though the use is at her peril, because she is at no charge in keeping the pawn, and "if she wears them abroad and is there robbed, she will be answerable." To this Story[10] replies: "The reason here given, so far from proving that the pledgee may lawfully use the jewels, expressly negatives any such right. And, unless the contrary is expressly agreed, it may fairly be presumed, that the owner of such a pawn would not assent to the jewels being used as a personal ornament, and thereby exposed to unnecessary and

1 Cp. as to diligence of pledgee, *Montague* v. *Stelts*, 34 Am. St. R. 736.

2 *McLemore* v. *Louisiana State Bank*, 91 U. S. (1 Otto), per Davis, J., 29, citing 2 Kent, Comm. 579; Story, Bailm. § 339; and *Commercial Bank* v. *Martin*, 1 La. Ann. 314.

3 *Ante*, 760, 783.

4 Jones, Bailm. 80: "If Caius deposit a dog with Titius, he can hardly be supposed unwilling that the dog should be used in partridge shooting, and thus be confirmed in those habits which make him valuable."

5 Anon. 2 Salk. 522; *Coggs* v. *Bernard*, 2 Ld. Raym. 916; *Mores* v. *Conham*, Owen, 123, 124.

6 Kent, 2 Comm. 578, says, if the pledgee "derives any profit from the pledge, he must apply those profits towards his debt." Story, Bailm. § 329, note 1 (9th ed.), disputes this, citing *Mores* v. *Conham*, Owen 123, and referring to other cases and the Abridgments under Distress.

7 Jones, Bailm. 81. See *Thompson* v. *Patrick*, 4 Watts (Pa.) 414, where, besides holding that a pawnee may use the pawn provided it is not the worse for it, it is added that if he uses it tortiously he is answerable by action only, and his lien is not thereby forfeited.

8 Story, Bailm. §§ 329, 330.

9 *Coggs* v. *Bernard*, 2 Ld. Raym. 917, approved by Sir Wm. Jones, Bailm. 81.

10 Bailm. § 330.

extraordinary perils." The opinion of Story seems the more just, since family jewels might not improbably be the subject of similar considerations to those pointed out in *Duke of Somerset* v. *Cookson* [1] and *Pusey* v. *Pusey*.[2] Not only is the risk to the pawnor increased by their use, but the responsibility of the pawnee may be a wholly inadequate assurance for restitution or compensation.

Duties owing by the pawnor to the pawnee.

So much, then, on the general principles of liability for negligence of the pawnee. There are, besides, duties owing by the pawnor to the pawnee, which we are now shortly to consider.

A pawnor, by the act of pawning, impliedly engages that he is the owner of the property pawned, and, unless he gives notice of a different interest, that he is the general owner, and that he has a good right to pass the property in the pawn.[3] He is bound to good faith, and is responsible for all fraud, both in the title and in the inception of the contract;[4] although he does not warrant the property, *Si sciens creditor accipiat vel alienum, vel obligatum, vel morbosum, contrarium ei non competit.*[5]

Expenses of the pawnee incurred on the pawn.

By the civil law the pawnor must reimburse the pawnee all expenses and charges necessarily incurred by the latter to preserve the pawn, even if the benefit results through the happening of some subsequent accident. Story[6] finds no decision in the common law on the point. He is of opinion that, in the case of an express contract to pay ordinary charges and expenses, its terms ought to govern; where there is no express declaration, an implication, if it arise, should have the same effect. Independently of the justice of this conclusion, it seems, he says, "reasonable that extraordinary expenses and charges which could not have been foreseen should be reimbursed by the pawnor."

Decision under the Pawnbrokers Act, 1872.

The Pawnbrokers Act, 1872,[7] has already been noticed. By it the earlier Acts relating to pawns and those making a business of pawning are repealed and consolidated.[8] A decision under the principal of these[9] calls for notice. In *Syred* v. *Carruthers*[10] the Queen's Bench held that there is no *primâ facie* presumption that a fire on the premises of a pawnbroker, by which a pledge in his possession is destroyed, is caused through the default, neglect, or wilful misbehaviour of the pawnbroker so as to authorise the pawnor to obtain compensation under the Act. By sec. 27, however, the pawnbroker is put under an absolute liability to make good, subject to certain deductions, the value, to be ascertained as therein directed, of pledges damaged or destroyed by fire; and he is by the same section empowered to insure to the extent of such value.[11]

V. The Contract of Hire.

Third class—Where the trust is for the benefit of both parties. Contract of hire.

To Story's third class of bailments—that in which the trust is for the benefit of both parties, or of both or one of them and a third person—is to be referred the contract of hire.

1 3 P. Wms. 390. 2 1 Vern. 273. 3 Story, Bailm. § 354.
4 Story, Bailm. § 355. 5 D. 13, 7, 16, § 1.
6 Bailm. § 357. 7 35 & 36 Vict. c. 93.
8 The old Act, 1 Jac. I. c. 21, as to the liabilities of pawnbrokers, is finally and completely repealed by the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 60.
9 39 & 40 Geo. III. c. 99, s. 24.
10 E. B. & E. 469. As to liability for accidental fire, see also 14 Geo. III. c. 78, s. 86, *ante*, 492, *et seqq.*
11 As to theft by the servant of a pawnbroker, see *Armfield* v. *Mercer*, 2 Times L. R. 764. For an exhaustive note on the law of pledge, see *Luckett* v. *Townsend*, 49 Am.

The designation of this contract in the civil law is *locatio conductio*. The definition of it is, "*Locatio conductio est contractus quo de re fruenda vel faciendu pro certo pretio convenit.*[1] *Igitur tria duntaxat hunc contractum constituunt: res quæ fruenda aut facienda conceditur, pretium*[2] *quo pro ea fruendu aut facienda dari convenit, et consensus circa supra dicta.*[3]

It was ordinarily essential for the *pretium* to be paid in money. In the case of productive property, however, as a farm or farm-stock, payment might by agreement be in the fruits or increase. Mommsen's opinion is that "the payment must necessarily consist in money; in consequence of which the produce lease among the Romans comes under the contingencies occurring in practical life, though not falling within the theory of jurisprudence."[4] Other commentators do not assent to this view.[5] Ordinarily *pretium* to be paid in money.

The employer who gives the reward is called *locator operis*, the letter of the work, but *conductor operarum*, the hirer of the labour and services. On the other hand, the party who receives the pay is called *locator operarum*, the letter of the labour and services, but *conductor operis*, the hirer of the work.[6] Definitions.

Kent's definition of this contract is "a contract by which the use of a thing or labour or services about it are stipulated to be given for a reasonable compensation, express or implied."[7] Story[8] defines it, "a Kent's definition. Story's definition.

Dec. 730–738. For the pawnbroker's liability for burglary where he has left his house unprotected, *Shackell* v. *West*, 2 E. & E. 326. See also Bell, Principles of the Law of Scotland (9th ed.), 135. As to the remedies for illegal pawning, *Leicester* v. *Cherryman*, [1907] 2 K. B. 101.

[1] Pothier, Pand. lib. 19, tit. 2, part 1, art. 1, § 1. *Locatio et conductio proxima est emptioni et venditioni; hisdemque juris regulis constitit. Nam ut emptio et venditio ita contrahitur, si de pretio convenerit: sic et locatio et conductio contrahi intelligitur, si de mercede convenerit:* D. 19, 2, 2, pr.; Inst. 3, 24, pr. See Hunter, Roman Law (3rd ed.), 505–514.

[2] *Pretium autem constitui oportet nam nulla emptio sine pretio esse potest:* Inst. 3, 23, § 1. Cp. Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), ss. 1, 8, 9. If either party was left to fix a price at his discretion, the contract was void: D. 18, 1, 35, § 1; although *hujusmodi emptio, quanti tu eum emisti quantum pretii in area habeo, valet:* D. 18, 1, 7, § 1. As to hire, Pothier, Traité du Contrat de Louage, n. 37.

[3] Alluding to a sentence from Paulus, *Locatio et conductio cum naturalis sit, et omnium gentium non verbis sed consensu contrahitur; sicut emptio et venditio:* D. 19, 2, 1. The definition in Mayna, Éléments de Droit Romain (2nd ed.), vol. ii. 197, is: *Il y a contrat de louage quand une partie s'oblige à procurer à l'autre l'usage d'une chose, ou à faire quelque chose pour elle, moyennant un prix à payer par cette dernière.* Mayna specifies three essentials to the contract—(1) *L'usage d'une chose ou de services déterminés à mettre à la disposition du conducteur, moyennant un prix déterminé;* (2) *Le prix doit être sérieux et certain et consister en une somme d'argent déterminée;* (3) *Dès qu'il y a consentement sur le prix et la chose, le contrat est parfait; aucune formalité n'est requise.*

[4] 2 Mommsen, 432, cited from Hare, Contracts, 90. Where the hire of a farm was a proportion of the produce, the tenant was called *colonus partiarius*. See Pliny, Epist. ix. 37. D. 19, 2, 25, § 6: *Partiarius colonus, quasi societatis jure, et damnum et lucrum cum domino fundi partitur.*

[5] Hare, Contracts, 91. Cp. Jones, Bailm. 118, where, by his definition, he confines letting to hire to cases where pecuniary compensation is given; 86, where he speaks of the contract being for a "stipend or price of the hiring"; and 93, where he classes all other cases as innominate contracts.

[6] Story, Bailm. § 309. Jones, Bailm. 90, note (*r*), the conclusion of which runs: "So, in Horace,

'*Tu secanda marmora*
Locas,'

which the stone-hewer or mason *conduxit.*" See the explanation of this in Poste's Gaius (4th ed.), 374, that delivery and re-delivery is the fact exclusively regarded in the Latin language; and the bailor is denoted by *locator*, and the bailee by *conductor*, without regarding the incident that while in *locatio-conductio rei* or *operarum*, the *locator* supplies a service for which the *conductor* pays the price, in *locatio-conductio operis faciendi*, it is the *locator* who pays the price and the *conductor* who performs the service.

[7] 2 Comm. 585; 1 Bell, Comm. (7th ed.) 274. [8] Bailm. § 308.

bailment of a personal chattel, where a compensation is to be given for the use of the thing, or for labour or services about it; or, in other words, it is a loan for hire or a hiring or letting of goods or of labour and services, for a reward."

Division of the subject.

We have seen [1] that this contract is susceptible of a double division: (1) Into *locatio* or *locatio conductio rei*, the bailment or letting of a thing to be used by the bailee for a compensation to be paid to him; and (2) *Locatio operis*, or the hire of the labour and services of the bailee for a compensation to be paid to the bailor.[2] This latter in its turn is susceptible of a subdivision into, first, *locatio operis faciendi*, or the hire of labour and work to be done, or care and attention to be bestowed on the goods bailed by the bailee for a compensation; and, secondly, *locatio operis mercium, vehendarum*, or the hire of the carriage of goods from one place to another for a compensation.

An important distinction must be attended to, namely, that while one who hires the services of another is bound to see to the way in which they are performed, and will be answerable for injuries resulting from his negligence; where there is a contract for the performance of work there attaches no such obligation; because the contractor is not under the control or supervision of the person for whom the work is done.

Requisites of the contract *locatio conductio.*

Story [3] specifies the requisites to this contract of *locatio conductio*, letting and hiring to be:

(*a*) That the bailment should not be prohibited by law.

(*b*) That it should be between persons competent to contract.

(*c*) That there should be a free and voluntary consent between the parties. The more detailed consideration of these points does not belong to our subject, but must be referred to the general law of contracts.

1. *Hire of Things.*

First subdivision of hire.

The first subdivision of *locatio conductio* is *locatio rei*, or the hiring of a thing. This we now proceed to consider.

Obligation on the letter.

The obligation on the letter, according to the Roman law, was to allow the hirer, unless prevented by *casus fortuitus*, the full use and enjoyment of the thing hired,[4] which must be let in such a condition that it can be used for the purpose agreed on,[5] and to fulfil all his own engagements and trusts in respect to it, according to the original intention of the parties: *Præstare, frui licere, uti licere.*" [6]

Obligation on the hirer.

The hirer is answerable for *exacta diligentia* in the case of the *res locata*.[7] By the hiring he makes a representation that he has the skill

[1] *Ante*, 739.

[2] Code Civil, arts. 1709, 1710: *Le Louage des choses est un contrat par lequel l'une des parties s'oblige à faire jouir l'autre d'une chose pendant un certain temps, et moyennant un certain prix que celle-ci s'oblige de lui payer. Le Louage d'ouvrage est un contrat par lequel l'une des parties s'engage à faire quelque chose pour l'autre moyennant un prix convenu entre elles.*

[3] Bailm. § 378.

[4] D. 19, 2, 9, §§ 3, 4.

[5] D. 19, 2, 10, § 1: *Si quis dolia vitiosa ignarus locaverit, deinde vinum effluxerit tenebitur in id quod interest; nec ignorantia ejus erit excusata.* D. 19, 2, 19, § 7, is on a very curious point: *Si quis mulierem vehendam navi conduxisset, deinde in nave infans natus fuisset, probandum est, pro infante nihil deberi; cum neque vectura ejus magna sit, neque is omnibus utatur, quæ ad navigantium usum parantur.*

[6] Story, Bailm. § 383. Burthens imposed by law on the *res locata* must be borne by the *locator*, who must execute all repairs, D. 19, 2, 15, § 1; D. 19, 2, 19, § 2; D. 19, 2, 25, § 2, and compensate the *conductor* for all necessary expenditure incurred by him, D. 19, 2, 19, § 4; D. 19, 2, 55, § 1.

[7] Cod. 4, 65, 28: *In judicio tam locati quam conducti dolum et custodiam, non etiam casum, cui resisti non potest, venire constat.*

of a specialist to apply to the use of what he hires.[1] He must besides pay the *merces*;[2] and at the end of the term of hiring he must deliver up the *res locata* in as good a condition as when it came into his hands, allowance being made for ordinary wear and tear. The hirer gains a special property in the thing hired; and the letter to hire an absolute property in the price, while he retains a general property as owner in the thing hired.[3]

Hirer's dealing with the bailment.

Difficulties have sometimes arisen from the hirer's dealing with the bailment. These have been cleared up either on the ground that there are statutory rights of dealing with it in the circumstances; or that the dealing is within the authority of the bailee. The case of *Singer Manufacturing Co.* v. *L. & S. W. Ry. Co.*,[4] is referable to the former class. The hirer of a sewing-machine deposited it in the cloakroom of a railway station. The hiring being determined, he refused to pay the cloakroom charges, and on application by the owners the railway company would not deliver up the machine without payment of their charges. The company were held to have a lien, since by sec. 2 of the Railway and Canal Traffic Act, 1854,[5] they were bound to afford all reasonable facilities for the reception of the luggage and goods of passengers. "One of the most reasonable of such facilities is the cloakroom"; and the lien a railway company have as carriers they have also as owners of the cloakroom.

Bailee's authority to deposit bailment.

The principle of the bailee's authority was also glanced at: "The person who deposited this machine was, as between himself and the owner of it, entitled to the possession of it at the time he deposited it"; and therefore, to take it with him if he travelled and to deposit it at a cloakroom if he desired; and was approved in *Keene* v. *Thomas*,[6] where the question debated was the lien of a coachbuilder for repairs done to a hired dog-cart, the letter of which had determined the bailment after the repairs were done and while it was still in the coachbuilder's hands. The decision amounts to no more than that, in the case before the Court, there was a provision that repairs required during the bailment were to be executed by the bailee, and this involved the coachbuilder's lien.

Keene v. *Thomas.*

Buxton v. *Baughan*[7] was distinguished. There a phaeton was given to a person to paint, who delivered it over to another, in whose possession it was afterwards found and who refused to deliver it up without a payment for the standing of it. There was no authority given by the owner to deal with the phaeton otherwise than to paint it, and Alderson, B., directed the jury that accordingly no right arose to detain it.[8]

Buxton v. *Baughan.*

Distinction considered.

The distinction indicated in this case seems correct. There must be possession and authority to deal with the property to validate any lien that may be set up. A wrongdoer, by warehousing his acquisition, cannot be allowed to put the rightful owner to expense, nor by delivering the article which he has obtained to one who does expensive repairs

[1] D. 19, 2, 9, § 5. *Celsus etiam imperitiam culpæ adnumerandam libro octavo Digestorum scripsit. Si quis vitulos pascendos vel sarciendum quid polciendumve conduxit, culpam eum præstare debere, et quod imperitia peccavit, culpam esse: quippe ut artifex (inquit) conduxit.*

[2] D. 19, 2, 13, § 7, subject to abatement in the case of any serious impairment of the thing hired. Moyle, Just. Inst. 3, 24, 5.

[3] Pothier, Traité du Contrat de Louage, nos. 77, 106, 107, 130, 131.

[4] [1894] 1 Q. B. 833.

[5] 17 & 18 Vict. c. 31.

[6] [1905] 1 K. B. 136.

[7] 6 C. & P. 674.

[8] Cp. *Weiner* v. *Gill*, [1905] 2 K. B. 172; (C. A.), [1906] 2 K. B. 574.

to it can he possibly put it out of the power of the rightful owner to regain possession. The proceeds of a theft deposited by the thief in the cloakroom of a railway station would, however, have attaching to them the lien for the charges for their custody.

Pothier's classification of the obligations of the letter as adopted by Story.

Story,[1] following Pothier, reduces the main obligations of the letter arising from this contract to six heads:

(1) The letter must procure delivery of the thing hailed to be made to the hirer, unless otherwise agreed.

(2) The letter must refrain from every obstruction in the use of the thing hailed.

(3) The letter must not do anything which tends to deprive the hirer of the thing hailed.

(4) The letter enters into an implied warranty of title and the right of possession to the hirer: *Ut præstet conductori frui licere, uti licere.*[2]

(5) The letter is to keep the thing in suitable order and repair for the purposes of the hailment.

(6) The letter warrants the article against faults and defects which prevent the due enjoyment or use of the thing.

Pothier's opinion as to the obligation on letting defective things.

As to this last obligation, Pothier[3] is of opinion that where a person, who lets a thing, knows of a defect that makes it unfit for the purpose for which it is let, he is responsible in damages; and even if he does not actually know of the defect, if the circumstances are such that he ought to have had a suspicion of it and been put on inquiry, and either does not himself inquire or give the hirer the option of inquiry, he is liable. If the letter follows a trade which makes it his duty to know whether the thing has faults or not, he is liable without proof that he did know; for example, a cooper who supplies wine casks made of bad wood, so that they leak, will not be permitted to set up that he did not know the bad quality of the wood; for his profession bound him to know, and to supply none unless of good quality.[4] "I can well conceive a case in which blame might be brought home to" the letter out of job horses, "*e.g.*, supposing he were to hire out, without notice or warning, a notoriously vicious and dangerous animal. I am not prepared to say that the owner (letter) might not in such a case be liable, although the horse was at the time of the accident under the control of another."[5]

Hyman v. *Nye*

The English law is the same, and was thus declared in *Hyman* v. *Nye*.[6] The defendant, a johmaster, let the plaintiff a landau and

1 Story, Bailm. §§ 383-390. Pothier, Traité du Contrat de Louage, n. 53 *et seqq.* See also Maynz, Éléments de Droit Romain (2nd ed.), vol. ii. 200.

2 Cp. Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 12.

3 Traité du Contrat de Louage, nos. 118, 119, 120; Maynz, Éléments de Droit Romain (2nd ed.), vol. ii. 201.

4 This passage is cited by Blackburn, J., *Searle* v. *Laverick*, L. R. 9 Q. B. 128. Cp. Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 14.

5 Per Lord Justice Clerk Macdonald, *Wilson* v. *Wordie*, 7 Fraser, 929.

6 6 Q. B. D. 685; *Lyon* v. *Lamb*, 16 Shaw, 1188. See *Jones* v. *Page*, 15 L. T. (N. S.) 619; *Marner* v. *Banks*, 17 L. T. (N. S.) 147. In *Willoughby* v *Horridge*, 12 C. B. 748, Maule, J., says: "Suppose it was the duty of one to provide another with a chair; I apprehend that duty could not be said to be fitly and adequately performed, by providing him with a chair having a tenpenny nail driven up through the bottom of it." If the proprietor of recreation grounds licenses roundabouts, shooting galleries, &c., on his grounds, and an accident happens, a different principle seems to be involved. All that is authorised can be done without risk, and the proprietor is warranted in assuming it will be so done. If injury arises from the negligence of the licensee, the proprietor will not be liable. See per Lord Westbury, *Daniel* v. *Metropolitan Ry. Co.* L. R. 5 H. L. 61. It is not the act that is authorised that causes the injury, but an independent and non-essential default. If the proprietor of the land hires the roundabouts, &c., and lets them out himself, the law is otherwise.

horses. While he was out with them a bolt in the under part of the carriage broke, and he was thrown out and injured. He brought an action against the defendant. It was proved that the defect, if any, could not have been discovered by ordinary inspection; and whether there was any inspection was not proved. At the trial the judge directed the jury that the plaintiff was bound to prove that the injury he had sustained was caused by the negligence of the defendant, and that if, in their opinion, the defendant took all reasonable care to provide a fit and proper carriage, their verdict ought to be for him. A verdict was given for the defendant, the jury finding that "the carriage was reasonably fit for the purpose for which it was hired, and that the defect in the bolt could not have been discovered by the defendant by ordinary care and attention." A rule was obtained by the plaintiff on the ground of misdirection, and in the result was made absolute. "A careful study of these authorities," said Lindley, J.,[1] after passing the cases under review, "leads me to the conclusion that the learned judge at the trial put the duty of the defendant too low. A person who lets out carriages is not, in my opinion, responsible for all defects, discoverable or not; he is not an insurer against all defects; nor is he bound to take more care than coach proprietors or railway companies who provide carriages for the public to travel in; but in my opinion he is bound to take as much care as they; and, although not an insurer against all defects, he is an insurer against all defects which care and skill can guard against. His duty appears to me to be to supply a carriage as fit for the purpose for which it is hired as care and skill can render it; and if whilst the carriage is being properly used for such purpose it breaks down, it becomes incumbent on the person who has let it out to show that the breakdown was in the proper sense of the word an accident, not preventible by any care or skill. If he can prove this, as the defendant did in *Christie* v. *Griggs*,[2] and as the railway company did in *Readhead* v. *Midland Ry. Co.*,[3] he will not be liable; but no proof short of this will exonerate him." Judgment of Lindley, J.

Speaking of the foregoing six headings,[4] Story says:[5] "In some respects the common law certainly differs, and in others it probably agrees." "The Roman law and the foreign law," he continues, "treat leases of real estate as bailments on hire, and indeed emphatically as such bailments;[6] and the owner or lessor, and not the tenant, is, in the absence of all other stipulations or customs to the contrary, bound to keep the estate in repair. The common law is different in such cases; for the landlord, without an express agreement, is not bound to repair; and the tenant may, and ought to, make the necessary repairs at his own expense.[7] Lord Mansfield[8] on one occasion said that by the common law he who has the use of a thing ought to repair it. It is true, that the remark was applied to the case of the grant of a way which was out of repair; but the remark was general. Lord Hale is also reported to have said, that if plate is let, and it is worn out Story's opinion on the relation between the civil law and the common law with regard to this subject.

[1] 6 Q. B. D. 687. Cp. *Vogan* v. *Oulton*, 79 L. T., per Wright, J., 385.
[2] 2 Camp. 79.
[3] L. R. 2 Q. B. 412; L. R. 4 Q. B. 379. As to latent defect in a ship's steering gear, *The Merchant Prince*, [1892] P. 9.
[4] *Ante*, 790.
[5] Bailm. § 392.
[6] Jones, Bailm. 90.
[7] *Pomfret* v. *Ricroft*, 1 Wms. Saund. 321, 1 Wms. Notes to Saunders, 557; *Countess of Shrewsbury's case*, 5 Co. Rep. 14 a; *Ferguson* v. ——, 2 Esp. (N. P.) 590; *Horsefall* v. *Mather*, Holt (N. P.) 7.
[8] *Taylor* v. *Whitehead*, 2 Doug. 749.

in the service, the hirer is not liable to any action unless he has been guilty of some default.[1] It has also been decided that tenants are bound to repair fences during their occupancy.[2] In the absence of any direct authority upon the other points above stated from the foreign law, they must be propounded as still open to controversy in our law." They must therefore be considered with reference to general principles.[3]

Holt, C.J., in *Coggs* v. *Bernard*.

Holt, C.J., in *Coggs* v. *Bernard*,[4] after citing the civil law as embodied in Bracton[5] as his authority, concludes: "From whence it appears that, if goods are let out for a reward, the hirer is bound to the utmost diligence,[6] such as the most diligent father of a family uses, and if he uses that, he shall be discharged." The material part of his citation is—*Talis ab eo desideratur custodia, qualem diligentissimus paterfamilias suis rebus adhibet quam si præstiterit et rem aliquid casu amiserit, ad rem restituendam non tenebitur.*[7]

Sir William Jones on the meaning of *diligentissimus*.

Sir William Jones, however, shows,[8] "by tracing the doctrine up to its real source, that the *dictum* of the Chief Justice was entirely grounded on a grammatical mistake in the translation of a single Latin word," and that "an epithet which ought to have been translated 'ordinarily diligent' has been supposed to mean extremely careful."[9]

Dean v. *Keate*.

Subsequently, in *Dean* v. *Keate*[10]—an action for the improper treatment of a horse let to hire, where the defendant, in place of sending it to a veterinary surgeon, treated it himself, with the result that he died—Lord Ellenborough said: "Had he [the defendant] called in a farrier he would not have been answerable for the medicines the latter might have administered; but when he prescribes himself, he assumes a new degree of responsibility; and prescribing so improperly, I think he did not exercise that degree of care which might be expected from a prudent man towards his own horse; and was in consequence guilty of a breach of the implied undertaking he entered into when he hired the horse from the plaintiff."[11] To the same effect is Pothier. He holds that the hirer is only bound for ordinary diligence, and is liable only for ordinary negligence (*faute légère*).[12]

Rules of diligence illustrated.

The rule as to diligence being, then, settled in the sense contended for by Sir William Jones, the hirer ought in using the thing to take the same care in the preservation of it which a good and prudent

1 *Pomfret* v. *Ricroft*, 1 Wms. Saund. 321; 1 Wms. Notes to Saunders, 574, note 7.

2 *Cheetham* v. *Hampson*, 4 T. R. 318, 323.

3 2 Parsons, Law of Contracts (8th ed.), 127, says, referring to the cases cited: "Perhaps the conflicting opinions may be reconciled, by regarding it as the true principle, that the owner is not bound (unless by special agreement, express or implied by the particular circumstances) to make such repairs as are made necessary by the natural wear and tear of the thing, or by such accidents as are to be expected, as the casting of a horseshoe after it has been worn a usual time; but he is bound to provide that the thing be in good condition to last during the time for which it is hired, if that can be done by reasonable care, and afterwards is liable only for such repairs as are made necessary by unexpected causes."

4 2 Ld. Raym. 909.

5 Bracton, fol. 62 b; cp. Inst. 3, 24, 5.

6 Comm. Vin. in Just. Inst. 3, 25, 5, notes 2, 3. *In judicio tam locati quam conducti, dolum et custodiam, non etiam casum cui resisti non potest, venire constat:* Cod. 4, 65, 28. *Culpa autem abest si omnia facta sunt, quæ diligentissimus quisque observaturus fuisset:* D. 19, 2, 25, § 7.

7 Inst. 3, 24, 5.

8 Bailm. 86.

9 Bailm. 87. See note to Story, Bailm. § 398, note 8 (9th ed.), collecting the authorities; 2 Kent, Comm. 587.

10 3 Camp. 4. Cp. *Eastman* v. *Sanborn*, 85 Mass. 594.

11 See note by Campbell to *Dean* v. *Keate*, 3 Camp. 6. See, too, note to *Coggs* v. *Bernard*, 1 Sm. L. C. (11th ed.), 173.

12 Pothier, Traité du Contrat de Louage, nos. 180, 192, 429. Cp. *Tilling* v. *Bidaulin*, 8 Times L. R. 517.

father of a family would take of his own; in other words, he is liable for ordinary negligence. If, then, he hire a horse, he is bound to ride it as moderately and to treat it as carefully as any man of common discretion would his own; and the law implies that proper treatment includes feeding a horse.[1] If, in spite of this care and treatment, the horse is injured, the hirer is not responsible. To the same purport is a *Nisi Prius* ruling, that if a hired horse refuses its food from fatigue, the hirer is bound to abstain from using it, and that if he pursues his journey with the horse, he becomes liable for all injuries occasioned thereby.[2] But, as we have seen,[3] the particular acts of duty vary with the nature of the things on which they are to be bestowed. Still, the duty owed is in no case more than that of ordinary care, that is, the care that a man of ordinary capacity and caution exercising his faculties would take of the same thing if it were his own and in the same circumstances.[4]

Rule of diligence extends to the condition of the building in which the thing hired is deposited.

The obligation to take reasonable care of the thing entrusted to a bailee of this class involves in it an obligation to take reasonable care that any building in which it is deposited is in a proper state, so that the thing therein deposited may be reasonably safe in it; thus, in *Searle* v. *Laverick*,[5] a shed was blown down by a high wind, and property bailed to the defendant was injured; notwithstanding this, on proof that the defendant had employed a careful and experienced person to build the shed, and had no knowledge of any negligence on his part, it was held that the plaintiff could not recover.

Grote v. *Chester and Holyhead Ry. Co.*

Grote v. *Chester and Holyhead Ry. Co.*[6] at first sight seems to suggest a stricter rule. An action was brought against a railway company for compensation for personal injury received by the plaintiff by the breaking down of a bridge over which he was being conveyed in a passenger train. The defendants objected that they were not liable, unless they were shown to be guilty of negligence either in constructing or maintaining the bridge. The judge, at the trial, directed the jury that the question was whether the bridge was constructed and maintained with sufficient care and skill, and was of reasonably proper strength with regard to the purposes for which it was made, and that if they should think is was not, and that the accident was attributable to any such deficiency, the plaintiff was entitled to recover. The jury found a verdict for the plaintiff, and the defendants moved on the ground of misdirection, but were unsuccessful. The principle was stated to be: "If a party in the same situation as that in which the defendants are, employ a person who is fully competent to the work, and the best method is adopted, and the best materials are used, such party is not liable for the accident."[7] The

[1] *Handford* v. *Palmer*, 2 B. & B. 359.

[2] *Bray* v. *Mayne*, Gow (N. P.) 1.

[3] *Ante*, 742, 749.

[4] 2 Parsons, Law of Contracts (8th ed.), 122 and note, where the rule applicable to the amount of care to be taken of hired slaves is minutely examined and the judgment of Marshall, C.J., in *Swigert* v. *Graham*, 7 B. Mon. (Ky.) 661, is set out. Sir William Jones, Bailm. 67, says that the word "*diligentissimus*" is improperly applied by Gaius, D. 19, 2, 25, § 7, to the case of an undertaking to remove a column from one place to another. On the other hand, it is pointed out that Gaius was referring, not to mere blocks of granite or marble, but to columns which would require the utmost attention to avoid injury. See 2 Kent, Comm. 588 note (*a*). The text of Gaius is, *Qui columnam transportandam conduxit, si ea dum tollitur, aut portatur, aut reponitur, fracta sit, ita ad periculum præstat, si qua ipsius eorumque quorum opera uteretur, culpa acciderit.*

[5] L. R. 9 Q. B. 122.

[6] 2 Ex. 251.

[7] Per Pollock, C.B., 2 Ex. 251, 255.

Discussed.

rule so laid down is very considerably stricter than that in *Searle* v. *Laverick*.[1] It should be observed, however, that the words "best materials" are to be understood with a similar limitation to that imposed by Lindley, J., in *Hyman* v. *Nye*,[2] on the words "reasonably fit and proper" when used with reference to the duty of a carriage proprietor in supplying a carriage for hire. "The expression 'reasonably fit and proper,'" says Lindley, J., "is a little ambiguous, and requires explanation. In a case like the present, a carriage to be reasonably fit and proper must be as fit and proper as care and skill can make it for use in a reasonable and proper manner, *i.e.*, as fit and proper as care and skill can make it to carry a reasonable number of people, conducting themselves in a reasonable manner, and going at a reasonable pace on the journey for which the carriage was hired; or (if no journey was specified) along roads, or over ground reasonably fit for carriages. A carriage not fit and proper in this sense would not be reasonably fit and proper, and *vice versâ*. The expression 'reasonably fit' denotes something short of absolutely fit, but in a case of this description the difference between the two expressions is not great." So, too, the expression "best materials" does not signify those absolutely the best, but materials that would be comprehended in the class of best materials when applied to work of the class with reference to which they are to be used. Again, secondly, it must be borne in mind that in the case of *Searle* v. *Laverick* [3] the bailee was bound only to use that ordinary care in the keeping of the article bailed which is required from an ordinary bailee for hire, while in *Grote* v. *Chester and Holyhead Ry. Co.*,[4] the degree of care exacted is that of a carrier of passengers, which is the most exact diligence. There is, therefore, no conflict between the cases, since they are applied to circumstances in which different degrees of care are requisite.

Lindley, J., in *Hyman* v. *Nye*.

General rule.

As a general rule, in the contract *locatio rei* the hirer is bound only to ordinary care and diligence, and is answerable for ordinary neglect; for the bailment of hiring of a thing is for the mutual benefit of letter and hirer.

The hirer is bound to exercise the same degree of care for the preservation of goods entrusted to him, in the case of their storage, as may reasonably be expected from a skilled storekeeper acquainted with the risks to be apprehended either from the character of the storehouse itself, or of its locality. This comprehends the duty of taking all reasonable precautions to obviate these risks, and, in addition, the duty of taking all proper measures for the protection of the goods when such risks are imminent or actually occur. In *Brabant* v. *King*,[5] where the Government, being bailees for hire, stored the appellant's explosive goods in sheds near to the water's edge and through a heavy flood the goods were immersed and rendered valueless, the Privy Council held that, however justifiable the selection of such a site may have been, it yet imposed on those responsible for the charge of the goods the duty of making arrangements within the store to place them so as to ensure their immunity from the incursion of flood water.

The hirer is bound to use the article with due care and moderation, and not to apply it to any other use, or to detain it for a longer period,

[1] L. R. 9 Q. B. 122.

[2] 6 Q. B. D. 688. See *The Merchant Prince*, [1892] P. 9, 179, where, negligence having been disproved, the defendants were held not bound to go further and show the cause of the defect or obstruction that wrought the injury.

[3] L. R. 9 Q. B. 122. [4] 2 Ex. 251. [5] [1895] A. C. 632.

than that for which it was hired.[1] If he uses the thing hired in a different way or for a longer time than the terms of the hiring allow, he becomes liable for all accidents happening to it while under his control, even though they may arise from inevitable accident. But where a horse was let to a minor to be moderately ridden, and he returned it in a bad condition, the King's Bench held that there was no power to convert what arose out of a contract into a tort for the purpose of avoiding the plea of infancy; so that as the minor was not chargeable on the contract he was not to be made liable in respect of a tort incidental to it.[2]

Where re-delivery becomes impossible.

Where the thing has perished while in the possession of the hirer, and so a re-delivery of it is become impossible, the hirer is excused from the performance of his promise to re-deliver, unless the loss has resulted from his fault or from a risk which he has undertaken.[3]

Onus of showing negligence.

The *onus* of showing negligence is, in some cases, thrown on the letter; so that a hirer is not bound to prove affirmatively that he used reasonable care,[4] though he is bound to account, that is, to give an explanation of the cause of the loss or injury.[5] It has, however, been held not enough to show that a horse which was let sound was returned with its knees broken.[6]

Where thing bailed returned in damaged condition.

The position of the bailor if the bailee returns the article hired in a damaged condition becomes dependent on the character of the damage done. The bailor commits his property to the bailee on the undertaking most generally implied that he will take due care of it. In ordinary circumstances good faith requires that, if the property is returned in a damaged condition, some account should be given of the time, place and manner of the occurrence of the injury. If, then, the bailee returns the property in a damaged condition, and fails to give any account of the matter, the law will authorise a presumption that he has been negligent; because where there is no apparent cause for the accident, and the bailee has possession, he must show how the accident

[1] Story, Bailm. §§ 397, 398, 413–415; Jones, Bailm. 68, 69, 121.

[2] *Jennings* v. *Rundall*, 8 T. R. 335; but cp. *Burnard* v. *Haggis*, 14 C. B. (N. S.) 45, where a minor was held guilty in trespass, for injuring a horse he had hired. See *Walley* v. *Holt*, 35 L. T. (N. S.) 631, where the limitations of the decisions are discussed; *Green* v. *Greenbank*, 2 Marsh. (C. P.) 485; Roll. Abr. Action sur Cas. (D) *vers hosteler* 3; with which cp. *Cross* v. *Andrews*, Cro. Eliz. 622; see also the preface to 4 R. R.; *Mills* v. *Graham*, 1 B. & P. (N. R.) 140; and *Liverpool Adelphi Loan Association* v *Fairhurst*, 9 Ex. 422, 427. In 2 Kent, Comm. 240 *et seqq.*, the authorities are well set out. See also Mr. Holmes's note to the 12th ed., 241, note 1: Torts connected with Contracts.

[3] *Taylor* v. *Caldwell*, 3 B. & S. 826. *Nickoll and Knight* v. *Ashton, Edridge*, [1901] 2 K. B. 126; *Krell* v. *Henry*, [1903] 2 K. B. 740. Cp. *Chicago, Milwaukee and St. Paul Ry. Co.* v. *Hoyt*, 149 U. S. (42 Davis) 1. In *Williams* v. *Lloyd*, Sir Wm. Jones, 179, it was said: "When a man agrees to deliver a horse to another and it dies, without default or negligence of the defendant, in this case the bailee shall be discharged." In *Lloyd* v. *Gubert*, L. R. 1 Q. B. 121, the proposition is enunciated: that by the common law "a person who expressly contracts absolutely to do a thing not naturally impossible is not excused from non-performance because of being prevented by the act of God or the king's enemies"; *Paradine* v. *Jane*, Aleyn, 26. With these cases should be considered *Rhodes* v. *Forwood*, 1 App. Cas. 256, and *Turner* v. *Goldsmith*, [1891] 1 Q. B. 544; the former case was decided on the ground that where there was no express contract to employ an agent in the circumstances there set out, no such contract would be implied; the latter, on the ground that the defendant had given up business and made no attempt to renew it, and that a condition sought to be implied by the defendant that his manufactory, which was burnt down, should continue to exist, was not to be imported into the contract between plaintiff and defendant.

[4] *Harris* v. *Packwood*, 3 Taunt. 264; *Marsh* v. *Horne*, 5 B. & C. 322.

[5] The subject is very fully discussed by Coulter, J., *Logan* v. *Mathews*, 6 Pa. St. 417; 2 Parsons, Contracts (8th ed.), 125.

[6] *Cooper* v. *Barton*, 3 Camp. 5. Cp. *Handford* v. *Palmer*, 2 B. & B. 359.

happened. The bailor need only point out the deteriorated condition of the article.[1] If, however, the deterioration is the natural consequence of wear and use the bailor must give other evidence to discharge the *onus* and to raise a case of neglect or misuse.[2] There are a hundred probable causes of a horse falling and breaking its knees quite apart from any default in the bailee. If not an ordinary incident of keeping a horse, such an occurrence is consistent with absence of negligence, and so negligence must be shown and will not be presumed.[3] Again, if a gilded mirror is lent and is returned tarnished, wear and tear will account for this, and in the absence of other circumstances is the reasonable explanation.[4] The *onus* then remains on the lender to show bad usage. But if the mirror is returned with a portion of its frame missing or cracked, the *onus* is shifted to the hirer to discharge himself of the negligence which *primâ facie* is indicated.

Scotch cases on *onus*. *Binny* v. *Veaux*.

The Scotch cases on this point of *onus* are numerous and interesting, and certain of them may with advantage be considered here. The earliest reported dates back to 1679.[5] "The Lords found, where a man hires a horse, if it die, or fall sick or crooked by the way (though he can prove that he rode *modo debito*, and not farther than the place agreed upon) yet the rider must prove the *casus fortuitus quem nulla præcessit illius culpa*, nor negligence, and the defect or latent disease it had before he hired it; and if he succumb in proving this, he must pay the price of the horse or the party's damage and interest." The reporter then comments on the decision thus: "The Chancellor's vote cast this decision, viz., that the rider should prove the accident and his own diligence, which is *perquam durum*. This is a difficult probation to burden the rider with, since horses may have latent diseases before the hiring."

Robertson v. *Ogle*.

In 1809 occurred the case of *Robertson* v. *Ogle*,[6] where a horse having been hired and returned useless, the Court held the proprietor was not obliged to prove actual maltreatment whilst the horse was out of his possession; but "if the horse's malady arose from any cause for which the defender was not blameable, and which he could not control, the *onus probandi* lay upon him."

The matter was a second time brought before the Court, when Lord Cullen said: "The horse had departed sound, and returned much damaged. The pursuer, Robertson, could not prove the treatment the horse had received in the interim when out of his custody; but in a case of this kind, it was customary to follow the rule, that *probatis extremis præsumuntur media*." The Lord Justice-Clerk said that, "upon reconsidering the matter, he believed the rule laid down by Lord Cullen was the soundest to walk by; although at first he had

[1] *Lyan* v. *Mathews*, 6 Pa. St. 417; Story, Bailm. §§ 411, 414; *Malaney* v. *Taft*, 6 Am. St. R. 135, the case of a horse hired to be driven to one place and driven to another without bailor's consent; the decision relied on *Cooper* v. *Barton*, 3 Camp. 5, note; *Skinner* v. *L. B. & S. C. Ry. Co.*, 5 Ex. 787; *Byrne* v. *Boadle*, 2 H. & C. 722; *Scott* v. *London Docks Co.*, 3 H. & C. 596.

[2] *Kearney* v. *L. & B. Ry. Co.*, L. R. 5 Q. B. 411; L. R. 6 Q. B. 759; *Higgs* v. *Maynard*, H. & R. 581; *Welfare* v. *L. & B. Ry. Co.*, L. R. 4 Q. B. 693 (Ex. Ch.); *Moffatt* v. *Bateman*, L. R. 3 P. C. 115.

[3] See *post*, 797, 801.

[4] In *Pomfret* v. *Ricroft*, 1 Wms. Saund. 321, at 323 *b*, Hale, C.J., is reported as saying: "*If* I lend a piece of plate and covenant by deed that the party to whom it is lent shall have the use of it, yet if the plate be worn out by ordinary use and wearing without any fault, no action of covenant lies against me."

[5] *Binny* v. *Veaux*, Morison, Dict. Dec. 10079.

[6] Decisions of Court of Session, June 23, 1809.

been inclined, in this case, to give effect to the ordinary maxim, *res perit suo domino*. Had the horse died by an accident, there is no doubt he must have perished to Robertson." The former judgment was adhered to.

Pyper v. *Thomson*.

In *Pyper* v. *Thomson*,[1] decided in 1843, the hirer was held not liable where he showed that the accident sued arose from a vice of the animal's: "The origin of the whole was the backing of the horse, which was the horse's fault and not the defender's." Lord Justice-Clerk Hope states the law thus:[2] "I acknowledge as sound and just the rule, that if a person gets a horse, or indeed any article belonging to another, for use, on the contract of hire, and brings back that animal or article much injured, he in whose custody and charge it was, must be able to discharge himself of the care he was bound to bestow on the property of the other, by showing that he was not to blame in regard to the cause of the injury, and must in general case be able to show how the accident occurred."

Wilson v. *Orr*.

In *Wilson* v. *Orr*,[3] the horse, whose loss was the subject of action, had died from the effects of a blow on the shoulder, which had been given whilst he was in the defender's custody. How or when given there was no evidence to show. The Court held that it lay upon the defender to show the cause of injury, and at least to produce *primâ facie* evidence that the cause was one for which he was not responsible; and having failed in this he was liable for the value of the horse. Lord Gifford's dictum in this case is noteworthy:[4] "Unless some blame attaches somewhere, the general rule is *res perit domino*," and is a good working solution of the various difficulties that may arise.

Bain v. *Strang*.

The last of these Scotch cases,[5] *Bain* v. *Strang*, illustrates the general rule: *res perit domino*. A man borrowed a horse which, whilst doing its work, without any apparent reason stumbled and was injured. The Court "assoilsied defender," holding that he had discharged the *onus* on him to prove that he had exercised reasonable care in the use of the thing bailed. Lord Shand states the rule thus:[6] "Where a horse, hired or lent, is taken out sound and brought back damaged, there is an *onus* on the borrower to show that the injury was not caused through his fault, and that it was sustained notwithstanding all reasonable care on his part." "If," said Lord President Inglis,[7] "the article is returned in a damaged condition, there is an *onus* on the borrower to show that the damage did not arise through his fault. It is argued that the *onus* is heavier than that, and that he is bound to show what was the specific cause from which the injury arose. I am not disposed to decide that question. . . . We have, I think, sufficient evidence to show that reasonable care was used."

General rule *res perit domino* where no blame attaches.

The general rule, then, may be stated in the words above quoted from Lord Gifford; but the circumstances may vary infinitely.

Is misuser equivalent to conversion?

Story[8] is of opinion that a misuser of property entrusted to a bailee is at common law a conversion of the property. As we have seen in considering the subject of pawns, in English law this is not necessarily so.[9] A distinction must be drawn between those acts which are altogether repugnant to the bailment and those acts

[1] 5 Dunlop, 498.
[2] 5 Dunlop, 499.
[3] (1879) 7 Rettie, 266.
[4] 7 Rettie, 268.
[5] (1888) 16 Rettie, 186. Cp. Exodus xxii. 14, 15. *Sutherland* v. *Hutton*, 23 Rettie, 718. *Post*, 806.
[6] 16 Rettie, 191.
[7] 16 Rettie, 189.
[8] Story, Bailm. § 413. See *Cooper* v. *Willomatt*, 1 C. B. 672; *Loeschman* v. *Machin*, 2 Stark. (N. P.) 311; *Farrant* v. *Thompson*, 5 B. & Ald. 826.
[9] *Ante*, 782.

which, though unauthorised, are not so repugnant that by their mere existence they operate as a disclaimer and a determination of the holding.[1]

Hire of horse and carriage with servant.

To this head of *locatio rei* must be referred that class of cases where a carriage and horses are hired, and the letter sends with them his coachman or servant;[2] and also that class of cases where the responsibility of a master for the use by his servants of the thing hired comes in question.[3] The greater leniency of the Roman law than of our own should be noted. Sir William Jones[4] gives the opinion of Pomponius,[5] which was generally adopted, and which makes the master liable only when he is culpably negligent in admitting careless guests, or servants whose bad qualities he ought to know; whereas in English law the master is liable for all acts, unless wilfully done for the servant's own benefit or "without the scope" of the hiring.

Hire of ready-furnished lodgings.

To illustrate the rule of the English law, Sir William Jones[6] gives the example of the hire of ready-furnished lodgings, where, if the hirer's servants, children, guests, or boarders, negligently injure or deface the furniture, the hirer is responsible.

Coupé Co. v. *Maddick.*

The Coupé Co. v. *Maddick*[7] affords another illustration. The plaintiffs brought an action in the County Court to recover damages from the defendant for injuries to a carriage and horse hired from them by the defendant. The injuries were caused by the man employed by the defendant to drive the carriage. After having driven his master home, he in breach of orders started on an entirely new and independent journey, on his own account, in the course of which the horse and carriage were injured. The County Court judge held the hirer not responsible, on the authority of *Storey* v. *Ashton*.[8] This involved a finding by the judge sitting as a jury, that the hirer was not negligent; and that the man's act was wholly outside his authority as servant. But the County Court judge's decision was set aside by

[1] *Donald* v. *Suckling*, L. R. 1 Q. B. 585, 615; Bac. Abr. Bailment (C); *id.* Trover, (C), (D), (E); *Isaack* v. *Clark*, 2 Bulst. 306, 309; 2 Wms. Notes to Saunders, 91.

[2] *Ante*, 600.

[3] *Ante*, 578 *et seqq.* *M'Manus* v. *Crickett*, 1 East, 106; *Croft* v. *Alison*, 4 B. & Ald. 590; *Limpus* v. *London General Omnibus Co.*, 1 H. & C. 526, and the rest. Wharton cites a case (Negligence, § 716), from Mommsen, of a student hiring a horse from a livery stable keeper, which, when he arrived at his destination, he gave to the ostler, who fastened the horse so negligently in its stall as to suffocate it. Mommsen is of opinion that the student could not be reasonably expected to know about the fastening of a horse, and that he is liable for ignorance only of what he could be reasonably expected to know. Wharton, however, is of the opposite opinion: "If I hire a horse I must see that he is safely kept as well as safely driven, and if I take the horse under my care, the owner of the horse has as much right to presume that I know how to tie him as that I know how to drive him." "Secondly, even supposing the first point to fail, the maxim *Respondeat superior* here comes in." I am unable to agree with either of these opinions. In the first place, the duty is not to tie the horse up personally, but to take proper care to hand him to a proper person; secondly, the delivery of a horse to an ostler at an inn does not seem to me to constitute any relationship of master and servant. On the other hand, in America, *Hall* v. *Warner*, 60 Barb. (N. Y.) 198, would be an authority. The law in Scotland is clear that "a person who hires a horse is not responsible for the *culpa* of those (ostlers of inns and others) to whom in the course of a journey he properly entrusts it": *Smith* v. *Melvin*, 8 Dunlop, 264. The point might have been raised in *Coupé Co.* v. *Maddick*, [1891] 2 Q. B. 413. The judges, however, do not even allude to it.

[4] Bailm. 89.

[5] D. 19, 2, 11.

[6] Bailm. 89, citing Pothier, Traité du Contrat de Louage, n. 193. Cp. Code Civil, art. 1735.

[7] [1891] 2 Q. B. 413.

[8] L. R. 4 Q. B. 476.

the Divisional Court [1] on two grounds: first, that the owner could maintain no action against the servant for breach of duty in the wrongful and negligent use of the horse and carriage by which they were damaged; "because . . . there was no invasion by the servant of the latter's (the owner's) right of ownership, and no contractual relation between them"; and, secondly, "on general principles of the public benefit." The decision is sustainable on neither. As to the former, *Mears* v. *L. & S. W. Ry. Co.*,[2] is in point on the other side. As to the latter, Lord Field's consideration in *Bank of England* v. *Vagliano* [3] of the principle determining which of two innocent parties is to suffer where loss arises from the misconduct of a third person, negatives the proposition enunciated by the learned judges in the Divisional Court.[4] Judgment of the Divisional Court.

The question ruled on by the Court was; what in the circumstances of the case is the conclusion in law where there is no finding of a contract to be answerable specially? The authorities [5] all point in one direction, and that in direct conflict with the learned judges' decision. If the hirer rebuts the presumption of fault and shows that the injury happened in some way with regard to which he is free from blame, he is free also from liability.

The Coupé Co. v. *Maddick* [6] was considered in *Sanderson* v. *Collins* [7] and treated with quite undue tenderness. The facts differed from *The Coupé case* only in that the coachman took his employer's carriage *Sanderson* v. *Collins.*

[1] Cave and Charles, JJ.

[2] 11 C. B. N. S. 850. *Mears* v. *G. E. Ry. Co.*, [1895] 2 Q. B., 387, very decisively states the principle. In *Lotan* v. *Cross*, 2 Camp. 464, Lord Ellenborough held that a mere gratuitous permission to a third person to use a chattel does not in contemplation of law take it out of the possession of the owner, who may maintain trespass for any injury done to it while so used. See this case criticised, Holmes, The Common Law, 173. As to what "permanent injury" is, see *Mumford* v. *Oxford, Worcester, and Wolverhampton Ry. Co.*, 1 H. & N. 34. On the general matter, Roll. Abr. Action sur Cas., (O) *vers qui ces gist*; and Bullen and Leake, Prec. of Plead. (3rd ed.), 395.

[3] [1891] A. C. 169. As to "public policy," see per Parke, B., advising the House of Lords in *Egerton* v. *Brownlow*, 4 H. L. C. 123; also Pollock, Contracts (7th ed.), 313 and *ante*, 720.

[4] See Law Magazine (4th ser.), vol. xvii. 97–118. "For a wilful act intrinsically wrong by a servant the master is not liable." "There can be no action except in respect of a duty infringed and" "no man by his wrongful act can impose a duty"; per Bramwell, B., *Degg* v. *Midland Ry. Co.*, 1 H. & N. 782.

[5] Story, Bailm. § 402, Agency, §§ 452–457; *Coleman* v. *Riches*, 16 C. B. 104. Cp. also 25 & 26 Vict. c. 93, s. 8; *Armfield* v. *Mercer*, 2 Times L. R. 764. The rule of the Roman law is thus stated by Ulpian: *Mihi ita placet, culpam etiam eorum quos induxit, præstet suo nomine, etsi nihil convenit; si tamen culpam in inducendis admittit, quod talem habuerit, vel suos vel hospites*: D. 19, 2, 11. *Si hoc in locatione convenit, ignem ne habeto, et habuit, tenebitur, etiam si fortuitus casus admisit incendium; quia non debuit ignem habere. Aliud est enim ignem innocentem habere permittit enim, sed inimicum ignem*: D. 19, 2, 11, § 1. Article 1732 of the Code Civil is: *Il répond des dégradations ou des pertes qui arrivent pendant sa jouissance, à moins qu'il ne prouve qu'elles ont eu lieu sans sa faute.* Pothier, Traité du Contrat de Louage, n. 199, says: *Le locataire est déchargé de l'obligation de rendre la chose, si la chose a péri sans sa faute; mais il doit enseigner et justifier comment elle a péri, autrement elle est présumée avoir péri par sa faute, et il est tenu de l'estimation.* Compare also the case stated by Mommsen *ante*, 798. The Dutch law provides that the lessee "is bound to make good all losses or damages, which by his own delicts, or by the neglect of his household, or even by any others out of hatred to the lessee, have been occasioned to the property hired. And the ignorance of any art that the party undertakes, or a trifling imprudence in matters which can only be carried on with the greatest prudence, is considered as a neglect; as also fire, unless the lessee proves it to be the effect of inevitable accident; in which case, the same as in all other misfortunes, he is not liable to make compensation to the lessor, except when a person stipulated a sum for the safe keeping": Grotius, Introduction to Dutch Jurisprudence (Eng. trans. by Herbert), bk. iii. c. 19, Of Letting and Hiring, sec. 11.

[6] [1891] 2 Q. B. 413.

[7] [1904] 1 K. B. 628.

out of the coach-house for his own purposes: in *The Coupé case* the coachman was told to take the carriage to the stables, but instead of going there and perhaps going through the form of unharnessing and then harnessing the horse and setting out on his journey, he took the short cut and without superfluous trouble drove off on his own business. Legally the two cases are indistinguishable; and in the latter the Court of Appeal stated the bailee's obligation to be to use "ordinary care," or, as it is alternatively stated, "reasonable care." A bailee, like the master in *The Coupé case*, or in *Sanderson's case*, is liable if his servant in the course of his employment fails to "use reasonable care in the custody of the carriage." But he is not responsible "for the acts of persons who are not his servants in respect of particular acts—that is, who are not acting within the scope of their employment in doing those acts. If a burglar broke into the coach-house, and took away the carriage and caused damage to it and brought it back, no liability would attach to the bailee, because the act would not be his, and he would not be responsible for the acts of a person between whom and himself there was no connection. But while not responsible in such a case, yet if his servant, whose duty it was to keep the carriage safely, had been negligent in leaving the coach-house open, and the carriage were taken away, the master would be liable, because of the negligence of a person for whom he is responsible." "If the servant, in doing any act, breaks the connection of service between himself and his master, the act done under those circumstances is not that of the master."

Abrahams v. *Bullock*. *Cheshire* v. *Bailey*.

The cases of *Abrahams* v. *Bullock*[1] and *Cheshire* v. *Bailey*[2] are complementary one to the other and mark the different aspects of this principle of law. In *Abrahams* v. *Bullock*, the coachman, who was hired with the horse and brougham by a traveller in jewellery, left his horse and brougham when the traveller went to his lunch in order to get his own dinner, and horse, brougham and jewellery—the traveller's stock—were all stolen. There was a breach by the servant of his master's contract, with the performance of which he was entrusted. He was negligent in not carrying out the duty he was employed to perform, to look after the hirer's effects during his temporary absence. In *Cheshire* v. *Bailey*[3] the facts were broadly the same, with, however, the vital distinction in principle, that the coachman, in concert with confederates, when the traveller left the brougham, drove it off in order that he and they might share the plunder of the jewellery that was in it. They were all convicted of the felony. The jobmaster was "not responsible for the consequences of the crime committed by the driver in this case, which was clearly outside the scope of his employment." "It is a crime committed by a person who in committing it severed his connection with his master and became a stranger; and as the circumstances under which it was committed are known, it raises no presumption of negligence in the defendant."

Loss following wrongful user but not necessarily consequent on it.

The case of a user that is wrongful, and a loss following, but not necessarily through the wrongful user, has been put; and answered by Tindal, C.J.,[4] as follows: "The real answer to the objection is that no

1 18 Times L. R. 701.

2 [1905] 1 K. B. 237.

3 [1905] 1 K. B. 237.

4 *Davis* v. *Garrett*, 6 Bing. 724. In *Adams* v. *Royal Mail Steam Packet Co.*, 5 C. B. (N. S.) 492, there was twofold delay. First, the charterers had no cargo at the place of loading when the ship was ready to receive it; secondly, after the cargo arrived

wrongdoer 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."

Sir William Jones's view[1] is: "If the bailee, to use the Roman expression, be *in morâ*, that is, if a *legal demand* have been made by the bailor, he must answer for any casualty that happens *after the demand*; unless in cases where it may be strongly presumed that the same accident would have befallen the thing bailed even if it had been restored at the proper time; or, unless the bailee have legally tendered the thing, and the bailor have put himself *in morâ* by refusing to accept it; this rule extends, of course, to every species of bailment." This is not exactly in point, since stress is laid upon a *legal demand*, and by the necessity of the case under discussion no legal demand can be made. The reasonable rule seems to be that the responsibility arises if the act is such as to warrant the plaintiff making a legal demand. If this be so, the case may be referred to the distinction between acts which determine the bailment and acts that only sound in damage. The practical effect is very similar; since, if legal demand be presumed, the bailor is responsible for any casualty happening after the demand. If the deviation from the lawful use does not warrant a legal demand, on proof of the loss and of the unlawful dealing with the bailed article, a presumption arises importing similar liability—viz., for the whole value of the thing lost or injured—and which is only to be rebutted by showing the same accident would have happened irrespective of the negligent and wrongful user. Sir William Jones's language, on the strength of the presumption that the accident would have in any case happened, does not seem adequate. He who, having undertaken a bailment, loses the article bailed in circumstances importing negligence, cannot escape liability on any presumption that if the negligence had not occurred the loss would still have occurred. He is put to show that whether he was or was not negligent, in all human probability the same result would have befallen, before he can be excused.[2]

Sir William Jones's view. Discussed.

In *Davey* v. *Chamberlain*[3] the action was for negligently driving a chaise, whereby the plaintiff's horse was killed. The two defendants were proved to have been together in the chaise when the accident happened; Chamberlain was sitting in the chaise smoking while the other was driving. Chamberlain contended that he was not liable, as the injury proceeded from the ignorance or unskilfulness of the other defendant, who was driving, and in charge of the horse and chaise.

Davey v. *Chamberlain.*

there was a further delay in loading, owing to a strike among the colliers. The Court held the charterers liable for the delay, and no distinction was made between the first period and the second. But for the first delay the second might have been immaterial: see per Williams and Byles, JJ., *l.c.* 404.

[1] Bailm. 70, 71.

[2] *Davis* v. *Garrett*, 6 Bing. 716; *Lilley* v. *Doubleday*, 7 Q. B. D. 510; Wharton, Negligence, § 559.

[3] 4 Esp. (N. P.) 229. Very like this is *Muse* v. *Stern*, 3 Am. St. R. 77, where defendant, being driven in his partner's phaeton by his partner's servant, was held not liable for an accident by which plaintiff was injured. See a note to 2 Parsons, Contracts (8th ed.), 121.

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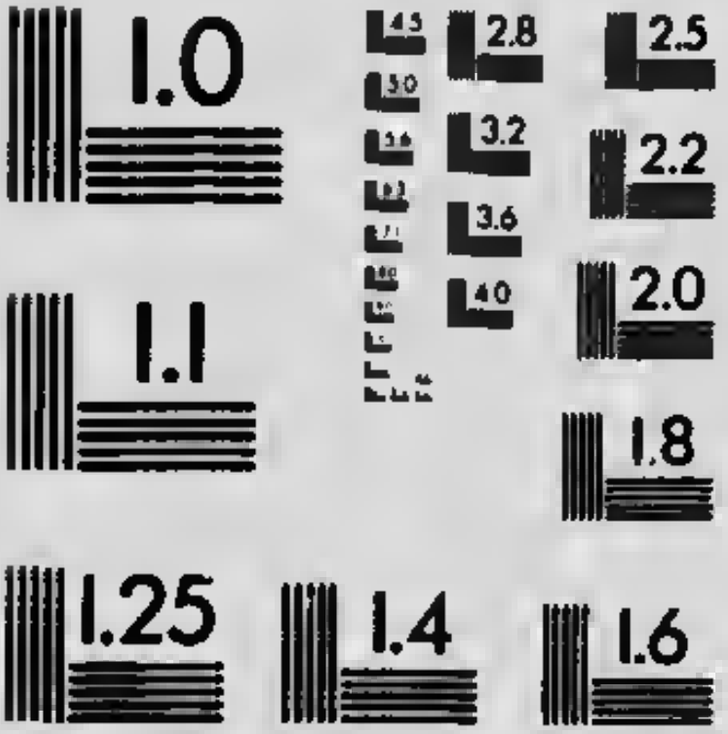

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Lord Ellenborough's direction was: "If a person, driving his own carriage, took another person into it as a passenger, such person could not be subjected to an action in case of any misconduct in the driving by the proprietor of the carriage, as he had no care nor concern with the carriage; but if two persons were jointly concerned in the carriage, as if both had hired it together, he thought the care of the King's subjects required that both should be answerable for any accident arising from the misconduct of either in the driving of the carriage, while it was in their joint care."

Cab cases

Cab cases.—The relation of cabman and cab proprietor is anomalous, partaking in some of the incidents of bailment of a thing, *locatio rei*, while others of its analogies are more akin to the relation of master and servant.

Metropolitan Hackney Carriage Acts.

In London the rights and liabilities of cab proprietor and cabman are fixed by the Metropolitan Hackney Carriage Acts,[1] as interpreted by a series of cases. The first case to be noted is *Morley* v. *Dunscombe*;[2] where the Court of Queen's Bench held that the arrangement between proprietor and man, that the proprietor should receive a certain sum and that the man should keep the excess of his receipts over it, constituted "clearly an arrangement between the defendant and the man as to the mode in which the wages of the latter should be paid."

Morley v. *Dunscombe.*

Powles v. *Hider.*

The same question was raised in *Powles* v. *Hider*.[3] Plaintiff, while travelling in a cab of which the defendant was the proprietor, lost his luggage by the fault of the driver, and sued the defendant on a contract to carry the luggage. Defendant contended that he was not liable, because the relation between himself and the cabman was that of bailor and bailee. The Queen's Bench, however, held that, under the Acts of Parliament, the driver was to be considered the servant or agent of the proprietor, and decided in accordance with *Morley* v. *Dunscombe*.

Fowler v. *Lock.*

Fowler v. *Lock*[4] differed from *Powles* v. *Hider* in that the action was by the cabman against the cab proprietor. Plaintiff was a driver upon the same terms as those proved in *Powles* v. *Hider*, and was hurt in consequence of the horse running away. A verdict was given for the plaintiff, with leave to move reserved to enter a verdict for the defendant or a nonsuit. The Court was divided, Grove and Byles, JJ., holding the relation between the cabman and the cab-master to be that of bailor and bailee, and the master liable; while Willes, J., considered that the case came within *Powles* v. *Hider*, and that the relation was that of master and servant.[5] *Powles* v. *Hider* was distinguished, by the majority of the Court, on the ground that the Metropolitan Hackney Carriage Acts referred only to the relation between carriage proprietors and people generally, and were not to be construed to alter the relations

[1] 1 & 2 Will. IV. c. 22; 3 & 4 Will. IV. c. 48; 6 & 7 Vict. c. 86; 16 & 17 Vict. cc. 33, 127; 30 & 31 Vict. c. 134; 32 & 33 Vict. c. 115; 59 & 60 Vict. c. 27. What is a "hackney carriage" is considered in *Hawkins* v. *Edwards*, [1901] 2 K. B. 169. By 6 & 7 Vict. c. 86, s. 28, where the driver of a hackney carriage by carelessness or wilful misbehaviour causes hurt or damage to any person or property in the street or highway, a justice may, on complaint, adjudge a sum of not more than £10 to the party aggrieved to be paid by the proprietor, who may recover the same from the driver.

[2] 11 L. T. (O. S.) 199.

[3] 6 E. & B. 207.

[4] (1872) L. R. 7 C. P. 272; L. R. 9 C. P. 751 note. Mention is made of these cases in *Smith* v. *Bailey*, [1891] 2 Q. B. 403.

[5] "Speaking for myself," says Williams, L.J., *Gates* v. *R. Bill & Son*, [1902] 2 K. B. 41, "in spite of the great authority of Willes, J., the dissentient judge in that case, I agree with the reasoning of the majority of the Court, as did Cockburn, C.J., in the case of *Venables* v. *Smith*."

hetwee the cab-master and the cabman. The effect of this view very largely increases the liabilities of the cab-master, and very considerably improves the position of the cabman; for the cab-master, as regards the outside world, is thus liable as for the acts of a servant; while as regards the cabman, he is fixed with the ordinary liabilities arising in the case of a hailor and bailee.

The subsequent history of this case is curious. The decision was appealed from, and the judges in the Exchequer Chamber were divided in their opinions upon it; but as those judges who were of opinion that the cabman was bailee were not satisfied that it followed necessarily that there was a warranty that the horse hailed was fit for the purpose for which it was bailed, and it might be that the plaintiff took upon himself the risk of its fitness, a new trial was ordered. On the new trial the jury found that there was personal negligence on the part of the defendant in the selection of the horse; and the Common Pleas refused a third trial.[1] Thus the reconsideration of the case was avoided; since if the cab-master and cabman were related as master and servant, then the master was liable for personal negligence; while if the relation was that of hailor and bailee, he was liable on the bailment. Result on the appeal.

In *Venables* v. *Smith*[2] the action was by an outside person against the cab proprietor. Plaintiff was run over through the negligence of a cabman after the day's work was over, and when executing some private business of his own. Plaintiff sued the cab proprietor. The Court followed the decision in *Powles* v. *Hider*. Cockburn, C.J., said: "Independently of the Acts of Parliament relating to this subject, the relation between them—*i.e.*, the driver and the proprietor—would be that of hailor and bailee, not that of master and servant." "But I think that the provisions of the Acts of Parliament alter what would otherwise be the relation of the proprietor and the driver, and for the purpose of the public produce the result that, as regards mischief done by the driver, who is selected by the proprietor, the relation of master and servant so far exists as to render the proprietor responsible for the acts of the driver."[3] *Venables* v. *Smith*.

A limitation on *Powles* v. *Hider* and *Venables* v. *Smith* was suggested in *King* v. *Spurr*[4]—that a cab proprietor who lends out a cab for a certain stipulated sum, the driver supplying the horse and harness, is liable under the Acts; but Grove and Bowen, JJ., distinguished the case. In many cases the effect of the statutes is to create the relation of master and servant—indeed, is sufficient to raise the presumption that that is the relation in all, but not to create the relation in all; and a case where the horse and harness are not supplied by the cab proprietor is not within the Acts. *King* v. *Spurr*.

In *King* v. *London Improved Cab Co.*,[5] however, Lord Esher, M.R., said: "I have come to the conclusion that by virtue of the Act the public are entitled, whether as between the proprietor and the driver *King* v. *London Improved Cab Co.*

[1] L. R. 10 C. P. 90.

[2] (1877) 2 Q. B. D. 279; *Playle* v. *Kew*, 2 Times L. R. 849. *Venables* v. *Smith* was approved by the Court of Appeal in *King* v. *London Improved Cab Co., Limited*, 23 Q. B. D. 281.

[3] *Steel* v. *Lester*, 3 C. P. D. 121, was the case of a sh navigated under a verbal agreement, where it was held that the agreement did not amount to a demise of the vessel, and that whatever was the precise relationship between the master and the owners, both were liable for negligence of the master in the management. The cab cases were much considered in the case.

[4] (1881) 8 Q. B. D. 104.

[5] 23 Q. B. D. 281.

the relationship of master and servant exists or not, to say that so far as the public are concerned that relationship must be deemed to exist." Lindley, L.J., suggested a distinction saving *King* v. *Spurr*: "I will only add that the regulations as to what has to be registered and accessible to the public seem to be based on the supposition that where a proprietor allows persons to drive his cabs in the public streets, such persons, so far as the public are concerned, are to be deemed servants of the proprietor. All the cases, except *King* v. *Spurr*,[1] are consistent with this view, and that case may be distinguishable, though the distinction may not be a very broad one, for there the cab only was hired by the driver and the horse was his property." This suggestion was seized upon in *Keen* v. *Henry*[2] as distinguishing that case from *King* v. *London Improved Cab Co.*, and identifying it with *King* v. *Spurr*, but was repudiated by the Court of Appeal. "It is evident," says Kay, L.J.,[3] "that the Lord Justice did not think the distinction a sound one"; and Lord Esher, M.R., added: "It must be understood that we are all of opinion that *King* v. *Spurr* has been overruled."

Keen v. *Henry.*

The trend of the cases was recognised as concluding the law in *Gates* v. *R. Bill & Son*[4]: "By virtue of the provisions of the Hackney Carriage Acts the cabdriver must, as regards the general public, be assumed to be for all purposes the servant of the cab proprietor." In the case before the Court the dispute was whether a mother who was in partnership with her son as a cab proprietor, but who was not registered, could be brought within the scope of the Acts. "It would be a strange thing," says Romer, L.J.,[5] "if a cab proprietor whose duty it was to obtain a licence could by disregarding that duty and illegally carrying on his business without a licence, escape from the liability to which he would have been subject if he had performed that duty."

Gates v. *R. Bill & Son.*

Summary.

The law as to cabs in London may therefore be summarised in two propositions:

(1) A cab-master stands to his cab-driver in the relation of master to servant whoever any act is done in the course of the cab-driver's business which causes any injury or liability to the outside world.[6]

(2) Between cab-master and cabman the relation is that of bailor and bailee.[7]

2. *Hire of Labour and Services.*

Locatio operis.

We next consider the second class of bailments for hire—*locatio, conductio operis*,[8] or the hiring of labour and services. This, we have already seen, is divided into (i) *locatio operis faciendi*, (ii) *locatio*

[1] 8 Q. B. D. 104. [2] [1894] 1 Q. B. 292. [3] *L.c.* 296.
[4] [1902] 2 K. B. 38. [5] *L.c.* 43.

[6] *Powles* v. *Hider*, 6 E. & B. 207; *Venables* v. *Smith*, 2 Q. B. D. 279; *King* v. *London Improved Cab Co.*, 23 Q. B. D. 281.

[7] *Fowler* v. *Lock*, L. R. 7 C. P. 272; L. R. 9 C. P. 751 note, L. R. 10 C. P. 90. Where a driver has accidentally injured [illegible] et lamp in London, his employer is not liable for the damage done under sec. [illegible] e Metropolis Management Act, 1855 (18 & 19 Vict. c. 120): *Harding* v. *Barker* [illegible]*ons*, 5 Times L. R. 42. *Crystal Palace District Gas Co.* v. *Idris*, 64 J. P. 452. The section is directed against any persons who "carelessly or accidentally break, throw down or damage" any street lamp. Sec. 58 of 57 Geo. III. c. xxix. was limited to damage done "wilfully or carelessly." *Baylis* v. *Linlott*, L. R. 8 C. P. 345, was an action against a hackney carriage proprietor for not securely carrying certain luggage belonging to a person who had hired his cart while plying for hire under the management of defendant's servant. [illegible]

[8] Sohm, Inst. of Roman Law (2nd ed. Eng. trans.), 420; Hunter, Roman Law (3rd ed.), 511-516. *Locatio, conductio operis* was said to be made *per aversionem* if the

operis mercium vehendarum. First, then, as to *locatio operis faciendi.* This again is divided into two kinds—(*A*) the hire of labour, or *locatio operis faciendi* strictly so called; (*B*) *locatio custodiæ*, or the receiving of goods on deposit for a reward for the custody thereof.

The *conductor operis*, in the Roman law, must execute and deliver the *opus* according to the specifications, and he is answerable for all defects, whether due to his own want of skill or to that of his workmen.[1] This liability exists till the acceptance and approval of the work by the *locator*.[2] If the work is destroyed before completion, the *conductor* is entitled to payment so far as he has gone, unless the contract is *per aversionem*.[3]

The *locator* must pay the *merces* agreed on if the work is satisfactorily executed; but if misled as to the price, he may withdraw from the contract.[4]

(*A*) Bailees for the hire of labour or services. (*A*) Hire of labour or services.

A distinction must here be taken between the present case and those we have before had to consider. In the case of the hire of labour and services the bailor is to pay the hire; whereas in the case of the hire of things the bailee is to pay it.[5] In the former case the phrase is *Res facienda datur;* in the latter, *Res utenda datur.*[6]

In the civil law another distinction was taken with regard to the hire of labour or services, between *operæ illiberales*, where a man works in consideration of pay; and *operæ liberales*, which are not the subject of hire, and for which the person requiring the services paid an honorarium.[7] *Operæ illiberales* and *operæ liberales.*

A difficulty has sometimes arisen in determining whether a contract is for the sale of goods or for work and labour. *Lee* v. *Griffin*[8] prescribes the test of whether when the contract is carried out it will result in the sale of a chattel. If so, in English law, the action cannot be brought for work and labour. If, on the other hand, work and labour have been done which result in nothing that can be the subject of sale, no action can be brought for goods sold and delivered.[9] Sale of goods or work and labour.

First, as to the position of the bailor in this relation of *locatio operis faciendi.* Story,[10] following Pothier, sets out the duties on the part of the employer in the Roman law under the following four heads: Duties of the bailor.

(1) To pay the price or compensation.

(2) To pay for all proper new and accessorial materials.

contract was for the job at a fixed price. *Per aversionem, c'est-à-dire en bloc pour un seul et même prix*: Pothier, Traité du Contrat de Vente, n. 308; Pothier, Traité du Contrat de Louage, nos. 435, 436.

[1] D. 19, 2, 25, § 7: *Qui columnam transportandam conduxit, si ea dum tollitur aut portatur, aut reponitur fracta sit ita id periculum præstat, si qua ipsius eorumque, quorum opera uteretur, culpa accideret: culpa autem abest, si omnia facta sunt, quæ diligentissimus quisque observaturus fuisset. . . . Idemque etiam ad cæteras res transferri potest.* For the use of *diligentissimus* here, see Jones, Bailm. 87. D. 19, 2, 13, §§ 5, 6.

[2] D. 19, 2, 24, pr., but *fides bona exigit ut arbitrium tale præstetur quale viro bono convenit.*

[3] D. 19, 2, 36, 37; or by *ex naturali, l.c.* 59.

[4] D. 19, 2, 60, § 4.

[5] *Coggs* v. *Bernard*, 1 Sm. L. C. (11th ed.) 194. See also next note.

[6] Pothier, Traité du Contrat de Louage, n. 393.

[7] Maynz, Éléments de Droit Romain (2nd ed.), vol. ii. 206.

[8] 1 B. & S. 272, explaining *Clay* v. *Yates*, 1 H. & N. 73. See the judgment of Beardsley, J., *Gregory* v. *Stryker*, 2 Denio (N. Y.), 628. Cp. D. 19, 2, 31.

[9] The test adopted before the decision in the text was whether work and labour are of the essence of the contract: *Clay* v. *Yates*, 1 H. & N. 73. Cp. *Atkinson* v. *Bell*, 8 B. & C. 277.

[10] Bailm. § 425, citing Pothier, Traité du Contrat de Louage, n. 405–410, 436, 437; 1 Domat, bk. 1, tit. 4, § 9. Bell, Principles of the Law of Scotland (9th ed.), 102.

(3) To do everything on his part to enable the workman to execute his engagement.

(4) To accept the thing when it is finished.

To these he subjoins, quite superflously, on his own authority:

(5) To be honest and observe good faith in his conduct. (This is an incident of all contracts.)

(6) To disclose defects to the other party. (This is included under the preceding head.)

(7) To conform to the special stipulations contained in the contract. (This is not only included under (5) but is of the essence of the contract.)

And he winds up: "These duties are formally treated of by Pothier,[1] and they seem so clear upon principles of general justice that the common law could hardly be deemed a rational science if it did not recognise them"—a conclusion that must command universal assent.

Destruction of article bailed pending completion.

There has been much discussion on the effect of a destruction of the article bailed pending completion or delivery. The sum of the results arrived at, after much conflicting and philosophical reasoning, may be stated as follows:

If, while the work is in progress, or at any time before the time when it should be delivered to the employer, the thing, which is the property of the employer and upon which the work is being done, perishes by internal defect, by inevitable accident, or by irresistible force, without any default of the workman, the workman is entitled to compensation to the extent of the value of the labour actually performed on it, unless his contract import a different obligation; for the maxim is *Res perit domino*.[2] If the workman has employed his

1 Traité du Contrat de Louage, 405–417.

2 2 Parsons (8th ed.), Contracts, 131. See *ante*, 797. In the Roman law this maxim applies only to the contracts of *mutuum* and *commodatum*. In *emptio-venditio* the rule is as in English law. *Cum autem emptio et venditio contracta sit . . . periculum rei venditæ statim ad emptorem pertinet, tam etsi adhuc ea res emptori tradita non sit. . . . Quidquid enim sine dolo et culpa venditoris accidit, in eo venditor securus est:* Inst. 3, 23, 3. Bayley, J., thus states the English rule: "Where goods are sold and nothing is said as to the time of delivery, or the time of payment, and everything the seller has to do with them is complete, the property vests in the buyer, so as to subject him to the risk of any accident which may happen to the goods": *Bloxam* v. *Sanders*, 4 B. & C. 948. *Rugg* v. *Minett*, 11 East, 217, per Lord Ellenborough, C.J.: "Everything having been done by the sellers which lay upon them to perform, in order to put the goods in a deliverable state in the place from whence they were to be taken by the buyers, the goods remained there at the risk of the latter." Tenant covenanting to repair, damage by fire only excepted, continues liable to payment of rent notwithstanding the premises are destroyed by fire: *Hare* v. *Groves*, 3 Anstr. 687. If he covenant without the exception, his duty is to rebuild: *Bullork* v. *Dommitt*, 6 T. R. 650. A tenant at will is not liable for general repairs, and *a fortiori* not to rebuild: *Horsefall* v. *Mather*, Holt (N. P.) 7. The rule seems to be: when the law creates a duty and the party is disabled to perform it without any default in him, and he has no remedy over, 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 any accident by inevitable necessity, because he might have provided against it by his contract: *Paradine* v. *Jane*, Aleyn, 26; and an anonymous case in Dyer, 33 (10). Cp. Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), ss. 20, 33; Benjamin, Sale (4th ed.), 657; Chalmers, Sale of Goods Act, 1893 (6th ed.), 54, *Brecknock and Abergavenny Canal Navigation Co.* v. *Pritchard*, 6 T. R. 750; *Hinde* v. *Whitehouse*, 7 East, 558; *Martineau* v. *Kitching*, L. R. 7 Q. B. 436. The maxim *Res perit domino* is considered in the House of Lords in *Bayne* v. *Walker*, 3 Dow (H. L.), 233. Lord Eldon, C., there says, 245: "The meaning of this is that where there is no fault anywhere, the thing perishes to all concerned; that all who are interested constitute the *dominus* as to this purpose; and if there is no fault anywhere then the loss must fall upon all," that is, the loss must lie where it falls. In *Paine* v. *Meller*, 6 Ves. 349, the completion of the purchase of a house was postponed from defects in the title. While the matter was still incomplete the house was burned down. Yet

own materials, says the same authority,[1] as accessorial to those of the employer, he is entitled to be paid for them if the thing perishes before it is completed.

Bell, in his Commentaries,[2] has reduced the law on this subject to three rules, which are accepted by the authorities as a satisfactory compendium of the law : Bell's rules.

(1) If the work is independent of any materials, or property of the employer, the manufacturer has the risk and the unfinished work perishes to him.

(2) If he is employed in working up the materials, or adding his labour to the property of the employer, the risk is with the owner of the thing with which the labour is incorporated.[3]

(3) If the work has been performed in such a way as to afford a defence to the employer against a demand for the price if the accident had not happened (as if it were defectively or improperly done), the same defence will be available to him after the loss.

"These principles seem also well founded in the common law, and will probably receive the like adjudication in each of these cases whenever it shall arise directly in judgment." [4] Approved by Story.

Primâ facie, they apply to those who enter into contracts for doing work and supplying material. Blackburn, J., however, points out, in delivering the judgment of the Exchequer Chamber in *Appleby* v. *Myers*,[5] that there is nothing to render it either illegal or absurd in the workman to agree to complete the whole, and to be paid when the whole is complete, and not till then. Then, in the event of a fire destroying the incomplete work, the workman must replace it. *Anderson* v. *Morice* [6] is in point here. The property in the cargo in question there did not pass to the purchaser before the loading was complete ; before that happened, the ship on which the cargo was being loaded had sunk, and the property never passed out of the vendor. The purchaser consequently was never in peril, and thus had no insurable interest. Had the loading been completed the result must have been otherwise. Blackburn, J., in *Appleby* v. *Myers*.

the purchaser was held bound, and the omission of the vendor to renew the insurance which expired on the day fixed originally for completion made no difference. In *Loft* v. *Dennis*, 1 E. & E. 474, though the landlord had insured, the tenant was held bound to pay his rent during reinstatement, and not entitled to have the insurance money laid out on the land. See the note to Campbell's Lives of the Chancellors, vol. vii. 619, citing Sugden, V. & P. (2nd ed.) 333. *Leeds* v. *Cheetham*, 1 Sim. 146 ; neither has one tenant any equity to compel the landlord to rebuild, though he has received insurance money : *Rayner* v. *Preston*, 18 Ch. D. 1 ; *Phœnix Assurance Co.* v. *Spooner*, [1905] 2 K. B. 753. See the Scotch cases of *Clark* v. *Glasgow Assurance Co.*, 1 Macq. (Sc. H. L.) 668 ; *M'Intyre* v. *Clow*, 2 Rettie, 278 ; *Richardson* v. *County Road Trustees of Dumfriesshire*, 17 Rettie, 805 ; *Brewer* v. *Duncan*, 20 Rettie, 229.

[1] Pothier, Traité du Contrat de Louage, n. 433, adopted by Story, Bailm. § 426.

[2] 1 Bell, Comm. (7th ed.) 486. Cp. *M'Intyre* v. *Clow*, 2 Rettie, 278.

[3] *Appleby* v. *Myers*, L. R. 2 C. P. 651 ; cp. *Menetone* v. *Athawes*, 3 Burr. 1592 ; *Gillett* v. *Mawman*, 1 Taunt. 137 ; 2 Kent, Comm. 591.

[4] Story, Bailm. § 426 a, § 437.

[5] L. R. 2 C. P. 651. *Howell* v. *Coupland*, 1 Q. B. D. 258 ; *Nickoll and Knight* v. *Ashton, Edridge*, [1901] 2 K. B. 126. Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 18, r. 2.

[6] 1 App. Cas. 713. "Merchants, according to my experience, attach very great weight to a stipulation as to who is to insure, as showing who is to bear the risk of loss" : per Blackburn, J., *Allison* v. *Bristol Marine Insurance Co.*, 1 App. Cas. 229, approved by Lord Selborne, in *Anderson* v. *Morice*, l.c. 748. *Mucklow* v. *Mangles*, 1 Taunt. 318, laid down that if a person contracts with another for a chattel which is not in existence at the time of the contract, though he pays him the whole value in advance, and the other proceeds to execute the order, the buyer acquires no property in the chattel while unfinished in the hands of the maker. This was doubted in *Carruthers* v. *Payne*, 5 Bing. 270. See note to 40 R. R. 784. *Brice* v. *Bannister*, 3 Q. B. D. 569.

Duties of the bailee.

Next, of the duties of the bailee.

In this species of bailment every man is presumed to possess the ordinary skill requisite to the due exercise of the art or trade which he assumes. *Spondet peritiam artis.*[1] *Imperitia culpæ adnumeratur.*[2] Thus, where a tailor receives cloth to be made into a coat, or a jeweller a precious stone to polish or to cut, each of them is bound to do the work required from him in the course of his business in a workmanlike manner. He is required to bestow ordinary diligence, and that care and prudence which the average prudent man takes in his own concerns.[3] For the contract is for mutual benefit; therefore the bailee is not answerable for slight neglect, nor for a loss by inevitable accident or irresistible force, or from the inherent defect of the thing itself, unless he took the risk on himself;[4] he is only answerable for ordinary neglect.[5]

Exception to liability.

There is one exception to this rule. Though the bailee is bound to exercise care and skill adequate to the business he undertakes only, and if the thing entrusted to him perish without fault of his the loss will be the bailor's, yet, where the delivery has the effect of transferring the property, the result is different. On this point all the commentators cite "the famous law of Alfenus in the Digest":[6] If an ingot of silver is delivered to a silversmith to make an urn, the whole property is transferred, and the employer is only a creditor of metal equally valuable which the workman engages to pay in a certain shape, unless it is agreed that the specific silver, and none other, shall be wrought up into the urn.[7]

Seymour v. *Brown.*

This rule was sought to be applied in the American case of *Seymour* v. *Brown.*[8] A quantity of wheat was sent to a miller to be exchanged for flour at the rate of a barrel of flour for every five bushels of wheat. The miller mixed the wheat with the mass of the wheat of the same quality belonging to himself, and, before the flour was delivered, the mill, with all its contents, was destroyed by fire. It was held that,

1 *Post*, 818. Pothier, Traité du Contrat de Louage, n. 425.

2 D. 50, 17, 132; Pothier, Traité du Contrat de Louage, n. 425, 426; Bell, Principles of the Law of Scotland (9th ed.), 106–108; 1 Bell, Comm. (7th ed.) 489, where in a note it is said: "There is a special law relative to 'ignorant smethis, who throw ignorance and drunkynnesse spillis and crukes men's horses throw schoyn in the quick.' It is enacted: (1) That a smith who shoes in the quick shall pay the cost of the horse till he be hale; (2) That he shall, in the meantime, find a horse for the journey; and, (3) That if the horse will not hale the smith shall pay his price to the owner. 1478, c. 11, 2 Act. Parl. 119."

3 D. 19, 2, 9, § 5. Gothofred's note on this passage is: *Imperitus autem nemo præsumitur in eo, in quo semel probatus est industriæ plenus, ut Advocatus in judicialibus, negotiator mercatorum matriculæ adscriptus.*

4 D. 19, 2, 13, §§ 5, 9.

5 Story, Bailm. §§ 433, 437.

6 D. 19, 2, 31. Story, Bailm. § 439, where the references are given. Jones, Bailments, 192. Alfenus, who was a shoemaker, and afterwards turned to be a jurisconsult, is mentioned by Horace—

Alfenus vafer omni
Abjecto instrumento artis clausaque taberna,
Sutor erat; sapiens operis sic optimus omnis
Est opifex solus, sic rex.

Satires, bk. i. sat. 3, 130.

There is an article on him in Bayle's Dictionary, *sub nom.*, also in the preface to Pothier's Pandects, where is an account of all the jurists whose opinions are referred to in the Digest.

7 The rules of the Roman law as to the effect of the union of things apart from the intention of the owner in the transfer of property, are lucidly explained in a note on Sohm, Inst. of Roman Law (2nd ed. Eng. trans.), 345.

8 19 Johns. (Sup. Ct. N. Y.) 44. There is a very full note on the cases on this point, 2 Parsons, Contracts (8th ed.), 133.

as there was no fault or negligence imputable to the miller, he was not responsible for the loss, and that the property was not transferred. Story, J., however, in *Buffum* v. *Merry*,[1] considers that this case cannot be supported otherwise than on the ground that there was a bailment of the wheat to be ground into flour, or a *locatio operis faciendi*, and that the Court must have been of opinion that the facts did not prove a sale of the wheat or an exchange of it for flour at so many bushels per barrel. Kent, too, disapproves the decision.[2] And Bronson, J., in *Smith* v. *Clark*,[3] says that "the decision was virtually overruled in *Hurd* v. *West*, 7 Cow. 752, and see p. 756, note. The case of *Slaughter* v. *Green*, 1 Rand. (Va.) R. 3, is much like *Seymour* v. *Brown*. They were both hard cases, and have made bad precedents."

Buffum v. *Merry.*

Smith v. *Clark.*

The case of *Seymour* v. *Brown* being, then, out of the way, the distinction is a plain one, and is clearly put by Cowen, J., in *Pierce* v. *Schenk*;[1] where logs were delivered at a saw-mill on the terms that they should be sawn into boards within a specified time, and that each party should have half the boards. After delivery, a portion was sawn and the saw-mill proprietor (the miller, as he is called in the report) converted both boards and logs to his use. The question was whether trover was properly brought. "Had," says the learned judge, "the contract by the parties been one of sale, as if the defendant had taken the logs under a promise to return boards generally of equal value to one-half of the boards to be made out of them, the decision of the judge would have been erroneous. But this was not the case. The plaintiff delivered his logs to the defendant, who was a miller, to be manufactured into boards—a specific purpose, from which he had no right to depart. On completing the manufacture, he was to return the specific boards, deducting one-half as a compensation for his labour. It is like the case of sending grain to a mill for the purpose of being ground, allowing the miller to take such a share of it for toll. This is not a contract of sale, but of bailment—*locatio operis faciendi*. The bailor retains his general property in the whole till the manufacture is completed; and in the whole afterwards minus the toll. The share to be allowed is but a compensation for the labour of the manufacturer, whether it be one-tenth or one-half. Thus, in *Collins* v. *Forbes*,[5] it appeared that Forbes furnished certain timber to one Kent, which the latter was to work up into a stage for the Commissioners of the Victualling Office, he to receive one-fourth of the clear profit and a guinea per week on the work being done. This was holden to

Pierce v. *Schenck.*

Cowen, J.'s, judgment.

[1] 3 Mason (U. S.) 478, 480. Story, Bailm. §§ 193-4.

[2] 2 Comm. 589. See notes by the editors of the 12th and 13th editions.

[3] 21 Wend. (N. Y.) 83. The Courts of the State of Vermont appear to be of a different opinion, and to uphold *Seymour* v. *Brown* within their jurisdiction: *Smith* v. *Niles*, 20 Vt. 315; *Downer* v. *Rowell*, 22 Vt. 347. This latter was a case where the obligation was to keep sheep "the full term of three years, and return the same or others in their place as good as they are." It was held that the property did not vest in the bailee till the return of "other sheep of equal quality." See 2 Parsons, Contracts (8th ed.), note at 136.

[4] 3 Hill (N. Y.) 28. *Gregory* v. *Stryker*, 2 Denio (N. Y.) 628, is an interesting case: A waggon, almost worthless, was sent to be repaired; when finished, it became worth $90, and the bill for repairing it was $78¼. When it was taken in execution for the workman's debt, the Court held that, "as a general proposition, where the owner of a damaged or worn-out article delivers it to another person to be repaired and renovated by the labour and materials of the latter, the property in the article as thus repaired and improved is all along in the original owner, and not in the person making it." The judgment of Beardsley, J., is well worthy of perusal.

[5] 3 T. R. 316.

be a bailment by Forbes." After citing a case, *Barker* v. *Roberts*,[1] the learned judge continues: "Nearly all the books concede the distinction laid down in Jones on Bailments, 102. between an obligation to restore the specific thing and a power or necessity of returning others equal in value. In the first case, it is a regular bailment. In the second, it becomes a debt." [2]

South Australian Insurance Co. v. *Randell.*

The same view was adopted by the Privy Council in *South Australian Insurance Co.* v. *Randell*.[3] Corn was deposited by farmers with a miller to be stored and used as part of the current consumable stock or capital of the miller's trade, and was by him mixed with other corn, subject to the right of the farmers to claim an equal quantity of corn of like quality, though not any particular corn. The Judicial Committee of the Privy Council held the dealing to be a sale and not a bailment. Their opinion is thus summed up; [4] "It comes to this, that where goods are delivered upon a contract for a valuable consideration, whether in money or money's worth, then the property passes. It is a sale and not a bailment. In the case of mixture by consent, the identity of the specific property of each who consents is no longer ascertainable, and the mixed property belongs to all in common. It may perhaps be regarded, under special circumstances, as the case of persons having a common property, and if they all concur in a bailment of this property, all may require a re-delivery of what they have so put in bailment. It may be that in such a case each might claim separately to have an aliquot part of the whole restored to him; but here the current stock was, from its very nature, liable to be changed from day to day both in quantity and quality. The delivery was not for the peculiar or primary purpose of storage *simpliciter*, as in the case of a bailment of property to be returned to one bailor, or of any part to one or more of several joint bailors; but the wheat was delivered by each farmer independently to be stored and used as part of the current stock or capital of the miller's trade. There seems to be no ground upon which a banker is held not to be a trustee, or a banker's current capital not to be trust property, that is not applicable in principle to the case of the miller and his current stock of wheat, which is his trading capital." [5]

Judgment.

1 8 Greenl. (Me.) 101.

2 Another passage of the judgment may be reproduced here. "I am of opinion," says Cowen, J., *l.c.* 31, "that when a manufacturer receives goods for the purpose of being wrought in the course of his trade, the contract is entire; and, without a stipulation to the contrary, he has no right to demand payment until the work is complete. *A fortiori* he has no right to carve out payment for himself without consulting the bailor. A miller is entitled to take toll from your grist, on grinding it; but he chooses to grind only a part, and then sell the whole. He is not entitled to his toll for what he actually ground. It is like the common case of a man undertaking to labour during a certain time, or in finishing a certain amount of work for so much. Till the labour be performed, he can claim nothing." Cp. *Cutler* v. *Closewell*, 2 Sm. L. C. (11th ed.) 1.

3 L. R. 3 P. C. 101, distinguished in *In re Williams*, 31 Upp. Can. Q. B. 143, (where the engagement was to deliver a barrel of flour of a specified quantity for so many bushels of wheat), on the ground that nothing remained uncertain except the price.

4 L. R. 3 P. C. 113.

5 See *Foley* v. *Hill*, 2 H. L. C. 28. The case may occur of the purchase of a certain definite quantity from a larger body; when by the English law, in general, the right does not pass till the vendor has made his selection. "If I agree," says Bayley, J., "to deliver a certain quantity of oil as ten out of eighteen tons, no one can say which part of the whole quantity I have agreed to deliver until a selection is made. There is no individuality till it is divided": *Gillett* v. *Hill*, 2 Cr. & M. 530, distinguished in *Knights* v. *Wiffen*, L. R. 5 Q. B. 660; *Campbell* v. *Mersey Docks and Harbour Board*, 14 C. B. N. S. 412. The American law does not seem to coincide: *Russell* v. *Carrington*, 42 N. Y. 118; *Waldron* v. *Chase*, 37 Me. 414; 2 Parsons, Contracts (8th ed.), 137.

Besides the duties already set out, there are others implied on the part of the bailee of work on a thing—such as the duty of observing good faith and practising no imposition on his employer as to his services. When his work is done, he is bound to return the thing upon which he has worked to his employer. This last obligation is, however, subject to his right to a lien where, by his labour and skill, he has conferred increased value on the thing bailed to him.[1] This lien only exists when he who claims it is a bailee under the contract *locatio operis faciendi*, and therefore has no application in the case of a journeyman or day-labourer or in any like case where the possession is that of the employer, and where the only security for the payment of wages is the employer's personal responsibility on the contract of hiring.[2]

Duty to observe good faith and to return the thing worked on.

Lien.

There was for some time uncertainty as to the rule of law, where the work contracted for was done, but so imperfectly that it was not worth the price agreed to be paid. In early times the rule had been that whenever anything was done under a special contract but not in conformity thereto, the party for whom it was done must pay the stipulated price and resort to a cross-action to indemnify himself.[3] In *Basten* v. *Butler*[4] on the authority of *Broom* v. *Davis*, evidence in reduction of damages, to show that work was done in a grossly improper way, was rejected, but a new trial was granted on this ground. In *Farnsworth* v. *Garrard*[5] the settled rule was thus stated by Lord Ellenborough: "The late Mr. Justice Buller thought (and I, in deference to so great an authority, have at times ruled the same way) that in cases of this kind, a cross-action for the negligence was necessary, but that if the work be done, the plaintiff must recover for it. I have since had a conference with the judges on the subject; and I now consider this as the correct rule—that if there has been no beneficial service, there shall be no pay; but if some benefit has been derived, though not to the extent expected, this shall go to the amount of the plaintiff's demand, leaving the defendant to his action for negligence. The claim shall be co-extensive with the benefit."[6] If the work is left unfinished by the wilfulness of the workman, in the case [illegible] having undertaken to do the whole, he is disentitled from recovering anything.[7]

Where thing not worth the price agreed to be paid.

Farnsworth v. *Garrard*.

So far we have considered only a portion, and that the least important portion, of the relations raised by the contract of [illegible] labour and services—viz., that which has reference to the bailment of goods for work to be done upon them. There is another aspect of the same subject—where contracts of hire and services are made for the work of architects, auctioneers, bankers, stockbrokers, solicitors, surgeons, and the rest—which demands careful and detailed

Portion of the contract of [illegible] labour and services [illegible] bailment

1 *Chapman* v. *Allen*, Cro. Car. 271; *Jackson* v. *Cummins*, 5 M. & W. 342.
2 *M'Intyre* v. *Carver*, 2 Watts & Serg. (Pa.) 392.
3 *Broom* v. *Davis*, 7 East, 480 note.
4 7 East, 479. *King* v. *Boston*, 7 East, 481 note.
5 1 Camp. 38. Cp. *Fisher* v. *Samuda*, 1 Camp. 190.
6 The course of the cases subsequently is *Denew* v. *Daverell*, 3 Camp. 451; *Street* v. *Blay*, 2 B. & Ad. 456; *Mondel* v. *Steel*, 8 M. & W. 858; *Riggs* v. *Burbidge*, 15 M. & W. 598, and *Dakin* v. *Oxley*, 15 C. B. N. S. 646. In *Davis* v. *Hedges*, L. R. 6 Q. B. 687, it was held that, though in an action for the price of work the defendant may set up that the work has been defectively done in reduction of damages, he is not bound to do so, but may bring his separate action in respect of the claim. *Davis* v. *Hedges* was distinguished in *Caird* v. *Moss*, 33 Ch. D., by Cotton, L.J., 34, and by Lindley, L.J., 35.
7 *Sinclair* v. *Bowles*, 9 B. & C. 92.

consideration, but where no actual bailment of property is involved. Since, then, we are at present concerned with bailments in the more tangible meaning of the term, the discussion of the duties raised by these relations so far as care or the want of it is involved are postponed, and subsequently discussed in other connections.[1]

(*B*) Hire of custody.

(*B*) Hire of custody or the receiving of goods on deposit for a reward for the custody thereof.

Sir Wm. Jones's statement of the duty.

This is the second subdivision we have proposed of the *locatio operis*, or the hiring of labour and services. Sir William Jones,[2] speaking of the bailee's duty in this case, says: "He is clearly responsible, like other interested bailees, for *ordinary* negligence; and although St. German seems to make no difference in this respect between a *keeper of goods for hire* and *a simple depositary*, yet he uses the word *default*, like the *culpa* of the Romans, as a generical term, and leaves the *degree* of it to be ascertained by the rules of law."[3]

Duty to re-deliver.

The duty to re-deliver may cause difficulty. In the United States it has several times been decided that where a person in the character of a bailee undertakes to deliver specific goods on demand, though the demand may be made wherever he may be at the time, his offer to deliver at the place where the property is, or at his dwelling-house or place of business, will be sufficient.[4]

To this subdivision are to be referred the duties of agisters of cattle, factors, forwarding merchants, warehousemen, and wharfingers, whose cases we now proceed to consider in their order.

Agisters of cattle. Definition.

(o) As to *agisters of cattle*.

Agistment[5] is "where other men's cattle are taken into any ground at a certain rate per week; it is so called because the cattle are suffered

[1] It is difficult to classify a case like *Renihan* v. *Wright*, 21 Am. St. R. 219, which is an action for breach of the bailment of a corpse, brought against the undertaker, for negligent delay in the delivery of a dead body. *L. & N.* v. *Bonner*, 27 Am. St. R. 850, may be cited in some parts of the United States for the proposition that a widow is entitled to recover for mental suffering as an element of damages in an action against a railroad company for their delay in the delivery of her husband's body, forwarded upon such railroad. See another curious case as to the widow's rights to the custody of the body of her deceased husband, *Larson* v. *Chase*, 28 Am. St. R. 370. In England, "A dead body by law belongs to no one, and is, therefore, under the protection of the public. If it lies in consecrated ground the ecclesiastical law will interpose for its protection; but, whether in ground consecrated or unconsecrated, indignities offered to human remains in improperly and indecently disinterring them, are the ground of an indictment": per Byles, J., *Foster* v. *Dodd*, L. R. 3 Q. B. 67, 77. Cp. 2 Russell, Crimes (5th ed.), 256; Pollmore, Ecc. Law, 689. Replevin for a corpse, 34 Irish Law Times, 25.

[2] Bailm. 97.

[3] Doctor and Student, dial. 2, c. 38.

[4] As to delivery generally, see *post*, 898. In 2 Kent, Comm. 509, it is said: "On a valid tender of specific articles the debtor is not only discharged from his contract, but the right of property in the articles tendered passes to the creditor. The debtor may abandon the goods so tendered; but, if he elects to retain possession of the goods, it is in the character of bailee to the creditor, and at his risk and expense." As to bailment of a coat delivered to the waiter while dining at a restaurant: *Ultzen* v. *Nicols*, [1891] 1 Q. B. 92; and for the liability where a coat is put in the place where coats were ordinarily put in the dining-room of a hotel: *Orchard* v. *Bush*, [1898] 2 Q. B. 284.

[5] Tomlin, Law Dictionary, art. Agistment. For this he cites 2 Co. Inst. 643. Jacob's Law Dictionary has the same passage, and the same authority for it; I am unable to verify it. In 4 Co. Inst. c. 73, The Courts of the Forests, 293, there is the following: "Agistator, so called, because he taketh beasts to agistment, that is, to depasture within the forest, or to feed upon the pawnage, and cometh of the French word, *gyser*, to lye, because the beasts that feed there are there *levant* and *couchant*, lying and rising. And his office consisteth in *agistando, recipiendo, imbraciando, et certificando*." "*Agistamentum*," says Tomlin, "from French *gysser*, *gister* (*jacere*), because the beasts are *levant* and *couchant* during the time they are on the land." Manwood, The Forest Laws, 195 derives agist and *agistamentum* from the Latin *agisto*, to drive, "for of

agiser . . . that is, to be *levant* and *couchant* there; and many great farms are employed to this purpose." Blackstone says:[1] "If a man takes in a horse or other cattle to graze and depasture in his grounds, which the law calls *agistment*, he takes them upon an implied contract to return them on demand to the owner."[2]

History of the term.

In the king's forests there were frequently demesne woods and lands, which were kept inclosed, in addition to the waste lands, that lay open for common to the inhabitants of the forest. Certain officers were appointed to the charge of these, who were called "the king's agisters of his forest." Their duty was to take in for money the beasts and cattle of every person, being an inhabitant within the forest, who was entitled to have common herbage there. The taking in of cattle to pasture or feed, by the week or otherwise, was called agisting of beasts or cattle, and the common of herbage that was afforded was called agistment.[3]

Its wider signification.

This strictness of language very early gave place to a more general meaning, and agistment came to signify the common of herbage of any kind of ground or land, or the money received for the same. An agister was one who received and took in the beasts and cattle of every person in his land for hire to have pasture there. If, however, a man had only common by a specialty in a certain place and had no cattle of his own to common he was not allowed to agist other men's cattle.[4]

Charta de Foresta.

The transition from the limited to the broad sense of the term may be traced through an article in the Charta de Foresta[5] in these words: *Unusquisque liber homo agistet boscum suum in foresta pro voluntate sua et habeat pannagium suum:* since, from the chartered right of every freeman to agist his own lands and woods within the forest, the application of the same name would be easy and natural to the exercise of the right that every man had to let his own land outside the boundaries of the forest for a purpose not unlawful.

Duty at common law.

At common law the duty of a bailee with whom cattle were left to be fed for reward is to take reasonable care of them, not "to take care of and re-deliver them to the bailor."[6] Or, as the law is stated by Blackburn, J., in *Smith* v. *Cook*:[7] "An agister does not insure the safety of the horses entrusted to him, he is bound to take reasonable care of them, and if they are killed through his negligence he is liable." The words used by Quain, J., in the same case, are "proper care."[8] *Smith* v. *Cook*.

This verb, *agito*, to drive or to feed, the lawyers have framed this verb, *agista*, to feed or to agist (by adding thereunto this letter *s*), and then of *agista*, *agistamentum*, the feeding or agistment of beasts or cattel, with herbage or mast." *Agistement de bestes est un la bestes ryment en aut pasture jou pus prendre de chekune beste un doner ou mayle*: Y. B. 22 Ed. I. (Horwood's ed.) 363. Cp. Murray, Eng. Dict. *sub voc.* Agist, Agistment, Agistor.

[1] 2 Comm. 452.

[2] *Chapman* v. *Allen*, Cro. Car. 271.

[3] Manwood, Laws of the Forest, c. 11, Of Agistment, and what Agistment is, 180-191. Cp. Com. Dig. Chase (D 1.), (Q 6.).

[4] In Lib. Assis. 22 Ed. III. 103, pl. 81; Manwood, Laws of the Forest, 182.

[5] 9 Hen. III. c. 9. (Ratified): referred to in Revised Statutes as 25 Ed. I.

[6] *Corbett* v. *Packington*, 6 B. & C. 268; *Turner* v. *Stallibrass*, [1898] 1 Q. B. 56.

[7] 1 Q. B. D. 81. In Oliphant, Law of Horses (5th ed.), 225, a *Nisi Prius* case of *Grant* v. *Smith*, tried before Pollock, C.B., Dec. 11th, 1850, is noticed, in which that learned judge directed a nonsuit. The action was brought by the owner of a pony injured while agisted to the defendant by being kicked by a horse whose shoes had not been taken off. The case is not overruled by *Smith* v. *Cook*, as lets sometimes been alleged; and the distinction between putting a horse shoed in a field with a pony, and a horse and heifer in a field to which there is access by a bull, seems sufficiently wide to warrant very different considerations being applied. The test is "reasonable care" in both cases.

[8] 1 Q. B. D. 83.

Broadwater v. *Blot.*

In the earlier case of *Broadwater* v. *Blot* [1] an agisted horse was proved to have strayed out of the defendant's field, and was lost; on this evidence plaintiff claimed to be entitled to a verdict. The counsel for the defendant objected, contending that "direct and positive negligence" must be shown—"either an insufficiency of fences, by reason of which the horse strayed, or that the defendant permitted the gates to be open for an unreasonable length of time." Gibbs, C.J., held that:

Gibbs, C.J.'s, statement of the law.

"All the defendant is obliged to observe is reasonable care. He does not insure; and is not answerable for the wantonness or mischief of others. If the horse had been taken from his premises, or had been lost by accidents which he could not guard against, he would not be responsible. I admit that particular negligence must be proved, by occasion of which the horse was lost, or gross general negligence, to which the loss may be ascribed, in ignorance of the special circumstance which occasioned it. If there were a want of due care and diligence generally, the defendant will be liable. The question is, were the defendant's fences in an improper state at the time the horse was taken in to agist? Did he apply such a degree of care and diligence to the custody of the horse as the plaintiff, who entrusted the horse to him, had a right to expect?"

The Roman law made the agister responsible, not only for reasonable diligence, but for reasonable skill in his business: *Si quis vitulos pascendos . . . conduxit culpam eum præstare debere; et quod imperitiâ peccavit, culpam esse; quippe ut artifex conduxit.*[2] Story [3] says the common law rule is the same.

Agister no lien.

An agister has no lien, for he merely provides food and takes care of the animals entrusted to him; neither has a livery stable keeper.[4]

Livery stable keepers.

Between the business of an agister and that of a livery stable keeper there is very little difference; they are both comprehended under the same principle, and the duty of both differs from an inn-keeper's, which is much more extensive.[5]

Searle v. *Laverick.*

The duties of a livery stable keeper as far as his obligation to take care goes were much discussed in the case of *Searle* v. *Laverick*: [6]

Judgment of Blackburn, J.

"We take it to be established law that by the custom of England, this extreme liability, making the bailee an insurer, is confined to carriers and innkeepers, and that livery stable keepers and warehousemen come within what Lord Holt calls the second sort, as to which he says: 'The second sort are bailiffs, factors, and such like.' As to this sort, he says the bailee is only bound to take reasonable care; and '*the true reason of the case is, it would be unreasonable to charge him with a trust further than the nature of the thing puts it in his power to perform it.* But it is allowed in the other cases' (*i.e.*, the carrier and innkeeper), 'by reason of the necessity of the thing.' The obligation to take reasonable care of the thing entrusted to a bailee of this class involves in it an obligation to take reasonable care that any building in which

[1] Holt (N. P.) 547. In the American case of *Sargent* v. *Slack*, 47 Vt. 674, 19 Am. R. 136, where some sheep had escaped through a defective fence, the agister was held liable. *Halestrap* v. *Gregory*, [1895] 1 Q. B. 561.

[2] D. 19, 2, 9, § 5. [3] Bailm. § 443.

[4] *Jackson* v. *Cummins*, 5 M. & W. 342; *Grinnell* v. *Cook*, 3 Hill (N. Y.) 485. The trainer of a race-horse was said to have a lien on the horse he trained in *Bevan* v. *Waters*, 3 C. & P. 520; but this was qualified in *Forth* v. *Simpson*, (1818) 13 Q. B. 680, by the limitation that the lien only existed where the owner had not the right of removing him to run at any race he pleased.

[5] *Calye's case*, 8 Co. Rep. 32 a., 1 Sm. L. C. (11th ed.), 110.

[6] L. R. 9 Q. B., per Blackburn, J., 126.

it is deposited is in a proper state, so that the thing therein deposited may be reasonably safe in it." The facts proved showed that plaintiff had sent his horse and two carriages to a livery stable keeper, who had put the carriages in a building, which fell, smashing them. The building was not finished at the time, and was in the hands of contractors, who were competent men, though the evidence was they had done this particular work unskilfully. The judge, at the trial, ruled [1] "that defendant's liability is that of an ordinary bailee for hire, and that all he was bound to do was to use ordinary care in the keeping of the plaintiff's carriages, and that, if in causing the shed to be built he did all that he did, by employing a builder and otherwise, with such care as an ordinary careful man would use therein, he would be protected, and would be exempt from liability for an event which was caused by the careless or improper conduct of the builder, of which the defendant had no notice"; and this direction was sustained by the Queen's Bench.[2]

Phipps v. New Claridge Hotel Co.

In *Phipps* v. *New Claridge Hotel Co.*,[3] which seems practically identical with *Mackenzie* v. *Cox*,[4] a dog was left at the defendants' hotel pending the departure of the plaintiff the same evening for Scotland, and was received by them into their sole custody. When required, it was missing. Bray, J., held that the contract was one of bailment, that failure to restore the bailment must be explained, and that the principle enunciated by Erle, C.J., in *Scott* v. *London Dock Co.*,[5] is applicable to the case of a bailment that "Where the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence in the absence of explanation by the defendants that the accident arose from want of care," [6] so that the plaintiff was entitled to recover.

Letting a horse.

If a person negligently lets an unsuitable horse, it is not a defence that he was ignorant that the horse was unsuitable; [7] although one who lets a horse does not warrant its freedom from defects which he does not know of and could not have discovered by the exercise of due care; [8] for the exercise of a common calling only requires a man to show skill in his business,[9] and liability for a horse, apart from bailment, is confined to cases where the owner has notice of the dangerous tendency.[10]

[1] *L.c.* 124.

[2] Two cases, *Brazier* v. *Polytechnic Institution*, 1 F. & F. 507, and *Pike* v. *Polytechnic Institution*, 1 F. & F. 712, are often cited as negativing any warranty of a staircase which fell. They are referred to in Montague Smith, J.'s, judgment in *Readhead* v. *Midland Ry. Co.*, L. R. 4 Q. B. 385.

[3] 22 Times L. R. 49.

[4] 9 C. & P. 632.

[5] 3 H. & C. 601.

[6] Cited by Lord Halsbury, C., *Dollar* v. *Greenfield*, The Times, May 19, 1905, as authority for the same proposition. *Dollar* v. *Greenfield* is not reported in any regular report. As it stands in the Times the Lord Chancellor's opinion is merely that he found there was evidence of negligence for a jury. In a Scotch case, *Smith* v. *Wallace*, 25 Rettie, 761, the cause of action was alleged to be that there was "nobody at head of horse while it was being yoked." The Court held that no cause of action was disclosed. "It is a matter of everyday experience that such a course is never taken." This is difficult to reconcile with the *dicta* in *Dollar's case*.

[7] *Horne* v. *Meakin*, 115 Mass. 326.

[8] *Copeland* v. *Draper*, 157 Mass. 558, 34 Am. St. R. 314.

[9] *Rex* v. *Kilderby*, 1 Wms. Saund. 311, 312, note 2.

[10] *Cox* v. *Burbidge*, 13 C. B. N. S. 430.

Factors

(β) As to *factors*.[1]

Before treating specially of factors, some general principles of the Roman law not previously noted under mandate of agency may be indicated as a guide to English principle.[2] An agent is bound to execute the commission he has undertaken,[3] or to give timely notice when he is unavoidably prevented from doing so.[4] In the execution of his commission he must show *exacta diligentia*.[5] If he has authority to delegate it, he must answer for *culpa in eligendo*;[6] if he has not authority to delegate it, he must execute the commission in person. He must account for all his principal's property that comes to his hands, including fruits and interest, though he is discharged from responsibility if he can show a loss through no fault of his own.[7] He must restore, at the expiration of his commission, all property belonging to his principal that remains under his control or for which he remains answerable, and render full accounts of his receipts and expenditure to his principal, and allow him to exercise all rights of action which he as agent has acquired against third persons. On the other hand the principal must indemnify the agent for all reasonable expenses incurred in his agency.[8]

Definition of factor.

A factor is described by Abbott, C.J., "as a person to whom goods are consigned for sale by a merchant, residing abroad, or at a distance from the place of sale, and he usually sells in his own name without disclosing that of his principal; the latter, therefore, with full knowledge of these circumstances, trusts him with the actual possession of the goods, and gives him authority to sell in his own name."[9]

Distinctions between the functions of a factor, a merchant, a broker, and an agent.

A factor differs from a merchant in that "a merchant buys and sells for his own direct mercantile profit;" while the factor, so far as concerns his principal, "only buys and sells upon a commission."[10] A factor differs from a broker[11] in that a broker is not trusted with the possession of goods, and ought not to sell in his own name.[12] Lastly, he differs

[1] Story, Agency, §§ 33, 34; 3 Chitty, Commerce and Manufactures, 193-224, Factors and Brokers; 3 Parsons, Contracts (8th ed.), 258.

[2] See generally Hunter, Roman Law (2nd ed.), 669-676, and particularly the discussion of Savigny's position, 621-622, that while the old law of non-representation was maintained in regard to the formal contract of *stipulatio*, yet that in the later Roman law, agency was universally allowed in the non-formal contracts.

[3] *Si susceptum non implevérit, tenetur*, D. 17, 1, 5, § 1; *quod mandatum susceperit; denique tenetur, etsi non gessisset*, D. 17, 1, 6, § 1; *de lite, quam suscepit exsequendam, mandati eum teneri constat*, D. 17, 1, 8, § 2.

[4] D. 17, 1, 27, § 2.

[5] *A procuratore dolum et omnem culpam non etiam improvisum casum præstandum esse*: Code, 4, 35, 13.

[6] D. 17, 1, 8, § 3.

[7] D. 17, 1, 10, §§ 2, 9.

[8] D. 17, 1, 3, § 2; D. 17, 1, 8, § 9; D. 17, 1, 28; D. 17, 1, 38.

[9] *Baring* v. *Corrie*, 2 B. & Ald. 143. "The definition of a factor, I thought, always was that which is laid down in Smith's Mercantile Law, where it is said: 'There are two extensive classes of mercantile agents, namely, factors who are entrusted with the possession as well as the disposition of property, and brokers who are employed without being put into possession of the goods.' As for limiting that definition by restricting it to persons entrusted with goods from abroad, I never before heard of such a limitation, and I think it must be rejected"; per Brett, J.A., *Ex parte Dixon, In re Henley*, 4 Ch. D. 137, where *Semenza* v. *Brindley*, 18 C. B. (N. S.) 467, is explained. The Factor's Act, 1889 (52 & 53 Vict. c. 45), gives the expression "Mercantile Agent" as a generic term, including both brokers and factors.

[10] Per Lord Stowell, *Matchless*, 1 Hagg. Adm. Rep. 101.

[11] As to brokers generally, see Story, Agency, §§ 28-32 a; Com. Dig. Merchant (B), Factor, and the notes. *Clarke* v. *Powell*, 4 B. & Ad. 846, where the various statutes are considered; *Smith* v. *Lindo*, 27 L. J. C. P. 196, 335. As to the powers and duty of a broker, *Robinson* v. *Mollett*, L. R. 7 H. L. 802. As to broker at a foreign port whose duty is to find a cargo for a ship and his powers, *Stumore*, *Weston* v. *Breen*, 12 App. Cas. 698.

[12] Per Abbott, C.J., *Baring* v. *Corrie*, 2 B. & Ald. 143. See Com. Dig. Merchant, (B.), Factor; also Russell, Mercantile Agency (2nd ed.), 3 *et seqq.*

from an agent in that his authority is extended to the management of all the principal's affairs in the place where he resides, or in a particular department; while an agent is one entrusted with the accomplishment of a particular act or course of dealing. The agent's powers within the scope of his authority are similar to those of a factor, unless they are expressly limited.[1]

Qualifications of agents and factors.

It is a general principle of the common law, that all persons are capable of acting as agents who are of sound mind, and who have no interest or employment adverse to their principals;[2] for the office of an agent is merely ministerial. In the case of a factor, the reason is not applicable; since the factor has rights and liabilities which cannot be enforced against a person labouring under disability;[3] and so those only may be factors who are *sui juris*.[4]

Extent of factor's authority.

The extent of a factor's authority is to be gathered from the commission under which he acts. If the commission be general it is to be construed according to its object, and implies all powers within the scope of the employment, "and the general words ought to receive the most liberal construction, which construction should, as far as possible, place the attorneys where the executrix intended to place them, in her room and stead, invested with all her authority and with all her discretion."[5] This was said in a case where an executrix had given a letter of attorney "to pay, discharge and satisfy all debts due from the testator." Even if the commission be special, the factor's authority includes all necessary and usual means of giving it effect,[6] though where the factor has express instructions he must pursue them strictly.[7] A factor cannot, without express power, or power necessarily implied, delegate his authority to another.[8] His authority is moreover to be construed according to the usage of trade. Thus where there is a custom to sell goods upon credit, a factor may do so; nevertheless, he must not unreasonably extend the term of credit, and must use due diligence to ascertain the solvency of the purchaser.[9] If the custom is to sell only for ready money, the factor's power is to that

1 1 Bell, Comm. (7th ed.), 506, where see the note. Kent, 2 Comm. 622, note (*b*), says an *agent* is a *nomen generalissimum*, and includes factors and brokers who are only a special class of agents. A *factor* is distinguished from a broker by being entrusted by others with the possession and disposal and apparent ownership of property, and he is generally the correspondent of a foreign house. A *broker* is employed merely in the negotiation of mercantile contracts, and is not trusted with the possession of goods and does not act in his own name. His business consists in negotiating exchanges or in buying and selling stocks and goods: but in modern times the term includes persons who act as agents to buy and sell, and who charter ships and effect policies of insurance.

2 Co. Litt. 52 a; Story, Agency, § 9. 3 Russell, Mercantile Agency (2nd ed.), 6.

4 Story, Bailm. § 162; Code Civil, art. 1990.

5 Per Eyre, C. J., *Howard* v. *Baillie*, 2 H. Bl. 620.

6 *Fenn* v. *Harrison*, 3 T. R. 757, 4 T. R. 177. Where there is a notorious custom to limit a broker's authority, it is the duty of third persons to ascertain the limit: *Baines* v. *Ewing*, L. R. 1 Ex. 320; see *Robinson* v. *Mollett*, L. R. 7 H. L. 802.

7 *Smart* v. *Sandars*, 3 C. B. 380, 5 C. B. 895; *Bostock* v. *Jardine*, 3 H. & C. 700. Mellor, J., in *Mollett* v. *Robinson*, in the Ex. Ch. L. R. 7 C. P. 101, says that this case "is misreported in 3 H. & C., but appears to be more accurately reported in 34 L. J. It was tried before me at Liverpool; and I have referred to my notes, and I find that no question was put to the jury, but that I directed a verdict for the plaintiff, giving to the defendants leave to move to enter a verdict for the defendants, or a nonsuit; upon which it appears that the Court of Exchequer granted a rule, which was afterwards discharged; and the case is only an authority for that which was conceded in the argument, viz., that without the aid of the custom, no contract binding the defendant was made in the present case." See also per Blackburn, J., 111. *Catlin* v. *Bell*, 4 Camp. 183.

8 *Delegata potestas non potest delegari*: 2 Co. Inst. 597. *Cockran* v. *Irlam*, 2 M. & S. 301 note; *Ecossaise Steamship Co.* v. *Lloyd*, 7 Times L. R. 76 (C. A.).

9 2 Kent, Comm. 622.

degree circumscribed.[1] In an emergency, deviation from instructions is condoned.[2]

Factor's statutory power to pledge.

At common law a factor had no power to pledge,[3] and a pledge by a factor did not even transfer the lien the pledgor himself had.[4] Now by statute that power has been made to attach to his possession. The consideration of his statutory powers in detail is, however, far from our present subject: therefore it will suffice to note that the various Acts are consolidated and amended by the Factors Act, 1889,[5] and to refer to Benjamin on Sale, Bell's Commentaries and similar text books, where the cases are fully considered.[6]

Degree of diligence required of a factor.

The question which concerns us here is what is the degree of diligence required of factors in the proper discharge of their duties? The rule suggested by all the analogies is that, as the contract is for the benefit of both parties, the factor is understood to contract for reasonable skill and ordinary diligence.[7] By reasonable skill we are to understand such skill as is ordinarily exercised by persons of average capacity engaged in similar pursuits.[8] The Roman law, in which *culpa* or *levis*

1 *Wiltshire* v. *Sims*, 1 Camp. 258, where is a note: "Chambre, J., says: 'There is no doubt of the authority of a factor to sell upon credit, though not particularly authorised by the terms of his commission so to do': *Houghton* v. *Matthews*, 3 B. & P. 489; *Scott* v. *Surman*, Willes (C. P.), 407. But this doctrine is founded on 'the constant and daily experience that factors do sell upon credit without any special authority,' and therefore confirms the general maxim that when an agent employed to do any act, he shall be supposed to have an authority to do it in the manner in which it is usually done. Goods are almost always, stock is scarcely ever, sold upon credit; and hence the distinction between the powers of the factor and the stockbroker. An agent can in no case bind his principal by any act beyond the scope of his authority: *Fenn* v. *Harrison*, 3 T. R. 757."

2 *Hunter* v. *Parker*, 7 M. & W. 322; per Parke, B., *l.c.* 342: "The master has, by virtue of his employment, not merely those powers which are necessary for the navigation of the ship and the conduct of the adventure to a safe termination, but also a power, when such termination becomes hopeless, and no prospect remains of bringing the vessel home, to do the best for all concerned, and therefore to dispose of her for their benefit. *It is a case of necessity when nothing better can be done for the benefit of the master's employers; and that necessity is found to have existed in this case.*" 3 Chitty on Comm. and Manuf. 218.

3 2 Kent, Comm. 625–8.

4 *M'Combie* v. *Davies*, 7 East, 5.

5 52 & 53 Vict. c. 45. *Inglis* v. *Robertson*, [1898] A. C. 616; *Cahn* v. *Pockett's Bristol Channel Steam Packet Co.*, [1899] 1 Q. B. 643; *Oppenheimer* v. *Attenborough*, [1907] 1 K. B. 510; *Oppenheimer* v. *Frazer*, [1907] 2 K. B. 50, (C. A.)

6 Perhaps an even more authoritative, as well as full, examination of the law may be obtained from a perusal of the elaborate judgment of Blackburn, J., in the Exchequer Chamber, in *Cole* v. *North-Western Bank*, L. R. 10 C. P. 357–374. Bramwell, B., shortly states the effect of the Factors Act in the same case, at 376, as follows: "The statute was meant to apply to those cases where one person has given an apparent authority to another, and a third person has dealt with that other in the belief that the authority really existed." See per Lord Herschell, *London Joint Stock Bank* v. *Simmons*, [1892] A. C. 216. The pledge must not be for an antecedent debt, sec. 4. As to what is an antecedent debt, *Macnee* v. *Gorst*, L. R. 4 Eq. 315; *Kaltenbach* v. *Lewis*, 10 App. Cas. 617. In *Martinez y Gomez* v. *Allison*, 17 Rettie, 322, a decision on 5 & 6 Vict. c. 39, it was said, at 335, by Lord Justice-Clerk Macdonald: "The Factors Act uses words inconsistent with the contention that any one who is a mere custodier can be held to be an agent. One who has possession merely that he may convey to another is not an agent." *Hastings* v. *Pearson*, [1893] 1 Q. B. 62, is distinguished in *Shenstone* v. *Hilton*, [1894] 2 Q. B. 452. *Lee* v. *Butler*, [1893] 2 Q. B. 318, is a decision on sec. 9 of the Factors Act (52 & 53 Vict. c. 45), assimilating the holder of goods under a hire and purchase agreement to a mercantile agent for the purposes of the Act; but is distinguished in H. L. in *Helby* v. *Matthews*, [1895] A. C. 471, followed in *Payne* v. *Wilson*, [1895] 2 Q. B. 537; *Biggs* v. *Evans*, [1894] 1 Q. B. 88, and *Strohmenger* v. *Attenborough*, 11 Times L. R. 7.

7 Jones, Bailm. 9, 10, 23, 86, 119, and the note in Theobald's edition, 84. As to the right of the pledgee to alienate the property: 1 Bell, Comm. (7th ed.), 516; Story, Bailm. §§ 23, 455.

8 See *ante*, 793, and *post*, Skilled Labour. *Chapman* v. *Walton*, 10 Bing. per Tindal, C.J. 63; Story, Bailm. §§ 431, 434.

culpa corresponds to ordinary neglect or the want of ordinary diligence,[1] lays down a similar rule. *Spondet peritiam artis.*[2] *Spondet diligentiam gerendo negotio parem.*[3] *Imperitia culpæ adnumeratur.*[4] But *In negotio gerendo opus sit diligentia atque industria; et is, qui mandat, diligentiam rei gerendæ convenientem exigere; et qui suscipit mandatum hoc ipso industriam et diligentiam ad rem exequendam necessariam in se futuram recipere videtur.*[5]

A factor, then, is bound not only to good faith, but to reasonable diligence. He is not liable for any loss by fire, theft, robbery, or other accident unconnected with his own negligence.[6] He must act with reasonable care and prudence, and exercise his judgment[7] after proper inquiries and precaution,[8] and if he does this in good faith, he is not liable because the course adopted does not in the event prove the most judicious.[9] If he omit inquiry, and sell to an insolvent person when ordinary diligence would have enabled him to find out his lack of credit, he will have to answer to his principal. So he will not be allowed to sell his own goods to a purchaser and take security for the price, and at the same time to sell the goods of his principal to the same person without security; for he is bound to use at least as much care and diligence in his principal's as in his own concerns.[10] The factor is bound to sell his principal's goods for their fair market value;[11] and he is further bound to follow the known course of business, if any such exists.[12] Though following the known course of business in ordinary cases will protect him from liability, this will not cover what he has done if he has acted negligently or *malâ fide*.[13] So, too, if he have been guilty of any negligence or breach of duty, the effect of which has been to

1 Jones, Bailm. 21–23.

2 Pothier, Traité du Contrat de Louage, n. 425. Jones, Bailm. 98, note (*l*).

3 Trayner, Legal Maxims, Bell, Principles of the Law of Scotland (9th ed.), 106. I cannot trace these phrases in the Digest. See the note to Story, Bailm. § 431.

4 Jones, Bailm. 23, note (*m*). D. 50, 17, 132.

5 Vinn. Ad. Inst. 3, 27, 11, note 2.

6 *Vere* v. *Smith*, 1 Vent. 121, where it is said: "Showing that he was robbed is giving an account." The duty there was to account.

7 *Moore* v. *Mourgue*, 2 Cowp. 479. If a broker undertakes business and then abandons the employment, he is liable to the same extent as if he negligently caused the loss ensuing, *Glaser* v. *Cowie*, 1 M. & S. 52; *Smith* v. *Price*, 2 F. & F. 748; unless he gives timely notice to his principal of his inability, *Callander* v. *Oelrichs*, 5 Bing. N.C. 58; cp. Civil Law texts, *ante*, 816. In *Park* v. *Hammond*, 6 Taunt. 495, 4 Camp. 344, it was held gross negligence in an insurance broker employed to insure goods from a certain point in their voyage home, to effect a policy "at and from" that point "beginning the adventure from the loading thereof on board." *Anderson* v. *Morice*, 1 App. Cas. 713, may indicate the consequences flowing from such neglect. So, too, it is negligence to omit any usual term, *Mullough* v. *Barber*, 4 Camp. 150. In *Ecossaise Steamship Co.* v. *Lloyd*, 7 Times L. R. 76 (C. A.), Lord Esher, M.R., said: "In the case of a succession of brokers employed with the consent and on behalf of the principal, each broker was only liable for his own negligence. If one broker had authority to employ another broker, he would be liable if he did not take reasonable care to appoint a good broker; and if he did not take reasonable care, he would be liable for the negligence of that broker." In the case cited the negligence was not obtaining a charter party with a "first-class signature."

8 Per Abbott, C.J., *Moneypenny* v. *Hartland*, 1 C. & P. 354 (the case, however, of a surveyor); *Smith* v. *Cologan*, 2 T. R. 188, note (*a*). If in one part of the transaction the factor exceed his instructions, but makes a corresponding saving in another part, it seems that in equity at least he will be held excused: *Cornwal* v. *Wilson*, 1 Ves. Sen. 509. Pothier, Traité des Obligations, n. 78. Lord Kenyon, *Miles* v. *Bernard*, Peake, Add. Cas. 61, appears to be of opinion that if an agent acts on the best available advice he is not liable for damage arising from the action thence taken.

9 *Comber* v. *Anderson*, 1 Camp. 523; *Lamert* v. *Heath*, 15 M. & W. 486.

10 Story, Agency, § 186.

11 *Bigelow* v. *Walker*, 24 Vt. 149.

12 *Wiltshire* v. *Sims*, 1 Camp. 258.

13 *Sadock* v. *Burton*, Yelv. 202; Anon., 12 Mo. 514 (case 857).

expose the goods entrusted to him to a peril by which they are damaged or destroyed, he will be liable; for whatever the immediate cause of the loss, the goods would not have been exposed to it but for the antecedent neglect of duty.[1]

Del credere agents.

A factor sometimes engages to guarantee his dealings, or to stand *del credere*,[2] as the phrase is, on receiving a certain commission, which is called a *del credere* commission. To "stand *del credere*" in any transaction is to be answerable as if the person so binding himself were the proper debtor. Where, then, a factor employed to sell goods receives a *del credere* commission he is liable to the principal for the price to be recovered, whether he ever receive it or not; and no payment that would not be effectual as between debtor and creditor will discharge his liability.[3]

Not within sec. 4 of the Statute of Frauds (29 Car. II. c. 3).

Del credere agents are liable in respect of their commission, although there is no guarantee in writing signed by them within sec. 4 of the Statute of Frauds;[4] for their undertaking is not one to pay the debt of another within the section. As Parke, B., says,[5] "being the agents to negotiate the sale, the commission is paid in respect of that employment; a higher reward is paid in consideration of their taking greater care in sales to their customers and precluding all question whether the loss arose from negligence or not, and also for assuming a greater share of responsibility than ordinary agents—namely, responsibility for the solvency and performance of their contracts by their vendees. This is the main object of the reward being given to them; and though it may terminate in a liability to pay the debt of another, that is not the *immediate* object for which the consideration is given."

Parke, B.'s statement of their position.

Factor's receipt of remittance.

It has been contended that a factor who has actually received the money for the goods of his principal is in the same position as if he had agreed to stand *del credere*. This is not so. The factor's obligation is not increased, by reason of his receipt of the remittance from the purchaser, beyond what it was in the earlier stages of the business. He is obliged to use average judgment and discretion, but he does not guarantee the payment whatever may betide. In making the remittance, then:

(1) If he follows the ordinary course of business; or
(2) If he remit the money by a banking house of recognised position and in good credit;[6] or
(3) If he remit in the way settled by either mercantile or local usage;[7]

he will be free from liability.

Factor agent for funds coming to his hands.

A factor or broker is an agent with regard to funds coming to his hands which are to be applied in a particular way; and the money

1 *Caffrey* v. *Darby*, 6 Ves. 488, 496; *Tobin* v. *Murison*, 5 Moo. P. C. C. 110.

2 "The phrase *del credere* is borrowed from the Italian language, in which its signification is exactly equivalent to our word guaranty, or warranty": Story, Agency, § 33, and *Ex parte White, In re Nevill*, L. R. 6 Ch., per Mellish, L.J., 403.

3 *Mackenzie* v. *Scott*, 6 Brown, Parl. Cas. 280; *Houghton* v. *Matthews*, (1803) 3 B. & P. 485; 2 Kent, Comm. 625, and note 1 by Mr. Holmes to the 12th ed. *Bramwell* v. *Spiller*, 21 L. T. (N. S.) 672, holds that an agent upon *del credere* commission is in no different position with regard to a vendee than any other agent, and cannot sue the vendee in his own name for a debt contracted between the principal and the vendee.

4 29 Car. II. c. 3.

5 *Couturier* v. *Hastie*, 8 Ex. 56, reversed on another point, 9 Ex. 102, 5 H. L. C. 673. See per Blackburn, J., *Fleet* v. *Murton*, L. R. 7 Q. B. 132; *Sutton* v. *Grey*, [1894] 1 Q. B. 285; *Harburg India Rubber Comb Co.* v. *Martin*, [1902] 1 K. B. 778.

6 *Knight* v. *Lord Plimouth*, 3 Atk. 480.

7 *Russell* v. *Hankey*, 6 T. R. 12.

paid to him may therefore be followed by his principal as far as it can be traced.[1] Lord Langdale, M.R., in *Clarke* v. *Tipping*,[2] the case of a fraudulent factor, expresses the broad principle on which a factor is to be judged: "Among the most important duties of a factor are those which require him to give to his principal the free and unbiased use of his own discretion and judgment, to keep and render just and true accounts, and to keep the property of his principal unmixed with his own or the property of other persons."

Clarke v. *Tipping*: judgment of Lord Langdale, M.R.

There is a distinction between a payment to the account of the agent in the agent's bank and a payment into the agent's bank in the principal's own name. In the former case the factor is liable, in the latter not; and on the ground stated by Lord Eldon in *Massey* v. *Banner*,[3] "because, if he had become bankrupt it would have gone to the credit of his estate; for it is clear in that case that if the bankers had any account with him by way of set-off, that set-off would affect equally his money and the money of the estate paid in to his account; they have no notice that it belongs to the estate; the account is between him and them. The same has been the case with executors and trustees, and I apprehend, that, for the safety of mankind, the principle must be, that if you desire to deal for me as you would for yourself, it must be so, that the dealing for me, if unfortunate, shall not be more so to me than it would have been to you if it had been for yourself."[4]

Lord Eldon, C.'s, judgment in *Massey* v. *Banner*.

An agent authorised to receive payment may not receive it in any way he chooses; the presumption is that he has only a power to receive it in money. "If the agent receives the money in cash, the probability is that he will hand it over to his principal; but if he is to be allowed to receive it by means of a settlement of accounts between himself and the debtor, he might not be able to pay it over; at all events, it would very much diminish the chance of the principal ever receiving it; and, upon that principle, it has been held that the agent, as a general rule, cannot receive payment in anything else but cash."[5]

Payment to an agent.

There is a difference between the case of an agent whose duty it is to collect a debt and one who has to hand over a document of title against payment. In the former case, if "he collects it by a cheque which is dishonoured, I do not know that he would have broken his authority, because the creditor would remain in the same position as before. The debtor would not have paid, and the creditor could have pursued the debtor."[6] In the latter: "Let us take a case that lawyers are familiar with—the sale of real property. Let us take the case of a solicitor who is entrusted by the vendor with the completion of the transaction. Is that solicitor justified by the ordinary course

Distinction between duty to collect a debt and duty to hand over a document of title against payment.

[1] *Taylor* v. *Plumer*, 3 M. & S. 562, distinguished in *Lister* v. *Stubbs*, 45 Ch. D. 5; *In re Hallett's Estate, Knatchbull* v. *Hallett*, 13 Ch. D. 696; *Ex parte Cooke, In re Strachan*, 4 Ch. D. 123, a stockbroker's case, where the broker misapplied funds, and his estate was held liable, on the footing of an agent.

[2] 9 Beav. 292.

[3] 1 Jac. & Walk. 248. *Pennell* v. *Deffell*, 4 De G. M. & G. 372.

[4] Cp. *Carrie* v. *Misa* (Ex. Ch.), L. R. 10 Ex. 153, affirmed in H. of L. 1 App. Cas. 554. The title of a creditor to a negotiable security given on account of a pre-existing debt, and received by him *bonâ fide* and without notice of any infirmity of title on the part of the debtor, is indefeasible whether that security be payable at a future time or on demand.

[5] Per Byles, J., *Sweeting* v. *Pearce*, 7 C. B. (N. S.) 485, affd. 9 C. B. (N. S.) 534; per Martin, B., 538; also per Bovill, C.J., *Bridges* v. *Garrett*, L. R. 4 C. P. 588, and per Fry, L.J., *Pearson* v. *Scott*, 9 Ch. D. 207.

[6] Per Smith, L.J., *Pape* v. *Westacott*, [1894] 1 Q. B. 281.

of business or the ordinary habits of men in parting with the conveyance and the title-deeds in exchange for a promise to pay or a cheque? Certainly not. The ordinary course is, I do not say not to take a cheque, but not to part with the deeds until the cheque is paid. Therefore, you cannot say, as a general rule, that a person who is authorised to receive money is authorised to take a cheque from a person." [1] The point to be ascertained is whether, in the ordinary course of business, it is customary to receive a cheque in payment. If it is, it is not negligent to take it; if it is not, presumptively there is negligence in taking a cheque in payment.[2]

Duty to account.

Where goods are consigned to a factor the law raises a contract to account for such as are sold, to pay over the proceeds, and to redeliver the unsold residue on demand.[3] If then the accounts are not rendered within a reasonable time, the factor must bear the costs of a suit instituted to have them taken; and he will not be excused though he shows that he has offered to pay a lump sum which turns out to be sufficient.[4] Moreover, he should be constantly ready with his accounts, and neglect of this duty is a good ground for charging him with interest.[5] So, too, sometimes it is the factor's duty to take legal proceedings,[6] though probably only in those cases where he has a right on his own account to do so.

Duty to insure.

Smith v. *Lascelles.*

In some circumstances a factor is bound to insure; and default in doing so renders him liable for negligence. The circumstances where the obligation to insure arises are defined by Buller, J., in *Smith* v. *Lascelles*,[7] as follows: "It is now settled as clear law, that there are three instances in which an order to insure must be obeyed. First, where a merchant abroad has effects in the hands of his correspondent here, he has a right to expect that he will obey an order to insure, because he is entitled to call his money out of the other's hands when and in what manner he pleases. The second class of cases is, where the merchant abroad has no effects in the hands of his correspondent, yet, if the course of dealing between them is such, that the one has been used to send orders for insurance, and the other to comply with them, the former has a right to expect that his orders for insurance will still be obeyed, unless the latter give him notice to discontinue that course of dealing. Thirdly, if the merchant abroad sent bills of lading to his correspondent here, he may ingraft on them an order to insure as the implied condition on which the bills of lading shall be accepted, which the other must obey if he accept them, for it is one entire transaction." [8]

Case added by Story.

To these cases Story [9] adds a fourth where there is a general usage of trade to insure goods; there the factor is bound to do what is usual, and thus to insure.

Claim of mortgagee on insurance money.

In the case of an insurance, it may be noted in passing that there is no right by which a mortgagee can claim the benefit of a policy underwritten for the mortgagor on the mortgaged property in case of loss by fire; for such a contract is not an incident to the mortgage, but of a personal nature for the benefit of the mortgagor, and to which the

1 Per Lindley, L.J., *Pape* v. *Westacott*, [1894] 1 Q. B. 278. Story, Agency, §§ 98, 202.
2 *Russell* v. *Hankey*, 6 T. R. 12.
3 *Topham* v. *Braddick*, 1 Taunt. 572.
4 *Collyer* v. *Dudley*, 1 Turn. & Russ. (Ch.) 421.
5 *Pearse* v. *Green*, 1 Jac. & Walk. 135.
6 *Curtis* v. *Barclay*, 5 B. & C. 141, 148.
7 2 T. R. 189. See a case in Emerigon, Traité des Assurances, vol. i. 144 (in Meredith's translation, 116), of which the facts are set out 2 Kent, Comm. 615.
8 Cp. *Corlett* v. *Gordon*, 3 Camp. 472.
9 Agency, § 190.

mortgagee's claim is no higher than that of any other creditor of the mortgagor. This is noted by Lord King, C., in *Lynch* v. *Dalzell*: [1] "These policies were not insurances of the specific things (goods) mentioned to be insured"; "nor did such insurances attach on the realty, or in any manner go with the same, as incident thereto, by any conveyance or assignment; but they were only special agreements with the persons insuring against such loss or damage as they should sustain." [2] Nevertheless it has been held that an insolvent may insure a house to which his assigns are entitled.[3] Further, warehousemen and wharfingers may insure their customers' goods in their hands, and recover the whole value under a policy of goods "held in trust or on commission." [4]

Lord King, C., in *Lynch* v. *Dalzell*.

Again, a carrier who insures may recover the whole value of goods lost by fire, even if the owner may be disabled from recovering under the Carriers Act, 1830; [5] this, however, is subject to the dominant principle in this branch of law, that insurance is no more than an indemnity; [6] so that what is recovered beyond that amount would be held in trust for the owners of the goods.

Carrier insuring may recover where owner of goods is disentitled.

As between a common carrier of goods and an underwriter upon them, the liability to the owner for their loss is primarily upon the carrier, while the liability of the insurer is only secondary. The insurer is practically in the position of a surety. Whenever he has indemnified the owner for the loss he is entitled to all the means of indemnity which the satisfied owner held against the party primarily liable, and an insurer who has paid a loss may use the name of the assured in an action to obtain redress from the carrier whose failure of duty caused the loss.[7] The insurer has, however, no more rights than the assured; and when a bill of lading provided that the carrier when liable for the loss should have the full benefit of any insurance that may have been effected on the goods, the effect of the proviso was held to limit the rights of the insurer to recover against the carrier.[8]

Insurer a surety.

[1] 4 Bro. Parl. Cas. 431.

[2] See per Story, J., *Columbia Insurance Co. of Alexandria* v. *Lawrence*, 10 Peters (U. S.), 512. A policy of fire insurance is a contract of indemnity, and on payment the insurer is entitled to recover from the assured any sum which he may have received in excess of the loss actually sustained by him: *Darrell* v. *Tibbitts*, 5 Q. B. D. 560. "A policy," says Blackburn, J., in *Wilson* v. *Jones*, L. R. 2 Ex. 150, "is, properly speaking, a contract to indemnify the insured in respect of some interest which he has, against the perils which he contemplates it will be liable to; and I know no better definition of an interest in an event than that indicated by Lawrence, J., in *Barclay* v. *Cousins* (2 East, 544), and more fully stated by him in *Lucena* v. *Craufurd* (2 B. & P. (N. R.) 301), that if the event happens the party will gain an advantage, if it is frustrated he will suffer a loss." In *Castellain* v. *Preston*, 11 Q. B. D. 380, a vendor contracted for the sale of a house which was insured against fire, and the contract contained no reference to the insurance. After the date of the contract the house was damaged by fire, and the vendor received the insurance money from the insurers. The purchase being completed without diminution of the purchase money, the insurers were held entitled to recover back a sum equal to the insurance money. See *The Westminster Fire Office* v. *The Glasgow Provident Investment Society*, 13 App. Cas. 699; *West of England Fire Insurance Co.* v. *Isaacs*, [1897] 1 Q. B. 226; *Phœnix Assurance Co.* v. *Spooner*, [1905] 2 K. B. 753. Underwriters cannot maintain an action for damage in their own names to the thing insured: *Simpson* v. *Thompson*, 3 App. Cas. 279. See *ante*, 498, 739.

[3] *Marks* v. *Hamilton*, 7 Ex. 323.

[4] *Waters* v. *Monarch Insurance Co.*, 5 E. & B. 870; *Howe Insurance Co.* v. *Baltimore Warehouse Co.*, 93 U. S. (3 Otto) 527; *post*, 828.

[5] 11 Geo. IV. & 1 Will. IV. c. 68. *L. & N. W. Ry. Co.* v. *Glyn*, 1 E. & E. 652. In *North British Insurance Co.* v. *Moffatt*, L. R. 7 C. P. 25, the suggestion of Erle, C.J., and Hill, J., in *L. & N. W. Ry. Co.* v. *Glyn* was adopted, that if insurance companies wish to limit their liability they must do so by express words in their policies.

[6] *Castellain* v. *Preston*, 11 Q. B. D. 386; *Lucena* v. *Craufurd*, 2 B. & P. (N. R.) 302.

[7] *Hall & Long* v. *Rd. Co.*, 13 Wall. (U. S.) 367, 370; *Phœnix Assurance Co.* v. *Spooner*, [1905] 2 K. B. 753. [8] *Wager* v. *Providence Insurance Co.*, 150 U. S. (43 Davis) 99, 108.

Duty in insuring.

To return to the factor. If it is his duty from any cause to insure, he thereby becomes bound to make himself acquainted with the nature of the intended transit, and with all the conditions which are usually inserted in policies for such a transit ;[1] to procure the execution of it within a reasonable time,[2] and in terms covering the peculiar risks [3] by solvent underwriters.[4] Then he will not be chargeable with any loss which may ensue merely because an insurance might elsewhere have been obtained on more favourable terms.[5] In the event of a loss happening he becomes bound to the exercise of reasonable diligence in recovering the subscriptions.[6]

Reinsurance.

A word may be added on the obligation on a reinsurer, which ' certainly no less than that of an original insurer ; and is *uberrimæ fidei* in both cases. Concealment vitiates the policy, even apart from intention to deceive. It is pointed out in *Sun Mutual Insurance Co.* v. *Ocean Insurance Co.*,[7] that the need for full disclosure in the case of reinsurance may be greater than between the parties to the original insurance. " In the former, the party seeking to shift the risk he has taken is bound to communicate his knowledge of the character of the original insured, where such information would be likely to influence the judgment of an underwriter ; while in the latter the party, in the language of Bronson, J., in the case of the *New York Bowery Fire Insurance Co.* v. *New York Fire Insurance Co.*,[8] is ' not bound, nor could it be expected, that he should speak evil of himself.' " [9]

Insurance broker. His position.

The position of an insurance broker [10] may properly be noticed here. Policies are usually effected through the agency of brokers, who keep running accounts with the parties. The premium as between the underwriter and the assured is considered to have been paid at the time of the subscription ; the underwriter acknowledges his receipt

1 *Mallough* v. *Barber*, 4 Camp. 150. 2 *Turpin* v. *Bilton*, 5 M. & G. 455.
3 *Park* v. *Hammond*, 6 Taunt. 495. 4 Story, Agency, § 187.
5 *Wake* v. *Atty*, 4 Taunt. 493 ; *Maydew* v. *Forrester*, 5 Taunt. 615.
6 Story, Agency, § 58 ; *Richardson* v. *Anderson*, 1 Camp. 43 note.

7 107 U. S. (17 Otto) 510. A double insurance is where the same man is to receive two sums instead of one, or the same sum twice over for the same loss, by reason of his having made two insurances upon the same goods, or the same ship : *Godin* v. *London Insurance Co.*, 1 Burr. 490. Where this is the case there is contribution between the two persons liable to pay, and the assured only can receive indemnity : *North British and Mercantile Insurance Co.* v. *London, Liverpool, and Globe Insurance Co.*, 5 Ch. D. 569 ; 3 Kent, Comm. (13th ed.), 281.

8 17 Wend. (N. Y.) 359, 367.

9 The practice with regard to discovery of documents in an action on a policy of marine insurance is stated in *Boulton* v. *Houlders*, [1904] 1 K. B. 784 ; *China Steamship Co.* v. *Commercial Assurance Co.*, 8 Q. B. D. 142, where (at 145), Brett, L.J., explains the reason of the rule. *Henderson* v. *The Underwriting and Agency Association*, [1891] 1 Q. B. 557, is questioned in *Harding* v. *Bussell*, [1905] 2 K. B. 83. The leading case on " insurable interest " is *Lucena* v. *Crawford*, 3 B. & P. 75, 2 B. & P. (N. R.) 269, 1 Taunt. 325. If a person be directly liable to loss in the happening of any particular event, as if he be an insurer, or be answerable as owner, for the negligence of the master, he has an insurable interest, notwithstanding the negligence is the negligence of his servants and in law his own negligence : *Walker* v. *Maitland*, 5 B. & Ald. 171. See also *Anderson* v. *Morice*, 1 App. Cas. 713 ; *Colonial Insurance Co. of New Zealand* v. *Adelaide Marine Insurance Co.*, 12 App. Cas. 128 ; *Wilson* v. *Jones*, L. R. 2 Ex., per Blackburn, J., 150. *Ebsworth* v. *Alliance Marine Insurance Co.*, L. R. 8 C. P. 596, considers the insurable interest of a consignee. See as to the division of opinion in this case the note in 6 R. R. 721. Bovill, C.J.'s, view seems to be adopted in the United States ; *De Forest* v. *Fulton Fire Insurance Co.*, 1 Hall (N. Y.) 94, holding a consignee's insurable interest to be the whole value of the goods. There is a very full note on Insurable Interest by Mr. Holmes, 3 Kent, Comm. (12th ed.), 376.

10 For the authority of an insurance broker see *Fisher* v. *Smith*, 4 App. Cas. 1. If an insurance broker keeps a policy he has effected in his hands, he is bound to use reasonable diligence to procure the underwriters to settle and pay any loss that may happen upon it : *Bousfield* v. *Creswell*, 2 Camp. 545.

of it; and if he does not actually receive it, he accepts the broker for his debtor, and substitutes him for this purpose in the place of the assured. The broker then has in an action the same grounds of defence against the claim for the premium as the assured would have, if he had effected the policy in his own person without the intervention of a broker, except in cases where the assured may be entitled to recover back the premium from the underwriter.[1] The assured does not, as matter of practice, in the first instance, pay the premium to the broker, nor does the latter pay it to the underwriter. As between the assured and the underwriter the premiums are considered as paid. The underwriter looks to the broker for payment and he to the assured, while the assured pays the premiums to the broker only.[2]

The insurance broker's duty[3] is then to negotiate the terms of a Duty. policy between the insurers and the assured, and to prepare a memorandum, or in the case of marine risks a slip, embodying the terms agreed on. When this is done his duty is discharged, and without specific instructions he is not entitled in any way to affect it, for it is no "part of the ordinary duty or power of a broker to cancel agreements once validly and completely entered into."[4] The broker undertakes a duty to use due care and diligence about securing, making, and completing the insurance.

Where for the completing of the insurance a proposal form has to be filled up and this is filled up by an agent without the principal reading it, the principal must be treated as having adopted it.[5] "The signing of the application without reading it or hearing it read was inexcusable negligence." "The law requires that the insured shall not only in good faith answer all the interrogatories correctly, but shall use reasonable diligence to see that the answers are correctly written. It is for his interest to do so, and the insurer has a right to presume that he will do it." This doctrine was accepted as good law by Wright, J., in *Biggar* v. *Rock Assurance Co.*[6]

The remark may here be made that insurance is a contract personal to the insurer. When the property, the subject of the insurance, is sold the insurance does not accompany it unless the insurer consents to the transfer of the policy to the grantee of the property.[7] But the contract being one of indemnity, the insurer on payment of the agreed amount of the loss becomes entitled to all the rights of the assured in respect of the destroyed property.[8]

The real bargain between the assured and the underwriters takes place when the slip containing the terms of the intended policy is accepted. By virtue of the provisions of 30 & 31 Vict. c. 23, ss. 7–9, the slip, in the case of insurance against marine risks, does not constitute a contract enforceable by law; though it is binding in honour.[9] It therefore becomes the duty of the brokers to advance the stamp and see that the policy is properly drawn up and the matter concluded within a reasonable time. If when the policy is presented to him the Insurance slip not a legal contract.

[1] *Jenkins* v. *Power*, 6 M. & S. 282.

[2] Per Bayley, J., *Power* v. *Butcher*, 10 B. & C. 329, cited by the Lord Chancellor in *Xenos* v. *Wickham*, L. R. 2 H. L. 319.

[3] 3 Kent, Comm. 286.

[4] *Xenos* v. *Wickham*, L. R. 2 H. L. 296, 321.

[5] *New York Life Insurance Co.* v. *Fletcher*, 117 U. S. (10 Davis) 519.

[6] [1902] 1 K. B. 516, 525.

[7] *The Great Western*, 118 U. S. (11 Davis) 520.

[8] *Phœnix Assurance Co.* v. *Spooner*, [1905] 2 K. B. 753; *ante*, 82.

[9] *Lishman* v. *Northern Maritime Insurance Co.*, L. R. 8 C. P. 216. But a Lloyd's slip on a risk which is not marine is a binding contract: *Thompson* v. *Adams*, 23 Q. B. D. 365.

underwriter refuses to sign, there is no mode either at law or in equity to force him to do so. Assuming the broker to have used reasonable diligence he is thereon discharged. If through the negligence of the broker the conclusion of the business has been unreasonably delayed, the broker is responsible for any damage sustained by the delay. This damage may be nothing; as where the risk will still be taken by other underwriters at the same premiums; or may be the whole amount recoverable, if a stamped policy had been executed.[1]

Ionides v. Pacific Insurance Co.

To prove the case against the broker the slip would have to be put in evidence "for the collateral purpose of showing that the broker had not used due diligence in bringing the matter to a conclusion within a reasonable time"; and in *Ionides* v. *Pacific Insurance Co.*,[2] the slip, though void as a contract by 30 & 31 Vict. c. 23, was held admissible in evidence for this purpose.

Fisher v. Liverpool Marine Insurance Co.

Blackburn, J.'s, reasoning.

From this undisputed law, Blackburn, J., in *Fisher* v. *Liverpool Marine Insurance Co.*,[3] sought to hold an insurance company liable for breach of duty in not issuing a policy in reasonable time after having undertaken the duty of preparing one. The foundation of this attempt was a difference in the way in which private underwriters did their business from insurance companies. In the case of an insurance company, after the slip has been initialled by the agent of the company, it [illegible]eturned by the broker of the assured, and a copy of it is then sent to the company by the broker for the purpose of preparing the policy. The policy is then drawn on stamped paper by the company, who themselves advance the stamp and execute the policy ready to be delivered to the assured. Blackburn, J., held that the effect of giving the copy slip and the acceptance by the company was that the company took upon themselves the duty of the broker, viz., to use due skill and diligence about preparing the policy in a reasonable time; and the mere fact that the company were trusted with the duty, he contended, was a sufficient consideration. But the majority of the Court held that the true effect of the transaction was that, on the initialling of the slip, an engagement was entered into, not merely to execute a binding policy, but to execute it in accordance with the usual and accustomed course of business, including an undertaking to procure the stamp and fill up the policy; and since no other agreement than that evidenced by the initialling the slip was entered into, the statute applied and prevented an action founded on a supposed breach of duty in not procuring a stamp and preparing a policy. This decision has been acquiesced in ever since.

Duty of the insured.

It is the duty of the insured to communicate all intelligence that he possesses which may affect the mind of the insurer. He is not bound to communicate loose rumours nor facts which the insured may be presumed to know, such as general news accessible in the newspapers. The law requires *uberrima fides*; yet either party may be silent as to grounds common to both.[4]

[1] Per Blackburn, J., *Fisher* v. *Liverpool Marine Insurance Co.*, L. R. 8 Q. B. 475; in Ex. Ch. L. R. 9 Q. B. 418.

[2] L. R. 6 Q. B. 674; 7 Q. B. 517. 30 & 31 Vict. c. 23, is repealed by the Stamp Act, 1891, s. 123, and the law relating to policies of sea insurance is contained in secs. 92–97 of the same Act (54 & 55 Vict. c. 39). See 1 Edw. VII., c. 7, s. 11. *Royal Exchange Assurance Corporation* v. *Sjoforsakrings Aktiebolaget Vega*, [1901] 2 K. B. 567; [1902] 2 K. B. 384.

[3] L. R. 8 Q. B. 466; L. R. 9 Q. B. 418.

[4] *Carter* v. *Boehm*, 3 Burr. 1905, 1 Sm. L. C. (11th ed.), 474. Cp. *Blackburn* v. *Vigors*, 12 App. Cas. 531.

Though we have in terms limited our consideration in the foregoing remarks to the case of factors and brokers—the most ample and responsible classes of agents—the principles applicable are appropriate to all cases of mercantile agency; we are, therefore, dispensed from considering the other cases of agency independently and in detail.[1]

(γ) As to *warehousemen*.[2]

The word warehouse is ambiguous. It may signify either: Warehouse and warehouseman—definitions.

(1) A store for goods for safe keeping.

(2) A building for storing imported goods on which customs dues have not been paid.

(3) A store for the sale of goods wholesale.[3]

So, too, warehouseman is an ambiguous term, and may mean either the keeper of a warehouse or the man that works therein. For the present purpose the third meaning of warehouse may be eliminated, and so may special aspects of the second;[4] our consideration can be confined to the view of a warehouse as a store for goods for safe keeping. The second meaning of warehouseman has reference to the law of master and servant, and may also here be disregarded.

A warehouseman, restricting the use of the term to its first meaning, is a bailee for reward; and therefore comes under the rule exacting ordinary diligence.[5] This is in accordance with the ruling in *Cailiff* v. *Danvers*,[6] where plaintiff claimed against the defendant, a warehouseman, for negligently keeping a quantity of *ginseng* which had been deposited by the plaintiff in his warehouse. The *ginseng* had been destroyed by rats; but several persons had looked at it on different days and every night; and the lid of the box containing it was shut down, though not nailed; and many cats were kept in the warehouse, while all possible care was taken to destroy vermin. On this Lord Kenyon said "that a warehouseman was only obliged to exert reasonable diligence in taking care of the things deposited in his warehouse; that he was not, like a carrier, to be considered as an insurer, and liable for all losses happening otherwise than by the act of God or the King's enemies; and that the defendant in the present case, having exerted all due and common diligence for the preservation of the commodity, was not liable to any action for this damage, which he could not prevent." Rule of diligence. *Cailiff* v. *Danvers*. Rule laid down by Lord Kenyon, C.J.

A warehouseman is not answerable for a theft committed by his servants; nor yet for any theft after he has shown that the goods were Duty of warehouseman.

[1] It is the duty of a confidential agent to keep regular accounts: *White* v. *Lady Lincoln*, 8 Ves. 363. *See In re Lee*, L. R. 4 Ch. 43, where the principle of the earlier case is said to apply only where there is a general agency. The duty of a "commission agent" is explained by Blackburn, J., *Ireland* v. *Livingston*, L. R. 5 H. L. 407; *Cassaboglou* v. *Gibb*, 11 Q. B. D. 797; *Holden* v. *French*, 10 C. B. 886. A commission agent is not bound to insure, for the benefit of his principal, goods consigned to him for sale, without some directions, either express or implied, to that effect, though he has such an interest in the goods that he *may* insure them to their full value in his own name: 3 Kent, Comm. 261 n. (*c*).

[2] See Bell, Princip. of Law of Scotland (9th ed.), 108, where the cases are collected; 2 Parsons, Contracts (8th ed.), 139; 3 Chitty, Commerce and Manufactures, 354–386.

[3] Ogilvie, English Dictionary, *sub voce* Warehouse.

[4] As to the Warehousing Acts and the questions raised as to bonded goods and the property therein, with the method of and limitations in transferring it, see 1 Bell, Comm. (7th ed.), 199–211; McCulloch, Dictionary of Commerce, art. Warehousing System; 2 Kent, Comm. 547, n. (*d*).

[5] Jones, Bailm. 96.

[6] Peake (N. P.) 114. See also *Garside* v. *The Proprietors of the Trent and Mersey Navigation*, 4 T. R. 581, and compare it with *Hyde* v. *The Navigation Co. from the Trent to the Mersey*, 5 T. R. 389, and *Maving* v. *Todd*, 1 Stark. (N. P.) 72.

placed in a reasonably safe place, and that he has not been guilty of negligence, and it has been added not "exercised less care towards them than towards his own property."[1] This last statement is not in accord with the principle we have seen governing in these cases; since it does not guard against the contingency of the bailee being very careless with his own goods. The true rule is that a warehouseman must take the same care in the preservation of the things bailed to him which a good and prudent business man would take of his own; since this is a contract of mutual benefit to the bailor and bailee.[2] He is bound to warehouse the goods entrusted to him in a place reasonably safe, suitable, and usual.[3]

To afford ordinary and average care.

The bailor has no right to expect more than ordinary and average care; so that where a building fell from a defect in the foundation, the warehouseman was held not conclusively chargeable; since such a casualty might befall without negligence on his part; although of course there was a presumption of evidence of fault.[4]

Goods must be properly packed.

A warehouseman, or storekeeper—as he appears to be called in Scotland—is also bound "to store in a proper manner" the goods he receives. This duty involves the obligation of reasonable inspection and shifting of them from time to time when goods are so packed that damage may result from their too long continuance in one position. Thus the warehouseman was held liable where bags were piled one above another in such circumstances that the pressure, long continued, was likely to cause deterioration in their contents, and where, with knowledge of this likelihood, no steps were taken to prevent it.[5]

Warehouseman not necessarily bound to follow bailor's instructions.

It is not of itself sufficient to constitute negligence of the warehouseman that he has departed from his bailor's instructions as to the custody of his goods; for he is not bound to greater care than ordinary care, unless he has accepted the goods on a special condition that he is to take unusual precautions. The fact of a deviation, if not in itself sufficient to make him liable, is yet a circumstance, and an important one, in the constitution of negligence, though not necessarily sufficient to dispose of the case.[6]

Only liable for servants acting within the scope of authority.

Aldrich v. *Boston and Worcester Ry. Co.*

Further, the warehouseman, though bound to use due care in storing the goods, is liable for the acts of his servants only while acting within the scope of their employment.[7] A good instance of this is given in *Aldrich* v. *Boston and Worcester Ry. Co.*,[8] where a fire broke out in the night-time at the defendant company's warehouse, and their servants although present did nothing to remove the plaintiff's goods which were burnt. He sued for their loss, and grounded his claim on the alleged negligence of the servants. The claim was held not sustainable, since it was no part of the servants' duty to rise in the night to look after the plaintiff's goods, and the mere circumstance

1 3 Chitty, Commerce and Manufactures, 368. *Ante*, 748.

2 *Dolum et custodiam, non ctium casum, cui resisti non potest, venire constat:* Code, 4, 65, 28; but see *Finucane* v. *Small*, 1 Esp. (N. P.) 315, and the comment on it in *Schmidt* v. *Blood*, 9 Wend. (N. Y.) 268.

3 A carrier also a warehouseman who accepts goods for transportation or keeps them after their arrival is not a gratuitous bailee: *White* v. *Humphry*, 11 Q. B. 43. *Ante*, 32, 755, 768.

4 *Wilmot* v. *Jarvis*, 12 Upp. Can. Q. B. 641 Cp. *Searle* v. *Laverick*, L. R. 9 Q. B. 122.

5 *Snodgrass* v. *Ritchie*, 17 Rettie, 712.

6 *Tobin* v. *Murison*, 5 Moo. P. C. C., per Lord Brougham, 128. *Union Credit Bank* v. *Mersey Docks and Harbour Board*, [1899] 2 Q. B. 205, discusses the liability of a warehouseman for conversion for wrongful delivery where the owners of the goods are not guilty of negligence. Cp. *Henderson* v. *Williams*, [1895] 1 Q. B. 521.

7 *Coleman* v. *Riches*, 16 C. B. 104.

8 100 Mass. 31.

that they were present at the fire in their character of citizens could not extend the plaintiff's rights against their employer.

Lord Ellenborough in *Livie* v. *Janson*.

There is authority that seems to point the other way. Lord Ellenborough, C.J., in *Livie* v. *Janson*[1]—an insurance case—reasons thus: "If the property, whether damaged or undamaged, would have been equally taken away from him [the assured] and the whole loss would have fallen upon him had the property been ever so entire, how can he be said to have been injured by its having been antecedently damaged? . . . Supposing ship and cargo to be damaged in the early part of a voyage by the ordinary sea perils, and afterwards wholly destroyed by fire before the voyage is finished; of what consequence to the owner is the damage which may have occurred from one or several successive causes of injury before the fire? And if the property, whether undamaged or not, would have been equally annihilated; is not its previous deterioration rendered wholly immaterial?"[2] But another case may be put; where damage being done to goods in the hands of a bailee, the bailor is content to leave the goods in their damaged condition and to treat the damages as a sum receivable by him. In this case the destruction of the damaged goods by fire appears irrelevant to the claim to recover. The presumption that this is the case should probably be made against a bailee in default; he is liable to pay damages, that is not restitution of the thing, but compensation—a money equivalent.[3]

Subsequent destruction of goods by casualty does not release from liability for previous negligence.

If a total loss has occurred without want of ordinary care and diligence on the part of the warehouseman, though previously to the loss he was guilty of actionable negligence by which the goods were deteriorated, it has been decided in an American case[4] that the subsequent destruction of the goods does not release him from his previously accrued liability for his negligent act. Again, where a man has contracted to warehouse goods in a certain place, but warehouses them in another, where they are destroyed by fire, without negligence on his part, he is, nevertheless, liable, since he has broken his contract and thus exposed them to injury; and this was decided in *Lilley* v. *Doubleday*.[5] The only exception, said Grove, J., citing *Davis* v. *Garrett*,[6] is where the goods must as inevitably have been destroyed at one place as at the other; and he lays down the rule: "If a bailee elects to deal with the property entrusted to him in a way not authorised by the bailor, he takes upon himself the risks of so doing except where the risk is independent of his acts and inherent in the property itself"; to which Lindley, J., agreed.

Lilley v. *Doubleday*.

The rule

These considerations suggest the duty of the warehouseman with

[1] 12 East, 648, 654.

[2] Cp. *Lidgett* v. *Secretan*, L. R. 6 C. P. 616; *Woodside* v. *Globe Marine Insurance Co.*, [1896] 1 Q. B. 105; *The Dora Foster*, [1900] P. 241.

[3] Cp. *Nitrophosphate and Odam's Chemical Manure Co.* v. *London and St. Katharine Dock Co.*, 9 Ch. D. 503, 526.

[4] *Powers* v. *Mitchell*, 3 Hill (N. Y.) 545.

[5] 7 Q. B. D. 510. The principle is the same as that which decides that when a debtor is directed by his creditor to remit money by post and it is lost, the creditor must bear the loss: *Warwicke* v. *Noakes*, Peake (N. P.), 67; *Dunlop* v. *Higgins*, 1 H. L. C. 381; *Household Fire, &c. Co.* v. *Grant*, 4 Ex. D. 216. The ground for discharging the debtor in that case is that he has obeyed the directions of his creditor, while the ground for making him liable in this case is that after undertaking an obligation to the owner of the goods, he did not perform it. *Lampson* v. *London and India Dock Joint Co.*, 17 Times L. R. 663: Custody of goods by dock company; in what circumstances a bailment by the consignee.

[6] 6 Bing. 716.

Goods deposited seized under colour of legal process.

regard to attempts to seize goods deposited under colour of legal process. The increased resort of people with valuable securities to Safe Deposit Companies for safe custody of deeds and jewellery renders this a matter of growing importance. It is not doubtful that a bailee for reward may excuse himself for failure to deliver the property to the bailor when called for, by showing that it was taken out of his custody under the authority of valid legal process,[1] of which fact he has given reasonable notice to the owner. But there is a duty on the bailee not to part with property improvidently on the mere allegation. He is bound to make all reasonable inquiries into the validity of the allegation before he parts with his bailor's property, and to receive such assurances as would convince a reasonable and intelligent man. An unexceptionable course for the warehouseman to adopt for his own security would be to interplead.[2]

No justification or excuse for parting with goods to show that they were subsequently taken under legal process.

If the bailee parts with his bailor's property without sufficient justification or excuse, and is then sued by the owner for a conversion or a negligent loss, it is not a defence or bar to the action to show that, after the property went into the possession of others, it was levied upon under process against the true owner. If it can be shown that the bailor became repossessed of the property, or that it came under his control, or that he had the benefit of it by application through regular legal proceedings upon a judgment against him (*i.e.*, the owner), such facts will go in mitigation of damages.[3] As we have seen, however, in the case of *Powers* v. *Mitchell*,[4] the subsequent appropriation by the owner in no way cures the original wrongful act.

Safe Deposit Companies.

The duty of Safe Deposit Companies is not different in kind from that of other warehousemen, though the preciousness of the securities they hold is likely to call into being the particular danger of liability to legal process more frequently than in the case of bulky goods.

Cailiff v. *Danvers.*

A case already cited[5] is an authority that for destruction of goods warehoused by rats a warehouseman is not answerable without negligence. Neither is he liable for robbery, accident, or fire, unless in any case there is gross negligence or default. The rule with regard to this

Foster v. *Essex Bank.*

is very clearly stated in *Foster* v. *Essex Bank*,[6] a decision mentioned with approbation in *Giblin* v. *McMullen*:[7] "The principle applicable to this species of bailment goes no further than to make the bailee liable in case of *ordinary neglect*; so that if he shows that he used due care, and nevertheless the goods were stolen, he would be excused. . . . And this is also reasonable, for one who takes goods into his warehouse, to keep for a stipulated price, does not intend to insure them against fire[8] or thieves. His compensation is only in the nature of rent; or, if anything beyond that, only for the vigilance of a man of common prudence. If he locks and fastens the warehouse, as other prudent people do, and thieves break through and steal, he ought not to be accountable, and if he leave the door or windows open, he ought to be."

[1] *Shelbury* v. *Scotsford*, Yelv. 22; approved *Ex parte Davies, In re Sadler*, 19 Ch. D., per dessel, M.R., 90.

[2] *Rothschild* v. *Morrison*, 24 Q. B. D. 750. *Glyn, Mills, Currie & Co.* v. *East and West India Dock*, 5 Q. B. D., per Field, J., 135.

[3] *Roberts* v. *Stuyvesant Safe Deposit Co.*, 123 N. Y. 57, 20 Am. St. R. 718.

[4] 3 Hill (N. Y.) 545; *ante*, 829.

[5] *Cailiff* v. *Danvers*, Peake (N. P.), 114.

[6] 17 Mass. 502.

[7] L. R. 2 P. C. 338.

[8] For a full consideration of the law where the loss has happened through fire, and as to the burden of proof, see *Lancaster Mills* v. *Merchants' Cotton Press Co.*, 24 Am. St. R. 586.

If the warehouseman have insured, he is liable to the owner for money paid and received to his use,[1] unless the policy is in similar terms to that which formed the subject of the decision in *North British Insurance Co.* v. *Moffatt*;[2] where the insurance by the warehouseman was on "goods in trust or on commission for which they (the assured) are liable." In this particular case, as the property in the teas, the subject of the insurance, had passed to purchasers, and the teas were accordingly at the risk of the purchasers, as between them and the assured it was held that the teas were not covered by the policy.

Where warehouseman has insured.

North British Insurance Co. v. *Moffatt.*

In a case[3] where floating policies of insurance were effected by wharfingers against loss by fire on grain and seed, Jessel, M.R., who was confirmed by the Court of Appeal, said:[4] "By the evidence, a wharfinger, by the custom, I suppose, of the City of London, or, at all events, by the custom of the trade, is in the same position as a common carrier. He is liable, in the absence of express stipulation, for the safe custody of the goods entrusted to his care; and if the goods are destroyed by fire, he is liable in law for breach of duty, in not so carefully attending to the goods that no fire could destroy them. It is no answer on this point to say, 'I was not guilty of negligence,' because it is negligence not to have prevented accident; and for this purpose it is not necessary to show that he was guilty of actual negligence or actual default; he is liable for not properly taking care of the goods. That being so, a wharfinger makes a charge to his customers of a sum sufficient to remunerate him not only for his expenses, but also for the risks attending his trade, and of course a fair margin of profit. Whether that is charged under the name of wharfage, or lighterage, or consolidated rate, is wholly immaterial for this purpose. It is a charge he makes to his customer, for undertaking those duties and liabilities amongst others."

North British and Mercantile Insurance Co. v. *London, Liverpool, and Globe Insurance Co.*

The responsibility of the warehouseman begins directly the goods are delivered to his custody. Till then they are in the custody of the carman, who is the agent of the person sending them; the moment the warehouseman applies his tackle to them the carman's liability ceases. This is illustrated by *Thomas* v. *Day*,[5] where an accident happened from the cords of certain packs breaking, after defendant's servant had offered to give slings to the carman to make them more secure while being slung in the crane to the warehouse, which offer was refused. On being raised in the crane the cords of the pack gave way, and the goods fell in the street and were injured. Lord Ellenborough, C.J., held the defendant bound to see to the strength of the cords. "If slings were necessary, the refusal of the carman, on his declining to use them, will not exempt the warehouseman; he ought to have insisted on the carman's using them; and, if he refused, he should have repudiated those goods, and refused to accept them." Where goods deposited with a warehouseman are pledged, the duty of the warehouseman is performed if he gets the property into his own possession *before* issuing the receipt setting forth that the property is deliverable to the pledgee,

Commencement of responsibility.

Thomas v. *Day.*

[1] *Sidaways* v. *Todd*, 2 Stark. (N. P.) 400; *Waters* v. *Monarch Life and Fire Insurance Co.*, 5 E. & B. 870; *L. & N. W. Ry. Co.* v. *Glyn*, 1 E. & E. 652; *ante*, 823. See *Ex parte Bateman*, 8 De G. M. & G. 263: timber burned at a saw-mill. The price had not been agreed, yet was held a provable debt in bankruptcy.

[2] L. R. 7 C. P. 25.

[3] *North British and Mercantile Insurance Co.* v. *London, Liverpool, and Globe Insurance Co.*, 5 Ch. D. 569.

[4] *Ld.* 573.

[5] 4 Esp. (N. P.) 262.

and transfers the possession when demanded to the lawful holder of the receipt. A warehouseman is indeed responsible for the custody of the property, but is not a guarantor of the title to an assignee of the receipt.[1] A warehouseman with whom goods have been deposited is guilty of no conversion by keeping them or restoring them to the person who deposited them with him, though that person turns out to have no authority from the true owner; yet so soon as he assumes to affect the property in them he becomes liable for a conversion.[2]

Where a dealing with goods by pledge and loan is effected by one not the real owner by means of documents of title which come into existence or are moulded only for the purposes of that transaction, and there is no dealing with the goods themselves, apart from the constructive dealing by means of a delivery order, on the repayment of the loan, the party who purported to lend upon the goods is not liable to an action by the true owner, although the goods have by fraud, to which the lender is no party, been put out of his possession. His transaction has been only intermediate: has had no adverse influence on the ownership: and has exhausted its effects, leaving the other parties in their previously existing relative positions. At most he has been a conduit, used by others, but is not as against the owner a responsible agent. "It is as if a thief had given his stolen goods to a carrier to be carried, and the latter, at the end of the journey, had returned the goods to the thief upon the thief discharging the lien for the carriage." "Of course it would be different if before the thief repossessed himself of the goods the true owner were to demand possession. If he did so and possession were refused the carrier would be guilty of conversion; so here, if before the defendant bank had parted with the goods, the plaintiffs had demanded possession, and the defendant bank had refused to comply with the demand, there would have been an exercise of dominion over the goods by the defendant bank inconsistent with the plaintiff's rights and constituting a wrongful act. But all the defendant bank, in the present case, did in connection with the goods was to relinquish to the person from whom they had received it the constructive possession."[3]

Bristol and West of England Bank v. *Midland Ry. Co.*

In *Bristol and West of England Bank* v. *Midland Ry. Co.*[4] the question was raised whether the persons entitled to goods from a warehouseman could sue him for negligently parting with the possession when their title had accrued after the wrongful act alleged had been committed. The point had been before the Court of Queen's Bench in *Goodman* v. *Boycott*,[5] when Wightman and Blackburn, JJ., differed in opinion, the former holding that the time of the accrual of title was immaterial, the latter being of the opposite opinion, but, as the junior judge, withdrawing his judgment. The view of Wightman, J., was acquiesced in; and a similar view was subsequently taken by Willes, J., in *Short* v. *Simpson*;[6] moreover, a Scotch case, *Piric* v. *Warden*,[7] was decided in the same way. The Court of Appeal approved and followed these cases, and held that it made no difference whether the wrongful

1 *Insurance Co.* v. *Kiger*, 103 U. S. (13 Otto) 352.

2 As to the effect of assignment of warehouseman's receipt, in making the warehouseman bailee to transferee: *Hollins* v. *Fowler*, L. R. 7 H. L. 757; *Zellner* v. *Mobley*, 20 Am. St. R. 390.

3 Per Bigham, J., *Union Credit Bank* v. *Mersey Docks and Harbour Board*, [1899] 2 Q. B. 216.

4 [1891] 2 Q. B. 653.

5 (1862) 2 B. & S. 1.

6 L. R. 1 C. P. 248.

7 9 Macph. 523.

act was before or after the accrual of the plaintiff's title. Fry, L.J., thought:[1] "It is reasonable to say that the man who ought to have the goods shall not be allowed to set up a wrongful prior act by which he has made away with the goods. He who ought to produce the goods of the man who has the title to the goods and the property in the goods, cannot discharge himself by saying, 'I have wrongfully made away with them, but that was before the accruer of your title.'"[2]

Judgment of Fry, L.J.

The duty of a warehouseman issuing receipts for goods in cases, sacks, or barrels, not open to be tested, may be noticed. By giving a receipt he merely expresses that he has received goods packed, bearing the same outward appearance as do cases in which are packed merchandise of the character described in the receipt; and that there is nothing unusual or out of the ordinary way of business in the marks, appearance, signs, labels, or character of the packages differing from that in which goods of the character described in the receipt are usually transported; and that they have been represented to him, and that he believes them to be, as described.[3]

Duty of warehouseman issuing receipts for goods in packages not open to be tested.

Many difficult questions occur, in the case of carriers who also warehouse goods, as to when their liability as carriers ends and that as warehousemen begins—such, for instance, as are discussed in *Bourne* v. *Gatliffe*[4] and *Cairns* v. *Robins*.[5] In *Mitchell* v. *Lancs & Y. Ry. Co.*, Blackburn, J.,[6] states the rule of law: "Where a carrier receives goods to carry to their destination with a liability as carrier (except so far as that duty is qualified by exceptions), he may be said to be an insurer. The goods are then to be carried at the risk of the carrier to the end of the journey, and, when they arrive at the station to which they were forwarded, the carrier has then complied with his duty when he has given notice to the consignee of their arrival. And after this notice, and the consignee does not fetch the goods away, and becomes *in morâ*, then I think the carrier ceases to incur any liability as carrier, but is subject to the ordinary liability of bailee." And he adds: "I do not think there has been any case decided to this extent, that because the owner of goods was idle and blameable for leaving them in the carrier's hands, therefore he as bailee held them under no responsibility whatever."

Carriers who are warehousemen.

Mitchell v. *Lancs. & Y. Ry. Co.*

In *Chapman* v. *G. W. Ry. Co.*, the question of liability was more fully discussed by Cockburn, C.J.[7] The Chief Justice points out that between the receipt of the goods and their departure, there must be an interval, and that this may be of even considerable duration. Again, there is not infrequently delay between their arrival at their destination

Chapman v. *G. W. Ry. Co.* Judgment of Cockburn, C.J.

[1] [1891] 2 Q. B. 663.

[2] Lindley, L.J., points out that Blackburn, J.'s, difference of opinion turned on a point of *pleading*, and that his difficulty would have been met if the vendor to the plaintiff had been joined as co-plaintiff: *Bristol and West of England Bank* v. *Midland Ry. Co.*, [1891] 2 Q. B. 661. The delivery of the key of the warehouse in which goods sold are deposited is a delivery sufficient to transfer the property; so is the transfer of them in the warehouseman's or wharfinger's book to the name of some other person: *Chaplin* v. *Rogers*, 1 East, per Lord Kenyon, C.J., 194; *Harman* v. *Anderson*, 2 Camp. 243, referring to *Hurry* v. *Mangles*, 1 Camp. 452. See 11 R. R. 707 n. Cp. D. 41, 2, 1, § 21: *vina tradita videri cum clares collo vinariæ emptori traditæ fuerint.*

[3] *Dean* v. *Driggs*, 137 N. Y. 274, 33 Am. St. R. 721.

[4] 4 Bing. N. C. 314; 3 M. & G. 643; 11 C. & F. 45. *Post*, 910.

[5] 8 M. & W. 258. Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 32.

[6] L. R. 10 Q. B. 260. *Price* v. *Union Lighterage Co.*, [1903] 1 K. B. 750, 755, affd. [1904] 1 K. B. 412.

[7] 5 Q. B. D. 281.

and the delivery of them to the consignee, "as, for instance, when goods arrive at night, or late on a Saturday, or where the train consists of a number of trucks which take some time to unload." In these cases "the goods remain in his [the bailee's] hands as carrier, and subject him to all the liabilities which attach to the contract of carrier." "The case, however, becomes altogether changed when the carrier is ready to deliver, and the delay in the delivery is attributable not to the carrier, but to the consignee of the goods. Here again, just as the carrier is entitled to a reasonable time within which to deliver, so the recipient of the goods is entitled to a reasonable time to demand and receive delivery. He cannot be expected to be present to receive delivery of goods which arrive in the night-time, or of which the arrival is uncertain, as of goods coming by sea, or by a goods train, the time of arrival of which is liable to delay. On the other hand, he cannot, for his own convenience or by his own *laches*, prolong the heavier liability of the carrier beyond a reasonable time. He should know when the goods may be expected to arrive. If he is not otherwise aware of it, it is the business of the consignor to inform him. His ignorance—at all events where the carrier has no means of communicating with him—which was the case in the present instance—cannot avail him in prolonging the liability of the carrier, as such, beyond a reasonable time. When once the consignee is *in morâ* by delaying to take away the goods beyond a reasonable time, the obligation of the carrier becomes that of an ordinary bailee, being confined to taking proper care of the goods as a warehouseman; he ceases to be liable in case of accident. What will amount to reasonable time is sometimes a question of difficulty, but as a question of fact, not of law. As such, it must depend on the circumstances of the particular case." [1]

Reasonable time. *Hick* v. *Rodocanachi*.

The question of "reasonable time" was exhaustively dealt with in *Hick* v. *Rodocanachi*,[2] a shipping case where the defendants, consignees under a bill of lading, were prevented by a strike of dock labourers from unloading. The bill of lading contained no mention of the time within which the goods were to be unloaded. The time implied was therefore a "reasonable time." The strike delayed the business for a month. Neither plaintiff nor defendants were in default, each doing the utmost possible for the unloading. The plaintiff, however, sued in respect of the delay, contending that time is to be measured by something which may be measured more or less exactly when the contract is entered into; that reasonable time implies ordinary circumstances.[3] The defendants' contention on the other hand was that reasonable time was to be determined, not by the probabilities at the time of making the contract, but by reference to the state of things as ascertained by the event.[4] The Court of Appeal adopted this view, and held that as

[1] The cases of the *primâ facie* obligation of the carrier to make an actual delivery to the consignee are carefully collected in Angell, Law of Carriers (5th ed.), §§ 301, 304. *Post*, 908.

[2] [1891] 2 Q. B. 626, reported in the House of Lords *sub nom. Hick* v. *Raymond & Reid*, [1893] A. C. 22; *Taylors* v. *Macfellans*, 10 Rettie, 10. "The question what is a reasonable time is a question of fact": Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 56. *Hulthen* v. *Stewart*, [1903] A. C. 389.

[3] This view was supported by citing *Burmester* v. *Hodgson*, 2 Camp. 488; *Ford* v. *Cotesworth*, L. R. 4 Q. B. 127; in Ex. Ch. L. R. 5 Q. B. 544; *Wright* v. *New Zealand Shipping Co.*, 4 Ex. D. 165, considered [1893] A. C. 31.

[4] Their authorities were Lord Truterden, C.J., in *Rogers* v. *Hunter*, M. & M. 63, defining "reasonable despatch"; Erle, C.J., Byles, and Montague Smith, JJ., in *Taylor* v. *The Great Northern Ry. Co.*, L. R. 1 C. P. 385, "reasonable time"; Thesiger, L.J., in *Postlethwaite* v. *Freeland*, 4 Ex. D. 155, "reasonable diligence"; and Lord

the strike could not be put down to any default on the defendants' part, and since there was no provision for the case in the contract, they could not be held liable for the delay. This decision was upheld in the House of Lords, where it was pointed out [1] that if the terms of the bills of lading had required the discharge to be effected in any particular number of days, it was quite clear that the burden of the delay would have fallen on the defendants; but that the balance of authority was distinctly in favour of the view that "reasonable time" is to be interpreted by the actual event, and not by consideration of ordinary circumstances merely.

Refusal of the consignee to accept.

If the consignee refuses to accept goods, the carrier becomes an "involuntary bailee," and it is to be left to the jury whether, considering all the circumstances, he has "acted with reasonable care." [2]

Onus.

Where negligence is alleged against a warehouseman the *onus* is on the plaintiff, unless there is a total default in delivering or accounting for the goods.[3]

(*c*) Closely allied to the business of a warehouseman is that of a *wharfinger*.[4]

Wharfinger. Wharf—definition.

A wharf is a sort of quay constructed of wood or stone, on the margin of a roadstead, harbour, or river, alongside of which ships or lighters are brought for the sake of being conveniently loaded or unloaded.[5]

Wharfs either (*a*) Legal, or

In England wharfs are of two kinds:

(*a*) *Legal wharfs*—certain wharfs in all seaports appointed by commission from the Court of Exchequer or legalised by Act of Parliament.

(*b*) Sufferance.

(*b*) *Sufferance wharfs*—places where certain goods may be landed and shipped by special sufferance granted by the Crown for that purpose.[6]

Selborne, in *Postlethwaite* v. *Freeland*, 5 App. Cas. 608, "reasonable time under the circumstances." "Reasonable time" in mercantile transactions is not applicable to cases of contracts respecting real property. For the considerations applicable, see per Lord Chancellor Manners: *Jessop* v. *King*, 2 Ball. & B. (Ir. Ch.) 95; *Edwards* v. *Carter*, [1893] A. C. 360. See on the same subject of reasonable time, *Chapman* v. *Lairin*, 4 Can. S. C. R. 349, and the remarks of Lord Blackburn, *Dahl* v. *Nelson*, 6 App. Cas. 54.

[1] [1893] A. C., per Lord Herschell, C., 28. The dictum of Lord Blackburn in *Postlethwaite* v. *Freeland*, 5 App. Cas. 599, that a stipulation that cargo is to be discharged with all dispatch according to the custom of the port, is identical with the implied obligation to discharge within a reasonable time, is dissented from by Lord Herschell, C., [1893] A. C. 30.

[2] *Hough* v. *L. & N. W. Ry. Co.*, L. R. 5 Ex., per Kelly, C.B., 57. As to the duty of wharfingers to retain goods till proper delivery orders are presented to them, see *Carr* v. *L. & N. W. Ry. Co.*, L. R. 10 C. P. 307.

[3] *Harris* v. *Packwood*, 3 Taunt. 264, with the interpretation of it by Abbott, C.J., in *Marsh* v. *Horne*, 5 B. & C. 322. See also *Clay* v. *Willan*, 1 H. Bl. 297. If there is a default to account at all, then trover will lie: Anonymous, 2 Salk. 655. In the case of a common carrier, as we shall subsequently see, the case is different: *Forward* v. *Pittard*, 1 T. R., per Lord Mansfield, 33. Some of the American cases require "some affirmative and substantive evidence of carelessness on the part of the defendants"—*e.g.*, *Lamb* v. *Western Rd. Co.*, 89 Mass. 98; *Willett* v. *Rich*, 142 Mass. 356, 56 Am. R. 684, where it is said: "We understand the doctrine to be well settled in this commonwealth, that the burden of proof never shifts." The liability of a warehouseman for goods placed in a warehouse and delivered under the "second" of the bills of lading without notice of the "first," is considered in the case of *Glyn* v. *The East and West India Dock Co.* in the Court of Appeal, 6 Q. B. D. 475, and by Lord Blackburn in the House of Lords, 7 App. Cas. 611.

[4] Story, Bailm. § 451–454, 1 Parsons, Law of Shipping, 220–231; 2 Parsons, Contracts (8th ed.), 143. Angell, Carriers (5th ed.), § 66, treats the obligations of warehousemen, wharfingers, and private carriers for hire as identical. As to their liability for deterioration of goods, see *post*, 848, 906.

[5] Ogilvie, English Dictionary, *sub voce* Wharf; also Termes de la Ley; 39 & 40 Vict. c. 36, ss. 39–99; sec. 63 repealed by 42 & 43 Vict. c. 21, s. 14; sec. 48 by 44 & 45 Vict. c. 12, s. 48; see also changes made by 46 & 47 Vict. c. 55, s. 19.

[6] *Baker* v. *Lister*, 7 T. R. 171. See *Meyerstein* v. *Barber*, L. R. 2 C. P., per Willes,

In the earliest times the right to constitute ports,[1] even to the detriment of those already existing, was in the king; but from the reigns of Elizabeth to Charles II., at various times Acts of Parliament were passed for issuing commissions to appoint and settle the limits of the ports and lawful places for shipping and discharging goods, and to regulate the charges and rights belonging to them.[2] These are the foundation of the rights and privileges now exercised.

Wharfinger not strictly a warehouseman.

The occupation of a *warehouseman* is so often carried on in conjunction with that of a wharfinger that to a great extent their businesses are identical. In strictness the wharfinger does not warehouse at all; he merely receives goods at and despatches them from the quay. In so far as he carries on the business of a warehouseman he is amenable to the considerations which apply to them; and which we have already considered.[3] In so far as he carries on business in places regulated by Act of Parliament, his case must be the subject of separate treatment.

Rule of diligence applicable to wharfingers.

A wharfinger does not undertake to transport goods himself and receives no profit for their transportation; and the rule of diligence to which he is bound is that applicable to ordinary bailees for hire – to use the diligence of a prudent owner with a full knowledge of the facts; or, as has been said, the wharfinger "is bound to guard against all *probable* danger; the common carrier against all *possible* danger." This view has not always been acquiesced in. In *Ross* v. *Johnson*,[4] for instance, Lord Mansfield says: "It is impossible to make a distinction between a wharfinger and a common carrier. They both receive the goods upon a contract. Every case against a carrier is like the same case against a wharfinger." But there, as Story[5] points out, the sole question was whether *trover* would lie against a carrier when the goods had been lost by his negligence, and not converted by him. During the argument a case was cited of a wharfinger, in which it was held that an action *on the case* and not *trover* was the proper action; in this view Lord Mansfield's language becomes quite consistent and intelligible.

Ross v. *Johnson*.

Lord Mansfield's *dictum* considered.

Maving v. *Todd*.

In the subsequent *Nisi Prius* case of *Maving* v. *Todd*,[6] "Lord Ellenborough was of opinion that the liability of a wharfinger, whilst he has possession of the goods was similar to that of a carrier; and he inquired whether the defendants had any case to the contrary." There the defendants united the character of lightermen and wharfingers; and the case falls in with the run of the authorities if looked at as

J., 50, for the duty of the wharfinger at a sufferance wharf. As to the rights of a master at a port where there is no English warehousing statute in force and no evidence of any law different from that of England: *Mors-le-Blanch* v. *Wilson*, L. R. 8 C. P. 227. Where the king or a subject has a public wharf to which all persons must come, who come to that port to unload their goods, either because they are the wharfs only licensed for that purpose or because there is no other wharf in that port, excessive duties for cranage, wharfage, &c., may not be exacted, but the duties must be reasonable; "for now the wharf and crane and other conveniences are affected with a public interest, and they cease to be *juris privati* only": *Allnutt* v. *Inglis*, 12 East, 539, per Lord Ellenborough, C.J., citing Lord Hale, *de Portibus Maris*, Harg. Tracts, vol. i. 77.

[1] For the law of ports and harbours, see 2 Chitty, Commerce and Manufactures, 1-32; Bac. Abr. Prerogative (B), 5. The definition of a port is considered in *Hunter* v. *Northern Marine Insurance Co.*, 13 App. Cas. 717, where *The Sailing Ship* "*Garston*" v. *Hickie*, 15 Q. B. D. 580, is discussed, and in *Ashton Smith* v. *Owen*, [1906] 1 Ch. 179. As to a harbour, see per Lord Esher, M.R., *The Queen* v. *Hannam*, 2 Times L. R. 234; The Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 742; *Musselburgh Real Estates Co.* v. *Musselburgh*, [1905] A. C. 491.

[2] Hale, de Port. Mar. c. 5, inserted in 1 Harg. Tracts 59; Bac. Abr. Prerog. (B) 5; 1 Eliz. c. 11; 13 & 14 Car. II. c. 11; 22 Car. II. c. 11, s. 21. The two earlier of which Acts are repealed by 6 Geo. IV. c. 105, which is itself repealed by The Statute Law Revision Act, 1873 (36 & 37 Vict. c. 91).

[3] *Ante*, 827.

[4] 5 Burr. 2827.

[5] Bailm. § 451.

[6] 1 Stark. (N. P.) 72.

deciding that the defendant, having accepted goods to carry for reward, had accepted them as carrier, and with a liability that was not affected because he also happened to be a wharfinger.[1]

Opinion of Story.

Story [2] holds that "the case of a wharfinger does not, indeed, seem in any respect distinguishable from that of a warehouseman; and it has not, in fact, been distinguished from it in any solemn adjudication. On the other hand, the case of a carrier has always been treated as an excepted case turning upon peculiar principles of public policy. In fact, the case before Lord Ellenborough was decided in favour of the defendants on another point, that of a special contract excluding losses by fire, and therefore it never called for any revision. If it is to be understood as containing any general proposition, not qualified by the particular circumstances of the case, it is opposed by other and better considered opinions." [3]

Cobban v. *Downe*.

Lord Ellenborough's judgment on the duty of a wharfinger in *Cobban* v. *Downe* [4] may be more unreservedly accepted. Goods were laid on a wharf, and the mate of the ship by which they were to be conveyed was called, and they were delivered to him, but afterwards were lost. Lord Ellenborough said: "What the duty of a wharfinger is, is to be measured by the usage and practice of others in similar situations, or his known and professed liability. Every man contracts with the public according to the known and ascertained extent of the trade or business in which he is engaged. The defendant has proved that, by established usage, the goods were delivered by the wharfinger to the mate and crew of the vessel which is to carry them; from which time it has been considered that their responsibility is then at an end. Undoubtedly, where the responsibility of the ship begins, that of the wharfinger ends; and a delivery to the ship creates a liability there; but the delivery must be to an officer or person accredited on board the ship; it cannot be delivered to the crew at random, but the mate is such a recognised officer on board the ship, that delivery to him is a good delivery, and the responsibility of the ship attaches, if the jury believe that the mate received the goods as stated by the defendant's witnesses." [5]

Lord Ellenborough's view of a wharfinger's duties.

In *Leigh* v. *Smith*,[6] a very similar case, Best, C.J., followed this ruling with a question whether "the case which has been cited is not a little too narrow."

Where the question is between buyer and seller.

Where the question is between buyer and seller, the delivery to the wharfinger must be sufficient to give the buyer his remedy over against the wharfinger before the seller is discharged.[7]

[1] *Forward* v. *Pittard*, 1 T. R. 27; *Hyde* v. *Trent and Mersey Navigation Co.*, 5 T. R. 389.

[2] Bailm. § 452, citing *Sidaways* v. *Todd*, 2 Stark. (N. P.) 460, and 1 Bell. Com. (5th ed.), 467, and note (6); see 1 Bell, Comm. (7th ed.) 194. In *Harman* v. *Anderson*, 2 Camp. 243, a warehouseman and a wharfinger are assumed to have identical rights and liabilities as contrasted with a carrier's.

[3] See the learned note to *Platt* v. *Hibbard*, 7 Cowen (N. Y.) 502, on Lord Mansfield's *dictum* considered in the light of English authority.

[4] 3 Esp. (N. P.) 41; *Selway* v. *Holloway*, 1 Ld. Raym. 46.

[5] Cp. D. 4, 9, 1, § 3: *Et sunt quidam in navibus, qui custodiæ gratia navibus præponuntur, ut παρφύλακες, id est, navium custodes, et diœtarii. Si quis igitur ex his receperit, puto in exercitorem dandam actionem; quia is qui eos hujusmodi officio præposuit, committi eis permittit; quanquam ipse navicularius vel magister id faciat, quod χειρόβολον, id est manus immissionem appellant. Sed si hoc non extet, tamen de recepto navicularius tenebitur.*

[6] 1 C. & P. 638. As to negligence in mooring and stationing vessels at a wharf, see *Wood* v. *Curling*, 15 M. & W. 626, 16 M. & W. 628.

[7] *Buckman* v. *Levi*, 3 Camp. 414; *Gibson* v. *Inglis*, 4 Camp. 72. Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 29.

Liability of wharfinger indistinguishable from that of the warehouseman.

As the liability of the *wharfinger* is not distinguishable from that of a *warehouseman*, since both are bound to take common and reasonable care of the commodity entrusted to them, the wharfinger is not liable for slight neglect, and the reason of the law that affects the carrier does not apply to him. He therefore also comes under the same rule with regard to the *onus* of proof which we have seen to apply in the case of a warehouseman, and the plaintiff cannot recover on mere proof of loss of articles entrusted to the bailee, but must give some positive evidence of a want of care in the bailee or his servants.[1]

Dock-owners.

(*c*) The consideration of the liability of wharfingers suggests that of *dock-owners*.

Definitions.

A dock is a place artificially formed, at the side of a harbour or the bank of a river, for the reception of ships, the entrance of which is generally closed by gates.

Dry or graving docks.

There are two kinds of docks—*dry or graving docks* and *wet docks*. The former are used for receiving ships in order to their being inspected and repaired. A ship in a graving dock differs nothing at common law from any other chattel delivered for work and labour to be done upon it, when, as we have seen, ordinary care must be used and ordinary negligence imports liability.[2]

Wet docks.

Wet docks are formed for the purpose of keeping vessels always afloat. One of the chief uses of a wet dock is to keep a uniform level of water, so that the business of loading and unloading ships can be carried on without interruption.[3]

Dock-owners are usually companies, incorporated by royal charter or by Act of Parliament, whose liability must most often be referred to the construction of the powers under which they individually act, or to the general Act, which is of the same description as those applying to gas and water companies.[4]

Apart from their special statutory liability, or the liability arising from the terms of their charters, with which here we have no direct concern, there are certain duties and liabilities they come under at common law that must be enumerated.

Their duties and liabilities.

A dock company by inviting a ship to enter its dock puts itself in the same position as a shopkeeper who invites a customer to his shop. A shopkeeper is bound to provide reasonable facilities, and to guard against anything in the nature of a concealed danger,[5] though he does not insure the safety of his customer. The duty of a dock company is treated in all its aspects in the cases of *Mersey Docks and Harbour Board* v. *Penhallow*[6] and *Mersey Docks and Harbour Board* v. *Gibbs*.[7] Giving judgment in the former case in the Exchequer Chamber, Williams, J.,[8] laid down the rule applicable, adopting the

[1] *Foote* v. *Storrs*, 2 Barb. (N. Y.) 326. *Antè*, 827.

[2] Cp. the decisions under the Workmen's Compensation Act, 1897 (60 & 61 Vict. c. 37), s. 7. *Raine* v. *Jobson*, [1901] A. C. 404; *Houlder Line* v. *Griffin*, [1905] A. C. 220.

[3] Ogilvie, English Dictionary, *sub voce* Dock; McCulloch, Dict. of Commerce, art. Docks.

[4] 10 Vict. c. 27 (the Harbours, Docks, and Piers Clauses Act, 1847), amended 25 & 26 Vict. c. 69, s. 5.

[5] *Indermaur* v. *Dames*, L. R. 1 C. P. 274; L. R. 2 C. P. 311. *Wright* v. *Lothbridge*, 63 L. T. 572, is an action against the Port Admiral and other officers of Chatham Dockyard, for damage to a barge through mooring in an unsafe berth pointed out by the foreman of the dockyard. It was held that the maxim *Respondeat superior* was not applicable. *The Sunlight*, [1904] P. 100, turned on the question whether the dock-master had in fact given an order to the ..., or merely indicated an approaching danger.

[6] 7 H. & N. 329. [7] L. R. 1 H. L. 93. [8] 7 H. & N. 339.

words of Tindal, C.J., delivering the judgment of the Exchequer Chamber in *Parnaby* v. *Lancaster Canal Co.*:[1] "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 obstruction, 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 it without danger to their lives or property."[2] Whether the duty laid upon the company is undischarged through negligent ignorance when the means of knowledge are at hand, or the requisite steps are neglected where there is actual knowledge, is immaterial; in both instances the company are fixed with actionable negligence. In the case before the Court a mud bank was suffered to exist in a dock open for the ingress and egress of ships. The duty of the company was not absolutely to prevent the accumulation of mud; it was no more than to use reasonable endeavours to do so; and, if these failed, to take such steps as they could to warn those using the dock so as to prevent the mud bank becoming a trap for their customers. If a dock is suitable only for the reception of vessels of a small burthen the dock company are liable if they permit the navigation of the docks by vessels of larger burthen without notice to the public; as in *Thompson* v. *N. E. Ry. Co.*[3] A dock, which, when finished, would have been adequate for large vessels, was opened before it was finished, and the large vessel of the plaintiffs, in attempting to get out fully loaded, was seriously injured through the channel not being in a fit state. Hill, J., in the Queen's Bench, expressed the liability of the defendants to be "to take reasonable care that their dock and basin were kept so free from obstruction that those who used them might do so without danger to their property."[4] In the Exchequer Chamber, this was approved with the addition:[5] "In our judgment it does not matter whether the obstruction in the channel had grown up after the dock and basin were opened, or whether the dock and basin were opened before the channel was well cleared. Strangers cannot be supposed to know the state of the dock, and the company who open their dock are bound to take reasonable care to make it safe for navigation by those who use reasonable care in navigating it." The dock-owner's duty is proportioned to the danger, so that, if an uncommon or unexpected danger arise he must use proportionate efforts to ward off its effects.[6]

Rule laid down by Tindal, C.J., in *Parnaby* v. *Lancaster Canal Co.*

Thompson v. *N. E. Ry. Co.*

In *Williams* v. *Swansea Harbour Trustees*,[7] the trustees of docks, being about to open a new one, issued a notice to "shipowners, merchants, and others," which contained a statement that "the depth of water on the dock sill was twenty-six and twenty-three feet at the highest spring tides, and fifteen feet at the lowest neaps." On the opening of the dock the plaintiff's ship entered and loaded, but was delayed in passing out because the depth in the entrance channel was only nineteen feet. The notice was held to be a representation to all the world that there was available access to the dock gates of the depth mentioned, or at all events approximating thereto, and that the plaintiffs were entitled to recover.[8]

Williams v. *Swansea Harbour Trustees.*

[1] 11 A. & E. 243 (Ex. Ch.). [2] *See Lax* v. *Corporation of Darlington*, 5 Ex. D. 28. *Ante*, 452. [3] 2 B. & S. 106; *The Excelsior*, L. R. 2 A. & E. 268.

[4] 2 B. & S. 116. [5] *L.c.* 121. [6] *Lack* v. *Mansbier*, 1 Camp. 138.

[7] 14 C. B. N. S. 845, which is explained in *Bede S.S. Co.* v. *River Wear Commissioners*, [1897] 1 K. B. 310, 325, to mean that the warranty is "of the accessibility of the dock and not of correspondence more or less exact between the depth of water at the entrance of the harbour and that of the dock sill." [8] As to the duties of dock-masters, see *Lloyd* v. *Iron*, 4 F. & F. 1011; *The Excelsior*, L. R. 2 A. & E. 268.

The Queen v. *Williams.*

The executive government of New Zealand was held liable in *The Queen* v. *Williams*[1] for not removing obstructions in a tidal harbour over which it had the control and management. The case was distinguished from *Parnaby* v. *Lancaster Canal Co.*[2] and *Mersey Dock Trustees* v. *Gibbs*[3] in that there were no harbour dues, and the public had a right to navigate subject to the harbour regulations. The Privy Council were nevertheless of opinion that these differences did not take the case out of the principle of those cases, and held that there was a duty imposed upon the executive government to take reasonable care that vessels using the skaiths and wharfs belonging to the executive government, and which received tonnage and wharfage dues in respect of vessels using them should do so without damage. In the argument it was contended that there is no case of liability of a person in fact ignorant of a danger not on his own premises. The former part of this proposition was demolished by Lord Blackburn's inquiry: "Is not negligent ignorance as bad as knowledge?" As to the latter it was urged that "there is no case which holds a wharfinger liable to make inquiries as to access, nor to search for danger any more than any other owner of premises." This was met by pointing out that the Crown controlled the bed of the river and therefore the danger was on the appellants' premises; and the point is not alluded to in the judgment. It however suggests a question of considerable importance which may now be considered.

Curling v. *Wood.*

The first case dealing with the point is *Curling* v. *Wood*[4] in the Exchequer Chamber on writ of error. Defendant, a wharfinger, had placed woodwork by his wharf in the bed of the river over which at certain times of the tide vessels of the size of the plaintiff's could not float. Plaintiff's vessel was moored over the woodwork for the purpose of using the wharf; and the defendant "improperly detained the vessel over the said woodwork for an improper time until the vessel, on the fall of the tide, struck upon the woodwork and was damaged." "Wharfingers in general," said Wilde, C.J., delivering the judgment of the Court,[5] "may not be bound to moor safely and securely. But in this case the defendant chooses to moor for profit, and in doing so he negligently and unskilfully does what causes the damage."

White v. *Phillips.*

Curling v. *Wood* was not cited in *White* v. *Phillips*,[6] where the defendants had erected a "campshed" in the bed of the river by his wharf; the plaintiffs sent a barge to be loaded from a schooner then unloading at the wharf; for the convenience of the schooner the barge was brought alongside the wharf, with the sanction of the defendants' foreman. As the tide fell the barge canted over on the campshed (of whose existence the plaintiffs' bargeman was ignorant) and was injured. The defendants sought to avoid liability on the ground that they were tenants and went into occupation with the

[1] 9 App. Cas. 418; *The Turkistan*, 13 Rettie, 342—a case where the proximate cause of the accident was the insufficiency of the buoys of the Glasgow Harbour Trustees. *Burrell* v. *Tuohy*, [1898] 2 I. R. 271. *The Bearn*, [1898] P. 48. The obligation of a pilot to take soundings in a harbour is with reference to the question of navigation, and not to the safety of the berth on which ships have to lie; therefore, his performance or neglect of this duty cannot avail to discharge the liability of harbour trustees.

[2] 11 A. & E. 223. [3] L. R. 1 H. L. 93.

[4] (1847) 16 M. & W. 628. In *A.-G.* v. *Terry*, L. R. 9 Ch. 423, a wharf owner drove piles into the bed of a river so as to occupy three out of sixty feet available for navigation, and this was held an obstruction independently of any actual obstruction being caused thereby.

[5] 16 M. & W. 632. [6] (1864) 33 L. J. C. P. 33.

"campshed" in its existing condition; but, says Erle, C.J.,[1] "it appears to me that a duty was thereupon cast on the defendants, either to give notice of the danger arising from the campshed being there in that state, or to have had it repaired and properly constructed. They succeeded to the wharf and, therefore, to the benefit of the campshed." In both of these cases the cause of the injury was under the control of the defendants, and its existence was unknown or imperfectly known to the plaintiffs. The duty on the defendants was therefore clear. Judgment of Erle, C.J.

In *The Moorcock*[2] the plaintiffs' vessel was injured through the uneven nature of the bed of the river where the vessel was moored to discharge at the defendants' wharf. The bed of the river was vested in conservators, and the defendants had no control over it. The case of the plaintiffs first alleged a warranty, that the condition of the bottom was fit and safe; this, however, was negatived by Butt, J.,[3] and was not raised in the Court of Appeal. The plaintiffs also contended that the defendants owed them a duty and must be taken to have represented that they had taken reasonable care to ascertain that the bottom of the river at the jetty where the plaintiff's vessel was moored was in such a condition as not to endanger its safety in the ordinary way. This contention Butt, J., affirmed. In the Court of Appeal the point glanced at in *The Queen* v. *Williams*,[4] that there was no duty on the defendants extending beyond the premises, was strenuously argued. The judgment of Butt, J., was, notwithstanding, upheld, though the distinction between the injury being caused *on* or *off* the premises was recognised by Bowen, L.J.,[5] who founded himself on the words of Holt, C.J., in *Coggs* v. *Bernard*,[6] "it would be unreasonable to charge persons with a trust further than the nature of the thing puts it in their power to perform." Applying this he adds: "The law will not imply that the persons who have not the control of the place have taken reasonable care to make it good, but it does not follow they are relieved from all responsibility." The Lord Justice then indicates what their responsibility is: "They are on the spot. They must know that the jetty cannot be used unless reasonable care is taken, if not to make it safe, at all events to see whether it is safe. No one can tell whether reasonable safety has been secured except themselves, and I think if they let out their jetty for use they at all events imply that they have taken reasonable care to see whether the berth, which is the essential part of the use of the jetty, is safe, and if it is not safe, and if they have not taken such reasonable care, it is their duty to warn persons with whom they have dealings that they have not done so." There is an implication on the part of the wharf-owner that he has taken reasonable care to ascertain that the condition of the berth is safe, and if it turns out to be unsafe, want of knowledge will not avail him. He can shelter himself by showing that he took reasonable care to find out or, if he did not, at the lowest he must say so and not permit the person coming in to be misled.[7] *The Moorcock.* In the Court of Appeal. Judgment of Bowen, L.J.

In the Court of Appeal, *The Calliope*[8] was decided on the assumption *The Calliope.*

[1] *L.c.* 30.

[2] [1889] 14 P. D. 64, followed in Ireland in *Butler* v. *M'Alpine*, [1904] 2 I. R. 445.

[3] 13 P. D. 157.

[4] 9 App. Cas. 418.

[5] 14 P. D. 70.

[6] 2 Ld. Raym. 918.

[7] *The Bearn*, [1903] P., per Collins, M.R., 76. Cp. *Casement* v. *Brown*, 148 U. S. (41 Davis) 615.

[8] 14 P. D. 138; [1891] A. C. 11. *McCallum* v. *Odette*, 7 Can. S. C. R. 36, was an action brought by one vessel against another for damage caused by negligently anchoring beside a wharf.

that the case was indistinguishable from *The Moorcock*. *The Calliope* was bound by charter party to deliver the cargo as directed by the consignees or their agents, and accordingly was ordered by the defendants to discharge the cargo at their wharf, where there were two berths, the first alongside the wharf, the second outside the first. In the space between the two a ridge of mud had been allowed to accumulate, on which the plaintiffs' vessel struck and was injured. Judgment of Lord Esher, M.R. "In *The Moorcock*," said Lord Esher, M.R.,[1] "we held that the wharfinger must take reasonable care that the front of his wharf is in a state of safety, or, if it is not, warn persons who have to use it that it is unsafe; it was not necessary to decide that there was a warranty by the wharfinger that the wharf was safe. The present case is, however, stronger than that of *The Moorcock*, because here the ship was bound to go to the defendants' wharf by contract, in the former case the ship could use the wharf if she pleased." Though, in the opinion of Lord Esher, M.R., the case was stronger than that of *The Moorcock*, that learned judge did not limit his decision to the point common to both cases. He says: "Is that duty" (*i.e.* the duty of the wharfinger) "confined to the place close to the wharf? Or is the wharf-owner liable for damage done to a ship by grounding upon a place which is in a dangerous state and over which she must necessarily go to get into the berth at the wharf? In my opinion the duty of the wharfinger extends to that part of the frontage as well as to the actual spot where the ship will finally lie, and his duty is to keep it reasonably safe or to tell those coming to his wharf that it is not safe." On this point Bowen, L.J., had carefully guarded himself in *The Moorcock*,[2] saying: "So far as I am concerned I do not wish it to be understood that I at all consider this is a case of any duty on the part of the owners of the jetty to see to the access to the jetty being kept clear."

Decision reversed in the House of Lords on the facts In the House of Lords the decision in *The Calliope* was reversed, on the ground that the Court of Appeal took a wrong view of the facts, and that what was held in the Court below to be an order to go to the wharf in fact gave information upon which the captain and pilot must form their own judgment;[3] further, the assumption made in the Court of Appeal—that "the ship was injured by grounding on the land of the defendants" was one for which the respondents "entirely failed to show the slightest foundation";[4] while the attribution to the defendants of responsibility for the existence of the ridge arose from a misapprehension of the real state of things, as the existence of the ridge was to be regarded as an incident to the natural use of the river by vessels navigating it.

Lord Herschell's opinion. Discussing the liability for the state of things outside the premises Lord Herschell[5] says: "If the obstruction which created the difficulty" "had been caused by some unusual and extraordinary circumstance which those navigating the river would have no right to anticipate, but which would be known to the wharfinger, then I quite agree that some duty on his part would arise towards them, and in the absence of warning, it may be that he would be under some responsibility." But in the case at bar it was pointed out that the pilot was well aware of the inequalities in the river. Lord Herschell then called attention to one very forceful consideration that had escaped

[1] 14 P. D. 140.
[2] 14 P. D. 70.
[3] [1891] A. C., per Lord Halsbury, C., 15.
[4] *L.c.*, per Lord Watson, 23, and per Lord Herschell, 25.
[5] *L.c.* 28.

notice :[1] "If on the one hand the condition of the bed of the river may be said to have been a matter peculiarly within the knowledge of the appellants, on the other hand the draught of the vessel, which was of at least as great importance in determining whether the vessel could approach the wharf or not, was peculiarly within the knowledge of the respondents."

Lord Watson's opinion.

Lord Watson also says :[2] "I do not doubt that there is a duty incumbent upon wharfingers in the position of the appellants towards vessels which they invite to use their berthage for the purpose of loading from or unloading upon their wharf; they are in a position to see, and are in my opinion bound to use reasonable diligence in ascertaining, whether the berths themselves and the approaches to them are in an ordinary condition of safety for vessels coming to and lying at the wharf. If the approach to the berth is impeded by an unusual obstruction they must either remove it, or, if that cannot be done, they must give due notice of it to ships coming there to use their quay."[3]

The fact that harbour trustees have a duty cast on them to look to the safety of the navigation does not free a wharfinger inviting ships to come to his berth for remuneration from a duty to ascertain the condition of their berth and, if need be, to warn ships purposing to come there.[4]

Hibbs v. *Ross*.

Reference may here be made to *Hibbs* v. *Ross*.[5] A ship was laid up in dock for the winter under the care of a shipkeeper, who removed the hatches from one of the hatchways leading into the hold, into which the plaintiff fell and was injured while lawfully on the ship and in the direct course used by persons passing across the ship from and to another ship. The only point discussed in the case, and in which the Court of Queen's Bench were divided in opinion, was whether the ship's register on which the defendant's name appeared as owner was *primâ facie* evidence for the jury from which they might draw the inference that the person in charge of the ship was employed by the defendant. This was decided in the affirmative. A question of a duty to keep the hatchway closed was not raised; probably because the negligence in the particular facts was indubitable.

Caniff v. *Blanchard Navigation Co.*

The general proposition—undisputed in *Hibbs* v. *Ross*—that there is a duty to keep hatchways closed while a ship is laid up in dock for the winter—was denied in an American State case.[6] "It would be preposterous," said the Court, "to hold that the owner who places his vessel in charge of a shipkeeper during the time she is out of commission and lying in winter quarters, is charged with the duty of building a railing around the open hatchways or with maintaining a light to indicate danger for the purpose of protecting persons from injury

[1] *L.c.* 29. [2] *L.c.* 23.

[3] The remarks of the Lord Chancellor at the bottom of 17 and on the first half of 18, seem rather directed to the question of the liability of some previous vessel for making the ridge, than to that of the breach of duty on the part of the wharfinger, in not removing it when near or not apprising those about to use the berth of its existence. It seems perfectly possible, that a vessel using the bed of the river in the natural way may so affect it as to cause damage to a following vessel, without being liable for it; while yet a wharfinger having a knowledge of the unusual destruction to the use of his berth, would be liable for inviting a ship there without giving warning of what Lord Herschell calls "unusual and extraordinary circumstances." Cp. *Letchford* v. *Oldham*, 5 Q. B. D. 538.

[4] *The Bearn*, [1906] P. 48, 82. [5] L. R. 1 Q. B. 534.

[6] *Caniff* v. *Blanchard Navigation Co.*, 11 Am. St. R. 545. Cp. the English case of *O'Neil* v. *Everest*, 61 L. J. Q. B. 453, where it was held no part of the defendant's duty to supply a cover for a hatchway. *Ante*, 64.

by falling into them." This, in the abstract, seems excellent sense. A duty may, however, be constituted by the custom of that port where the vessel lies to use such precautions;[1] or the place a vessel occupies may be conceded subject to a right of way being allowed over it; and then if the user of the way is a right as distinguished from a mere permission it must not be kept in a condition unnecessarily dangerous.

Gray v. *Thomson.*

In *Gray* v. *Thomson*,[2] a Scotch case, by the rules of the port of Glasgow, there was an obligation on those responsible for ships in the position the defenders' vessel occupied, to keep hatchways protected at night; and the question was raised to what extent a deflection from this obligation was allowable when it was necessary to work at night. There could be no implication that night work was not lawful; and, if lawful, the care and caution dictated by the circumstances was alone required. The shipowner was held not liable.

Dock companies acting as warehousemen and wharfingers.

Dock companies are both warehousemen and wharfingers; in each of these capacities they must afford the security demanded of their calling or occupation.

Forwarding agents.

(2) Here, too, must be noticed the class of *forwarding agents.*

Forwarding agents are a class of business men who store and forward goods by other agencies than their own, and receive a commission for their trouble in storing goods and in selecting carrying agencies for them.[3] In so far as they store goods, they are mere warehousemen; in so far as they forward them, they are ordinary agents.[4]

Their duty.

Forwarding agents are liable for ordinary negligence, and bound to ordinary diligence, and to that only.[5] Many attempts, says Brett, J.,[6] have been made to introduce within the exceptional liability of common carriers other trades, as those of wharfingers, forwarding agents, carters, &c., "but all such attempts have failed, because those trades, although, in respect of their being public or common trades, they are similar to the trade of common carriers, are not similar to it in those respects in which it was similar to the trades of shipmasters and innkeepers." One of the first duties of forwarding agents as consignees for transmission undoubtedly is to obey the instructions of the con-

[1] In *Loader* v. *London and East and West India Docks Joint Co.*, 65 L. T. 674, the work in question was only "usually performed"; the case negatives any such practice as amounts to the holding out of an inducement. In *The Hornet*, [1892] P. 361, it was laid down, distinguishing *The Scotia*, 6 Asp. M. L. C. 541, that there is no duty in law on the owner of a barge to have a man on board of her when moored in a dock. As to duty of those on board a ship within the jurisdiction of a harbour-master, to conform to the directions of the harbour-master, even when those directions are probably erroneous: see *Rency* v. *Magistrates of Kirkcudbright*, [1892] A. C. 264.

[2] 17 Rettie, 200. In *Forsyth* v. *Ramage*, 18 Rettie, 21, there was held to be no duty to fence the unfinished portions of buildings or vessels in course of construction, so that where a man engaged on a ship that was building, fell down a manhole in the engine-room, he was held disentitled to recover. This case was distinguished in *Jamieson* v. *Russell*, 19 Rettie, 898, on the ground that the tank into which the deceased fell was at other times usually covered and lighted, whereas on the occasion of the accident, it was neither covered nor lighted. The Lord President (Robertson), who had succeeded Lord President Inglis between the time of the decision of the two cases, intimated that, in his opinion, *Forsyth* v. *Ramage* was wrongly decided. Lord M'Laren dissented from the decision in *Jamieson* v. *Russell*. *Forsyth* v. *Ramage* was decided on the ground of "the impossibility of fencing consistently with the progress of the work of completing the ship." *Thomson* v. *Scott*, 25 Rettie, 54, is a "trap" case. *Ante*, 449.

[3] Wharton, Negligence, § 703. *Aldridge* v. *G. W. Ry. Co.*, 15 C. B. N. S. 582, see conclusion of judgment of Williams, J., 599. Crompton, J., describes the contract made as a forwarding agent: *Bristol and Exeter Ry. Co.* v. *Collins*, 7 H. L. C. 213.

[4] *Roberts* v. *Turner*, 12 Johns. (Sup. Ct. N. Y.) 232.

[5] 2 Kent, Comm. 591; Story, Bailm. § 444; Wharton, Negligence, § 703; *Alabama, &c. Rd. Co.* v. *Thomas*, 18 Am. St. R. 119.

[6] *Nugent* v. *Smith*, 1 C. P. D. 31.

signor, either express or fairly implied. If they vary from these, and a loss is thereby occasioned, they are liable to the owners of the goods.[1]

Shortly, it may be said that a forwarder's duty and responsibility is of the same character as that of a private carrier—that is, a bailee for compensation.[2]

A forwarding agent has no concern in the vessels or vehicles used to transport the goods; nor any interest in the freight.[3]

A transportation company—one, that is, which receives goods and forwards them—are a common carrier and not a forwarder, although the conveyances used by them in fact belong to third persons.[4]

The use of the term forwarder or forwarding agent in a receipt is not conclusive of the character of the contract,[5] and a contract to "forward" goods for an agreed amount to a specified destination has been held a contract by a common carrier.[6]

VI. Carriers for Hire.

Carriers for reward who are not common carriers.

We have already, when discussing the subject of mandates, considered the obligation imposed on a carrier without hire—which we have seen to consist in the bringing to bear slight diligence, and the liability for gross negligence merely.[7] We are now to consider the liability of carriers for reward who are not common carriers.[8] This is a branch of the bailment of hiring—*locatio-conductio*—which is called *locatio operis mercium vehendarum*.

Distinction between a carrier and a common carrier.

The distinction between a carrier and a common carrier is the distinction between carrying under a special contract and carrying as a business.[9] A private person may contract with another for the carriage of his goods, and incur no responsibility thereby beyond that of an ordinary bailee for hire—that is, the responsibility of ordinary diligence; but where persons hold themselves out as exercising the public employment of carrying goods for people generally, and as ready to engage in the carriage of goods for hire, and not as a mere casual occupation, then they are common carriers.[10]

Definition.

Angell's definition of a private carrier for hire is a negative one: "Any person carrying for hire who does not come within the definition and explanation to be given of a common carrier is a private carrier."[11] His definition and explanation of a common carrier are taken from *Gisbourn* v. *Hurst*.[12] A person to whom goods had been entrusted carried cheese to London, and usually loaded on his return voyage with goods for a reasonable price for all persons indifferently. The Court

Gisbourn v. *Hurst*.

1 Angell, Carriers (5th ed.), § 75.

2 Redfield, Carriers, § 3. See *Sutton* v. *Ciceri*, 15 App. Cas. 144, for the proposition that the exception of insurance risks did not discharge the defenders from their liabilities as ordinary carriers. *Price* v. *Union Lighterage Co.*, [1904] 1 K. B. 412; *The Pearlmore*, [1904] P. 286, 299; *Nelson and Sons* v. *Nelson Line*, [1906] 2 K. B. 804.

3 *Roberts* v. *Turner*, 12 Johns. (N. Y.) 232.

4 *Mercantile Mutual Insurance Co.* v. *Chase*, 1 E. D. Smith (N. Y.) 115.

5 *Blossom* v. *Griffin*, 13 N. Y. 569, where goods were received "to be forwarded," but the defendant was held, with reference to the special circumstances, liable as a common carrier.

6 *Krender* v. *Woolcott*, 1 Hilt. (N. Y.) 223.

7 *Ante*, 766. Angell, Carriers (5th ed.), §§ 17–44.

8 Angell, Carriers (5th ed.), §§ 45–59.

9 *Satterlee* v. *Groat*, 1 Wend. (N. Y.) 272.

10 *Beckman* v. *Spouse*, 5 Rawle (Pa.), 179, 182.

11 Angell, Carriers (5th ed.), § 46: "and therefore bound to only ordinary diligence."

12 1 Salk. (N. P.) 249. In *Fish* v. *Chapman*, 2 Kelly (Ga.) 353, there is a discussion of the definition by Nisbit, J., set out in Story, Bailm. (8th ed.), § 495 n. 3. See Serjeant Williams's argument in *Robinson* v. *Dunmore*, 2 B. & P. 416.

held that "such an undertaking to carry for hire as this privilege was to be considered as that of a common carrier, and the goods so delivered for that time under legal protection, and privileged from distress, and so wherever they are delivered to a person exercising any public trade or employment." From this we may extract a definition that any person undertaking for hire to carry the goods of all persons indifferently is to be considered a common carrier.

Brind v. *Dale.*

Difficulties, however, occur in estimating the effect of the facts towards determining in individual cases whether a man is a private carrier for hire or a common carrier. Thus in *Brind* v. *Dale*[1] the defendant was the owner of thirty or forty carts which were in the habit of standing near the wharfs on the Thames ready to be hired by any person who chose to engage them, either by the hour, day, or job. The defendant's business was that of "a town carman" who let out carts for hire; while it was contended that a common carrier is one who, for hire and reward, takes goods from town to town, and who is by law bound to take any goods offered to him to carry if his cart is not full. Lord Abinger was of opinion that defendant was not a common carrier.

Story's comment.

On this Story says:[2] "It is very difficult to distinguish between the case of a carman and that of a hoyman, or lighterman, or bargeman plying between different parts of the same town, or taking jobs by the hour or the day. And yet it does not seem to have been doubted that such hoymen, lightermen, and bargemen are common carriers. See *Lyon* v. *Mells*, 5 East, 439. What substantial distinction is there, in the case of parties who ply for hire in the carriage of goods for all persons indifferently, whether goods are carried from one town to another or from one place to another within the same town? Is there any substantial difference whether the parties have fixed termini of their business or not, if they hold themselves out as ready and willing to carry goods for any person whatsoever to or from any places in the same town or in different towns? Is a ship engaged in general freighting business or let out generally for hire for any voyage which the freighter may require less a common carrier than a regular packet ship which plies between different ports?"[3]

Ingate v. *Christie.*

In *Ingate* v. *Christie*[4] the defendant had a counting-house, with his name and the word "lighterman" on the door-posts of it, and carried goods in his lighters from the wharfs to the ships for anybody who employed him, and was a lighterman, and not a wharfinger. Alderson, B., referring to the passage just quoted, said: "Mr. Justice Story is a great authority, and if we would adhere to principle the law would be what it ought to be—a science. There may be cases on all sides, but I adhere to principle if I can." His statement of principle was as follows: "The criterion is, whether he carries for particular persons only, or whether he carries for every one. If a man holds himself out to do it for every one who asks him, he is a common carrier; but if he does not do it for every one, but carries for you and me only, that is matter of special contract. Here we have a person with a counting-house, "lighterman" painted at his door, and he offers to carry for every one."

Alderson, B.'s, test.

[1] 8 C. & P. 207.

[2] Bailm. § 496, n. 3; with whose opinion Kent, 2 Comm. 598 n. (*b*), coincides.

[3] For this view he cites: *Rich* v. *Kneeland*, Cro. Jac. 330; 1 Roll. Abr. Action sur le Case (C), pl. 1-4; *Bardell* v. *Mourillyan*, 2 Esp. (N. P.) 693; 1 Bell, Comm. (5th ed.), 467, 468; *Whalley* v. *Wray* 3 Esp. (N. P.) 74; *Muddle* v. *Stride*, 9 C. & P. 380; and some American cases.

[4] 3 C. & K. 61.

The facts in *Brind* v. *Dale*,[1] however, justify the distinction taken by Lord Abinger, whose ruling is not inconsistent with the principle laid down by Alderson, B.; for it was proved that the driver said to the plaintiff at the time of the hiring, "Don't you leave me; I cannot leave the horses to look after the goods." And the plaintiff said, "I shall go along with you to look after the goods," which would constitute a special contract. If, then, the plaintiff did not accompany the goods, he was guilty of negligence himself; of which he would not be permitted to take advantage. Further, the reporter does not put the general proposition any higher than a *semble*, that a town carman, whose carts ply for hire near the wharfs, and who lets them by the hour, day, or job, is not a common carrier. *Brind* v. *Dale*.

The case of *Liver Alkali Co.* v. *Johnson*,[2] points the same way; for there Blackburn, J., speaking of *Ingate* v. *Christie*, says it is "in express conformity with what appears to have been Lord Ellenborough's view in *Lyon* v. *Mells*,[3] and no English authority has been cited in conflict with this doctrine"; while of *Brind* v. *Dale*[4] he says, Lord Abinger "reserved the point; and, as the jury found in favour of the defendant on the question whether the goods were received by him as a common carrier, it was never reviewed in *banc*." *Liver Alkali Co.* v. *Johnson*.

The *Liver Alkali Co.* v. *Johnson* does not definitively lay down that one who has carriages for hire is a common carrier, from the necessity of his position, nor yet that without being a common carrier he has the liabilities of one; for the case may be explained by the particular findings; yet it undoubtedly raises a strong presumption that in the opinion of the Exchequer Chamber as then constituted, such, had it been necessary to decide the point, was their view of the law.[5]

Alderson, B.'s, distinction between goods carried for every one and goods carried occasionally and specially, may then be taken to indicate the dividing line between private carriers for hire and common carriers. Distinction of Alderson, B., adopted.

On the liability of the private carrier for hire, Holt, C.J.,[6] says: "He is only to do the best he can. And if he be robbed, &c., it is a good account." He gives the reason for dealing with a bailee of this class differently from the mode of dealing with a common carrier, because "it would be unreasonable to charge him with a trust further 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." Duty of private carriers for hire.

The law was thus laid down by Lord Abinger, C.B., in the case already referred to:[7] "I take it that if a man agrees to carry goods for hire, although not a common carrier, he thereby agrees to make good losses arising from the negligence of his own servants, although he would not be liable for losses by thieves or by any taking by force." The ordinary diligence to which a private carrier for hire is bound, is such diligence as a prudent man commonly takes of his own goods, and ordinary negligence is the lack of such care. Lord Abinger, C.B., in *Brind* v. *Dale*. Rule of diligence for a private carrier for hire.

We have in another connection[8] considered the distinction in the civil law between a robbery by force and a secret theft: *Adversus* Theft and robbery.

[1] 8 C. & P. 207.

[2] L. R. 9 Ex. 338 (Ex. Ch.); *post*, 872. Cp. *Scaife* v. *Farrant*, L. R. 10 Ex. 358, (Ex. Ch.), distinguished as a special contract.

[3] 5 East, 428.

[4] 2 Moo. & Rob. 80, 83; 8 C. & P. 207. See per Brett, J., in *Nugent* v. *Smith*, 1 C. P. D. 26.

[5] See Brett, J.'s, exposition of the meaning of "common" in the phrase common carrier: *Liver Alkali Co.* v. *Johnson*, L. R. 9 Ex. 343.

[6] *Coggs* v. *Bernard*, 2 Ld. Raym. 918.

[7] *Brind* v. *Dale*, 8 C. & P. 211.

[8] *Ante*, 74 *i*.

latrones parum prodest custodia; adversus furem prodesse potest, si quis advigilet.[1] The conclusion is that the bailee has to show that the loss does not arise from negligence,[2] if the nature of the bailment is such that want of negligence discharges from liability; of course, if he is a common carrier, that is, an insurer, the bailee is in any event liable, provided he has not contracted himself out of his liability. The rule of construction in this last case has been declared to be, that "words of general exemption from liability are only intended (unless the words are clear) to relieve the carrier from liability where there has been no misconduct or default on his part or that of his servants. The exceptions in a bill of lading are not intended to excuse the carrier from the obligation of bringing due skill and care on the part of himself and his servants to bear both upon the stowing and the carrying of the cargo. Even in cases within the exceptions the shipowner is not protected if default or negligence on his part or that of his servant contributed to the loss. . . . It is the duty of the shipowner by himself and his servants to do all he can to avoid the excepted perils; the exception, in other words, limits the liability, not the duty."[3]

Return of property in a damaged condition.

A distinction may be suggested in the case where a private carrier delivers the goods in a damaged condition. If the kind of damage done is most often the effect of the carriage, or of the conditions through which the goods must pass in the circumstances of the carriage, it would seem that the bailor should show that the damage arose from want of ordinary care, before liability is affixed; if the damage is not apparently a natural result of the circumstances in which the contract has been carried out, then the law will authorise a presumption of negligence. Again, if damage done is not the self-evident and natural consequence of usage, and the bailee refuses to give any account of how the damage happened, much more should a presumption of negligence be raised.[4] Story[5] inclines to deny this. He is of opinion that even total loss raises no presumption of negligence in itself. In England the test would probably be to inquire who would be entitled to succeed if no evidence were given. In the case of an absolute loss this would be the bailor; because the obligation is to deliver at some time, somehow fixed; and when that time is arrived, and default is made, it is for the bailee to excuse the default.[6] The possibility of applying this test may depend on the way in which the pleadings are framed. If the pleader frames his case on negligence, as is most usually done, instead of on the mere breach of the contract to deliver, then he would be bound to give evidence sufficient to sustain the view that he has put forward, and could not put the defendant to explain as he would if mere non-delivery were alleged. In the case of deterioration accounted for by the circumstances of the bailment, the state of things speaks

Test applicable.

Deterioration consequent on the bailment.

1 Cited Jones, Bailm. 44, from the annotator on D. 17, 2, 52, § 3.

2 See *Verner* v. *Sweitzer*, 32 Pa. St. 208. *Clark* v. *Spence*, 10 Watts (Pa.), 335, per Rogers, J. 337: "All the bailor has to do in the first instance is to prove the contract and the delivery of the goods, and this throws the burden of proof that they were lost, and the manner they were lost, on the bailee, of which we have a right to require very plain proofs." *Pitlock* v. *Wells*, 109 Mass. 452, was decided on the ground that there was only "an involuntary or gratuitous bailment." The decision is easier to account for on this ground than the way in which the facts were looked at to bear it out.

3 Per Bowen, L.J., *Steinman & Co.* v. *Angier Line*, [1891] 1 Q. B. 623; *Price* v. *Union Lighterage Co.*, [1903] 1 K. B., per Walton, J., 753, [1904] 1 K. B. 412.

4 See, *ante*, 795.

5 Bailm. §§ 410, 454, 525.

6 Cp. *Phipps* v. *New Claridge's Hotel Co.*, 22 Times L. R. 49. *Ante*, 815.

lor itsell, and, to make out a case, something ol neglect must be shown; still where the condition ol the thing entrusted to the carrier is depreciated to a degree out of proportion to the conditions of the contract, apparently the bailee is in default. It is lor him to show that he is not; and, therefore, the *onus* lies upon him to discharge the presumption ol negligence raised by appearances.[1] The considerations operative in this case, of course, apply to all those classes of bailment where the delivery ol the thing bailed is for the mutual benefit of bailor and bailee. *Onus.*

The private carrier for hire does not undertake any responsibility for loss arising from the ordinary deterioration of goods from their inherent infirmity and tendency to decay. He is bound, notwithstanding, to take reasonable care when he knows that he has perishable goods in his custody; and it has even been held that he is bound to have them aired and ventilated, if these are usual and reasonable things to do in the circumstances.[2] Deterioration of goods from inherent infirmity.

We have been hitherto speaking of the normal obligations of the private carrier. His liability may, it is obvious, be varied indefinitely by the terms of the contract into which he enters. A mere carrying by a person who does not hold himself out to carry for people in general will, of itself, without special terms, import the obligations that have been enumerated. Though not a common carrier a man may yet put himself in the position of a common carrier by the obligation he specially binds himself to; as in *Robinson* v. *Dunmore*,[3] where, on the plaintiff observing to the defendant, who was to carry goods for him, that the tarpaulin of the cart in which he purposed to put them was too small, defendant replied, "I will warrant the goods shall go safe." The goods were injured by rain. Lord Eldon, C.J., directed a verdict for the plaintiff, as by his warranty the defendant had put himself in the position of a common carrier; on motion this direction was sustained. Obligations may be varied by contract. *Robinson* v. *Dunmore.* Warranty fixes carrier for hire with liability of a common carrier.

In the view ol Brett, J.,[4] by a special custom of the realm, all shipowners are equally liable for loss by inevitable accident, whether they are common carriers or private carriers for hire; but this is by no means established law; indeed, the weight ol authority seems considerably to preponderate against it. Brett, J.'s, view of a special custom constituting shipowners insurers.

VII. Innkeepers.

In *Thomson* v. *Lacy*[5] each of the three judges essayed to define an inn. Abbott, C.J.'s, definition was:[6] A house where the keeper "furnishes beds and provisions to persons in certain stations of life who may think fit to apply for them," or "who furnishes every accommodation to all persons for a night or longer"; Bayley, J.'s:[7] "A house where the traveller is furnished with everything which he Innkeepers. Definitions of an inn by Abbott, C.J. Bayley, J.

1 The subject is discussed in a note to 2 Parsons, Contracts (8th ed.), 125.

2 *The Brig Collenberg*, 1 Black (U. S.), 170. *Post*, 883.

3 2 B. & P. 416.

4 *Liver Alkali Co.* v. *Johnson*, L. R. 9 Ex. 343; repeated *Nugent* v. *Smith*, 1 C. P. D. 33, but dissented from by Cockburn, C.J., *Nugent* v. *Smith*, 1 C. P. D. 433. Mellish, L.J., declined to express any opinion on the subject. Cockburn, C.J., points out that the majority of the Exchequer Chamber in *Liver Alkali Co.* v. *Johnson* did not adopt Brett, J.'s, views. See, too, Story, Bailm. §§ 501, 504; Holmes, The Common Law, 180.

5 3 B. & Ald. 283. 6 *L.c.* 285. 7 *L.c.* 286.

Best, J.

has occasion for whilst upon his way"; and Best, J.'s:[1] "An inn is a house, the owner of which holds out that he will receive all travellers and sojourners who are willing to pay a price adequate to the sort of accommodation provided, and who come in a situation in which they are fit to be received."

Criticised.

These definitions, as definitions, are very unsatisfactory, both from excess and defect. The first, for example, would include a workhouse; nothing less than a mammoth store would come up to the second; and the lessee of a theatre might very well make the profession required in the third.

Bacon's definition.

Bacon's definition of an innkeeper may, perhaps, better serve:[2] "A person who makes it his business to entertain travellers and passengers, and provide lodging and necessaries for them and their horses and attendants, is a common innkeeper"; from which it would follow that the place which the innkeeper occupies for his business of providing lodging and necessaries for travellers and passengers, and their reasonable or necessary accompaniments, is an *inn*.

[1] *L.c.* 287.

[2] Abr. Inns and Innkeeper (B). At common law, previously to 7 Edw. VI. c. 5, any person might keep a tavern and sell liquors. That Act first limited the price of wines, secondly, restrained persons from selling wines, and, thirdly, restrained the number of vintners. *Stevens* v. *Duckworth*, Hard., per Hale, C.B., 344, referring to 18 Edw. II., *de visu Franci Pledgii*, art. 28, *De ceux qi assidument hauntent les tavernes et homme ne sait dount ils vivent.* See n. (*a*), 2 Kent, Comm. 597, referring to *The State* v. *Chumbliss*, 1 Chevrs (S.C.) 220. A tavern, it there appears, originally was a place where the keeper sold wine alone; then food and lodging was afforded for wayfarers. The term tavern came to be synonymous with that of inn as far back as the reign of Elizabeth. The Act 2 Jac. I. c. 9, recites "the ancient, true, and principal use of inns . . . was for the receit, relief, and lodging of wayfaring people travelling from place to place, and for such supply of the wants of such people as are not able by greater quantities to make their provision of victuals, and not meant for entertainment and harbouring of lewd and idle people, to spend and consume their money and their time in lewd and drunken manner." Cp. also 4 Jac. I. c. 5: An Act for repressing the odious and loathsom Sin of Drunkenness. In *Rex* v. *Collins* (2 Jac. I.), Palm. 374, the erecting a common inn without any licence was held lawful unless it was *ad communne nocumentum*, and to this end it was necessary to allege that it is in an unfit place, or that by reason of the great number of inns in the same place it is burthensome, or the harbour of thieves and of bad characters. In *Sir Giles Mompesson's case* it is said to have been resolved that a man may erect an inn without any licence from the king because it is only a trade. Vin. Abr. Inns (A) Who may erect an Inn. Viner is a translation of Roll. Abr. Inns (A), *Que poet ereter un Inne.* Nevertheless in 1 Bulst. 189 (9 Jac. I.), Croke, J., is reported as saying: "No person is to erect an inn without a licence from the king"; but in 22 Jac. I., at a conference of the judges at Serjeant's Inn, reported Hutton, 99, it was resolved "that any one may erect an inn for lodging of travellers, without any allowance or licence, as well as any one before the statute of 2 Ed. VI. (7 Ed. VI. c. 5) might have kept a common alehouse, or as at this day (19th June 1623) one may set up to keep hackney horses or coaches, to be hired by such as will use them; and all men may convert barley into malt until they be restrained by the Act of Parliament made for that purpose. And as all men may set up trades not restrained by the Act of 5 Eliz. which directeth, no man that hath not been bound, or served as an apprentice by the space of seven years, or by restraint of setting up trades in corporations, by such as be not free, by the like reason all men may use the trade of innkeeping, unless it could be brought to be within the statute of 2 Ed. VI. (7 Ed. VI. c. 5), which hath never been taken to be subject to that statute in point of licence." See Holinshed, Chronicle (ed. 1586), bk. 1 ch. 16, 246. Of our innes and thorowfaires. In *Cromwell* v. *Stephens*, 2 Daly (N. Y. C. P.), 15, the meaning of the terms "inn" and "hotel," "guest" and "lodger," are carefully examined and defined by Daly, C.J., In a boarding-house, it is said by the same learned judge, the guest is under an express contract at a certain rate for a certain time, while in an inn there is no express engagement, the guest being on his way is entertained from day to day according to his business upon an implied contract. In 2 Parsons, Contracts (8th ed.), 151, "guest" and "boarder" are thus contrasted: "The guest comes without any bargain for time, remains without one, and may go when he pleases, paying only for the actual entertainment he receives; and it is not enough to make a boarder and not a guest that he has stayed a long time in the inn in this way."

Considerations of the essentials of an inn.

A coffee-house is not an inn,[1] nor is a boarding-house,[2] nor a refreshment-bar,[3] nor an eating-house,[4] nor a lodging-house,[5] nor a place where select persons are entertained for a short season of the year.[6] On the other hand, "a man," says Parke, B.,[7] "may keep an inn for those persons only who come in their own carriages"; and again, "if he has only a stable for a horse he is not bound to receive a carriage."[8] Ought there is an obligation on the innkeeper to admit and entertain to the extent of his accommodation (but no further)[9] all persons of the class for whose entertainment he holds out his house and against whom no reasonable objection can be shown, he may exclude such as are not sober or orderly or who are not able to pay his reasonable charges; and he is under no obligation to admit, and has the power to prohibit, the entrance into his house of any person or class of persons for the purpose of plying his guests with solicitations for patronage in their business. He may afford the means of supplying the requirements of his guests on his premises, outside his business as innkeeper, as, for example, by establishing a news stand or a barber's shop there, and wholly excluding competitors from his hotel. Apart from this, persons other than guests are said *primâ*

[1] *Doe d. Pitt* v. *Laming*, 4 Camp., per Lord Ellenborough, C.J., 77. A "coffee palace" was held an inn, *Miller* v. *Federal Coffee Palace*, 13 Vict. L. R. 30.

[2] *Dansey* v. *Richardson*, 3 E. & B. 144; where the Queen's Bench were divided as to the propriety of Erle, J., asking the jury whether they were of opinion that the loss for which the action was brought was through the negligence of a servant, and, if they were, then was the employer guilty of negligence in engaging the servant? Erle, J., adhered to his view taken at the trial; Wightman, J., thought him right, but Coleridge, J., and Lord Campbell, C.J., thought no distinction should be drawn between the act of the servant and the act of the defendant, and that the question was wrongly framed. In *Holder* v. *Soulby*, 8 C. B. N. S. 254, the Court of Common Pleas, Erle, C.J., presiding, held that there is no liability on the part of a lodging-house keeper to answer for the loss of a lodger's goods where there is mere absence of care and no misfeasance; but in *Scarborough* v. *Cosgrove*, [1905] 2 K. B. 805, the Court of Appeal followed the view of Lord Campbell, C.J., and Coleridge, J., in *Dansey* v. *Richardson*, and commenting on *Holder* v. *Soulby*, held that the keeper of a boarding-house is bound to use ordinary care of the luggage of his guest. Thus the negligence of the servant is the negligence of the boarding-house keeper.

[3] *Sealey* v. *Tomly*, [1902] 1 K. B. 290; *The Queen* v. *Rymer*, 2 Q. B. D. 136; *Carpenter* v. *Taylor*, Hilt. (N. Y. C. P.) 193—case of a restaurant.

[4] *Pullman Palace Co.* v. *Lance*, 26 Am. St. R. 325.

[5] *Scarborough* v. *Cosgrove*, [1905] 2 K. B. 805, 813.

[6] *Parkhurst* v. *Foster*, 1 Ld. Raym. 479; *Holder* v. *Soulby*, 8 C. B. N. S. 251; *Ultzen* v. *Nicols*, [1894] 1 Q. B. 92; where the liability of a restaurant-keeper for the loss of a coat stolen while plaintiff was dining, and which had been taken by a waiter from the plaintiff on his entry and hung on a peg, was said in argument to bear a strong analogy to the liability of a railway company for small luggage delivered to a porter; *Richards* v. *L. B. & S. C. Ry. Co.*, 7 C. B. 839; *G. W. Ry. Co.* v. *Rauch*, 13 App. Cas. 31; *Orkhard* v. *Rush*, [1898] 2 Q. B. 284. By the Innkeeper's Liability Act, 1863 (26 & 27 Vict. c. 41), s. 4, inn shall mean any hotel, inn, tavern, public-house, or other place of refreshment, the keeper of which is now by law responsible for the goods and property of his guests, and the word innkeeper shall mean the keeper of any such place. But in *Dixon* v. *Birch*, L. R. 8 Ex. 135, it was held that the manager of an hotel belonging to a company is not an innkeeper, and that the company itself must be sued. The word "hotel" is practically synonymous with the words "inn" and "tavern," says Thompson, Negligence, § 6654. Sleeping-car and steamboat companies are not innkeepers: *l.c.* § 6658. *Si un hoste invite un al suppar, et le nuit estount farr spent il luy invite a stayer la tout le nuit, sil suit apres robbe uncore le hoste ne serra charge pur ceo, car cest guest ne fuit ascun traveller*: 1 Roll. Abr. Action sur Case (E) pl. 4, p. 3. In *Newton* v. *Trigg* (Case 166), 1 Show (K. B.), 268, it is stated, "Innkeepers are compellable by the constable to lodge strangers; they may *detain the persons of the guests* who eat, or the horse which eats till payment." The words in italics are clearly no longer law.

[7] *Johnson* v. *Midland Ry. Co.*, 1 Ex. 371.

[8] *Broadwood* v. *Granara*, 10 Ex. 423.

[9] *Browne* v. *Brandt*, [1902] 1 K. B. 696: He is not bound to make up a bed in a sitting-room or the coffee-room, nor yet to allow a visitor to spend the night in either.

facie to have the right to enter an inn or hotel without making themselves trespassers; for there is an implied licence for the public to enter; though such licence is in its nature revocable, and those thus entering become trespassers when they refuse to depart when requested.[1]

Guests. Reception into an inn.

Travellers and passengers received into an inn are "guests."[2] What form of reception into an inn is required to make the person so received a guest has given rise to some controversy. In *York* v. *Grindstone*,[3] against the opinion of Holt, C.J., it was held that if a traveller leave his horse at an inn, and lodge elsewhere, he is to be deemed a guest, "because the horse must be fed, by which the innkeeper hath gain; otherwise, if he had left a trunk or dead thing."[4] More than a hundred years afterwards occurred the next reported case,

Bennett v. *Mellor.*

Bennett v. *Mellor*,[5] where plaintiff's servant took goods, which he had been unable to sell at the weekly market, to the defendant's inn, and asked the defendant's wife if he could leave them till the week following. She answered she could not tell, for they were full of parcels. The plaintiff's servant then sat down in the inn, had some liquor, and put the goods on the floor behind him, whence they were stolen. A verdict was given for the plaintiff, which, on motion for a new trial, was sustained, on the ground that, if the proposal of the plaintiff's servant had been accepted, the defendant would have been special bailee, and so not answerable where there was no "actual negligence"; but since the proposal had not been accepted, and the plaintiff's servant had sat down and was partaking of refreshment, he had thereby become a guest, with the consequential duty on the innkeeper to protect his goods or be answerable for their loss.

Strauss v. *County Hotel Co.*

This case was held "clearly distinguishable" in *Strauss* v. *County Hotel Co.*,[6] because "there it was expressly found that the plaintiff

[1] *State* v. *Steele*, 19 Am. St. R. 573; *Commonwealth* v. *Power*, 48 Mass., per Shaw, C.J., 601. The conditions in which touting hotel keepers may be excluded from railway premises is a fairly well illustrated head of law in the United States, Thompson, Negligence, § 3129.

[2] A guest is "one who patronises an inn as such": *Walling* v. *Potter*, 35 Conn. 183. "Any one away from home receiving accommodations at an inn as a traveller is a guest. A lodger is one who for the time being has his home at his lodging-place": *Pullman Palace Car Co.* v. *Lowe*, 26 Am. St. R. 325. *Orchard* v. *Bush*, [1898] 2 Q. B. 284.

[3] 1 Salk. 388, 2 Ld. Raym. 866, in the name of *York* v. *Grenaugh*, commented on by Lord Lyndhurst, C.B., *Jadson* v. *Etheridge*, 1 C. & M. 743, 747. *Grinnell* v. *Cook*, 3 Hill (N. Y.) 485, followed Holt, C.J.'s, opinion. The authorities are collected in a note to 2 Parsons, Contracts (8th ed.), 153, where the conclusion is adverse to the innkeeper's liability as insurer, and in accord with the view of Holt, C.J. On this point see *Mason* v. *Thompson*, 26 Mass. 280, and on the contrary, *Healey* v. *Gray*, 68 Me. 489, and *Ingallsbee* v. *Wood*, 33 N. Y. 577, where a horse was left at an hotel, the owner never intending to be a guest, the innkeeper was held to be a mere ordinary bailee for hire, with no greater or different rights than if the defendant had been a livery-stable keeper merely.

In *Lynar* v. *Mossop*, 36 Upp. Can. Q. B. 230, a person asked for a room to change his dress in at an inn, which was assigned to him and a key handed him, which he did not use; after occupying the room for an hour, plaintiff went to his friend, with whom he remained. Next morning on returning for his portmanteau it could not be found. It was held, on the authority of *Gelley* v. *Clerk*, Cro. Jac. 189, and *Winter-mute* v. *Clarke*, 5 Sandford (N. Y.) 242, that the plaintiff ceased to be a guest after he left the inn, and that the defendant was not liable as innkeeper. In *Hancock* v. *Rand*, 46 Am. R. 112, a general on service, who engaged rooms at an hotel at a fixed monthly price, with an understanding that, if he were satisfied and were not ordered away, he should stay till the spring, was held to be a guest. See the cases collected in the note at 118.

[4] 7 T. R. 273; *Houser* v. *Tully*, 62 Pa. St. 92.

[5] 12 Q. B. D. 27. Cp. *Palin* v. *Reid*, 10 Ont. App. 63, *ante*, 744; and *Adams* v. *Young*, 58 Am. R. 789.

had come within the house and had placed his goods near his chair." [1] In *Strauss's case* the plaintiff arrived at a railway station where he was met by one of the porters of the defendants' hotel, to whom he gave three packages, and asked him to take them to the adjoining hotel. At that time he intended to pass the night at the hotel, but after getting a telegram he decided to go on to Manchester the same day. He went into the coffee-room to dine, and being told there was no joint ready, proceeded, *by the waiter's advice*, to the station refreshment-room, which was *under the same management as the hotel, and connected with it by a covered passage.*[2] On his way he met the porter with his luggage, and told him to lock it up till he was ready to start for Manchester. The luggage was accordingly locked up in a room adjoining the refreshment-room, but, on the plaintiff's arrival at the platform, part of it was missing. The learned judge nonsuited on the ground that there was no evidence that the plaintiff ever became a guest of the defendants at their inn; and his ruling was upheld by the Queen's Bench Division, as the "relation of landlord and guest not having been made out, the action cannot be sustained." From the report of this case in the Law Journal,[3] which is much fuller than that in the Law Reports, the view of the Court on the facts appears to have been that the refreshment-room was not part of the inn—the judge's view at the trial must have been that it *could* not be so considered—and that the removal of the plaintiff from the coffee-room to the refreshment-room was an act not different in its nature from going from one shop to another, and was not merely the removal for more commodious serving from one portion of a building to another. The decision, therefore, turns on the particular facts proved, and does not conflict with *Bennett* v. *Mellor*,[4] where the man was served his glass of refreshment in the house; in the present case what occurred in the coffee-room and the subsequent order in the refreshment-room were distinct transactions.

Considered.

Chancellor Kent's view of *Bennett* v. *Mellor* is that "the responsibility of innkeepers was laid down with great strictness and even with severity";[5] nevertheless it has been followed and is quoted in the text-books as a binding authority.[6] It is, however, clear law, from so early as the time of James I., that the mere entrusting of goods does not constitute the bailor a guest. A person with a hamper of hats left them at an inn for two days; when he returned they had been

Kent's view of *Bennett* v. *Mellor*.

Mere entrusting of goods does not constitute the bailor a guest.

[1] On the authority of *Richmond* v. *Smith*, 8 B. & C. 9, this latter ground of distinction seems very immaterial, and, if anything, a point for the plaintiff in *Strauss's case*: *Armistead* v. *White*, 17 Q. B. 261.

[2] Cp. *Cromwell* v. *Stephens*, 2 Daly (N. Y. C. P.), 15; *Krohn* v. *Sweeny*, 2 Daly (N. Y.), 200.

[3] 53 L. J. Q. B. 25.

[4] 5 T. R. 273, approved *Clute* v. *Wiggins*, 14 Johns. (Sup. Ct. N. Y.) 175. *McDonald* v. *Edgerton*, 5 Barb. (N. Y.) 560, is so far similar to *Ultzen* v. *Nicols*, [1894] 1 Q. B. 92, that the point involved was the liability of an innkeeper for an overcoat handed to the barman by the plaintiff while drinking at the bar, and lost: the Court laid down, 562, that: "The purchasing of the liquor was enough to constitute the plaintiff a guest," and remarked, citing Cro. Jac. 189, that "it has been expressly adjudged that if the guest goes out to view the town for a while, intending to return, the innkeeper is liable for his goods lost in his absence. And so if he goes out and says he will return at night." Com. Dig. (B), (B 1), Action upon the Case for Negligence. Cp. *Grinnell* v. *Cook*, 3 Hill (N. Y.), per Bronson, J., 490.

[5] 2 Kent, Comm. 594.

[6] Story, Bailm. §§ 470, 471, 472, 479, 480, 482; 1 Sm. L. C. (11th ed.), 128; Wharton, Innkeepers, 15, 75, 76, 70, 98, 99, 106, 119, 130; Oliphant, Innkeepers (5th ed.), 204.

stolen. He was held to have no claim against the innkeeper except as a bailee.[1]

Medawar v. Grand Hotel Co.

Smith, J.'s, opinion in *Medawar* v. *Grand Hotel Co.*, which Fry, L.J., considered correct, but which was overruled by Lord Esher, M.R., and Bowen, L.J.,[2] was that the defendant, the hotel keeper, was no more than a bailee, and the plaintiff was not a guest but a bailor of goods. The correctness of an inference was thus in issue whether or not the circumstances of the plaintiff's reception and occupation at the hotel constituted him a guest. The facts proved were, that the plaintiff arrived early in the morning at the defendant's hotel, asked for a bedroom, and was told that the hotel was full and that he could not have a room; there was, however, one room temporarily unoccupied till the arrival of a lady and gentleman for whom it had been engaged, which the plaintiff might have the use of to wash and dress in. His luggage was accordingly sent up there. The plaintiff occupied the room, opening his luggage and taking therefrom a stand for brushes and toilet articles, in which was a drawer containing valuable trinkets. This stand he left on the dressing-table. His other luggage was also left in the room, and with the door unlocked. After paying for his breakfast the plaintiff went out without giving any further heed to his luggage and did not return till past midnight. Meanwhile the lady and gentleman who had engaged the room arrived, and were shown to it by the page boy, who, by the direction of the porter, moved the plaintiff's property into the corridor, and there left it. When the plaintiff came back and asked for his room he was told that he had not one; subsequently one casually vacant was found, and this he occupied. His luggage was removed from the corridor and placed in it. Next morning he discovered that the trinkets in the drawer of the stand had been stolen. The action was for their value.

View of Smith, J., and Fry, L.J.

From these facts, Smith, J., and Fry, L.J., drew the conclusion that "the plaintiff engaged the room merely for the purpose of washing and dressing; he did not insist upon any further right. He could not have been charged for any further occupation. He was not a guest in the hotel after he had washed and dressed and had had his breakfast,[3] and he only left his property in the hotel in the expectation that by doing so he might have a preferential claim to the occupancy of some other room."[4]

Judgment of the Court of Appeal.

The opinion of Lord Esher, M.R., and Bowen, L.J., which prevailed, was: "Until the room is wanted for the new guest, it seems to me[5] that, according to the common law and custom of the realm, the innkeeper is bound to afford accommodation to any one who offers

1 *Gelley* v. *Clark*, Cro. Jac. 188; Bacon, Abr. Inns (C), 5. As to leaving a horse for a fortnight with an intention to return, *Day* v. *Bather*, 2 H. & C. 14 (with this compare *The Case of an Hostler*, Yelv. 66), and as to leaving a valise for forty-eight hours without the intention to return, *Murray* v. *Marshall*, 59 Am. R. 152. In *Williams* v. *Gessey*, 7 C. & P. 777, a box was sent by A to an inn kept by B, who booked parcels for carriers, but did not receive anything for so doing. The person who took the box told B to keep it till A called for it. B replied, Very well. The box was lost. In an action of *trover*, held, no evidence of conversion. See also the same case, *sub nom.* *Williams* v. *Gesse*, 3 Bing. (N. C.) 849. *Ante*, 752.

2 [1891] 2 Q. B. 11. *Maxwell* v. *Gerard*, 84 Hun 537.

3 "It *cannot*," says Lord Esher, M.R., *Le.* 29, "*be contended* that he was only to wash and dress in the room; he was to have the use of the room until the persons by whom it had been engaged should arrive."

4 [1891] 2 Q. B., per Fry, L.J., 29.

5 *L.c.*, per Bowen, L.J., 25.

himself as a guest. He has no right to be like the dog in the manger, and say, 'I shall want the room for another person this day week, and therefore I will not let it to you to-day.' Until it is wanted by those who have acquired a right to occupy it, an arriving guest is entitled to find accommodation in it. Therefore the plaintiff, when he arrived in the morning, had a right to such accommodation in that room, which was then empty, as could be furnished to him consistently with the engagement which the hotel-keeper had made with the persons who were to have the use of it in the course of that day or the following day." Even the arrival of the lady and gentleman and their occupancy of the room they had pre-engaged, did not determine, *eo instanti*, the plaintiff's status as guest. "A reasonable time must be allowed for him to carry away or secure his effects; and I think that in the present case the relation of host and guest between the defendants and the plaintiff, and the legal liability of the defendants continued until a reasonable time after a demand for the room had been made by the persons who had engaged it, and that the defendants had no right the moment they wanted the room to eject the goods into the corridor and leave them unguarded there without any notice to the plaintiff."[1] Lord Esher, M.R., said:[2] "We must bring into play our knowledge of the world."

Reasonable time must be allowed to determine the status of guest.

Medwear v. *Grand Hotel Co.*, a decision on particular facts.

Probably very few of that experienced class of citizens of the world—habitual travellers—realised before this decision in how commanding a position admission to an hotel bedroom for the sole purpose of washing and dressing places them.

Assuming the hotel-keeper was merely a bailee of the goods left in the bedroom, he was either bailee for reward or involuntary bailee. If the latter, then affirmative evidence of the lack of that slight degree of diligence that the law requires would have to be shown.[3] If the former, in the words of Smith, J.:[4] "The bailor has to prove, in order to render the bailee liable, actual negligence of the bailee which caused the loss, and if it be proved that the loss was occasioned by his own neglect, he has no case against the bailee."

Position of the plaintiff if not a guest.

In an American case,[5] where also the determination whether the relation of guest and innkeeper is established is held to be a question of fact, the elements to be taken into consideration are thus summed up: "The duration of the plaintiff's stay, the price paid, the amount of accommodation afforded, the transient or permanent character of the plaintiff's residence and occupation, his knowledge or want of knowledge of any difference of accommodation afforded to, or price paid by, boarders and guests, are all to be regarded in settling the question. It is expressly decided in *Berkshire Woollen Co.* v. *Proctor*,[6] however, that an agreement with an innkeeper for the price of board by the week is not decisive that the relation is that of boarder instead of guest."

American case *Hall* v. *Pike*.

Passing from these matters to a consideration of the various aspects of the relation when constituted between the innkeeper and

Relation between the innkeeper and his guest.

[1] *L.c.*, Bowen, L.J., 27. *Ante*, 834. [2] *L.c.* 19.

[3] *Ante*, 795, 848. "After the relation is fully terminated, the innkeeper is held only to that degree of care imposed on a gratuitous bailee, and is liable for losses or injuries to the effects of a departing guest only where he is guilty of gross negligence": Thompson, Negligence, § 6671.

[4] [1891] 2 Q. B. 16. There is an American case, *Wear* v. *Gleason*, 20 Am. St. R. 186, that may be looked at in connection with the case in the text.

[5] *Hall* v. *Pike*, 100 Mass. 495, 497. [6] 61 Mass. 424. Story, Bailm. § 477.

his guest—whom, says Ashhurst, J.,[1] "the law has fixed an indelible obligation" on the innkeeper to receive—we have first to see what liability for negligence is raised thereby.

Form of the ancient writ in the Register.

The law of the innkeeper's liability has been said to be peculiar to the English law; and the ancient writ in the Register lays a duty on innkeepers "by the law and the custom of England," the analogy of which has been seized on in other cases. There is, however, a marked similarity to the rule of the civil law.[2] By the Prætor's Edict a peculiar responsibility was laid upon shipmasters, innkeepers, and stable-keepers, who were made liable for all losses not arising from inevitable casualty or overwhelming force.

Prætor's Edict.

Ait Prætor: Nautæ, caupones,[3] *stabularii,*[4] *quod cujusque salvum fore receperint, nisi restituant, in eos judicium dabo.*[5] To which is subjoined the remark of Ulpian: *Maxima utilitas est hujus edicti; quia necesse est plerumque eorum fidem sequi, et res custodiæ eorum committere. Ne quisquam putet graviter hoc adversus eos constitutum; nam est in ipsorum arbitrio, ne quem recipiant.* And the explanation is given, *Nisi hoc esset statutum, materia daretur cum furibus adversos eos, quos recipiunt, coeundi; cum ne nunc quidem abstineant hujus modi fraudibus.*[6] The extent of the liability is indicated as follows: *At hoc edicto omnimodo qui recepit tenetur, etiamsi sine culpa ejus res periit, vel damnum datum est; nisi si quid damno fatali contingit. Inde Labeo scribit, si quid naufragio aut per vim piratarum perierit non esse iniquum exceptionem ei dari. Idem erit dicendum et si in stabulo, aut in caupona vis major contigerit.*[7]

Limitations in the civil law.

The responsibility of innkeepers by the civil law was further limited in several respects. It was not enough to charge the innkeeper that the guest had brought his goods or baggage to the view or the knowledge of the innkeeper; he must have delivered them into his charge. Neither was the innkeeper responsible for the acts of other guests or persons at the inn, though he was responsible for the acts of his servants and boarders done in the house. Neither was he compelled to receive the guest when he had room, as he is by the common law.[8] These limitations are found in the jurisprudence of those nations of Europe which have taken the civil law for their model,[9] and are the variations that have been urged, amongst others, as grounds for inferring a native origin to our law.

1 *Kirkman* v. *Shawcross*, 6 T. R. 18, per Lord Kenyon, C.J., 18, referring to 3 W. & M. c. 12, and 21 G. II. c. 28.

2 Per Holt, C.J., *Lane* v. *Cotton*, 12 Mod. 482.

3 *Caupona, locus ubi caupones vinum et cibos vendunt.*

4 As to this word, it is used in the second sense given for it in Facciolati and Forcellini's Lexicon (*sub verbo*): *Qui mercede homines eorumque jumenta hospitio excipit. Nam stabulum tum ad jumenta pertinet, tum ad homines.* See note by Denman, J., to judgment of Brett, J., in *Nugent* v. *Smith*, 1 C. P. D. 29. The conclusion of the passage cited by Denman, J., is as follows: *Videtur a caupone differre in eo, quod caupo viatoribus necessaria ad victum præbet; stabularius etiam tectum et lectum.* D. 47, 5, *Furti adversus nautas, caupones, stabularios.* See Pothier, Pand. 4, 9, §§ 1, 2. Compare Hor. Sat. i. 5, 4—

"*Inde forum Appii*
Differtum nautis cauponibus atque malignis."

5 D. 4, 9, 1, pr. 6 D. 4, 9, 1, § 1. 7 D. 4, 9, 3, § 1.

8 *Rex* v. *Ivens*, 7 C. & P. 213; *Hawthorn* v. *Hammand*, 1 C. & K. 404; 1 Hawk. P. C. bk. 1, c. 78, Of Nuisances relating to Public Houses, §§ 1, 2; *State* v. *Steele*, 19 Am. St. R. 573.

9 Story, Bailm. §§ 466, 467, citing Dig. 4, 9, *Nautæ, Caupones, Stabularii ut recepta restituant*, and Pothier, Traité du Dépôt de l'Hotellerie, nos. 79, 80.

Liabilities of English Innkeepers.

The liabilities of an English innkeeper are treated at length in *Calye's case*,[1] which is the leading English authority upon the subject. There the exact point resolved was that if a man come to an inn and deliver his horse to the innkeeper to be put to pasture, and the horse be stolen, the innkeeper is not responsible, because the case is outside the terms of the original writ [2] by which the duties of innkeepers are specified. It is, however, from Coke, C.J.'s, commentary on the words of this writ, clause by clause, as it is set out in the report, that the principles of the law with regard to innkeepers are to be collected. They are:

Principles laid down in *Calye's case*.

First: The action must be against the keeper of a common inn.[3]

Second: The thing in respect of which the action is brought must be *infra hospitium*.[4]

Third: The innkeeper is bound in law to keep the goods of his guest within the inn, "without any stealing or purloining," [5] unless by the guest's own servant or by fault of the guest.

Fourth: If the guest is beaten in the inn, the innkeeper is not answerable, "for the innkeeper ought to keep the goods and chattels of his guest, and not his person." [6]

Duty to take reasonable care of the persons of the guests.

For all that, it is the duty of the innkeeper to take reasonable care of the persons of his guests, so that they are not injured by want thereof while they are in his house. Thus, in *Sandys* v. *Florence*,[7] a statement of claim being amended so as to set out that, while the plaintiff was using an hotel, of which the defendant was proprietor, *as a guest for reward to the defendant*, by the negligence of the defendant the ceiling of the room in which the plaintiff was fell upon and injured him, was held to disclose a cause of action; though it was conceded that, as originally drawn, omitting the allegation that plaintiff was received as a guest for reward to the defendant, the claim was not sustainable.

[1] 8 Co. Rep. 32 a, 1 Sm. L. C. (11th ed.), 119. Cp. Com. Dig. Action upon the Case for Negligence (B), Action against a Common Innkeeper.

[2] Fitzh. De Nat. Brev. 94 B. Registrum Brevium, 105 a: *De transgressione quando quis depredatus est in hospitio transeundo per patriam.* The distinction is pointed out in *Warbrook* v. *Griffin*, 2 Brownl. 255: "If the owner desire that his horse should go to grass, the innkeeper shall not answer; but if an innkeeper receive the horse, and of his own head puts the horse to grass, and he is stolen, there the innkeeper shall be charged." The distinction is that of the civil law as stated by Ulpian: *Eodem modo tenetur caupones et stabularii, quo exercentes negotium suum recipiunt: cæterum si extra negotium receperint, non tenebuntur:* D. 4, 9, 3, § 2.

[3] 8 Co. Rep. 32 a. In *Parker* v. *Flint*, 12 Mod. 254, 1 Ld. Raym. 479, *nom. Parkhurst* v. *Foster*, Holt, C.J., held that a person may hire lodgings at an inn and so not be a guest; and *à fortiori* this is true of a private house; Com. Dig. Action upon the Case for Negligence (B), (B 2.); *Holder* v. *Soulby*, 8 C. B. N. S. 254. Where a gig was stolen that was put by the ostler outside the inn yard, in a part of the street where the defendant was in the habit of placing the carriages of his guests on fair days, and was not put there at the instance of the plaintiff, the plaintiff recovered: *Jones* v. *Tyler*, 1 A. & E. 522.

[4] 8 Co. Rep. 32 b. In *Stannian* v. *Davis*, 1 Salk. 404, the innkeeper was held liable where a horse was taken out of the inn, and immoderately ridden and whipped, though it did not appear by whom. Bags of wheat stolen during the night from an outhouse appurtenant to the inn, where loads of that description were ordinarily received, were held to be *infra hospitium*: *Clute* v. *Wiggens*, 14 Johns. (Sup. Ct. N. Y.) 175; but see *Albin* v. *Presby*, 8 N. H. 408, to the contrary.

[5] 8 Co. Rep. 33 a; *Walsh* v. *Porterfield*, 87 Pa. St. 376. There is no distinction between money and goods: *Kent* v. *Shuckard*, 2 B. & Ad. 803.

[6] 8 Co. Rep. 33 b; *Candy* v. *Spencer*, 3 F. & F. 306, where goods were left in the lobby of an inn; *Hallenbake* v. *Fish*, 8 Wend. (N. Y.) 547; innkeeper not liable in trover without an actual conversion; *Norcross* v. *Norcross*, 53 Me. 163; where goods were stolen from a sea-bathing house provided for a guest, but separate from the inn, *Minor* v. *Staples*, 71 Me. 316, 36 Am. R. 318.

[7] 47 L. J. C. P. 598.

There is also a duty on the innkeeper to do what he can to keep his guests from suffering violence at the hand of other guests. Of course the innkeeper's liability as an insurer does not extend thus far; but, though there is no decision precisely in point, the principle is plain—innkeepers are bound to use what means they have available for the protection of their guests where they have knowledge of danger threatening them while in their inn.[1] The innkeeper is bound to the exercise of reasonable care, and this duty cannot be delegated so as to relieve the innkeeper;[2] but his liability rests on the ground of negligence.

There is a representation by the innkeeper that his inn is reasonably fit for occupation with safety by his guest, not merely, as in *Sandys* v. *Florence*,[3] from structural dangers, but from dangers arising from disease or bad sanitation known to him. Thus an hotel-keeper who had a case of small-pox in his hotel was held liable in damages to a guest whom he had received without notifying its presence, and from which disease the guest subsequently suffered.[4]

Extent of innkeeper's obligations. *Burgess* v. *Clements.*

The extent of the innkeeper's obligation to answer for the safety of property brought to his inn by a guest was the subject of decision by the King's Bench in *Burgess* v. *Clements*.[5] Plaintiff went to defendant's inn as a guest, and was shown into the travellers' room. Subsequently he asked for a room in which he might show his goods. The innkeeper's wife assented, "accompanied with that which is equivalent to telling him that he must take charge of it, for she says, 'You may have the room; there is a key to the door, and you may lock it.'" The plaintiff took the room, and displayed his goods there to a customer. Whilst he was doing so, the door twice opened and a stranger looked in. The customer suggested the necessity of care in view of the suspicious conduct of the stranger. After he had gone, the plaintiff left the room without taking any precaution, and did not return till nine o'clock, when two of his boxes containing valuables were missing. The door of the room opened into a gateway which led to the street, and there was a key in the lock outside. The plaintiff did not lock the door when he went away, and "did not know that he even shut it." The jury were directed that an innkeeper is *primâ facie* answerable for the goods of his guest in his inn, but that a guest by his own conduct may discharge the innkeeper from his responsibility. They found for the innkeeper.

On motion for a new trial, the direction of the judge at the trial was

[1] Cp. Law Magazine, Nov. 1892, No. 266, 68. The condition of the licence of an innkeeper is that "he should not permit drunkenness or disorderly conduct, unlawful games, or the assembling of persons of notoriously bad character on his premises": Paterson, Licensing Acts (16th ed.), 3. Thompson, Negligence, § 6674.

[2] *Stott* v. *Churchill*, 36 N. Y. Supp. 476, and 157 N. Y. 692, the case is merely referred to; no facts are given. [2] *Supra.*

[4] *Gilbert* v. *Hoffman*, 66 Iowa, 205. In *Rex* v. *Luellin*, 12 Mod. 445, an innkeeper was indicted for refusing to receive one taken ill with the small-pox. The indictment "was quashed for not saying he was a traveller."

[5] 4 M. & S. 306. An early case is *Sanders* v. *Spencer* (1566), 3 Dyer, 266b, with the Y. B. references in the margin. In Roll. Abr. Action sur Case (D), Vers Hosteler, pl. 3. it is laid down that an infant innkeeper cannot be held liable in an action on the case for the loss of his guest's goods; but see *Cross* v. *Andrews*, Cro. Eliz. 622. See Y. B. 42 Ed. III. 11, pl. 13, for an action on the custom of England that in all common inns the innkeeper and his servants should take good care of what things their guests had in their chamber in the inn; Reeves, Hist. of the English Law (2nd ed.), vol. iii. 91; Shep. Abr. Innes. The law is now subject to the limitations imposed by The Innkeepers' Liability Act, 1863 (26 & 27 Vict. c. 41).

sustained. Admitting an innkeeper to be *primâ facie* liable, there may be circumstances by which that *primâ facie* liability is discharged —as, for example, if the guest by his own neglect induces the loss,[1] or himself introduces the person who purloins the goods. Neither is it a part of the business of an innkeeper to provide showrooms for his guests, but only convenient lodging-rooms and lodging. In the case under discussion, the requirement of the plaintiff was for a room to display his wares, a necessary attendant on which was the introduction of persons over whom the innkeeper had no check or control, and so for a purpose alien from the purposes of an inn, which is *ad hospitandos homines*. Again, the duty of the plaintiff was to use "at least ordinary diligence" in circumstances of suspicion; "for in general though a traveller who resorts to an inn may rest on the protection which the law casts around him, yet, if circumstances of suspicion arise, he must exercise ordinary care";[2] and the intrusion of a stranger twice while he was displaying his goods should have excited sufficient suspicion to induce him to lock the door after him.

Primâ facie liability of innkeeper rebuttable.

Duty on guest.

The following year in *Farnworth* v. *Packwood*,[3] Le Blanc, J., states the law very succinctly: "A landlord is not bound to furnish a shop to every guest who comes into his house; and if a guest takes exclusive possession of a room, which he uses as a warehouse or shop, he discharges the landlord from the common law liability."

Farnworth v. *Packwood*.

In *Richmond* v. *Smith*[4] a guest chose to have his goods carried into the travellers' room in preference to his bedroom, as was the usual practice of the inn; yet he was held entitled to recover on a loss, for "if it had been intended by the defendant not to be responsible unless his guests chose to have their goods placed in their bedrooms or some other place selected by him, he should have said so."

Richmond v. *Smith*.

In *Dawson* v. *Chamney*[5] another point was raised. The plaintiff gave his horse in charge to defendant's ostler, who put him in a stall with another horse which grievously kicked plaintiff's, who brought his action. Cresswell, J., directed the jury that, if they were of opinion that the defendant, by himself or his servants, had been guilty of direct injury or of negligence, they should find for the plaintiff; otherwise, for the defendant. This was objected to as a misdirection, but was sustained by the Queen's Bench, which held that the damage raised a presumption of negligence, calling on the defendant for an answer. So soon, however, as he satisfied the jury that he had not been guilty of negligence, the verdict was rightly entered for him. On general grounds of law, the fact that a horse has kicked another horse is not any evidence of negligence;[6] and the innkeeper is not an insurer against injury, and "shall not be charged, unless there be a default in him or his servants, in the well and safe keeping and custody of their guest's goods and chattels within their common inn; for the innkeeper is bound in law to keep them safe without stealing or purloining."[7]

Dawson v. *Chamney*.

[1] As where the guest refused to put his valuables in the place suggested by the landlord: *Jones* v. *Jackson*, 29 L. T. (N. S.) 399.

[2] 4 M. & S., per Lord Ellenborough, C.J., 312.

[3] 1 Stark (N. P.), 249.

[4] 8 B. & C. 9.

[5] 5 Q. B. 164. *Ante*, 798, n 3.

[6] *Cox* v. *Burbidge*, 13 C. B. N. S. 430. *Ante*, 84.

[7] 8 Co. Rep. 33a. Doubts have sometimes arisen as to what goods the innkeeper should answer for. There is an exhaustive judgment as to this in *Pinkerton* v. *Woodward*, 33 Calif. 557.

Morgan v. *Ravey.*

Dawson v. *Chomney* [1] was unfavourably commented on in *Morgan* v. *Ravey*.[2] The rule as to the innkeeper's liability there laid down was that he is a general insurer, for that is what it amounts to, and that "there is a defect in the innkeeper wherever there is a loss not arising from the plaintiff's negligence, the act of God or the Queen's enemies." [3] "The only case that points the other way is *Dowson* v. *Chamney*"; and Pollock, C.B., referred to a report of that case in 7 Jurist, 1037, where it was said "there was no evidence of the manner in which the horse received the injury for which the action was brought." The learned Chief Baron then continues: "This may be the explanation of that case; for though damage happening to the horse from what occurred in the stable might be evidence of *defectus* or neglect, still, if it was not shown how the damage arose, it was not even shown that it arose from what occurred in the stable." The reporter in a note has, however, disproved this suggestion by pointing out that the judgment was written, and that in the written judgment the injury was stated to have been received "by the kick of another horse." The case would thus be a negation of liability on an innkeeper, where he had exercised all caution in stabling a guest's horse; and where by the unknown viciousness of another guest's horse an injury was inflicted, the innkeeper was not to be held liable as an insurer. Assuming the innkeeper to be free from blame, the accident would have occurred from inevitable accident, and thus, though not within the terms of Pollock, C.B.'s, proposition in *Morgan* v. *Ravey*, at least within the principle of it. This view can only be sustained by regarding the innkeeper as an insurer in certain respects only, and not wholly as a common carrier. If this be the right view, *Dawson* v. *Chamney* [4] was the case of inevitable accident arising from the kick of a horse without the negligence of the defendant, and the plaintiff was disentitled to recover, because he did not show a cause of action.

Judgment by Pollock, C.B.

Loss of goods by accidental fire.

The question suggests itself whether at common law the loss of goods of the guest by an accidental fire affects the innkeeper with liability.[5] If the innkeeper is in the same position as a common carrier, which is held law by many authorities,[6] then he is not exonerated from responsibility by reason that the guest's goods are destroyed by an accidental fire.[7] This is itself a disputed point. Chancellor Kent [8] has, indeed, said that innkeepers "are held responsible to as strict and severe an extent as common carriers"; but he goes on to say that, "the principle was taken from the Roman law, and adopted into modern jurisprudence." The Roman law, however, though strict and severe, did not affect the innkeeper with a liability so severe as that of a common carrier; and in the case of accidental fire the innkeeper was not liable at all by Roman law, since this was included under

Opinion of Chancellor Kent.

1 5 Q. B. 164. Cp. *Merritt* v. *Claghorn*, 23 Vt. 177, the facts and extracts from the judgment in which are set out, 2 Parsons, Contracts (8th ed.), 146 n.ll. In *Ingallsbee* v. *Wood*, 33 N. Y. 577, the liability of an innkeeper for the loss of the horse of his guest caused by a fire which burnt down the innkeeper's stable is said to be that of an ordinary bailee for hire. See 2 Parsons, Contracts (8th ed.), 153. In Scotland the law appears to be the same, *M'Doncll* v. *Ettles*, Decisions of the Court of Session 15th Dec. 1809.

2 6 H. & N. 265.

3 *L.c.*, per Pollock, C.B., 277.

4 5 Q. B. 164. As to agistment, see *ante*, 812.

5 As to fire generally, see *ante*, 486.

6 *Morgan* v. *Ravey*, 6 H. & N. 265; there is also a report of the case at *Nisi Prius sub nom. Morgan* v. *Rarey*, 2 F. & F. 283. See note to *Cutler* v. *Bonney*, 18 Am. R. 130

7 Per Dallas, C.J., in *Thorogood* v. *Marsh*, Gow (N. P.), 105.

8 2 Comm. 592.

the head of inevitable accident.[1] Chancellor Kent continues:[2] The responsibility of the innkeeper "does not extend to trespasses committed upon the person of the guest, nor does it extend to loss occasioned by inevitable casualty, or by superior force, as robbery." Whence it may be concluded that, in the earlier passage, he did not intend any more extensive meaning. Story,[3] too, says: "Innkeepers are not responsible to the same extent as common carriers. The loss of the goods of a guest while at an inn will be presumptive evidence of negligence on the part of an innkeeper or of his domestics. But he may, if he can, repel this presumption by showing that there has been no negligence whatsoever, or that the loss is attributable to the proper negligence of the guest himself; or that it has been occasioned by inevitable casualty or by superior force." He thus refers to the *dictum* of Bayley, J., in *Richmond* v. *Smith*:[4] "The case, however, did not call for the *dictum*, and it has since been overturned by a solemn decision, if it meant to suggest so unqualified a proposition as that the liability of innkeepers and common carriers is of the same extent and subject only to the like exceptions."[5] Some of Story's late editors have shown more respect for the *dictum* than for their author's text, which they have altered to conform to it.[6]

Opinion of Story.

Richmond v. *Smith*.

Chitty, says:[7] There must be a *default* on the part of the innkeeper; and such default is to be imputed to him wherever there is a loss not arising from the plaintiff's negligence,[8] the act of God, or the Queen's enemies."

Various opinions. Chitty.

Redfield holds[9] that the innkeeper "is presumptively responsible for all injuries happening to the goods of his guests and by them entrusted to his care; and that he cannot exonerate himself except by showing that he did all to insure their safety which it was in his power to do, and that no default is attributable to his servants or guests. This brings the rule of law on this subject so near to that which obtains in the case of common carriers that the distinction is not of much moment

Redfield.

1 Story, Bailm. § 465; Ersk. Inst. bk. 3, tit. 1, § 28; Stair, Inst. bk. i. tit. 13, § 3, and note in Brodie's edition. *Quia in locato conducto culpa, in deposito dolus duntaxat præstatur; at hoc edicto omnimodo qui recepit tenetur, etiamsi sine culpa ejus res periit, vel damnum datum est; nisi si quid damno fatali contingit. Inde Labeo scribit, si quid naufragio aut per vim piratarum perierit, non esse iniquum, exceptionem ei dari. Idem erit dicendum et si in stabulo, aut in caupona vis major contigerit:* D. 4, 9, 3, § 1. *Post*, 879, 881.

2 2 Comm. 593.

3 Bailm. § 472; also Story, Contracts (2nd ed. 1847), § 749: "Whenever there is a loss by a guest at an inn, the innkeeper is *primâ facie* responsible. He may, however, excuse himself," &c.

4 8 B. & C. 11: "It appears to me that the innkeeper's liability very closely resembles that of a carrier. He is *primâ facie* liable for any loss not occasioned by the act of God or the King's enemies; although he may be exonerated where the guest chooses to have his goods under his own care." This *dictum* has been adopted by Nelson, C.J., in *Piper* v. *Manny*, 21 Wend. (N. Y.) 284. *Purvis* v. *Coleman*, 21 N. Y, 111, 116.

5 *Dawson* v. *Chamney*, 5 Q. B. 164.

6 See Story, Bailm. (8th ed.) by Bennett, § 472.

7 Contracts (12th ed.), 441. In the following edition the word "defect" is substituted for Chitty's and Sir Edward Coke's word "*default*" as they translate the *pro defectu* of the common law writ, but without any change in the sense.

8 *Schultz* v. *Wall*, 134 Pa. St. 262, 19 Am. St. R. 680, excepts from the innkeeper's liability goods stolen in his house "by the servant or companion of the guest." In *Cross* v. *Andrews*, Cro. Eliz. 622, the innkeeper sought to excuse himself by a plea of insanity; but this was held no defence, "for the defendant, if he will keep an inn, ought at his peril to keep safely his guest's goods; and although he is sick, his servants then ought carefully to look to them." *Ante*, 45.

9 Carriers, §§ 595 with the note, 553, where the whole subject is reviewed by the author, the judge who decided *M'Daniels* v. *Robinson*, 26 Vt. 316, 62 Am. Dec. 580, where there is a note on "guests" and "boarders." See *Magee* v. *Pacific Improvement Co.*, 35 Am. St. R. 190.

unless in cases of loss by accidental or incendiary fires, and possibly in some few other cases. Hence it is now becoming to some extent common for the Courts to state the degree of responsibility of these two classes of persons in the same or similar terms, and thus to declare that innkeepers are responsible for the safety of the property of their guests except for damage resulting from inevitable accident or irresistible force, being that of the public enemy.' [1]

Bennett, J.

On the other hand, the conclusion of Bennett, J., at the end of a long judgment in *Mateer* v. *Brown*,[2] reviewing and commenting on all the cases, is "that some Courts as well as commentators are, at length, returning to the sound and healthy principle of the common law, which places the liability of innkeepers and carriers on the same ground." This judgment narrows the controversy to a single point. The common law is contained in the writ in the "Registrum Brevium" [3] and Coke's "Commentary." [4] The writ says the innkeeper shall be responsible *pro defectu*; which Sir Edward Coke translates by *default*. Bennett, J., contends that the "uncertainty and confusion which have been thrown over this branch of the law have arisen from confounding the word *defectu* in the writ, and the word default, used by Lord Coke as its translation, with the term negligence, an error into which Judge Story himself seems to have fallen." [5] But if error arises from confounding default and negligence, error would seem no less to arise from confounding "default" with "without default." In any event the law in America seems unsettled, though the tendency seems to be to accept the distinction between the liability of an innkeeper and a common carrier; [6] while in England the rule of the common law, whatever it may be, is narrowed by reason of 14 Geo. III. c. 78, s. 86, which provides that "no action, suit, or process whatever shall be had, maintained, or prosecuted against any person in whose house, chamber, stable, barn, or other building, or on whose estate any fire shall accidentally begin, nor shall any recompense be made by such person for any damage suffered thereby; any law, usage, or custom to the contrary notwithstanding."

Innkeeper responsible *pro defectu*.

Law in America unsettled.

Really the difference arises because the relations compared differ essentially. The carrier usually has an entire control of the goods delivered to him. So soon as they come to his hands they pass not only from use but from the sight of the owner. The carrier's control is absolute; negligence conducing to their loss on the part of the owner is next door to impossible. But with goods in an inn the owner has the use of them; interferes continually and thus modifies the responsibility

[1] See *Holder* v. *Soulby*, 8 C. B. N. S. 254. In *Hulett* v. *Swift*, 33 N. Y. 571, it is said: "It is true that the liability of the innkeeper, by the custom of the realm, was not unlimited and absolute, and that the loss of the goods of the guest was merely presumptive evidence of the default of the landlord. But this presumption could only be repelled by proof that the loss was attributable to the negligence or fraud of the guest, or to the act of God or the public enemy." This, however, is denied to be law in *Cutler* v. *Bonney*, 18 Am. R. 127; and *Merritt* v. *Cleghorn*, 23 Vt. 177, is followed, where "Judge Redfield, delivering the opinion of the Court, reached the conclusion that where there was no negligence there was no responsibility for loss by fire." Cp. *Mason* v. *Thompson*, 26 Mass. 280.

[2] 1 Calif. 221. The judgment of Bennett, J., is set out in a note to Story, Bailments (8th ed.), § 472; *Shaw* v. *Berry*, 31 Me. 478; *Hulett* v. *Swift*, 42 Barb. (N. Y.) 230, 33 N. Y. 571; *Sibley* v. *Aldrich*, 33 N. H. 553.

[3] 105 a. *De transgressione.* Fitzh. De Nat. Brev. 94 B, where the words are "by the default."

[4] *Calye's case*, 8 Co. Rep. 32 a.

[5] Story, Bailm. § 470.

[6] *Cutler* v. *Bonney*, 18 Am. R. 127. There is a very ample note to the report of this decision embracing a review of the principal authorities on both sides, with,

of the innkeeper. If an analogy is to be found for the innkeeper's position it is rather that of a railway company's responsibility for a passenger's luggage which he takes with him into a railway carriage.[1]

Armistead v. *Wilde*.

Returning to the discussion of the cases, the next to note is *Armistead* v. *Wilde*,[2] where the plaintiff was held disentitled to recover, by reason of his own negligence. Plaintiff's servant, after displaying a large sum of money in the public room of the inn, put it in an ill-secured box, and left the box in the public room for the night. In the morning the money was gone. There was strong ground to suspect that one of those to whom the notes had been displayed was the thief. At the trial the judge directed the jury to find for the plaintiff, unless they thought the traveller "had been guilty of gross negligence in leaving the money in the travellers' room." The jury found for the defendant. A rule was granted on objections to the judge's direction, under the impression that it was "that the jury were to consider whether a prudent man would of his own accord have taken the parcel to the innkeeper and left it with him, or have taken it to his own room and locked it up."[3] On the argument, the other facts appearing, and it being made evident that the judge's direction was to be applied only to the facts of the case, the rule was discharged, on the ground that each case must depend on its own circumstances, and that, though the innkeeper is *primâ facie* liable, his liability may be rebutted by proof of negligence on the part of the guest leading to the loss. The jury having found the negligence, and, in the opinion of the Court, on ample evidence, the verdict was sustained.

Gross negligence.

Lord Campbell, C.J., doubted whether to require *gross* negligence of the guest in order to discharge the innkeeper was not a direction too favourable to the plaintiff, and guarded the decision of the Court against laying down "that negligence on the part of the guest conducing to the loss will not exonerate the landlord unless it amount to *crassa negligentia*."[4] This very point came before the Court in *Cashill* v. *Wright*,[5] when Erle, J., said:[6] "We think that the rule of law resulting from all the authorities is that, in a case like the present [*i.e.*, where a gold watch and money were stolen from the plaintiff's bedroom in defendant's inn] the goods remain under the charge of the innkeeper and the protection of the inn, so as to make the innkeeper *liable as for breach of duty, unless the negligence of the guest occasions the loss in such a way as that the loss would not have happened if the guest had used the ordinary care that a prudent man may be reasonably expected to have taken under the circumstances.*"

Cashill v. *Wright*.

Rule of law stated by Erle, J.

Oppenheim v. *White Lion Hotel Co.*

Willes, J., in *Oppenheim* v. *White Lion Hotel Co.*,[7] considered this to lay down "the proper definition of negligence, in terms which are not to be mistaken." He also explains a misunderstood passage in the report of *Calye's case*:[8] "It is no excuse for the innkeeper to say that he delivered the guest the key of the chamber in which he is lodged, and that he left the chamber door open; but he ought to keep the

Passage in the report of *Calye's case* explained.

however, a bias to the view opposed to the decision. Street, Foundations of Legal Liability, vol. ii. 295-297. Cooley, Torts (2nd ed.), 758.

[1] *Talley* v. *G. W. Ry. Co.*, L. R. 6 C. P. 44. *Post*, 1000.

[2] (1851) 17 Q. B. 261.

[3] Per Patteson, J., 17 Q. B. 265.

[4] *L.c.* 266.

[5] (1856) 6 E. & B. 891; cp. *Fowler* v. *Dorlon*, 24 Barb. (N. Y.) 384, holding that loss of the goods of a guest at an inn is *primâ facie* evidence of negligence on the part of the innkeeper.

[6] *L.c.* 900.

[7] (1871) L. R. 6 C. P. 521. The report in the Law Reports of the passage referred to in the text is very obscure. The Law Journal Report, 40 L. J. C. P. 231, is, however, quite clear.

[8] Co. 8 Rep. 33 a.

goods and chattels of his guest there in safety." This has often been referred to as an authority for the proposition that where the innkeeper has given his guest a key, he has thereby relieved himself of his common law liability. Willes, J., points out [1] that this is not so; since it is by no means laid down that proof of mere neglect to use the key is, in law, conclusive to discharge the innkeeper; and that, in the succeeding passage to that quoted, the report intimates that the guest may by his conduct release the innkeeper from his common law obligation: "He [Sir Edward Coke] evidently means that the fact of the guest having the means of securing his door and neglecting to avail himself of them affords the innkeeper no excuse, by way of plea, as matter of law. The giving the guest a key, or giving a warning to lock his door, would certainly be a circumstance which might be urged in the innkeeper's favour. By omitting to lock his door, a jury might well think that the guest chose to take the risk of robbery upon himself, and that he ought to have taken more care." [2] There is no question of law in this, but one of fact only, and that is whether the guest has, or has not, exercised reasonable care in each case. This is for the jury if, in the opinion of the Court, there is any evidence that can be left to them; [3] and they should be instructed to bear in mind that the innkeeper is not invested with the character of an absolute and unqualified insurer, and that failure on the guest's part to use reasonable care is enough to discharge him from liability.[4]

Willes, J.'s, explanation.

Reasonable care of the guest a question of fact.

The point whether the guest is negligent in entrusting his luggage to the particular servant of the innkeeper through whom the loss happens does not appear ever to have been taken in an English case; probably because the servants in an English inn, till quite recently, were not so numerous as to accentuate the division of responsibility, as it is accentuated in the huge American hotels. There are, however, some valuable remarks on this point in the charge to the jury in the case of *Elcox* v. *Hill*,[5] which were affirmed by the Supreme Court of the United States. "Travellers must be presumed to know the relative duties of the different classes of employés about an hotel, that is to say, they have no right to intrust their baggage to the care of the table-waiter or to the ostler, from the fact that it is not the duty of such employés to look after or care for the baggage, or take the custody of it." "Probably if a guest at an hotel should deposit his money or jewellery with a table-waiter, or cook, or bell-boy without direction to do so from the landlord or clerk in charge, or leave his satchel containing money and valuables unprotected in the halls or public passages, or leave his money exposed in his room and his room unlocked, no one would hesitate to say that such an act was an act of negligence, to such an extent as to excuse the landlord in case of loss." [6]

Negligence of the guest in entrusting luggage to any particular servant of the innkeeper.

Elcox v. *Hill*.

Money or jewellery left with a waiter.

[1] L. R. 6 C. P. 520.

[2] See *Mitchell* v. *Woods*, 16 L. T. (N. S.) 676, where Kelly, C.B., ruled that it is not negligence for a guest at an hotel to omit to lock his door. Cp. *Sanders* v. *Spencer*, Dyer, 266 b.

[3] *Herbert* v. *Markwell*, 45 L. T. 649.

[4] *Spice* v. *Bacon*, 36 L. T. (N. S.) 896. In *Purvis* v. *Coleman*, 21 N. Y. 117, it is said to be "the well-settled law of this State that if the plaintiff's negligence has caused or contributed to the loss or injury, an action against the carrier cannot be maintained." If it is shown that the plaintiff was intoxicated and this contributed to the loss, the plaintiff cannot recover: *Walsh* v. *Porterfield*, 87 Pa. St. 376, and undoubtedly this would be the direction to the jury in England, yet authority on the other side is not wanting. *Rubenstein* v. *Cruikshanks*, 54 Mich. 199; *Cunningham* v. *Bucky*, 42 W. Va. 671. *Ante*, 149.

[5] 98 U. S. (8 Otto) 222.

[6] In this case evidence was tendered that the servant who received the luggage had confessed to having stolen it, but it was held inadmissible, on the ground that though

When the guest's luggage is placed in the custody of the hotel-keeper's servants, the responsibility for the safe custody of it rests upon him. If the luggage is lost, to escape liability the hotel-keeper must show two things; Responsibility for luggage given in custody of the servants of the hotel-keeper.

(1) That the owner was guilty of negligence,

(2) That this negligence conduced to the loss.

If he fails in either, the owner is entitled to recover.[1]

There still remains the possibility, at any rate, of dispute whether the negligent person is the servant of the innkeeper. Two cases illustrate this—the English case of *Bather* v. *Day*,[2] and the American case of *Coskery* v. *Nagle*,[3] decided mainly on the authority of the English one. Is the negligent person a servant?

In *Bather* v. *Day*,[2] the innkeeper sought immunity by showing a private arrangement with the ostler, by which the stables and the profits arising from them were handed over to him to make what profit he could. But, though the acts on which the action was based were the misfeasance of the ostler, the innkeeper was held liable, and on broad and manifest considerations of public policy.[4] *Bather* v. *Day*

The American case raises a point of even more general interest; for it was there decided that when a traveller arrives at a station, and is met by the porter of an hotel who indicates to the traveller a certain vehicle by which he will be taken to the hotel, and the traveller delivers to the porter his baggage or the check for getting the same from the railway authorities, the traveller is so far constituted a guest as to render the proprietor liable for the safe keeping or re-delivery of the baggage. The liability of the proprietor, it was said, commences from the time of the delivery of the baggage or check to the porter and no private arrangement between a landlord and carrier for the transportation of persons can make any difference. *Coskery* v. *Nagle*.

The decision is convenient and not unlikely to be followed; still it is doubtful whether it is in its full extent the natural development of sound principle. Where the arriving traveller has previously secured rooms, no other conclusion seems called for. The contract of host and guest has before been constituted, and the baggage is delivered to the host's servant under an operating contract. Where, however, the journey to the hotel is a speculative one on the part of the traveller as to whether rooms are available or not, no contract with the innkeeper is made till the fact of the landlord having appropriate accommodation is ascertained. No common law duty arises if the innkeeper has in fact no accommodation. The liability, it may be suggested, is referable to the fact that the innkeeper professes, through his porter, to carry between his inn and the station in such a manner as to constitute himself a common carrier. Though the general position *Coskery* v. *Nagle* considered.

on the trial of the servant it was admissible against himself, yet against the landlord it was mere hearsay; and that the failure of the landlord to prosecute did not render the statement any more evidence, since there was no greater duty on him to do so than on any other citizen.

[1] *Medawar* v. *Grand Hotel Co.*, [1891] 2 Q. B. per Lord Esher, M.R., 21. In *Joslyn* v. *King*, 20 Am. St. R. 650, a letter-carrier recovered against the clerk of an hotel the value of a registered letter directed to a guest at the hotel, and lost through the negligence of the clerk to whom the letter-carrier had delivered it, and the value of which the letter-carrier was compelled by the department to pay. What duty—a legal one—there was by the clerk to the letter-carrier is not obvious and is not made so by the report. Was the clerk the letter-carrier's gratuitous bailee? Even if he were, the negligence does not appear to have been gross. *Ante*, 742.

[2] 32 L. J. Ex. 171. [3] 20 Am. St. R. 333. [4] *Ante*, 858 n 5, 861.

is clearly unsustainable, that a mere commendation by the servant of the innkeeper, acting within the scope of his authority, of a particular line of vehicles plying between his master's inn and some other terminus will fix the master with liability for loss during the transit, yet where the conveyance is the innkeeper's and he makes a profession of carrying between a railway station or landing-place and his inn, he is probably liable, as common carrier, to those who, or whose goods, are conveyed by him. If the conveyance is not the innkeeper's and the contractor undertakes a more general conveyance of passengers, the liability of the innkeeper for the act of his porter would seem in principle limited to his negligent act, and not to be an absolute liability; on the ground that the services of the porter, though rendered with a view to the constitution of the relation of innkeeper and guest, are yet rendered independently of and antecedently to the constitution of any such relation. The case differs from that of the conductor of an omnibus assisting a passenger to enter. There the act of the conductor is in performance of the duty for which he is engaged, and is an acceptance of the passenger and a representation that there is accommodation in his vehicle. But the porter has no authority to constitute the relation of host and guest; he is no more than an advertising medium, and the relation is subsequently made when the traveller's requirements are made known at the inn to the person in charge.

Angus v. *M'Lachlan.*

A remark of Kay, J., in *Angus* v. *M'Lachlan*,[1] has been noticed [2] as "inaccurate," as reported, "in attributing to the learned judge a view which is clearly inconsistent with the authorities." The passage referred to is as follows: "The general law was that a bailee, such as an innkeeper, was not bound to be more careful in keeping the goods of his guests than he was as to his own." A perusal of the case will show that the defendant claimed a lien and detained goods, which he locked up with his own, after the plaintiffs had left the hotel. They subsequently were found to be damaged by moths and mice. The possession of the innkeeper was not a possession of a guest's goods during the existence of the relation of host and guest, but was by way of lien for his unpaid bill, after the relation of host and guest had terminated. Reference therefore is to be had to principles governing in the case of an innkeeper's lien, which are as well recognised as the different principles governing in the relation of host and guest. The only point Kay, J., had to decide was the duty of an innkeeper or any other ordinary bailee entitled to lien when holding goods in exercise of lien. And his decision as to this, that the only diligence the innkeeper in such circumstances is bound to use is the diligence that an average prudent business man would use with his own goods,[3] seems sound in principle, and not open to any just exception.

The Innkeepers' Liability Act, 1863 (26 & 27 Vict. c. 41).

The liabilities of innkeepers have been diminished by an Act passed in 1863, "respecting the liability of innkeepers, and to prevent frauds on them." [4]

Liability limited to £30.

By section 1 of this Act, no innkeeper shall be liable to make good any loss or injury to goods or property brought to his inn, not being a horse or other live animal, or any gear appertaining thereto, or any carriage, to a greater amount than £30, except:

[1] 23 Ch. D. 336.

[2] 1 Sm. L. C. (9th ed.), 141. In the 11th ed. the fact that the learned judge was considering the point of lien is noticed, vol. i. 127.

[3] See *ante*, 792. [4] The Innkeepers' Liability Act, 1863 (26 & 27 Vict. c. 41).

(1) Where such goods or property shall have been stolen, lost, or injured through the wilful[1] act, default, or neglect of such innkeeper, or any servant in his employ.

(2) Where such goods or property shall have been deposited expressly for safe custody with such innkeeper; provided that in the case of such deposit they may require as a condition of their liability that the goods or property shall be deposited in a box or other receptacle fastened and sealed by the person depositing the same.[2]

Act not to apply where innkeeper refuses to keep property in safe custody.

By section 2 innkeepers are not to have the benefit of the Act in respect of property which they refuse to have for safe custody, or which by their default the guest is unable to deposit with them.

Notice to be exhibited.

By section 3 every innkeeper is required to cause at least one copy of section 1 of the Act, printed in plain type, to be exhibited in a conspicuous part of the hall or entrance to his inn, and shall be entitled to the benefit of the Act only in respect of goods or property brought to the inn while the copy is so exhibited.[3]

The Innkeepers Act, 1878 (41 & 42 Vict. c. 38).

By the Innkeepers Act, 1878,[4] an innkeeper may sell by public auction goods left with him after six weeks, after giving at least one month's notice of his intention in the way specified in the Act.

Duty of innkeeper is no more than to find reasonable and proper accommodation.

An innkeeper is not bound to provide for his guest the precise rooms he wants. The law requires of him no more than to find for his guests reasonable and proper accommodation,[5] and that no longer than he is clothed with his character of traveller; for "the object of the law" "is merely to secure that travellers shall not, while upon their journeys, be deprived of necessary food and lodging."[6] Accordingly, in *Lamond* v. *Richard*,[7] the Court held that where by a ten months' residence at an hotel the guest had lost the character of a traveller, the innkeeper was entitled to give reasonable notice and to vacate the rooms appropriated. "The custom of England does not extend to persons who are in an inn as lodgers or boarders, and the length of time that a guest has stayed is a material ingredient in determining such a question."

Prepayment may be insisted on.

A doubt has been raised whether a guest can maintain proceedings against an innkeeper for refusing to receive him as a guest without a tender of the amount to which the innkeeper would be reasonably entitled for the entertainment furnished to his guest. In *Pinchon's case*[8] the resolution of the judges was: "A victualler or innkeeper is not compellable to deliver victuals till he be paid for them in hand."

[1] "Wilful" applies to "act" only: *Squire* v. *Wheeler*, 16 L. T. (N. S.) 93.

[2] To make an innkeeper liable beyond £30 he must be informed in a reasonable and intelligible manner at the time of the deposit of a parcel of valuables with him by a guest that the deposit is for safe custody: *O'Connor* v. *Grand International Hotel Co.*, [1898] 2 I. R. 92.

[3] *Spice* v. *Bacon*, 2 Ex. D. 463, 36 L. T. (N. S.) 896. On the point for which this case was previously cited it is only reported in the Law Times. *Hodgson* v. *Ford*, 8 Times L. R. 722 (C. A.); *Huntly* v. *Bedford Hotel Co.*, 7 Times L. R. 641 (C. A.); *Carey* v. *Long's Hotel Co.*, 7 Times L. R. 213 (C. A.). In Pennsylvania, under the local Act there, it has been decided that if *actual* knowledge of the place to deposit valuables has been brought home to the guest, it is immaterial whether the provisions of the Act as to the posting of notices in certain places have been complied with. Where constructive notice is relied on, the terms of the Act must be strictly complied with: *Schultz* v. *Wall*, 134 Pa. St. 262, 19 Am. St. R. 686.

[4] 41 & 42 Vict. c. 38.

[5] *Fell* v. *Knight*, 8 M. & W. 269. *Browne* v. *Brandt*, [1902] 1 K. B. 696.

[6] *The Queen* v. *Rymer*, 2 Q. B. D., per Denman, J., 140.

[7] [1897] 1 Q. B. 541.

[8] 9 Co. Rep. 87. The guest's rights in his room are discussed *Dean* v. *Hogg and Lewis*, 10 Bing. 345.

Fell v. *Knight.*

In *Fell* v. *Knight* Lord Abinger, C.B., expressed the view [1] that it is not sufficient for a plaintiff to allege readiness to pay; he should further state that he was willing and offered to pay; and gave the judgment of the Exchequer holding a declaration bad for want of an allegation of tender. In so far, however, as this *dictum* is inconsistent with the subsequent considered judgment of the same Court (delivered by Parke, B., who was absent on the former occasion), in *Pickford* v. *Grand Junction Ry. Co.*,[2] it is probably not law. The test suggested was that, whenever a duty is cast on a party, in consequence of a contemporaneous act of payment, to be done by another, it is sufficient if the one pay, or be ready to pay, the money when the other is ready to undertake the duty. Pickford's was a carrier's case. The gist of the decision is: "The money is not required to be paid down by the plaintiffs until the carrier receives the goods, which he is bound to carry."

Pickford v. *Grand Junction Ry. Co.*

Innkeeper's lien.

We have already incidentally seen [3] that an innkeeper is entitled to a lien for his charges.[4] This lien attaches to the goods brought to the inn by the guest, though not to the person of his guest, nor to the apparel he is actually wearing;[5] and avails against any goods the guest has with him, even though they are not his own.[6] The reason of this is that the innkeeper has to receive the guest and his goods without inquiries into his title to them.[7] Consequently the innkeeper's lien attaches to the goods immediately on their coming into his inn to the extent of the innkeeper's lawful charges against his guests.[8] Thus, if the goods are stolen by the guest and brought to the inn, the lien attaches, unless bad faith is shown in the innkeeper,[9] or knowledge that the goods are not the guest's goods and sent to the inn for a specific purpose.[10] Much more then does the lien attach to all the luggage that is brought to an hotel, where husband and wife stay, and credit is given to the husband while the luggage they have with them is mainly the wife's separate estate.[11]

Servant robbed.

If a servant or agent is robbed of his master's money or goods the master may maintain the action against the innkeeper in whose house the loss is sustained. In *Bedle* v. *Morris* [12] it was moved in arrest of judgment "that the action did not lie for the master on the robbery of the servant. But *non allocatur*; for none can have satisfaction but he who has the loss, and the loss is to the master." "Moreover, it is not material whether he was his servant or not; for if he was his friend by whom the party sent the money and he is robbed in the inn, the true owner shall have the action. *Per totam Curiam.* And judgment given accordingly." [13]

1 8 M. & W. 269. On the other hand, *Rex* v. *Ivens*, 7 C. & P. 213, per Coleridge, J.

2 8 M. & W. 372, 378. 3 *Angus* v. *M'Lachlan*, 23 Ch. D. 330.

4 As to lien, see *Kruger* v. *Wilcox*, Amb. 252, Tudor, L. C. Mercantile Law (3rd ed.), 353 *cum notis*; *Chase* v. *Westmore*, 5 M. & S. 180, Tudor, L. C. Mercantile Law (3rd ed.), 356 *cum notis*.

5 *Sunbolf* v. *Alford*, 3 M. & W. 248. See *Newton* v. *Trigg*, 1 Show. (K. B.). (Case 166) 268; *ante*, 851 n. [6].

6 *Turrill* v. *Crawley*, 13 Q. B. 197; *Snead* v. *Watkins*, 1 C. B. N. S. 267; *Threfall* v. *Borwick*, L. R. 7 Q. B. 711; L. R. 10 Q. B. 210; *Mulliner* v. *Florence*, 3 Q. B. D. 484; Bacon, Abr. Inns and Innkeepers (D).

7 *Snead* v. *Watkins*, 1 C. B. N. S. 267. 8 *Smith* v. *Dearlove*, 6 C. B. 132.

9 *Johnson* v. *Hill*, 3 Stark. (N. P.), 172.

10 *Broadwood* v. *Granara*, 10 Ex. 417, limiting the lien to "goods brought by a guest to an inn." 11 *Gordon* v. *Silber*, 25 Q. B. D. 491.

12 Yelv. 162, S. C. *sub nom. Beedle* v. *Morris*, Cro. Jac. 224.

13 See Bac. Abr. Inns and Innkeepers (C), 5. *Berkshire Woollen Co.* v. *Proctor* 81 Mass. 417. *Ante*, 748.

CHAPTER II.

COMMON CARRIERS.

General Considerations.

Definitions.

We have already noted the definition of a common carrier in discriminating a common carrier from a private carrier for hire.[1] The *differentia* indicated by Alderson, B., in *Ingate* v. *Christie*[2]—of carrying for all persons indifferently and not a particular person—is that most generally accepted.

Story, Bailments.

Thus Story says:[3] "A common carrier has been defined to be one who undertakes for hire or reward to transport the goods of such as choose to employ him from place to place";[4] and

Redfield, Carriers.

Redfield:[5] "To constitute one a common carrier he must make that a regular and constant business, or at all events he must, for the time, hold himself ready to carry for all persons indifferently who choose to employ him."

Parker, C.J., in *Dwight* v. *Brewster*.

In *Dwight* v. *Brewster*,[6] Parker, C.J., defines a common carrier as "one who undertakes, for hire or reward, to transport the goods of such as choose to employ him, from place to place. This may be carried on at the same time with other business."

Fish v. *Chapman*.

In *Fish* v. *Chapman*[7] Nisbit, J., said: "To constitute a man a common carrier, the business of carrying must be habitual and not casual. The undertaking must be general and for all people indifferently. He must assume to be the servant of the public; he must undertake for all people."

Ware, J., in *The Huntress*.

Ware, J.'s,[8] description is to the same effect, though he states his meaning more fully; thus: "A common carrier is one who makes it a

[1] *Ante*, 845.

[2] 3 C. & K. 61.

[3] Bailm. § 495.

[4] See the full judgment of Story, J., in *Citizens' Bank* v. *Nantucket Steamboat Co.* 2 Story, Rep. (U. S.) 16, the learned judge says, at 35: "It is not necessary that the compensation should be a fixed sum, or known as freight; for it will be sufficient if a hire or recompense is to be paid for the service, in the nature of a *quantum meruit* to or for the benefit of the" carrier.

[5] Carriers, § 19, citing *Gisbourn* v. *Hurst*, 1 Salk. 249 (the definition in which case is said by Gibson, C.J., in *Gordon* v. *Hutchinson*, 1 W. & S. (Pa.) 286, to be the "best definition of a common carrier"; it is, "any man undertaking for hire to carry the goods of all persons indifferently." This definition is approved in *Allen* v. *Sackrider*, 37 N. Y. 341; cp. *Gilbart* v. *Dale*, 5 A. & E. 543, where defendant was held not a carrier but keeper of a booking-office.

[6] 18 Mass. 53.

[7] 2 Kelly (Ga.) 349, cited in judgment of Brett, J., in *Nugent* v. *Smith*, 1 [illegible]. Nisbit, J.'s, judgment is set out in Story, Bailm. (8th ed.) § 495, note 3.

[8] *The Huntress*, Daveis (U. S. Adm.) 86.

business to transport goods either by land or water, for hire, and holds himself ready to carry them for all persons who apply and pay the hire. Undertaking, as he does, to carry goods for all persons, he is considered as engaged in a public employment and as engaging beforehand to carry goods for a reasonable remuneration for any person who may apply to him and pay the hire, and he will be liable to an action for refusing, unless he has a reasonable cause for his refusal." Bell's [1] definition is: "One who, for hire, undertakes the carriage of goods for any of the public indiscriminately from and to a certain place."

Bell, in Principles of the Law of Scotland.

Lastly, Brett, J., in *Nugent* v. *Smith*,[2] says: "The real test of whether a man is a common carrier, whether by land or water, therefore really is, whether he has held out that he will, so long as he has room, carry for hire the goods of every person who will bring goods to him to be carried. The test is not whether he is carrying on a public employment, or whether he carries to a fixed place;[3] but whether he holds out, either expressly or by a course of conduct, that he will carry for hire, so long as he has room, the goods of all persons indifferently who send him goods to be carried. If he does this, his first responsibility naturally is, that he is bound, by a promise implied by law, to receive and carry for a reasonable price the goods sent to him upon such an invitation."

No obligation to equality of treatment at common law.

At common law a common carrier of goods is under no obligation to treat all customers equally. His obligation is to accept and carry all goods delivered to him for carriage according to his profession on being paid a *reasonable* compensation for so doing. If he refuses to carry the goods, failing some reasonable excuse, an action lies against him. There is nothing in the common law to hinder a carrier from carrying for favoured customers at any unreasonably low rate, or even gratis; the only limitation is that he must not charge more than is reasonable.[4] With railway companies, by statute [5] the law is otherwise.

How common carrier differs from (i) a forwarding merchant; (ii) warehouseman.

A common carrier differs from a forwarding merchant who has no concern in the vehicle by which goods are sent, nor in the freight, and engages merely to cause goods to be forwarded to their destination for reward;[6] and he differs from a warehouseman in that the warehouseman engages for custody, not for transport.[7] Waggoners and teamsters;[8] coach-masters or proprietors of stage coaches (when they usually carry for all persons indifferently);[9] railway companies, for goods

Who are common carriers.

[1] Principles of the Law of Scotland, § 160. In Guthrie's edition (9th ed.), 110, after the words "goods" the words "generally, or of certain classes of goods," are added.

[2] 1 C. P. D. 27. On this point the judgment is unaffected by the judgment of Cockburn, C.J., in the Court of Appeal, 1 C. P. D. 423.

[3] Cp. *Brind* v. *Dale*, 8 C. & P. 207, with Story's comment, Bailm. § 496, note 3; also the judgment in *Robertson* v. *Kennedy*, 2 Dana (Ky.) 430: "According to the most approved definition, a common carrier is one who undertakes, for hire or reward, to transport the goods of all such as choose to employ him from place to place. Draymen, cartmen, and porters who undertake to carry goods for hire as a common employment from one part of the town to another, come within the definition; so also does the driver of a slide with an ox-team. The mode of transporting is immaterial."

[4] *G. W. Ry. Co.* v. *Sutton*, L. R. 4 H. L. 226.

[5] The Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), s. 96.

[6] Angell, Carriers (5th ed.), § 75. Cp. *Gilbart* v. *Dale*, 5 A. & E. 543. *Ante*, 844.

[7] Story, Bailm. §§ 444–454. *Ante*, 827.

[8] 2 Kent, Comm. 598, 599; *Gisbourn* v. *Hurst*, 1 Salk. 249; *Hyde* v. *Trent and Mersey Navigation Co.*, 5 T. R. 389.

[9] *Dwight* v. *Brewster*, 18 Mass. 50; *Middleton* v. *Fowler*, 1 Salk. 282; Story, Bailm. § 500.

which they profess to carry or actually carry;[1] carmen and porters who undertake to carry goods for hire as a common employment, from one part of a town or city to another;[2] lightermen, hoymen,[3] barge-owners, ferrymen,[4] canal boatmen, and the owners and masters[5] of ships and steamboats engaged in the transportation of goods for persons generally for hire—all these to the extent that they profess or are compelled to carry, are included under the designation of common carriers.[6]

By the Roman law carriers were held to the most exact diligence, because they might reject or receive the goods tendered to them for carriage at their option.[7] If they received goods they were liable, whether they received in person or by the master of the vessel, or the supercargo, or other person whatsoever to whom the things were given in charge, provided that they were authorised to receive goods in the way of business.[8] By the same law, however, the carriers' (*vectores* or *viatores*) liability stopped short of inevitable damage (*damnum fatale*).[9] Roman law.

[1] *Palmer* v. *Grand Junction Ry. Co.*, 4 M. & W. 749; *Crouch* v. *L. & N. W. Ry. Co.*, 14 C. B. 255; *Thomas* v. *Boston and Providence Rd. Corporation*, 51 Mass. 472.

[2] Story, Bailm. § 496.

[3] *Rich* v. *Kneeland*, Cro. Jac. 330; *Dale* v. *Hall*, 1 Wils. (C. P.) 281.

[4] *Willoughby* v. *Horridge*, 12 C. B. 742.

[5] *Morse* v. *Slue*, 2 Lev. 69, where it was admitted that the action lay equally against the masters and owners of vessels. This was afterwards decided by Lord Hardwicke, in *Boucher* v. *Lawson*, Cas. temp. Hardw. 85, 194. This doctrine has been since recognised in *Goff* v. *Clinkard*, cited 1 Wils. (C. P.) 282, and applies equally to the carrier of goods in the coasting trade, *Dale* v. *Hall*, 1 Wils. (C. P.) 281, and to a bargeman and hoyman upon a navigable river, *Rich* v. *Kneeland*, Cro. Jac. 330. In *Varble* v. *Bigley*, 29 Am. R. 435, it was said, differing from the Louisiana Courts, *Bussey* v. *Mississippi Valley Transport Co.*, 24 La. An. 165, that the owner of a tow-boat is not a common carrier. See the judgment for an examination of the principles to be applied to the determination of this question. In *Transportation Line* v. *Hope*, 95 U. S. (5 Otto) 297, the towing a barge in conjunction with thirty or forty others was held not to constitute the towing company a common carrier, since there was not that exclusive control of the barge which that relation would imply. Yet such a company was to exercise a careful and skilful judgment in furnishing the motive power, in selecting a proper position for the barge, in causing her to be lashed suitably, and in the general regulation of her movements.

[6] Angell, Carriers (5th ed.), §§ 67–90. In *Coup* v. *Wabash, &c. Ry. Co.*, 56 Am. R. 374, a railway company contracting to transport a menagerie in cars owned and controlled by the owner of the menagerie, was held not liable as a common carrier; and this on the ground that "the duty to receive cars of other persons, when existing, is usually fixed by the railroad laws, and not by the common law. But it is not incumbent on companies, in their duty as common carriers, to move such cars except in their own routine. They are not obliged to accept and to run them at all times and seasons, and not in the ordinary course of business." An "express company" is defined in *Pacific Express Co.* v. *Seibert*, 142 U. S. (35 Davis) 339. Evidence that at the door of a booking-office there is a board on which is painted "conveyances to all parts of the world," and a list of names of places, is not sufficient proof that the owner is a common carrier: *Upston* v. *Slark*, 2 C. & P. 598.

[7] *Est in ipsorum arbitrio, ne quem recipiant:* D. 4, 9, 1, § 1. *Ante*, 856.

[8] D. 4, 9, 1, §§ 2, 3.

[9] *Nisi si quid damno fatali contingit:* D. 4, 9, 3, § 1. Among *damna fatalia* were reckoned losses by shipwreck, by lightning, or other casualty, by pirates, and by *vis major*. Losses by fire, burglary, and robbery come also under this head, but not theft; *qui salvum fore recepit, non solum à furto, sed etiam a damno recipere videatur:* D. 4, 9, 5, § 1. Under the Code Civil, common carriers are not liable for losses resulting from superior force, such as robbery, arts. 1782, 1784, 1929, 1953. In Scotland, loss by fire was regarded in ordinary cases as *damnum fatale*, but robbery is not: 1 Bell, Comm. (7th ed.) 499. The case as to fire seems somewhat doubtful, since Bell says, at 500: "It has, on the whole, appeared in Scotland that this responsibility for fire is not to be held within the true principle of the edict as adopted by us. It is rather considered as a *damnum fatale*, an inevitable accident, for which the carrier, &c., are not responsible." The law, however, is altered by statute; The Mercantile Law Amendment Act, 1856 (Scotland), 19 & 20 Vict. c. 60, s. 17, making all carriers for hire of goods within Scotland liable to make good to the owner of such goods all losses arising from accidental fire while such goods were in the custody or possession of such carriers. See Smith, Merc. Law (10th ed.), 304 and note.

Special liability of a carrier by the Roman law only in the case of water carriers.

The special liability of a carrier by the Roman law existed only in the case of water carriers. "It is," says Cockburn, C.J.,[1] "a misapprehension to suppose that the law of England relating to the liability of common carriers was derived from the Roman law; for the law relating to it was first established by our Courts with reference to carriers by land, on whom the Roman law, as is well known, imposed no liability, in respect of loss, beyond that of other bailees for reward."

Liability of carrier by water in English law, how derived.

Historically, the liability of a carrier by water in English law is derived from the liability of land carriers; this is pointed out by Cockburn, C.J., in the course of the judgment,[2] which has already been quoted. "As matter of legal history, we know that the more rigorous law of later times, first introduced during the reign of Elizabeth, was, in the first instance, established with reference to carriers by land, to whom by the Roman law no such liability attached. It was not till the ensuing reign, in the eleventh of James I., that it was decided, in *Rich* v. *Kneeland*,[3] that the common hoyman or carrier by water stood on the same footing as a common carrier by land, and rightly, for in principle there could be no difference between them." From this time, accordingly, there has been held to be no distinction in principle between a land carrier and a water carrier;[4] though there are particular developments of detail that require separate consideration.

Liver Alkali Co. v. *Johnson*

In the *Liver Alkali Co.* v. *Johnson*[5] the contention was that the character of a common carrier is not constituted unless he holds himself out as plying between particular places, or holds himself out to go to some particular place and to take all goods brought him for the voyage. The defendant was a barge-owner, who let out vessels for the conveyance of any goods to any customers who applied. The termini were not fixed, except in each case by the customer. The majority of the Court (Blackburn, J., delivered the judgment) were of opinion that the defendant "has the liability of a common carrier"; though they did not "think it necessary to inquire whether the defendant is a carrier so as to be liable to an action for not taking goods tendered to him."[6] Brett, J., dissented and was of opinion[7] that the defendant "was not a common carrier," "because he does not undertake to carry goods for or to charter his sloop to the first comer. He wants, therefore, the essential characteristic of a common carrier; he is, therefore, not a common carrier, and therefore does not incur at any time any liability on the ground of his being a common carrier."

Lord Russell, C.J., in *Hill* v. *Scott*[8] somewhat dryly remarks: "I prefer of the two the language of Blackburn, J., although there is really no essential difference."

Scaife v. *Farrant.*

Liver Alkali Co. v. *Johnson* was mainly relied on by the plaintiff in *Scaife* v. *Farrant*[9] also in the Exchequer Chamber. The defendant was the agent of a railway company for collecting and delivering goods and parcels; in addition he carried on upon his own account the business of a carrier, removing goods and furniture for hire for all persons who applied to him, and in his own vans. Generally the van or vans were hired by, and filled with the goods of, one person only.

1 *Nugent* v. *Smith*, 1 C. P. D. 428.
2 *L.c.* 430.
3 Cro. Jac. 330, Hob. 17.
4 *Trent Navigation* v. *Wood*, 3 Esp. (N. P.) 127.
5 (1874) L. R. 9 Ex. 338; cp. *Flauli* v. *Lashley*, 36 L. Ann. 106.
6 L. R. 9 Ex. 340.
7 *L.c.* 343.
8 [1895] 2 Q. B. 371, 376.
9 (1875) L. R. 10 Ex. 358.

The plaintiff made an agreement with the defendant to remove his furniture, the defendant "undertaking risk of breakage (if any) not exceeding £5 on any one article." While the furniture was being removed, it was burned, without negligence on the defendant's part. The plaintiff contended that *Liver Alkali Co.* v. *Johnson*[1] established that the defendant was a common carrier, and so liable. The Exchequer Chamber held that the facts showed the plaintiff to have entered into a special contract, by the terms of which he was bound; and the fair construction of the agreement was that the defendant was willing to undertake a particular casualty and no other. Cockburn, C.J., intimated an opinion that the question of what constitutes a common carrier "ought to be submitted to further consideration."[2]

Nugent v. *Smith.*

In the following year, in *Nugent* v. *Smith*,[3] in the Court of Appeal Cockburn, C.J., reviewed the authorities. After noting that the Court of Appeal was bound by the judgment in *Liver Alkali Co.* v. *Johnson*,[4] he thus expressed his own opinion:[5] "I cannot help seeing the difficulty which stands in the way of the ruling in that case, namely, that it is essential to the character of a common carrier that he is bound to carry the goods of all persons applying to him, while it never has been held, and, as it seems to me, could not be held, that a person who lets out vessels or vehicles to individual customers on their application was liable to an action for refusing the use of such vessel or vehicle if required to furnish it. At all events, it is obvious that, as the decision of the Court of Exchequer Chamber proceeded on the ground that the defendant in that case was a common carrier,[6] the decision is no authority for the position taken in the court below, that all shipowners are equally liable for loss by inevitable accident."

Cockburn, C.J.'s opinion.

Criticised.

From this passage it may be gathered that Cockburn, C.J., considered that Blackburn, J., in *Liver Alkali Co.* v. *Johnson*, had introduced into his definition of a common carrier other than the accepted elements. It may, however, be remarked that in the Court of Exchequer, judgment was given on the ground that the defendant was within the terms of Story's definition of a common carrier, and exercised a public employment "by means of numerous vessels, which he let to any one who chose to hire them."[7] If the judgment of the majority of the Exchequer Chamber could be limited to the affirmance of this, no difficulty would arise. Yet there are expressions in the judgment indicating that the defendant was exercising a public employment, and which lead to the inference that the carrying on the business of letting vehicles for the carriage of particular goods is in law a carrying on a

[1] L. R. 9 Ex. 338. [2] L. R. 10 Ex. 366.

[3] (1876) 1 C. P. D. 423. In this case Cockburn, C.J., cites Parsons' definition of common carrier (at 427)—"One who offers to carry goods for any person between certain termini and on a certain route." "He is bound to carry for all who tender to him goods and the price of carriage, and insures these goods against all loss but that arising from the act of God or the public enemy, and has a lien on the goods for the price of the carriage." "If either of these elements is wanting, we say the carriage is not a common carrier, either by land or by water." *Avinger* v. *South Carolina Ry. Co.*, 13 Am. St. R. 716, is an action against a common carrier for refusing to carry goods tendered to him.

[4] L. R. 9 Ex. 338. [5] 1 C. P. D. 433.

[6] The decision scarcely goes so far as that; only that he had "the liability of a common carrier," to the exclusion of the question as to whether he would "be liable to an action for not taking goods tendered to him": per Blackburn, J., L. R. 9 Ex. 340.

[7] Per Kelly, C.B., L. R. 7 Ex. 269.

public employment, and consequently, an exercise of the business of a common carrier.[1] Even if this he so, the nominal definition of a common carrier need not he disturhed, though the notion of what is comprehended under it may require to he extended. If it he not so, then the view of Cockburn, C.J., appears to state the law, and the decision in *Liver Alkali Co.* v. *Johnson* must be explained on the facts found hy the jury, without any wider application.

Common carrier to carry passengers.

Another branch of a common carrier's business is to carry passengers for hire. This is a development of much later date than his ohligation to carry goods; for the first case reported of an attempt to recover damages by a person for an injury done to him as a passenger was tried before Lord Kenyon in 1791, and reported in Peake's *Nisi Prius* Cases, 81, in 1795.[2] The liability arising from the undertaking to carry passengers differs from that with regard to goods, and will be independently considered.

Distinction between common carrier and private carrier.

A common carrier, it has been said, differs from a private carrier,[3] first, in respect of duty; secondly, in respect of risk.

First, in respect of duty.[4]

Duty of common carrier.

A common carrier exercises a public employment;[5] so that he cannot, like an ordinary tradesman or mechanic, receive or reject a customer at pleasure, or charge any price that he chooses to demand. A refusal to receive goods or to carry them according to the course of his particular employment, without sufficient excuse, will render him liable to an action. But he cannot he sued in assumpsit for not carrying safely where no rate is fixed by law; for in such a case the carrier is entitled to say on what terms he will carry, and is not obliged to take everything which is brought to his warehouse unless the terms on which he chooses to undertake the risk are complied with hy the person who employs him.[6] At the same time, a common carrier may only require reasonable compensation for bis services, and for the risks that they draw with them. Moreover, at common law he is under no obligation to treat all customers equally; still 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 heyond what the carrier was entitled to receive, in an action for money had and received, as being money extorted from him.[7]

[1] Cp. *Coggs* v. *Bernard*, 1 Sm. L. C. (11th ed.), 209; *Ingate* v. *Christie*, 3 C. & K. 61; *Ansell* v. *Waterhouse*, 2 Chit. (K. B.) 1.

[2] *White* v. *Boulton*, Peake (N. P.), 81; referred to by Hubbard, J., in *Ingalls* v. *Bills*, 50 Mass. 8.

[3] Angell (5th ed.), Carriers, § 67.

[4] Cp. Code Civil, art. 1782 *et seqq.*; Erskine, Institutes, bk. 3, tit. 1, 28.

[5] "If a man takes upon him a public employment, he is bound to serve the public as far as the employment extends; and for refusal an action lies," *Lane* v. *Cotton*, 1 Ld. Raym. 646, per Holt, C.J., 654; per Paston, J., Y. B. 14 H. VI. 18, pl. 58; cp. Y. B. 19 H. VI. 49, pl. 5, with Y. B. 21 H. VI. 55, pl. 12, and Y. B. 48 E. III. 6, pl. 11. "It is the duty of every artificer to exercise his art rightly and truly as he ought," Fitzh. De Nat. Brev. 94 D.

[6] —— v. *Jackson*, Peake, Add. Cas. 183; see also Lord Kenyon's ruling as to common law duty, and the remark by Parke, B., as to innkeepers, in *Johnson* v. *Midland Ry. Co.*, 4 Ex. 371. "A man may keep an inn for those persons only who come in their own carriages." This was in answer to an argument of counsel that a company, having chosen to be carriers, can no more select the goods they will carry than an innkeeper his guests.

[7] Per Blackburn, J., in *G. W. Ry. Co.* v. *Sutton*, L. R. 4 H. L. 237, and the fact of charging less to one is *evidence* that the greater charge is unreasonable: *Baxendale* v. *Eastern Counties Ry. Co.*, 27 L. J. C. P. 137, 145; and the excess may be recovered at common law even when not paid under protest: *Parker* v. *G. W. Ry. Co.*, 7 M. & G. 253; *Edwards* v. *G. W. Ry. Co.*, 11 C. B. 588; *Heiserman* v. *Burlington, &c. Ry. Co.*, 63 Iowa, 732.

It has been said [1] that the carrier is liable in respect of his reward, a view that has the sanction of Sir Edward Coke, who says: "He hath his hire, and thereby implicitly undertaketh the safe delivery of the goods delivered to him." [2] High though the authority of Coke, C.J., or Holt, C.J., singly, is, and in conjunction almost irresistible, in this case the law has been settled in a sense contrary to theirs. Thus, in *Forward* v. *Pittard*,[3] Lord Mansfield, C.J., said: "It appears from all the cases for a hundred years back that there are events for which the carrier is liable independent of his contract. By the nature of his contract, he is liable for all due care and diligence; and for any negligence he is suable on his contract. But there is a further degree of responsibility by the custom of the realm, that is, by the common law a carrier is in the nature of an *insurer*." [4] While Holroyd, J., said in *Ansell* v. *Waterhouse*,[5] a carrier's case: "This is an action against a person who, by ancient law, held as it were a public office, and was bound to the public." "This action is founded on the general obligation of the law and *ex delicto* for acting against it." And in the case of *Tattan* v. *G. W. Ry. Co.*,[6] a case on costs, and therefore keenly contested, Blackburn, J., said: "*Marshall* v. *York, Newcastle, and Berwick Ry. Co.*[7] is a distinct decision that it [an action against a common carrier for the breach of his duty to carry goods safely] is in

Carrier said to be liable "in respect of his reward."

Lord Mansfield, C.J., in *Forward* v. *Pittard*.

Tattan v. *G. W. Ry. Co.*

[1] Bac. Abr. Carriers (B): *Riley* v. *Horne*, 5 Bing. 217; *Morse* v. *Slue*, Sir T. Raym. 220; 1 Vent. 238; *Lane* v. *Cotton*, 1 Salk. 143.

[2] Co. Litt. 89 a. To this Mr. Hargrave appends a note: "The hire is not the *only* or *principal* ground, on which the carrier is liable; for factors, though they also receive a reward, are not so, except for *negligence* or by reason of a special undertaking. The great cause of the laws charging the carrier is the *public employment* he exercises." In *Morse* v. *Slue*, 1 Vent. 238, Hale, C.J., is reported as saying: "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."

[3] 1 T. R. 27, 33.

[4] Cp. *Hide* v. *Proprietors of Trent Navigation*, 1 Esp. (N. P.) 36, per Lord Kenyon, C.J.: "Where a man is bound to any duty, and chargeable to a certain extent by the operation of law, in such case he cannot by any act of his own discharge himself."

[5] 2 Chitty (K. B.), 1, 4.

[6] 2 E. & E. 844, 854. *Tattan* v. *G. W. Ry. Co.* was discussed in *Baylis* v. *Lintott*, L. R. 8 C. P. 345, and distinguished by the Court of Appeal in *Fleming* v. *Manchester, Sheffield, and Lincolnshire Ry. Co.*, 4 Q. B. D. 81, as being before the County Courts Act (30 & 31 Vict. c. 142), s. 5. See *Kerr* v. *Midland G. W. Ry. Co.*, 10 Ir. C. L. Appendix, xlv.; *Pontifex* v. *Midland Ry. Co.*, 3 Q. B. D. 23; *Cohen* v. *Foster*, 66 L. T. 616; *Steljes* v. *Ingram*, 19 Times L. R. 534.

[7] 11 C. B. 655. "It seems to me that the whole current of authorities, beginning with *Govett* v. *Radnidge* (3 East, 62), and ending with *Pozzi* v. *Shipton* (8 A. & E. 963), establishes that an action of this sort is in substance, not an action of *contract*, but an action of *tort* against the company as carriers." "The earliest instance I find of an action of this sort is in Fitzherbert's *Natura Brevium*, *Writ de Trespass sur le Case*, in which it is said (94 D): 'If a smith prick my horse with a nail, &c., I shall have my action upon the case against him without any warranty by the smith to do it well; for it is the duty of every artificer to exercise his art rightly and truly as he ought.' There is no allusion there to any contract"; per Williams, J., *l.c.* 663. In Y. B. 14 H. VI. 18, pl. 58, the law is laid down in accordance with Fitzherbert. Compare the case mentioned by Willes, J., in the opening passage of his judgment in *British Columbia Saw Mill Co.* v. *Nettleship*, L. R. 3 C. P. 508. In *Buddle* v. *Willson*, 6 T. R. 369, 373, it is laid down (on the authority of Denison, J., in *Dale* v. *Hall*, 1 Wils. (K. B. 282), that in the ordinary case of an action against a common carrier, the cause of action is *ex contractu*. Then came the judgment of the King's Bench in *Gavett* v. *Radnidge*, 3 East, 62. Cp. *Weall* v. *King*, 12 East, 452. Sir J. Mansfield, C.J., delivering the judgment of the Common Pleas in *Powell* v. *Leyton*, 2 B. & P. (N. R.) 365, re-affirmed the principle of *Buddle* v. *Willson*. Divey, Parties to an Action, 20, is to the same purport. See note to *Buddle* v. *Willson*, 3 R. R. 298, and Bullen and Leake, Prec. of Plead. (3rd ed.) 120. *Powell* v. *Leyton* is considered in *Ansell* v. *Waterhouse*, 2 Chitty (K. B.), 1. The *Queen* v. *McLeod*, 8 Can. S. C. R. 1, should also be referred to, especially the judgment of Fournier, J., 45–54. See *ante*, 733, 763, and *post*, 993.

substance, no less than in form, an action on the case. The defendants there were held liable to the plaintiff, a servant travelling on their line with his master, who paid his fare, for the loss of his luggage; although not only was the declaration not framed on a contract, but there was no contract with the plaintiff on which it could have been framed. That is a conclusive authority that a common carrier is liable to an action for a breach of the duty imposed on him by the custom of the realm, apart from any considerations of contract."

Common carrier may limit his profession in what manner he pleases.

It is at the option of every man whether he becomes a common carrier or not; if he does, he may limit his profession in what manner he pleases, and may fix what prices he chooses to charge.[1] By the common law as it stood before the Carriers Act, 1830,[2] as soon as the carrier has entered upon his duties in the manner and under the regulations that he may have chosen to prescribe to himself, so long as he professes to carry on his business he is bound to receive goods (and passengers if they are within the limits of his profession) and carry them for a reasonable reward,[3] and according to the route which he holds out to the public, though it is not the shortest or the most convenient;[4] and he can neither capriciously in a single instance, nor by public notice seen and read by his customer, exonerate himself from the consequences of gross neglect.[5] He may choose the kind of conveyance he is to carry in, the times of transit, the mode of delivery, the articles that he will profess to carry, and what price he will have when he shall be paid. His duty to receive is always limited by his convenience and his profession to carry,[6] although his liability is not limited to England; for if he holds himself out as a carrier to some place without the realm, he becomes liable to an action at the suit of any for whom he may refuse to carry.[7]

As to risk.

Secondly, in respect of risk.

Riley v. *Horne*.

The common law as to this is stated by Best, C.J., in *Riley* v. *Horne*:[8] "We have established these points—that a carrier is an insurer

[1] *Smith* v. *Horne*, 8 Taunt. 144; see per Bayley, J., *Garnett* v. *Willan*, 5 B. & Ald. 57; *Wyld* v. *Pickford*, 8 M. & W. 443, 461; *Hinton* v. *Dibbin*, 2 Q. B. 646; *Thorogood* v *Marsh*, Gow (N. P.), 105, 107.

[2] 11 Geo. IV. & 1 Will. IV. c. 68. The Canadian Law as to custody of goods may be gathered from *The Merchants' Despatch Transportation Co.* v. *Hately*, 14 Can. S. C. R. 572.

[3] 2 Kent, Comm. 599; *Harris* v. *Packwood*, 3 Taunt. 264, 271; *Pickford* v. *Grand Junction Ry. Co.*, 8 M. & W. 372.

[4] *Hales* v. *L. & N. W. Ry. Co.*, 4 B. & S. 66. As to sea journeys, *Leduc* v. *Ward*, 20 Q. B. D. 475.

[5] *Riley* v. *Horne*, 5 Bing., per Best, C.J., 224; *Smith* v. *Horne*, 8 Taunt. 144; *Newborn* v. *Just*, 2 C. & P. 76. But he may by *clear* agreement. *Manchester, Sheffield and Lincolnshire Ry. Co.* v. *Brown*, 8 App. Cas. 703; see *Czech* v. *General Steam Navigation Co.*, L. R. 3 C. P. 14; and *post*, 892. The effect of mere notice of exceptional circumstances not amounting to an ingredient in the contract of carriage was considered in *Horne* v. *Midland Ry. Co.*, L. R. 8 C. P. 131; *Elbinger Actien-Gesellschafft* v. *Armstrong*, L. R. 9 Q. B. 473; *The Parana*, 2 P. D. 118. *Ashendon* v. *L. & B. Ry. Co.*, 5 Ex. D. 190, is the case of an ambiguous agreement which was held not to be just and reasonable within sec. 7 of the Railway and Canal Traffic Act, 1854 (17 & 18 Vict. c. 31). *Shaw* v. *G. W. Ry. Co.*, [1894] 1 Q. B. 373. By the old common law a carrier could not exonerate himself from liability due to the negligence or misconduct of his own servants, at least if the statement in Doctor and Student, Dial. 2, c. 38, is adopted: "If he [the carrier] would per case refuse to carry it [the goods] unless promise were made unto him that he shall not be charged for no misdemeanour that should be in him, the promise were void, for it were against reason and against good manners, and so in all others cases like." This is the law to-day in the United States. 2 Kent, Comm. (13th ed.) 608 n. *x*.

[6] *Jackson* v. *Rogers*, 2 Show. (K.B.) 327; *Oxlade* v. *N. E. Ry. Co.*, 1 C. B. N. S. 454; *Johnson* v. *Midland Ry. Co.*, 4 Ex. 387.

[7] *Crouch* v. *L. & N. W. Ry. Co.*, 14 C. B. 255.

[8] 5 Bing. 224.

of the goods which he carries; that he is obliged for a reasonable reward to carry any goods to the place to which he professes to carry goods that are offered him, if his carriage will hold them, and he is informed of their quality and value; that he is not obliged to take a package the owner of which will not inform him what are its contents, and of what value they are; that if he does not ask for this information, or if, when he asks and is not answered, he takes the goods, he is answerable for their amount, whatever that may be; that he may limit his responsibility as an insurer, by notice; but that a notice will not protect him against the consequences of a loss by gross negligence."

This statement has, however, been contradicted in one respect, and expanded in another by subsequent decisions.

(1) Denied as to right of carrier to refuse to take a package. *Crouch* v. *L. & N. W. Ry. Co.*

(1) It has been contradicted as to the alleged right of the carrier to refuse a package without a disclosure of its contents. The Court of Common Pleas considered this point in *Crouch* v. *L. & N. W. Ry. Co.*,[1] and held that, as a general rule of law, there was not "a shadow of authority to sustain that position, except the *dictum* of Best, C.J., in *Riley* v. *Horne*; and it is a proposition which in its generality cannot stand the test of reasoning."[2] The Court must not be taken to deny that there are cases, as of imperfect packing or fraudulent concealment and the like, where the refusal of information of the contents of a package would, in the event of loss suffered by some casualty, exonerate the carrier from liability. "But, to say that the company may in all cases insist upon being informed of the nature and contents of every package tendered to them, as a condition of their accepting it, seems to me to be a proposition that is perfectly untenable."

The Nitro-glycerine case.

In a celebrated United States case[3] this point was carefully considered. The plaintiff's premises were greatly injured by an explosion of nitro-glycerine, which the defendants were carrying without knowledge of its dangerous properties, and in the ordinary way of business. The question raised was whether the innocent owner of the premises had an action against the carrier, who was ignorant of what he was carrying. The Supreme Court of the United States were of opinion that notice of the dangerous substance could not be imputed to the defendant; since, if it were, it would involve a right to refuse packages offered for carriage without knowledge of their contents, or a right to inspect the contents as a condition of carriage. On the authority of *Crouch* v. *L. & N. W. Ry. Co.*,[4] this position is held unsustainable. The only right of the carrier in this respect is to refuse to receive packages offered without being made acquainted with their contents when there is good ground for believing that they contain anything of a dangerous character. When, then, there are no attendant circumstances to awaken suspicion, there is no legal presumption of knowledge, and consequently no liability for the consequences of ignorance.[5]

1 14 C. B. 255.

2 Per Maule, J., 295.

3 *The Nitro-glycerine case*, 15 Wall. (U. S.) 524; *Cramb* v. *Caledonian Ry. Co.*, 19 Rettie, 1054.

4 14 C. B. 255, 291.

5 In *Reg.* v. *Lister*, Dears & B. (C. C.) 209, the keeping of large quantities of naphtha near a highway to the danger of the public was held to be an indictable offence, though no fire had taken place. In *Standard Oil Co.* v. *Tierney*, 36 Am. St. R. 395 there was held to be a duty on the shipper of dangerous or explosive substances to notify the carrier of the danger attending the handling of them, and if an injury results to the carrier's servants the shipper is liable for the injury thus sustained. If the carrier has knowledge of the dangerous character of any article he is carrying, there is also a duty

(2) Extended as to liability for amount. Judgment of Parke, B., in *Walker* v. *Jackson*.

(2) Again, Best, C.J.'s, statement has been expanded with regard to the proposition that if, when the carrier "asks and is not answered, he takes the goods, he is answerable for their amount, whatever that might be."[1] "I take it now to be perfectly well understood, according to the majority of opinions upon the subject," says Parke, B.,[2] "that if anything is delivered to a person to be carried, it is the duty of the person receiving it to ask such questions about it as may be necessary; if he ask no questions, and there be no fraud to give the case a false complexion on the delivery of the parcel, he is bound to carry the parcel as it is. It is the duty of the person who receives it to ask questions; if they are answered improperly, so as to deceive him, then there is no contract between the parties; it is a fraud which vitiates the contract altogether."

Facts in *Walker* v. *Jackson*.

The facts of the case eliciting these remarks were: A "light four-wheeled phaeton" was delivered so the defendant as carrier; for which the plaintiff paid the regular charge. The carriage was safely placed on the defendant's ferry-boat, and conveyed safely across the river. On commencing to draw it up the slip towards the quay on the other side, the defendant's servants were overpowered by its weight. The carriage ran down into the river, and jewellery and watches, packed in a box under the seat, which much increased its weight, but about which nothing was said, were injured. The Court held that the plaintiff's right of action was unaffected by his failing to disclose the fact that watches and jewellery were contained in the carriage, and that there was no conflict with the principle asserted in *Gibbon* v. *Paynton*;[3] for there the action of the plaintiff was misleading to the extent of being frandulent; he put valuable property in an old nail-bag stuffed with hay; while in the present case the plaintiff appeared not at all to have altered his normal mode of travelling. This decision settled the law and the older conflicting cases "have dropped from the hooks."[4]

Carrier insurer in all cases except two.

Carriers are "insurers in all cases except in two," says Lord Kenyon in *Hyde* v. *Trent and Mersey Navigation Co.*,[5] and in *Thorogood* v. *Marsh*,[6] Dallas, C.J., says: "The general law is clear. A common carrier is in every case an insurer against fire." A fire caused by lightning is the only exception;[7] and even when the destruction of the goods was brought about by a high wind communicating a fire from a distance, the Court of Appeals of New York held the carrier liable.[8]

on him to notify the fact to all who have to come into contact with it. In *Baldwin* v. *L. C. & D. Ry. Co.*, 9 Q. B. D. 584, it is said: "It was the duty of the plaintiffs to inform the company at the time, if special care were required in dealing with the rags"—the particular goods being carried in that case.

1 *Walker* v. *Jackson*, 10 M. & W. 161. Cp. *Lebeau* v. *The General Steam Navigation Co.*, L. R. 8 C. P. 88, 97. *Willoughby* v. *Horridge*, 12 C. B. 742, is the case of injury to a horse landing from a ferry-boat through a defective slip. *Yerkes* v. *Sabin*, 49 Am. R. 434, also deals with responsibility for horses; *Wight* v. *Chairman, &c. of Ohinemuri County*, 22 N. Z. L. R. 692, with the negligence of a ferryman. The first recorded instance of an action on the case was one for overloading a boat, whereby plaintiff's horse perished, Lib. Ass. 22 E. III. 94, pl. 41, summarised in Reeves, Hist. of the Eng. Law (2nd ed.), vol. iii. 89.

2 10 M. & W. 168, which was adopted *Lebeau* v. *The General Steam Navigation Co.*, L. R. 8 C. P. 88.

3 4 Burr. 2298. *Post*, 888.

4 Per Wright, J., *Shaw* v. *G. W. Ry. Co.*, [1894] 1 Q. B. 380.

5 5 T. R. 394. 6 Gow (N. P.), 105, 107.

7 *Gatliffe* v. *Bourne*, 4 Bing. N. C. 314, 3 M. & G. 643; 11 Cl. & F. 45.

8 *Miller* v. *Steam Navigation Co.*, 10 N. Y. 431.

How the carrier's liability as an insurer is restricted we shall now proceed to discuss, classifying his possible immunity under eight heads. Restrictions of carrier's liability.

(1) A common carrier is not liable for damage arising from any natural cause which the care and foresight reasonably to be expected from him would not provide against. In law such events are known as the acts of God. (1) Act of God.

In *Coggs* v. *Bernard*,[1] speaking of the common carrier, Holt, C.J., says: "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 be is chargeable.[2] And this is a politick 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 it in that point." Holt, C.J., in *Coggs* v. *Bernard*.

We must bear in mind that the *casus fortuitus*[3] of the civil law—what is termed in the common law inevitable accident—is divided into two classes; the first comprehending those occurrences which are occasioned by the elementary forces of nature unconnected with the agency of man or other cause; the second comprehending those which have their origin, either in whole or in part, in the agency of man, whether through commissions or omissions, nonfeasances or misfeasances, or in any other cause independent of the agency of natural forces. A common carrier is not liable for inevitable accident in the first of these senses, but he is liable in the second;[4] by the Roman law he was liable in neither. *Casus fortuitus* in the civil law.

The strictness with which inevitable accident in this second sense is excluded in English law is illustrated by Lord Mansfield, C.J., in *Forward* v. *Pittard*,[5] where he mentions the Gordon riots of 1780) as insufficient to excuse a carrier from delivering goods received in the way of his business. An even stronger case is put in *McArthur* v. *Sears*,[6] by Cowen, J.: "I believe it is a matter of history that inhabitants of remote coasts accustomed to plunder wrecked vessels have sometimes resorted to the expedient of luring benighted mariners *Forward* v. *Pittard*. *McArthur* v. *Sears*.

[1] 2 Ld. Raym. 909, 918. [2] See Y. B. 9 E. IV. 40, pl. 22.

[3] *Casus fortuitus quod fato contingit, cuivis diligentissimo possit contingere*, is the definition of the civil law: see Kent, C.J., in *Colt* v. *M'Mechen*, 6 Johns. (Sup. Ct. N. Y.) 168; and 3 Kent, Comm. 216. Colquhoun, Roman Civil Law, §§ 1534, 2162. *Casum fortuitum definimus omne quod humano coeptu prævideri non potest, nec cui proviso potest resisti. Casus fortuiti varii sunt: velut a vi ventorum, turbinum, pluviarum, grandinum, fulminum, æstus, frigoris et similium calamitatum quæ cœlitus immittuntur. Nostri vim divinam dixerunt. Græci θεοῦ βίαν. Item naufragia, aquarum inundationes, incendia, mortes animalium, ruinæ ædium, fundorum chasmata, incursus hostium, prædonum impetus. His adde damna omnia, a privatis illata quæ quominus inferrentur nullâ curâ cavere potest*: Vinnius, Partit. Juris. lib. ii. c. 66, cited by Cockburn, C.J., *Nugent* v. *Smith*, 1 C. P. D. 436. A landslip caused by an ordinary rainfall is not the "act of God": *Gleeson* v. *Virginia Midland Rd. Co.*, 140 U. S. (33 Davis) 435.

[4] *Forward* v. *Pittard*, 1 T. R., per Lord Mansfield, C.J., 34. [5] 1 T. R. 27.

[6] 21 Wend. (N. Y.) 198, where, also, the learned judge says: "A man hires his vessel to be repaired by a skilful workman, who makes a rudder apparently sound, but internally rotten, and the loss happens by reason of its breaking. The owner is liable though ignorant of the defect"; he cites as his authority for this *Backhouse* v. *Snead*, 1 Murph. (N. C.) 173.

by false lights to a rocky shore. Even such a harrowing combination of fraud and robbery would form no excuse."

Character of the intervention necessary to excuse.

What amount and character of intervention by natural agency suffices to bring a loss within the exception of "act of God" has been the subject of considerable difference of opinion. On the one hand, the intervention necessary has been narrowed down to such direct and violent and sudden acts of nature as could not by any amount of ability be foreseen, or, if foreseen, averted.[1] On the other, a claim has been made to comprehend as well any sudden and entire failure of the wind as any sudden gust of wind working loss to a vessel taken unprepared by it.[2] For this latter view the case of *Amies* v. *Stevens*[3] was vouched, where a hoy going through a bridge was driven against a pier by a sudden gust of wind, and sunk.

Amies v. *Stevens.*

Nugent v. *Smith*, view of Cockburn, C.J.

The legal definition of an "act of God" was elaborately canvassed in *Nugent* v. *Smith*.[4] Cockburn, C.J., adopting the view of Story,[5] held that losses by perils of the sea must arise from some overwhelming power which cannot be guarded against by ordinary exertions of human skill and prudence; and that the same is equally true with regard to acts coming within the designation of "act of God"; therefore, all that can be required of the carrier is that he should do all that is reasonably and practically possible to ensure the safety of the goods. If, despite the resort to all the means known to prudent and experienced carriers, a storm or other natural agency works damage, the carrier is protected; for then the injury may be said to come from the "act of God." Mellish and James, L.JJ., worded their conclusion as follows:[6] "The 'act of God' is a mere short way of expressing this proposition. A common carrier is not liable for any accident as to which he can show that it is due to natural causes directly and exclusively without human intervention, and that it could not have been prevented by any amount of foresight and pains and care reasonably to be expected from him."[7]

Proposition adopted by Mellish and James, L.JJ.

Even act of God will not in all cases protect from liability.

River Wear Commissioners v. *Adamson.*

The "act of God" will not in every case excuse from liability; for example, where an Act of Parliament provides that in the event of damage occurring the liability shall be discharged in any particular way the Act may indicate. "If," says Lord Cairns, C., in *River Wear Commissioners* v. *Adamson*,[8] "a duty is cast upon an individual by common law, the act of God will excuse him from the performance of that duty. No man is compelled to do that which is impossible. It is the duty of a carrier to deliver safely the goods entrusted to his care; but if in carrying them with proper care they are destroyed by lightning, or swept away by a flood, he is excused, because the safe delivery has, by the act of God, become impossible. If, however, a man contracts that he will be liable for the damage occasioned by a particular state of circumstances, or if an Act of Parliament declares that a man shall be liable for the damage occasioned by a particular state of circumstances, I know of no reason why a man should not be liable for the damage occasioned by that state of circumstances whether the state of circumstances is brought about by the act of man or by the act of God.

1 Per Brett, J., *Nugent* v. *Smith*, 1 C. P. D. 19, 34.

2 *Colt* v. *M'Mechen*, 6 Johns. (Sup. Ct. N. Y.), per Spencer, J., 165: "He caused the gust to blow in the one case; and in the other, the wind was stayed by him."

3 1 Str. 127. 4 1 C. P. D. 437. 5 Bailm. § 512 a. 6 1 C. P. D. 444.

7 See *Nichols* v. *Marsland*, 2 Ex. D. 5; and *Nitro-phosphate and Odam's Chemical Manure Co.* v. *London and St. Katharine Docks Co.*, 9 Ch. D., per Fry, J., 516.

8 2 App. Cas. 750. Lord Young is said to have defined "Act of God": "something which no reasonable man could ever expect": Obituary Notice in the *Scotsman*.

There is nothing impossible in that which, on such an hypothesis, he has contracted to do, or which he is by the statute ordered to do: namely, to be liable for the damages."

The law as thus stated can be traced back as far as the year 1537, where it is laid down with equal distinctness [1] by Fitzherbert and Shelley, JJ., that "the lessee is excused from the penalty; as if it were of an house which is burnt by lightning, or overturned by the wind, because it is the act of God, which cannot be resisted." [2]

Maule, J., takes exception to the verbal accuracy of the proposition. He considers that what is intended to be signified is that the casualty was not within the contract; for a man may by apt words bind himself or warrant that it shall rain to-morrow and, if not, he pays damages.[3]

(2) The second exception to a common carrier's liability is for acts "of the enemies of the King." (2) Acts of the enemies of the King.

By "the enemies of the King" are not to be understood mere private depredators, who, in a sense, are at war with society, but the public enemies of the Sovereign of the carrier, whether that Sovereign be an Emperor, a Queen, or a reigning Duke.[4] The ground of this exception is probably the inability of process to issue against the wrongdoer; and, as the King's Courts could not assist the bailee in his remedy, so it was held inequitable to assist the bailor.[5] Thus, in *The Marshal's case* [6] an action of debt was brought against the Marshal of the Marshalsea for an escape of a prisoner. The plea was that enemies of the King broke into the prison and carried off the prisoner against the will of the defendant. The Court distinguished, saying if alien enemies of the King, for instance the French, released the prisoner, or perhaps if the burning of the prison gave him a chance to escape, the excuse would be good, "because then (the defendant) has remedy against no one." On the other hand, if subjects of the King broke the prison, the defendant would be liable, for they are not enemies, but traitors.

Losses occasioned by robbers or rioters are not regarded as losses by a public enemy, though there must be a time when riot or insurrection may be merged in actual belligerency.[7] Public enemies are not merely those who, being the agents of a *de facto* Government, are engaged in war with the State of which the carrier is a member,[8] Public enemies.

[1] Dyer, 33, Case (16).

[2] Cp. Aleyn, 26. See, also *Viterbo* v. *Friedlander*, 120 U. S. (13 Davis) 707.

[3] *Canham* v. *Barry*, 15 C. B., 597, 619; *Baily* v. *De Crespigny*, L. R. 4 Q. B. 180.

[4] *Russell* v. *Niemann*, 17 C. B. N. S. 163, recognised and approved in the H. of L. in the unreported case of *Taylor* v. *Perrin*; *De Laurier* v. *Wyllie*, 17 Rettie, 167, 189; *Serraino* v. *Campbell*, [1891] 1 Q. B. 283; *The Heinrich*, L. R. 3 A. & E. 424.

[5] Holmes, The Common Law, 177, 201.

[6] Y. B. 33 H. VI. 1, pl. 3.

[7] Y. B. 33 Henry VI. 1, pl. 3. In an Anonymous case, in Hil. 38 Eliz., Owen, 58, Gawdy, J., says: "If rebels break a prison whereby the prisoners escape, yet the gaoler shall be responsible for them; as it is in the 33 H. VI." On which Popham, C.J., remarks: "In that case the gaoler hath remedy over against the rebels, but there is no remedy over in our case," *i.e.*, where goods were taken at sea by pirates. To this Gawdy replies: "Then the diversity is when the factor is robbed by pirates and when by enemies." Popham, C.J., rejoins: "There is no difference." In *Pickering* v. *Barkley*, Style, 132, Rolle, J., said: "I suppose that pirates are perils of the sea; and to this purpose a certificate of merchants was read in Court that they were so esteemed amongst merchants. Yet the Court desired to have Granly, the Master of the Trinity House, and other sufficient merchants, to be brought into the Court to satisfy the Court *viva voce* Friday next following. Judgment was given this term *nil capiat per billam*, because the taking by pirates are accounted perils of the seas." See also *Barton* v. *Wolliford*, Comb. 56; *Paradine* v. *Jane*, Aleyn, 26. Confederate troops were held public enemies within the meaning of the law, in *Philadelphia, &c. Rd. Co.* v. *Harper*, 29 Md. 330.

[8] *Gage* v. *Tirrell*, 91 Mass. 299.

Pirates.

since the designation of public enemy is held to include pirates;[1] and this held good in the civil law as well.[2] Robbery within the realm is not an exception from the carrier's liability; and the definition of piracy[3] is the committing those acts of robbery and depredation upon the high seas which, if committed upon land, would have amounted to felony.[4] The distinction has probably arisen from the inability of any nation to keep a maritime police to perform at sea like functions to its municipal police at home; whence robbery on the high seas, from the greater facilities for it and the less means of prevention against it, has come to be differently regarded from robbery within the realm. Thus it is that pirates have ever been regarded in the light of public enemies, as Lord Bacon says:[5] "*Indubitatum semper fuit, bellum contra piratas geri posse per nationem quamcumque, eo quod iis minime infestatum et levium. Vera enim causa hujus rei hæc est, quod piratæ communes humani generis hostes sint; quos idcirco omnibus nationibus persequi incumbit, non tam propter metus proprios quam respectu fœderis inter homines sociales. Sicut enim quædam sunt fœdera in scriptis et in tractatus redacta contra hostes particulares inita, ita naturalis et tacita confœderatio inter omnes homines intercedit contra communes societatis humanæ hostes.*"

Lord Bacon's view.

Morse v. *Slue*.

Morse v. *Slue*[6] might, at first sight, seem an authority pointing the other way, and importing a liability on the part of the carrier even in the case of loss from pirates. A special verdict found that the defendant's ship lay in the Thames with goods of the plaintiff's on board, and a sufficient number of men to look after them, when, in the night, eleven persons, on pretence of pressing seamen for the King's service, came on board and took the goods. In an action to recover for the loss of the goods, it was argued that the defendant was a common carrier, and so obliged to keep the goods at his peril; to which it was answered that, by the civil law, if goods were taken by pirates, the master should not answer for them. Other points were taken in argument, and "the Court inclined strongly for the defendant, there not being the least negligence in him";[7] subsequently Hale, C.J.,[8] distinguished the case from one of piracy; "This case," said he, "is not to be measured by the rules of the Admiral law, because the ship

Hale, C.J.'s, distinction.

[1] Story, Bailm. § 25.

[2] *Si quid naufragio, aut per vim piratarum perierit non esse iniquum exceptionem ei dari*: D. 4, 9, 3, § 1.

[3] Russell, Crimes (5th ed.), vol. i. 253. See *United States* v. *Smith*, 5 Wheat. (U. S.) 153, a judgment by Story, J., and a note displaying extraordinary learning and research by the reporter, 163–180. Also *Dawson's case*, 13 How. St. Tr. 451, Sir Charles Hedges's charge to the grand jury, 454. In *Bonnet's case*, 15 How. St. Tr. 1234, *pirata* is said to be derived from πειράω, transire, *a transeundo mare*, and anciently to have been taken "in a good and honourable sense and signified a maritime knight and an admiral or commander at sea"; citing Spelman, Gloss. *sub voce*; see also Du Cange, Gloss. *sub voce*. Bewes, Lex Mercatoria (6th ed.), vol. i. 351. The meaning of the word "pirate" must have degenerated, for in Asser's Life of Alfred in the following: *Rex Alfredus jussit cymbas et galeas, i.e. longas naves fabricari per regnum, ut navali prælio hostibus advertantibus obviaret, impositisque piratis in illis vias maris custodiendas commisit*. Vin. Abr. Pirates and Piracy.

[4] *The Magellan Pirates*, 1 Ecc. & Ad. (Spinks) 81, 84; Forsyth, Cases and Opinions on Constitutional Law, 90, 116; Wheaton, International Law (Lawrence's ed.), 246 *cum notis*.

[5] Dialogue, De Bello Sacro, Bacon's Works (ed. 1803), vol. x, 313, 314; in English (Spedding's ed.), vol. vii. 32.

[6] 1 Vent. 190, 238; Sir T. Raym. 220.

[7] 1 Vent. 190; *Barclay* v. *Cuculla y Gana*, 3 Doug. 389.

[8] 1 Vent. 238; or according to 1 Mod. 85, n. (*a*): "The master could not avail himself of the rules of the civil law by which masters are not chargeable *pro damno fatali*." Cp. *Sutton* v. *Mitchell*, 1 T. R. 18.

was *infra corpus comitatus*." That the robbery was from a ship was thus not enough to constitute piracy, it was necessary besides that the crime should be committed on the high seas.

Carrier must use his best means to protect the goods even in the case of a public enemy.

A carrier is not able to excuse himself for the loss of goods entrusted to him to be carried by the mere suggestion of coercive force. Craven and pusillanimous yielding to a public enemy no more excuses than submission to an ordinary and preventible evil. The carrier is bound to use due diligence to prevent destruction and loss. If the journey is a hazardous one, the carrier must provide a man of good judgment to take charge of the goods, and the man so appointed is bound to act as an average prudent man would do in the transaction of his own business, and that ordinary diligence which the law demands must be measured by reference to the surroundings in which it is involved.[1]

(3) Where loss or deterioration of goods arises from inherent defect.

(3) The carrier is excused where loss or deterioration of the goods arises from inherent defect.

Blower v. *G. W. Ry. Co.*

The law in England was thus laid down in two almost simultaneous cases, *Blower* v. *G. W. Ry. Co.*,[2] and *Kendall* v. *L. & S. W. Ry. Co.*[3] In the former a hullock delivered to the defendants to be carried escaped from the truck in which it was placed, and was killed, without any negligence on the part of the defendants. Willes, J., cited with approval the passage dealing with the subject in Story on Bailments,[4] "where the authorities are all collected." "Although," says Story, "the rule is thus laid down in general terms at the common law, that the carrier is responsible for all losses not occasioned by the act of God or of the King's enemies; yet it is to be understood in all cases that the rule does not cover any losses, not within the exception, which arise from the ordinary wear and tear and chafing of the goods in the course of their transportation, or from their ordinary loss, deterioration in quantity and quality in the course of the voyage, or from their inherent natural infirmity and tendency to damage, or which arise from the personal neglect, or wrong, or misconduct of the owner or shipper thereof. Thus, for example, the carrier is not liable for any loss or damage from the ordinary decay or deterioration of oranges or other fruits in the course of the voyage from their inherent infirmity or nature,[5] or from the ordinary diminution or evaporation of liquids,[6] or the ordinary leakage from the casks in which the liquors are put in the course of the voyage, or from the spontaneous combustion of goods, or from their tendency to effervescence or acidity, or from their not being properly put up and packed by the owner or shipper; for the carrier's implied obligations do not extend to such cases."[7]

Story, cited by Willes, J.

Kendall v. *L. & S. W. Ry. Co.*

In *Kendall* v. *L. & S. W. Ry. Co.*, plaintiff's horse was conveyed by the defendants as carriers, and, at the end of the journey, was found to be injured. There was no negligence. The Court of Exchequer directed the verdict to be entered for the defendant. "There is no doubt in this case," said Bramwell, B., "that the horse was the immediate cause of its own injuries. That is to say, no person got into

Judgment of Bramwell, B.

[1] *Holladay* v. *Kennard*, 12 Wall. (U. S.) 254, case of a stage coach traversing the Indian country.

[2] L. R. 7 C. P. 655.

[3] L. R. 7 Ex. 373.

[4] § 492 a.

[5] See *Ship Howard* v. *Wiseman*, 18 How. (U. S.) 231, where the cargo was potatoes.

[6] As to an imperfection in a hung for which the carrier was held not liable, see *Hudson* v. *Baxendale*, 2 H. & N. 575.

[7] Cp. Angell, Carriers (5th ed.), §§ 210, 211, 212, 214, 214 a; Redfield, Carriers, § 231 *et seqq.*, Internal Decay. Bad Package. For carrier's duty as to perishable goods, *e.g.*, butter, *Beard* v. *Illinois Central Ry. Co.*, 18 Am. St. R. 381.

the hox and injured it. It slipped, fell, or kicked, or plunged, or in some way hurt itself. If it did so from no cause other than its inherent propensities, 'ite proper vice'—that is to say, from fright, or temper, or struggling to keep its legs—the defendants are not liahle. But if it eo hurt itself from the defendants' negligence, or any misfortune happening to the train, though not through any negligence of the defendants, as, for instance, from the horse-box leaving the line owing to some obstruction maliciously put on it, then the defendants would, as insurers, be liahle. If perishahle articles—say, eoft fruit—are damaged hy their own weight and the inevitahle ehaking of the carriage, they are injured through their own intrinsic qualities. If through pressure of other goods carried with them, or by an extraordinary shock or shaking, whether through negligence or not, the carrier is liahle." [1]

Nugent v. *Smith.*

In *Nugent* v. *Smith*,[2] in the Court of Appeal, these two caeee are referred to as authoritative expositions of the law on the suhject of loss or deterioration of goods arising from inherent defect. Where the negligence of the defendant or his eervants hae hrought on the peril, the damage is attrihuted to the hreach of duty, and not to the vice.[3]

Law as settled in America.

In America the law is settled on similar lines, and is authoritatively expounded in the cases of *Nelson* v. *Woodruff* [4] and *The Brig Collenberg*.[5] The rule is thus etated in the Supremo Court of the United States: "If the damage has proceeded from an intrinsic principle of decay naturally inherent in the commodity itself, whether active in every eituation or only in the confinement and closeness of the ship, the merchant must bear the loss as well as pay the freight; as the masters and owners are in no fault, nor does their contract contain any insurance or warranty against euch an event." [6] This covers, not only loss hy the decay of fruit,[7] hut also damage caused hy the effect of that condensation of vapour in the hold of a ehip caused hy transition from a warm to a cold climate, and called "sweat." In the event of this happening, if there is no defect in the ship or its arrangements and navigation, the carrier is not liahle.[8] Neither is the carrier liahle for loss caused hy the activity of an inherent tendency, as, for instance, of some liquors to effervesce.[9]

Richardson v. *N. E. Ry. Co.*

To this heading may he refeired *Richardson* v. *N. E. Ry. Co.*[10] A valuahle greyhound hitch was delivered to the servants of a railway company, who were not common carriers of dogs. At the time of the delivery the greyhound had on a leather collar, with a strap attached.

[1] In *Ohrloff* v. *Briscall, The Hélène*, L. R. 1 C. P. 231, ignorance of shipowners as to the latent effect of heat in storing casks of oil with wool and rags was not held to affect them with liability when oil merchants of great experience were also ignorant.

[2] 1 C. P. D. 443.

[3] *Phillips* v. *Clark*, 2 C. B. N. S. 156; *Gill* v. *Manchester Ry. Co.*, L. R. 8 Q. B. 186; *Steel* v. *State Line Steamship Co.*, 3 App. Cas. 72, 87. Cp. *Trainor* v. *The Black Diamond Steamship Co.*, 16 Can. S. C. R. 156.

[4] 1 Black (U. S.) 156.

[5] *L.c.* 170.

[6] Per Nelson, J., in *Clark* v. *Barnwell*, 12 How. (U. S.) 282; for this he cites *Davidson* v. *Guynne*, 12 East, 381; *Sheels* v. *Davies*, 4 Camp. 119, *sub nom.* *Shields* v. *Davis*, 6 Taunt. 65. See *Trainor* v. *The Black Diamond Steamship Co.*, 16 Can. S. C. R. 156.

[7] *The Brig Collenberg*, 1 Black (U. S.), 170; *Ship Howard* v. *Wiseman*, 18 How. (U. S.) 231.

[8] *Clark* v. *Barnwell*, 12 How. (U. S.) 272.

[9] *Warden* v. *Greer*, 6 Watts (Pa.), 424. Cp. *Johnson* v. *Chapman*, 19 C. B. N. S. 563; *Pirie* v. *Middle Dock Co.*, 44 L. T. 426.

[10] L. R. 7 C. P. 75. Cp. *Harpers* v. *Great North of Scotland Ry. Co.*, 13 Rettie, 1139, *Phipps* v. *New Claridge's Hotel Co.*, 22 Times L. R. 49.

In the course of the journey it became necessary to remove the greyhound from one train to another, which had not come up at the time the dog was removed. While waiting, she was tied up to the platform of the company's station, and, while so fastened, slipped her head from the collar, ran on the line, and was killed. In the argument, a ruling of Lord Ellenborough, C.J.'s, in *Stuart* v. *Crawley*,[1] was much pressed. Plaintiff's servant took a dog to the warehouse of the defendant, who was a common carrier. The dog had a string about his neck, and the defendant's book-keeper gave a receipt acknowledging the delivery. The dog was tied by the cord to a watch-box, but, within half an hour afterwards, slipped his head through the noose, and was lost. The defendant alleged negligence of the plaintiff based on the insecurity of the fastening. Lord Ellenborough held the defendants liable. "The case," he said,[2] "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."

Stuart v. *Crawley.*

Lord Ellenborough's statement of the law.

In giving judgment in *Richardson* v. *N. E. Ry. Co.*,[3] Willes, J., pointed out that the facts were "obviously different" from what they were in *Stuart* v. *Crawley*, as the greyhound was fastened by a strap, which indicated that that was the thing by which it 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." Though the first point, that the defendants were not common carriers, would suffice to discharge them, in the absence of negligence—which does not appear to have been shown—the second ground, that the course adopted by the servant in fastening the dog up with a strap, that had the effect of misleading, would have been good, even had the defendants been common carriers, on the analogy of the cases, cited in *Stuart* v. *Crawley*,[4] of goods badly packed; and it is that view that is here in point.

Willes, J.'s, judgment.

If, however, the defect in the packing were visible—as if casks of wine or spirits were delivered in a manifestly unsafe condition, so that, unless coopered, the contents would leak out—the defendant would not be excused; for he is an insurer, and, as such, is bound to deliver the goods in the state in which he received them. It is otherwise if there is no omission or negligence on the carrier's part.[5]

Visible defect will not exclude carrier's liability.

[1] 2 Stark. (N. P.) 323. [2] *L.c.* 324. [3] L. R. 7 C. P. 82.

[4] 2 Stark. (N. P.) 323. The liability of a railway company to strangers for not taking care of dogs being carried by them, through which want of care they escape and bite strangers, is discussed, *Gray* v. *North British Ry. Co.*, 18 Rettie, 76. Cp. *Dickson* v. *G. N. Ry. Co.*, 18 Q. B. D. 176.

[5] *Hudson* v. *Barendale*, 2 H. & N. 575.

Damage caused partly by plaintiff's want of care.

But if the injury were partly caused by the plaintiff's want of care, the defendant would not be excused; though the jury would have to consider its effect on the damages.[1] This case differs from the case previously touched on, where negligence of the defendant and the vice of a living animal co-operate to produce injury.[2] There, if the negligence were absent, the vice might be quiescent, and the plaintiff can recover for the whole loss. In the present case, the plaintiff's default operates in any event; and hence should go in reduction of, though it will not excuse, the defendant's liability.[3]

Perishable goods damaged by salt water.

Duty of master of ship in dealing with cargo.

With regard to perishable goods so damaged by salt water that they cannot be taken forward to the port of discharge so as to earn the freight, it becomes the duty of the master to save and dry the cargo, even as between himself and his owner, though the expense of his performing the duty falls upon the cargo saved.[4] He is at liberty, on occasion arising, to tranship, and will be protected if the jury find it to be the proper course of dealing with the goods; although he is not bound to do so.[5] There is not merely a power, but a duty, for the master, as representing the shipowner, to take reasonable care of the goods entrusted to him; not only in doing what is necessary to preserve them on board the ship during the ordinary incidents of the voyage, but also in taking reasonable measures to check and arrest their loss, destruction, or deterioration by reason of accidents, for the necessary effects of which there is, by reason of an exception in the bill of lading, no original liability.[6] In some cases, the master may even be bound to sell; but to justify doing so, he must establish, first, a necessity for the sale,[7] and, secondly, inability to communicate with the owner and to obtain his directions; and this necessity cannot be established without showing that every reasonable exertion was used to forward the goods, and that they were not able to be conveyed to their destination as merchantable articles or without an expenditure in excess of their value.[8]

Johnson v. *N. E. Ry. Co*

Under this head of loss or deterioration from inherent defect may be noticed the case of *Johnson* v. *N. E. Ry. Co.*,[9] an action to recover a locomotive engine entrusted to the defendants to be carried by them under a special contract providing for conveyance on the engine's own wheels, and under steam. A bolt giving way, prevented it being forwarded further by the method contracted for. The plaintiffs contended that the defendants had undertaken the carriage, and that if it could not be conveyed in the stipulated mode, defendants were bound to forward it by some other mode. The defendants contended that the breakdown of the engine constituted an exception to their duty to deliver. This view was approved by the majority of the

1 *Higginbotham* v. *G. N. Ry. Co.*, 10 W. R. 358; *Cox* v. *L. & N. W. Ry. Co.*, 3 F. & F. 77; *Barbour* v. *S. E. Ry. Co.*, 34 L. T. (N. S.) 67.

2 *Gill* v. *Manchester Ry. Co.*, L. R. 8 Q. B. 186.

3 See as to improperly packed goods, *Baldwin* v. *L. C. & D. Ry. Co.*, 9 Q. B. D. 582. Cp. *The Fifin Maggiore*, L. R. 2 A. & E. 106.

4 *Mordy* v. *Jones*, 4 B. & C. 394; *Philpott* v. *Swann*, 11 C. B. N. S. 270, 281; *Notara* v. *Henderson*, L. R. 7 Q. B. 225.

5 Per Patteson, J., *Tronson* v. *Dent*, 8 Moo. P. C. C. 419, 455.

6 *Cargo ex Argos*, L. R. 5 P. C. 134, 165; *Tronson* v. *Dent*, 8 Moo. P. C. C. 419.

7 *Australasian Steam Navigation Co.* v. *Morse*, L. R. 4 P. C. 222; *Acatos* v. *Burns*, 3 Ex. D. 282.

8 *Atlantic Mutual Insurance Co.* v. *Huth*, 16 Ch. D. 474. For what constitutes total loss on an insurance of a cargo of fruit, see *Dyson* v. *Rowcroft*, 3 B. & P. 474; approved *Cologan* v. *London Assurance Co.*, 5 M. & S. 447, 455; *Rankin* v. *Potter*, L. R. 6 H. L. 83, 119.

9 5 Times L. R. 68 (C. A.). Cp. *The Freedom*, L. R. 3 P. C. 594, 600.

Court of Appeal; by Bowen, L.J., because there is an implied exception to the duty of common carriers in the case of inherent defects; and by Lord Esher, M.R., on the ground that the contract was a special one, and that even then there was an implied exception in the case that had happened. Lord Halsbury dissented, holding, on the facts, that the defendants were bound to make delivery.

Lord Halsbury, C.

(4) The common carrier is not liable for loss of goods where the goods are of a dangerous nature, or, being apparently safe, require for any reason special precautions to be used in their carriage; unless the fact of such dangerous or special nature is communicated to the carrier, so that he may adopt the necessary precautions.[1]

(4) Where goods are of a dangerous nature which is not apparent.

This is merely an affirmation that contributory negligence is a defence in the case of common carriers as in other relations. Thus, where the owner of goods selects the carriage they are to be conveyed in, or loads them in a carriage allotted to him by the carrier, the carrier is not liable for loss arising from defects in the carriage which were pointed out before choosing;[2] or if, in the second instance, the loss arises from defects in the loading, which the owner of the goods has himself undertaken;[3] for in both cases the act of the owner of the goods has varied the duty that else the common law would have imposed. A passage from the judgment of Willes, J., in *Talley* v. *G. W. Ry. Co.*,[4] is much in point. "If the passenger packed up articles liable to ignition by friction, and by the shaking of the carriage they caught fire; if a passenger were to look on whilst his luggage was being taken away or rifled, when he might be reasonably expected to interfere; if he were to expose small articles of apparent great value in a conspicuous part of the carriage and leave them there while he unreasonably absented himself and they were in consequence purloined, he would have no more just reason for complaint against the carrier than if he had upon some false alarm thrown his property out of the window." A little further on he states the principle of all these cases: "There is, moreover, a general principle applicable to these as to all bailments—viz., that the bailee shall not be heard to complain of loss occasioned by his own fault." Though verbally applied to passengers' luggage, the principle is of general application.

Willes, J., in *Talley* v. *G. W. Ry. Co.*

General principle.

By the Railway Clauses Act, 1845, s. 105,[5] there is a statutory prohibition, imposing a fine of £20 for its violation, against sending goods of a dangerous nature without distinctly marking it on the outside of the package containing them, and giving notice thereof to the carrier. If the sender has received the goods without a knowledge of their contents, and forwarded them without negligence and without acquiring a knowledge of their contents, he is not within the purview of the Act.[6]

Railway Clauses Act, 1845, s. 105.

[1] *Brass* v. *Maitland*, 6 E. & B. 470; *Readhead* v. *Midland Ry. Co.*, L. R. 2 Q. B., per Blackburn, J., 436; L. R. 4 Q. B. 379; *Hutchinson* v. *Guion*, 5 C. B. N. S. 149; *Alston* v. *Herring*, 11 Ex. 822; *Pierce* v. *Winsor*, 2 Sprague (U. S. Adm.), 35; Angell, Carriers (5th ed.), § 212, n. (*c*). *Williams* v. *The East India Co.*, 3 East, 192, is an action by a shipowner against the charterer for the loss of the ship through the shipping of dangerous goods without notice. *East Indian Ry. Co.* v. *Kalidas Mukerjee*, [1901] A. C. 396. "Dangerous goods" include "prohibited or uncustomed goods by which the ship may be subject to detention or forfeiture": *Dunn* v. *Bucknall*, [1902] 2 K. B. 614, 621. Cp. *Cramb* v. *Caledonian Ry. Co.*, 19 Rettie, 1054; *Standard Oil Co.* v. *Tierney* 36 Am. St. R. 505.

[2] *Harris* v. *Northern Indiana Rd. Co.*, 20 N. Y. 232.

[3] *East Tennessee Rd.* v. *Whittle*, 27 Ga. 535, cited Angell, Carriers (5th ed.), § 214 n. *a*.

[4] L. R. 6 C. P. 51.

[5] 8 & 9 Vict. c. 20.

[6] *Hearne* v. *Garton*, 2 E. & E. 66. As to the restrictions on the carriage of

Acatos v. *Burns.*

In *Acatos* v. *Burns* [1] the contention was that *Brass* v. *Maitland* [2] showed that there is a warranty by the shipper that goods shipped have no concealed defect at the time of shipment; but the Court of Appeal negatived this, and distinguished that case on the ground that the nature of the danger was as much known to the one side as to the other. The rule of law to be drawn from the decision is thus stated in the head-note: "Where the owner of a vessel has an opportunity of examining goods shipped on board of her, no warranty on the part of the owner of the goods can be applied that they are fit to be carried on the voyage." It is doubtful whether the expressions in the judgments go further than to deny that goods shipped are taken to be warranted free from concealed defect, and whether an opportunity of examining goods would in all cases be conclusive against the ship-owner's [3] liability in respect of them.

Rule of law.

(5) Where there has been fraud.

(5) The common carrier is not liable for a loss where there has been fraud on the part of the owner of the goods in the constitution of the contract, "for the common law abhors fraud, and will not fail to overthrow it in all forms, whether new or old, in which it may be manifested."

As the carrier incurs great responsibility so he has a right to look for such an amount of good faith from the owner of the goods as will enable him to decide on the care that the charge of the goods requires, and the fair remuneration he should receive. The law on this point dates back a great while—so long ago as 1649, to *Kenrig* v. *Eggleston*.[4] The plaintiff delivered a box to the carrier's porter saying "there was a book and tobacco in the box." In truth it contained £100 in money besides. Rolle, C.J., "directed that although the plaintiff did tell him of some things in the box only, and not of the money, yet he must answer for it; for he need not tell the carrier all the particulars in the box. But it must come on the carrier's part to make special acceptance. But in respect to the intended cheat to the carrier, he told the jury they might consider him in damages, notwithstanding, the jury gave £97 against the carrier, for the money only (the other things being of no considerable value), abating £3 only for carriage. *Quod durum videbatur circumstantibus.*" On which last remark Lord Mansfield, C.J.'s, comment [5] is that as the facts pointed to fraud he "should have agreed in opinion with the *circumstantibus.*"

Kenrig v. *Eggleston.*

Direction of Rolle, C.J.

Lord Mansfield's comment in *Gibbon* v. *Paynton.*

In *Tyly* v. *Morrice*,[6] two bags of money, sealed up, were delivered to the carrier, with a declaration that they contained £206; for which sum he gave a receipt. The bags having been lost, the carrier paid the £206; it then appeared that they really contained £450; for the difference between which sum and the sum paid an action was brought. The Chief Justice told the jury that, "since the plaintiffs had taken this course to defraud the carrier of his reward, they had thereby barred themselves of that remedy which is founded only on the reward."

Tyly v. *Morrice.*

Gibbon v. *Paynton.*

The cases are commented on by Lord Mansfield, C.J., in *Gibbon* v. *Paynton*,[7] where plaintiff sent £100 by the defendant's coach hid in

dangerous goods, see 36 & 37 Vict. c. 85, ss. 23, 28, extended 38 & 39 Vict. c. 17, s. 42. See now Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), ss. 446–450. As to gunpowder, &c., Explosives Act, 1875 (38 & 39 Vict. c. 17); 39 & 40 Vict. c. 36, s. 139; The Petroleum Act, 1871 (34 & 35 Vict. c. 105), amended by 42 & 43 Vict. c. 47; 44 & 45 Vict. c. 67.

1 3 Ex. D. 282. 2 6 E. & B. 470. 3 See *ante*, 870, 883.

4 Aleyn, 93. 5 *Gibbon* v. *Paynton*, 4 Burr. 2301.

6 Carthew (K. B.) 485. There is a note: "The case of *Kenrigg* v. *Eggleston* was cited as an authority for the plaintiffs: *sed non allocatur*; for the Court held that case different from the present cases." 7 4 Burr. 2298.

hay in an old mail-bag. "The bag and the hay arrived, but the money was gone." In argument, *Titchburne* v. *White*,[1] tried at Guildhall by King, C.J., was cited,[2] where the Chief Justice held "that if a box is delivered generally to a carrier and he accepts it, he is answerable, though the party did not tell him there is money in it." Lord Mansfield said:[3] "This action is brought against the defendant upon the foot of being a common carrier. His warranty and insurance is in respect of the reward he is to receive; and the reward ought to be proportionable to the risque. If he makes a greater warranty and insurance, he will take greater care, use more caution, and be at the expense of more guards or other methods of security; and therefore he ought in reason and justice to have a greater reward. Consequently, if the owner of the goods has been guilty of a fraud upon the carrier, such fraud ought to excuse the carrier. . . . And if he has been guilty of a fraud, how can he recover? *Ex dolo malo non oritur actio.*" *Titchburne v. White.*

In *Gibbon* v. *Paynton*[4] there was fraud. In *Miles* v. *Cattle*[5] the plaintiff was entrusted with a £50 note to deliver to the defendant for carriage. Instead of doing so, he slipped it into his own bag of clothes. The bag containing the note was stolen. He was held entitled to recover for the loss of the bag and the clothes, but not for the note; since, in violation of his trust, "the plaintiff thought proper not to deliver the parcel to the defendants, but to deposit it in his own bag; thereby depriving Garbut [the owner] of any remedy he might have had against the defendants in case the parcel had been lost by them, and becoming himself a wrongdoer towards the defendants by depriving them of the sum they would otherwise have earned for the carriage of the parcel."[6] *Miles v. Cattle.*

The reasoning of this case, if sound, is supersubtle; the placing a £50 note of anybody's in a clothes-bag for conveyance may well be such negligence as to disentitle the owner of the bag to recover. But to go into questions of ownership at all or of the plaintiff's duty to the owner is hazardous. The plaintiff had possession, or, in Lord Ellenborough's words in *Rooth* v. *Wilson*, an "interest in the integrity and safety" of the property, for which he was liable to answer over to his bailor,[7] and this, and not considerations of the plaintiff's conduct previously to the defendant's accepting the mandate out of which the claim arose, is the correct test to apply to ascertain his right to sue.[8] Criticised.

Orange County Bank v. *Brown*[9] is like *Miles* v. *Cattle* in its facts. The plaintiff, a passenger by the defendants' boat—the defendants were common carriers of passengers—had with him as baggage an ordinary travelling trunk containing a very considerable sum of money. The trunk and its contents were lost. On an action being brought, it was held that as a passenger the plaintiff was merely entitled to have his "baggage"[10] conveyed; that the sum of money in the trunk could not *Orange County Bank v. Brown.*

1 1 Str. 145. In *Malpica* v. *McKown*, 1 La. Rep. 248, the principle is doubted, but the conclusion is come to that it is the better opinion that the master would be responsible for a trunk or parcel received on board a vessel without information as to its contents unless there is notice given disclaiming responsibility. See also *Araujo* v. *Curral*, 1 La. Rep. 528.

2 4 Burr. 2300. *Humphreys* v. *Perry*, 148 U. S. (41 Davis) 627.

3 4 Burr. 2300. 4 *L.c.* 2298.

5 6 Bing. 743. Cp. *Bank of Kentucky* v. *Adams Express Co.* 93 U. S. (3 Otto) 174.

6 *L.c.*, per Tindal, C.J., 747. 7 1 B. & Ald. 62. See *ante*, 733.

8 Story, Bailm. § 152, disapproves the grounds of the decision in *Miles* v. *Cattle*.

9 9 Wend. (N. Y.) 85.

10 As to what is "baggage," see *Phelps* v. *L. & N. W. Ry. Co.*, 19 C. B. N. S. 321;

be regarded as baggage, and therefore the plaintiff could not recover; because his conduct in representing the trunk and its contents as mere baggage, when in fact he was conveying a large portion of very valuable property, was not fair; for while it deprived the defendants of the reward they were entitled to for the carriage of such property, it exposed the carrier to greater risks than he contracted to encounter, and was only carried by him in so far as he was a victim to a deception practised by the plaintiff. If *Miles* v. *Cattle* had been decided on the ground of the unfair enhancement of the risk, the decision would have been unimpeachable; for the law similarly regards conduct actually fraudulent and conduct the effect of which is fraudulent by wilfully depriving the carrier of his rights, though no actual dishonest intent may be present.[1]

(6) Where delay is beyond carrier's control.

(6) The common carrier is not liable for delay in delivery arising from circumstances beyond his control.

Briddon v. *G. N. Ry. Co.*

The earliest case on this point, *Briddon* v. *G. N. Ry. Co.*,[2] has been referred to the "act of God." A heavy snowstorm obstructed the defendants' line, and impeded the delivery of cattle, though "extraordinary effort" would have enabled the delivery to have been made. The Court held that extraordinary effort was not in the circumstances to be expected from the company, whose contract was only to carry "without delay and in a reasonable time under ordinary circumstances." This regards only that which is ordinary and does not exact extraordinary effort.

Taylor v. *G. N. Ry. Co.*

Common carrier's duty to delivery independent of time of delivery.

In the following case of *Taylor* v. *G. N. Ry. Co.*[3] delay took place through the negligence of another company who had running powers over the defendants' line. The county court judge held the defendants responsible, but the Court of Common Pleas reversed his decision, and held[4] that a common carrier's duty to deliver safely has nothing to do with the time of delivery, which is a matter of contract; "the first duty of a common carrier is to carry the goods safely, and the second to deliver them, and it would be very hard to oblige a carrier, in case of any obstruction, to risk the safety of the goods in order to prevent delay. His duty is to deliver the goods within a reasonable time, which is a term implied by law in the contract to deliver; as Tindal, C.J., puts it when he says 'the duty to deliver within a reasonable time being merely a term ingrafted by legal application upon a promise or duty to deliver generally'";[5] and "reasonable time" is measured by reference to all the circumstances of the case. *Baldwin* v. *L. C. & D. Ry. Co.*,[6] was a case of delay, where the county court judge found "that the proximate cause of the loss of the goods was the improper condition in which they were packed, and not the delay." Had the packing been proper, he would have had to find, as a question

Hudston v. *Midland Ry. Co.*, L. R. 4 Q. B. 366; *Macrow* v. *G. W. Ry. Co.*, L. R. 6 Q. B. 612; *Cusack* v. *L. & N. W. Ry. Co.*, 7 Times L. R. 452. Thompson, Negligence, § 3416, 3425, where is the customary mass of cases.

1 The law of the United States is clear on this point: 2 Kent, Comm. 603; *Railroad Co.* v. *Fraloff*, 100 U. S. (10 Otto) 24.

2 (1858) 28 L. J. Ex. 51.

3 (1866) L. R. 1 C. P. 385.

4 *L.c.*, per Byles, J., 387.

5 *Raphael* v. *Pickford*, 5 M. & G. 551, 558. As to reasonable time, see *ante*, 834. The carrier is excused for delay in delivery caused by mobs or a strike accompanied by intimidation and violence, but not for the loss of the goods, *Gulf, &c. Ry. Co.* v. *Levi*, 18 Am. St. R. 45; Cp. *Forward* v. *Pittard*, 1 T. R. 27. *Ante*, 879.

6 9 Q. B. D. 582.

of fact, whether the delivery was within a "reasonable" time after the receipt.[1]

(7) Goods taken by legal process.

(7) The carrier is exonerated from his obligation to his bailor where the goods are seized under legal process; that is, if the carrier notifies his bailor of the fact with reasonable diligence.[2]

This principle, common to the whole law of bailments, is treated here for convenience rather than from any prominence given to it in this subdivision. When property in the hands of a bailee for hire is demanded by third persons under colour of process, it lies upon the bailee to satisfy himself as to the validity of the process and of the demand; and in the event of the process being bad he will not be excused to his bailor by merely protesting against the demand and then parting with the goods. "A person who would allow his own property to be taken from him under like circumstances and without doing more to prevent such a result, or to repossess himself of it when taken, could scarcely be called a prudent man."[3]

Carrier delivering goods to the sheriff on invalid process is still excused.

In an American State case[4] an attempt was made to hold a carrier liable for giving up goods to the sheriff on process, on its face valid, but ultimately turning out to be invalid. The attempt was unsuccessful. "Whatever," it was said, "may be a carrier's duty to resist a forcible seizure without process, he cannot be compelled to assume that regular process is illegal, and to accept all the consequences of resisting officers of the law. If he is excusable for yielding to a public enemy, he cannot be at fault for yielding to actual authority what he may yield to usurped authority."

No defence to show, after goods negligently parted with, that they were seized under process.

It is not a defence or bar to an action against a bailee to show when he is sued by his bailor, whether for conversion or for negligent loss of the property bailed, that after it went into the possession of others it was levied upon under process against the owner. He should not have been negligent and parted with the possession; and then, perchance, the subsequent misfortunes might not have befallen. Yet if the property is back in the hands of the real owner, this may be shown either as ground for discharge or at least in mitigation of damages.[5]

Goods of wrong man seized.

The case has also arisen of goods wrongly seized under legal process as the goods of one man, while a writ has been in the hands of the sheriff to seize them as the goods of their lawful owner; and it has been held that the fact that they *might* have been levied and sold under an execution against their owner, could not be given in evidence in mitigation of damages in an action brought for the wrong by the true owner.[6]

1 *Wren* v. *Eastern Counties Ry. Co.*, 1 L. T. (N. S.) 5. A contract to carry goods by a given train does not amount to a warranty that the train will arrive at a particular hour: *Lord* v. *Midland Ry. Co.*, L. R. 2 C. P. 339. That a train arrives several hours late is *primâ facie* evidence of unreasonable delay in carrying goods, and demands explanation: *Roberts* v. *Midland Ry. Co.*, 25 W. R. 323. In *Norris* v. *Sacoonah, Florida, and Western Ry. Co.*, 11 Am. St. R. 355, it was held that where the delivery of perishable freight is delayed by an unprecedented flood, constituting an "act of God," mere failure to notify the consignor or consignee of the detention is not of itself negligence rendering the carrier liable. *Post*, 898.

2 *Blivin* v. *Hudson River Rd. Co.*, 36 N. Y. 493. *Ohio, &c. Rl. Co.* v. *Yohe*, 51 Ind. 181. Inhibition by the military authorities also affords an excuse: *Phelps* v. *Illinois Central Rd. Co.*, 94 Ill. 548.

3 *Roberts* v. *Stuyvesant Safe Deposit Co.*, 123 N. Y. 57, 20 Am. St. R. 718, 723.

4 *Pingree* v. *Detroit, &c. Rd. Co.*, 11 Am. St. R. 479.

5 *Cp. ante*, 828.

6 *Ball* v. *Liney*, 48 N. Y. 6, 8 Am. R. 511. Cp. Story, Eq. Jur. § 805 *et seqq.* When property has been tortiously taken, the owner is not only entitled to an action, but to full compensation in damages; and he can neither be deprived of the one nor the other by any mere act of the wrongdoer, as by an unaccepted offer to return the

(8) In certain circumstances where he has given notice.

(8) The common carrier *may* not be liable at common law where he has given a notice which is communicated to the customer, that he will only carry goods under certain conditions set out in the notice.[1] By subsequent changes in the law a notice is not sufficient; there must now be a contract.[2]

Smith v. *Horne.*

"The doctrine of notice," says Burrough, J., in *Smith* v. *Horne*,[3] "was never known until the case of *Forward* v. *Pittard*,[4] which I argued many years ago. Notice does not constitute a special contract; if it did, it must be shown on the record; it only arises in defence of the carrier. . . . I lament that the doctrine of notice was ever introduced into Westminster Hall." *Forward* v. *Pittard* was decided in 1785, and the decision was against the carrier (though not on the point of notice).

Forward v. *Pittard.*

Nicholson v. *Willan.*

In 1804 *Nicholson* v. *Willan*[5] was decided in the King's Bench. The action was on a carrier's common law liability for the loss of goods. The plea was Not guilty; under which it was proved that the defendants had some time before put up an advertisement in their office at Nottingham limiting their liability for goods above the value of £5 unless the goods were insured. Lord Ellenborough, C.J., said[6] the practice of making a "special acceptance" had prevailed for a long time, and "there is no case to be met with in the books in which the right of a carrier thus to limit by special contract his own responsibility has ever been by express decision denied."[7] Lord Ellenborough, C.J., here treats "notices" and "special acceptances" as identical. Moreover in *Kenrig* v. *Eggleston*:[8] in the note to *Southcote's case*;[9] in *Gibbon* v. *Paynton*,[10] by Yates, J.; in *Morse* v. *Slue*;[11] in *Catley* v. *Wintringham*, by Lord Kenyon, C.J.,[12] the validity of a special acceptance as a limitation of the carrier's common law liability was distinctly recognised; and the recognition carries back the law of the subject to a very early period.

Notice as a form of special acceptance.

Notice, as a form of special acceptance, we must conclude from the *dictum* of Burrough, J., to be of much later introduction than the special contract of acceptance, though the distinction may have been only between an expressed and an implied term in the contract of carriage. Yet whatever the earlier view, at the time of the judgment in *Nicholson* v. *Willan*,[13] any distinction that may have originally been drawn between notices and special acceptances had been abandoned.

Leeson v. *Holt.*

Lord Ellenborough's view of the law.

In 1816 Lord Ellenborough, C.J., in *Leeson* v. *Holt*,[14] again treated "notices" and "special acceptances" as indistinguishable, and operating as contracts. "If," says he, "this action had been brought twenty years ago, the defendant would have been liable, since by the

property, or causing it to be subsequently taken on legal process *in his own favour* against the owner. Evidence, however, may be given in mitigation of damages where there has been a sale before suit brought, or legal process issued against the owner in favour of some person other than the wrongdoer: *Higgins* v. *Whitney*, 24 Wend. (N. Y.) 379.

1 *Thorogood* v. *Marsh*, Gow (N. P.), 105.

2 The Carriers Act, 1830 (11 Geo. IV. & 1 Will. IV. c. 68).

3 8 Taunt. 146.

4 1 T. R. 27. In the case as reported there is no allusion to the point.

5 5 East, 507. Cp. *Bodenham* v. *Bennett*, 4 Price (Ex.), 31, per Graham, B., 33.

6 *L.c.* 513.

7 See *Harris* v. *Packwood*, 3 Taunt. 264.

8 Aleyn, 93.

9 4 Co. Rep. 84 a: "It is good policy for him who takes any goods to keep, to take them in special manner, *scil.* to keep them as he keeps his own goods or to keep them the best he can at the peril of the party; or if they happen to be stolen or purloined, that he shall not answer for them; for he who accepteth them ought to take them in such or the like manner, or otherwise he may be charged by his general acceptance."

10 4 Burr. 2301

11 1 Vent. 190, 238.

12 Peake (N. P.), 150.

13 5 East, 507.

14 1 Stark. (N. P.) 186.

common law a carrier is liable in all cases except two, where the loss is occasioned by the act of God, or of the King's enemies using an overwhelming force, which persons with ordinary means of resistance cannot guard against. It was found that the common law imposed upon carriers a liability of ruinous extent, and, in consequence, qualifications and limitations of that liability have been introduced from time to time, till, as in the present case, they seem to have excluded all responsibility whatsoever, so that under the terms of the present notice, if a servant of the carrier's had in the most wilful and wanton manner destroyed the furniture entrusted to them, the principals would not have been liable. If the parties in the present case have so contracted, the plaintiff must abide by the agreement, and he must be taken to have so contracted if he chooses to send his goods to be carried after notice of the conditions. The question, then, is, whether there was a special contract. If the carriers notified their terms to the person bringing the goods by an advertisement which, in all probability, must have attracted the attention of the person who brought the goods, they were delivered upon those terms; but the question in these cases always is, whether the delivery was upon a special contract." This may be termed the high-tide mark of the doctrine of notice. The case was at *Nisi Prius*, and the views enunciated seem never to have obtained general acceptation amongst judges; indeed, in no other case is the effect of a notice stated with similar uncompromising thoroughness.

Hide v. *Proprietors of Trent and Mersey Navigation.*

At the beginning of the nineteenth century a notice communicated is treated as evidence of a contract; nevertheless the law had previously been differently stated. Thus, in *Hide* v. *Proprietors of the Trent and Mersey Navigation*,[1] in 1793, Lord Kenyon, C.J., said: "There is a difference where a man is chargeable by law generally and where on his own contract. Where a man is bound to any duty, and chargeable to a certain extent by the operation of law, in such case he cannot by any act of his own discharge himself. As in the case of common carriers, who are liable by law in all cases of losses, except those arising from the act of God, or of the King's enemies; they cannot discharge themselves from losses happening under these circumstances by any act of their own: as by giving notice, for example, to that effect. But the case is otherwise where a man is chargeable on his own contract; there he may qualify it as he thinks fit."

Lord Kenyon's view of the law.

Still between the view of Lord Ellenborough and that of Lord Kenyon there is no necessary contrariety. Lord Ellenborough treats a notice communicated as evidence of a contract on the basis of the notice. Lord Kenyon requires that the notice should form part of a special acceptance. The difference between them would most often resolve itself into an inquiry as to the amount of evidence bringing home the fact of the notice. Lord Ellenborough's view would be satisfied by requiring that the consignor *ought* to have known of the notice and its contents at the time of consigning the goods; Lord Kenyon would require evidence that he actually did know; yet evidence might be given (as, where there is a wilful abstaining from becoming acquainted with the terms of a notice and thus misleading the carrier) which would bind the consignor to the terms of the contract embodied in the notice, though he were in fact

Mode of operation of notice differently regarded by Lord Kenyon and Lord Ellenborough.

[1] 1 Esp. (N. P.) 36.

ignorant of the terms of it. While in Lord Ellenborough's point of view knowledge of the notice would not *necessarily* affect the consignor with the terms of it.[1] For some time, at any rate, effect was given to the broader interpretation of Lord Ellenborough, and the mere publication of a notice came to be looked on as *primâ facie* limiting liability; and it grew to be the prevalent opinion that a carrier might restrict his liability by a notice—that is, if brought home to his employer—even though that notice was general and not sufficient to constitute a special contract. So non-essential in practice was any active assent on the part of the consignor to create the binding agreement, that it was, and remained, a matter of doubt and controversy whether the notice operated by creating a limitation through the mere expression of the will of the carrier, or by the operation of the assent of the consignor creating a contract between consignor and carrier.[2] The result of this uncertainty was very fruitful in litigation.

Criticism of the law in Bell's Commentaries.

The effect of the state of the law as to notice on the terms of carriage is thus stated by a writer of high authority:[3] "Of the extravagance into which this doctrine of notice has run, and the distracting questions which come to be involved in it, the newspapers and the books of English reports are full. One carrier frees himself from responsibility for fire;[4] another, even from the common responsibility of the contract for negligence.[5] One man is bound by a notice which has appeared in a newspaper that he has been accustomed to read;[6] another, because a large board was stuck up in the coach office;[7] while a third is freed from the effect of the notice in the office because handbills were circulated of a different import.[8] Then it is said, What if he cannot read?[9] or if he does not go himself, but sends a porter, and *he* cannot read? or what if he be blind, and cannot see the placard? And thus difficulties multiply, the Courts are filled with questions, and the public left in uncertainty."

Effectual notice to be given.

One great safeguard there was, "effectual notice" was in all cases necessary. "The rule of law might be superseded in the particular case by a special contract, since *modus et conventio vincunt legem;* but then such special contract must be proved; and whether it exists or not is always a question for the jury."[10]

Review of the cases.

The decisions upon the fact, and the effect of notice and what acts or neglects avoided it, were conflicting and embarrassing; a review of some of the principal will be sufficient to indicate the course and tendency of them.

Beck v. *Evans.*

In *Beck* v. *Evans*[11] a cask was delivered to be carried by the defendant's waggon, and nothing was said about the value. While on the road the cask was perceived to be leaking, and the waggoner, though told, paid no attention to its condition, so that the contents—brandy—

1 Cp. per Mellish, L.J., *Parker* v. *S. E. Ry. Co.*, 2 C. P. D. 423, cited *post*, 966.

2 See *M'Manus* v. *Lancs. & Y. Ry. Co.*, 4 H. & N. 327. Per Lord Wensleydale, *Peck* v. *North Staffordshire Ry Co.*, 10 H. L. C. 473, 574

3 1 Bell, Comm. (7th ed.) 503.

4 *Maving* v. *Todd*, 1 Stark. (N. P.) 72.

5 *Leeson* v. *Holt*, 1 Stark. (N. P.) 186.

6 *Ibid.*

7 *Clark* v. *Gray*, 4 Esp. (N. P.) 177.

8 *Cobden* v. *Bolton*, 2 Camp. 108.

9 A person who can read, and sends a servant who cannot read to sign a contract note under sec. 8 of the Railway and Canal Traffic Act, 1854 (17 & 18 Vict. c. 31), is in the same position as if he had signed the note himself; *Kirby* v. *G. W. Ry. Co.*, 18 L. T. (N. S.) 658; *Foreman* v. *G. W. Ry. Co.*, 38 L. T. (N. S.) 851.

10 Per Lord Ellenborough, C.J., *Kerr* v. *Willan*, 2 Stark. (N. P.) 56; 6 M. & S. 150; *Davis* v. *Willan*, 2 Stark. (N. P.) 279.

11 16 East, 244. Cp. *Wilson* v. *Freeman*, 3 Camp. 527; *Down* v. *Fromont*, 4 Camp. 40; *Birkett* v. *Willan*, 2 B. & Ald. 350.

were lost. The conduct of the waggoner was thus negligence of the grossest character, such as would have fixed even a gratuitous bailee with liability; consequently he was held answerable.

A more difficult point arose in *Levi* v. *Waterhouse*.[1] A silversmith at Exeter delivered to the defendant's under-book-keeper, at the mail-coach office there, a brown-paper parcel, enclosing two hundred guineas, and addressed to London. The under-book-keeper knew the value of the contents, yet he booked it, signed a receipt for it, and caused it to be put in the banker's bag for greater safety. The parcel was lost. The carrier had given a special notice. Gibbs, C.J., ruled that mere knowledge of the value did not waive the notice. His ruling was affirmed in the Court of Exchequer. The decision of the Court of Exchequer does not place the case so high as would appear to be possible from other portions of the report; where it is expressly said to be "proved that the book-keeper knew the value" of the contents of the parcel. In giving judgment Thomson, C.B., says: "It appears that the book-keeper might have inferred that this parcel was one of value, but nothing was distinctly said about the actual value, nor did he undertake that the notice should be dispensed with. He did not, therefore, warrant its safe conveyance; and on that ground we think the direction correct." This decision is correct on the ground put by the Court of Exchequer; nor less so if the facts were as stated in the report; since an under-book-keeper cannot be entitled to vary the published conditions of his master's business.[2] That the decision must not be carried further than this may be gathered from the case of *Bodenham* v. *Bennett* in the same Court;[3] where a valuable bank parcel was sent, which was usually carried by the coachman in his side-pocket. When the coach arrived at its destination the book-keeper unloaded it, received the way-bill, took two parcels out of the front seat of the coach, but did not inquire for the plaintiff's parcel, since it was usually carried by the coachman (who on the day in question was intoxicated); from whom he, therefore, ought to have asked it. The judge left to the jury the question whether there had been gross negligence; and this they found. The Court refused to disturb the verdict, being of the same opinion; in which circumstances the fact of the notice did not exonerate from liability.

Levi v. *Waterhouse*.

Judgment of Thomson, C.B.

Bodenham v *Bennett*

An effort to distinguish *Bodenham* v. *Bennett* was made in *Batson* v. *Donovan*,[4] first, on the ground that the defendant's book-keeper had knowledge of the contents of the lost parcel. In that view it conflicts with *Levi* v. *Waterhouse*; since there the Court laid stress on the fact

Batson v. *Donovan*.

1 1 Price (Ex.), 280.

2 *Slim* v. *G. N. Ry. Co.*, 14 C. B. 647. Cp. *Page* v. *G. N. Ry. Co.*, Ir. R. 2 C. L. 228; and *Anderson* v. *Chester and Holyhead Ry. Co.*, 4 Ir. C. L. R. 435.

3 4 Price (Ex.), 31; *Garnett* v. *Willan*, 5 B. & Ald. 53. These cases go to show that notices were introduced to protect the carrier only from extraordinary events or from his responsibility as insurer, and not from the consequences of the want of due and ordinary personal care and diligence; but in England it has been held that such notices may be used to protect the carrier from the negligence of his servants: *Hinton* v. *Dibbin*, 2 Q. B. 646; *Peck* v. *North Staffordshire Ry. Co.*, 10 H. L. C. 473, 497; *Manchester, Sheffield, and Lincolnshire Ry. Co.* v. *Brown*, 8 App. Cas. 703. So far as the statement in 2 Kent, Comm. 608, is contrary to this, it does not express correctly the English law, though it is in accord with the American decisions: *Railroad Co.* v. *Lockwood*, 17 Wall. U. S. 357; *Liverpool and Great Western Steam Co.* v. *Phenix Insurance Co.*, 129 U. S. (22 Davis) 397, 439. Mr. Bell contends, 1 Comm. (7th ed.) 501–505, that a notice should not avail to excuse the carrier unless he shows a special agreement to that effect, or evidence not merely of notice but of assent to it. *Post*, 957.

4 4 B. & Ald. 21.

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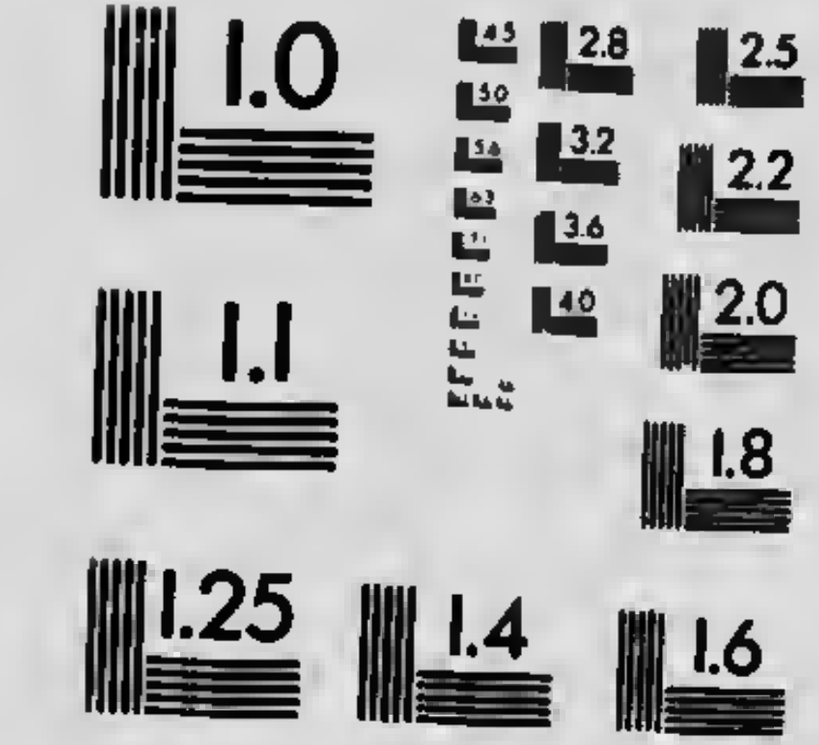

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that the book-keeper did not "undertake that the notice should be dispensed with."[1] Thus knowledge merely was ineffectual to charge the carrier. Secondly, "it did not appear that the plaintiffs knew of the notice."[2] As to this the report in *Bodenham* v. *Bennett* says:[3] "The learned judge stated to the jury the common law liability of carriers, and that they might stipulate to restrain it by notice; that they had given such a notice in this case, and therefore the question was, whether there had been gross negligence in the carrying of this parcel." Thirdly, "the Court thought that the parcel was carried beyond its destination, which would make it a case of misfeasance."[4] Reference to the report will show that, though the Court inclined to the probability of this view (which was in fact the correct one), it was not the view on which their judgment was based. Indeed, it must have been considered immaterial, else it would have been left to the jury. *Batson* v. *Donovan* was decided by the majority of the Court on the ground of a duty to inform the carrier of the contents of the parcel, failure in which was equivalent to fraud, as in the case of *Gibbon* v. *Paynton*.[5] A second ground of decision was—that the conduct of the defendant did not amount to gross negligence, and since the carrier's liability was limited by notice, he was not liable for less than this; as the case was decided on the first point only, much stress was not laid upon this second point. As to the first, the view of Best, J., which seems the sounder,[6] was that there is no obligation to communicate to a carrier, unasked, what the contents of a parcel are; since if he makes inquiry he may either know and take what extra precautions are necessary, or, being misled, if loss occurs, may be exonerated on the score of fraud or misconduct.

Grounds of the decision.

Best, J.'s, judgment.

Marsh v. *Horne*.

The facts in *Marsh* v. *Horne*[7] were the same as in *Levi* v. *Waterhouse*, and there was distinct knowledge on the carrier's part that the value of the goods exceeded £5—the limit in his notice. The King's Bench, following that case, adopted the rule that mere acceptance with knowledge of value on the carrier's part is no waiver of the condition in a notice communicated to the consignor.

Brooke v. *Pickwick*.

In *Brooke* v. *Pickwick*,[8] in the Common Pleas, it did not appear that the plaintiff was apprised of the carrier's notice limiting liability, and he was therefore held entitled to recover against the carrier under the common liability as an insurer. The case is interesting for an expression of opinion by Best, C.J.:[9] "I wish, therefore, that these notices had never been holden sufficient to limit the carrier's responsibility. It is too late, however, now to hold that they are without effect where the customer is distinctly informed of their existence. But, though the judges have holden that they will, in such a case, exempt the carrier from his common law responsibility as an insurer, it has never been decided that they will excuse him from the consequences of gross negligence. If the jury find that there was gross negligence, and they could not find otherwise under the circumstances of this case, the trunk having been lost at midday, it is immaterial whether the carrier has been apprised of the value of the article or not. He must have supposed in the present instance, from the size of the

Best, C.J.'s, judgment.

1 *Levi* v. *Waterhouse*, 1 Price (Ex.), 285.
2 Per Bayley, J., 4 B. & Ald. 40.
3 4 Price (Ex.) 32.
4 Per Bayley, J., 4 B. & Ald. 40; whereas *Batson* v. *Donovan* "was a case of negligence only, not of misfeasance," per Bayley, J., 35.
5 4 Burr. 2298.
6 *Crouch* v. *L. & N. W. Ry. Co.*, 14 C. B. 255.
7 (1826) 5 B. & C. 322.
8 (1827) 4 Bing. 218.
9 *L.c.* 223.

trunk and the condition of the passenger, that it was worth more than £5; and where is the line to be drawn if passengers are always to disclose the exact value of their luggage? If would be dangerous to extend to cases of gross negligence the doctrine of modern law, that a carrier is not liable as an insurer where he has given notice to limit his responsibility. . . . I must continue, therefore, to retain the opinion I expressed in *Batson* v. *Donovan* till the twelve judges decide I am wrong."

Macklin v. *Waterhouse.*

The same Court subsequently decided [1] that a notice, that the proprietor of a general coach office will not be responsible for the carriage of parcels of more than £5 value unless entered as such, will not avail the proprietor of a coach who takes a parcel from the office, unless it be otherwise shown that he is connected with the office; and, further, that the carrier's agent telling the female servant of the owner of a parcel that it ought to be insured is not a sufficient notice of the limitation of responsibility; and that where there is notice limiting liability for one journey it must be held to apply to the return journey.[2]

Riley v. *Horne.*

Law in America.

In America the law was somewhat differently construed, and continued to adhere more nearly to the old common law strictness of interpretation. The rule laid down in the American decisions is expressed by Nelson, J., in *New Jersey Steam Navigation Co.* v. *Merchants' Bank*:[3]

Nelson, J., in *New Jersey Steam Navigation Co.* v. *Merchants' Bank.*

"He [the carrier] is in the exercise of a sort of public office, and has public duties to perform, from which he should not be permitted to exonerate himself without the assent of the parties concerned. And this is not to be implied or inferred from a general notice to the public, limiting his obligation, which may or may not be assented to. He is bound to receive and carry all the goods offered for transportation, subject to all the responsibilities incident to his employment, and is liable to an action in case of refusal. And we agree with the Court in the case of *Hollister* v. *Nowlen* [4] that if any implication is to be indulged from the delivery of the goods under the general notice, it is as strong that the owner intended to insist upon his rights and the duties of the carrier as it is that he assented to their qualification. The burden of proof lies on the carrier, and nothing short of an express stipulation by parol or in writing should be permitted to discharge him from duties which the law has annexed to his employment. The exemption from these duties should not depend upon implication or inference founded on doubtful and conflicting evidence; but should be specific and certain, leaving no room for controversy between the parties."

Common Law as to land carriage modified by the Carriers Act, 1830 (11 Geo. IV. & 1 Will. IV. c. 68).

We are now in possesion of the doctrines of the common law on this point of notice by carriers, limiting or exonerating them from liability. They are become of the less importance by reason of the legislation that was found necessary to obviate the abuses which grew from them, and which resulted in the passing of the Carriers Act, 1830, regulating the conditions of land carriage. The detailed consideration of the provisions of this Act must, however, be deferred until we have dealt with other prominent general considerations applicable to the law of common carriers, and are in a position to follow out those more special branches of the subject having exclusive reference to land carriage.[5]

[1] *Macklin* v. *Waterhouse*, (1828) 5 Bing. 212.
[2] *Riley* v. *Horne*, 5 Bing. 217.
[3] 6 How. (U. S.) 382.
[4] 19 Wend (N. Y.), per Bronson, J., 247. Cp. *Cole* v. *Goodwin*, 19 Wend. (N. Y.) 251.
[5] *Post*, 918.

DELIVERY.[1]

Various significations of the term delivery.

Great part of the difficulties which arise with regard to the law regulating "delivery" are due to the ambiguous signification of the term. Delivery, in the sense with which we are here concerned with it, signifies the transfer of the possession of goods. Delivery, besides, signifies the passing of the property in a chattel, as in *Dixon* v. *Yates*,[2] where Parke, J., says: "Where, by the contract itself, the vendor appropriates to the vendee a specific chattel, and the latter thereby agrees to take that specific chattel, and to pay the stipulated price, the parties are then in the same situation as they would be after a delivery of goods in pursuance of a general contract. The very appropriation of the chattel is equivalent to delivery by the vendor, and the assent of the vendee to take the specific chattel, and to pay the price is equivalent to his accepting possession. The effect of the contract, therefore, is to vest the property in the bargainee."[3] Delivery is also spoken of as the correlative to the "actual receipt" necessary to give validity to a parol contract for the sale of chattels of the value of £10 or upwards by virtue of 17th section of the Statute of Frauds.[4]

Delivery.

I. To the carrier.

II. By the carrier.

Delivery, so far as it need be considered here, is of two kinds:

I. Delivery to the carrier for the purposes of the carriage.[5]

II. Delivery by the carrier when the carriage has been completed.

It is only between these periods that the special liability of the common carrier exists, commencing so soon as the common carrier has possession of goods for the purpose of carriage and terminating when his duty to deliver them on the completion of the transit has been discharged.

Generally speaking, slighter evidence is sufficient to charge the carrier on delivery to him than is required to discharge him when he is to make delivery on the completion of the transit.

I. Delivery to the carrier.

I. Delivery to the carrier.

In one sense it is the reward that renders the carrier liable. As Sir Edward Coke says, the carrier "hath his hire, and thereby implicitly undertaketh the safe delivery of the goods delivered to him."[6] This, as we have seen,[7] must not be construed that unless a reward is fixed

1 Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), part iii., ss. 27–37, where the statutory rules as to delivery are set out. By s. 62 "Delivery" means voluntary transfer of possession from one person to another. Cp. Pollock, On Possession, 43–46, 57–77; 2 Kent, Comm. 496–509; 2 Parsons, Contracts (8th ed.), 175–203.

2 5 B. & Ad. 340.

3 Cp. *Heilbutt* v. *Hickson*, L. R. 7 C. P. 438, 450; *Kemp* v. *Falk*, 7 App. Cas. 573, 586. *Frayano* v. *Long*, 4 B. & C. 219; also note 28 R. R. 226, of the subsequent cases. Willis, Contract of Sale, 38.

4 29 Car. II. c. 3, s. 17, is repealed by the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), sched.; s. 4, re-enacts it with some amendments. What constitutes acceptance under the statute is considered in *Page* v. *Morgan*, 15 Q. B. D. 228, and *Taylor* v. *Smith*, [1893] 2 Q. B. 65. Another aspect of delivery is to be found in *Manton* v. *Moore*, 7 T. R. 67; *Goodall* v. *Skelton*, 2 H. Bl. 316, where in a note cases on delivery are grouped in three classes—(1) What delivery is sufficient to complete the contract, so as to pass the property to the purchaser. (2) What delivery is sufficient to defeat the right of stoppage *in transitu*. (3) What delivery is sufficient to constitute an acceptance of goods under the Statute of Frauds. *Hibbert* v. *Carter*, 1 T. R. 745. Benjamin, On Sale (4th ed.), 676–705; *Grice* v. *Richardson*, 3 App. Cas. 319; *Wyand* v. *Atchison, &c. Ry. Co.*, 9 Am. St. R. 504; and a note at 511, "To whom carrier may lawfully deliver property." For Place of Delivery, see 2 Kent, Comm. 505.

5 56 & 57 Vict. c. 71, s. 32. Delivery of goods to the carrier is *prima facie* a delivery of goods to the buyer.

6 Co. Litt. 89 a; *Dalston* v. *Janson*, 1 Ld. Raym. 58.

7 *Ante*, 763 n.[2], 875.

beforehand the carrier is not liable. The public profession of the carrier and acceptance of the goods for carriage will create the duty to carry them in accordance with his profession. Hence, with equal accuracy it may be said that the carrier is liable by reason of his profession, or by reason of the reward ;[1] because the law implies the reward from the exercise of the profession. The carrier must carry for a reasonable amount ; and if the person desiring his goods to be carried avers and proves his readiness to pay a reasonable sum for the carriage, no actual tender of the money is needed.[2] Neither is it necessary that the compensation should be a fixed sum. It is sufficient if it be in the nature of a *quantum meruit* enuring to the benefit of the carrier.[3] The acts to be done by both parties—namely, the receipt of the goods and the payment of a reasonable sum for their carriage—are contemporaneous acts, the carrier being bound to receive the goods on the money being paid or tendered, and the bailor to pay the reasonable amount demanded on the carrier's taking charge of the goods ; and the case of *Rawson* v. *Johnson*[4] clearly shows that, " whenever a duty is cast on a party in consequence of a contemporaneous act of payment to be done by another, it is sufficient if the latter pay, or be ready to pay, the money, when the other is ready to undertake the duty." [5]

A common carrier is bound to receive and carry all goods offered within the limits of his profession and to carry them for a reasonable reward.

As soon as goods are accepted for the purpose of carriage, the liability of a common carrier attaches. He may in some cases receive goods to warehouse preparatory to the transit ; as he often holds goods as warehouseman after the completion of the transit. The test question in these cases is whether the goods are received for deposit in the custody of the carrier as a mere accessory to the carriage—or whether they are in his possession for some independent purpose. In the former case the carrier is liable as common carrier ; in the latter, only as bailee for hire.[6] The carrier may also give notice, where the goods to be forwarded are within the Carriers Act, 1830, that he will not be responsible for loss unless an additional sum is paid. If the owner refuses this payment, yet leaves the goods, the liability of the bailee is that of a bailee for hire,[7] and not that of a common carrier. If he makes the payment the liability becomes that of a common carrier.

When liability attaches.

Test.

The carrier is only bound to convey goods he has room for in his carriage,[8] and which he can carry with security,[9] and holds himself out

What carrier is bound to carry.

[1] *Crouch* v. *G. N. Ry. Co.*, 11 Ex. 742 ; *New Jersey Steam Navigation Co.* v. *Merchants' Bank*, 6 How. (U. S.) 344.

[2] *Pickford* v. *Grand Junction Ry. Co.*, 9 Dowl. (Prac. Cas.), 766 ; *G. W. Ry. Co.* v. *Sutton*, L. R. 4 H. L., per Blackburn, J., 237.

[3] *Citizens' Bank* v. *Nantucket Co.*, 2 Story (U. S.), 16. This case is valuable on account of an exceedingly elaborate considered judgment of Story, J., on the nature and extent of the obligations of common carriers.

[4] 1 East, 203 ; *Levy* v. *Herbert*, 7 Taunt. 314 ; *Waterhouse* v. *Skinner*, 2 B. & P. 447.

[5] Per Parke, B., *Pickford* v. *Grand Junction Canal Co.*, 8 M. & W. 378.

[6] *Maring* v. *Todd*, 1 Stark. (N. P.) 72 (see the remark on this case and on *Ross* v. *Johnson*, 5 Burr. 2825, where Lord [illegible]ld, C.J., is reported as saying, " It is impossible to make a distinction bet[illegible]*wharfinger* and a *common* carrier. They both receive the goods upon a contra[illegible]very case against a carrier is like the same case against a wharfinger," in 2 Ken. Comm. 600 n. (*a*)) ; *Hyde* v. *Trent Navigation Co.*, 5 T. R. 389 ; *Roskell* v. *Waterhouse*, 2 Stark. (N. P.) 461 ; *Camden Rd. Co.* v. *Belknap*, 21 Wend. (N. Y.) 354. *Ante*, 836.

[7] *Wyld* v. *Pickford*, 8 M. & W. 443. See per Parke, B., *Fowles* v. *G. W. Ry. Co.*, 7 Ex. 699.

[8] Per Best, C.J., *Riley* v. *Horne*, 5 Bing. 224. *Ex parte Robins*, 7 Dowl. (Prac. Cas.) 566 ; *Jackson* v. *Rogers*, 2 Show. (K. B.) 327.

[9] *Edwards* v. *Sherratt*, 1 East, 604, where Lord Kenyon, C.J., said : " All the circumstances and urgency of the case should have been disclosed to the boatman at the time,

to carry.[1] In case of dispute, the *onus probandi* is on the plaintiff to establish that the person sought to be charged by him is a common carrier on the ground that the goods conveyed by him are within the true nature and extent of the business in which he holds himself out to the public as engaged.[1] Yet the carrier is not in every case bound to receive goods tendered to him for carriage even when his profession is to carry goods of the description tendered. A condition is superadded that the goods tendered to him must be fit to be carried in the ordinary course of business; and, if they are not in a fit condition with reference to the ordinary requirements of business, the carrier has an absolute right to refuse them until they are tendered to him in suitable condition.[2]

What constitutes delivery.

The principle of what constitutes delivery to a carrier is thus stated in a work of authority:[3] "While it is the undoubted general rule that the delivery, to bind the carrier, must be made either to him, or to some one with authority from him, or who may be rightly presumed to have such authority,[4] it is not to be understood that it is not subject to such conventional arrangements between the parties as they may choose to make in regard to the mode of delivery, or that it may not be varied by usage or by a particular course of dealing between them. . . . If, therefore, the parties agree that the goods may be deposited for transportation at any particular place, and without any express notice to the carrier, such notice will be a sufficient delivery; and proof of a constant and habitual practice and usage of the carrier to receive the goods when they are deposited for him in a particular place, without special notice of such deposit, is sufficient to show a public offer by the carrier to receive goods in that mode, and to constitute an agreement between the parties, by which the goods when so deposited shall be considered as delivered to him without any further notice. Such a practice and usage are tantamount to an open declaration, a public advertisement, by the carrier that such a delivery should, of itself, be deemed an acceptance by him; and to permit him to set up, against those who have been thereby induced to omit it, the want of the formality of an express notice, which had been thus waived, would be sanctioning injustice and fraud."

Delivery a question of fact.

Then comes the question on whose account is delivery to the carrier made—on behalf of consignor or consignee? As a general rule, delivery by the consignor to the carrier is a delivery to the consignee, who afterwards is held to take the risks of the carriage. If the carrier is indicated by the consignee, he then becomes the consignee's special agent. But if the consignor undertakes to deliver at an appointed place till the goods are delivered there, they are at the risk of the consignor. Which is the actual state of facts in any particular transaction is matter for the jury to find.[5]

and he should have been asked whether he chose to undertake the risk. Common honesty would have suggested this. For no man in his senses would, under these circumstances, have taken the corn under a liability as a common carrier."

1 *Citizens' Bank* v. *Nantucket Co.*, 2 Story (U. S.) 16; *Johnson* v. *Midland Ry. Co.*, 4 Ex., per Parke, B., 371.

2 *Keddie* v. *North British Ry. Co.*, 24 Sc. L. R. 173.

3 Hutchinson, Carriers, § 90.

4 *Colepepper* v. *Good*, 5 C. & P. 380; *Gilbart* v. *Dale*, 5 A. & E. 543; *Camden Rd. Co.* v. *Belknap*, 21 Wend. (N. Y.) 354.

5 *Dunlop* v. *Lambert*, 6 Cl. & F. 600. As to right of consignees to whom goods are addressed to have delivery, *Cork Distilleries Co.* v. *Great Southern and Western Ry. Co.*, L. R. 7 H. L. 269. As to delivery to consignees without payment of freight, consignor remaining liable, *G. W. Ry. Co* v. *Bagge*, 15 Q. B. D. 625.

Where goods have passed from the possession of one to that of another person in course of transmission, the test seems to be whether the parties sought to be charged have themselves or through their agents assumed the charge and custody of the goods.[1] This, too, is a question of fact. In the case of a warehouseman, Lord Ellenborough, C.J., in summing up to the jury, said: "The whole question turned upon the single point of, when the warehouseman's liability commenced and the agency of the carman ended? for until the goods were delivered to the warehouseman, the carman was to be considered as the agent of the person sending them; but when the warehouseman took them into his own hands, the moment the warehouseman applied his tackle to them, from that moment the carman's liability commenced [qu. ceased]."[2] *Thomas v Day.*

Where the goods are placed in the carrier's conveyance without the knowledge or assent of himself or his agents, there is, of course, no delivery.[3] It has been held, too, that leaving goods in an inn-yard from whence a carrier sets out is not in law a delivery to the carrier.[4] The jury have to find the facts, and say whether they amount to a taking in charge (of which the circumstances are as many as the cases)[5] and which imports the commencement of the carrier's liability. The implication is that the delivery is for the purpose of immediate transportation. If the carrier for his own purposes puts the goods into his warehouse, his liability is still that of carrier. Where, however, the transit is delayed to enable the consignor to give orders as to the destination, or in any other way for the convenience of the owner, during the time of such delay the liability is not that of a common carrier, but of a warehouseman only. The exact relation is very seldom a matter of specific arrangement between the parties, but is rather a growth from the circumstances. What is the extent of responsibility is dependent on findings of fact, which often are very indefinite, though the governing principles are easily ascertainable.[6] Facts indicating delivery.

It is further certain that "goods ought to be plainly and legibly marked, so that the owner or consignee may be easily known; and if in consequence of omitting to do it, without any fault on the part of the carrier, the owner sustain a loss, or any inconvenience, he must impute this to his own fault."[7] Goods should be marked.

In an American case, *Finn* v. *Western Rd. Corporation*,[8] it is said: "A consignor who neglects to give proper directions for the transmission of his goods, has no right to expect that the carrier will take the responsibility of investigating the history of his business in order to ascertain his probable intentions in regard to the particular consignment. The carrier has the right to wait and hold the goods on storage *Finn* v. *Western Rd. Corporation.*

[1] Story, Bailm. § 453; *Harris* v. *Packwood*, 3 Taunt. 264; *Boehm* v. *Combe*, 2 M. & S. 172; *Brind* v. *Dale*, 8 C. & P. 207.

[2] *Thomas* v. *Day*, 4 Esp. (N. P.) 262. *Ante*, 827. See *Roskell* v. *Waterhouse*, 2 Stark. (N. P.) 461; *Randleson* v. *Murray*, 8 A. & E. 109; Story, Bailm. § 536.

[3] *Lovett* v. *Hobbs*, 2 Show. (K. B.) 127; *Leigh* v. *Smith*, 1 C. & P. 638.

[4] *Selway* v. *Holloway*, 1 Ld. Raym. 46.

[5] *Boys* v. *Pink*, 8 C. & P. 361; *Davey* v. *Mason*, Car. & M. 45. An inn where parcels were deposited without express authority was held a receiving-house of the defendants, in *Syms* v. *Chaplin*, 5 A. & E. 634. Where goods were delivered at a wharf to an unknown person there, and no knowledge of the fact was brought home to the wharfinger or his agents, it was held no delivery: *Buckman* v. *Levi*, 3 Camp. 414. A delivery to a recognised servant is sufficient, as to the mate of a ship: *Cobban* v. *Downe*, 5 Esp. (N. P.) 41.

[6] Story, Bailm. § 535; Redfield, Carriers, §§ 95–102; *Judson* v. *Western Rd. Corporation*, 86 Mass. 520.

[7] Per Ware, J., *The Huntress*, Davels (U. S. Adm.), 82, 92.

[8] 102 Mass. 290.

Bradley v. *Dunipace.*

until he receives the proper directions, before he undertakes the severe obligations of that service." In *Bradley* v. *Dunipace*,[1] in the Exchequer Chamber, a shipping case, the master was held liable for the wrong delivery of sacks of rye-meal, for which he had given bills of lading, and which were not so marked as to be properly discriminated. But *Bradley* v. *Dunipace* was not a case where the carrier hesitated to assume the responsibility; for there can be no doubt that a delivery imperfect through defective numbering or addressing of the goods would be sufficient to justify him abstaining from conveying the goods as carrier. The question in that case more particularly was, What was the contract he entered into? He was held liable because that contract was unperformed.

Goods imperfectly addressed.

It seems to follow that where a carrier has received goods imperfectly addressed, he thereby, in the absence of any fraud or concealment, undertakes to carry them on the carrier's ordinary terms. In the event of his carrying them, the American case already quoted decides that: "The carrier is entitled to have some authority or direction from the consignor himself to justify his delivery to another. If none such accompanies the goods, he is not bound to take the risk of delivery to any one who does not produce evidence of his title or authority from the consignor."[2]

Effect of delivery to the carrier as between consignor and consignee.

While on this point the effect of delivery to the carrier as between consignor and consignee may be stated in the words of Lord Alvanley, C.J., in *Dutton* v. *Solomonson*:[3] "If a tradesman order goods to be sent by a carrier, though he does not name any particular carrier, the moment the goods are delivered to the carrier it operates as a delivery to the purchaser; the whole property immediately vests in him; he alone can bring an action for any injury done to the goods; and if any accident happen to the goods it is at his risk."[4]

II. Delivery by the carrier.

II. Delivery by the carrier.

Within what time.

When goods are arrived at their destination the common carrier has a further duty to deliver. This duty is asserted so far back as the 38th Eliz.,[5] where Popham, C.J., lays down that "carriers are paid for their carriage, and take upon themselves safely to carry and deliver the things received." As to what the nature of this delivery is, whether it is to be merely at or by the premises of the consignee, or on them and to him, has been sometimes a matter of discussion.

Golden v. *Manning.*

In *Golden* v. *Manning*[6] where goods were received by the defendants who had a porter to carry out goods, it was held by the Court that the defendants'

[1] 1 H. & C. 521.

[2] 102 Mass. 291. Three New Hampshire cases should be consulted on this: *Stinson* v. *Jackson*, 58 N. H. 138, on the duty of the carrier when goods are wrongly addressed; *First National Bank of Peoria* v. *Northern Rd.*, 58 N. H. 203, on delivery without production of the bill of lading; *Converse* v. *Boston & Maine Rd.*, 58 N. H. 521, on ratification of unauthorised delivery. As to failure to *receive* goods through a strike, see *Pittsburg, &c. Rd. Co.* v. *Hollowell*, 32 Am. R. 63.

[3] 3 B. & P. 584. The principal point decided in this case is that where payment for goods is by bill, during the currency of the bill the right to sue for goods sold and delivered is suspended; following *Mussen* v. *Price*, 4 East, 147; *Anderson* v. *Carlisle Horse Clothing Co.*, 21 L. T. (N. S.) 760.

[4] This is now regulated in England by the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), ss. 29, 32. See per Parke, B., *Wait* v. *Baker*, 2 Ex. 7; *Mirabita* v. *Imperial Ottoman Bank*, 3 Ex. D. 164; *Dawes* v. *Peck*, 8 T. R. 330; *Shepherd* v. *Harrison*, L. R. 5 H. L., per Lord Chelmsford, 127. In *Freeman* v. *Birch*, reported in a note to *Coats* v. *Chaplin*, 3 Q. B. 492, a laundress sent home linen by a carrier who lost it. She was held entitled to sue him. The case was distinguished from that of a complete sale. The owner of the linen was not the employer of the carrier; and the risk of the bailee was not over till the goods were delivered.

[5] (1596) Owen, 57.

[6] (1773) 3 Wils. (C. P.) 429, 433.

duties as carriers were "to send notice to persons to whom goods are directed, of the arrival of those goods within a reasonable time, and must take special care that the goods be delivered to the right person." Referring to the facts of the case, the Court continued: "It was by the negligence of the defendants that the direction of the box was obliterated. The master of a stage coach takes a greater price for the carriage of goods than other carriers, so is certainly bound either to send out the goods from his warehouse in London to be delivered to the persons to whom the same are directed, or to send notice of the arrival thereof within a reasonable time."

Hyde v. Trent and Mersey Navigation Co.

In *Hyde* v. *Trent and Mersey Navigation Co.*,[1] there was a discussion whether the carrier was bound to deliver to the consignee at his house, or whether he discharged himself by delivery to a porter at the inn at the place of destination. Three of the judges[2] adopted the view that carriers were obliged to see the goods carried home to their place of destination; but Lord Kenyon, C.J., expressed great doubts on the point. "On more recent occasions," says Story,[3] "the opinions of other distinguished judges have settled down in favour of the three judges against him; and Kent[4] says: "The actual delivery to the proper person is generally conceded to be the duty of the carrier."

Storr v. Crowley.

The case of *Storr* v. *Crowley*[5] is similar in its facts to *Golden* v. *Manning*,[6] and, like that case, was decided on the narrowest basis possible.

Garrow, B.'s, opinion.

Garrow, B., however, says in his judgment:[7] "According to the usual course of transactions, such as the present, it seems to me, that the person who undertakes to carry an article from one individual to another, does so in consideration of a reward to deliver it at the house of that individual. With regard to presents in particular that must be the case, because commonly no notice is given to the party for whom they are intended."

Ware, J., in The Huntress.

To the same effect are the observations of Ware, J., in *The Huntress*.[8] "Among the obligations which common carriers take upon themselves as resulting from the nature of their employment

[1] (1793) 5 T. R. 389. See *Constable* v. *National Steamship Co.*, 154 U. S. (47 Davis) 51, 60.

[2] Ashhurst, Buller, and Grose, JJ.

[3] Bailments, § 543. Story's own view is: "*In contractibus tacite veniunt ea, quæ sunt moris et consuetudinis* (Pothier, Traité du Contrat de Louage, n. 57, and see per Tindal, C.J., *Moon* v. *Guardians of the Witney Union*, 3 Bing. N. C. 814). But in the absence of any special contract, or custom, or usage, probably no general rule can be laid down." *Rowe* v. *Pickford*, 8 Taunt. 83, was the case of a consignee of goods sent by a common carrier to London, who, having no warehouse of his own, was accustomed to leave the goods in the waggon, office or warehouse of the common carrier; the Court held, with reference to stoppage *in transitu*, that the transit was at an end when the goods were received and placed in the warehouse. In *In re Webb*, 8 Taunt. 443, common carriers agreed to carry wool from London to Frome, stipulating that when the consignees had not room in their own store to receive it, the carriers, without additional charge, would retain it in their own warehouse until the consignor was ready to receive it. Wool thus carried and placed in the carrier's warehouse was destroyed by an accidental fire. The Court held them to hold these goods not as carriers but as warehousemen, and so not to be liable; "for this is a loss which would fall on them as carriers if they were acting in that character, but would not fall on them as warehousemen, if they were acting in the character of warehousemen." Cp. *Fisk* v. *Newton*, 1 Denio (N. Y.), 45; *Clendaniel* v. *Tuckerman*, 17 Barb. (N. Y.) 184. *Howell* v. *Grand Trunk Ry. Co.*, 92 Hun (N. Y.) 423: luggage was sent in advance, the owner stopping at an intermediate station; while waiting for him it was burned. It was held that a common carrier's liability did not exist where the luggage was in the hands of Customs officers under the Customs laws. *Westminster Fire Office* v. *Reliance Marine Insurance Co.*, 19 Times L. R. 668—the case of goods covered by marine insurance while "temporarily" placed on quay and until delivered to export vessel. *Ante*, 899.

[4] 2 Comm. 604.

[5] (1825) M'Cle. & Y. 129.

[6] 2 W. Black. 916, 3 Wils. (C.P.) 429.

[7] M'Cle. & Y. 137.

[8] (1840) Daveis (U. S Adm.), 86.

is that of delivering the goods, when they are transported to the place of destination to the proper person. If they are delivered to a wrong person, and any loss or damage ensues in consequence, they are responsible to the owner."

Whatever doubts may at one time have been entertained as to the carrier's duty to deliver it is now too late to call it in question. The existence of such a duty must be taken as incontestable—a duty founded in long custom, but, like most others, susceptible of variation to almost any extent by apt words of agreement, or even by tacit understanding. In the absence of this, the duty of the carrier appears to be to deliver on the premises and not outside them, in such manner as not to cause nuisance or obstruction, and either to the consignee or to one *primâ facie* his agent. He is certainly not required (and this was held in an unreported case before Cave, J., in the spring of 1891) to carry the goods upstairs at the place of their delivery for their more convenient disposition; and if the carrier's servant on request does this, it is to be regarded as a mere voluntary courtesy, and the master is not chargeable for injury caused by the servant's negligence to the goods while thus being carried.

Not required to carry goods upstairs in the house where delivery is made.

In any particular trade there may be a particular custom of delivery. A brewer delivering beer would scarcely be said to have completed his duty if he rolled the barrels on to the premises; or a coal merchant, if he stacked the sacks of coal in the forecourt. In each case there is a well-established method of delivery into the cellar. The milliner, who sends home a delicate construction of hat for the mistress of the house, would not be required, possibly not allowed, to deliver it in the dressing-room. It would be left at the downstairs door. But probably the upholsterer who brings home an expensive fitting for upstairs would be required to go thither and to see to the suitable disposition of his achievement. There is no need to multiply examples. *Modus et conventio vincunt legem.* It must be borne in mind that in three of the four instances given above the delivery is usually by the seller and not by the common carrier.

Time of delivery.

The time of delivery has nothing to do with the duty to deliver safely. Where there is an express contract, the terms of the contract of course govern; where there is no express contract, there is an implied contract to deliver within a reasonable time; "the duty to deliver within a reasonable time being merely a term engrafted by legal implication upon a promise or duty to deliver generally,"[1] and this delivery must be without unnecessary deviation.[2] So that where a

[1] Per Tindal, C.J., *Raphael* v. *Pickford*, 5 M. & G. 558.

[2] Per Tindal, C.J., *Davis* v. *Garrett* 6 Bing. 725. In *Lavabre* v. *Wilson*, 1 Dougl. 291, Lord Mansfield says: "A deviation from necessity must be justified both as to substance and manner. Nothing more must be done than what the necessity requires. The true objection to a deviation is not the increase of the risk. If that were so, it would only be necessary to give an additional premium. It is, that the party contracting has voluntarily substituted another voyage for that which has been insured." What constitutes "necessity" is elaborately discussed in *Phelps* v. *Hill*, [1891] 1 Q. B. 605. "A deviation defined 'a voluntary departure without necessity or reasonable cause from the regular and usual course' of a voyage. . . . But it is no deviation in respect of such a voyage to touch and stay at a port out of its course, if such departure is within the usage of trade": *Hostetter* v. *Park*, 137 U. S. (30 Davis) 40; *Constable* v. *National Steamship Co.*, 154 U. S. (47 Davis) 67. See *Leduc* v. *Ward*, 20 Q. B. D. 475, approved *Glynn* v. *Margetson*, [1893] A. C. 351, where the effect of printed words in a bill of lading is indicated. *The Dunbeth*, [1897] P. 133. A deviation was held to deprive the shipowners of the stipulations in the bill of lading limiting their liability, though the damage did not occur during the deviation. *Thorley* v. *Orchis SS. Co.*, [1907] 1 K. B. 243, in C. A., 660, following *Balian* v. *Joly*, 6 Times L. R. 345.

railway company were prevented from delivering a parcel of goods, by an accident on its line resulting from the negligence of another company which had running powers, the Common Pleas held, in *Taylor* v. *G. N. Ry. Co.*, that the railway company were not liable for damage to the goods by the delay.[1] Shortly after the same Court held, in *Lord* v. *Midland Ry. Co.*,[2] that a contract to carry by a particular train does not amount to a warranty that the goods shall arrive at the usual hour for the arrival of the train by which they are sent, even though at the time of receiving the goods the company's servants are informed that the object of the sender requires them so to arrive. *Taylor* v. *G. N. Ry. Co.* *Lord* v. *Midland Ry. Co.*

The carrier is bound to provide a safe and proper means for delivery. If, as in *Rooth* v. *N. E. Ry. Co.*,[3] the defendants undertake to carry cattle, there is an obligation to provide a safe and proper means for these cattle to cross the company's line and to leave the premises. Two questions were there left to the jury—Was there a complete and safe delivery? and, Was there a proper place to deliver? Commenting on this, Kelly, C.B., said:[4] "The one question involves the other. The question, that is, of safe and complete delivery, involves that of whether a safe and convenient place to deliver was provided." The Chief Baron's view is not perfectly accurate. Undoubtedly a safe and complete delivery would ordinarily render unnecessary the consideration of whether a safe and convenient place to deliver was provided. Yet the possibility is not excluded of the safe and complete delivery being made in an unsafe and inconvenient place necessitating extra expense and precautions to carry it out. On this hypothesis the carrier would seem to be liable for all extra expenses necessarily or reasonably incurred by his default. Kelly, C.B., further pointed out[5] that in *Roberts* v. *G. W. Ry. Co.*,[6] the defendants succeeded because "the declaration contained an express allegation of an absolute legal obligation to provide a fence to a yard near a railway station," and it was held impossible to say that that as a matter of law was the special precaution that must necessarily be taken. Mode of delivery. *Rooth* v. *N. E. Ry. Co.* *Roberts* v. *G. W. Ry. Co.*

The circumstances which constitute delivery were the subject of discussion in *Shepherd* v. *Bristol and Exeter Ry. Co.*,[7] where the Court were divided in opinion. Cattle delivered by the plaintiff to the defendants, and carried by them as common carriers, arrived at the defendants' station on a Sunday morning, between eleven and twelve o'clock. Owing to certain police regulations the plaintiff was unable to take them away before midnight. They arrived and were taken out of the trucks safely. The plaintiff's servant was at the station, and would at once have driven them away but for the regulations. They were put into a pen, where the plaintiff, who subsequently came, fed them, buying the hay of the railway company's foreman. Between twelve and one o'clock on Monday morning, when plaintiff's servant went to fetch them, he found that two had been killed. He desired to take the remaining twenty, but was not allowed to do so unless he signed for the lot. This he refused to do, and in consequence was not permitted to take any. The majority of the Court of Exchequer[8] What is delivery. *Shepherd* v. *Bristol and Exeter Ry. Co.*

[1] L. R. 1 C. P. 385; *Briddon* v. *G. N. Ry. Co.*, 28 L. J. Ex. 51. *Grand Trunk Ry. Co.* v. *Frankel*, 33 Can. S. C. R. 115.

[2] L. R. 2 C. P. 339.

[3] L. R. 2 Ex. 173; distinguished *Harris* v. *Midland Ry. Co.*, 25 W. R. 63.

[4] L. R. 2 Ex. 179.

[5] *L.c.* 180.

[6] 4 C. B. N. S. 506.

[7] L. R. 3 Ex. 189. Cp. *McKinney* v. *Jewett*, 90 N. Y. 267, the case of some horses spoiled while waiting at the defendant's station.

[8] Bramwell and Channell, BB.

held that "nothing more remained to be done by the defendants under their contract as carriers when the alleged damage occurred." Martin, B., considered the matter "a pure question of fact," [1] and that the cattle were "not delivered either actually or constructively." The question would seem largely to turn on what was the ordinary course of business,[2] and would therefore ordinarily have been for the jury; in this particular case the Court had the power to draw inferences of fact, and two judges drew one inference, one another.[3]

Another aspect of the same question is where the carrier is ready to part with the goods but the consignee is not ready to receive them. The carrier must give him a reasonable time, after notice, to remove the goods. The carrier may indicate beforehand some time within which he requires the things removed. There is further a duty on the consignee to use reasonable diligence to find out whether his goods are arrived or not. After the expiration of the reasonable time the carrier's obligation as carrier ceases and he remains liable as bailee only with a liability according to the circumstances.[4]

Cockburn, C.J., in *Chapman* v. *G. W. Ry. Co.*

"When once," says Cockburn, C.J.,[5] speaking of railway carriers, "the consignee is in *morâ* by delaying to take away the goods beyond a reasonable time, the obligation of the carrier becomes that of an ordinary bailee, being confined to taking proper care of the goods as a warehouseman; he ceases to be liable in case of accident.[6] What will amount to reasonable time is sometimes a question of difficulty, but as a question of fact, not of law. As such, it must depend on the circumstances of the particular case." [7]

North Pennsylvania Rd. Co. v. *Commercial Bank of Chicago.*

The Supreme Court of the United States considered the question of the carrier's duty in the delivery of cattle in *North Pennsylvania Rd. Co.* v. *Commercial Bank of Chicago.*[8] "A railroad company," it is said in the judgment,[9] "it is true, is not a carrier of live stock with the same responsibilities which attend it as a carrier of goods. The nature of the property, the inherent difficulties of its safe transportation, and the necessity of furnishing to the animals food and water, light and air, and protecting them from injuring each other, impose duties in many respects widely different from those devolving upon a mere carrier of goods. The most scrupulous care in the performance of his duties will not always secure the carrier from loss. But, notwithstanding this difference in duties and responsibilities, the railroad company, when it undertakes generally to carry such freight, becomes subject, under similar conditions, to the same obligations, so far as the delivery of the animals which are safely transported is concerned, as in the case of goods. They are to be delivered at the place of destination to the party designated to receive them if he presents himself, or can with reasonable efforts he found, or to his order. No obligation of the carrier, whether the freight consists of

1 L. R. 3 Ex. 195.

2 *Stephenson* v. *Hart*, 4 Bing. 476. *M'Kean* v. *M'Ivor*, L. R. 6 Ex. 36; where the usual course of business is followed in the absence of special instructions, the carrier is discharged.

3 By 57 & 58 Vict. c. 57, s. 23 (amending and re-enacting 41 & 42 Vict. c. 74, s. 33), railway companies are required to make provision of food and water at railway stations for animals carried or about to be carried by them; *Curran* v. *Midland Great Western Co. of Ire'and*, [1896] 2 I. R. 183.

4 *Cairns* v. *Robins*, 8 M. & W. 258.

5 *Chapman* v. *G. W. Ry. Co.*, 5 Q. B. D. 282.

6 *I.e.*, as distinguished from negligence.

7 See *ante*, 834.

8 123 U. S. (16 Davis) 727. *Post*, 938.

9 *L.c.*, per Field, J., 734.

goods or of live stock, is more strictly enforced.[1] If the consignee is absent from the place of destination, or cannot, after reasonable inquiries, be found, and no one appears to represent him, the carrier may place the goods in a warehouse or store with a responsible person, to be kept on account of and at the expense of the owner. He cannot release himself from responsibility by abandoning the goods or turning them over to one not entitled to receive them.[2] If the freight consist, as in this case, of live stock, the carrier will not, under the circumstances mentioned, that is, when the consignee is absent or cannot after reasonable inquiries be found, and no one appears to represent him, relieve himself from responsibility by turning the animals loose. He must place them in some suitable quarters where they can be properly fed and sheltered, under the charge of a competent person or his agent, or for account and at the expense of the owner. Turning them loose without a keeper, or delivering them to one not entitled to receive them, would equally constitute a breach of duty, for which he could be held accountable." [3]

Distinction between ordinary road carriers and railway carriers.

There is apparently a difference between ordinary road carriers and railway carriers in discharging the duty of delivering goods carried.[4] In *Hyde* v. *Trent and Mersey Navigation Co.*[5] the majority of the Court were of opinion that the risk of the carrier continued until a personal delivery at the house or place of deposit of the consignee with notice. With railway companies the rule is otherwise.[6] The trucks cannot leave the line of rails on which they move, while if they are drawn up on the line they necessarily obstruct other traffic; thus it is often essential for them to be unloaded, without waiting for instructions or intervention from those to whom their contents belong. Hence arises, as an almost inseparable incident to a railway company's business, the necessity for large warehouses for the storage of goods pending delivery. The contract made by railway carriers of goods is accordingly modified from that of ordinary road carriers, and may be thus stated: They contract to "carry the goods safely to the place of destination and there discharge them on the platform, and then and there deliver them to the consignee or party entitled to receive them, if he is there ready to take them forthwith; or, if the consignee is not there ready to take them, then to place them securely and keep them safely a reasonable time ready to be delivered when called for." [7]

Rule of duty laid down by Shaw, C.J., in *Norway Plains Co.* v. *Boston Rd.*

Actual delivery to the proper person is generally conceded to be the duty of the carrier.[8] A delivery-note does not pass the property as a bill of lading by being indorsed. Anything beyond the mere act of

Duty of the carrier actually to deliver.

[1] *Forbes* v. *Boston and Lowell Rd. Co.*, 133 Mass. 154; *McEntee* v. *New Jersey Steamboat Co.*, 45 N. Y. 34.

[2] *Fisk* v. *Newton*, 1 Denio (N. Y.), 45.

[3] See Angell, Carriers (5th ed.), § 291; also 2 Kent, Comm. 500 *et seqq.* as to symbolical delivery.

[4] This is probably due to the fact that the railway Acts originally contemplated the charge of tolls for use of the road, and that carriers by rail would use their own waggons. When the companies became carriers, their right to deliver depended on their special Act, and the charges for delivery at the consignee's door rested on the right to make terminal charges. See *Hall* v. *L. B. & S. C. Ry. Co.*, 15 Q. B. D. 505.

[5] 5 T. R. 389.

[6] *Thomas* v. *Boston and Providence Rd. Corporation*, 51 Mass. 472; *South and North Alabama Rd. Co.* v. *Wood*, 41 Am. R. 749.

[7] Per Shaw, C.J., *Norway Plains Co.* v. *Boston and Maine Rd.*, 67 Mass. 272. *Rice* v. *Boston and Worcester Rd. Corporation*, 98 Mass. 212. As to the liability of taking goods to a port beyond their proper destination, *Ellis* v. *Turner*, 8 T. R. 531.

[8] *Smith* v. *Horne*, 8 Taunt. 144; *Garnett* v. *Willan*, 5 B. & Ald. 53; *Duff* v. *Budd*, 3 B. & B. 177. As to constructive delivery by carrier, *Tarbell* v. *Royal Exchange Shipping Co.*, 110 N. Y. 170, 6 Am. St. R. 350.

delivery remains to be done after it has been given, as, for example, the weighing of goods.[1] There must be a positive acting upon it to give it effect.[2]

Heugh v. *L. & N. W. Ry. Co.*

If the carrier has delivered to the wrong person, he is *primâ facie* guilty of a conversion.[3] But, says Kelly, C.B., in *Heugh* v. *L. & N. W. Ry. Co.*,[4] referring to the cases just noted, "in neither case was it held, or even contended, that the misdelivery amounted, as matter of law, to a conversion; but in both cases it was admitted to be a question for the jury—and the question was, in fact, left to them—whether under all the circumstances the defendants had acted with reasonable care." This and similar decisions turn upon the fact that the transit has been completed, and the carrier has done all he could to secure delivery; so that the character in which he holds the goods is changed from that of an insurer to that of a less onerous responsibility.[5] To make him liable there must be some fault; and it is a question of fact whether there has been any such negligence as makes him guilty of a conversion; and where he has carried out the directions of the sender, the mere circumstance that he has delivered the goods to some person to whom the sender did not intend delivery to be made is not sufficient to support the allegation that he has converted them.[6] The proposition would be more strictly accurate put in another way. The liability of the carrier having been terminated by the fulfilment of the contract, the substituted contract requires some negligence in order to fix the bailee of the goods with responsibility for their misdelivery; and, until negligence is shown, it does not follow that acts, which in law, in the abstract, point to conversion, necessarily affix liability to the bailee in the special circumstances of the particular case. This may be tested by assuming a similar misdelivery while the carrier's liability is subsisting. The carrier is liable in trover for the misdelivery.[7]

Mere wrong delivery not sufficient to support a claim for conversion.

Where carrier holds goods in another capacity than that of carrier.

Where the carrier holds the goods in another and less onerous capacity than that of carrier, he is not liable. This cannot depend upon the facts showing conversion in one case and not a conversion in the other; for the facts, by hypothesis, are the same; and "conversion" is a conclusion of law deduced from ascertained facts.[8] If, then, the bailee holds the goods in one capacity—as carrier—he is liable for a conversion; if he holds them in another capacity—as warehouseman—he is not; in each instance the facts are the same, so far, that is, as they relate to the alleged converting. Therefore, it is not the question of conversion which is for the jury, but the question in what capacity the defendant holds the goods; and, if in the capacity of bailee, whether as depositary or as bailee for hire; then, has his conduct been negligent to such a degree as would affix a responsibility to him in a case where he is not necessarily, and in all events, liable? Actual

1 *Busk* v. *Davis*, 2 M. & S. 397.

2 *M'Ewan* v. *Smith*, 2 H. L. C. 309, distinguished *Pooley* v. *G. E. Ry. Co.*, (1876) 34 L. T. per Cleasby, B., 540

3 *Stephenson* v. *Hart*, 4 Bing. 476; *Duff* v. *Budd*, 3 B. & B. 177.

4 L. R. 5 Ex. 57.

5 See *ante*, 833.

6 *M'Kean* v. *M'Ivor*, L. R. 6 Ex. 36; *Samuel* v. *Cheney*, 135 Mass. 278, 283, is claimed to be "in some respects similar." See also *Southern Express Co.* v. *Van Meter*, 35 Am. R. 107.

7 *Youl* v. *Harbottle*, Peake (N. P.), 49, cited by Bayley, J., in *Devereux* v. *Barclay*, 2 B. & Ald. 704; *Wyld* v. *Pickford*, 8 M. & W. 443. *Cunnington* v. *G. N. Ry. Co.*, 49 L. T. 392, is a case on misdelivery.

8 *Hollins* v. *Fowler*, L. R. 7 H. L. 757. *McCormick* v. *Pennsylvania Central Rd. Co.*, 99 N. Y. 65, deals with conversion of baggage.

delivery, of course, cannot be insisted on in all cases: circumstances may imply it; it may be waived; it may be impossible.

Termination of responsibility.

The responsibility for the custody of goods does not terminate until the owner or consignee might reasonably have an opportunity to remove them,[1] if, that is, there is a contract or a custom for him to do so. Neglect of the opportunity to remove goods will not impose a greater burthen [2] on the carrier than exists if the owner does his duty.

Distinctions.

The same contract at different times may import different liabilities to those entrusted with goods.[3] Those cases where the continued custody of the goods is for the convenience of the carrier are distinguishable from those cases where the custody is not incident necessarily to the carriage, and is for the convenience, or through the negligence, of the bailor. In the former class the liability continues that of the common carrier; in the latter it is that of a mere bailee.

On what terms goods remain after termination of carrier's responsibility.

This latter class also admits of subdivision between the cases where the bailment is a bailment for hire, and those where it is a mere deposit. A carrier may refuse to enter into any new contract for keeping goods after he has completed his undertaking for the carriage of them and has discharged himself from responsibility by a delivery of the goods to the bailor, or by tender of them, or by some other act which the law regards as delivery.[4] If he does this, it is said in an American case of authority [5] that the goods remain with him as an involuntary depositary, for he has discharged his duty to the owner, which is—failing actual delivery, which he cannot compel—to do what is fairly equivalent to a delivery; [6] and has refused to undertake any further obligation to him. There does not then appear to be any distinction between his position and the position of a mere finder of goods.[7] He may suffer them to remain undisturbed, or he may remove them to a convenient distance and there leave them in a suitable place for the owner, doing no unnecessary damage; he will then incur no responsibility.[8]

Hudson v. *Baxendale*.

In *Hudson* v. *Baxendale* [9] the rule was laid down apparently more in favour of the owner. Bramwell, B.,[10] held the true rule to be: "That when a consignee refuses to accept a parcel tendered to him by a carrier, the carrier must conduct himself as a reasonable man would do with reference to it. I doubt if a consignor has a right to impose on a carrier the burden of doing anything after he has tendered the goods. But, assuming that he has, it is sufficient if the carrier does what is reasonable."

G. W. Ry. Co. v. *Crouch*.

The question then arises—As a reasonable man, with respect to what standard? This was answered by Willes, J., in *G. W. Ry. Co.* v. *Crouch*,[11] in the Exchequer Chamber. "Generally speaking, dealing

[1] *G. W. Ry. Co.* v. *Crouch*, 2 H. & N. 491, 3 H. & N. 183; *Hodkinson* v. *L. & N. W. Ry. Co.*, 14 Q. B. D. 228.

[2] *Chapman* v. *G. W. Ry. Co.*, 5 Q. B. D. 278.

[3] *Garside* v. *Trent and Mersey Navigation*, 4 T. R. 581; *Hyde* v. *Trent and Mersey Navigation Co.*, 5 T. R. 389.

[4] *Heugh* v. *L. & N. W. Ry. Co.*, L. R. 5 Ex. 51; *Otago Harbour Board* v. *John Lysaght*, 20 N. Z. L. R. 541.

[5] *Smith* v. *Nashua and Lowell Rd.*, 27 N. H. 86.

[6] *Ostrander* v. *Brown*, 15 Johns. (Sup. Ct. N. Y.) 39; Story, Bailm. § 543; Angell, Carriers (5th ed.), § 289; *Patten* v. *Johnson*, 131 Mass. 297, is a case on what amounts to waiver of delivery.

[7] *Ante*, 910.

[8] *Fisk* v. *Newton*, 1 Denio (N. Y.), 45; *Cope* v. *Cordova*, 1 Rawle (Pa.), 203, in which cases the law is exhaustively considered and the English cases referred to.

[9] 2 H. & N. 575.

[10] *L.c.* 581.

[11] 3 H. & N. 202.

with a parcel under such circumstances in a reasonable manner will impose upon the carrier the duty of keeping it for a reasonable time, if he have the means of doing so, at the place to which it was originally consigned." Crompton, J., considered that,[1] "according to the general law, where a carrier undertakes to carry goods to a particular place he must deposit them for a reasonable time, if the consignee is not ready to receive them." This Willes, J.,[2] agreed was the correct rule. That being so, it seems that not every hasty refusal must be taken by the carrier as irrevocable, but a *locus pœnitentiæ* must be given. The consignee, whether refusing acceptance or not, is to have his reasonable time for the purposes of getting delivery. After the expiry of this time, the position of the carrier may be that of an involuntary depositary; still, he must act reasonably with regard to the subject-matter and to the circumstances.

Mitchell v. *Lancs. & Y. Ry. Co.* Blackburn, J.s', judgment.

In *Mitchell* v. *Lancs. & Y. Ry. Co.*,[3] Blackburn, J., said:[4] "I take it the law is very clear to this extent, that where a carrier receives goods to carry to their destination with a liability as carrier (except so far as that duty is qualified by exceptions), he may be said to be an insurer. The goods are then to be carried at the risk of the carrier to the end of the journey, and, when they arrive at the station to which they were forwarded, the carrier has then complied with his duty *when he has given notice to the consignee of their arrival.*[5] And after this notice, and the consignee does not fetch the goods away and becomes *in morâ*, then I think the carrier ceases to incur any liability as carrier, but is subject to the ordinary liability of bailee."[6]

Considered.

This seems to assume a duty on the carrier to give notice to the consignee; though the expression is susceptible of the meaning that notice is the clearest way of showing that the consignee has had reasonable opportunity to remove his goods, and does not lay down an absolute rule that to give notice is a *conditio sine quâ non* of reasonable opportunity. Blackburn, J., also leaves ambiguous the answer to the question what sort of bailee's liability it is that is incurred on the termination of the carrier's obligation—that of the bailee for hire, or that of the involuntary depositary? In the case before him there was no dispute as to which; for if the defendants were not liable as carriers, then their liability was that of warehouseman. "I think in this case the railway company in holding these goods could have charged warehouse rent; and, that being so, I think there can be no doubt that *primâ facie* there was a liability in them as bailees for reward. The liability of an ordinary bailee is to take ordinary and reasonable care."[7] As the case did not raise the question whether in any circumstances the liability of the carrier may be only that of an involuntary depositary, Blackburn, J., does not discuss it. Probably in the existing state of opinion, and with the present methods of the conduct of railway business, the question is not likely practically to be raised. But assuming reasonable notice given of the arrival of goods and omission to remove them, with a further distinct notice that the carrier repudiates all liability with regard to them, there seems no

Suggested solution of the difficulty.

1 *L.c.* 197.
2 *L.c.* 202.
3 L. R. 10 Q. B. 256.
4 *L.c.* 260.
5 In *Hudson* v. *Baxendale*, 2 H. & N. 575, the Court held that notice, as a matter of law, was not necessary.
6 *Bourne* v. *Gatliffe*, 4 Bing. N. C. 314; 3 M. & G. 643; 11 Cl. & F. 45; *Cairns* v. *Robins*, 8 M. & W. 258. See Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 45.
7 L. R. 10 Q. B. 260.

reason why the liability of the carrier should be other than that of an involuntary bailee.[1]

The American cases have decided, and the decision seem svery good sense, that "reasonable time" in this connection is such "as would enable one living in the vicinity of the place of delivery and informed of the probable time of arrival to inspect and remove the goods during business hours."[2]

Right to warehouse goods.

As to the right to put goods in warehouse, there seems to be, says a high authority,[3] "no question but that the carrier will be justified" in so disposing of goods not called for in a reasonable time.

Retention of the goods.

The carrier may refuse to undertake any new duties with respect to the goods, yet he may continue to retain them in his hands without any further contract. In such a case the law implies that the goods are held by him as a depositary; and he is liable for gross negligence, and is bound to the exercise of slight care, such as is taken by a man of common sense of his own property.[4] Further, though he has at first refused to undertake any responsibility with regard to the goods, he may subsequently so act that he may become bound by the same contract into which he has at first refused to enter, either as a depositary or a bailee for hire; and the question whether he has done so will be a question of fact, and for the jury.[5]

Duty of carrier where he is required to hold the goods when such holding involves expense. *Notara* v. *Henderson.*

There is one point more—What is the duty of the carrier during the time he is required to hold the goods pending the taking of delivery of them by the consignee, when the holding of them either necessitates expense or renders it expedient? In the well-known shipping case of *Notara* v. *Henderson*,[6] in the Exchequer Chamber, a duty was held to be imposed upon the master, as representing the shipowner, to take reasonable care of the goods entrusted to him, not merely in doing what is necessary to preserve them on board the ship during the ordinary incidents of the voyage, but also in taking reasonable measures to check and arrest their loss, destruction, or deterioration by reason of accidents, for the necessary effects of which there is, by reason of the exception in the bill of lading, no original liability.[7] *Notara* v. *Henderson* was followed by *Cargo ex Argos*, *Gaudet* v. *Brown*,[8] also a shipping case, where Sir Montague Smith said:[9] "It results from them (the cases passed in review) that not merely is a power given, but a duty is cast on the master, in many cases of accident and emergency, to act for the safety of the cargo in such manner as may be best under the

Cargo ex Argos, *Gaudet* v. *Brown.*

[1] *Clark* v. *Eastern Rd. Co.*, 139 Mass. 423, holds that in certain circumstances a railway company may be a gratuitous bailee of baggage brought to be conveyed with a passenger. *Ante*, 754. As to carriage "at owner's risk," see *Wood* v. *Burns*, 20 Rettie, 602, where an organ, carried upon special terms, while being landed from the carrier's vessel slipped and was smashed.

[2] Thompson, Negligence, § 6614.

[3] Redfield, Carriers, § 121. In *National Steamship Co.* v. *Smart*, 107 Pa. St. 492, 500, where the liability of carrier has ceased, the goods are said to be held on the obligation "to exercise ordinary care in keeping and preserving" them. *Ante*, 833. As to "ordinary care," *ante*, 756.

[4] *In re Webb*, 8 Taunt. 443; *Hyde* v. *Trent and Mersey Navigation Co.*, 5 T. R. 389; *Garside* v. *Trent and Mersey Navigation*, 4 T. R. 581; *Chapman* v. *G. W. Ry. Co.*, 5 Q. B. D. 278.

[5] *Smith* v. *Nashua and Lowell Rd.*, 27 N. H. 86; *Cairns* v. *Robins*, 8 M. & W. 258; *White* v. *Humphery*, 11 Q. B. 43.

[6] L. R. 7 Q. B. 225. *The Savona*, [1906] P. 252. *Nobel's Explosives Co.* v. *Jenkins*, [1896] 2 Q. B. 326.

[7] Cp. *Giles* v. *Taff Vale Ry. Co.*, 2 E. & B. 822, where it was held in the Ex. Ch. to be the duty of a railway company to plant "quicks" pending delivery. *Rose* v. *Bank of Australasia*, [1894] A. C. 687.

[8] L. R. 5 P. C. 134.

[9] *L.c.* 165.

circumstances in which it may be placed; and that, as a correlative right, he is entitled to charge its owner with the expenses properly incurred in so doing." Referring to this in *G. N. Ry. Co.* v. *Swaffield*,[1] the case of a land carrier, Pollock, B., says:[2] "That seems to me to be a sound rule of law. That the duty is imposed upon the carrier I do not think any one has doubted; but if there were that duty without the correlative right, it would be a manifest injustice." Kelly, C.B., in the same case—that of a horse received at a station, and no consignee appearing, being sent on to a livery stable keeper, for whose charges the company sued—said:[3] "My brother Pollock has referred to a class of cases which is identical with this in principle, where it has been held that a shipowner who, through some accidental circumstances, finds it necessary for the safety of the cargo to incur expenditure is justified in doing so, and can maintain a claim for reimbursement against the owner of the cargo. That is exactly the present case. The plaintiffs were put into much the same position as the shipowner occupies under the circumstances I have described. They had no choice, unless they would leave the horse at the station or in the high road to his own danger and the danger of other people, but to place him in the care of a livery stable keeper, and, as they are bound by their implied contract with the livery stable keeper to satisfy his charges, a right arises in them against the defendant to be reimbursed those charges which they have incurred for his benefit."

G. N. Ry. Co. v. *Swaffield.*

Rule stated by Lord President Inglis in *Adams* v. *Morris.*

The rule of liability in *Notara* v. *Henderson*[4] has been recognised by the Scotch courts in *Adams* v. *Morris*[5] where Lord President Inglis said:[6] "It is the duty of a master, when an injury has been caused to cargo by an excepted cause, to repair by all the means in his power the mischief which has been done, and to land the cargo in as good a condition as the circumstances will admit. The neglect of this duty does not fall within the exceptions in the charter-party. It is a plain duty required of the master to the shipowners and the merchant and all concerned." Moreover, the authorities cited by Willes, J., in his judgment in *Notara* v. *Henderson*,[7] show that this obligation is not founded merely on special local circumstances, but is so widely observed as to rise to the generality of a principle of universal law.

Duty of the carrier the event of the refusal by the consignee to receive.

Hudson v. *Baxendale.*

In the event of the consignee absolutely refusing to receive goods it was contended that there was an absolute duty on the carrier to give notice to the consignor. The Court of Exchequer, in *Hudson* v. *Baxendale*,[8] refused to go this length, and agreed with the direction of the judge at the trial, that "there was no law requiring a carrier to give notice, though in certain cases it might be reasonable that he should do so."[9] Whether notice should be given or not is dependent on the facts of the case, not on any rule of law.

Proof of loss or non-delivery.

With regard to the proof of loss or non-delivery of goods, the principle is well stated in Hutchinson on Carriers;[10] "Although the claim of the plaintiff in an action for the loss of the goods may rest upon negligence or nonfeasance, and not upon a positive misfeasance, and would therefore seem to require proof of a negative character, the burden of showing the loss is unquestionably upon him, and he must

1 L. R. 9 Ex. 132.
2 *L.c.* 138.
3 *L.c.* 136.
4 L. R. 7 Q. B. 225.
5 18 Rettie, 153.
6 *L.c.* 159.
7 L. R. 7 Q. B. 233.
8 2 H. & N. 575.
9 *L.c.* 582. As to effect of notice when given, see *Carr* v. *L. & N. W. Ry. Co.*, L. R. 10 C. P. 307.
10 § 764.

give some proof of the allegation of the loss notwithstanding its negative character; and, if it be out of his power to show positively the loss of the goods, he must at least prove such circumstances as would create the inference against the defendant that they had been lost; as, for instance, that they had been bailed to the carrier a sufficient length of time to be transported to their destination, and had not been there received or delivered to the person entitled to them to whom they were consigned." [1]

Vendee may sue carrier when property vests.

Where goods are ordered from a distant place, and the vendor sends them by a carrier, the vendee in whom the property vests may bring the action, although he knows nothing of the carrier, and the carrier knows nothing of him.[2]

Demand of goods at a place other than that to which they are consigned.

If goods are delivered to a carrier to be carried to a certain place, with the name of the consignee stated, the consignee may demand them in another place, and the carrier is discharged from any liability to the vendor if he delivers them to the consignee so designated.[3]

L. & N. W. Ry. Co. v. *Bartlett.*

"It is clear," said Pollock, C.B., in *L. & N. W. Ry. Co.* v. *Bartlett*,[4] "that a consignee may receive the goods at any stage of the journey; and though the consignor directs the carrier to deliver them at a particular place, there is no contract by the carrier to deliver them at that place and not elsewhere." Bramwell, B., adds, in his forceful way: [5]

Dictum of Bramwell, B.

"It would probably create a smile anywhere but in a court of law if it were said that a carrier could not deliver to the consignee at any place except that specified by the consignor.[6] The goods are intended to reach the consignee, and provided he receives them it is immaterial at what place they are delivered. The contract is to deliver the goods to the consignee at the place named by the consignor unless the consignee directs them to be delivered at a different place." The implication, arising from the relation of the parties as consignor and consignee, is that the ownership of the property is in the consignee. But where the consignor is known to the carrier to be the owner, the consignee is regarded simply as an agent to receive the goods at the place indicated.[7] On the other hand, where the property is the consignee's,

[1] *Woodbury* v. *Frink*, 14 Ill. 279, cited Angell, Carriers (5th ed.), § 470.

[2] Per Crompton, J., in *Bristol and Exeter Ry. Co.* v. *Collins*, 7 H. L. C. 211.

[3] Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 45, sub-s. 2. *Whitehead* v. *Anderson*, 9 M. & W. 518, 534.

[4] 7 H. & N. 407, explained and distinguished in *Metcalfe* v. *Britannia Ironworks Co.*, 1 Q. B. D., per Quain, J., 631; affd. 2 Q. B. D. 423.

[5] *L.c.* 408.

[6] See *Cork Distilleries Co.* v. *Great Southern and Western Ry. Co.* (*Ireland*), L. R. 7 H. L. 269.

[7] *Southern Express Co.* v. *Dickson*, 94 U. S. (4 Otto) 549. In *Dawes* v. *Peck*, 8 T. R. 332, Lord Kenyon, C.J., gives the rule, indicating the proper party to sue for damage to goods consigned while in the custody of the carrier, that whoever has sustained the loss by the negligence of the carrier is the proper party to call for compensation from the person by whom he has been injured; and in the case before the Court the judgment was that the consignor of goods having delivered them to a particular carrier by order of the consignee, the consignor could not maintain an action against the carrier for their loss. This was distinguished in *G. W. Ry. Co.* v. *Bagge*, 15 Q. B. D., by Lord Coleridge, C.J., 627, where the consignor was held liable, on the terms of his contract, to pay the freight of goods carried by the plaintiffs. In *Davis* v. *James*, 5 Burr. 2680, it was objected that the action ought to have been brought in the name of the consignee of the goods and not in the name of the consignors; "for that the consignors parted with their property upon their delivering the goods to the carrier; and that no property remained in them after such delivery." Lord Mansfield said: "There was neither law nor conscience in the objection. The vesting of the property may differ according to the circumstances of cases." *Prima facie* the consignee is the proper person to bring an action against the carrier; but the question is most often one for a jury: *Dunlop* v. *Lambert*, 6 Cl. & F. 600.

the consignor is no more than his agent in forwarding the goods consigned.[1]

Carrier's rights under a floating policy of insurance. *L. & N. W. Ry. Co.* v. *Glyn.*

There remains to be noticed the contention raised in *L. & N. W. Ry. Co.* v. *Glyn.*[2] The plaintiffs, who were common carriers, insured against fire in a company of which the defendant was treasurer. By the policy, £15,000 was declared to be insured "on goods their (plaintiffs') own and in trust as carriers" in a certain warehouse. There were various other phrases and conditions to the same effect. The warehouse, with its contents, was destroyed by fire, and the insurance company resisted payment of a greater sum than would cover the plaintiff's interest as carriers. It was contended by the insurers, that as the value of the goods destroyed by fire exceeded £10, and as the owners had not declared such value to the plaintiffs, the plaintiffs were not liable to the owners for the loss, by reason of the Carriers Act, 1830.[3] The Court negatived this contention and held that the plaintiffs would be trustees for the owners of the goods of the amount thus recovered, less plaintiffs' charges as carriers, in respect of the goods.

Vendor's rights where purchaser declines to receive goods.

The question may arise of the rights of the vendor, in the event of the purchaser declining to receive the goods as by the contract he ought,[4] a question often occurring when goods are left in the carrier's hands.

Holt, C.J., laid down [5] that "if the vendee does not come and pay and take the goods, the vendor ought to go and request him; and then, if he does not come and pay, and take away the goods in convenient time, the agreement is dissolved, and he is at liberty to sell them to any other person." The ruling of Lord Ellenborough, C.J., in *Greaves* v. *Ashlin*,[6] has sometimes been thought to conflict with Holt, C.J.'s, statement: "If, the buyer does not carry away the goods bought within a reasonable time, the seller may charge him warehouse-room; or he may bring an action for not removing them, should he be prejudiced by the delay. But the buyer's neglect does not entitle the seller to put an end to the contract. . . . In this case the notice given to fetch away the goods could not discharge the defendant from his contract, nor empower him to sell the property of the plaintiff." The goods in question were oats.

Greaves v. *Ashlin.*

Maclean v. *Dunn.*

Judgment of Best, C.J.

The right to sell is, however, supported by the next case, *Maclean* v. *Dunn*.[7] It was admitted by both plaintiff and defendant that "perishable articles" might be resold. Best, C.J., in his judgment, after remarking the difficulty in determining what are "perishable articles," thus continues: "If articles are not perishable, price is, and may alter in a few days, or a few hours. In that respect there is no

1 In *Gordon* v. *Harper*, 7 T. R. 12, Grose, J., says: "Where goods are delivered to a carrier, the owner has still a right of possession as against a tort feasor, and the carrier is no more than his servant." In *Moore* v. *Wilson*, 1 T. R. 659, it was held that the consignor of goods might sue the carrier for non-delivery, "for that, whatever might be the contract between the vendor and the vendee, the agreement for the carriage was between the carrier and the vendor, the latter of whom was by law liable." For other cases see the note in 1 R. R. 347. *Thompson* v. *Fargo*, 49 N. Y. 188. See Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 32, sub-s. 2.

2 1 E. & E. 652, see *ante*, 823.

3 11 Geo. IV. & 1 Will. IV. c. 68, s. 1.

4 As to transfer of property as between seller and buyer, see Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), part ii.

5 (1704) *Langfort* v. *Administratrix of Tiler*, 1 Salk. 112. See per Lord Ellenborough, C.J., *Hinde* v. *Whitehouse*, 7 East, 571.

6 (1813) 3 Camp. 426.

7 (1828) 4 Bing. 722. See *Boorman* v. *Nash*, 9 B. & C. 145. The right in the civil law to resell where the goods are of a perishable nature is treated by Moyle, Contract of Sale, 148 n. 5. See Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 48.

difference between one commodity and another. It is a practice, therefore, founded on good sense, to make a resale of a disputed article, and to hold the original contractor responsible for the difference. This practice itself affords some evidence of the law, and we ought not to oppose it, except on the authority of decided cases. Those which have been cited do not apply. Where a man, in an action for goods sold and delivered, insists on having from the vendee the price at which he contracted to dispose of his goods, he cannot, perhaps, consistently with such a demand, dispose of them to another; but if he sues for damages in consequence of the vendee's refusing to complete his contract, it is not necessary that he should retain dominion over the goods. . . . It is most convenient that, when a party refuses to take goods he has purchased, they should be resold, and that he should be liable to the loss, if any, upon the resale. The goods may become worse the longer they are kept; and, at all events, there is the risk of the price becoming lower." In the subsequent case of *Acebal* v. *Levy*,[1] in the same Court, where Tindal, C.J., then presided, it was considered that "there can be no doubt but that the plaintiff might, after reselling the goods, recover the same measure of damages in a special count framed upon the refusal to accept and pay for the goods bought." *Acebal* v. *Levy.*

On the other hand, there are cases[2] which Mr. Benjamin[3] treats in this connection, and which he considers "decide expressly that the vendor has no right to resell, for they determine that he is responsible for nominal damages where there is no difference in these values," *i.e.*, the difference between the contract price and the market value. Mr. Benjamin's view.

Here also should be noted the comment in Blackburn on Sale,[4] on *Maclean* v. *Dunn*. "The *dictum* of the Court goes to the extent that the resale was perfectly legal and justifiable; probably it may be so, but there has never been a decision to that extent." Comment on *Maclean* v. *Dunn* in Blackburn on Sale.

There is, however, a clear distinction between the various cases we have been considering. Holt, C.J., in *Langfort* v. *Tiler*,[5] asserts merely the validity of a sale after notice from the vendor to the purchaser to receive the goods and neglect to do so, after the lapse of "convenient time." *Maclean* v. *Dunn* was well within the requirements thus laid down, for after notice by the vendor the purchaser "declined to receive them,"[6] *i.e.*, the goods. The vendor then sold. Cases considered.

On the other hand, in *Greaves* v. *Ashlin*,[7] there was mere omission to "carry away the goods bought, within a reasonable time." In the cases cited by Mr. Benjamin again, the decision is that, though non-payment does not put an end to a contract, still the vendor is entitled to refuse delivery of goods sold till he is tendered payment for them;[8] or in the words of Brett, J.,[9] "when one contracting party gives notice to the other that he is insolvent, and does nothing more, the other party has a right to assume that he intends to abandon the contract." So that the damages recoverable from the vendor for breach of his *Greaves* v. *Ashlin.*

[1] (1834) 10 Bing. 384. Cp. 56 & 57 Vict. c. 71, s. 47.

[2] *Valpy* v. *Oakeley*, 16 Q. B. 941; *Griffiths* v. *Perry*, 1 E. & E. 680, considered and followed *Ex parte Chalmers, In re Edwards*, L. R. 8 Ch. 289, 292.

[3] On Sale (4th ed.), 797.

[4] (2nd ed.) 469.

[5] 1 Salk. 112.

[6] 4 Bing. 724.

[7] 3 Camp. 426.

[8] *Ex parte Chalmers, In re Edwards*, L. R. 8 Ch. 289.

[9] *Morgan* v. *Bain*, L. R. 10 C. P. 26. *In re Phœnix, Bessemer Steel Co., Ex parte Carnforth Hæmatite Iron Co.*, 4 Ch. D. 108, explained *Mersey Steel and Iron Co.* v. *Naylor*, 9 Q. B. D., per Jessel, M.R., 658; and if the plaintiff brings an action without tender of the price or what is equivalent to it, he cannot maintain it: *Morton* v. *Lamb*, 7 T. R. 125. See also *Pordage* v. *Cole*, 1 Wms. Saund. 319 *l*, and *Cutter* v. *Powell*, 2 Sm. L. C. (11th ed.) 1.

contract in not delivering are nominal merely, even if the purchaser's inability to pay is only manifested by matter subsequent to the period when it was the vendor's duty to have made delivery of the goods under the contract; and where, had he made the delivery to which he was in law bound, the property would have actually vested in the purchaser.[1]

Summary of the law.

Where then the purchaser has merely abstained from taking delivery equally with those cases where the vendor has refused delivery on account of the manifested inability of the purchaser to make payment —in the event of a resale by the vendor at a profit on tender of the purchase-money, and expenses probably, the purchaser would be entitled to the profit.[2] Till he pays or tenders the price he cannot maintain trover[3] or an action against a wrongdoer.[4] But neither failure to seek delivery nor non-payment of an instalment, nor even the calling a meeting of creditors and a declaration of insolvency by the purchaser will put an end to the contract.[5] Where the goods are properly sold and a loss results, the purchaser is liable up to the contract price *plus* the reasonable expenses attending the sale. If, however, the sale realises a profit, the purchaser may claim this on tender of the price *plus* the reasonable expenses of the sale; for in selling the goods the vendor is considered to act as the agent of the purchaser for that purpose. The distinction as to whether the property has passed or not must be kept in mind in both classes of cases as materially affecting the character of the sale; and this distinction is dependent on whether the contract is executed or executory, for specific chattels or for goods to which something has to be done.[6] In the class, however, which includes *Langfort* v. *Administratrix of Tiler*[7] and *Maclean* v. *Dunn*[8] there is not merely an omission or default on the part of the purchaser, but, in the latter case at least, a positive refusal to perform the contract; and in the former such conduct apparently as warranted the inference of a refusal. If then the vendor elects to resell and to treat the defendant's refusal as a repudiation of the contract, there seems nothing inconsistent with cases we have been considering in his doing so. In the event of a profit being realised the purchaser would not be entitled to it, because he had refused to perform his contract and the vendor had acted upon his refusal as he was entitled to do. His mere non-performance, as we have seen, is quite a different thing, and gives rise to rights quite different also. The vendor, however, has his option of treating the contract as subsisting and suing the purchaser for the price.[9]

1 In *Pease* v. *Gloahec*, L. R. 1 P. C. 219, 227, it is said, that if bills given for the price are current, though certain to be dishonoured, the property has passed even to the divesting the vendor's right to stop *in transitu*.

2 Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 37; Benjamin, On Sale (4th ed.), 797.

3 *Milgate* v. *Kebble*, 3 M. & G. 100; *Bloxam* v. *Sanders*, 4 B. & C. 941. See Blackburn, On Sale (2nd ed.), 455, for a comment on this last case. Also per Blackburn, J., *Donald* v. *Suckling*, L. R. 1 Q. B. 616, and *Grice* v. *Richardson*, 3 App. Cas., per Sir Barnes Peacock, 322; 2 Kent, Comm. 493, note (*d*).

4 *Lord* v. *Price*, L. R. 9 Ex. 54.

5 *Ex parte Chalmers, In re Edwards*, L. R. 8 Ch. 289.

6 *Simmons* v. *Swift*, 5 B. & C. 857, 862; *Dixon* v. *Yates*, 5 B. & Ad. 313, 340. *Martindale* v. *Smith*, 1 Q. B. 389, is the case of a special contract. See Hare, Contracts, Sale of Specific Goods, 396, 450, Dependent and Independent Promises, 587, 615. Where an act is to be done by each party which the defendant's neglect prevents being done, plaintiff may, in an action for money had and received, recover any payments he has made under the contract: *Giles* v. *Edwards*, 7 T. R. 181.

7 1 Salk. 112. 8 4 Bing. 722.

9 The cases, English and American, are well considered in *Bement* v. *Smith*, 15 Wend. (N. Y.) 493. See also 3 Parsons, Contracts (8th ed.), 209 *cum notis*. Cp. *Sands* v. *Taylor*, 5 Johns. (Sup. Ct. N. Y.) 395.

If in either of the cases just considered the vendor proceeds to a resale, we are next to consider his proper mode of procedure. There must first be, as we have seen,[1] an offer of the goods by the vendor and default by the purchaser. Notice of the intention to sell seems also requisite, or, at least, highly advisable, and an intimation that the vendor will hold the purchaser responsible for the difference between the agreed price and the sum realised, with all expenses necessarily incurred.[2] Cases, of course, may occur where these preliminaries would be dispensed with. In the run of cases their observance would most probably be insisted on. The *onus* at least would be on the vendor who disregarded them to show that he had taken other suitable steps. Besides, as favourable a sale as can be obtained must be secured. *Quoad hoc*, the vendor is the agent of the vendee.[3] There is no duty to notify to the purchaser the time and place of the sale, for the doing so might thwart the sale itself. The ordinary method of sale of the particular goods should be adopted, unless circumstances make some special method more advantageous. "The only requisite to such a sale, as a measure of the rights and the injury of the party, is good faith, including the proper observance of the usages of the particular trade."[4] Neither need the sale be by public auction, though it follows from what has been said, that, if sale by public auction is the customary mode of sale in the particular trade concerned, that mode should preferentially be adopted.[5] Mode of conducting a resale by the vendor.

A delivery to any general carrier where there are no specific directions is a constructive delivery to the vendee. If there be no particular mode of carriage specified, and no particular course of dealing between the parties, the property and the risk remain with the vendor while in the hands of the common carrier.[6] Delivery to carrier constructive delivery to vendee.

If the goods are forwarded by sea, the vendor should cause them to be insured, if there is an usage to insure.[7] In all cases the vendor should inform the vendee of the consignment and delivery with due diligence.[8] Goods to be insured.

[1] *Langfort* v. *Administratrix of Tiler*, 1 Salk. 112.

[2] *Sands* v. *Taylor*, 5 Johns. (Sup. Ct. N. Y.) 395.

[3] This rule holds good in the sale of real estate also; see *Baldwin* v. *Belcher*, 1 Jo. & Lat. (Ir. Ch.) 18, 26; *Daniels* v. *Davison*, 16 Ves. 249, 255.

[4] Per Emott, J., *Pollen* v. *Le Roy*, 30 N. Y. 557.

[5] *L.c.* 558. The maxim *caveat emptor* is considered and explained in *Drummond* v. *Van Ingen*, 12 App. Cas. 284, approving *Mody* v. *Gregson*, L. R. 4 Ex. 49. See also *Jones* v. *Just*, L. R. 3 Q. B. 197, and *Jones* v. *Padgett*, 24 Q. B. D. 650. For the obligation of the vendor in the civil law to take due care of goods pending delivery, Moyle, Contract of Sale, 107; Just. Inst. 3, 23, 3, note. As to the passing of property in *res specifica*, *Seath* v. *Moore*, 11 App. Cas. 350, where the alteration in the law of Scotland effected by the Mercantile Law Amendment (Scotland) Act (19 & 20 Vict. c. 60), s. 1, is considered; *Henckell du Buisson* v. *Swan*, 17 Rettie, 252. See also *Mucklow* v. *Mangles*, 1 Taunt. 318, with the criticism in *Carruthers* v. *Payne*, 5 Bing. 270, 276. In the Common Pleas, in *Meyerstein* v. *Barber*, L. R. 2 C. P. 51, Willes, J., points out that since *Dixon* v. *Yates*, 5 B. & Ad. 313, it has never been doubted that by the law of England the sale of a specific chattel passes the property to the vendee without delivery, notwithstanding the learned note of Serjeant Manning to *Bailey* v. *Culverwell*, 2 M. & Ry. 566. Lord Blackburn says the same in almost identical words in *Kemp* v. *Falk*, 7 App. Cas. 586.

[6] *Coates* v. *Chaplin*, 3 Q. B. 483; *Coombs* v. *Bristol and Exeter Ry. Co.*, 3 H. & N. 510. As to where the vendor is excused, *Vale* v. *Bayle*, 1 Cowp. 294.

[7] *Buckman* v. *Levi*, 3 Camp. 414. See now Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 32, sub-s. 3.

[8] 2 Kent, Comm. 500. See the history and leading principles of Vendor's Right of Stoppage *in Transitu*, 2 Kent, Comm. (13th ed.). 540 *et seqq.*, *cum notis*.

CHAPTER III.

COMMON CARRIERS BY LAND.

1. *Of Goods.*

We have now gone through the leading general relations common to all classes of carriers. The next portion of our subject deals with those principles of the law of common carriers which have a special bearing on land carriage. In tracing the history of the notices published by common carriers limiting their liability,[1] we gained some insight into the uncertainty produced by the interpretations, not always consistent, put upon them by the Courts, and into the hardships worked by the notification of unreasonable conditions of carriage by carriers who, from their position, were able to enforce their terms on perhaps unwilling, and certainly powerless customers.

The Carriers Act, 1830.

In 1830 the evil had become so apparent and pressing that Parliament intervened, and, by the Carriers Act,[2] placed the law as it bore on the land carriage of goods on a uniform footing. This Act, by section 1, provides[3] that no common carrier by land[4] for hire shall be liable for the loss of,[5] or any injury to, any gold or silver coin, gold or silver in a manufactured or unmanufactured state, precious stones, jewellery, watches, clocks, timepieces, trinkets,[6] bills, bank-notes, orders, notes or securities for payment of money,[7] stamps, maps, writings, title-deeds, paintings,[8] engravings,[9] pictures,[10] gold or silver

1 *Ante*, 892.

2 11 Geo. IV. & 1 Will. IV c. 68.

3 Amended 28 & 29 Vict. c. 94.

4 The Act applies, though the carriage is partly by water, in so far as the contract is by land: *Bazendale* v. *G. E. Ry. Co.*, L. R. 4 Q. B. 244 (Ex. Ch.); *Le Conteur* v. *L. & S. W. Ry. Co.*, L. R. 1 Q. B. 54; *Pianciani* v. *L. & S. W. Ry. Co.*, 18 C. B. 220.

5 As to the detention, *Hearn* v. *L. & S. W. Ry. Co.*, 10 Ex. 793; as to the temporary loss, *Miller* v. *Brasch*, 8 Q. B. D. 35; 10 Q. B. D. 142. As to taking beyond the destination, *Morritt* v. *N. E. Ry. Co.*, 1 Q. B. D. 302. Misdelivery is loss under sec. 7 of 17 & 18 Vict. c. 31, *Skipworth* v. *G. W. Ry. Co.*, 59 L. T. 520; *post*, 926.

6 Ivory, black and agate bracelets, shirt-pins, gilt rings, brooches, tortoise-shell purses, glass smelling-bottles, are trinkets: *Bernstein* v. *Baxendale*, 0 C. B. N. S. 251; so are ivory fans: *A.-G.* v. *Harley*, 5 Russ. (Ch.) 173, 174: but an eyeglass with a gold chain attached to it for the purpose of being worn round the neck is not: *Davey* v. *Mason*, Car. & M. 45. "Trinkets meant articles worn about the person as personal adornments," *Levi* v. *Cheshire Lines Committee*, 17 Times L. R. 443; *Cowell* v. *Cheshire Lines Committee*, 23 Times L. R. 580.

7 A document in the form of a bill of exchange, accepted, but with no drawee, and found by the jury to be of no value, is not within these words: *Stoessiger* v. *S. E. Ry. Co.*, 3 E. & B. 549.

8 *Woodward* v. *L. & N. W. Ry. Co.*, 3 Ex. D. 121. Coloured imitations of rugs and carpets and coloured working designs are not paintings within the Act.

9 *Boys* v. *Pink*, 8 C. & P. 361.

10 *Henderson* v. *L. & N. W. Ry. Co.*, L. R. 5 Ex. 90.

plate or plated articles, glass,[1] china, silks manufactured or unmanufactured, wrought up or not wrought up with other materials,[2] furs,[3] or lace, contained in any parcels [4] or package [5] when the value exceeds the sum of £10, unless at the time of delivery at the office, warehouse, or receiving-house [6] of such carrier, or to his book-keeper, coachman, or other servant, the value and nature of such article or articles shall have been declared,[7] and the increased charge, or an engagement to pay the same, accepted by the person receiving the parcel.

By section 2 a common carrier, on the delivery of such parcels or packages exceeding the value of £10 and so declared as aforesaid, may demand an increased rate of charge, to be announced by a notice in legible characters affixed in the office, warehouse, or other receiving-house,[8] and persons sending parcels are to be bound by such notice without further proof of the same having come to their knowledge. Section 2.

By section 3, when the value of a parcel has been declared under the Act and the increased rate of charge has been paid or contracted to be paid, the carrier shall, if required, give a receipt for the parcel, acknowledging the same to have been insured, which receipt shall not be liable to any stamp duty; and carriers who do not give such receipt when required, or affix the proper notice, are not entitled to the benefit of this Act, but shall be responsible as at common law and liable to refund the increased charge. Section 3.

By section 4 a common carrier cannot by a notice [9] limit his liability Section 4.

[1] *Owen* v. *Burnett*, 2 Cr. & M. 353. The same case decides that "articles of great value in a small compass" spoken of in the preamble does not limit the enactment to articles of small size. In *Levi* v. *Cheshire Lines Committee*, 17 Times L. R. 443, "opera glasses and photographic apparatus" were found by a jury not to be within the Act.

[2] *Davey* v. *Mason*, Car. & M. 45; *Flowers* v. *S. E. Ry. Co.*, 16 L. T. (N. S.) 329. A silk dress part of the personal luggage of a passenger was held within the Act. This was followed in *Dyke* v. *S. E. & C. Rys. Managing Committee*, 17 Times L. R. 651, where there was an ineffectual contention that the Carriers Act, 1830, did not apply to passengers' luggage; *Caswell* v. *Cheshire Lines Committee*, 23 Times L. R. 580. See *Bernstein* v. *Baxendale*, 6 C. B. N. S. 251; *Brunt* v. *Midland Ry. Co.*, 2 H. & C. 889.

[3] *Mayhew* v. *Nelson*, 6 C. & P. 58: "Hat bodies" made partly of the soft substance taken from the skin of rabbits and partly from the wool of sheep do not come within the description of "furs."

[4] *Treadwin* v. *G. E. Ry. Co.*, L. R. 3 C. P. 308. See Carriers Amendment Act, 1865 (28 & 29 Vict. c. 94). In *Henderson* (or *Anderson*) v. *L. & N. W. Ry. Co.*, L. R. 5 Ex. 90, distinguishing *Treadwin* v. *G. E. Ry. Co.*, it was held that where framed pictures are sent by a carrier the frames as well as the pictures are within the Carriers Act.

[5] A waggon containing articles of the kind mentioned in the section, but open at the top so that the company can see what the articles are, is a parcel or package: *Whaite* v. *Lanes. & Y. Ry. Co.*, L. R. 9 Ex. 67.

[6] *Syms* v. *Chaplin*, 5 A. & E. 634.

[7] If the value and nature of the articles is declared, the common law liability revives whether the carrier demands an increased charge or not: *Behrens* v. *G. N. Ry. Co.*, 6 H. & N. 366; 7 H. & N. 950. It is a question of fact for the jury whether the goods in question are within the meaning of the section: *Brunt* v. *Midland Ry. Co.*, 2 H. & C. 889; *Woodward* v. *L. & N. W. Ry. Co.*, 3 Ex. D. 121. The value is the price the consignee is to pay, not the price at which the consignor bought: *Blankensee* v. *L. & N. W. Ry. Co.*, 45 L. T. 761.

[8] For form of notice, see *Owen* v. *Burnett*, 2 Cr. & M. 353. A formal notice of the nature of the goods is not necessary if the value is, in fact, brought to the knowledge of the company, so that they may fix the additional charge if so minded: *Bradbury* v. *Sutton*, 19 W. R. 800, and in Ex. Ch. 21 W. R. 128. The notice should be in such large characters that a person delivering goods at the office could not fail to read it without gross negligence: *Clayton* v. *Hunt*, 3 Camp. 27; *Butler* v. *Heane*, 2 Camp. 415.

[9] This means a public notice; see *Walker* v. *York and North Midland Ry. Co.* 2 E. & B. 759, where Lord Campbell, C.J., says: "It seems to be contended that since the statute 11 Geo. IV. & 1 Will. IV. c. 68, it is not lawful to make a special contract limiting the liability of a carrier; but I am clearly of opinion that the Legislature had no such intention, and that such is not the operation of the Act. Sec. 4

at common law to answer for the loss of any articles in respect whereof he is not entitled to the benefit of this Act.

Section 5. By section 5 every office of such common carrier shall be deemed a receiving-house;[1] any one proprietor shall be liable to be sued, and no action shall abate for the want of joining any co-proprietor.

Section 6. By section 6 special contracts are excepted from the operation of the Act.[2]

Section 7. By section 7 persons entitled to damages for parcels lost or damaged may recover the extra charge for insurance.

Section 8. By section 8 a common carrier shall not be protected by this Act from liability to answer for losses arising from the felonious acts of servants in his employ; nor shall the servant himself be freed thereby from answering for his own personal neglect or misconduct.[3]

Section 9. By section 9 the declared value of a parcel is not conclusive against the carrier.

in effect says that a carrier shall not limit his liability merely by a public notice, but leaves it open to him to limit his liability by a special contract." See per Wightman, J., 762.

[1] *Burrell* v. *North*, 2 C. & K. 680; *Davey* v. *Mason*, Car. & M. 45; *Williams* v. *Geese*, 3 Bing. N. C. 849, s.c. *sub nom. Williams* v. *Gesse*, 7 C. & P. 777, 5 Scott, 56; *Boys* v. *Pink*, 8 C. & P. 361.

[2] *Shaw* v. *G. W. Ry. Co.*, [1894] 1 Q. B. 373. The section does not give validity to special contracts generally, but refers only to contracts by which the company voluntarily renounces the protection given by sec. 1 of the Act: *Bazendale* v. *G. E. Ry. Co.*, L. R. 4 Q. B. 244.

[3] In *Macke* v. *L. & S. W. Ry. Co.*, 2 Ex. 415, "Servant" is not confined to a servant in the strict sense of the word, but includes a person employed, not directly, but through his employer's employment. See also *Bank of Kentucky* v. *Adams Express Co.*, 93 U. S. (3 Otto) 174. In *Syms* v. *Chaplin*, 5 A. & E. 634, it was laid down that where goods are received by the agent of two companies, without indication as to which he receives them for, they are not received for either until the agent makes up his mind, but from that time they are held for that he determines: *Stephens* v. *L. & S. W. Ry. Co.*, 18 Q. B. D. 121; see Stroud, Judicial Dictionary, *sub voce* Servant. Where a felony is set up as an answer to a defence under this Act, the question of negligence is immaterial: *G. W. Ry. Co.* v. *Rimell*, 18 C. B. 575; *Metcalfe* v. *L. & B. Ry. Co.*, 4 C. B. N. S. 307. It is enough for the plaintiff to make out a *primâ facie* case of felony; if this is left unanswered, plaintiff is entitled to succeed: *Vaughton* v. *L. & N. W. Ry. Co.*, L. R. 9 Ex. 93; *M'Queen* v. *G. W. Ry. Co.*, L. R. 10 Q. B. 569. But mere showing that goods have been delivered to the company, and lost, or a portion abstracted, is not sufficient to raise the inference of a felony by the company's servants, or as Willes, J., states the point: "When it is sought to establish a theory by circumstantial evidence, all the facts proved must be consistent with the theory; but there must also be some one substantial credible fact inconsistent with the contrary": *G. W. Ry. Co.* v. *Rimell*, 27 L. J. C. P. 205; *Metcalfe* v. *L. & B. Ry. Co.*, 27 L. J. C. P. 334, as to which see *Vaughton* v. *L. & N. W. Ry. Co.*, L. R. 9 Ex. 97. As to the *dictum* of Willes, J., in *Metcalfe* v. *L. & B. Ry. Co.*, 4 C. B. N. S., at 309, 310, see note to *Coggs* v. *Bernard*, 1 Sm. L. C. (11th ed.) 217; *Gogarty* v. *Great Southern and Western Ry. Co.*, Ir. R. 9 C. L. 233. In *Rache* v. *Cork, Blackrock, and Passage Ry. Co.*, 24 L. R. Ir. 250, the Act does not seem to have been adopted; and on a loss being shown the company did not call the night-watchman who had charge of the room where the plaintiff's bag was deposited. The defendants were accordingly held liable. See *Turner* v. *G. W. Ry. Co.*, 34 L. T. (N. S.) 22. As to evidence admissible, see *Kirkstall Brewery Co.* v. *Furness Ry. Co.*, L. R. 9 Q. B. 468. *Burt* v. *G. W. Ry. Co.*, 11 C. B. 140, was not within the statute: see as to this, *G. W. Ry. Co.* v. *Rimell*, 18 C. B. 575, per Jervis, C.J., 585; also per Willes, J., 586; and *Metcalfe* v. *L. & B. Ry. Co.*, 27 L. J. C. P., per Willes, J., 267. Cp. *McQueston* v. *Sanford*, 40 Me. 117. Loss by theft by strangers or by the carrier's servants, in the absence of gross negligence, was held a risk of the road against which the contract or notice at common law protected the carrier entirely apart from the Act of 1830, and notwithstanding sec. 8 of that Act, in *Shaw* v. *G. W. Ry. Co.*, [1894] 1 Q. B. 373. See also *G. W. Ry. Co.* v. *Willis*, 18 C. B. N. S. 748, as to admissions by railway servants. The admissions of a coachman as to the loss of a parcel were received against the coach proprietor in *Mayhew* v. *Nelson*, 6 C. & P. 53. As to the personal liability, *ex delicto*, of the coachman, guard, or other servant, *Cavenagh* v. *Such*, 1 Price (Ex.), 328; *Williams* v. *Cranston*, 2 Stark. (N. P.) 82.

By section 10 money can be paid into court with the same effect as money paid into court in any other action. Section 10.

In the Exchequer Chamber in *Baxendale* v. *Hart*, Pattesnn, J.,[1] thus sums up the effect of the Act: "The meaning of the Legislature is, that all persons sending goods of a particular description and value, whenever they deliver them to the carrier, are bound to give information of the nature and value of the articles. That is the first clause; and the object of the Legislature was, that such information should be given whether the goods were delivered at the office of the carrier, or at the sender's house, or on the road, or elsewhere; and clauses follow with certain provisions as to what is *then* to be done. Although the value and nature of the articles may be declared, it does not necessarily follow that the carrier would be protected, but a different clause must be acted on before his liability ceases. However, the first step to be taken is that the sender of the goods notify their value; then it is that the carrier is entitled to have a larger charge. He cannot have that larger charge, or save himself from responsibility, by saying, 'I will have such a sum of money,' but he must have a tariff stuck up in his office, to notify to all persons sending articles of that kind what he proposes to demand beyond the usual charge. The notice required by section 2 to be affixed in the office is not a notice that the carrier means to avail himself of the benefit of the Act, and that all persons who send articles of a particular description and value shall tell him that they are of that description and value—for the statute requires that in the first instance—but it is only a notice of what the extra charge is to be." Pattesnn, J.'s, summary of the effect of the Act in *Baxendale* v. *Hart*.

From the date of the coming into force of the Act a mere general notice ceased to operate as a public condition or public declaration; and, in order to have any effect a notice now had to amount to a special contract. Special contract allowable under the Act.

Before the Act, where the common carrier published a notice addressed to the public at large, the question raised was whether the notice was brought home to the person sought to be affected by it. A notice might also be specifically delivered to some person to form the basis of a special contract with him. Where the common carrier did not profess to be a common carrier of the goods tendered him for conveyance, this was always, and continues to be, allowable; and if the consignor, after seeing the notice, sent the goods, he was taken to agree that they should be sent on the carrier's terms.

Since the Act, where the goods are within the common carrier's profession, and their nature and value is declared (though there is a general notice displayed respecting goods above £10 in value), unless the increased charge in respect of them is specially notified to the proprietor of goods, the carrier cannot demand the extra payment. If he notifies it but fails to demand it, he is in the same way to be taken to receive the goods subject to his common law liability.[2] Moreover, it is competent for the carrier to insist on the full price of carriage being paid beforehand; and unless payment is made he may decline to Rights of the carrier under the Act as to payment.

[1] 6 Ex. 789. The carrier loses the benefit of the Act if, after a declaration of value, he receives the goods without demanding the extra charge: *Behrens* v. *G. N. Ry. Co.*, 6 H. & N. 366, 7 H. & N. 950. He has an insurable interest in goods the value of which has not been declared in accordance with the Act: *L. & N. W. Ry. Co.* v. *Glyn*, 28 L. J. Q. B. 188. Every person actually engaged in the performance of the contract of carriage and delivery is a servant of the carrier within the 5th section, though not strictly so within the meaning of *Quarman* v. *Burnett*, 6 M. & W. 499: *Machu* v. *S. W. Ry. Co.*, 2 Ex. 415.

[2] *Behrens* v. *G. N. Ry. Co.*, 7 H. & N. 950.

carry or only carry on his own terms. If payment is made as demanded the carrier is bound to carry on the terms of the common law liability as modified by the Carriers Act, 1830. If the price is not paid and the common law liability as modified by the Act is not insisted on, and the proprietor of the goods still chooses that they should be carried, the carrier may insist on his own terms. "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." [1]

Conditions allowable under a special contract.

There has been considerable conflict of authority respecting the conditions that may be imposed by a special agreement. By the common law, common carriers are bound to carry for all persons who apply, and for a reasonable reward, unless they have a reasonable excuse for refusing to do so.[2] The interpretation of a special contract *primâ facie* is that, the consignor, having the right to insist on the performance by the carrier of his common law duty, has elected to waive it and to agree to a contract more to the mind of the parties.

This nominal freedom of choice became ever more and more illusory as the business of a common carrier was concentrated in a limited number of powerful corporations, who were able absolutely to dictate the acceptance of what terms they pleased, on pain of practically prohibiting carriage on any other terms. Certain limitations there were beyond which common carriers were not permitted to go. Story, writing in 1832, thus states the limit at that date : [3] "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 or fraud ; or, by demanding an exorbitant price, compel the owner of the goods to yield to unjust and oppressive limitations and qualifications of his rights. The carrier will also be equally as liable in case of the fraud or misconduct of his servants, as he will be in case of his own personal fraud or misconduct."

Limitations to the right of making special contracts as stated by Story, J., in 1832.

Yet though this was the law in 1832, between that time and 1854 a contrary rule gradually came to be established ; and at the time of the passing of the Railway and Canal Traffic Act, 1854, the decisions, according to Blackburn, J., had come to hold that a carrier might by a special contract limit his responsibility even in the case of gross negligence, misconduct, or fraud on the part of his servant.[4]

Blackburn, J.'s, view of the change in the law between 1832 and 1854.

This change is to be traced through a series of cases, the first of which is *Wyld* v. *Pickford*.[5] The first count of the declaration in that case charged the defendants with a breach of duty as carriers in not taking proper care of maps. The second count was in trover. To the first count there was a plea setting out that the plaintiffs had notice that the defendants would not be responsible for loss and damage to maps unless insured and paid for at the time of the delivery to the

Wyld v. *Pickford*.

1 *Wyld* v. *Pickford*, 8 M. & W., per Parke, B., 458.

2 *Benett* v. *Peninsular and Oriental Steamboat Co.*, 6 C. B. 775. Story, Bailm. §§ 495, 591. "No doubt, at common law, a carrier may enter into a special contract. He may, it is true, be bound to carry goods ; and, if he refuses to do so, except on the terms of a special contract, he may subject himself to an action for that breach of duty" : per Martin, B., *Carr* v. *Lancs. & Y. Ry. Co.*, 7 Ex. 715. *Ante*, 875.

3 Bailm. § 549. The law as stated by Story continued and continues to be the law in the United States : *Railroad Co.* v. *Lockwood*, 17 Wall. (U.S.) 357 ; Thompson, Negligence, § 6507.

4 Per Blackburn, J., *Peek* v. *North Staffordshire Ry. Co.*, 10 H. L. C. 494.

5 (1841) 8 M. & W. 443.

defendants, and that the defendants accepted on this condition. There was a similar plea to the second count, setting out that the conversion was a misdelivery through mistake and inadverteney. To these pleas there was a demurrer. The Court held that a condition or declaration operates only by being incorporated in a special contract. Judgment was given for the plaintiff, because on the balance of the authorities a notice that the carrier "would not be responsible for the loss of or damage done to"[1] goods unless insured did not make the carrier irresponsible for every loss, but only for such as occurred without negligence, whether gross or ordinary; and because the inadvertent misdelivery admitted in the plea might be grossly negligent even though inadvertent. This decision went on the view that the authorities bound the Court to construe the terms of the notice, that the carrier "would not be responsible for the loss of or damage done to" goods, to mean would not be responsible for loss or damage unless caused by negligence.

Hinton v. Dibbin.

The matter was next considered in *Hinton* v. *Dibbin*,[2] where the action was for the negligent loss of silk of a greater value than £10. The plea was the Carriers Act. Gross negligence was averred by way of replication; to this there was a demurrer. This raised the precise point whether, under the Carriers Act, the carrier was exempted from negligence as well as mischance. The Court held that he was.[3]

Shaw v. York and North Midland Ry. Co.

Then came a series of railway cases. The first of these is *Shaw* v. *York and North Midland Ry. Co.*[4] Plaintiff claimed for the loss of a horse against the defendants as carriers. When the horse was received by the defendants, a ticket was given to the plaintiff with the following notice on it: "N.B.—This ticket is issued subject to the owner's 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." The injury to the horse was caused by a defect in the horse-box, pointed out to the defendants' servants who had ineffectually tried to put it right. Alderson, B., at the trial, was of opinion, first, that the defendants were bound to the exercise of ordinary care, the notice notwithstanding; secondly, that, on the authority of *Lyon* v. *Mells*,[5] the notice was subject to an implied exception of injury arising from the defective horse-box. He accordingly directed a verdict for the plaintiff. A new trial was granted on the ground of misdirection, Lord Denman, C.J., holding[6] that the terms of the ticket must be adhered to as expressing the contract; and though 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," he had not done so, but had alleged instead a duty arising from a contract the existence of which was disproved by the evidence.

Austin v. Manchester, Sheffield, and Lincolnshire Ry. Co.

Austin v. *Manchester, Sheffield, and Lincolnshire Ry. Co.*,[7] in the Queen's Bench, followed—also the case of the conveyance of a horse. Like the former, this was decided on the form of the declaration; though the effect of the decision was that where the plaintiff by signed

[1] 8 M. & W. 444.

[2] (1842) 2 Q. B. 646.

[3] See a case with similar facts but with different statutory words, where the carrier, though exonerated *quâ* common carrier, was held liable as an ordinary bailee: *Wheeler* v. *Oceanic Steam Navigation Co.*, 125 N. Y. 155, 21 Am. St. R. 729.

[4] (1849) 13 Q. B. 347.

[5] 5 East, 428. See, too, *Garnett* v. *Willan*, 5 B. & Ald. 53, holding that the construction of this kind of conditions is "against unforeseen and unexpected losses and injuries not occasioned by actual negligence or default."

[6] 13 Q. B. 353.

[7] (1851) 16 Q. B. 600.

conditions took upon himself all risks of conveyance, the carriers were not liable even for gross negligence.

Chippendale v. Lancs. & Y. Ry. Co.

Then came *Chippendale* v. *Lancs. & Y. Ry. Co.*,[1] an appeal from a county court, which held the defendants exonerated from liability, on the terms of the condition on their ticket, for any injury, even though caused by a defect in the carriage in which the plaintiff's cattle were conveyed. Erle, J., said:[2] "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. That 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; for though domestic animals might be carried safely, it might be almost impossible to carry wild ones without injury."[3]

Austin v. Manchester, Sheffield, and Lincolnshire Ry. Co.

Austin v. *Manchester, Sheffield, and Lincolnshire Ry. Co.*,[4] in the Common Pleas, is the next case. The declaration, which "appears to have been drawn with great care in order to avoid the objection upon which the decisions in *Shaw* v. *The York and North Midland Ry. Co.*[5] and this case[6] proceeded, and to lead to the supposition that there was some duty cast upon the defendants beyond that which arose out of the special contract made between them and the plaintiffs,"[7] alleged "gross and culpable negligence" in the defendants' servants; which was proved at the trial. The condition on the ticket, said Cresswell, J., which exempted the defendants from responsibility of whatsoever kind and howsoever caused, protected them from responsibility for the negligence of the defendants' servants; "whether that is called negligence merely, or gross negligence, or culpable negligence, or whatever epithet might be applied to it, we think it is within the exemption from responsibility provided by the contract."[8]

Carr v. Lancs. & Y. Ry. Co.

Very shortly afterwards *Carr* v. *Lancs. & Y. Ry. Co.*,[9] was decided in the Exchequer. 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 a horse, in these words: "This ticket is issued subject to the owner's undertaking all risks of conveyance whatsoever, as the 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 Ry., or in their vehicles"; 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 that the accident was due to the gross negligence of the defendants. This finding was not complained of, yet judgment was arrested, on the ground that there was a special contract by which the plaintiff had taken on himself all risk, and agreed that the company should not be

1 (1851) 21 L. J. Q. B. 22. 2 *L.c.* 24.

3 *Ante*, 883. As to conditions on ticket, *post*, 961.

4 (1852) 10 C. B. 454. This case is inserted out of its order in Common Bench Reports under 1850. The correct date of the decision is May 8, 1852, as appears from 16 Jur. 763. 5 13 Q. B. 347. 6 In the Q. B., 20 L. J. Q. B. 440.

7 Per Cresswell, J., 10 C. B. 472. 8 *L.c.* 476.

9 (1852) 7 Ex. 707; *cp. Gannell* v. *Ford*, 5 L. T. (N. S.) 604; *G. N. Ry. Co.* v. *Morville*, 21 L. J. Q. B. 319.

responsible for any injury or damage, however caused. Parke, B., observed,[1] with reference to the argument on the inconvenience arising from such contracts, that that is not matter for the interference of the Court, 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 limiting their liability."

Railway and Canal Traffic Act, 1854.

The Legislature apparently answered that appeal by passing the "Railway and Canal Traffic Act, 1854."[2]

Walker v. *York and North Midland Ry. Co.*

Before it passed, however, occurred the case of *Walker* v. *York and North Midland Ry. Co.*[3] The defendants caused notices to be personally served on a number of fishermen at Scarborough Station that they would not carry fish except on certain conditions limiting liability, which conditions the servants of the company had no power to modify or affect. A riot ensued amongst the fishermen in consequence, and after this the plaintiff sent his goods. The judge directed the jury that, if they thought that the plaintiff was one of those served with the notice, they might infer from that fact a special contract according to its terms; and advised them to draw that inference from the receipt of the notice and the subsequent sending of the goods, unless in the meanwhile the plaintiff had unambiguously refused to deliver the goods for carriage on the terms of the notice, and the defendants had acquiesced in the 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.[4]

Railway and Canal Traffic Act, 1854, contrasted with the Carriers Act, 1830.

The year following this decision the Railway and Canal Traffic Act, 1854,[5] was passed. Contrasting this with the Carriers Act, 1830, Blackburn, J., says: "There is a considerable difference in the purview of the two Acts. Carriers were under the risks of the common law liability, and the first Act was passed for their protection. The monopoly which railway companies had was the ground of the extension of their liability by the second Act."[6]

Analysis of the Railway and Canal Traffic Act, 1854.

In making an analysis of the Act we find section 1 deals with definitions.

Section 1.

Sections 2 to 6.

By sections 2 to 6[7] a scheme is provided whereby persons to whom sufficient facilities are not afforded, or against whom any undue preference for a competitor is shown, may obtain relief.

[1] 7 Ex. 714. [2] 17 & 18 Vict. c. 31. [3] (1853) 2 E. & B. 750.

[4] See, too, *York, Newcastle, and Berwick Ry. Co.* v. *Crisp*, 14 C. B. 527; *Hughes* v. *G. W. Ry. Co.*, 14 C. B. 637; *Slim* v. *G. N. Ry. Co.*, 14 C. B. 647.

[5] 17 & 18 Vict. c. 31.

[6] *Harrison* v. *L. & B. Ry. Co.*, 2 B. & S. 134. See per Wright, J., *Shaw* v. *G. W. Ry Co.*, [1894] 1 Q. B. 382.

[7] By the Regulation of Railways Act, 1873 (36 & 37 Vict. c. 48), s. 6, the jurisdiction is transferred to the Railway Commissioners (which is extended and amended by the Railway and Canal Traffic Act, 1888 (51 & 52 Vict. c. 25)). Since the passing of this Act, railway companies cannot refuse to carry traffic which they have facilities for carrying; but they carry it not as common carriers, but as ordinary bailees, and subject to reasonable conditions under sect. 7: *Dickson* v. *G. N. Ry. Co.*, 18 Q. B. D. 176, where the company refused to carry dogs except on the most onerous terms. "I cannot doubt," said Wills, J., in *Winsford Local Board* v. *Cheshire Lines Committee*, 24 Q. B. D. 459, referring to the last cited case, "that the Court of Appeal in that case meant to lay down the broad proposition which I propose to apply in this case. The view which, as I understand, was there taken of the position of a railway company before and after the Act, was that before the Act a railway company not being a common carrier of dogs was not bound to carry those animals at all, and therefore, if it did carry them, could do so upon any terms it chose to lay down; but that since the passing of the Act a railway company, at all events if it undertook the carriage of these animals, came under the 2nd section, and could only do this subject to the

Section 7.

Section 7 [1] provides that every railway and canal company "shall be liable for the loss of,[2] or for any injury [3] done to, any horses, cattle, or other animals,[4] or to any articles, goods [5] or things in the receiving,[6] forwarding, or delivering thereof, occasioned by the neglect or default [7] of such company or its servants,[8] notwithstanding any notice,

obligation to afford 'reasonable facilities' for this kind of traffic over the whole extent of its system." See, too, in the same case, the comments on *S. E. Ry. Co.* v. *Railway Commissioners and the Corporation of Hastings*, 5 Q. B. D. 217; 6 Q. B. D. 586. But see the view of the Court of Appeal in *Darlaston Local Board* v. *L. & N. W. Ry. Co.*, [1894] 2 Q. B. 694, in which the correctness of the *Hastings case* is asserted. A company will not be compelled to carry goods easily damaged to a particular station if there is no means of providing proper accommodation there: *Thomas* v. *North Staffordshire Ry. Co.*, 3 Rail. Cas. (N. & Macn.) 1. If a company refuse to carry a certain class of goods as common carriers, and require special rates to be paid for the carriage of such goods, this is a refusal of reasonable facilities: *G. W. Ry. Co.* v. *Railway Commissioners*, 7 Q. B. D. 182, 194; see *Nicholls* v. *N. E. Ry. Co.*, 59 L. T. 137. As to undue preference, see *Denaby Main Colliery Co.* v. *Manchester, Sheffield, and Lincolnshire Ry. Co.*, 11 App. Cas. 97; *L. & N. W. Ry. Co.* v. *Evershed*, 3 App. Cas. 1029. There is no right of action by a common carrier against a company on the ground that he is excluded from their station; his remedy is by this Act: *Barker* v. *Midland Ry. Co.*, 18 C. B. 46. *The Rhymney Railway Co.* v. *The Rhymney Iron Co.*, 25 Q. B. D. 146, following *Manchester, Sheffield, and Lincolnshire Ry. Co.* v. *Denaby Main Colliery Co.*, 14 Q. B. D. 209, held that no action will lie for breach of sec. 2 of The Railway and Canal Traffic Act, 1854 (17 & 18 Vict. c. 31); see also per Lord Blackburn, 11 App. Cas. 121. As to competing omnibuses, *In re Marriott and L. & S. W. Ry. Co.*, 1 C. B. N. S. 499; *In re Palmer and L. B. &c. Ry. Co.*, L. R. 6 C. P. 194; *In re Parkinson and G. W. Ry. Co.*, L. R. 6 C. P. 554; *London County Council* v. *A.-G.*, [1902] A. C. 165.

[1] Sec. 7 was extended to steamers belonging to railway companies by sec. 31 of The Railway Clauses Act, 1863 (26 & 27 Vict. c. 92). But that Act applies only to railways whose special Acts are passed after that date; sec. 30. By sec. 16 of the Regulation of Railways Acts, 1868 (31 & 32 Vict. c. 119), the Act of 1854 (17 & 18 Vict. c. 31), is extended to the steamers of all railways; but sec. 59 of The Railway and Canal Traffic Act, 1888 (51 & 52 Vict. c. 25), repeals that part of sec. 16 of the Act of 1868 which extended the provisions of the Act of 1854 to the steamers of railways. *The Stella*, [1900] P. 161. Sec. 7 of the Railway and Canal Traffic Act, 1854, is not limited to goods which the Company are bound to carry by the particular class of train in which they are in fact carried, so that goods carried by passenger train which the company are only obliged to carry by goods train are within it: *Wilkinson* v. *Lancs. & Y. Ry. Co.*, [1906] 2 K. B. 619; affd. 23 Times L. R. 509; yet if the company carry goods by passenger train which they are only bound to carry by goods train (non-perishable goods), they may make their bargain as to the terms, and the case is not within sec. 90 of the Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20): *Stone* v. *Midland Ry. Co.*, [1904] 1 K. B. 669.

[2] "Loss" under this section was held to cover misdelivery: *Skipwith* v. *G. W. Ry. Co.*, 59 L. T. 520.

[3] *Allday* v. *G. W. Ry. Co.*, 5 B. & S. 903.

[4] *Harrison* v. *L. & B. Ry. Co.*, 2 B. & S. 122, 149; dogs are not such a description of goods as at common law a carrier could be compelled to carry: per Wightman, J., *l.c.* 144; cp. *Dickson* v. *G. N. Ry. Co.*, 18 Q. B. D. 176.

[5] Passengers' luggage is within the section: *Cutler* v. *N. L. Ry. Co.*, 19 Q. B. D. 64; *Cohen* v. *S. E. Ry. Co.*, 2 Ex. D. 253.

[6] This does not apply to goods received as warehouseman: *Van Toll* v. *S. E. Ry. Co.*, 31 L. J. C. P. 241; *Hodgman* v. *West Midland Ry. Co.*, 5 B. & S. 173; in Ex. Ch. 35 L. J. Q. B. 85 (as to remarks in dissenting opinion of Cockburn, C.J., in the Queen's Bench, see *Hart* v. *Baxendale*, 6 Ex. 769); nor to carriage beyond the company's line: *Zunz* v. *S. E. Ry. Co.*, L. R. 4 Q. B. 539. *Roche* v. *Cork, Blackrock, and Passage Ry. Co.*, 24 L. R. Ir. 250, is the case of money extracted from a bag left in a cloak-room.

[7] In *Harrison* v. *L. & B. Ry. Co.*, 2 B. & S. 122, Ex. Ch. 152, Erle, C.J., and Keating, J., held that if the loss was occasioned by pure accident, it was not within the statute, but the majority of the Court gave no opinion on the point.

[8] "Servants" includes agents: *Doolan* v. *Midland Ry. Co.*, 2 App. Cas. 792. "Having regard to the terms of The Railway and Canal Traffic Act, 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 servant's employment. The Company, therefore, as regards theft without negligence, are left in the same position in which they had been at common law for at least a hundred years in relation to such theft, and that is, that subject in the

condition, or declaration made and given by such company contrary thereto or in any wise limiting such liability; every such notice, condition, or declaration being hereby declared to be null and void."

But it is provided that:

(1) The company may make such conditions as "shall be adjudged by the Court or judge, before whom any question relating thereto shall be heard, to be just and reasonable."[1] Company may make conditions.

(2) The amount of damage that may be recovered shall be limited to a sum not exceeding £50 for any horse, £15 per head for neat cattle, £2 per head for any sheep or pig,[2] unless a higher value shall have been declared at the time of delivery,[3] in which case the company may demand an additional sum by way of insurance, and "such percentage or increased rate of charge shall be notified in the manner prescribed in the statute 11 Geo. IV. & 1 Will. IV. c. 68, and shall be binding upon such company in the manner therein mentioned." Limitation of the amount of damage recoverable in certain cases.

(3) The burden of proof of the value of animals, articles, goods, and things, and the amount of injury done thereto, shall in all cases under the Act lie upon those claiming compensation for loss or injury.[4] Burden of proof.

case of the valu ... s specified in the Act of 1830, to the provisions of sec. 8 of that Act, they can by contract or notice 'brought home' exempt themselves from liability for such theft': per Wright, J., *Shaw* v. *G. W. Ry. Co.*, [1894] 1 Q. B. 383.

[1] The carrier must show that the contract is reasonable: *Ruddy* v. *Midland G. W. Ry. Co.*, 8 L. R. fr. 224. If the higher charge is not in terms authorised by statute, it lies upon the carrier to show that it is reasonable: *Harrison* v. *L. & B. Ry. Co.*, 2 B. & S. 122, 152; see *Ashendon* v. *L. B. & S. C. Ry. Co.*, 5 Ex. D. 190.

[2] A condition exonerating the carrier from liability for negligence in carrying cattle is invalid, even though there be a subsequent condition offering a free pass to induce the owner to send a drover in charge, and the free pass is accepted: *Routh* v. *N. E. Ry. Co.*, L. R. 2 Ex. 173, but a condition to carry at a lower rate than the ordinary, with a liability for negligence only, was held not an unreasonable condition in *Harris* v. *Midland Ry. Co.*, 25 W. R. 63. A condition requiring damage to be pointed out at the time of unloading is unreasonable where there is no option: *Lloyd* v. *Waterford and Limerick Ry. Co.*, 15 Ir. C. L. R. 37; but one requiring claims for loss to be sent in within seven days of delivery has been held good: *Lewis* v. *G. W. Ry. Co.*, 5 H. & N. 867. See also *Simons* v. *G. W. Ry. Co.*, 18 C. B. 805; *Moore* v. *G. N. Ry. Co.*, 10 L. R. Ir. 95. A condition that the carrier will not be liable for the overcrowding of cattle is unreasonable: *Corrigan* v. *G. N. Ry. Co.*, 6 L. R. Ir. 99; so is one that the carrier will not be responsible for the correct selection of cattle: *M'Nally* v. *Lancs. & Y. Ry. Co.*, 8 L. R. Ir. 81. A condition exonerating the carrier from the loss of the market by the consignor has been held good: *Beal* v. *South Devon Ry.* 5 H. & N. 875; in Ex. Ch. 3 H. & C. 337; and there is no warranty that goods carried by a given train shall arrive at any particular hour: *Lord* v. *Midland Ry. Co.*, L. R. 2 C. P. 339. Mere mention of the value to a stationmaster is no declaration of value within the meaning of the Act, if it is not intended to operate as a declaration of value: *Robinson* v. *L. & S. W. Ry. Co.*, 19 C. B. N. S. 51. The consignor is bound by his declaration of value and cannot afterwards show the value of the goods was in excess of it: *M'Cance* v. *L. & N. W. Ry. Co.*, 7 H. & N. 477; 3 H. & C. 343; *Nevin* v. *The Great Southern and Western Ry. Co.*, 30 L. R. Ir. 125. In *Hill* v. *L. & N. W. Ry. Co.*, 42 L. T. 513, a ram was injured during transit, and it was held there was no recovery beyond £2 where there was no declaration of value.

[3] *Robinson* v. *L. & S. W. Ry. Co.*, 19 C. B. N. S. 51; a customs declaration is not a declaration of the value within the meaning of sec. 6 of the Carriers Act, 1830: *Hirschel* v. *G. E. Ry. Co.*, 22 Times L. R. 661. *M'Cance* v. *L. & N. W. Ry. Co.*, 7 H. & N. 477; 3 H. & C. 343; *Lebeau* v. *General Steam Navigation Co.*, L. R. 8 C. P. 88.

[4] "The defendants," says Cleasby, B., in *Harris* v. *Midland Ry. Co.*, 25 W. R. 64, where there was a special contract to carry cattle limiting liability to negligence only, "engage to carry safely but to be liable only for negligence. There was no evidence of negligence here, only conjecture. The injury must have been received during transit, but there is not sufficient evidence to show how it was inflicted. The plaintiff must show that death was caused by what he alleges. The fact of its being found in the condition alleged upon its arrival cannot be sufficient to show that such a state of things was brought about by negligence of the defendants."

Special contract must be signed.

(4) No special contract under the Act is to be binding unless signed by the person delivering property for carriage.[1]

Carriers Act 1830 unaffected.

(5) The Carriers Act, 1830, is in all respects unaffected.[2]

Two views as to the interpretation of the Act.

There was for some time after the passing of the Act a very keen conflict as to its interpretation. Two different views were advanced.

First view.

The one view was that no distinction was to be drawn between notices, conditions, or declarations on the one hand and special contracts on the other; that, in both instances, the judge at the trial was required to decide whether they were "just and reasonable," and that in both instances they must be signed.

Second view.

The other view was that, to guard against the unreasonableness of companies being allowed to protect themselves from responsibility for negligence, they were made liable for any loss or injury occasioned by the neglect or default of themselves or of their servants, notwithstanding any notice, condition, or declaration made and given by them contrary thereto; and that by the Act "every such notice, condition, or declaration" having the effect of limiting their liability in this respect was "to be null and void." Then, recognising that by law a notice delivered to the owner of goods and assented to by him amounted to a contract, and further recognising that the assent which is frequently given at the time of the delivery of goods is often without any actual knowledge of the conditions to which assent is by law presumed to be given, this second view regarded the Act as providing that only such conditions should be made "as shall be adjudged by the Court or judge, before whom any question relating thereto shall be tried, to be just and reasonable." Having thus dealt with notices, conditions, or declarations, it regards the section as proceeding to deal with special contracts, and as preserving the liberty secured by the Carriers Act, 1830, to make special contracts with the owners of goods upon any terms of carriage which might mutually be arranged between them, provided such contract were signed.

Conflicting decisions maintaining these views.

Early decisions in favour of the former view are *Simons* v. *G. W. Ry. Co.*,[3] in the Common Pleas, and *M'Manus* v. *Lancs. & Y. Ry. Co.*,[4] in the Exchequer Chamber; in favour of the latter, *Wise* v. *G. W. Ry. Co.*[5] and *Pardington* v. *South Wales Ry. Co.*,[6] both in the Exchequer.

Peek v. *North Staffordshire Ry. Co.*

In *Peek* v. *North Staffordshire Ry. Co.*, the controversy was carried to the House of Lords, after a considerable division of opinion in the courts below. The judges were summoned to deliver their opinions, when a division of opinion again appeared. The former of the two views above stated was supported by Blackburn, Crompton, and Williams, JJ., and Cockburn, C.J.; and the latter by Willes, J., Martin, B., and Pollock, C.B. The majority of the House of Lords, the Lord Chancellor (Westbury) and Lords Cranworth and Wensleydale, agreed with the majority of the judges who delivered their opinions before them. Lord Chelmsford took the contrary view.

Summary of points decided.

Peek v. *North Staffordshire Ry. Co.*[7] decides—first, that between conditions and contracts there is no distinction; secondly, that a condition or contract, to bind a trader, must be in writing; thirdly, that every condition or contract made under the Act must be proved,

1 The signature of a railway agent employed by the consignor to deliver, and by the carrier to receive, goods is sufficient to bind the sender: *Aldridge* v. *G. W. Ry. Co.*, 15 C. B. N. S. 582.

2 *Shaw* v. *G. W. Ry. Co.*, [1894] 1 Q. B. 373.

3 18 C. B. 805.

4 4 H. & N. 327.

5 1 H. & N. 63.

6 1 H. & N. 392.

7 10 H. L. C. 473.

to the satisfaction of the Court trying the case, to be just and reasonable; fourthly, that, whether a condition or contract, in either case it must be signed to be valid; and, fifthly, that the *onus* of showing that the condition or contract is just and reasonable is on the company that alleges it.

Manchester, Sheffield, and Lincolnshire Ry. Co. v. *Brown*.

Dictum of Lord Bramwell.

Though the authority of *Peek's case* is insuperable, the justice and wisdom of the decision was called in question as late as 1883, in *Manchester, Sheffield, and Lincolnshire Ry. Co.* v. *Brown*,[1] by Lord Bramwell, who says: "At the time it was decided,[2] and from thence continuously until now, I have thought it was wrongly decided, as I know it was contrary to the intention of the framers of the Act; and this case confirms me in that opinion. For here is a contract made by a fishmonger and a carrier of fish, who know their business, and whether it is just and reasonable is to be settled by me, who am neither fishmonger nor carrier, nor with any knowledge of their business. And although that case has been in existence for twenty years, and has been acted upon in Courts of law, if it were within my competency to overrule it I would do so, because it is impossible to say that people have regulated their contracts in reference to it: they have done nothing of the sort. What they have done is this: they have entered into their contracts without reference to it, and when it has become convenient they have broken those contracts, and, having had the benefit of them, they have turned round and have sought to avoid them."

Proposition established by *Manchester, Sheffield and Lincolnshire Ry. Co.* v. *Brown*.

Manchester, Sheffield, and Lincolnshire Ry. Co. v. *Brown*[3] may be cited as establishing the following proposition: that if the consignor has an offer *bonâ fide* made to him of having his goods carried upon terms just and reasonable, and voluntarily chooses in consideration of a pecuniary benefit to exonerate the carrier from any part of his ordinary responsibility, a contract thus limiting the carrier's liability may be just and reasonable, though without the alternative option it would not be so.[4] This decision was supplemented by that in the

[1] 8 App. Cas. 716; *Beal* v. *South Devon Ry.*, 3 H. & C. 337.

[2] In 1863.

[3] 8 App. Cas. 703; *Ronan* v. *Midland Ry. Co.*, 14 L. R. Ir. 157; *Foreman* v. *G. W. Ry. Co.*, 38 L. T. 851. In *Lewis* v. *G. W. Ry. Co.*, 3 Q. B. D. 195, the liability of the carriers was limited to "wilful misconduct." Cp. *Bennett* v. *Stone*, [1902] 1 Ch. per Buckley, J., 232, affd. [1903] 1 Ch. 509; *Cordey* v. *Cardiff Pure Ice and Cold Storage Co.*, 19 Times L. R. 256. "Wilful misconduct" was defined in *Graham* v. *Belfast and Northern Counties Ry. Co.*, [1901] 2 Ir. R. 13, 19: "Misconduct to which the will is party as contradistinguished from accident, and is far beyond any negligence, even gross or culpable negligence, and involves that a person wilfully misconducts himself who knows and appreciates that it is wrong conduct on his part in the existing circumstances to do, or to fail or omit to do (as the case may be), a particular thing, and yet intentionally does, or fails or omits to do it, or persists in the act, failure, or omission regardless of consequences." Lord Alverstone, C.J., in *Forder* v. *G. W. Ry. Co.*, [1905] 2 K. B. 536, accepts this with the addition "or acts with reckless carelessness, not caring what the results of his carelessness may be." In the same case (537) there is a hard saying of Kennedy, J.'s: "In my opinion, the knowledge which is necessary to give rise to a charge of wilful misconduct must be knowledge on the part, not of some official of the company, not even of its highest officials, but of the person who under the rules of the company is engaged in, or is entrusted with, the control of the transaction in which the mischief has arisen." Thus, if the board of directors or the general manager, with knowledge, have directed a course of conduct with regard to goods received on such a contract, the company is not chargeable with "wilful misconduct" if the loading porters or their immediate superior having control of the loading are ignorant of the requirement. Ridley, J., concurred. The ground of the decision of Lord Alverstone, C.J., is much the safer to adopt.

[4] In *Lewis* v. *G. W. Ry. Co.*, 3 Q. B. D. 195, the case of the conveyance of some cheeses, this alternative was offered, and the contract was held just and reasonable. In

G. W. Ry. Co. v. *McCarthy.*

G.W. Ry. Co. v. *McCarthy*,[1] where whether a condition is just and reasonable is held [2] "not a question of law, but a question of fact, or, it may be, a mixed question of law and fact, which must be determined according to the special circumstances of the contract in which it is inserted"; and though this be so, yet the judge "is not entitled to ask the jury to find the facts which he may consider it necessary to ascertain in forming his own judgment." [3]

Sheridan v. *The Midland Great Western Ry. Co.*

In the Irish case of *Sheridan* v. *The Midland Great Western Ry. Co.*,[4] the reasonableness of the alternative offered is declared to be a question for the judge and not for the jury.

Liability for carrier's own negligence must be excluded either directly or by necessary implication.

In special contracts the liability of carriers for their own negligence must be excluded either directly or by necessary implication; for the law presumes that the liability continues if not manifestly excepted. Thus a condition that a carrier accepts no responsibility will not exclude liability for actual negligence; [5] nor yet will one exonerating a carrier from liability for damage occasioned by kicking, plunging, or restiveness of a horse protect him where the restiveness is induced by his negligence; [6] but a condition exempting a carrier "from all liability for loss or damage by delay in transit or from whatever other cause arising" is good to excuse the negligence of the carrier's servants.[7]

Contract to carry at owner's risk only exempts from ordinary risks.

Again, a contract to carry goods "at the owner's risk" only exempts the carrier from the ordinary risks incurred by goods going along the railway, and not from liability for negligence,[8] unless the consignor has notice that the carriers carry at a lower rate "where the sender relieves them from all liability of loss, damage, or delay"; when the contract must be interpreted by the sender's knowledge of its meaning, and will exonerate from liability for negligence; [9] but does not carry immunity from the consequences of wilful misconduct.[10]

Mere misdelivery does not amount to wilful misconduct, and is no more than negligence.[11] Though Day, J., entertained "no doubt whatever" in *Mallet* v. *G. E. Ry. Co.*[12] his decision is irreconcilable with the principle just enunciated, and is commented on and "distinguished" in *Foster* v. *G. W. Ry. Co.*[13] There were two routes by which the fish, the subject of the contract, might be sent. A term of the contract was that they should be sent by one. They were sent by the other "by mistake," and were in consequence delayed. A condition relieved the defendants "from all liability for . . . delay . . . except upon proof that such delay arose from wilful misconduct on the part of the company's servants." The

Abendon v. *L. & B. Ry. Co.*, 5 Ex. D. 190, the action was in respect of a dog; the alternative was offered, and the contract was held not just and reasonable, as *Harrison* v. *L. B. & S. C. Ry. Co.*, 2 B. & S. 122, is overruled by *Peek* v. *North Staffordshire Ry. Co.*, 10 H. L. C. 473. See *Shaw* v. *G. W. Ry. Co.*, [1894] 1 Q. B. 373.

1 12 App. Cas. 218; cp. *M'Nally* v. *Lancs. & Y. Ry. Co.*, 8 L. R. Ir. 81; *Moore* v. *G. N. Ry. Co.*, 10 L. R. Ir. 95; *Knox* v. *G. N. Ry. Co.*, [1896] 2 L. R. 632.

2 Per Lord Watson, 12 App. Cas. 233.

3 *L.c.* 239.

4 24 L. R. Ir. 146.

5 *Martin* v. *Great Indian Peninsular Ry. Co.*, L. R. 3 Ex. 9.

6 *Gill* v. *Manchester Ry. Co.*, L. R. 8 Q. B. 186; *Moore* v. *G. N. Ry. Co.*, 10 L. R. Ir. 95.

7 *Manchester, Sheffield, and Lincolnshire Ry. Co.* v. *Brown*, 8 App. Cas. 703.

8 *Robinson* v. *G. W. Ry. Co.*, 35 L. J. C. P. 123; *D'Arc* v. *L. & N. W. Ry. Co.*, L. R. 9 C. P. 325; *Goldsmith* v. *G. E. Ry. Co.*, 44 L. T. 181; *Dixon* v. *Richelieu Navigation Co.*, 15 Ont. App. 647.

9 *Lewis* v. *G. W. Ry. Co.*, 3 Q. B. D. 195, 206.

10 *Ronan* v. *Midland Ry. Co.*, 14 L. R. Ir. 157.

11 *Stevens* v. *G. W. Ry. Co.*, 52 L. T. 324.

12 [1899] 1 Q. B. 309.

13 [1904] 2 K. B. 306.

Court held that the substitution of one route for the other avoided the contract and left the parties to their common law rights. The fallacy of this is in treating a "mistake" of the servants of the company in performing their contract as a recision of it: "Without his consent they altered the contract and sent the goods by a different route." The servant who made the mistake, the loader, had obviously no authority to rescind the special contract (even if he assumed to do so, which was not even contended), and to substitute for it the common law obligation. If the consignee has refused to accept, and the goods are then delivered to a person with a name like that of the consignee, without inquiry, there is wilful misconduct.[1]

Goods transferred from the line of one company to that of another in order to facilitate conveyance.

The great increase of intercommunication between railways, whereby goods can be forwarded from one end of the kingdom to another without break, has caused arrangements very frequently to be made by which goods are transferred through the hands of three or four or even more companies, until they reach their destination. The legal effect of this, in case of loss on a section of the journey not on the line of the company with whom the contract was made, has been the subject of considerable difference of opinion, terminated, as is not uncommon in these cases, by a decision in the House of Lords.

Muschamp v. *Lancaster and Preston Junction Ry. Co.*

The earliest of the cases on this point is *Muschamp* v. *Lancaster and Preston Junction Ry. Co.*[2] A parcel was delivered at Lancaster to the defendants directed to a person at a place in Derbyshire. The defendants were proprietors of the line only so far as Preston. There the railway united with the line of another company by which the carriage should have been performed; who lost the parcel, for which the plaintiff sued. At the trial, Rolfe, B., directed the jury that where a common carrier takes into his care a parcel addressed to a particular place, and does not by positive agreement limit his responsibility to a part only of the distance, there is *primâ facie* evidence of an undertaking on his part to carry the parcel to the place to which it is directed. A rule alleging misdirection was moved for, which, on argument, was discharged, the opinion of the Court being summed up by Rolfe, B.:[3] "All convenience is one way, and there is no authority the other way." This decision was followed in *Watson* v. *Ambergate Ry. Co.*[4]

Scothorn v. *South Staffordshire Ry. Co.*

In *Scothorn* v. *South Staffordshire Ry. Co.*[5] a countermand was communicated to defendants' agent, who was authorised to deliver the goods according to the original contract. By some negligence that order was disobeyed, and the goods were lost. The earlier cases were distinguished on this ground, and the decision turned mainly on the construction of the contract being that the defendants were to procure their agents to deliver according to the plaintiff's directions; as they had not done so, and a loss had been occasioned, they were bound to make it good.

Collins v. *Bristol and Exeter Ry. Co.*

Collins v. *Bristol and Exeter Ry. Co.* is the leading case on this line of decisions.[6] The principle upon which *Muschamp* v. *Lancaster and Preston Junction Ry. Co.* was decided was accepted on all sides as good,

[1] *Hoare* v. *G. W. Ry. Co.*, 37 L. T. (N. S.) 186. See *Webb* v. *G. W. Ry. Co.*, 26 W. R. 111; *Haynes* v. *G. W. Ry. Co.*, 41 L. T. 436.

[2] (1841) 8 M. & W. 421; *Merchants' Despatch Transportation Co.* v. *Hately*, 14 Can. S. C. R. 572.

[3] 8 M. & W. 430.

[4] 15 Jur. 448.

[5] (1853) 8 Ex. 341.

[6] 7 H. L. C. 194; followed *McMillan* v. *Grand Trunk Ry.* 15 Ont. App. 14, a case worth referring to.

and as Crompton, J., said, speaking of that case in the House of Lords,[1] was "acted upon by judges and juries without any doubt at almost every sittings and assizes." Its effect was nevertheless sought to be eluded on the ground of a condition in the contract with the Great Western Ry. Co., hy which the company were not to be held carriers beyond the extent of their own railway, but were to receive the entire payment for carriage out of which they were first to pay themselves as carriers on their own line, then, as forwarding agents, to pay the residue to the next railway or other carrier, and were to be responcible no further than the extent of their own line. The contention was that this made the contract beyond the Great Western line a contract with common carriers merely, the condition determining so soon as the limits of the Great Western system were passed. The facts showed that the plaintiff delivered at the station of the Great Western Ry. Co. at Bath a van-load of furniture to be conveyed to Torquay. The plaintiff signed a receipt-note, headed: "Bath Station.—To the Great Western Ry. Co.—Receive the under-mentioned goods on the conditions stated on the other side to he *sent* to Torquay Station, and delivered to the plaintiff or his agent." The company were not to he answerable for loss or damage by fire, nor to be responsible for loss or damage to goods heyond the limits of their railway. The van wae placed on a truck and conveyed to Bristol, where the Great Western line ended and the defendants' began. The same truck and guard went with the van to Exeter, where the defendants' line ended, and was joined hy the line of the South Devon Ry., which ran to Torquay. At the defendants' station at Exeter the furniture and van were accidentally destroyed hy fire. The plaintiff sued the defendants, who ohjected that the conditions governed the whole of the transport and exempted them from liahility. After a verdict for the plaintiff a rule was obtained and made ahsolute in the Court of Exchequer, on the ground that there was only one contract to carry the goods from Bath to Torquay, and that the company were, under the "conditions," expressly exempted from liahility to loss hy fire.[2] In the Exchequer Chamber thie was reversed, as the Great Western Ry. Co. received the goods to he carried on their line suhject to the stipulation againet loss hy fire, and discharged themselves hy forwarding the goods to he carried hy the defendants; and, there heing no evidence of the terms on which the goods were to be carried on the defendants' line, they niust he treated as having received them as common carriere, and were consequently liahle for their loss. The case wae then taken to tho House of Lords, and the judges were eummoned. The majority agreed with the opinion of the Exchequer Chamher; two[3] were in favour of restoring the judgment of the Exchequer. The House of Lords unanimously adopted the view of the Exchequer and reversed the judgment of the Exchequer Chamber, holding that the contract was entire for the whole journey, and that the goods were carried on the defendants' railway under t' ^ contract; so that the defendants were either not liahle at all, ae no agreement was entered into with them, or, if the contract in any way attached, the exception of lose hy fire accompanied it and freed them from liahility.

View of the Court of Exchequer.

View of the Court of Exchequer Chamber.

Declaration of the law in the House of Lords.

Muschamp v. *Lancaster and Preston Junction Ry. Co.*,[4] was dis-

[1] 7 H. L. C. 212.

[2] 11 Ex. 790.

[3] Martin, B., and Watson, B., had been appointed to the Bench after the decision of the Court of Exchequer.

[4] 8 M. & W. 421.

tinguished in that there were no conditions in the contract, which was created merely by the receipt of a parcel by the railway company to be delivered at a place on another line. What, then, was the effect of the condition? "A contract," said Lord Chelmsford,[1] "to convey goods from A to B, with a condition that, for a certain part of the journey, the company will not be responsible, will be no more inconsistent with the absolute contract for the whole journey, than where a carrier undertakes to convey goods, with a condition that for a certain description of goods he will not be liable at all." Thus, assuming the condition limiting liability to apply to the Great Western line alone, it was not inconsistent with the condition that the carrier was not to be liable for loss by fire which was not so limited. Lord Cranworth, however, disposes of the whole contention that there was a right of action against the Bristol and Exeter Ry. Co.: [2] "A person sending goods by a railway cannot be supposed to know, in the case of a continuous line, who are the owners of its different portions. He has a right to suppose, when the officers of the company at one extremity receive goods to be delivered at the other extremity, either that the whole line belongs to them, or, at all events, that they mean so to represent it, and that they contract on that footing." Thus, if the plaintiff had contracted with the Great Western Ry. Co., without limitation of liability, his action must be against them; if with limitation of liability, the contract was still with them, and against them the action must be brought, to the complete exoneration of auxiliary lines.[3]

Point decided in *Collins* v. *Bristol and Exeter Ry. Co.*

Care must be taken not to misunderstand this decision, which was given on the construction of the clauses of a written contract made between the plaintiff and the Great Western Ry. Co. The plaintiff's contention was that, though by the contract with the Great Western Ry. Co. their responsibility was restricted to their own line, when the Bristol and Exeter Ry. Co. received the goods, they received them with the common law responsibility of common carriers, and were thus liable for their loss by fire, while on their line. The defendants' contention was that the particular contract made was with the Great Western Ry. Co., who were left to make their "own bargains with all the forwarding companies, receiving a certain sum from the consignor

[1] 7 H. L. C., 231. [2] 7 H. L. C., 235.

[3] The American view may be contrasted with the English rule above illustrated: "A railroad company," said Field, J., in *Myrick* v. *Michigan Central Rd. Co.*, 107 U. S. (17 Otto) 106, "is a carrier of goods for the public, and, as such, is bound to carry safely whatever goods are entrusted to it for transportation, within the course of its business to the end of its route, and there deposit them in a suitable place for their owners or consignees. If the road of the company connects with other roads, and goods are received for transportation beyond the termination of its own line, there is superadded to its duty as a common carrier that of a forwarder by the connecting line; that is, to deliver safely the goods to such line—the next carrier on the route beyond. This forwarding duty arises from the obligation implied in taking the goods for the point beyond its own line. The common law imposes no greater duty than this. If more is expected from the company receiving the shipment, there must be a special agreement for it. This is the doctrine of this court, although a different rule of liability is adopted in England and in some of the States. As was said in *Railroad Co.* v. *Manufacturing Co.*, 16 Wall. (U. S.) 318, 324: 'It is unfortunate for the interests of commerce that there is any diversity of opinion on such a subject, especially in this country; but the rule that holds the carrier only liable to the extent of his own route, and for the safe storage and delivery to the next carrier is itself so just and reasonable that we do not hesitate to give it our sanction.'" See *Insurance Co.* v. *Railroad Co.*, 104 U. S. (14 Otto) 146, 157. Connecting carriers are not liable for the negligence of each other except by special agreement: *Sumner* v. *Walker*, 30 Fed. R. 261.

for the whole journey." [1] The conclusion of the House of Lords was that, whatever the intention of the Great Western Ry. Co. was, "it has not been expressed with sufficient clearness, and if it is important for that company, in future cases, to limit its liability to its own line, the terms of the present receipt-note should be altered." [2] The contract of the Bristol and Exeter Ry. Co. was, accordingly, with the Great Western Ry. Co., who were responsible to the plaintiff only on the terms of their contract with him. Thus the Bristol and Exeter Ry. Co. were not liable to the plaintiff on a contract, for they had no contract with him; neither were they liable as common carriers, for if the goods were received from the Great Western Ry. Co. on their own account and not while acting as agents for the plaintiff, the Bristol and Exeter Ry. Co. were not common carriers of the goods *quâ* the plaintiff.

Considered and distinguished.

Mode of contracting to forward goods, with liability as common carrier attaching, to the ultimate carrier.

It is manifest, then, that the case does not at all affect the position of things where a contract like that indicated by Crompton, J.,[3] is entered into on the terms that: "We do not choose to undertake responsibilities for negligence and accidents beyond our limits of carriage, where we have no means of preventing such negligence or accident; and we will not, therefore, undertake the carriage of your goods from A to B; but we will be carriers as far as our line extends, or our vehicles go, and will be carriers no farther; but to protect you against the inconveniences and trouble to which you might be exposed if we only undertook to carry to the end of our line of carriage, we will undertake to forward the goods by the next carriers, and on so doing our liability shall cease, and our character of carriers shall be at an end; and for the purpose of so forwarding and of saving the trouble of two payments, we will take the whole fare, or you may pay as one charge at the end"; "but if we receive it we will receive it only as your agents for the purpose of ultimately paying the next carriers." Had the contract been of that sort, the Bristol and Exeter Ry. Co. would have been liable as common carriers to the plaintiff, on the ground of their exercise of a public employment and the receipt of the goods to be carried for the plaintiff for reward.[4]

Mytton v. *Midland Ry. Co.*

While *Collins* v. *Bristol and Exeter Ry. Co.* was before the House of Lords, and between the argument and the judgment,[5] the Court of Exchequer decided *Mytton* v. *Midland Ry. Co.*,[6] a case of passenger's luggage, in accordance with its previous decisions.[7] On the facts it was held that there was only one contract, and that was with the South Wales Ry. Co. and not with the defendants. "We think," says Martin, B.,[8] "that the principle of *Muschamp* v. *The Preston and Lancashire Ry. Co.* applies to this case; and as there was no contract with the Midland Ry. Co. the plaintiff fails in this action, and the defendants are entitled to our judgment." Had there been a partnership shown, as was attempted to be done by arguing that a partnership was established by proof that the three companies concerned divided the fares according to the mileage travelled over each of the three lines traversed, the plaintiff would have had no right to sue any one of the companies who constituted the partnership.

Martin, B.'s, judgment.

1 Per Lord Wensleydale, 7 H. L. C., 239.
2 Per Lord Wensleydale, *ibid.*
3 7 H. L. C. 213.
4 Per Holt, C.J., *Cogge* v. *Bernard*, 2 Ld. Raym. 918.
5 June 13, 1856.
6 4 H. & N. 615.
7 Cp. *Keys* v. *Belfast Ry. Co.*, 8 Ir. C. L. R. 167, 9 H. L. C. 556; *Hayes* v. *South Wales Ry. Co.*, 9 Ir. C. L. R. 474.
8 *L.c.* 621.

Shortly after the decision in *Collins's case* was given, *Coxon* v. *G. W. Ry. Co.*[1] came on for argument in the Exchequer. The plaintiff sent some oxen to the Craven Arms Station of the Shrewsbury and Hereford Ry. Co. to be carried to Birmingham. A portion of this journey would be made over the Great Western's line. The plaintiff's drover signed a way-bill with the following condition: "For the convenience of the owner, the company will receive the charges payable to other companies for conveyance of such cattle over their lines of railway; but the company will not be subject to liability for any loss, delay, default, or damage arising on such railway." One lump sum was charged for carriage, which was to be paid at Birmingham, on the Great Western's line. The oxen were placed in trucks belonging to the Great Western; on the arrival of the train at Wolverhampton it was found that the bottom of one of the trucks was broken, that one of the oxen was dead, and that others were injured. In an action against the Great Western Ry. Co. the defendants contended that the contract was with the Shrewsbury and Hereford Ry. Co., and not with them. This defence was made good, Bramwell, B., pointing out that in *Collins* v. *Bristol and Exeter Ry. Co.*,[2] it was not said that a divided contract was impossible, but that such a contract had to be proved. He then examined the condition, and concluded that "they [the Shrewsbury and Hereford Ry. Co.] do not say that they will not carry on another railway, but only that they will not be liable for damage arising on such railway. So that there is an absolute refusal of liability for damage, but not a refusal to carry." That being so, the Court held that this *primâ facie* exoneration was not affected by anything in the contract.

Coxon v. *G. W. Ry. Co.* Facts.

In *Hooper* v. *L. & N. W. Ry. Co.*,[3] where the facts are identical with *Mytton* v. *Midland Ry. Co.*,[4] Denman and Lindley, JJ., treated *Mytton's case* as overruled, since it is inconsistent with *Foulkes* v. *Metropolitan Ry. Co.*[5] The action was for delay in forwarding, and injury to, goods in a portmanteau which the defendants—not the company with whom the plaintiff had contracted, but a company into whose train he changed during the course of his journey in pursuance of his contract—had received to forward and had neglected to do so, whereby the contents were injured and the plaintiff deprived of their use. The facts disclosed something that "was therefore wrongful, not as a breach of contract, but as a wrongful act in itself."[6] "Whether there would be an implied contract with the defendant company," says Lindley, J.,[7] "may be a question of difficulty, but, as a matter of fact, the portmanteau was lawfully in their charge, and the fact of its not forthcoming at Euston involves the default of some one of the defendants' servants. The defendant company having received the portmanteau are responsible for its loss in accordance with the principle of *Foulkes* v. *The Metropolitan Ry. Co.*"

Hooper v. *L. & N. W. Ry. Co.* Contract not sued.

Judgment of Lindley, J.

The decision in *Mytton's case* is that the plaintiff could not sue on a contract to be implied from the circumstances; and the case was argued throughout on the assumption that if no privity of contract could be made out, there could be no recovery; as clearly appears from the judgment of Martin, B.: "The only question is, whether there was any contract between the plaintiff and

Comment.

[1] (Feb. 11, 1860) 5 H. & N. 274.
[2] 7 H. L. C. 194.
[3] (1880) 50 L. J. Q. B. 103; *Baldwin* v. *L. Ch. & D. Ry. Co.*, 9 Q. B. D. 582.
[4] 4 H. & N. 615.
[5] (1870) 5 C. P. D. 157.
[6] *Hayn* v. *Culliford*, 4 C. P. D. 182, 185. Cp. *Cramb* v. *Caledonian Ry. Co.*, 19 Rettie, 1054.
[7] 50 L. J. Q. B. 105.

the Midland Ry. Co., or whether the contract was not an entire contract with the South Wales Ry. Co.," and "there was no evidence whatever of any privity of the Midland Ry. Co. to that contract." [1]

Foulkes v. *Metropolitan Ry. Co.*

In *Foulkes* v. *Metropolitan Ry. Co.*[2] two points were decided. First, that the contract was with the two railway companies, either of which could sue or be sued thereon—which *Bristol and Exeter Ry. Co.* v. *Collins*[3] treated as a possible event, though one to be proved. The Court in *Foulkes's case* treated it as proved. Secondly, that there is a duty, independent of contract, not to do an act to injure another. It is to this duty that Thesiger, L.J., refers when he says:[4] "I think that the true principle in such a case as the present is, that the company, so far as concerns its own line, in which term I include a line over which running powers are exercised, and its own acts and omissions, is under the same obligations in reference to the security of the passenger as it would have been if he had directly contracted with him. This principle is a reasonable one, for underlying it is the fact that more or less directly or indirectly the carrying company derives a benefit from its carriage of the passenger, and should therefore come under some corresponding obligation towards him, and what more appropriate obligation can there be than the ordinary one undertaken by railway companies towards their passengers, namely, that of taking due and reasonable care for their safety."

Judgment of Thesiger, L.J.

Carrying company liable irrespective of contract.

Whether the omission in the earlier cases to discuss the obligation of the carrying company as distinguished from the contracting company, on the ground of duty apart from contract, was due to an impression that at least an implied contract must be shown to found liability, or merely to an oversight, is now immaterial, since the decisions have placed the law beyond doubt, that while the contracting company is liable on the contract, the carrying company is also liable for any default that can be brought home to them.[5]

Law in America.

The law as established in England, holding the company with whom the contract is directly made liable throughout the route, has not been accepted in America.[6] There the tendency of decisions has been to hold the carrier liable only for the extent of his own route, and for the safe storage and delivery to the next carrier.[7] This tendency has been supposed to have taken its rise from *Garside* v. *Trent and Mersey Navigation Co.*,[8] which is cited by Redfield, C.J.,[9] as pointing to the existence of a rule to that effect. When examined the case shows that such a supposition is erroneous. The contract there, as alleged in the declaration, was to carry as common carriers from Stourport to Manchester, and thence to forward to Stockport. The course of business was that, when the goods arrived at Manchester, "if any carrier to the place of their destination be at Manchester ready to receive them, they are immediately delivered, upon payment of the carriage from Stourport to Manchester; and, if not, the defendants keep them in their warehouse till a carrier arrive to whom they may be delivered on making the above payment, the defendants not charging anything for

Garside v. *Trent and Mersey Navigation Co.*

[1] 4 H. & N. 621.

[2] 5 C. P. D. 157. See *Metropolitan Ry. Co.* v. *G. W. Ry. Co.*, 3 Times L. R. 113, where one company was held entitled to an indemnity against the other company.

[3] 7 H. L. C. 194.

[4] 5 C. P. D. 170.

[5] *Meux* v. *G. E. Ry. Co.*, [1895] 2 Q. B. 387.

[6] For a discussion of the English and American rules, see Albany Law Journal, vol. iii. 485; Am. Law. Rev., vol. ii. 426.

[7] See cases collected, Redfield, Carriers, § 181, n. 9, and *ante*, 933 n.

[8] 4 T. R. 581.

[9] Carriers, § 181.

lodging and keeping the goods in their warehouse." The goods were burnt by an accidental fire after their arrival in Manchester, and before any carrier came from Stockport. The Court held that the holding of the goods was as warehousemen, "not for the convenience of the carrier, but of the owner of the goods," [1] and that, as there was no *laches*, the defendants were not liable. It will be thus seen, that so far is this from being a decision that the carrier is only liable to the extent of his own route, that the facts of the case would not allow the question to be raised; and that the decision turned on the fact that the defendants were not carriers at all, but warehousemen, not insurers, and against whom no default was alleged.

Hyde v. Trent and Mersey Navigation Co.

In connection with *Garside* v. *Trent and Mersey Navigation Co.*, *Hyde* v. *Trent and Mersey Navigation Co.*[2] must be considered, where more, though slight, countenance is given to the American view. The plaintiffs delivered to the defendants eighteen bags of cotton to be safely carried "from Gainsborough to Manchester, and there to be delivered to the plaintiffs." The goods were put on board the defendants' barges and were conveyed to Manchester, and there landed upon the quay and lodged in the warehouse, where they were consumed by an accidental fire the same night. The usage had uniformly been for the cotton merchants to have their goods conveyed to their own warehouses in carts furnished by the defendants. Formerly, the defendants employed their own carts for this, but had latterly given up the business of carting, together with the profits, to a person in their employ, whom the plaintiffs knew to have taken it over. The question was whether the defendants were liable as common carriers, or whether the transit had ceased as far as they were concerned, and the goods were held by them as warehousemen pending delivery to the carter. The case was decided on the wording of the contract, "to Manchester there to be delivered," on which words the Court were of opinion that the defendants held the goods as carriers till they were delivered. On the more general question there was a difference of opinion, Lord Kenyon, C.J., dissenting from the rest of the Court, and being of opinion that the fact of the notoriety of the defendants' practice to hand over the goods to the carter to carry imposed a limit to their liability as carriers had it not been for the special terms. The rest of the Court were of opinion that "the carriers have the direction of the goods, and are responsible for them until they are delivered to the owner." [3]

Dissent of Lord Kenyon, C.J.

Garside's case was distinguished; since there, by the contract, the carrier's duty was terminated at Manchester, while here the general duty was to carry, or to procure to be carried, further; and was likened to "the case of an innkeeper who agrees with his head ostler that the latter shall supply the customers with post-horses; in which case if goods be lost the innkeeper is liable, because he holds himself out to the public as the responsible person, and his engagement with his servant cannot vary the contract between him and the public." [4]

Garside v. *Trent and Mersey Navigation Co.* distinguished.

Neither of these cases, then, is an authority for the view taken in the American decisions, though some countenance for it may be derived from what Lord Kenyon, C.J., said in *Hyde's case*.[5] But this view was dissented from by the other members of the Court, and was not the point of the actual decision.[6]

[1] *L.c.*, per Buller, J., 582. [2] 5 T. R. 389. [3] *L.c.*, per Buller, J., 397.
[4] 5 T. R. per Buller, J., 398. [5] *L.c.* 394.
[6] The case of *London* v. *Marquette, &c. Rd. Co.*, 54 Am. R. 307, may be referred

Inconsistent cases.

There are, however, in the American courts many cases that hold the carrier liable beyond the limits of his own route, upon the ground of a special undertaking, express or implied; in most of these cases the matter is for the jury to draw, or refuse to draw, an inference to that effect from the facts.[1]

Rule not affected by the transit being partially by sea.

It makes no difference to the liability that the goods are sent partly by sea, and are injured on the sea voyage; for the Courts infer a contract to carry through.[2]

Gill v. *Manchester Ry. Co.*

Where, as in *Gill* v. *Manchester Ry. Co.*,[3] the traffic of a railway is carried on for the joint benefit of two companies, either may be sued. For the constitution of such a liability, however, there must be some agreement, the effect of which is to constitute one company the agent of the other, and to bring the relation within the principle stated by Lord Cranworth in *Cox* v. *Hickman*:[4] "The real ground of the liability is that the trade has been carried on by persons acting on his [the defendant's] behalf. When that is the case, he is liable to the trade obligations, and entitled to its profits or to a share of them. . . . The correct mode of stating the proposition is to say that the same thing which entitles him to the one makes him liable to the other." Where goods are delivered to the agent of two companies, at a place where only one has a station, and are handed by him to that company to go by the line of the other, there is evidence of a contract for the whole distance by the first company.[5] And where there is a written contract for carriage to a particular station, parol evidence may be given of a further contract to carry to a remoter station.[6]

Aldridge v. *G. W. Ry. Co.*

Aldridge v. *G. W. Ry. Co.*[7] decided three points of importance.

(1) That in cases where the contract is, in addition to carriage over the company's own line, to forward over a line not under the control of the contracting party, and for which no extra payment is received, a condition that the contracting company is not to be responsible for loss or delay on the further line is just and reasonable.

(2) That the liability of a railway company for "empties" is not that of a gratuitous bailee, because the company may be justly considered as having had the carriage of the empties prepaid in the shape of the previous payment for the carriage of the same packages when full; so that the contract includes the obligation on the railway to carry the "empties" back without further charge.

(3) That a special contract under the Railway and Canal Traffic Act, 1854, may be signed by the carrier employed to cart and deliver between the consignor and the railway company though he is the common agent of both parties.[8]

to for the American decisions. It lays down—one judge dissenting—that, if goods to be transferred from one carrier to another are merely stored in a warehouse whence the other carrier is in the habit of taking them at his convenience, the common carrier's liability continues while they are so stored. *Ante*, 833.

1 *E.g.*, *Weed* v. *Sorotoga and Schenectady Rd. Co.*, 19 Wend. (N. Y.) 534. These cases are considered in a note to Story, Bailm. § 538.

2 *Wilby* v. *West Cornwall Ry. Co.*, 2 H. & N. 703; *Doolan* v. *Midland Ry. Co.*, 2 App. Cas. 792.

3 L. R. 8 Q. B. 186.

4 8 H. L. C. 306; see per Lord Wensleydale, 313. See, also, per Bramwell, L.J., *Foulkes* v. *Metropolitan District Ry. Co.*, 5 C. P. D. 158.

5 *Webber* v. *G. W. Ry. Co.*, 4 H. & C. 582.

6 *Malpas* v. *L. & S. W. Ry. Co.*, L. R. 1 C. P. 336; commenting on *Jeffrey* v. *Walton*, 1 Stark. (N. P.) 267.

7 15 C. B. N. S. 582.

8 Citing Sugden, Vendors and Purchasers (14th ed.), 147.

There has been some doubt whether the common law liability of carriers extends to live stock conveyed by them. It has never been necessary to decide the point since the carriage of cattle is universally a matter of special contract. On principle, it would seem that the liability of bailees of cattle would be less than that of insurers; or at least that in cases of injury arising to cattle in the hands of bailees, the probability of the injury in any case affecting the bailee with liability would be greatly less than in most other cases; since harm may happen to cattle, despite all precautions, through the vices of their disposition or through some casual impulse, defying precaution. It has been said that in this latter event the carrier is protected by reason of the implied exception to the carrier's liability arising from internal defect in the subject of the bailment to him.[1] It seems, however, an unsatisfactory method to treat as an exception to a rule that which is an ever-present quality in all the cases under the rule, rather than to treat the class itself as an exception to the broader rule of the carrier's liability. Liability for the conveyance of live stock.

The greater number of the authorities on the subject point to the exclusion of cattle from the list of things carried with the common carrier's liability, though there is weighty authority for the other view. Carrier's liability for cattle.

In *Carr* v. *Lancs. & Y. Ry. Co.*,[2] Parke, B., intimates a doubt whether a carrier is a common carrier with regard to cattle. "Most certainly," he says, "every common carrier is bound only to carry goods of that description which his public calling requires him to carry." And in *M'Manus* v. *Lancs. & Y. Ry. Co.*,[3] Martin, B., says:[4] "We are able to decide this case without referring to the second point made by the defendants, viz., the alleged distinction between the liability of carriers as to the conveyance of horses and live stock and ordinary goods; but should the question ever arise, we think that the observation that fell from Mr. Baron Parke in *Carr* v. *Lancs. & Y. Ry. Co.* is entitled to much consideration." *Carr* v. *Lancs. & Y. Ry. Co.* *M'Manus* v. *Lancs. & Y. Ry. Co.*

This view of the law was acted on in *Moffat* v. *G. W. Ry. Co.*,[5] where, in an action for the loss of a horse, on a declaration against the defendants as carriers, Keating, J., told the jury that the question for them to decide was whether defendants had been guilty of negligence in the carriage of the horse, meaning by carriage their treatment of the animal from the moment they took it into their custody. "The company were not responsible for accidents of a nature beyond the range of ordinary risks, but they were for anything resulting from the negligence of their servants." *Moffat* v. *G. W. Ry. Co.*

In *Blower* v. *G. W. Ry. Co.*,[6] however, Willes, J., considers the point, and though he indicates that any difference there may be between his view and that of Parke, B., may be referred to a verbal rather than to a substantial difference, he still expresses a clear opinion that railway companies are common carriers of cattle. To arrive at this conclusion he eliminates any liability for the acts of animals of an extraordinary character by reason of a vice inherent in them or of a disposition producing frenzy or unruly conduct; either of which classes *Blower* v. *G. W. Ry. Co.*

[1] *Blower* v. *G. W. Ry. Co.*, L. R. 7 C. P., per Willes, J., 662. *Ante*, 883 and 906.
[2] 7 Ex. 707, 712. See, too, *Chippendale* v. *Lancs. & Y. Ry. Co.*, 21 L. J. Q. B. 22; *G. N. Ry. Co.* v. *Morville*, 21 L. J. Q. B. 319; *Shaw* v. *York and North Midland Ry. Co.*, 13 Q. B. 347.
[3] 2 H. & N. 693; in Ex. Ch. 4 H. & N. 327.
[4] *Loc.* 702.
[5] 15 L. T. (N. S.) 630.
[6] L. R. 7 C. P. 655.

of acts he regards as springing from something naturally inherent in the animal, and which by its natural development leads to the mischief. An insurer is bound to safeguard the thing entrusted to him, yet he is not liable for a loss necessarily incidental to the property insured; that being so, in the case of animals, the carrier is liable as a common carrier, subject to his non-liability for injuries arising from ordinary inherent qualities.

Whether, then, a railway company are common carriers of animals, with a liability ceasing with the development of inherent vice, or whether animals are held a separate class of chattels for transportation, on account of the existence in them, as a class, of inherent vice, the liability in regard to which is governed by its own law, is of no great practical importance so long as it is recognised that for injuries arising from inherent vice the carrier is not responsible.

Combe v. *L. & S. W. Ry. Co.*

In *Combe* v. *L. & S. W. Ry. Co.*,[1] the plaintiff brought his action for negligence in the carriage of a horse, in not providing a truck reasonably fit for the purpose. "The law," says Lord Coleridge,[2] C.J., "implies an undertaking on the part of the carrier to provide a reasonably fit truck for the conveyance of the horses." The rest of the Court reiterated the opinion that negligence was required to be shown in order to give a right of action. Thus, it may be taken that the liability of carriers with regard to cattle is not absolute, but dependent on the proof of negligence.[3]

2. *Of Passengers.*

The liability of carriers of passengers[4] for injuries sustained by a passenger through the negligence of their servants, though not strictly a subdivision of the law of bailments, may most conveniently be treated here.

First decision in 1791.

This liability was first the subject of a reported decision in *White* v. *Boulton*[5] in 1791. Counsel for the defendant there referred to a

Case before Lord Loughborough, C.J.

case said to have been tried before Lord Loughborough, C.J., in which his lordship had held that the proprietors of a mail-coach were not answerable for the negligence of their servants; saying that those coaches were not under the government of the proprietors, but the concern of the public, being established merely for the conveyance of letters; and therefore, if any person travelled in them he went at his

Lord Kenyon, C.J.'s, criticism thereon.

own risk, and the law implied no promise for his safety. To this Lord Kenyon, C.J., answered, "he was certain that no such determination had ever been made by Lord Loughborough. It was too absurd to enter into the head of any man. Doubts had been entertained by great lawyers in the last and beginning of the present century whether the

[1] 31 L. T. (N. S.) 613. [2] *L.c.* 615.

[3] As to duty with regard to living animals, *Shaw* v. *Great Southern and Western Ry.*, 8 L. R. Ir. 10. It is negligence "to treat a horse as if he were a mineral:" *Pickering* v. *N. E. Ry. Co.*, 4 Times L. R. 7 (C. A.). As to injury to cows, *Smith* v. *Midland Ry. Co.*, 4 Times L. R. 68, distinguished in *Ainsby* v. *G. N. Ry. Co.*, 8 Times L. R. 148. *Ante*, 130. As to *onus* on the company in conveyance of animals, *Prior* v. *L. & S. W. Ry. Co.*, 2 Times L. R. 89. A railway company which holds itself out as willing to carry live stock is bound to provide suitable means of receiving them: *Corington Stock-yards Co.* v. *Keith*, 139 U. S. (32 Davis) 128.

[4] A person driving his own carriage who gives a seat to another does not subject himself to the liability of a common carrier of passengers: *Moffatt* v. *Bateman*, L. R. 3 P. C. 115.

[5] Peake (N. P.), 81.

Postmaster-General was liable for letters sent. He would not deliver any opinion on that point, as it had nothing to do with the present case; for when these coaches carried *passengers*, the proprietors of them were bound to carry them safely and properly." [1]

In 1797, in *Aston* v. *Heaven*, Eyre, C.J.,[2] laid down the rule in the following oft-quoted terms: "This action is founded entirely in negligence. It has been said by the counsel for the plaintiff, that wherever a case happens, even where there has been no negligence, he would take the opinion of the Court whether defendants circumstanced as the present, that is, coach-owners, should be liable in all cases, except where the injury happens from the act of God or of the King's enemies. I am of opinion the cases of the loss of goods by carriers and the present are totally unlike. When that case does occur, he will be told that the carriers of goods are liable by the custom to guard against frauds they might be tempted to commit by taking goods entrusted to them to carry, and then pretending they had lost or been robbed of them; and because they can protect themselves; but there is no such rule in the case of the carriage of persons. This action stands on the ground of negligence alone." After commenting on the facts, he continued: "The immediate cause of the accident is agreed on all hands; the question, therefore, depends on the consideration of Whether there was any negligence in the driver? It is said he was driving with reins so loose that he could not readily command his horses; if that was the case, the defendants are liable; for a driver is answerable for the smallest negligence. But if this does not appear, and the accident appears to have arisen from any unforeseen accident or misfortune, as from the horses suddenly taking fright; in such case the defendants are not liable." *Aston* v. *Heaven*, rule stated by Eyre, C.J.

In *Dudley* v. *Smith* [3] the plaintiff, an outside passenger on a coach, was injured by being driven against a low archway of the inn, only nine feet nine inches from the ground, leading to the stable-yard which was the end of the journey. When arrived before the archway the coachman requested her to alight, as the passage into the yard was very awkward. She said as the road was dirty she would rather be driven into the yard, which was the usual place for the inside passengers to alight. Lord Ellenborough, C.J., ruled that defendant was bound to carry the plaintiff from the usual place of taking up to the usual place of setting down, and that the driver before passing through any place that is dangerous is bound to inform the passengers of the full extent of the danger. *Dudley* v. *Smith*.

The law was also stated by Mansfield, C.J., in *Christie* v. *Griggs*.[4] "There was a difference," he said,[5] "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 went no farther 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 coach was purely accidental, the plaintiff had no remedy for the misfortune he had encountered." [6] *Christie* v. *Griggs*.

[1] *Ante*, 130. [2] 2 Esp. (N. P.) 534. [3] (1808) 1 Camp. 167.

[4] 2 Camp. 79. *Ansell* v. *Waterhouse*, 6 M. & S. 385, decides that an action against a common carrier for the overturning of a coach is in tort, and therefore it is not necessary that all the proprietors should be joined. *Ante*, 875; *post*, 993.

[5] *L.c.* 81.

[6] In *Readhead* v. *Midland Ry. Co.*, L. R. 2 Q. B., Blackburn, J., says, 438: "Mans-

Harris v. *Costar.*

In the subsequent case of *Harris* v. *Costar*,[1] Serjeant Vaughan took the point that there was nothing in law requiring that "a passenger is to be carried, like a bale of goods, safely at all events"; and Best, C.J., replied: "I shall not say that there is any such contract," and ruled that the contract averred in the declaration was to be construed, "like all other instruments, taking the whole together, and meant that the defendants were to use due care."

Crofts v. *Waterhouse.*

These cases were at *Nisi Prius*; but at the end of the same year in which *Harris* v. *Costar*[1] was decided, the obligation of a carrier of passengers came before the Court of Common Pleas in *Crofts* v. *Waterhouse*.[2] The driver of a stage-coach upset his coach while turning a corner. Passing the same spot twelve hours before, a cottage had served him as a landmark; this had been pulled down in the interval. The judge directed the jury that, as there was no obstruction in the road, the driver ought to have kept within the limit of it. On motion for a new trial on the ground of misdirection, a rule was made absolute; for the question whether the deviation was the effect of negligence ought to have been put to the jury. "The action," said Best, C.J., "cannot be maintained unless negligence be proved; and whether it be proved or not is for the determination of the jury, to whom in this case it was not submitted. The coachman must have competent skill, and must use that skill with diligence; he must be well acquainted with the road he undertakes to drive; he must be provided with steady horses; a coach and harness of sufficient strength and properly made; and also with lights by night. If there be the least failure in any one of these things, the duty of the coach proprietors is not fulfilled, and they are answerable for any injury or damage that happens. But with all these things, and when everything has been done that human prudence can suggest for the security of the passengers, an accident may happen. The lights may, in a dark night, be obscured by fog; the horses frightened, or, as it happened in the present case, the coachman may be deceived by a sudden alteration in objects near the road by which he had used to be directed on former journeys. It is not his fault if, having exerted proper skill and care, he from accident gets off the road; and the proprietors are not answerable for what happens from his doing so."[3]

Conditions on which a carrier of passengers is to conduct his business laid down by Best, C.J.

Distinction between carrier of goods and carrier of passengers.

The distinction between a carrier of goods and a carrier of passengers is summarised by Park, J., in the same case, as follows:[4] "A carrier of goods is liable in all events except the act of God or the King's enemies; a carrier of passengers is only liable for negligence."

So far we have more prominently regarded the duty of the coachman. There was for some time more doubt in determining the duty of the proprietor in providing a vehicle in which the journey should be accomplished.

Israel v. *Clark.*

In *Israel* v. *Clark*,[5] where the plaintiff sought to recover damages for an injury arising from the overturning of the defendant's coach in consequence of the axle-tree having broken, Lord Ellenborough, C.J., said that carriers of passengers "were bound by law to provide a

field, C.J., here does not very accurately distinguish between the possible view of the case, that the misfortune 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."

[1] (1825) 1 C. & P. 636.
[2] (1825) 3 Bing. 319; *Stokes* v. *Saltonstall*, 13 Pet. (U. S.) 181.
[3] *L.c.* 321. [4] *L.c.* 321. [5] (1803) 4 Esp. (N.P.) 259.

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."

After this came *Christie* v. *Griggs*.[1] The axle-tree of a coach snapped asunder at a place where there was a slight descent from the kennel crossing the road, and the plaintiff was thrown from the top of the coach. Mansfield, C.J., held, that "As the driver had been cleared of everything like negligence, the question for the jury would be as to the sufficiency of the coach. If the axle-tree was sound, as far as human eye could discover, the defendant was not liable." *Christie* v. *Griggs.*

In *Bretherton* v. *Wood*,[2] in the Exchequer Chamber, Dallas, C.J., uses ambiguous expressions about the carrier's liability as to goods and passengers without discriminating between them. He says:[3] "This action is on the case against a common carrier, upon whom a duty is imposed by the custom of the realm, or in other words, by the common law, to carry and convey their goods or passengers safely and securely, so that by their negligence or default no injury or damage happen. A breach of this duty is a breach of the law, and for this breach an action lies, founded on the common law, which action wants not the aid of a contract to support it."[4] *Bretherton* v. *Wood.*

Then came *Bremner* v. *Williams*,[5] where Best, C.J., considered that "every coach proprietor warrants to the public that his stage-coach is equal to the journey it undertakes," and that "it is the duty of a proprietor of a stage-coach to examine it previous to the commencement of every journey." In the subsequent case of *Crofts* v. *Waterhouse*[6] the same judge says the coachman must be provided with "a coach and harness of sufficient strength and properly made"; and in *Harris* v. *Costar*,[7] where the declaration was to carry "safely," Best, C.J., said that this meant to use "due care."[8] *Bremner* v. *Williams.* *Crofts* v. *Waterhouse.* *Harris* v. *Costar.*

In *Sharp* v. *Grey*[9] the extent of the proprietor's duty was directly involved in the decision. The axle-tree of the defendant's coach broke on a journey, whereby the plaintiff was thrown off it and sustained injury. The axle-tree was an iron bar inclosed in a frame of wood consisting of four pieces bound together by clamps of iron fastened by screws. Before the journey the defendant's servants had examined this part of the vehicle in the usual way, when no defect was obvious to the sight. Upon investigation after the accident a defect was found in that portion of the iron bar which could only be examined by unscrewing the iron clamps and taking off the wooden frame. Tindal, C.J., directed the jury to consider whether there had been that degree of vigilance on the part of the defendant which was required by his engagement to carry the plaintiff safely. The plaintiff having got a verdict a motion was made to set it aside on the ground of misdirection; as the defendant had conducted his business with all the caution that could be reasonably required. In refusing the rule, Gaselee and Bosanquet, JJ., 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 clearly against the *Sharp* v. *Grey.* Direction to the jury of Tindal, C.J.

[1] (1809) 2 Camp. 79.
[2] 3 B. & B. 54.
[3] *L.c.* 62.
[4] *Ante*, 936.
[5] (1824) 1 C. & P. 414.
[6] (1825) 3 Bing. 319, 321.
[7] 1 C. & P. 636; *Curtis* v. *Drinkwater*, 2 B. & Ad. 169, was a case where luggage was jolted on to plaintiff.
[8] *Ante*, 746.
[9] (1833) 9 Bing. 457. As to the various reports of the case and their discrepancies, see note L. R. 2 Q. B. 438.

notion of a warranty excluding latent and undiscoverable defects:[1] "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 on investigation." Alderson, J.'s, opinion was remarked on in *Grote* v. *Chester and Holyhead Ry. Co.*,[2] by Parke, B.: "In that case the coach proprietor is liable for an accident which arises from an imperfection in the vehicle although he has employed a clever and competent coachmaker." This reference is said by Mellor, J., in *Readhead* v. *Midland Ry. Co.*,[3] to be "merely intended to express that a coach proprietor could not shelter himself from the consequences of using an unsafe coach by the fact that he had employed a competent coachmaker to make it—which differs materially from implying a warranty against a defect which no amount of care or skill could discover."

Parke, B., in *Grote* v. *Chester and Holyhead Ry. Co.*

Revolution in the law necessitated by the construction of railways.

The cases in the earlier part of the century were concerned with accidents happening to coaches merely, and were not of widely reaching importance; but, as in the other branches of carrier's law so also in this, the general construction of railways and the revolution thereby effected in the amount and methods of travelling immensely increased the need for authoritative legal decision.

Two views of the carrier's obligation: (i) To take every precaution to procure a vehicle reasonably fit; (ii) An absolute obligation to do so.

The two competing views may be thus stated: The obligation of a carrier of passengers to the passenger is to take every precaution to procure a vehicle reasonably sufficient for the journey it is to assist in performing. The other is: there is an absolute obligation on the carrier to supply a vehicle fit for the purposes for which it is provided, or to be responsible for the damage resulting from its defects.

Law settled in *Readhead* v. *Midland Ry. Co.*

In *Readhead* v. *Midland Ry. Co.*,[4] the Exchequer Chamber declared the former to be the correct proposition. The accident in *Readhead's case* arose from the fracture of one of the wheels of a railway carriage, the tire of which had split into three pieces owing to an air-bubble in the welding, which could not be detected by inspection nor by any of the usual tests. Lush, J., directed the jury that, if every reasonable precaution had been taken, the defendants were not responsible for the accident; and they found that the defendants had taken every reasonable precaution in examining the tire before the journey. A rule *nisi* for a new trial was granted, on the ground "that a carrier of passengers is bound at his peril to provide a roadworthy carriage, and is consequently liable if the carriage turns out to be defective, notwithstanding that the infirmity was of such a nature that it could neither be guarded against nor discovered," but was discharged, the Court being divided in opinion, Lush, J.[5] (adhering to the terms of his ruling at the trial), and Mellor, J., giving judgment for the respondents, while Blackburn, J., dissented, being of opinion that,[6] "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."

The majority of the Court of Queen's Bench decide in accordance with the former view. Blackburn, J., dissents, holding the latter.

[1] See Montague Smith, J.'s, judgment in *Readhead* v. *Midland Ry. Co.*, L. R. 4 Q. B. 387.

[2] 2 Ex. 255. [3] L. R. 2 Q. B. 424.

[4] L. R. 2 Q. B. 412; L. R. 4 Q. B. 379. See, as to the implied undertaking with regard to the condition of a specific article, *Robertson* v. *Amazon Tug and Lighterage Co.*, 7 Q. B. D. 598. [5] *L.c.* 417. [6] L. R. 2 Q. B. 432.

The decision of the Queen's Bench affirmed in the Exchequer Chamber, and the former view established.

In the Exchequer Chamber, after an elaborate examination of the authorities, Montague Smith, J., summed up the decision of the Court as follows:[1] "It seems to be perfectly reasonable 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, has 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 Ry. Co.*[2] '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 occasioned 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."[3]

Judgment of Montague Smith, J.

Francis v. *Cockrell.*

In the following year *Francis* v. *Cockrell*[4] was decided in accordance with these principles; which Kelly, C.B., thus summarised:[5] "First there is the principle which I hold to be well established by all the authorities, that one who lets for hire, or engages for the supply of any article or thing, whether it be a carriage to be ridden in, or a bridge to be passed over, or a stand from which to view a steeplechase, or a place to be sat in by anybody who is to witness a spectacle, for a pecuniary consideration, does warrant, and does impliedly contract, that the article or thing is reasonably fit for the purpose to which it is to be applied; but, secondly, he does not contract against any unseen or unknown defect which cannot be discovered, or which may be said to be undiscoverable, by any ordinary or reasonable means of inquiry and examination.[6]"

Summary of the law by Kelly, C.B.

[1] L. R. 4 Q. B. 379, 392.

[2] 2 Ex. 251.

[3] In *Manser* v. *Eastern Counties Ry. Co.*, 3 L. T. (N. S.) 585, the verdict for the plaintiff was upheld, on the ground that by precaution the cause of injury could have been foreseen. Cp. *ante*, 609 *et seqq.*

[4] (1870) L. R. 5 Q. B. 184; in Ex. Ch. L. R. 5 Q. B. 501. The ambiguity in the use of the word "warranty" is indicated in *Faux* v. *Williamstown Bathing Co.*, 29 V. L. R. 459. In a New South Wales case, Innes, J., criticising the term "reasonably fit," says: "I can see no difference between reasonably fit and absolutely fit. A thing must be absolutely fit or not. To ask the jury if the tackle was sufficient and proper was equivalent to asking them if it was reasonably and absolutely fit": *McWhinnie* v. *Union Steamship Co.*, 9 N. S. W. R. (Law) 7; *Steel* v. *State Line Steamship Co.*, 3 App. Cas., per Lord Cairns, C., 76. There are some valuable remarks by Maule, J., as to "reasonableness" with reference to repairs to be done to a ship, in *Moss* v. *Smith*, 19 L. J. (C. P.) 228, 9 C. B. 102; *Clarke* v. *Army and Navy Co-operative Society*, [1903] 1 K. B. 155; *Earl* v. *Lubbock*, [1905] 1 K. B. 253.

[5] L. R. 5 Q. B. 508.

[6] *Randall* v. *Newson*, 2 Q. B. D. 102, guarded against an undue extension of the principle of *Readhead* v. *Midland Ry. Co.* by engrafting the limitation that that case did not apply to the sale of a chattel; in *Randall* v. *Newson* the rule is that there is a *warranty* by the vendor that the chattel purchased is reasonably fit for the purpose for which it is bought, and there is no exception of latent defects. See Benjamin,

Law as laid down in Scotland.

In a Scotch case the jury were charged: "You are to say whether there was such appearance of defect as the eye of an artificer, applied with reasonable attention, could discover, and will take into consideration that the eye of an experienced person might discover defects imperceptible to others."[1] This was consequent on a ruling: "The rule then is, that if the carriage is sound as far as the human eye can discover, the proprietors are not liable."[2]

Law as laid down by the Supreme Court of the United States.

Judgment of Harlan, J.

In the United States this law is laid down to the same effect, and with a minuteness and precision that render reproduction here useful. In *Pennsylvania Co.* v. *Roy*,[3] after citing authorities,[4] Harlan, J., says: "These and many other adjudged cases, cited with approval in elementary treatises of acknowledged authority, show that the carrier is required, as to passengers, to observe the utmost caution characteristic of very careful, prudent men. He is responsible for injuries received by passengers in the course of their transportation which might have been avoided or guarded against by the exercise upon his part of extraordinary vigilance, aided by the highest skill. And this caution and vigilance must necessarily be extended to all the agencies or means employed by the carrier in the transportation of the passenger. Among the duties resting upon him is the important one of providing cars or vehicles adequate, that is, sufficiently secure, as to strength and other requisites, for the safe conveyance of passengers. That duty the law enforces with great strictness. For the slightest negligence or fault in this regard from which injury results to the passenger, the carrier is liable in damages." And in a previous passage on the same page of the report he sums up the carrier's duty thus: "Although the carrier does not warrant the safety of the passengers at all events, yet his undertaking and liability, as to them, go to the extent that he or his agents, when he acts by agents, shall possess competent skill, and, as far as human care and foresight can go, he will transport them safely." These expressions accurately convey the English law, which on this point is identical with that of the United States.

Richardson v. *G. E. Ry. Co.*

The principles settled in *Readhead* v. *Midland Ry. Co.*[5] and *Francis* v. *Cockrell*[6] were applied in *Richardson* v. *G. E. Ry. Co.*,[7] though with some difficulty; since the decision of the Court of Common Pleas, overruling the decision of the judge at the trial, was itself overruled by the

Sale (4th ed.), 659, and the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 14. *Randall* v. *Newson* is unfavourably criticised in 2 Kent, Comm. (13th ed.) 480, n. (2) Evidence, as "though perhaps supported by some general expressions in some earlier cases . . . contrary to the general tendency of the decisions." In England the law is finally settled by the case in the face of various objections which else might be urged not without force. See *Mellish* v. *Motteux*, Peake (N.P.), 115, overruled in *Baglehole* v. *Walters*, 3 Camp. 154, confirmed *Pickering* v. *Dowson*, 4 Taunt. 779, on the effect of a sale with all faults. Failure to test the ring of a buoy to which the ship's cable was attached—a test not universally, though frequently, required of makers—was held negligence, where the ring broke, by reason of a defect not discoverable by external inspection and damage was caused: *Burrell* v. *Tuohy*, [1898] 2 I. R. 271.

[1] *Anderson* v. *Pyper*, (1820) 2 Mur. (Sc. Jury Court) 270. In the New York courts the doctrine that the carrier is absolutely bound to provide roadworthy vehicles, and is liable for the consequence of all defects irrespective of negligence, has been adopted: *Alden* v. *New York Central Rd. Co.*, 26 N. Y. 102. The facts of this case have a very strong likeness to those in *Readhead* v. *Midland Ry. Co.* The decision is the opposite way. The opposite view is taken in Massachusetts: *Ingalls* v. *Bills*, 50 Mass. 1; *Moreland* v. *Boston, &c. Rd. Corporation*, 141 Mass. 31. [2] 2 Mur. 268. [3] 102 U. S. (12 Otto) 451, 456.

[4] *Philadelphia and Reading Rd. Co.* v. *Derby*, 14 How. (U. S.) 468, followed in *Steamboat New World* v. *King*, 16 How. (U. S.) 469; *Stokes* v. *Saltonstall*, 13 Pet. (U. S.) 181, approved *Railroad Co.* v. *Pollard*, 22 Wall. (U. S.) 341.

[5] L. R. 2 Q. B. 412; L. R. 4 Q. B. 379.

[6] L. R. 5 Q. B. 184, 501. [7] L. R. 10 C. P. 486; 1 C. P. D. 342.

Court of Appeal. A coal-truck belonging to the Birmingham Waggon Co., which had been lent to a colliery company, came on the defendants' lines at Peterborough. The defendants were compelled by statute to forward foreign traffic—*i.e.*, through traffic from other lines. At Peterborough an examination of the truck was made, and two defects were discovered. Notice was given to the Birmingham Waggon Co. in order that they might remedy one of the defects, which interfered with the safety of the carriage; the other, which it was unnecessary immediately to remedy, was left for subsequent care. The first defect being repaired, the truck was sent on; when an accident occurred through a defect in the axle in no way connected with those previously mentioned. In consequence of the accident the plaintiff was injured. The question was whether the company were guilty of negligence in not making a more minute examination than they did; as there was no doubt that the crack, having reached the surface, might have been discovered by a more minute examination.

Questions for the jury.

Three questions were left to the jury—First, whether the defect in the axle would have been discovered upon any fit and careful examination of it. The jury answered that it would. Secondly, whether it was the duty of the defendants to examine the axle by scraping off the dirt and so minutely looking at it as to enable them to see the crack. The jury answered, No. Thirdly, whether, if this was not their duty at first, it became so on discovering the two first-discovered defects. The answer of the jury was: "It was their duty to require from the Birmingham Waggon Co. some distinct assurance that it had been thoroughly examined and repaired."

Kelly, C.B.'s, view of the effect of the verdict.

Kelly, C.B., thought the last answer immaterial, and directed the jury to find a verdict for the defendants, reserving leave to move to enter a verdict for the plaintiff. The Court of Common Pleas made a rule absolute to do so, Lord Coleridge, C.J., holding the answer to the third question to be "most material." The Court of Appeal restored Kelly, C.B.'s, judgment, Jessel, M.R., saying, with reference to the third answer: "I do not think we ought to give any effect to this finding of the jury, and the case for the plaintiff therefore fails";[1] in which conclusion the rest of the Court concurred.[2]

Lord Coleridge's opinion to the contrary overruled in the Court of Appeal.

Jessel, M.R.'s, view.

"The real question," said Jessel, M.R.,[3] "is whether the company were guilty of negligence in not making a more minute examination; for there is no doubt that the crack, having reached the surface, might have been discovered by a sufficiently minute examination. We must look to what is reasonable in reference to the exigencies of the case. The company cannot stop all foreign trucks and empty them for the purposes of a minute examination. If they were entitled to do so, it would practically destroy the right given by statute to other companies of having the through traffic forwarded, and give a monopoly to the company itself. The suggestion that they should do this is too absurd to bear discussion. It cannot be said that it is obligatory on the company to treat the foreign trucks so as to destroy the very object for which they were sent on to the line—viz., for the purpose of through traffic. There must be some reasonable limit to the amount of examination required, and the substantial question was whether the mode of examination adopted by the company was reasonably

[1] 1 C. P. D. 346.
[2] Cp. per Lord Westbury in *Daniel* v. *Metropolitan Ry. Co.*, L. R. 3 H. L. 61.
[3] 1 C. P. D. 344.

Rule as laid down by Jessel, M.R.

satisfactory." "If the defect discovered were such as ought reasonably to induce a person of experience to think that some other defect existed, or was likely to exist, then there would be a duty to examine further, but if the defect discovered had no probable connection with any other undiscovered defect, then I see no reason why any further or other examination should be made." [1]

Responsibility of railway company for the waggons of consignors.

The question of the extent of the responsibility of a railway company for the waggons of consignors used on the company's line for the conveyance of the goods of their owners was discussed in *Watson* v. *North British Ry. Co.*[2] The principle elicited was that the railway company are bound to use "all reasonable care and diligence" in their custody and management.

Watson v. *North British Ry. Co.*

Barr v. *Caledonian Ry. Co.*

In the later case of *Barr* v. *Caledonian Ry. Co.*,[3] where the pursuer's waggons which had conveyed coal on the defenders' line were injured when empty on the return journey, the same point was again and more elaborately considered. The Court approved the earlier decision. Lord M'Laren thus states the principle: [4] "I think it is a just and convenient rule, and it is certainly in accordance with the best traditions of our jurisprudence, that in the case of innominate contracts the obligations of the parties and the responsibility for negligence should be the same as in the case of the nearest known contract. This principle would lead to two conclusions: (1) that the railway company is responsible for the safe carriage and delivery of the coal under a contract of carriage; (2) that the company is responsible for the care of the waggons as under a contract of location." . . . "The waggons were not being carried, but were being used as part of the apparatus for the carriage of goods over the company's line"; and the case is "quite different from the case of a railway carriage or waggon received by a railway company for delivery at a distinct place, and for which freight is paid."

Judgment of Lord M'Laren.

Railway company liable for defect in Pullman cars.

These duties incumbent on a railway company cannot be shifted or evaded. Thus, a railway company is liable for defects causing injury to passengers in Pullman cars which they arrange with a car company to be run on their lines. "The law," says a United States case,[5] citing a long list of text-writers in support of the proposition, "will not permit a railroad company engaged in the business of carrying persons for hire through any device or arrangement with a sleeping-car company whose cars are used by the railroad company, and constitute a part of its train, to evade the duty of providing proper means for the safe conveyance of those whom it agreed to convey." In the case cited the Pullman car company had been sued jointly with the railway company, but had subsequently been discharged from the action. It does not admit of doubt that they would be liable for their own negligence although the railway company may also be liable.

Hyman v. *Nye.*

The Court, in *Hyman* v. *Nye*,[6] were concerned with the liability of a jobmaster for the breaking down of a carriage which had been hired

[1] Cockburn, C.J., deals with the same point in *Stokes* v. *Eastern Counties Ry. Co.*, 2 F. & F. 691, 693. In a New York case it was held that the duty on a railway company of inspecting cars of another company used on its road is just the same as if they were its own: *Goodrich* v. *New York Central Rd. Co.*, 116 N. Y. 398, 15 Am. St. R. 410.

[2] 3 Rettie, 637. [3] 18 Rettie, 139. [4] *L.c.* 148.

[5] *Pennsylvania Co.* v. *Roy*, 102 U. S. (12 Otto) 451, 457; *Dwinelle* v. *New York, &c. Rd. Co.*, 120 N. Y. 117.

[6] 6 Q. B. D. 685. Cp. *Vogan* v. *Oulton*, 79 L. T. 384; *Faux* v. *Williamstown Bathing Co.*, 29 V. L. R. 459.

from him; and the consideration of that case, consequently, belongs more particularly to another branch of our subject, where it has already been noticed;[1] but this seems an appropriate place for extracting the rule there formulated, as the learned judge—Lindley, L.—who delivered the leading opinion held that the liability of the job-master with respect to the vehicle he supplies is identical with that of the carrier of passengers with respect to the carriage he supplies—viz., that "he is an insurer against all defects which care and skill can guard against."[2] The "duty," he says, "appears to me to be to supply a carriage as fit for the purpose for which it is hired as care and skill can render it; and if whilst the carriage is being properly used for such purpose it breaks down, it becomes incumbent on the person who has let it out to show that the breakdown was, in the proper sense of the word, an accident not preventable by any care or skill. If he can prove this, as the defendant did in *Christie* v. *Griggs*,[3] and as the railway company did in *Readhead* v. *Midland Ry. Co.*,[4] he will not be liable; but no proof short of this will exonerate him."

Who is a passenger?

We have considered what the duty of a carrier of passengers is to those whom he carries, but we have not yet inquired what is sufficient to constitute a person a member of the class to whom the duty is owing.

A passenger has been defined[5] as "a person who undertakes, with the consent of the carrier, to travel in the conveyance provided by the latter, otherwise than in the service of the carrier as such." And again, as "one who travels in some public conveyance by virtue of a contract, express or implied, with the carrier, as to the payment of fare, or that which is accepted as an equivalent therefor."[6]

Definitions criticised.

Neither of these definitions is perfectly satisfactory; and perhaps a perfectly satisfactory definition is unattainable in view of the frequent complication of circumstances in which the state of a passenger is constituted. The cases go to show that the relationship may arise from very slight circumstances, and when constituted the whole duty of a carrier to a passenger forthwith attaches. Neither entry into the conveyance nor payment of the fare is essential to the relation; being within the waiting-room waiting for a carriage may make a person as effectually a passenger as if actually seated in the conveyance itself.[7]

G. N. Ry. Co. v. *Harrison*.

In *G. N. Ry. Co.* v. *Harrison*[8] the contention was that the plaintiff was entitled to recover for injuries received while travelling on the

[1] *Ante*, 790. [2] *L.c.* 687. [3] 2 Camp. 80.

[4] L. R. 2 Q. B. 412; L. R. 4 Q. B. 379. Cp. *Jones* v. *Page*, 15 L. T. (N. S.) 619; *Marner* v. *Banks*, 17 L. T. (N. S.) 147.

[5] Shearman and Redfield, Negligence, § 488. There is a chapter devoted to this in Thompson, Negligence, §§ 2633-2675. *McDonough* v. *Metropolitan Rd. Co.*, 137 Mass. 210, held the fact that a boy had not taken his seat in a tramcar when he was injured did not prevent his being a "passenger." Where a person intending to travel by railway lost his train and waited in the station for a tramcar "a few minutes" till the lights were put out, and then was injured while attempting to leave, it was held he "remained at his own risk": *Heinlein* v. *Boston, &c. Rd. Co.*, 147 Mass. 130, 9 Am. St. R. 676. This case would probably not be followed in England. Cp. *G. W. Ry. Co.* v. *Bunch*, 13 App. Cas. 31; *post*, 1002.

[6] *Bricker* v. *Philadelphia, &c. Rd. Co.*, 132 Pa. St. 4, 19 Am. St. R. 585. A variety of definitions of "passenger" are collected and commented on in *Pennsylvania Rd. Co.* v. *Price*, 96 Pa. St. 256, 267.

[7] *Hamilton* v. *Caledonian Ry. Co.*, 19 Dunlop, 457; Thompson, Negligence, §§ 2638-2642.

[8] 10 Ex. 376, 382. *Skinner* v. *L. & B. Ry. Co.*, 5 Ex. 787, is cited as an authority to show that a passenger may maintain an action for the negligence of a company

defendants' railway if there was any evidence, however small, that he was in the defendants' railway carriage by the licence of the company. The evidence showed a practice of allowing the reporters of a London newspaper going down to country races to travel on the defendants' line free. The reporter was for this purpose supplied with a ticket with the name of a person in the reporting department of the newspaper written on it, which purported to be not transferable; and contained the intimation that any person other than the one whose name was inscribed using the pass would be liable to the penalty which a passenger incurs by travelling without having paid his fare. The plaintiff, acting in good faith and while engaged on the business of his paper, went to the station with a ticket as described, but with the name of another reporter in the same department as himself written on it. He showed the ticket to a porter, who said, "All right," and put him in a carriage. The plaintiff and other persons had previously travelled with similar tickets not bearing the name of those who used them. An accident happened during the journey, and the plaintiff, being injured, brought his action. The defendants submitted at the trial that there should be a nonsuit, which the judge refused and the jury found for the plaintiff.

On a bill of exceptions, the Exchequer Chamber held that there was "such evidence of a licence as would make it wrong to say that the plaintiff was a trespasser." The effect of the decision is to apply the obligation attaching to a passenger on the part of a railway to all persons lawfully on the railway and to admit evidence to show the character in which a person is thus travelling, even where the *primâ facie* conditions constitutive of lawful travelling appear to have been violated.

Wide interpretation given by the Court.

Austin v. *G. W. Ry. Co.*[1] illustrates the same view. The mother of the plaintiff, a child of just over three years old, took a ticket for herself, at the time having the plaintiff, in her arms, to travel on the defendants' railway; she did not take a ticket for the plaintiff; though by 7 & 8 Vict. c. 85, s. 6, the defendants were entitled to half the fare charged for an adult in respect of all children between three and twelve years of age, and were not allowed to charge for children under three years of age. In the course of the journey there was an accident, and the plaintiff's leg was broken. The plaintiff recovered in an action. The defendants moved on the ground that the plaintiff was not lawfully a passenger, as there had been concealment, which was equivalent to a fraud, in the circumstances attending his being in the carriage of the company. The Court sustained the verdict. Blackburn, J., thus stated the principle applicable:[2] "I think that what was said in the case of *Marshall* v. *Newcastle and Berwick Ry. Co.*,[3] was quite correct. It was there laid down that the right which a passenger by railway has to be carried safely, does not depend on his having made a contract,

Austin v. *G. W. Ry. Co.*

Blackburn, J.'s, statement of a railway company's duty to those carried by them.

in whose train he lawfully is, whether he has received a ticket or not: see Brown and Theobald, Law of Railways (3rd ed.), 302. The decision goes no further than that in that case there was a question for the jury. *Way* v. *Chicago Rd. Co.*, 52 Am. R. 431, is the case of an injury arising while falsely personating some one entitled to a not transferable ticket. The company were held not liable. In a note to the report other cases bearing on the point are collected. Generally speaking, prepayment of the fare, if demanded, is necessary to constitute a passenger; but this cannot be laid down as a conclusion of law.

[1] L. R. 2 Q. B. 442. *Lyles* v. *Southend-on-Sea Corporation*, [1905] 2 K. B. 1, 21. Cp. *ante*, 167 and 176. See *Walker* v. *G. N. Ry. Co. of Ireland*, 28 L. R. Ir. 69, and *ante*, 73.

[2] L. R. 2 Q. B. 445.

[3] 11 C. B. 655.

hut that the fact of his heing a passenger casts a duty on the company to carry him safely. If there had heen fraud on the part of the plaintiff, or if the plaintiff had heen taken into the train without the defendants' authority, no such duty would arise. Whether the mother's fraud could he treated as the fraud of the child so as to hring the present case within the principle of the cases which have heen referred to, we need not now inquire. The averment of fraud which may he thought to make the plea valid is disproved. We must take it that the child, without fault and through an honest mistake on the mother's part, was taken into the train hy the railway company, and received as a passenger by their servants with their authority. . . . It certainly seems to me that a duty to carry safely arises under those circumstances."

Foulkes v. *Metropolitan District Ry. Co.*

In *Foulkes* v. *Metropolitan District Ry. Co.* the decisions are classified hy Thesiger, L.J. :[1]

Four classes of decisions stated by Thesiger, L.J.

(1) Where a railway company issues a ticket for a journey partly on its own line and partly on that of another company.

In this case the company issuing the ticket is *primâ facie* responsible for injuries caused hy negligence throughout the whole route.[2]

(2) Where, as hetween the company and the individual passenger, though there is no contract, there are circumstances which raise a presumption that the person carried is not unlawfully in the company's carriage—*e.g.*, in the case of a servant travelling with his master,[3] or in the case of a child travelling with his mother.[4]

In this case a duty is implied hy law.

(3) Where, as hetween the carrier and the passenger, there may be a contract ; hut the performance of the carrier's portion of it has devolved on some other person.

In this case such other person is liahle for the default[5] as well as the carrier, who is liahle on his contract.

(4) Where a railway company contracts to carry for a journey over a line upon which another company has running powers, with which other company there is an arrangement for mutual conveyance of passengers, and where the person with whom the contract of carriage is so made is carried hy the company other than that with which the contract of carriage is made, and is injured while heing so carried.

In this case the carrying company are under the same obligations in

[1] 5 C. P. D. 168; *Nolton* v. *Western Rd. Corporation*, 15 N. Y. 444. As to acquiring rights as a passenger, *Pennsylvania Rd. Co.* v. *Price*, 96 Pa. St. 256, reversed on the construction of a local statute, *Price* v. *Pennsylvania Rd. Co.*, 113 U. S. (6 Davis) 218. *McVeety* v. *St. Paul, &c. Ry. Co.*, 22 Am. St. R. 728, deals with circumstances where a traveller by railway loses the rights of a passenger.

[2] *G. W. Ry. Co.* v. *Blake*, 7 H. & N. 987, 991 ; *Thomas* v. *Rhymney Ry. Co.*, L. R. 5 Q. B. 226, in Ex. Ch. L. R. 6 Q. B. 266. See *John* v. *Bacon*, L. R. 5 C. P. 437.

[3] *Marshall* v. *York, Newcastle, and Berwick Ry. Co.*, 11 C. B. 655.

[4] *Austin* v. *G. W. Ry. Co.*, L. R. 2 Q. B. 442. The case of *Stockdale* v. *Lancs. & Y. Ry. Co.*, 11 W. R. 650, seems a better illustration, at any rate a more extreme illustration, than either of those given in the text. The plaintiff, with the guard's permission, got into his van ; when the train got to its destination the van was not opposite the platform. In attempting to get out she was injured. Held, that as she got into the van at the invitation and under the superintendence of the guard, the guard's van became a carriage for passengers, and there was a breach of duty in not allowing time for her to alight. See *post*, 979.

[5] *Dalyell* v. *Tyrer*, E. B. & E. 899, the case of a ferryman, unable on a certain day to work his ferry, who hired a boat and crew in substitution, the owner of which was held liable in the case of an accident to a regular customer of the ferryman. In *Reynolds* v. *N. E. Ry. Co.*, Roscoe, N. P. (18th ed.).775, A took a ticket of B railway company over the lines of B, C, and D railways ; through negligence of C an accident happened, for which C, the defendant company, was held responsible. Cp. *ante*, 931.

reference to the security of the passenger, and as to their own acts and omissions, as they would be under had it directly contracted with him.[1]

"Nor can it matter," says Bramwell, L.J.,[2] "whether the defendants receive the fare by the hands of their own servants or those of others. . . . The defendants, I repeat, are the carriers, and the contract of carriage is with them. If the interest of the South-Western in the matter affects this reasoning, it would at the outside go to show that the two companies are partners and the contract was with them jointly. . . . Suppose a receiver was appointed of the South-Western's tolls and takings; could it be contended that this money could be taken by him without the defendants being entitled to a share of it?"

In what circumstances a person not rightfully in a railway carriage is disentitled to recover.

The question suggested by the decision is—Is a person not rightfully in or about a railway carriage in all cases disentitled to recover for injuries sustained through the default of the company in or about whose carriage he is? The point was assumed in *G. N. Ry. Co.* v. *Harrison*,[3] as against an admitted trespasser; and there is the case of *Lygo* v. *Newbold*,[4] which is a decision that a person of full age, who got into a cart without authority to do so, could not maintain an action by reason of the breaking down of the cart. The cart was, however, for the purpose of carrying luggage only, and not passengers; and though the servant in charge assented to the plaintiff riding, the owner had only provided a vehicle for one purpose, and could not reasonably be held liable when it was applied, without reference to him, for another.[5]

Railway company's duty differs in respect of trespassers and passengers.

There is no doubt that a difference of duty exists on the part of a railway company in guarding against injuries to trespassers, and in safeguarding their own passengers. The duty in the latter case is to use "the utmost care and diligence which can be bestowed by human skill and foresight."[6] In the former the duty "rests merely upon grounds of general humanity and respect for the rights of others, and requires the carrier to so perform the transportation service as not wantonly or carelessly to be an aggressor towards third persons."[7] But it is not the law that a person whose title as a passenger is defective may be treated as a trespasser.[8] In the frequent cases of people hurrying into trains about to start, with no time to take tickets; of people getting into wrong trains; or of people carried beyond their distance—in all cases travelling without tickets, and without direct authorisation from the companies—it is impossible to say the law will

[1] In an omnibus case, *Brien* v. *Bennett*, 8 C. & P. 724, holding up a finger to the driver, and the stoppage of the omnibus in consequence, was held evidence to go to the jury to support a declaration as to the stopping of the omnibus implying a consent to take plaintiff as a passenger. See also *Cooke* v. *Midland Ry. Co.*, 9 Times L. R. 147 (C. A.).

[2] 5 C. P. D. 158. [3] 10 Ex. 376. [4] 9 Ex. 302.

[5] *Railroad Co.* v. *Jones*, 95 U. S. (5 Otto) 439. Cp. *Kentucky Central Rd. Co.* v. *Thomas's Administrators*, 42 Am. R. 208. This distinction has received judicial sanction in America, where, the driver of a car having permitted a person to ride on his car without pay, but without any collusion for the purpose of defrauding the company, it was held, on the person suing for injuries received while so riding, that the permitting one to ride without pay is not outside the scope of the driver's duty, although a violation of instructions for which he is responsible to his master, yet still an act affecting the master with liability. In this case the car was for the conveyance of passengers: *Wilton* v. *Middlesex Rd. Co.*, 107 Mass. 108. Cp. *Lehigh Valley Rd. Co.*, v. *Greiner*, 113 Pa. St. 600; *Harris* v. *Perry*, [1903] 2 K. B. 219. Cp. *ante*, 951 n 4.

[6] *Chicago, &c. Rd. Co.* v. *Mehlsack*, 19 Am. St. R. 20. [7] *Ibid.*

[8] *Chicago, &c. Rd. Co.* v. *Mehlsack*, 19 Am. St. R 17; *Bricker* v. *Philadelphia and Reading Rd. Co.*, 132 Pa. St. 1, 19 Am. St. R. 585.

put them in the position of mere trespassers.[1] The way in which a passenger may be discriminated from a trespasser probably is, to consider whether any act or declaration of the railway company or their servants is shown affecting them with knowledge that the person alleged by them to be a trespasser was travelling in their train, and that they acquiesced in his doing so, or, at least, did not take immediate measures to prevent his continuing to do so; or whether there are any circumstances in the case from which a consent may be implied; as, in the case of travelling without a ticket, the opening of the gate to let the traveller pass without asking for a sight of the ticket; in the case of getting into a wrong train, any circumstances of ambiguity whereby the passenger may have been misled; in the case of travelling beyond the distance covered by the traveller's ticket, a practice of paying excess fares at the station of his arrival;[2] in all cases, any conduct, whether general or special, by which the conclusion can be drawn that the company waive the tort and elect to resort to other remedies to secure their rights.[3] Suggested criterion.

[1] As to what their position is, see *Arnold* v. *Pennsylvania Rd. Co.*, 115 Pa. St. 135, 2 Am. St. R. 542 and note. As to travelling without a ticket in violation of a by-law, *Dearden* v. *Townsend*, L. R. 1 Q. B. 10. As to absence of intention to defraud, *Bentham* v. *Hoyle*, 3 Q. B. D. 289. As to liability to conviction under 8 & 9 Vict. c. 20, s. 103, for travelling without having previously paid the fare, with intent to avoid payment, where a person bought the "forward half" of a non-transferable ticket from one who had partially used it, *Langdon* v. *Howells*, 4 Q. B. D. 337. As to refusing to show ticket without intent to defraud under ss. 108, 109, *Saunders* v. *S. E. Ry. Co.*, 5 Q. B. D. 456. As to illegality of by-law under 8 & 9 Vict. c. 20, ss. 103, 109, *Dyson* v. *L. & N. W. Ry. Co.*, 7 Q. B. D. 32. Sec. 103 is superseded by sec. 5 of the Regulation of Railways Act, 1889 (52 & 53 Vict. c. 57), and partially repealed by the Statute Law Revision Act, 1892 (55 & 56 Vict. c. 19); *Huffam* v. *North Staffordshire Ry. Co.*, [1894] 2 Q. B. 821. The cases are collected and the law discussed in an article on "Railway Tickets" in the Law Journal for August 11, 1894. In *Fulton* v. *Grand Trunk Ry. Co.*, 17 Upp. Can. Q. B. 428, plaintiff got upon a train without a ticket, and when asked for his fare declined paying it, "as he had not made up his mind how far he would go." The conductor told him he must decide, and on his declining again on the same ground, stopped and train and put him off. The plaintiff then tendered the conductor a 20 dollar gold-piece, telling him to take his fare, 1.35 dollar. The Court held that the plaintiff had refused to pay his fare within the meaning of an Act enacting that "passengers refusing to pay their fares may by the conductor of the train and the servants of the company be with their baggage put out of the cars, using no unnecessary force, at the usual stopping-place or near any dwelling-house, as the conductor shall elect, first stopping the train." In the United States it has been decided, as a point of law, that a person purchasing a railway ticket has a right to rely upon the ticket-clerk giving him a proper ticket, and that in the absence of special circumstances there is no duty on the purchaser to examine the same, so that in the event of mistake happening, the railway authorities are not discharged by alleged negligence of the passenger: *Georgia, &c. Rd. Co.* v. *Dougherty*, 22 Am. St. R. 499. In England, the same result would be attained by leaving to the jury the question whether, considering the relative positions of the ticket-clerk and the proposed passenger, the latter had so acted as to preclude himself from alleging the act of the ticket-clerk, with probably a direction that the *onus* of proof lay on the railway company. A contract to carry from one station to another does not entitle the passenger to break the journey at an intermediate station: *Ashton* v. *Lancs. & Y. Ry. Co.*, [1904] 2 K. B. 313; *Bastaple* v. *Metcalfe*, [1906] 2 K. B. 288. Where the holder of a cheap excursion ticket sought to make it available in reduction of the ordinary fare to a place beyond the excursion limit, the railway company were held entitled to enforce a condition of forfeiture and to charge full fare: *G. N. Ry. Co.* v. *Palmer*, [1895] 1 Q. B. 862; *L. & N. W. Ry. Co.* v. *Hinchcliffe*, [1903] 2 K. B. 32. A by-law that a passenger not producing his ticket must pay the fare over again is not unreasonable: *Hanks* v. *Bridgman*, [1896] 1 Q. B. 253; nor is one requiring the production of it to an inspector on request, *Lowe* v. *Volp*, [1896] 1 Q. B. 256. These cases are tramway cases.

[2] Cp. per Lord President M'Neill, *Hamilton* v. *Caledonian Ry. Co.*, 19 Dunlop, 461.

[3] See *L. & B. Ry. Co.* v. *Watson*, 4 C. P. D. 118, distinguished in *G. N. Ry. Co.* v. *Winder*, [1892] 2 Q. B. 595. A passenger who enters a sleeping-car for the purpose of asking permission to wash his hands, was held not a trespasser, in *Williams* v.

Watkins v. *G. W. Ry. Co.*

Thus in *Watkins* v. *G. W. Ry. Co.*,[1] a mother was going with her daughter, an intending passenger, to a train, when she knocked her head against an obstruction. Denman, J., was of opinion that acquiescence by the company in such accompaniment would be enough to put the licensee on the same level as to rights with a passenger.[2]

Shaw, C.J., in *Commonwealth* v. *Power*.

The position of the mother in the case before Denman, J., is illustrated by what is pointed out by Shaw, C.J., in *Commonwealth* v. *Power*:[3] that persons other than passengers *primâ facie* have the right to enter the dépôt of a railway company, as others besides guests may go into hotels without making themselves trespassers, because in both instances there is an implied licence given to the public to enter, but such licences in their nature are revocable,[4] except in the one case as to passengers, and in the other as to guests, who have the right to enter the train, ticket office, or hôtel, as the case may be, if they are sober, orderly and able to pay for transportation or fare.

Hamilton v. *Caledonian Ry. Co.*

In *Hamilton* v. *Caledonian Ry. Co.*,[5] the by-laws of the Caledonian Railway provided that persons travelling without a ticket would be charged excess fare according to a schedule furnished to the station-masters. A person having business at various stations along the line sometimes travelled without a ticket, though not with intention to avoid payment of his fare. On one occasion, while so travelling without a ticket he was injured and brought an action to recover damages in respect of his injuries. The company objected that he was not a passenger. The Court, however, through Lord President M'Neill, expressed the opinion[6] "that a person may be a passenger in the sense of the Act,[7] although he may not have a ticket." "He may be a passenger though without a ticket if he has been in use so to travel, and the officers of the company know that he had so travelled." This expression is probably too narrow; if the officers of the company know that he is so travelling, he would, it would seem, be entitled to treatment as a passenger, even though he had never travelled thus before. The determining factor in the case would appear to be *bona fides* on the traveller's part; and not even necessarily knowledge on the part of the company's officers.

Thatcher v. *G. W. Ry. Co.*

The Court of Appeal were of opinion in *Thatcher* v. *G. W. Ry. Co.*,[8] that it is a common practice known to railway companies for one person to come to a railway station to see another off. That being so,

Opinion of Lord Esher, M.R.

Lord Esher, M.R., thus answers the question, What duty has the railway company to those persons? "No doubt in strict logic they

Pullman Palace Car Co., 40 La. Ann. 417, 8 Am. St. R. 538; and so, according to *Thorpe* v. *New York Central, &c. Rd. Co.*, 76 N. Y. 402, is a passenger unable to find a seat in the ordinary car, who enters a sleeping-car and takes a seat there.

1 37 L. T. (N. S.) 193; *York* v. *Canada Atlantic SS. Co.*, 22 Can. S. C. R. 167. In *Little Rock, &c. Ry. Co.* v. *Lawton*, 29 Am. St. R. 48, a railway company was held to have a duty to a person acting as escort to a female passenger and little child though the escort is not a passenger, and to stop a reasonable time to let her alight from the car; and a notice to trespassers does not apply to such a person.

2 This may have been right on the facts of the case, but in *Redigan* v. *Boston and Maine Rd.*, 155 Mass. 44, 31 Am. St. R. 520, the Court held plaintiff disentitled to recover against a railway company for leaving open a trap-door in the platform of a railway station, down which plaintiff fell while taking a short cut through the railway station on his own business. The breach of duty alleged was that he was not prevented going by the defendants. The principle of this decision is that asserted in *Batchelor* v. *Fortescue*, 11 Q. B. D. 474.

3 48 Mass. 596, 602; *State* v. *Steele*, 19 Am. St. R. 573.

4 Cp. *Weaver* v. *Bush*, 8 T. R. 78.

5 (1857), 19 Dunlop, 457.

6 19 Dunlop, 461.

7 8 & 9 Vict. c. 83, s. 101.

8 10 Times L. R. 13 (C. A.).

had not the same amount of duty to them as they had to persons who paid them money in consideration of being carried as passengers. But, so far as regarded the taking means for providing for personal safety, it was impossible to measure the difference between their duty to the one class of persons and their duty to the other. In short, it was their duty to take reasonable care with regard to both. The defendants, therefore, owed the plaintiff the duty to take reasonable care not to do anything to endanger his personal safety. . . . The allowing the door of the guard's van to remain open in such a way that it swept the plaintiff down while he was standing on the platform was clearly a failure on the part of the defendants' servants to take such reasonable care as it was their duty to take."

Rounds v. *Delaware Rd. Co.*

Of course the fact of a person being a trespasser does not authorise brutal conduct or wilful injury of any kind; as was said in *Rounds* v. *Delaware Rd. Co.*[1]—a case where a boy trespassed on a railway car: "The fact that the plaintiff was a trespasser on the cars is not a defence. The lad did not forfeit his life, or subject himself to the loss of his limbs, because he was wrongfully on the car. The defendant owed him no duty of care by reason of any special relation assumed or existing between the company and him, but he was entitled to be protected against unnecessary injury by the defendant or its servants in exercising the right of removing him, and especially from the unnecessary and unjustifiable act of the brakeman by which his life was put in peril, and which resulted in his losing his limb." The boy was kicked off the car.

Passenger in wrong train.

If a passenger has got into the wrong train through his own lack of care he must qualify himself by payment of the fare to entitle himself to ride in the train. If he is unwilling to do this he may be lawfully put off at any convenient and safe place and without unnecessary force. If the passenger has got into the wrong train through the negligence of the company's servant he may insist to ride thereon in pursuance of his contract, and if put off may recover damages for his ejection; or he may claim to be conveyed to the place to which he designed to go.

Statutory passengers.

Where the carrier has undertaken, or is compelled by law, to carry a passenger, the consideration of whether the passenger paid or was carried free is altogether irrelevant.

Collett v. *L. & N. W. Ry. Co.*

In *Collett* v. *L. & N. W. Ry. Co.*,[2] a post-office officer was injured while travelling on the defendants' line in the execution of postal duty, which by statute he was authorised to do free of charge. The Court of Queen's Bench held the company liable, Lord Campbell, C.J., saying:[3] "That it was the duty of the company to use due and proper care and skill in conveying is admitted. That duty does not arise in respect of any contract between the company and the persons conveyed by them, but it is one which the law imposes; if they are bound to carry, they

[1] 64 N. Y. 129, 138. This decision would equally have been arrived at in England. Some of the American text-writers, *e.g.* Thompson, Negligence, § 3188, labour under the impression that the rule there laid down is identical with that in the ludicrous case of *Croaker* (or *Craker*) v. *Chicago & N. W. Rd. Co.*, 17 Am. R. 504. The English case involving the same principle—a wholly distinct one—is *Limpus* v. *London General Omnibus Co.*, 1 H. & C. 526; *Schultz* v. *Third Avenue Rd. Co.*, 89 N. Y. 242. See *Delany* v. *Dublin United Tramways Co.*, 30 L. R. Ir. 725. This case is examined, *ante*, 146.

[2] (1851) 16 Q. B. 984.

[3] *L.c.* 989. Lord Campbell's expression, "if they are bound to carry they are bound to carry safely," is explained by Lord Halsbury, C., *East Indian Ry. Co.* v. *Kalidas Mukerjee*, [1901] A. C. 402.

are bound to carry safely; it is not sufficient for them to bring merely the dead body to the end of the journey." [1]

Passengers by invitation. *Philadelphia and Reading Rd. Co.* v. *Derby.*

The year following the same rule was accepted by the Supreme Court of the United States in *Philadelphia and Reading Rd. Co.* v. *Derby.*[2] The language of the judgment is most comprehensive: [3] "If one be lawfully on the street or highway, and another's servant carelessly drives a stage or carriage against him, and injures his property or person, it is no answer to an action against the master for such injury, either that the plaintiff was riding for pleasure, or that he was a stockholder in the road, or that he had not paid his toll, or that he was the guest of the defendant, or riding in a carriage borrowed from him, or that the defendant was the friend, benefactor, or brother of the plaintiff." "If the plaintiff was lawfully on the road at the time of the collision, the Court were right in instructing the jury that none of the antecedent circumstances or accidents of his situation could affect his right to recover." The plaintiff was a stockholder in the company, riding by invitation of the president, paying no fare, and not in the usual passenger cars.

American law based on the consideration that carriers have public duties to discharge.

The American law is settled on the basis that common carriers have public duties to discharge, from which they are not able to exonerate themselves even with the consent of their customers; and that special contracts made by them with their customers are good and valid to the extent only of excusing them, for example, for all losses happening by accident without any negligence or fraud on their part; but that an exemption from liability for negligence is repugnant to the law of their constitution and the public good, and consequently inoperative.

Exception of company's negligence void.

These principles are applied both to carriers of goods and carriers of passengers. Thus, where a drover travelling with cattle had signed an agreement "to take all risk of injury to them and of personal injury to himself," and was injured through the negligence of the company's servants, the Supreme Court of the United States held the stipulation void, and that he was entitled to recover for his injuries from the company.[4]

Contradictory decision in England. *McCawley* v. *Furness Ry. Co.*

The year previously to this decision the Queen's Bench decided a very similar case in the opposite way. *McCawley* v. *Furness Ry. Co.*[5] was decided on demurrer. The plaintiff, who travelled on defendants' line as a cattle-drover, declared on a contract to be safely and securely

1 *Ross* v. *Hill*, 2 C. B. 877. In *Grand Trunk, &c. Rd. Co.* v. *Richardson*, 91 U. S. (1 Otto) 454, 471, *Bains* v. *Rd. Co.*, 42 Vt. 380, is approved, where it is said "that a railroad company in the discharge of its duties, and in the exercise of its right to protect its property from injury to which it is exposed by the unlawful act or neglect of another, is bound to use ordinary care to avoid injury even to a trespasser." For what is signified by "ordinary care," see *ante* 28 and 756.

2 14 How. (U. S.) 468. In *Steamboat New World Co.* v. *King*, 16 How (U. S.) 474, Grier, J., alluding to the decision, says: "We desire to be understood to reaffirm that doctrine, as resting not only on public policy, but on sound principles of law."

3 14 How. (U. S.) 485.

4 *Railroad Co.* v. *Lockwood*, (1873) 17 Wall. (U. S.) 357; *Hart* v. *Pennsylvania Rd. Co.*, 112 U. S. (5 Davis) 331. It is there laid down that the test applicable to every limitation of the common law liability of a carrier, is its just and reasonable character. "In Great Britain a statute directs this test to be applied by the courts. The same rule is the proper one to be applied in this country in the absence of any statute," *l.c.* 342. For the responsibility of a railway company to strangers, see *Reary* v. *Louisville, &c. Ry. Co.*, 40 La. Ann. 32, 8 Am. St. R. 497; but where the drover gets in an improper place: *Little Rock, &c. Ry.* v. *Miles*, 48 Am. R. 10. In England an agreement of the kind referred to in the text is invalid when made with an infant: *Flower* v. *L. & N. W. Ry. Co.*, [1894] 2 Q. B. 65. *Ante*, 725.

5 (1872), L. R. 8 Q. B. 57. In *Duff* v. *G. N. Ry. Co.*, 4 L. R. Ir. 178, the drover signed the conditions. As to the position of a passenger, taking a ticket by a goods

carried. The defendants pleaded a contract "to carry under a free pass" "whereby it was, amongst other things, provided that any drover accompanying cattle" "should travel at his own risk." The replication set up "gross and wilful negligence and mismanagement of defendants." To this there was a demurrer. The Court held that the plaintiff could not recover. Blackburn, J., puts the law most clearly: "The duty of a carrier of passengers is to take reasonable care of a passenger, so as not to expose him to danger, and if they negligently expose him to danger, and he is killed, they might be guilty of manslaughter, and they would certainly be liable to the relatives of the deceased in damages. But here the passenger was carried under special terms; that agreement would not take away any liability that might be incurred as to criminal proceedings, but it regulates the right of the plaintiff to recover damages. The plea states that it was agreed that the plaintiff, being a drover travelling with cattle, should travel at his own risk; that is, he takes his chance, and, as far as having a right to recover damages, he shall not bring an action against the company for anything that may happen in the course of the carriage. It would, of course, be quite a different thing were an action brought for an independent wrong, such as an assault or false imprisonment. Negligence in almost all instances would be the act of the company's servants, and 'at his own risk' would of course exclude that, and gross negligence would be within the terms of the agreement; as to wilful, I am at a loss to say what that means; but any negligence for which the company would be liable (confined, as I have said, to the journey—and it is so confined by the declaration) is excluded by the agreement." [1]

Judgment of Blackburn, J.

In *Gallin* v. *L. & N. W. Ry. Co.*,[2] the principle of this decision was held applicable to negligence incidental to the actual conveyance, and arising from defect in arrangements made for the purpose of conducing to its effective fulfilment. There a drover, carried on terms identical with those in *M'Cawley's case*, got out of the van in which he was being carried on a stoppage occurring, and, in walking from the spot where the train stopped along the railway to the passenger station, fell over a bridge into a river and was injured. He was held not entitled to recover, since the terms on which he was travelling "at his own risk" covered not only the direct, but the incidental perils of the transit. Mellor, J., was of opinion that the words "travel at his own risk include, as in *Hodgman* v. *West Midland Ry. Co.*,[3] all the incidents connected with the journey." "All those risks which result or arise during the transit, and until the transit is actually at an end, are intended to be guarded against, and are actually guarded against, by those words." [4]

Gallin v. *L. & N. W. Ry. Co.*

train with a condition that the company should be freed from responsibility, and who was injured through the carriage in which he was carried stopping short of the platform, see *Johnson* v. *Great Southern and Western Ry. Co.*, Ir. R. 9 C. L. 108; *Peterson* v. *Seattle Traction Co.*, [1901] 23 Wash. 615, holds such a contract between a car company and their labourers to be good.

[1] *The Stella*, [1900] P. 161. As to what is necessary in order to except misconduct or default of the carrier's own servants, see per Bowen, L.J., *Steinman & Co.* v. *Angier Line*, [1891] 1 Q. B. 623; *Price* v. *Union Lighterage Co.*, [1904] 1 K. B. 412; followed in *James Nelson & Sons* v. *Nelson Line* (No. 2), [1907] 1 K. B. 769; *The Pearlmoor*, [1904] P. 280.

[2] L. R. 10 Q. B. 212.

[3] 5 B. & S. 173, in Ex. Ch. 6 B. & S. 560, the case of a horse injured before fully received by the carrier.

[4] On the authority of these cases the Victorian case of *M'Donald* v. *Victorian Railways Commissioners*, 13 V. L. R. 399, was decided. *Knox* v. *G. N. Ry. Co.*, [1898] 2 I. R. 632.

Opinion of Bramwell, B.

Even assuming that the plaintiff in this case was in the position of an ordinary paying passenger, it is not at all clear that his position would have been improved. For, as is said by Bramwell, B., in *Siner* v. *G. W. Ry. Co.*:[1] "Suppose it [the train] had stopped just against the parapet of a bridge . . . can there be any doubt that it would have been the duty of the passengers to stay in, and that they would have got out at their peril?"

Duties of passengers irrespective of class.

A point has been made that the duty of a company to their passengers may vary in proportion to the amount of care they pay for; like goods carried under special contracts where the obligation of the company may materially differ as the charge made is usual or reduced.

Indianapolis, &c. Rd. Co. v. *Horst.*

But it has been decided adversely to the company. "Life and limb are as valuable," it was said in one case,[2] "and there is the same right to safety in the caboose as in the palace car. . . . The same considerations apply to freight trains; the same dangers are common to both." The test to be applied is thus stated in the same case. "The standard of duty should be according to the consequences that may ensue from carelessness. The rule of law has its foundation deep in public policy." "The highest degree of carefulness and diligence is expressly exacted."[3]

G. W. Ry. Co. v. *Blake.*

Bristol and Exeter Ry. Co. v. *Collins*[4] decided, as we have already seen, that the terms of a contract for the carriage of goods made with one company at the outset of the journey *primâ facie* held good for the whole journey. In *G. W. Ry. Co.* v. *Blake*,[5] in the Exchequer Chamber, the contracting party were held liable to the passenger for injury arising as well on their own line as during the passage over another line. The injury arose from the condition of a part of the line over which the appellants had no direct control, since it was part of an auxiliary line, and under the management of an auxiliary company.

Remarks of Cockburn, C.J.

A point having been made of this gave occasion to Cockburn, C.J., to lay stress on the distinction between railway companies and stage-coach proprietors. "This," said he,[6] "is not like the case of a stage-coach proprietor, because the road is not in his hands, and he has no means of securing its proper condition. When the contract is entered into the road would be in a certain condition without anything being required to be done on the part of the coach proprietor to keep it in a safe condition. Railway companies ought at least to use due and reasonable care to keep the line over which they contract to carry passengers in a safe condition. There is no doubt that is the obligation which attaches to a railway company who undertake to convey passen-

[1] L. R. 3 Ex. 154; in Ex. Ch. L. R. 4 Ex. 117. Cp. *Praeger* v. *Bristol and Exeter Ry. Co.*, 24 L. T. (N. S.) 105, distinguishing *Siner's case* on two grounds—first, there was a clear invitation; secondly, the danger was not apparent; *Cockle* v. *L. & S. E. Ry. Co.*, L. R. 7 C. P. 321.

[2] *Indianapolis, &c. Rd. Co.* v. *Horst*, 93 U. S. (3 Otto) 296. In *Hamilton* v. *Caledonian Ry. Co.*, 19 Dunlop, 459, Inglis, Dean of the Faculty, in arguing, says: "By its regulations the Company refused to carry a drunken person, but suppose he was smuggled into the train, would the Company be responsible for his safety?" His answer to his own question is: "He was truly in the position of a person getting up behind a carriage and getting his leg broken by an accident." To this Lord President M'Neill says: "Does your principle of law apply to a person having a third class ticket going into a first class carriage? Inglis, D.F., I am unable to answer that. There may be a difficulty about that."

[3] *Railroad Co.* v. *Lockwood*, 17 Wall. (U. S.) 358. The English rule is the same: see per Bramwell, L.J., *Phillips* v. *L. & S. W. Ry. Co.*, 5 C. P. D. 288.

[4] 7 H. L. C. 194. *Ante*, 931.

[5] 7 H. & N. 987.

[6] *L.c.* 992.

gers through the whole distance on their line; and if, by arrangement with another company, they convey passengers over the whole or part of another line, the same obligation attaches, and they make the other company their agent, and on their part they undertake that the other company shall keep their line in a proper condition."

Converse case in *Hall* v. *N. E. Ry. Co.*

The converse case occurred in *Hall* v. *N. E. Ry. Co.*,[1] and was complicated by the fact that the plaintiff was a drover in charge of sheep, and travelling "at my own risk without paying any fare." He was injured on an auxiliary line, and brought his action against the injuring company, and not against the company with whom his contract was and an action against whom would have been within *G. W. Ry. Co.* v. *Blake*.[2] The point raised in the present case was expressly reserved there; Cockburn, C.J., saying,[3] "it is unnecessary to say" whether or not such a claim could be sustained. The Queen's Bench, however, decided that the true construction of the contract was, "In consideration of my being carried the whole way free of charge I agree that I shall be travelling the whole way at my own risk";[4] consequently the auxiliary company were as much protected from the effects of their negligence as the principal and contracting company; even though "the plaintiff did not sign the ticket, and he was not asked to do so,"[5] for "he travelled without paying any fare, and he must be taken to be in the same position as if he had signed it."

Point expressly reserved by Cockburn, C.J., in *G. W. Ry. Co.* v. *Blake*.

Buxton v. *N. E. Ry. Co.*

Thomas v. *Rhymney Ry. Co.*

G. W. Ry. Co. v. *Blake*[6] was followed without discussion in *Buxton* v. *N. E. Ry. Co.*[7] In *Thomas* v. *Rhymney Ry. Co.*,[8] however, a distinction was sought to be established on the ground that in the earlier case the companies had an agreement for the sharing of profits, and so became the agents the one of the other; while in the present case, where the defendant company merely had running powers over the line of another company, by whose negligence, and without negligence on the part of the defendants, the accident happened, the relation was only that of different stage-coach proprietors at common law. The Exchequer Chamber held[9] that "where a railway company issues a ticket for a journey in the course of which the train which conveys the passenger has to pass along a portion of a line of railway belonging to another company (whether it be under running powers, or whether it be under any particular contract for a participation in profits or otherwise), the contract between the railway company and the traveller to whom such ticket is issued is, upon every principle of law, a contract not only that they will not themselves be guilty of any negligence, but that the passenger shall be carried with due and reasonable care along the whole line from one end of the journey to the other."

Daniel v. *Metropolitan Ry. Co.*

In the House of Lords, in *Daniel* v. *Metropolitan Ry. Co.*[10] Lord Hatherley, C., alluding to the duty of a railway company conveying passengers over a line of part of which the company is not owner, said: "They [the company] would be obliged to see that their own line of

[1] L. R. 10 Q. B. 437. [2] 7 H. & N. 987. [3] *L.c.* 993.
[4] L. R. 10 Q. B., per Blackburn, J., 442.
[5] *L.c.* 441. [6] 7 H. & N. 987. [7] L. R. 3 Q. B. 549.
[8] L. R. 5 Q. B. 226; in Ex. Ch. L. R. 6 Q. B. 266.
[9] Per Kelly, C.B., L. R. 6 Q. B. 273.
[10] L. R. 5 H. L. 55, referring to *Birkett* v. *Whitehaven Junction Ry. Co.*, 4 H. & N. 730, where switches on the line over which the defendants had running powers got out of order and there was neglect of precautions by the defendants.

road was in perfect order, and they would be responsible for any negligence which occurred on the other line of road, whether under their control or not, if they have contracted to carry passengers over that particular piece of road; but they would not be answerable, as I apprehend, for any mischief occasioned by any matter extraneous altogether to the work in which they were engaged, and as to which they had no reasonable ground for supposing that ordinary and proper care had not been taken by those persons whose duty it was to take such care."

Wright v. *Midland Ry. Co.*

An illustration of this exception arising from collateral negligence, and not from anything incident to the carriage, occurs in *Wright* v. *Midland Ry. Co.*[1] At the junction of the Midland Company's line with the North-Western's was a signal-box in charge of a servant of the defendants, who set the signal in favour of the defendants' train so that it could proceed along a portion of the line over which both companies had running powers. While on this line, it was run into by a train of the North-Western's, which was driven by persons who negligently disregarded the signal. The plaintiff was injured, brought his action, and was held, by the Court of Exchequer, not entitled to recover; since the accident did not arise from any negligent act which made the road unsafe, nor the carriage or engine unsafe, or the signals wrong, but from something done outside the carrying, and which was really an independent trespass. The case, in fact, was like that which was repeatedly alluded to, in *Daniel* v. *Metropolitan Ry. Co.*,[2] during its progress through the various courts, where a waggon heavily laden with goods, "piled up to that enormous height to which we often see waggons piled up in this metropolis,"[3] is so improperly packed that a bale of goods falls off upon a stage-coach, and kills or injures a passenger. In reference to that case, the Lord Chancellor (Hatherley) said:[4] "I apprehend that all that is to be done by those who carry passengers for hire is that they are bound to see that everything under their own control is in full and complete and proper order. They are bound to see, also, if there be a certain and definite risk as to which they have any knowledge or can reasonably be supposed to have any knowledge, that it is sufficiently guarded against." In *Wright's case* they had done all this, and the accident was due to a pure tort of some one over whom they had no control; just as if a ditch had been dug across the line by a wrongdoer.

Case put in *Daniel* v. *Metropolitan Ry. Co.*

Considered by the Lord Chancellor (Hatherley).

The cases discussed.

Limitation on liability expressed by Kelly, C.B., in *Thomas* v. *Rhymney Ry. Co.*

Indeed, this is a case expressly excepted by Kelly, C.B., in his judgment in *Thomas* v. *Rhymney Ry. Co.*, where he says:[5] "We must not be considered as holding that, where the mischief complained of has arisen from the act of a stranger, such as would arise from any mischievous person leaving a log of wood across the railway, or any other act which might endanger a railway train passing along, an action would be maintainable against the railway company, because in that case there would not be any direct or indirect breach of duty or breach of contract on their part."

Test of liability.

Breach of duty or breach of contract, then, is the test that is to be applied; and it is not the duty of a railway company to take precautions against possible negligence on the part of persons who are not in their

1 L. R. 8 Ex. 137.
2 L. R. 5 H. L. 45.
3 *I.c.* per Lord Hatherley, C., 54.
4 *I.c.* 55.
5 L. R. 6 Q. B. 274. As to the American law, see *Flaherty* v. *Minneapolis, &c. Ry. Co.*, 12 Am. St. R. 654; also *Railroad Co.* v. *Barron*, 5 Wall. (U. S.) 90, and the cases there referred to.

employment nor under their control in the discharge of duties which, if rightly performed, will not affect them.[1]

In the cases we have been considering no question was raised that the person travelling with a "free pass" was unaware of the terms under which he is conveyed. The question remains to be considered of how far a passenger is bound by conditions not actually communicated to him, or the effect of which he has not troubled himself to master. Most of the decisions turn on the terms on which luggage is received or dealt with; but the principle on which conditions attached to a ticket are held valid may not inconveniently be here dealt with.

Question of how far a person travelling on a line of railway is to be held bound by conditions not actually communicated to him.

The earliest case to be noticed is *Van Toll* v. *S. E. Ry. Co.*[2] A bag was deposited at a cloak-room, and a ticket given in exchange, containing the conditions of the deposit. The ticket was produced when the depositor went to demand the bag; but the bag had previously been delivered to another person. In the Court of Common Pleas, on motion, the judgment was for the defendants, because, the facts were "that the plaintiff knew that the deposit was to be made according to some terms imposed by the defendants, because she conformed to some of them, not upon inquiries then made, but as having previous knowledge: that the defendants had used all reasonable means to make known to the depositors, and among them to the plaintiff, the terms on which they received deposits; and that the plaintiff knew there were special terms, and either knew what they were, or, with the means of knowing what they were, chose to make the deposit without ascertaining them—either assenting to them on the assumption that they were reasonable, or being willing to be bound by them whatever they might be."[3] It followed "that the plaintiff does not prove that the deposit was made on the terms of absolute liability stated in the declaration."

Van Toll v. *S. E. Ry. Co.*

The next case, *Stewart* v. *L. & N. W. Ry. Co.*,[4] was decided on the broad ground that "a person must be presumed to know what he has the means of knowing."[5] Luggage was not carried by an excursion train, tickets for which were issued at one-fourth the ordinary fare, and on which was printed, "Ticket as per bill," and on the back, "This ticket is issued subject to the conditions contained in the company's time and excursion bills";[6] one of which conditions was luggage under 60 lb. free at passenger's own risk.

Stewart v. *L. & N. W. Ry. Co.*

Lewis v. *M'Kee*[7] raised a question of discharge of liability by reason of an indorsement on a bill of lading made by the party to be charged, and unseen and unassented to by the other party, and is unimportant to the present point, save for a dilemma propounded by Willes, J., in giving judgment:[8] "If one person seeks to impose on another a liability by contract, but chooses to abstain from reading the terms of the document in which the liability is sought to be expressed, he is in this dilemma. Either he has chosen to accept the terms without taking the trouble of informing himself what they are; or if not reading, he did not assent to the terms proposed, then no action

Lewis v. *M'Kee*.

Dilemma propounded by Willes, J.

[1] *Daniel* v. *Metropolitan Ry. Co.*, L. R. 3 H. L. 45.

[2] (1862) 12 C. B. N. S. 75; cp. *Stallard* v. *G. W. Ry. Co.*, 2 B. & S. 419. In *Pepper* v. *S. E. Ry. Co.*, (1868) 17 L. T. 469, a condition was held to cover delay in returning an article as well as loss of it. A condition that a Company will not be "responsible" includes damage done to the thing deposited: *Pratt* v. *S. E. Ry. Co.*, [1897] 1 Q. B. 718.

[3] *L.c.*, per Erle, C.J., 83.

[4] (1864) 3 H. & C. 135.

[5] *L.c.*, per Pollock, C.B., 138.

[6] *L.c.* 136.

[7] L. R. 4 Ex. 58.

[8] *L.c.* 61.

Considered.

lies, because one side has intended one thing, and the other a different thing, and the transaction is vitiated by mutual error." [1] This dilemma, however, is only effectual in those cases where there is no duty independent of the contract; for where there is a duty, failing the communication of the terms of the contract, the obligation implied by law must be observed. The dilemma also assumes, on the hypothesis of an acceptance of terms without an ascertaining of their purport, that any communication to the person to be bound is sufficient to bind him if he fails to show circumstances of exoneration. Now, it is precisely on this point that the subsequent controversy turns.

Zunz v. *S. E. Ry. Co.*

Zunz v. *S. E. Ry. Co.*[2] contains a distinct enunciation of this proposition. Plaintiff took a passenger ticket from the defendant company, from London to Paris, on which was printed: [3] "The South-Eastern Railway Company is not responsible for loss or detention of, or injury to, luggage of the passenger travelling by this through ticket, except while the passenger is travelling by the South-Eastern Railway Company's trains or boats." Plaintiff's luggage was lost on a French railway. In the Queen's Bench, Cockburn, C.J.,[4] said: "We are bound on the authorities to hold that when a man takes a ticket with conditions on it, he must be presumed to know the contents of it and must be bound by them."

Cockburn, C.J., considered that the passenger is presumed to know the conditions on the ticket.

Henderson v. *Stevenson.*

The subsequent case of *Henderson* v. *Stevenson* [5] considerably qualifies this as a universal proposition, and, though a Scotch case, is, as pointed out by Blackburn, J., in *Harris* v. *G. W. Ry. Co.*,[6] not only an authority, but a decision "on a subject in respect of which the law of Scotland and the law of England are one and the same." A ticket having on its face only the words "Dublin and Whitehaven" was given to a passenger, who, without looking at it, paid for it, and went on board the vessel on which he had taken his passage. Having lost his luggage, he brought an action against the company, who referred to a condition on the back of the ticket by which they intimated they would not undertake liability in a case like the plaintiff's.

Opinion of Lord Cairns, C.

The opinion of Lord Cairns, C., lays great stress on the circumstances, first, that in point of fact the plaintiff did not read the ticket, and did not know what was written on the back; and, secondly, that there was nothing on the face of the ticket referring to the back. "Can it be held," he said,[7] "that when a person is entering into a contract containing terms which *de facto* he does not know, and as to which he has received no notice, that he ought to inform himself upon them? My Lords, it appears to me to be impossible that that can be held." This ground of decision seems absolutely irreconcilable with the *dictum* of Cockburn, C.J., in *Zunz* v. *S. E. Ry. Co.*[8] There the fact that a man takes a ticket with conditions on it was held to raise a presumption that he knows the contents, and therefore must be bound by them. In *Henderson* v. *Stevenson* the Lord Chancellor [9] is of opinion that "it would be extremely dangerous, not merely with regard to contracts of

[1] That is, with reference to the special terms; for some liability—*e.g.*, that of an involuntary bailee—there must be.

[2] L. R. 4 Q. B. 539. [3] *L.c.* 541. [4] *L.c.* 544.

[5] (1875) L. R. 2 H. L. (Sc.) 470; cp. *G. W. Ry. Co.* v. *Goodman*, 12 C. B. 313.

[6] 1 Q. B. D. 515, 523. [7] L. R. 2 H. L. (Sc.) 476.

[8] L. R. 4 Q. B. 539.

[9] L. R. 2 H. L. (Sc.) 475. *Johnson* v. *Great Southern and Western Ry. Co.*, Ir. R. 9 C. L. 108, was decided the year before *Henderson* v. *Stevenson*, with which it seems identical as to its facts, though inconsistent in its conclusion.

this description, but with regard to all contracts, if it were to be held that a document complete upon the face of it can be exhibited as between two contracting parties, and, without any knowledge of anything beside, from the mere circumstance that upon the back of that document there is something else printed, which has not actually been brought to and has not come to the notice of one of the contracting parties, that contracting party is to be held to have assented to that which he has not seen, of which he knows nothing, and which is not in any way ostensibly connected with that which is printed or written upon the face of the contract presented to him."

Some of the other Law Lords go much further than this; thus, Lord Chelmsford said:[1] "I think that such an exclusion of liability for negligence cannot be established without very clear evidence of the notice having been brought to the knowledge of the passenger and of his having expressly assented to it. The mere delivery of a ticket with the conditions indorsed upon it is very far, in my opinion, from conclusively binding the passenger." And Lord Hatherley:[2] "I agree with the observation that was made by my noble and learned friend,[3] that the money having been paid, and the ticket having been taken up, a contract was completed upon the ordinary terms of conveyance for himself and his luggage, unless it can be made out that he entered into a special contract to the contrary. A ticket is in reality nothing more than a receipt for the money which has been paid."[4]

Lord Chelmsford's view even more thoroughgoing.

Also Lord Hatherley's.

These observations, Blackburn, J., points out in *Harris* v. *G. W. Ry. Co.*,[5] "are expressions used by the different Lords which seem to express opinions, which were not, I think, part of the decision of the case then before them, and which are not, in my opinion, correct when applied to the case we have before us of a ticket given on the deposit of goods with a company, who do not hold themselves forth as general receivers of goods to be kept for hire, but let it be known that though they do not, and will not, as a general rule, receive or keep such goods, they will take them if the passenger brings them to a particular office, and there receives a ticket on the production of which the goods will be given up to the person producing it." In that case the rule applicable is—"If the bailor and bailee agree that the goods shall be deposited on other terms than those implied by law, the duty of the bailee, and consequently his responsibility, is determined by the terms on which both parties have agreed. And it is clear law that where there is a writing, into which the terms of any agreement are reduced, the terms are to be regulated by that writing. And though one of the parties may not have read the writing, yet, in general, he is bound to the other by those terms."[6]

Consideration by Blackburn, J., of the effect of the foregoing opinions.

Rule stated by Blackburn, J., in *Harris* v. *G. W. Ry. Co*

[1] *L.c.* 477. [2] *L.c.* 478. [3] Lord Chelmsford.

[4] "This certainly is no part of the decision of the House, and, indeed, seems to be contrary to the view taken by the Lord Chancellor": per Blackburn, J., *Harris* v. *G. W. Ry. Co.*, 1 Q. B. D. 532. In *Lewis* v. *New York Sleeping Car Co.*, 143 Mass. 267, a railway ticket is described "as only a symbol of the contract." By The Regulation of Railways Act, 1889 (52 & 53 Vict. c. 57), s. 5: (1) any passenger is to deliver up his ticket or pay his fare at the request of any officer or servant of the company, or to give his name and address; (2) if a passenger fails to deliver up his ticket or pay his fare and refuses his name and address any officer or servant of the company may detain him. See *Mulkern* v. *Metropolitan Ry. Co.*, 8 Times L. R. 252; *Brotherton* v. *Metropolitan and District Joint Committee*, 9 Times L. R. 645 (C. A.).

[5] (1876) 1 Q. B. D. 515, 529.

[6] 1 Q. B. D. 530. Cp. *Skipwith* v. *G. W. Ry. Co.*, 4 Times L. R. 589, the case of loss of a bag from the cloak-room of a railway station, where the Court said: "The

Approved in the Court of Appeal by Mellish, L.J.

In giving judgment in *Parker* v. *S. E. Ry. Co.*,[1] Mellish, L.J.,[2] approved the rule in *Harris* v. *G. W. Ry. Co.*; because the plaintiff there admitted that he believed there were some conditions on the ticket; and distinguished the case from *Henderson* v. *Stevenson*,[3] which he held to be a "conclusive authority" that where a person does not know that there is writing on the back of a ticket he is not bound by what is contained in the writing.

View of Mellish, L.J.

In *Parker* v. *S. E. Ry. Co.*[4] and in *Gabell* v. *S. E. Ry. Co.*, where joint judgments were given, the plaintiffs admitted that they knew there was writing on the back of the tickets they respectively received, though they swore that they did not read it, and, further, that they did not know or believe that they contained conditions. In these circumstances, Mellish, L.J., overruling the Common Pleas Division [5] (where the case was decided a month previously to the argument of *Harris* v. *G. W. Ry. Co.* in the Queen's Bench Division [6]), said:[7] "I am of opinion that we cannot lay down, as a matter of law, either that the plaintiff was bound or that he was not bound by the conditions printed on the ticket, from the mere fact that he knew there was writing on the ticket, but did not know that the writing contained conditions. I think there may be cases in which a paper containing writing is delivered by one party to another in the course of a business transaction where it would be quite reasonable that the party receiving it should assume that the writing contained in it no condition, and should put it in his pocket unread." The learned judge then gives the instance of a person receiving a toll-ticket, when driving through a turnpike-gate, as one where the receiver might reasonably put it in his pocket unread: and that of bill of lading as one where the receiver would be bound, whether he read it or not.

As to the effect of a railway ticket containing conditions.

He then discusses the case of a railway ticket where the holder could see there was writing on it.[8] "The railway company must, however, take mankind as they find them, and, if what they do is sufficient to inform people in general that the ticket contains conditions, I think that a particular plaintiff ought not to be in a better position than other persons on account of his exceptional ignorance or stupidity or carelessness. But if what the railway company do is not sufficient to convey to the minds of people in general that the ticket contains conditions, then they have received goods on deposit without obtaining the consent of the persons depositing them to the conditions limiting their liability.

Proper direction for the jury.

I am of opinion, therefore, that the proper direction to leave to the jury in these cases is, that if the person receiving the ticket did not see or know that there was any writing on the ticket, he is not bound by the conditions; that if he knew there was writing, and knew or believed that the writing contained conditions, then he is bound by the conditions; that if he knew there was writing on the ticket, but did not know or believe that the writing contained conditions, nevertheless he would be bound if the delivering of the ticket to him in such a manner that he could see there was writing upon it was, in the opinion of the jury, reasonable notice that the writing contained conditions." [9]

company were not obliged to take charge of parcels in a cloak-room; they could therefore make what conditions they chose."

[1] 2 C. P. D. 416. [2] *L.c.* 421. [3] L. R. 2 H. L. (Sc.) 470.
[4] 2 C. P. D. 416. *Bate* v. *Canadian Pacific Ry.*, 15 Ont. App. 388.
[5] 1 C. P. D. 618. [6] 1 Q. B. D. 515. [7] 2 C. P. D. 422. [8] *L.c.* 423.
[9] 2 C. P. D. 423. In *Richardson* v. *Rowntree*, [1894] A. C. 217, the House of Lords expressed entire agreement with Mellish, L.J.'s, view. *Post*, 967.

This question of reasonable notice Bramwell, L.J., considered rather a matter of law than of fact,[1] and hence concluded that judgment should be entered for the defendants. To the objection that the conditions imposed on a person might be unreasonable, his answer was :[2] "I think there is an implied understanding that there is no condition unreasonable to the knowledge of the party tendering the document, and not insisting on its being read—no condition not relevant to the matter in hand."

Bramwell, L.J.'s, opinion that reasonable notice not a matter of fact but of law.

The Common Pleas Division had the subject before them again in *Burke* v. *S. E. Ry. Co.*[3] Plaintiff took a ticket from London to Paris from the defendants. On the outside of the cover was "Cheap return ticket, London to Paris and back. Second class," and other matter, but no reference to the inside of the cover, where there was a condition limiting the responsibility of the defendants to their own trains. The plaintiff was injured while travelling in France. He sued the defendants, and said he had not read the condition, and did not know of it. Cockburn, C.J., directed the jury that if the condition was brought to the plaintiff's notice it was a defence; and asked them the question suggested in *Parker* v. *S. E. Ry. Co.*,[4] whether what was done by the company was reasonably sufficient to bring the condition to the notice of the plaintiff. The jury found it not sufficient and gave £250 damages. Cockburn, C.J., left the plaintiff to move the Court for judgment, and, on motion, the Common Pleas Division entered judgment for the defendants without calling on their counsel to argue; holding the whole book to be the contract, and the only contract made with the plaintiff; and distinguishing *Henderson* v. *Stevenson*,[5] on the ground that on the face of the card in that case there was printed "Dublin to Whitehaven," and nothing else, and on the back a condition. There the House of Lords split the ticket in two, and said there was room to find that the contract was what appeared on the face of the card; but in this case no such separation was possible.

Burke v. *S. E. Ry. Co.*

Henderson v. *Stevenson* distinguished.

Stephen, J., in *Watkins* v. *Rymill*,[6] throws doubt on this judgment, as he says it "can hardly be supported by any principle short of that laid down in *Zunz* v. *S. E. Ry. Co.*,[7] if, indeed, it does not go further." The suggestion is that the principle involved in *Zunz's case* has been disputed. This is not so. That decision lays down that the Railway and Canal Traffic Act, 1854, only extends to the traffic on a company's own lines; so that it does not apply to a contract exempting from liability for loss on a railway not belonging to, or worked by, the company. The point of notice was never directly raised in the case, and consequently never directly decided. True, Cockburn, C.J., said "that when a man takes a ticket with conditions on it, he must be presumed to know the contents of it";[8] that was said with reference to a contract where there was no duty at law, and when, without proof of the actual contract, there could be no claim against the company. True, also, that the *dictum* has not been accepted as a complete statement of the law in all cases; but those in which it has not been accepted, are cases where either the plaintiff could rely upon a duty apart from the contract or upon special circumstances which rebut the inference drawn from the constitution of the contract; for example, as is pointed out by Stephen, J., in *Henderson* v. *Stevenson*,[9] because the

Stephen, J.'s, doubt in *Watkins* v. *Rymill*.

The cases discussed.

[1] 2 C. P. D. 430. [2] *L.c.* 428. [3] 5 C. P. D. 1.
[4] 2 C. P. D. 416. [5] L. R. 2 H. L. (Sc.) 470. [6] 10 Q. B. D. 187.
[7] L. R. 4 Q. B. 539. [8] *L.c.* 514. [9] L. R. 2 H. L. (Sc.) 470.

document is misleading, and actually misleads. Broadly put, the statement is correct that, where a person sues on a contract, with no other and alternative claim, the terms of the contract must he shown, and that the apparent terms are presumahly the terms hy which hoth parties are hound. The imperfection in the *dictum* of Cockburn, C.J., is that it does not express limitations which circumstances, not arising in the case with which he was dealing, might in some cases make material to be considered.

Effect of the decision in *Burke* v. *S. E. Ry. Co.*

The decision in *Burke* v. *S. E. Ry. Co.*[1] is no more than the decision in *Zunz's case* as to luggage applied to passengers.[2] Apart from special contract there was no duty; and the claim of the plaintiff was to sever the contract, insisting on what made for him, and repudiating what was against him. The Court held that the whole ticket was the contract; and, in effect, that, the construction of it heing for the Court, the plaintiff had no cause of action.

Effect of the decision in *Parker* v. *S. E. Ry. Co.*

Parker v. *S. E. Ry. Co.*[3] may he cited as an authority that where there is writing on a ticket, and the recipient does not know or helieve that the writing contains conditions, the question must he suhmitted to the jury, whether the recipient had notice that the writing contains conditions. The case of the plaintiff is not stated high enough to hring him within this ruling, since his assertion of ignorance was limited to this condition. For instance, he must have heen aware of the previous condition, "This ticket is availahle for fourteen days, including the day of issue and expiry," and most prohahly of the condition, "The cover without the coupons, or the coupons without the cover, are of no value." If so, he came within that hranch of the rule laid down hy Mellish, L.J.,[4] "that if he knew there was writing, and knew or believed that the writing contained conditions, then he is hound hy the conditions," and there was no case for the jury. In *Parker* v. *S. E. Ry. Co.*, Mellish, L.J.'s, words must he taken to refer to the passenger heing affected with notice of any writing containing conditions, and not to his knowledge of the particular writing; otherwise the rule of law that requires the construction of the whole of a document would he seriously infringed on.

Watkins v. *Rymill.*

The next case is *Watkins* v. *Rymill*[5]—a decision on the presumption of assent to conditions upon which a waggonette was received hy the defendant, the keeper of a repository for the sale on commission of horses and carriages. Stephen, J., elahorately examines the earlier cases, and enunciates the general principle:[6] "A great number of contracts are, in the present state of society, made hy the delivery hy one of the contracting parties to the other of a document in a common form, stating the terms hy which the person delivering it will enter into the proposed contract. Such a form constitutes the offer of the party who tenders it. If the form is accepted without ohjection hy the person to whom it is tendered, this person is, as a general rule, hound hy its contents, and his act amounts to an acceptance of the offer made to him, whether he reads the document or otherwise informs

General rule formulated by Stephen, J.

1 5 C. P. D. 1.

2 "An undertaking to transport and deliver beyond the terminus of the carrier's lines is not within the common law liability of a common carrier": per Bowie, J. *Baltimore Rd. Co.* v. *Green*, 25 Md. 89.

3 2 C. P. D. 416. *Hooper* v. *Furness Ry. Co.* 23 Times L. R. 451. 4 *L.c.* 423.

5 10 Q. B. D. 178. Cp. *Bonham* v. *Herriott*, 7 Times L. R. 104; *Bate* v. *Canadian Pacific Ry. Co.*, 15 Ont. App. 388.

6 *L.c.* 188.

himself of its contents or not." To this general rule Stephen, J., finds four exceptions:

Four exceptions:

(1) Where the nature of the transaction is such that the person accepting the document does so on the presumption (not unreasonable) that the document is a mere acknowledgment of an agreement not intended to be varied by special terms.[1]

(1) Reasonable ignorance.

(2) Where there is fraud.

(2) Fraud.

(3) Where the document is misleading, and actually misleads.[2]

(3) Mistake.

(4) Where the conditions are unreasonable in themselves.[3]

(4) Want of equity.

The law as to conditions on passengers' tickets came again before the House of Lords in *Richardson* v. *Rowntree*.[4] The respondent obtained from the appellants a ticket for a voyage on their steamer. Upon the ticket were the words: "It is mutually agreed for the consideration aforesaid, that this ticket is issued and accepted upon the following conditions." One of the conditions was: "The Company is not under any circumstances liable to an amount exceeding 100 dollars for loss of or injury to the passenger or his luggage." The respondent having brought an action to recover damages exceeding 100 dollars, the condition was set up as disentitling her to recover. At the trial three questions were left to the jury:

(i) Did the plaintiff know that there was writing or printing on the ticket?

(ii) Did she know that the writing or printing on the ticket contained conditions relating to the terms of the contract of carriage?

(iii) Did the defendants do what was reasonably sufficient to give the plaintiff notice of the conditions? To the first question the jury answered "Yes"; to the second and third they answered "No." In the House of Lords it was pointed out that these were the questions suggested in *Parker* v. *S. E. Ry. Co.* as proper to be left to the jury, and it was held, affirming the Court of Appeal, that the leaving them to the jury was correct; and further, that when no other facts are proved than payment of money for a ticket and receipt of a ticket folded up so that no writing was visible unless it was opened and read, defendants are not entitled as matter of law to say the plaintiff is bound by the conditions on the ticket.

Since the purpose of conditions is to limit the liability to which the company would otherwise be subject at common law, and as the conditions are expressed in the language of the company, in so far as there is any ambiguity, they are to be construed against the company proposing them.[5] Thus, a statement, forming part of a condition, that "Every attention will be paid to insure punctuality as far as practicable"

Conditions *primâ facie* to be construed against the company propounding them.

[1] *Parker* v. *S. E. Ry. Co.*, 2 C. P. D. 416. See the remarks of Lush, J., in *Crooks* v. *Allan*, 5 Q. B. D. 40, as to a clause "printed in type so minute, though clear, as not only not to attract attention to any of the details, but to be only readable by persons of good eyesight."

[2] *Henderson* v. *Stevenson*, L. R. 2 H. L. (Sc.) 470.

[3] *Parker* v. *S. E. Ry. Co.*, 2 C. P. D., per Bramwell, L.J., 428.

[4] [1894] A. C. 217. *The Stella*, [1900] P. 161, 168; *G. N. Ry. Co.* v. *Palmer*, [1895] 1 Q. B. 862. A somewhat indulgent finding of fact is the ground of the decision in *Stephen* v. *The International Sleeping Car Co.*, 19 Times L. R. 621, and possibly a lack of due prominence to Blackburn, J.'s, *dictum* in *Harris* v. *G. W. Ry. Co.*, 1 Q. B. D. 530: "It is clear law that where there is a writing, into which the terms of any agreement are reduced, the terms are to be regulated by that writing. And though one of the parties may not have read the writing, yet, in general, he is bound to the other by those terms": he is not in a better position where he is careless than where he is careful.

[5] *Taubman* v. *Pacific Steam Navigation Co.*, 26 L. T. (N. S.) 704, does not seem to conform to this rule.

is not merely a "vague assurance," but a part of the contract of carriage; and when there is "wilful delay or reckless loitering" the company must be held not to have performed the contract entered into with reference to the condition to ensure punctuality.[1] If there is a clear refusal to guarantee the punctuality of their trains, such a condition as part of the contract would be valid,[2] and the company are protected from everything except wilful misconduct of their servants.[3] But if the condition is for the benefit of the company, they may be held to have waived it by their conduct; as in *Jennings* v. *G. N. Ry. Co.*,[4] where a master took tickets for himself and three servants, keeping the tickets in his own care, and telling the guard he had the servants' tickets, when the servants were

Jennings v. *G. N. Ry. Co.*

[1] *Le Blanche* v. *L. & N. W. Ry. Co.*, 1 C. P. D. 286: the plaintiff, having lost his train, had taken a special train to carry him to his destination, the question whether he was entitled to charge the defendant company for it by way of damages was considered. The Common Pleas decided in accordance with the *dictum* of Alderson, B., in *Hamlin* v. *G. N. Ry. Co.*, 26 L. J. Ex. 22: "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." (The *dictum* does not appear in the report in 1 H. & N. 408.) This decision was reversed in the Court of Appeal, 1 C. P. D. 393, Mellish, L.J., agreeing, that as a general rule the *dictum* of Alderson, B., was correct, but that "the question must always be whether what was done was a reasonable thing to do having regard to all the circumstances," and suggesting the rule for the determination of what is reasonable to be "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 company." In *Lockyer* v. *International Sleeping Car Co.*, 61 L. J. Q. B. 501, a statement in the official guide of a sleeping-car company, which had sleeping-cars on certain trains running from Paris, that such trains corresponded with some leaving London at specified times, was held not to be a warranty of punctuality, but a mere representation that the proper times of the arrival of the trains from London were those mentioned therein; and it was further held that the putting forward such a statement imposes no duty on the company to see that the trains did in fact arrive to time. As to reasonableness of railway company's arrangements, *Pittsburgh, &c. Ry. Co.* v. *Lyon*, 123 Pa. St. 140, 10 Am. St. R. 517, and note at 521. In *Boston and Maine Rd.* v. *Chipman*, 146 Mass. 107, 4 Am. St. R. 293, a condition that coupons from a book of tickets will not be accepted unless detached by, or in the presence of, the conductor, was held reasonable. Earlier cases on conditions are *Buckmaster* v. *G.E. Ry. Co.*, 23 L. T. (N. S.) 471; *Thompson* v. *Midland Ry. Co.*, 34 L. T. (N. S.) 34. *Mosher* v. *St. Louis, &c. Ry. Co.*, 127 U. S. (20 Davis) 390, is a case where plaintiff was removed from a train for travelling without compliance with the special conditions of an excursion ticket over several lines, but his default was due to the negligence of one of the companies, not the company removing him, over whose line the ticket purported to give him the right to travel, it was held, he could not recover against the company removing him.

[2] *McCartan* v. *N. E. Ry. Co.*, 54 L. J. Q. B. 441; *Duckworth* v. *Lancs. & Y. Ry. Co.*, 17 Times L. R. 454.

[3] *Woodgate* v. *G. W. Ry. Co.*, 51 L. T. 826; *Driver* v. *L. & N. W. Ry. Co.*, 16 Times L. R. 293.

[4] L. R. 1 Q. B. 7. As to duty to produce season tickets on demand, see *Woodard* v. *The Eastern Counties Ry. Co.*, 30 L. J. (M. C.) 190; 52 & 53 Vict. c. 57, s. 5. As to power of railway company to sue for excess fare beyond the price of tourist tickets where these are used contrary to the by-laws, *G. N. Ry. Co.* v. *Winder*, [1892] 2 Q. B. 595; *G. N. Ry. Co.* v. *Palmer*, [1895] 1 Q. B. 862; *L. & N. W. Ry. Co.* v. *Hinchcliffe*, [1903] 2 K. B. 32. An extraordinary pretension was advanced in *Harris* v. *North British Ry. Co.*, 18 Rettie, 1009, where one of the passengers in a railway carriage on the defendants' line having collected the tickets from his fellow passengers, handed them to the ticket-collector, who, finding one of the tickets to be defective, claimed to treat the passenger handing the tickets to him as if he were the holder of the defective ticket, and to remove him from the carriage. On an action by the passenger, it was held that the person who collects tickets from his fellow passengers and hands them to the railway company's officer, does not by doing so incur responsibility of any kind. A busybody is not presumably fraudulent. In *Erie Rd. Co.* v. *Winter*, 143 U. S. (36 Davis) 60, parol evidence of what took place between the passenger and the ticket-seller when a ticket was purchased, was held admissible to make up the contract of carriage; "for passengers on railroad trains are not presumed to know the rules and regulations which are made for the guidance of the conductors and other employés of railroad companies, as to the internal affairs of the company, nor are they required to know them."

allowed to enter the train without each showing his ticket. Upon these facts heing proved, the company were held to be cstopped in an action by the master for expelling the servants from the train from pleading a by-law: "No passenger sball be allowed to enter any carriage used on the railway or to travel therein upon the railway without having first paid his fare and obtained a ticket"; which ticket such passenger was to show when required, and to deliver up before leaving the company's premises.

Passenger may waivo his rights.

The passenger also on his part may waive his right to claim the performance of duties which hy the contract the company may have in the first instance taken upon themselves.[1]

Bound to carry all persons subject to certain limitations as to conduct, &c.

In so far as a carrier is a common carrier of passengers—that is, within the limits within which he holds himself out to carry for hire passengers who apply—he is bound to carry, from his accustomed place of setting out to his usual place of destination, all persons who apply, so long as be has convenient accommodation for their safe carriage, and unless there is sufficient excuse for a refusal; and sufficient excuse is, where tbere is a refusal to obey reasonahle regulations, or gross and vulgar conduct, or conduct creating disturbance, or where the character of the suggested passenger is doubtful, dissolute, or suspicious; and a *fortiori* where the character is unequivocally bad, or the ohject of the journey is to interfere with the business of the carrier.[2]

Distinction between right to refuse to carry and right to expel.

Although the carrier can properly refusc to carry an improper and dangerous person—*e.g.*, an insane or drunken man,[3] or one whose

[1] *Fitzgerald* v. *Midland Ry. Co.*, 34 L. T. (N. S.) 771. As to performance of positive conditions on a ticket, in order to entitle a season-ticket holder to a return of his deposit, *Cooper* v. *L. B. & S. C. Ry. Co.*, 4 Ex. D. 88. As to obligation of railway company where the train is full, *G. N. Ry. Co.* v. *Hancroft*, 21 L. J. Q. B. 178. *Ante*, 952.

[2] *Jencks* v. *Coleman*, 2 Sumn. (U. S. Circ. Ct.) 221, summing up by Story, J., at 226: "Suppose a person were to come on board, who was habitually drunk, and gross in his behaviour, and obscene in his language, so as to be a public annoyance; might not the proprietors refuse to allow him a passage? I think they might, upon the just presumption of what his conduct would be." *Bennett* v. *Dutton*, 10 N. H. 481; *Commonwealth* v. *Power*, 48 Mass. 596, where, according to *Hall* v. *Power*, 53 Mass. 482, the "great and leading principles" on the right of a railway company to remove or exclude persons from their trains, are laid down. *Delahanty* v. *Michigan Central Ry. Co.*, [1904] 7 Ont. L. R. 690, does not seem to have been overruled. If it be good a publican who ejects a drunken man from his premises would appear to be in a very serious position if his unwelcome guest in reeling home, or elsewhere, were to fall under the wheels of a tramcar. *M'Cormick* v. *Caledonian Ry. Co.*, 6 Fraser, 362, is more in conformity to principle. A drunken man got out of a train, was seen on the platform, not heeded, and subsequently his dead body was found on the line. "When he [the drunken man] came out of the train the contract ceased. The supposed analogy of a contract of a railway company to carry luggage is wholly erroneous. When the company contract to carry luggage they are under an obligation to see it safely delivered; but they, or the porters in their employment, are under no obligation to ensure the safety of passengers who have left the train in which they were travelling"; per Lord Justice-Clerk Macdonald, *l.c.* 365. A drunken man who is rightly put out of a train has terminated his contract. He must not be disembarked at a distance from a station, or unreasonably, or in circumstances of apparent danger having regard to his condition; but assuming these preliminaries rightly surmounted, the company does not seem to be under any duty to him to take care of him till he gets sober, or his relatives take him in charge. There may perchance be a duty to hand him over to the police. Cp. for the rights of the other passengers who are travelling with a drunken man whose presence is known to the authorities, *Adderley* v. *G. N. Ry. Co.*, [1905] 2 I. R. 378; *Lowe* v. *G. N. Ry. Co.*, 9 Times L. R. 516; see 52 & 53 Vict. c. 57, s. 5. It is a question of fact for a jury whether a passenger has "failed to produce" his ticket: *Brotherton* v. *Metropolitan and District Joint Committee*, 9 Times L. R. 645 (C. A.).

[3] See previous note. *Atchison, &c. Rd. Co.* v. *Weber*, 52 Am. R. 543, where it is laid down to be "the duty of the railroad company to remove from the train and leave an unattended passenger, who, after entering upon a journey, becomes sick and unconscious or insane until he is in a fit condition to resume his journey, or until he shall obtain the proper assistance to take care of him to the end of his journey." In

character is had—he cannot expel him after having admitted him as a passenger and received his fare, unless he misbehaves.[1]

Duty of carrier to carry passengers safely,

With these and like exceptions, it is the duty of the carrier, a duty imposed on him by the custom of the realm—in other words, by the common law—to carry passengers safely and securely, so that by his negligence or default no injury or damage may happen. A breach of this duty is a breach of the law; and for this breach an action lies founded on the common law, and does not require any contract to support it.[2]

and subject to the conditions under which the carrier conducts his business.

The contract of carriage is subject to the conditions on which the carrier carries on his business, provided only that the intending passenger has reasonable notice of them. *Mesnard* v. *Aldridge*[3] decided that the printed conditions of an auction are sufficiently made known to bidders by being pasted up in the auction-room; and the printed conditions of a line of coaches are, with equal reason, sufficiently made known to passengers by being posted up at the place where they book

the present case the passenger removed had delirium tremens. The judge at the trial charged: "Of course the carrier is not required to keep hospitals or nurses for sick or insane passengers, but when a passenger is found by the carrier to be in such a helpless condition, it is the duty of the carrier to exercise the reasonable and necessary offices of humanity towards him until some suitable provision may be made." The "reasonable and necessary offices of humanity" is rather a question-begging phrase in which to wrap up a *legal* duty. The fact of the passenger being intoxicated does not absolve the carrier from exercising what care for his safety he has available: *Giles* v. *G. W. Ry. Co.*, 36 Upp. Can. Q. B. 360.

1 *Butler* v. *Manchester, Sheffield, and Lincolnshire Ry. Co.*, 21 Q. B. D. 207; *Massiter* v. *Cooper*, 4 Esp. (N. P.) 260; *Coppin* v. *Braithwaite*, 8 Jur. 875; *Prendergast* v. *Compton*, 8 C. & P., per Tindal, C.J., 462; *Apthorpe* v. *Edinburgh Street Tramways Co.*, 10 Rettie, 344; *Highland Ry. Co.* v. *Menzies*, 5 Rettie, 887; *Pearson* v. *Duane*, 4 Wall. (U. S.) 605. In *Boylan* v. *Hot Springs Rd. Co.*, 132 U. S. (25 Davis) 146, the right to expel was affirmed where the contract on the ticket excluded the right to travel in the event of non-compliance with certain conditions; but there the contract on the ticket had been *signed* by the plaintiff. See also *Mosher* v. *St. Louis, &c. Rd. Co.*, 127 U. S. (20 Davis) 390; *Fulton* v. *Grand Trunk Ry. Co.*, 17 Upp. Can. Q. B. 428; *Grand Trunk Ry. Co.* v. *Beaver*, 22 Can. S. C. R. 498. *Apthorpe* v. *Edinburgh Street Tramways Co.*, *supra*, is a case affirming the right to expel a passenger who has taken a ticket on a condition, and has not complied with the condition. In the case in question the condition was that the ticket should be checked. *Quimby* v. *Boston, &c. Rd. Co.*, 150 Mass. 365, decides that the failure of a passenger to sign an agreement on the back of a free railway pass given expressly "provided he signs the agreement" is immaterial if he accepts and uses it.

2 *Bretherton* v. *Wood*, (Ex. Ch.) 3 B. & B. 54; *Ansell* v. *Waterhouse*, 2 Chitty (K. B.), 1. Though a person injured by a railway company or carrier may elect whether he will sue in contract or tort, this election is personal, so that an action will not lie against a railway company at suit of the master of a servant who has sustained an injury while being carried by them, for the relation arose out of a contract to which the master was not a party: *Alton* v. *Midland Ry. Co.*, 19 C. B. N. S. 213. The decision in *Alton's case* has been called in question, but without sufficient reason. In the notes to *Vicars* v. *Wilcocks*, 2 Sm. L. C. (11th ed.), 548, it is said to be "clear on general principles, and from *Hadley* v. *Baxendale* that no liability is incurred in the ordinary case of a separate and distinct collateral contract with a third person uncommunicated to the original contractor or wrongdoer, although the nonperformance of this contract may, in one sense, have resulted from the original wrongful act or breach of contract." The master's action for his servant is found Bracton, f. 155, § 2, 155 h, § 3. *Berringer* v. *G. E. Ry. Co.*, 4 C. P. D. 163, is the case of a father suing in respect of services rendered by his son. No contractual relation is involved, since by the common law a parent is entitled to the wages of his unemancipated children: 1 Bl. Comm. 453. *Alton* v. *Midland Ry. Co.* was followed in *Fairmount and Arch Street Passenger Ry. Co.* v. *Stutler*, 54 Pa. St. 375, where a multitude of cases are cited in argument. See Cooley, Torts (2nd ed.), 106 and note 1; also *Taylor* v. *Manchester, Sheffield, and Lincolnshire Ry. Co.*, [1895] 1 Q. B. 134, on the meaning of sec. 116 of the County Courts Act, 1888 (51 & 52 Vict. c. 43), a misconception of the effect of which case is set right in *Kelly* v. *Metropolitan Ry. Co.*, [1895] 1 Q. B. 944, a decision on the same section; *Meux* v. *G. E. Ry. Co.*, [1895] 2 Q. B. 387. These were not followed in the Irish C. A. case of *Meegan* v. *Belfast, &c. Ry. Co.*, [1897] 2 I. R. 572. *Post*, 993.

3 Esp. (N. P.) 271.

their names.[1] Since the passengers are bound to conform to the reasonable regulations of the carrier so far as they have reasonable notice of them, so, too, is the carrier bound by his public profession; for example, when he circulates time-tables he is bound to start at or about the time he represents. There has been some doubt about the ground on which this obligation is placed. In *Denton* v. *G. N. Ry. Co.*,[2] Lord Campbell, C.J., and Wightman, J., held that issuing a time-table by the company amounted to a contract with those who came to the station in consequence. To this Crompton, J., did not assent;[3] he inclined to think that the company, by holding out the time-table as theirs, and by not carrying in accordance with the times therein specified, "committed a breach of their duty as public carriers," by which they were bound to carry according to their public profession. The whole Court were agreed that the company were liable for a fraudulent representation.[4] The view that there is a contract seems to have been adopted in the subsequent cases and without further controversy.[5]

Effect of the time-table.

Denton v. *G. N. Ry. Co.*

In *Hurst* v. *G. W. Ry. Co.*[6] the circumstances were a little peculiar. The company's time-table, which "would, doubtless, have shown that there was an absolute repudiation of a warranty of punctuality,"[7] was not put in; but the plaintiff claimed to recover on proof that he took a ticket at Cardiff to be carried on the Great Western Railway to Newcastle *viâ* the Midland Railway. The grievance was that his train was nearly an hour and a half late in starting. The plaintiff got a verdict, but the Common Pleas entered judgment for the defendants, as "the mere taking of a ticket does not amount to a contract on the part of a railway company, or impose upon them a duty to have a train ready to start at the time at which the passenger is led to expect it; and, in order to maintain an action, it is incumbent on the plaintiff to show either a breach of contract or a breach of some legal duty."[8]

Hurst v. *G. W. Ry. Co.*

The representation made by a carrier issuing a time-table is in the nature of an advertisement offering a reward; and though when once publicly made it becomes binding if accepted before it is retracted,[9] it is not irrevocable, but may be retracted by a notice of the change made, circulated as extensively as the notice of the regular trains, or in such a way as it would be reasonably calculated to come to the intending passengers' knowledge; or, indeed, if there is a reservation of the right to make occasional changes in the running of particular trains, passengers would be bound to make reasonable inquiries whether such reservation has been acted on.[10]

Nature of the representation by a carrier; its effects.

When once the passenger has been received he must, if he desire it, be carried the whole route;[11] so that, if the usual place of alighting

Duty to carry the whole way.

[1] *Whitesell* v. *Crane*, 8 Watts & Ser. (Pa.) 369. *Ante*, 892.

[2] 5 E. & B. 860; this case is criticised, Pollock, Contracts (7th ed.), 16, but is treated as good law in *Carlill* v. *Carbolic Smoke Ball Co.*, [1893] 1 Q. B. 256, 272. Cp. *Hamlin* v. *G. N. Ry. Co.*, 1 H. & N. 408; *Hobbs* v. *L. & S. W. Ry. Co.*, L. R. 10 Q. B. 111.

[3] 5 E. & B. 868.

[4] In *Cooke* v. *Midland Ry. Co.*, 9 Times L. R. 147 (C. A.), on the question of reasonable time, Lindley, L.J., says: "A man could not be compelled to wait more than a couple of hours at a station after the proper time for the train to arrive." *G. W. Ry. Co.* v. *Lowenfeld*, 8 Times L. R. 230, a judgment of his Honour Judge Stonor, may profitably be looked at.

[5] *Le Blanche* v. *L. & N. W. Ry. Co.*, 1 C. P. D. 286.

[6] (1865) 19 C. B. N. S. 310.

[7] *L.c.* per Willes, J., 320.

[8] Per Erle, C.J., 19 C. B. (N. S.) 317.

[9] *Shucy* v. *United States*, 92 U. S. (2 Otto) 73; *Carlill* v. *Carbolic Smoke Ball Co.*, [1893] 1 Q. B., per Bowen, L.J., 268; *Boston and Maine Rd.* v. *Bartlett*, 57 Mass. 224.

[10] *Sears* v. *Eastern Rd. Co.*, 96 Mass. 433.

[11] *Mosaiter* v. *Cooper*, 4 Esp. (N. P.) 260.

from a stage-coach is at an inn-yard, the passenger must be put down there, and cannot be compelled to alight even at the inn gate.[1] That is, the carrier's duty to carry is absolute,[2] and, in case of disablement by accident of the conveyance he provides, he is bound to provide another[3] for the completion of the journey. He is bound to stop at the usual places, and to allow the usual intervals for refreshments;[4] for it may be that the practice of stopping at certain places is the passenger's reason for preferring that particular conveyance to another line.[5]

Yet the fact that a passenger on a railway train attempts to alight while the train is in motion cannot be held contributory negligence as a conclusion of law. *Primâ facie* evidence of negligence undoubtedly it is; but circumstances are frequently shown that may excuse it and devolve the determination of the quality of the act on the jury.[6]

Time for stoppages.

The law does not define for what length of time stoppages should be made on the way, for the purpose of enabling passengers for intermediate stations on the route to alight. This is for the jury in estimating the facts of the individual case; but "prudence and duty would require of a conductor to detain a train longer to pass out fifty aged females than five active men."[7] The question that must be left to them in each case is, whether in the actual facts of the case reasonable time to leave the carriage was afforded.[8]

Duty during transit. *Blamires* v. *Lancs. & Y. Ry. Co.*

Blamires v. *Lancs. & Y. Ry. Co.*,[9] in the Exchequer Chamber, throws light on the duty of a railway company to their passengers, where an Act of Parliament exists, bearing upon the circumstances of the transit, though not determining the matter. By the Regulation of Railways Act, 1868,[10] s. 22, "every company shall provide, and maintain in good working order, in every train worked by it which carries passengers and travels more than twenty miles without stopping," means of communication between the passengers and the servants of the company in charge of the train. In an action for negligence brought by a passenger in a train within the meaning of the Act, it appeared that the precaution had not been adopted, and the plaintiff averred this want of communication between the passengers and the guard as negligence in the defendants, though the accident was caused by the breaking of a tire across a rivet-hole. There was some evidence

1 *Dudley* v. *Smith*, 1 Camp. 167.

2 *Ker* v. *Mountain*, 1 Esp. (N. P.) 27.

3 Jeremy, Carriers (ed. 1815), 23: "*a fortiori* the proprietors are bound to carry them [passengers] to the place to which they profess their coach to go, and cannot refuse to proceed at any intermediate stage; and in case of accident they would be bound to provide another conveyance; for their undertaking is absolute."

4 On long routes, "easy and safe modes and reasonable time for obtaining food and safe ingress and egress to and from refreshment stations" must be afforded: *Peniston* v. *Chicago, &c. Rd. Co.*, 34 La. Ann. 777, 44 Am. R. 444. But a passenger may not leave the train for other business, and an answer given by a conductor as to the length of time the train is to wait neither increases nor diminishes the duty or liability of the company to a passenger who has relied on the statement made to him: *Missouri Pacific Ry. Co.* v. *Foreman*, 15 Am. St. R. 785.

5 Jeremy, Carriers, 23: "So if there is a general usage to allow certain intervals for refreshment, they cannot vary at their pleasure those usages which are perhaps a reason for preferring their conveyance to the less convenient arrangement of other proprietors." Cp. *Barker* v. *New York Central Rd. Co.*, 24 N. Y. 599.

6 *Treat* v. *Boston, &c. Rd. Co.*, 131 Mass. 371.

7 Per Buffington, C.J., charging the jury in *Pennsylvania Rd. Co.* v. *Kilgore*, 32 Pa. St. 293.

8 *Pennsylvania Rd. Co.* v. *Kilgore*, 32 Pa. St. 292.

9 L. R. 8 Ex. 283.

10 31 & 32 Vict. c. 119.

that if such means of communication had existed the accident might have been prevented.

Direction to the jury of Kelly, C.B.

Kelly, C.B., directed the jury [1] that "it is not every disobedience to an Act of Parliament that will constitute negligence in a railway company so as to make the railway company responsible for accidents of this nature. It is only if the duty imposed by the Act of Parliament be such that the breach of it, the neglect of the duty, was likely to conduce to an accident of this nature, that the Act of Parliament would have any effect upon it; and if there had been any duty imposed on the company, any precaution which they ought to have taken, and which they have failed in taking, any duty which they have not performed, and the non-performance of which led to this accident or was likely to conduce to this accident, then, whether there was an Act of Parliament or not, that breach of duty is worthy of your consideration to see whether you can find negligence." The jury found there was no negligence in respect of the breaking of the tire, but that the want of communication was negligence.

The case taken to the Exchequer Chamber.

In the Exchequer Chamber the verdict of the jury was sustained, on the ground that it was right to use the Act as some evidence of what due and ordinary care in the circumstances would be. This is put most clearly by Grove, J.: [2] "Negligence must depend very much on the state of knowledge at the time. If a particular precaution has not been hitherto known or used, or if its use is obscure, the omission of it is not negligence; but if it is used to any considerable extent, that changes the case, and makes the omission some evidence of negligence. . . . The Act is important evidence, as showing, not merely that the means existed, but that it was known and was sanctioned by the Legislature." Blackburn, J., limits his decision.[3] "We have not to decide," said he, "whether, if the Act did not apply, there was sufficient evidence to show that it was the duty of the company to provide means of communication, whether such an obligation was cast upon them by the common law duty to take reasonable care of their passengers." He prefers to "leave it open for future decision what may be the duty of companies in cases where the train is intended to stop at shorter distances than twenty miles, and what may be the effect of the Act in that case." This reservation does not affect the principle laid down by Grove, J., and also by Brett, J.[4] (which is, that proof of ordinary usage is admissible to show whether particular conduct is careful or not, and that "it is right to use the Act as some evidence of what is due and ordinary care under the circumstances of this case"); but seems rather directed to the proposition that, when the Legislature has made provisions for some special object, the exceptional state of things thereby provided against is not to be erected into a standard for deciding what should ordinarily be done or omitted.[5]

Relativity of the notion of negligence enforced by Grove, J.

Judgment of Blackburn, J.

Considered.

Duty to use best practical precautions.

The duty owed by a railway company to their passengers is to take reasonable care—to use the best precautions in known practical use for securing their safety and convenience. The jury have to say what is reasonable care and whether proper precautions have been used.[6] Still, passengers are not entitled to expect the utmost care that can possibly be conceived; for the management of railways is a matter of

[1] *L.c.* 286. [2] *L.c.* 289. [3] *L.c.* 288. [4] *L.c.* 289.

[5] Cp. *Groves* v. *Lord Wimborne*, [1898] 2 Q. B. 402; *Hardaker* v. *Idle District Council*, [1896] 1 Q. B. 335.

[6] A company were held liable in *Flint* v. *Norwich and New York Transportation Co.*, 34 Conn. 554, for an injury caused by the explosion of a gun caused by some

practical experience to which additions are made day by day. It is not, therefore, necessary that every suggestion of science should be adopted ; [1] although it is the duty of railway companies to use every precaution in known practical use. There are certain safeguards which can only be secured by the sacrifice of convenience [2]—as, for instance, a slower rate of speed, which may add something to the security while greatly sacrificing the convenience of the passengers. A company is not liable merely for preferring increased speed to a slight enhanced security in travelling.[3] If, then, a precaution which is adopted by a railway company in obedience to a statute,[4] does not indicate any advance in science or aid to security, the fact of legislative enactment does not add anything to the obligation of the company to take collateral and additional precautions for the safety of passengers. If, on the other hand, the legislative requirement denotes a recognised sense of the propriety of such a safeguard as is there stipulated for with all its incidental improvements, it seems to be evidence of the growth of that practical experience to the assured results of which railway companies are bound to conform.[5]

Safeguards sacrificing convenience not demanded.

disorderly soldiers carried by the company under a Governmental obligation ; and in *Simmons* v. *New Bedford Steamboat Co.*, 97 Mass. 361, where passengers scrambled into a small boat hung over the deck of a steamboat, and caused it to fall on other passengers ; also where the passenger was an infant, and the conductor was found to have been negligent in not warning him of the danger of attempting to alight while the tram was in motion, *Hemmingway* v. *Chicago, &c. Ry. Co.*, 7 Am. St. R. 823 ; *sed quære*, whether the duty is not too widely laid down. If *Metropolitan Ry. Co.* v. *Jackson*, 3 App. Cas. 193, applies it clearly is.

[1] *Hanson* v. *Lancs. & Y. Ry. Co.*, 20 W. R. 297 ; *Wisely* v. *Aberdeen Harbour Commissioners*, 14 Rettie, 445 ; *Robinson* v. *New York Central, &c. Rd. Co.*, 20 Blatchf. (U. S. Circ. Ct.) 338 ; *Titus* v. *Bradford, &c. Rd. Co.*, 136 Pa. St. 618, 20 Am. St. R. 944.

[2] In America it has been held that a railway company is liable to a person waiting for a train in a proper place and using due care, who is struck by a mail-bag thrown from the postal car, though it was a well-known custom to throw bags as the train was passing through stations : *Snow* v. *Fitchburg Rd. Co.*, 136 Mass. 552. This was on the ground that the act was itself dangerous, and the company therefore owed a duty of precaution ; *Carpenter* v. *Boston Rd. Co.*, 97 N. Y. 494 ; and in *Old Colony Rd.* v. *Slavens*, 148 Mass. 363, 12 Am. St. R. 558, a railway company against whom a judgment has been recovered by one who sustained personal injuries through the obstruction of a side-walk at its station by mail-bags, is not a joint wrongdoer with mail-carriers who negligently caused the obstruction in such a sense as to prevent a recovery by it of the amount of the damages paid by it. *Ante*, 173 n 4.

[3] *Ford* v. *L. & S. W. Ry. Co.*, 2 F. & F. 730, and *Stokes* v. *Eastern Counties Ry. Co.*, 2 F. & F. 691. Cp. *Fremantle* v. *L. & N. W. Ry. Co.*, 2 F. & F. 337, 340.

[4] *Ante*, 305 and 761.

[5] There is an American case on a somewhat ludicrous point, deciding that a railway company is not liable for the neglect of its guard to fulfil his promise to wake a passenger, whereby he was carried beyond his destination : *Nunn* v. *Georgia Rd.*, 51 Am. R. 284. *Pullman Palace Car Co.* v. *Smith*, 23 Am. St. R. 356, improves on this by deciding that a sleeping-car company is answerable for failing to wake its passengers, whereby they pass their station, even when their contract is with the railway company and not with the defendant company. Another American case which may be looked at is *Carpenter* v. *New York, &c. Rd. Co.*, 124 N. Y. 53, 21 Am. St. R. 644, which gives the American view of the duty of a railway company to watch passengers in sleeping-cars to prevent money being abstracted from beneath their pillows. The note to 21 Am. St. R. 647, indicates the leading authorities on the rights, duties, and liabilities of sleeping-car companies. The conclusion from the American cases is that a sleeping-car company is neither a common carrier nor an innkeeper, and thus their obligation to their guests is to exercise ordinary or reasonable care to protect them, and they will only be liable on proof of negligence. They are bound to exercise ordinary care to protect passengers from thieves, and the mere loss of luggage is not *primâ facie* evidence of negligence against them. *Pullman Palace Car Co.* v. *Lowe*, 26 Am. St. R. 325, to which there is a very full note setting out the authorities. The Wisconsin Court, whose chivalry is noteworthy even if *Croaker's case* (*ante*, 588) were its only illustration, has held that there is a common law duty on a railway company to wake its women passengers who have to change carriages so as to give them time to dress before the time to change arrives : *M'Keon* v. *Chicago, &c. Rd. Co.*, 94 Wis. 477.

In a Scotch case [1] a claim was made against a company in respect of the inconveniences attendant on being snowed up. The claim was formulated: "It was their duty when the train was snowed up to have made all reasonable provision for the comfort and safety of the passengers and to have seen that their needs were duly attended to." The Court held the averments were irrelevant. Yet between the obligation to travel with the furniture of an hotel to meet the possible emergency of being snowed up and a repudiation of all duty in regard to severity of weather there is a wide interval, admitting the assertion of a duty to act according to the circumstances in the mitigation of the condition of the passengers, and of course to use what means are available for their relief. Claim for damages for being snowed up in train.

The duty of a railway company to their passengers is not discharged by purchasing from reputable manufacturers the iron rods or other iron-work used in the construction of their bridges. There is a duty besides on the company to test and inspect and not implicitly to rely on the reputation of the manufacturers from whom they procure their material. This duty of inspecting and testing does not end when the materials are put in their place, but continues during their use, and is a duty to ascertain from time to time whether things in their nature liable to deteriorate are being impaired either by use or by exposure to the elements.[2] Duty to test and inspect material.

To determine what improvements are and what are not required to be adopted by railway companies, several factors have to be considered. They are bound to avail themselves of all improvements which will contribute materially to the safety of the passengers, when the utility of such improvements has been thoroughly tested and demonstrated,[3] but subject to a reasonable regard to the ability of the company and the nature and cost of the improvements. What improvements should be adopted.

If the improvement relates to a matter in respect of which there are numerous accidents, and can be effected at a small cost, the obligation on the railway company to adopt it is peremptory. On the other hand, if the improvement is a matter of inadequate benefit at a cost of great expense, or even of trivial concern without the probability of expense, they are not bound to adopt it.[4] The case of *Cornman* v. *Eastern Counties Ry. Co.*[5] is somewhat in point. Plaintiff, being at the defendants' station on Christmas Day, was driven by a crowd against a portable weighing-machine, the foot of which projected about six inches above the level of the platform. The machine was unfenced, and had stood in the same position without any accident occurring to passers-by for about five years. Evidence was given that most of the great railway companies adopted precautions rendering such an accident impossible. The judge at the trial told the jury [6] "that one Company was not bound to adopt all the arrangements of another; and he asked them whether they thought that the machine was so constructed, and in such a position as that, without any negligence of *Cornman* v. *Eastern Counties Ry. Co.*

[1] *Mathieson* v. *Caledonian Ry. Co.*, 5 Fraser, 511.

[2] *Murphy* v. *Phillips*, 35 L. T. (N. S.) 477; *Manser* v. *The Eastern Counties Ry. Co.*, 3 L. T. (N. S.) 585; *Stokes* v. *The Eastern Counties Ry. Co.*, 2 F. & F. 691; *Louisville, &c. Ry. Co.* v. *Snyder*, 10 Am. St. R. 60.

[3] See per Kekewich, J., *National Telephone Co.* v. *Baker*, [1893] 2 Ch. 205.

[4] *Smith* v. *New York, &c. Rd. Co.*, 19 N. Y. 127.

[5] 4 H. & N. 781. A similar case is *Blackman* v. *L. B. & S. C. Ry. Co.*, 17 W. R. 765. For the American cases, see *Hamilton* v. *Texas Rd. Co.*, 53 Am. R. 756; *Gillis* v. *Pennsylvania Rd. Co.*, 59 Pa. St. 129—crowd drawn together at a railway station to hear the President of the United States.

[6] 4 H. & N. 783.

persons coming on the platform, accidents might occur." The jury found for the plaintiff. The Court of Exchequer entered the verdict for the defendant.

Bramwell, B.'s, opinion.

Bramwell, B., said:[1] "I think that all the ingredients to make out a case of negligence against the Company exist, except that proof is wanting that the mischief which happened is one which could have been foreseen. In such a case it is always a question whether the mischief could have been reasonably foreseen. Nothing is so easy as to be wise after the event. But here no witness stated that he would have known that the position of the weighing-machine was likely to cause danger. I adopt the rule stated by Williams, J., in *Toomey* v. *The Brighton Ry. Co.*:[2] 'It is not enough to say that there was some evidence; a *scintilla* of evidence,[3] or a mere surmise that there may have been negligence on the part of the defendants, clearly would not justify the judge in leaving the case to the jury; there must be evidence on which they might reasonably and properly conclude that there was evidence.' Here the evidence was that the company might reasonably have anticipated that no mischief could occur, since no mischief had resulted from keeping the machine in the position in which it stood for so long a period."[4]

Rule stated by Williams, J., in *Toomey* v. *L. B. & S. C. Ry. Co.*

Hart v. *Lancs. & Y. Ry. Co.*

Hart v. *Lancs. & Y. Ry. Co.*[5] also illustrates the duty of railway companies to their passengers in this respect. A pointsman having but an instant to decide what to do with a runaway engine (the man in charge of which, who was alone, had fallen down in a fit), turned it into a siding on which there was a train at rest, rather than allow it to meet an advancing express train. The plaintiff, who was in the train at rest, was injured, and sued the company for damages for negligence; first, in not having two men on the engine while engaged in coaling, from which it was returning when the fit of the driver left it without guidance; and, secondly, in having the points of the sidings so arranged that the engine must necessarily, in case of the driver being incapacitated, pass on to the main line. The fact that an alteration had been made since the accident, so that a runaway engine would pass along a supplementary siding leading up to a "dead end," was urged as evidence of previous negligence.

Contended that coaling an engine is dangerous work.

The contention as to the first point was that the work of coaling an engine was dangerous from an alleged liability of the men engaged in the work to become affected by the sulphurous vapour arising from the burning coal. In the absence of evidence, the Court refused to accept this, Kelly, C.B., remarking: "Surely, it was never heard that sickness of any kind was ever produced by it. If, then, this be an operation usually conducted by one man and without any ill results arising therefrom, it would surely be a very strong thing to say that the not employing two men to perform the operation was negligence on the part of the Company." As to the second point, the Court held it to be most reasonable to hold the company negligent in not foreseeing that the plan which had been in use safely for twenty years would occasion an

Subsequent precaution not necessarily evidence of antecedent neglect.

[1] *L.c.* 786.

[2] *Toomey* v. *L. B. & S. C. Ry. Co.*, 3 C. B. N. S. 146. Cp. *Dublin, Wicklow, and Wexford Ry. Co.* v. *Slattery*, 3 App. Cas. 1155. This case is not, however, within the rule thus enunciated; for what the Court practically say is, that the evidence given was susceptible of either reading, and that could not affect the defendants with liability, since the plaintiff must give evidence that points to a conclusion of negligence. *Ante*, 119 *et seqq.*

[3] Best, Evidence (10th ed.), 69.

[4] Cp. *Sturges* v. *G. W. Ry. Co.*, 8 Times L. R. 231 (C. A.); *Nicholson* v. *Lancs. & Y. Ry. Co.*, 34 L. J. Ex. 84; *Jones* v. *Grand Trunk Ry. Co.*, 16 Ont. App. 37.

[5] 21 L. T. (N. S.) 261.

accident; and the fact that, when they found that it had resulted in an accident they altered their method should even less be a circumstance going to fix them with liability. As Bramwell, B., said in his forcible way: "People do not furnish evidence against themselves simply by adopting a new plan in order to prevent the recurrence of an accident. I think that a proposition to the contrary would be barbarous. It would be, as I have often had occasion to tell juries, to hold that, because the world gets wiser as it gets older, therefore it was foolish before."[1]

Significance of previous accidents.

On the other hand, the fact of previous accidents at the same place, in similar circumstances, may be given in evidence as tending to show that the attention of the parties responsible had been called to the position of things there, and that they had failed to provide proper means for providing against accident;[2] while the making of repairs after an accident, though inadmissible as evidence of antecedent negligence, may yet be evidence in the nature of an admission that the duty to repair is on the person doing the repairs.[3]

Repairs after accident.

Thomas v. *Great Western Colliery Co.*

The consideration pointed out by Lindley, L.J., in *Thomas* v. *Great Western Colliery Co.*,[4] must also not be forgotten. A particular kind of brattice cloth, well known to be inflammable, was kept for a long period in proximity to an engine which emitted sparks, and no accident had happened. From this it was sought to argue absence of negligence. His Lordship refuted this contention by pointing out that "long immunity from accident did not prove absence of carelessness. It might only prove long-continued habitual negligence"; and this was the conclusion actually drawn in the particular case before the Court.

Observation of Lindley, L.J.

Strip of ice extending half across a platform.

The Court held there was evidence of negligence where a passenger, walking by daylight up and down the platform of a station, was injured by slipping on a strip of ice extending half-way across the platform, and of the presence of which no explanation was given.[5]

[1] *L.c.* 263. Two suggestions were thrown out in this case that may be noted. First, one by Bramwell, B., whether the pointsman, whose presence of mind saved a great catastrophe, was not liable in trespass, since his act was voluntary and wilful. As to this, see per Lord Macnaghten, *Jenoure* v. *Delmege*, [1891] A. C. 77, and *ante*, 157. And secondly, one by Cleasby, B., whether the company could be held responsible for an injury proximately caused by such an act of their servant done under such circumstances. As to this, see *Limpus* v. *London General Omnibus Co.*, 1 H. & C. 526, and *ante*, 581. Bramwell, B.'s, remark in the text is expanded in *Diamond Match Co.* v. *New-haven*, 3 Am. St. R. 70, 73, and cited with approbation as expressing also the rule in the United States in *Columbia Rd. Co.* v. *Hawthorne*, 144 U. S. (37 Davis) 202. The same principle was acted on in *Sanitary Commissioners of Gibraltar* v. *Orfila*, 15 App. Cas. 400, 413; *G. W. Ry. Co.* v. *Davies*, 39 L. T. (N. S.) 475.

[2] *District of Columbia* v. *Armes*, 107 U. S. (17 Otto) 519, 520.

[3] *Readman* v. *Conway*, 126 Mass. 374, explained *Skinners* v. *Proprietors of Locks and Canals*, 154 Mass. 170: "For the same reason," it is there said, "the fact that a city makes repairs upon a highway after an accident thereon, has been held admissible to show an acceptance of the highway as dedicated." The statement of the rule in *Morse* v. *Minneapolis, &c. St. Louis Ry. Co.*, 30 Minn. 465, reproduced in *Columbia Rd. Co.* v. *Hawthorne*, 144 U. S. (37 Davis) 208, laying down that such evidence "ought not to be admitted under any circumstances" must therefore be qualified by the addition of some such words as "for that purpose," or their equivalent.

[4] 10 Times L. R. 244 (C. A.).

[5] *Shepherd* v. *Midland Ry. Co.*, 25 L. T. (N. S.) 879. Cp. *Crofter* v. *Metropolitan Ry. Co.*, L. R. 1 C. P. 300—the case of brass nosing to steps of a railway station worn smooth; *Davis* v. *L. & B. Ry. Co.*, 2 F. & F. 588—it is not enough to show improper condition of station if accident not caused thereby; *Rigg* v. *Manchester, Sheffield, and Lincolnshire Ry. Co.*, 14 W. R. 834—the opinion of witnesses that a platform is dangerous no evidence of it; *Longmore* v. *G. W. Ry. Co.*, 10 C. B. N. S. 183—faulty construction of bridge.

Withers v. *North Kent Ry. Co.*

Again, in *Withers* v. *North Kent Ry. Co.*,[1] an accident happened through the bad condition of an embankment, made five years previously, through a marshy country subject to floods, after an extraordinary storm, accompanied for sixteen hours with very violent rain which washed away the soil of the embankment, leaving the "sleepers" of the railway unsupported, so that the embankment gave way as the ordinary express train went over them. The negligence alleged was, first, the construction of a line "on a low embankment composed of a sandy sort of soil likely to be washed away by water, and that the culverts were insufficient to carry off the water";[2] and, secondly, the rate of speed at which the train was going at the time. The jury found for the plaintiff, with heavy damages, but the Court directed a new trial. As to the first point, "the line had lasted five years in a country subject to floods, and it does not appear that there had been any accident or objection to its construction until this extraordinary flood occurred. The company were not bound to have a line constructed so as to meet such extraordinary floods." As to the second, the speed "was the ordinary express train speed, and there had been nothing to indicate there would be danger in continuing it."[3]

In none of these cases was the state of circumstances revealed by a subsequent accident considered sufficient to warrant the inference of a negligent inefficiency. They rather point to the conclusion that, if apart from the accident a presumption could have been reasonably drawn against the suitability of the provision made, the defendants in each case would have been liable. The ground for imputing liability is not what a reasonably prudent man would conclude, with the fact of an accident having arisen to direct his judgment, but what a reasonably prudent man would conclude as to the likelihood of an accident occurring, apart altogether from the fact of its occurrence.

Questions of engineering skill not for a jury unless with specific directions.

Where questions of engineering skill are involved, it is obvious that a jury is no fit tribunal to decide them. The rule to be adopted in such cases is similar to that observed in the case of actions for negligence against solicitors or medical men. The judge has to define the circumstances, and it is for the jury to determine whether their existence in the case before them has been proved.[4]

Tuttle v. *Detroit, Grand Haven, and Milwaukee Ry.*

In *Tuttle* v. *Detroit, Grand Haven and Milwaukee Ry.*[5] the accident sued on was alleged to have arisen by reason of a particularly sharp curve in one of the defendants' yards. Liability was negatived on the ground of the plaintiff's acquaintance with the appliances amongst which his work lay; but the Court added:[6] "It appears that the curve was a very sharp one at the place where the accident happened, yet we do not think that public policy requires the courts to lay down any rule of law to restrict a railroad company as to the curves it shall use in its freight dépôts and yards, where the safety of passengers and the public is not involved; much less that it should be left to the varying and uncertain opinions of juries to determine such an engineering question."[7] From which expression of opinion we may gather that, in the opinion of the Court, in no case is the determination of an engineering question for the jury, at least without specific directions;

[1] 27 L. J. Ex. 417. This case and *Ruck* v. *Williams*, 3 H. & N. 308, are commented on in *G. W. Ry. Co. of Canada* v. *Braid*, 1 Moo. P. C. (N. S.) 101.

[2] This evidence was objected to, as not relevant to the case laid in the declaration, but it was admitted.

[3] Per Pollock, C.B., 27 L. J. Ex. 418.

[4] *Hunter* v. *Caldwell*, 10 Q. B. 69.

[5] 122 U. S. (15 Davis) 189.

[6] *L.c.*, per Bradley, J., 194.

[7] *Ante*, 10.

and, secondly, that in those portions of a railway system which are open for passengers, or in immediate connection with which they may be placed, a more stringent rule must he adopted than applies to those portions where those alone who are engaged in the working of the line may be expected to resort.

Standard of care a variable one

As, then, the standard of care and duty is variable the amount is not to he fixed hy reference to the conduct of other railway companies in the vicinity, and certainly not by their usual conduct; for an agreement, express or tacit, amongst railway companies can in no circumstances be held to jeopardise the safety of the passenger.[1] As it was said in *Metzgar* v. *Chicago, Milwaukee, &c. Py. Co.*:[2] "A fault is none the less a fault hecause it is common."

Railway company may not experiment with the safety of their passengers.

While a railway company is not allowed with immunity to lag behind the standard of safety generally held requisite, on the other hand, it is not permitted, without responsibility, to introduce untried novelties. That which has been approved as safe hy experience may, of course, he adopted. Where, however, the consequences of any defect developing in untried machinery or agencies would he the exposing human life to hazard, it devolves on those making an experiment which turns out badly to show that they have followed such a course as the rules of science or mechanics applicable to the matter in hand warranted them regarding as safe according to ordinary probabilities. They must themselves assume the risk of their experiments resulting in failure, and they are not permitted to shift the consequences on their passengers or employés.[3]

Duty to provide means of alighting.

The duty of railway companies to provide means of alighting for their passengers has heen the subject of a series of decisions,[4] in the course of which many fine distinctions havo been drawn. Though it has never in terms heen decided that it is the duty of a railway company

[1] *Grand Trunk Rd. Co.* v. *Richardson*, 91 U. S. (1 Otto) 454. Cp. *Wisely* v. *Aberdeen Harbour Commissioners*, (1887) 14 Rettie, 445.

[2] 14 Am. St. R. 224, 225, referring to *Hamilton* v. *The Des Moines Valley Rd. Co.*, 36 Iowa, 31, where it is said, at 38: "If, because an act is usual and common, it ceases to be negligent, it follows that the sure way of escaping liability for injuries to persons and property, in cases of this character, would be to adopt a certain and uniform system of common negligence."

[3] *Marshall* v. *Widdicomb Furniture Co.*, 11 Am. St. R. 573.

[4] In *Geirk* v. *Connolly*, 13 V. L. R. (Law) 446, the Supreme Court of Victoria held that where a carrier of passengers had stopped at an ordinary stopping place at the request of certain passengers to enable them alight, he was liable to one who had given him no intimation of her wish to alight for driving on while she was in the act of alighting, and thereby causing her injury; since it was his duty, before going on, to ascertain whether all had alighted who had wished to do so. In *Louisville and Nashville Rd. Co.* v. *Crunk*, 12 Am. St. R. 443, it was held that where a railway company has issued a ticket to an invalid with knowledge that he is too feeble to walk, his assistants who carry him into the train have a reasonable time to leave the train, just as if they were passengers, even though they voluntarily offered their services to carry the passenger. In a note to this case are collected the decisions on what is sufficient time to alight. While a passenger is leaving a steamer for a lawful purpose and is on the premises of the steamboat company, the same degree of care is exacted from the company as is required while the passenger is on the boat: *Dodge* v. *Boston and Bangor Steamship Co.*, 148 Mass. 207. In *Evansville, &c. Rd. Co.* v. *Duncan*, 92 Am. Dec. 322, the Court, in speaking of a person leaving a train while in motion, says: "If the leap was made under such circumstances that a person of ordinary caution and care would not have apprehended danger therefrom, then it was not such an act of carelessness as would relieve the defendant from the responsibility otherwise resting upon it." This was approved *Louisville and Nashville Rd. Co.* v. *Crunk*, 12 Am. St. R. 443, 449. A person suffering from a complaint who travels by railway must take the risks that one in his condition is likely to incur through a railway journey. The railway company's duty to him is to be measured by the standard of care reasonably necessary for the safety of the average passenger: *Linklater* v. *Minister of Railways*, 18 N. Z. L. R. 536.

to provide a platform for the purposes of alighting, it has been assumed in England that the stopping a train, for the purpose of enabling passengers to alight, warrants the inference that there is a platform on which they can alight, unless some intimation is given them to the contrary.[1]

Foy v. *L. B. & S. C. Ry. Co.*

The duty of the company in the case of the absence of a platform has been a matter of more difficulty to settle. In *Foy* v. *L. B. & S. C. Ry. Co.*[2] the train was too long to be all drawn up at the platform, and the plaintiff's wife was asked by the porter to alight a little beyond the end of the platform; in doing so she was injured. The Court of Common Pleas held the company liable "because the place and the means of descent provided were not reasonably convenient." It is to be noted that it was assumed that the plaintiff was intended to alight. The decision is not that any of the preliminaries were wanting, but, all things being provided, the provision was not that reasonable provision without which the obligation of the carrier is not discharged.

Harrold v. *G. W. Ry. Co.*

But in *Harrold* v. *G. W. Ry. Co.*[3] judgment was entered for the defendants, where the plaintiff, knowing that the carriage in which he was had overshot the platform, without waiting to see whether or not the train would be backed, so as to bring the carriage back to the platform, chose to get out in the dark, and in so doing missed his footing and fell upon the line (which at that spot was upon an embankment) and, rolling over the embankment into the roadway beneath, was injured. Here the decision hinged on the doubt whether the preliminary conditions to alighting were complied with. The defendants succeeded because the plaintiff had not shown that the time for alighting had arrived. And that was assumed in their favour which, in the earlier case, had been decided against the company, that the place for alighting was not reasonable.

Siner v. *G. W. Ry. Co.*

The cases, then, so far from being contradictory, are complements the one of the other. *Harrold's case* is very like in its facts to *Siner's*,[4] which has been before alluded to, and which was decided in the Exchequer Chamber. The only material distinction is that in *Siner's case* the plaintiff jumped down from the carriage in daylight, while in *Harrold's case* the plaintiff jumped down in the dark. The judges in the Exchequer Chamber (Keating, J., who tried the case, dissenting) affirmed the judgment of the Court of Exchequer (Kelly, C.B., dissenting), making absolute a rule for a nonsuit on the ground that there was no evidence for the jury.

Considered.

The decision was based on the fact that there was no evidence of invitation to alight—no evidence that a reasonable time had been given for the alighting of the people in the other part of the train. This must have been effected before the train could have been put back for the plaintiff to alight. Further, there was evidence that the plaintiff could see where she was getting out, and the risks attending her movements. The decision, in short, is on the same point as in *Harrold's case*: where the plaintiff, to prove his case, had to show that the company had provided for his alighting, or had given him a reasonable expectation that they looked to his alighting there and then; as he failed to give any evidence of this, and the facts were equally consistent with some

1 *Siner* v. *G. W. Ry. Co.*, L. R. 4 Ex., per Hannen, J., 124; see, too, what is said in *Bridges* v. *N. L. Ry. Co.*, L. R. 7 H. L. 213.

2 (1865) 18 C. B. N. S. 225, 228.

3 (1866) 14 L. T. (N. S.) 440.

4 L. R. 4 Ex. 117.

additional precaution being taken by the company before the proper time for alighting arrived, the plaintiff was held disentitled to recover. In addition to this, the majority of the Exchequer Chamber were of opinion that the whole surroundings being apparent to the plaintiff, and the risk, if any, manifest, the plaintiff, in jumping from the carriage without making any requisition to the company's servants for other or additional facilities to alight, and without an invitation to alight, was the author of her own wrong, so that the case thus became one of simple contributory negligence.

Praeger v. Bristol and Exeter Ry. Co.

Praeger v. *Bristol and Exeter Ry. Co.*[1] was also carried to the Exchequer Chamber. The platform of the station, "at the end which was first reached by the train," instead of having its edge parallel with the line of the train, sloped off into a curve. The plaintiff sat in the compartment drawn up opposite the curved part, so that a space of eighteen inches or two feet was left between the footboard and the platform. A guard opened the door, but said nothing. It was a dark evening, and the station was dimly lighted. The plaintiff, stepping out, fell between the carriage and the platform, and was injured. The Court of Exchequer Chamber, overruling the Court of Exchequer, unanimously held there was evidence of negligence. This decision is obviously just. The receding of the platform was in the nature of a trap; the opening of the door by the guard constituted an invitation to alight; while "the evening was dark, and the station dimly lighted." Had there been no platform at all, the case would have been much more arguable. As it was the platform misled the plaintiff into the opinion that it was continuous.

Discussed.

Cockle v. L. & S. E. Ry. Co. compared with *Praeger v. Bristol and Exeter Ry. Co.*

Cockle v. *L. & S. E. Ry. Co.*[2] followed *Praeger* v. *Bristol and Exeter Ry. Co.*[3] There was the same receding of the platform, the same alighting by the plaintiff, and injury, and action. In *Cockle's case* the evidence went in one respect even further than in *Praeger's*. "It was a very dark night," and "the part of the platform at which the train would in the ordinary course have stopped was well lighted with gas-lamps, but the lights towards the place where the accident happened had been put out, because at that place the trains did not usually stop or the passengers alight."[4] In another respect it did not go so far. In *Praeger's case* the guard opened the carriage door; in *Cockle's case* "there was no evidence of any invitation to alight having been given by any of the defendants' servants," though this was qualified by the fact that it was "clear that the train had been brought to a final standstill, as it was not again set in motion until it started on its onward journey."[5] The Exchequer Chamber held there was here an invitation to alight, "at all events after such a time has elapsed that the passenger may reasonably infer that it is intended that he should get out if he purposes to alight at the particular station"; [6] and also that, the danger not being "visible and apparent," there was negligence in the company.

Lewis v. L. C. & D. Ry. Co.

The next case is *Lewis* v. *L. C. & D. Ry. Co.*[7] The carriage in which the plaintiff was travelling shot a little beyond the platform. The name of the station was called out; the plaintiff, who knew the station well, began to alight when the train backed into the station; the jerk of the train in backing threw the plaintiff down and injured

[1] (1871) 24 L. T. (N. S.) 105.
[2] L. R. 7 C. P. 321.
[3] 24 L. T. (N. S.) 105.
[4] L. R. 7 C. P. 322.
[5] *L.c.* 323.
[6] *L.c.* 320.
[7] (1873) L. R. 9 Q. B. 66.

her, for which injury she sued. The Court of Queen's Bench held her disentitled to recover. "I do not at all agree," said Blackburn, J., "that 'Bromley, Bromley!' meant 'Jump out.' The calling out of the name of the station is generally done just as the train is drawing up, and before it has quite stopped, and this is matter of common knowledge. It is, in fact, done by way of preparing people to get out." [1]

Weller v. *L. B. & S. C. Ry. Co.*

Then comes *Weller* v. *L. B. & S. C. Ry. Co.*[2] On the approach of a train to a station a porter called out the name of the station and the train was brought to a standstill. The plaintiff, a season-ticket holder and accustomed to stop there, not being able to see whether there was a platform or not because it was so dark, seeing another person get out of the next carriage, concluded it was all right, and in attempting to alight was injured; hence the action. "There was no evidence to show that the stoppage of the train was a temporary one only, or that the train was afterwards backed; but, on the contrary, it seemed to be clear that the train pursued its journey without having been backed." [3] The Court of Common Pleas held there was evidence of negligence. For this there seems to have been abundant material: "There was no evidence of any warning to the passengers not to get out, or of any intimation that the train was going to back, but, on the contrary, it afterwards pursued its journey without putting back." [4] Merely overshooting the platform it was agreed was not negligence,[5] and Honyman, J., expressed his opinion that the calling out the name of the station would not *per se* be any evidence of negligence. "For," said he,[6] "I rather agree with my brother Keating in *Cockle* v. *S. E. Ry. Co.*,[7] that it amounts to no more than an intimation to the passengers that the train is approaching the station."

Bridges v. *North London Ry. Co.*

This was much considered in the case of *Bridges* v. *North London Ry. Co.*, decided a few months after in the House of Lords.[8] Much of the argument there turned on the effect of calling out the name of a station. The conclusion of the House is expressed by Lord Hatherley, referring to the leading opinion of the Lord Chancellor (Cairns): [9]

Opinion of Lord Hatherley.

"I entirely concur with the views taken of this case by the noble and learned lord on the woolsack, and, concurring with him especially in that part of his observations in which he stated that he thought we were not bound to lay down any special rule as to what the effect of calling out the name of a station would be, I cannot help observing that when the name of a station has been called out, accompanied by a stoppage, and a considerable interval has elapsed," "there is a certain amount of evidence to go to the jury to authorise the finding of a verdict for the plaintiff, unless some explanation could be given of the facts by the defendants, instead of their merely submitting that the plaintiff had not produced sufficient evidence to call upon them for a defence."

Facts.

Bridges's case is an important one in the series now under consideration. The injured man, who was very near-sighted, was in the

1 This passage is from the Law Journal Report, 43 L. J. Q. B. 12.

2 (1874) L. R. 9 C. P. 126.

3 *L.c.* 128.

4 *L.c.*, per Denman, J., 133.

5 *L.c.*, per Brett, J., 132: "I also agree that merely overshooting the platform is not negligence." Per Honyman, J., 134: "I also agree with my Brother Blackburn in *Lewis* v. *L. C. & D. Ry. Co.* (L. R. 9 Q. B. 71), that merely overshooting the platform a little would not *per se* be any evidence of negligence."

6 L. R. 9 C. P. 134.

7 L. R. 5 C. P. 457, 468.

8 L. R. 7 H. L. 213.

9 *L.c.* 240.

last carriage of a train that arrived at Highbury a few minutes before seven on a night in January, when the tunnel through which the train had to pass to reach the station was filled with steam. The station platform extended into the tunnel for a space, but was narrower than the main platform. Further in the tunnel there was a short sloping piece of ground; then a heap of hard rubbish lying by the side of the rails, irregular in form and height. The train only went partially up to the main platform. The last carriage but one came opposite the narrower portion in the tunnel; the last carriage was opposite the rubbish. The injured man appeared to have attempted to alight, and to have fallen; from which fall he sustained injuries that caused his death. The evidence showed that after some of the passengers had got out there was a warning "Keep your seats!" and the train moved further into the station. Blackburn, J., at the trial, nonsuited, being of opinion that there was no evidence of negligence. The Court of Queen's Bench [1] sustained this ruling, which was affirmed in the Exchequer Chamber by a majority of four to three of the judges there present.[2] In the House of Lords the judges who were summoned to give their opinions [3] were unanimous in favour of reversing the decision of the Courts below. The Lords [4] were also unanimously in favour of reversing the decision of the Exchequer Chamber; a verdict was accordingly entered for the plaintiff, the widow of the injured man.

"It was not negligence," says the Lord Chancellor,[5] "to stop the train in the tunnel; it was not necessarily negligence not to have a platform in the tunnel. But the question, and the only question in the case, appears to me to be this—Was there evidence to go to the jury that in this state of things the company or its servants so conducted themselves as to lead to the deceased getting out of the carriage at the time that he did get out?" This question the House of Lords answered in the affirmative. Not, as we have seen, because the name of the station was called out, but because, first, "the train having actually stopped"; [6] secondly, "the servants of the company having called out 'Highbury!'" [6] thirdly, "the requisite time having elapsed for any of the passengers to get out and leave the carriage"; [6] fourthly, the admission by the subsequent cry of "Keep your seats!" that the previous call of the name of the station "was an invitation to leave the seats." Opinion of Lord Cairns, C.

Robson v. *N. E. Ry. Co.*[7] was a case where the station at which the *Robson* v. *N. E. Ry. Co.*

[1] L. R. 6 Q. B. 379—Cockburn, C.J., said "if a rule was granted it would be certain in that court to be discharged, and therefore it was refused."

[2] L. R. 6 Q. B. 377—Cleasby, Pigott, Channell, and Bramwell, B.B., being for affirming, Keating, Willes, J.J., and Kelly, C.B., for reversing, the decision of the Court of Queen's Bench.

[3] Pollock, B., Denman, Brett, Keating, JJ., and Kelly, C.B.

[4] The Lord Chancellor (Cairns) and Lord Hatherley. Lord Colonsay heard the argument, but died before judgment was given.

[5] L. R. 7 H. L. 238.

[6] *L.c.* 239.

[7] (1876) 2 Q. B. D. 85. A remark of Mellish, L.J.'s, goes to show that there is no absolute obligation to provide a platform for passengers to alight at. At 88 he says: "It is clearly the law that railway companies are bound to find reasonable means for passengers to alight at every station at which they choose to stop. The plaintiff here was invited to alight, and the fact of the carriage being beyond the platform affords some evidence that she could not get out without assistance and exposing herself to some danger." In *Wharton* v. *Lancs. & Y. Ry. Co.*, 5 Times L. R. 142 (C. A.)—evidence of the platform being too far below the first step of the carriage was held evidence that the railway company had not provided reasonable facilities for alighting. In Canada an accident caused by alighting from a carriage at a place

injury to the plaintiff occurrad was a very small one, the platform short, and the station-master tha only sarvant kept thera. On tha arrival of tha train in which tha plaintiff was a passengar, the carriage in which she was riding was carried past the platform. When the train stopped, tha plaintiff rosa, opened tha door, and stepped on tha iron stap of the carriage. Sha looked to see whether there wera any railway sarvants ahout; she saw tha station-master taking luggage out of the van, hut did not see the guard; getting frightened that tha train would mova away, she tried to alight by getting on the foot-hoard, har foot slipped, she fell by the side of the carriage and thus sustained the injury for which the action was brought. The Court of Appeal were of opinion that she could recover, and distinguished the case from *Siner's case*, on tha ground that there the plaintiff, without looking for assistance, elected to face the apparent circumstances, and to alight as best sha could; while in the present case the plaintiff waited for assistance, till, afraid of the train moving on, sha ventured to alight. The question for the jury was, whether the acts which induced such a state of mind as led to the consequences indicated a failure of duty on the part of the defendants.[1]

Rose v. *N. E. Ry. Co.*

Rose v. *N. E. Ry. Co.*[2] was "more than covered"[3] by *Robson's case*. Nevertheless, the Court of Exchequer nonsuited, but the Court of Appeal entered a verdict for the plaintiff. The portion of the train in which the plaintiff was carried overshot the platform; a clerk and porter attending to the train called out to the passengers to keep their seats; the plaintiff did not hear the call, and, after waiting for some little time, seeing the passengers in the other carriages getting out, she got out of the carriage, and in so doing fell to the ground and was injured. The plaintiff lived near the station, and admitted that on previous occasions, when some of tha carriages had overshot the platform, the train had been backed to allow passengers to alight.

Opinion of Kelly, C.B.

Kelly, C.B., in the Court of Exchequer, said[4] the "fair inference on the whola case is, that unless the passengers in the foremost part of the train had all got out without waiting for the train to back, it would have been put back in order that they might alight in safety," and that to have left the case to the jury upon the question of negligence "would have been greatly straining the principles of justice as applicable to cases of this nature." Cleasby, B., concurred with Kelly, C.B., distinguishing *Robson's case*, as on the ground that in the present case[4] "there was a calling out by the porters that the passengers were to keep their seats, and that, on other occasions the train, when it had overshot the platform, had been put back."

Opinion of Cockburn, C.J., in the Court of Appeal.

In the Court of Appeal, Cockburn, C.J., was of opinion[5] that it was "the clearest of a" possible cases." "It is not enough that the train has come to a standstill, and the porters call out 'Keep your seats!' unless the train is afterwards backed, or something is done." The view of Cockburn, C.J., thus seems to be that the evidence of negligence of the railway company was the fact that the train was not backed

where there was no platform was held wholly attributable to the plaintiff's own default: *Quebec Central Ry. Co.* v. *Lortie*, 22 Can. S. C. R. 336.

[1] The judgment of Brett, J.A., appears to be very incorrectly given in the Law Reports, especially the sentence "The House of Lords held," &c. In the Law Journal report, 46 L. J. Q. B. 52, there is to be found a more accurate summary; so also of Lord Coleridge's judgment. *Smith* v. *Victorian Rys. Commissioner*, 28 V. L. R. 44

[2] 2 Ex. D. 248.

[3] *L.c.*, per Amphlett, J.A., 252.

[4] *L.c.* 249.

[5] *L.c.* 250.

at all; so that had the plaintiff kept her seat she might have been carried on.[1]

Cases compared and considered.

The result of this examination shows that though the list of cases we have been considering undoubtedly reveals divergences of judicial opinion, there is yet no absolute conflict of authority amongst them. The dividing-line between some of the cases may be fine, and the judicial tendency in the later certainly differs considerably from that shown in the earlier cases; still it cannot be said that the effect of the later is absolutely to overrule the earlier decisions. For example, to compare *Harrold* v. *G. W. Ry. Co.*[2] with *Rose* v. *N. E. Ry. Co.*[3] there is little doubt that the tendency of the judges in the earlier case was lenient towards the railway company; while the leaning of the judges in the later case was towards the plaintiff; yet the ground of the earlier decision is that the plaintiff, without an invitation to alight, and without waiting to see whether the train would be backed, chose to get out; while the decision in the later case is that though the plaintiff waited, yet the company's men did nothing to obviate inconvenience and danger. The result is the same if we compare any others of the series. But though in theory all the cases stand, there is no doubt that the tendency has been to impose a greater stringency of obligation on the companies. The Court that decided *Siner's case* would assuredly have decided *Glasscock* v. *London, Tilbury and Southend Ry. Co.*[4] the same way; while the judges who decided *Glasscock's case* could hardly have differed from Kelly, C.B., in the earlier case.

Siner v. *G. W. Ry. Co.*

Siner v. *G. W. Ry. Co.*[5] may perhaps be rested preferentially on the second ground of Montague Smith, J.'s,[6] judgment—that of contributory negligence. The rule applicable is stated by Lord Hatherley in *Dublin, Wicklow, and Wexford Ry. Co.* v. *Slattery*:[7] "If such contributory negligence be admitted by the plaintiff or be proved by the plaintiff's witnesses while establishing negligence against the defendants, I do not think there is anything left for the jury to decide, there being no contest of fact." This is approved by Lord Watson in *Wakelin* v. *L. & S. W. Ry. Co.*[8]

Lord Hatherley's statement in *Dublin, Wicklow, and Wexford Ry. Co.* v. *Slattery.*

Washington, &c. Rd. Co. v. *Harmon's Administrator.*

In a very useful American case—*Washington, &c. Rd. Co.* v. *Harmon's Administrator*[9]—the duty of a passenger carrier is expressed to be[10] "to safely carry and deliver the passenger, and in so doing not

[1] There is an elaborate judgment of Bradley, J., examining the American cases on the law of the duty of a railway company to provide means for their passengers safely alighting, in *Van Ostran* v. *New York Central Rd. Co.*, 35 Hun (N. Y.) 590. See also *Terre Haute and Indianapolis Rd. Co.* v. *Buck*, 49 Am. R. 168. Failure to stop long enough for passengers to alight is held a breach of duty in *Washington and Georgetown Rd. Co.* v. *Harmon's Administrator*, 147 U. S. (40 Davis) 571. *Roe* v. *Glasgow and South Western Ry. Co.*, 17 Rettie, 59, is an extraordinary decision holding that a claim based on the negligence of a railway company in insufficiently lighting a station whereby a passenger was induced to get out of a moving train, believing it had stopped sufficiently, disclosed a cause of action to go to a jury. Lord Young dissented, considering that "if there was great darkness, that demanded all the more care." It seems scarcely credible that an action should be maintainable for injuries sustained from getting out of a moving train by the allegation that the place where the pursuer chose to get out was so dark that he did not see the train was in motion. For the law in Canada, see *Quebec Central Ry. Co.* v. *Lortie*, 22 Can. S. C. R. 336.

[2] 14 L. T. (N. S.) 440.

[3] 2 Ex. D. 248.

[4] 18 Times L. R. 295; in H. of L. 19 Times L. R. 305.

[5] L. R. 4 Ex. 117.

[6] *L.c.* 124.

[7] 3 App. Cas. 1169. Cp. *Nolan* v. *Brooklyn, &c. Rd. Co.*, 41 Am. R. 345, the head note of which is: "It is not necessarily negligent for a passenger to ride on the front platform of a street car;" and see the note at 347.

[8] 12 App. Cas. 48.

[9] 147 U. S. (40 Davis) 571.

[10] *L.c.* 580.

only to provide safe and convenient means of entering and leaving the cars, but to stop when the passenger was about to alight and not to start the car until he had alighted." The passenger consequently has "a right to assume that the car would actually stop to allow him to get off," [1] and since the right to start depends on the passenger being off the step, the fact that the passenger is on the step when the car starts cannot, in itself, be contributory negligence.

Willoughby v. *Horridge.*

Here may be noted a case, *Willoughby* v. *Horridge*,[2] dealing with the liability of the lessees of a ferry who provided steamboats for the conveyance of passengers' goods and cattle, and also steps for landing. They were also held liable for an injury sustained by the horse of a passenger in consequence of the side rail at the landing-slip (of the dangerous state of which they had been forewarned) giving way, even though the horse at the time was under the control and management of the owner. On appeal *Walker* v. *Jackson* [3] was relied on by the appellant, and was distinguished by Maule, J., because "substantially this is an action against the defendants for negligence in providing an insufficient slip—or, rather, in permitting it to be used after they had notice of its unfitness." In the result the Common Pleas dismissed the appeal, the ground of their decision being thus stated by Jervis, C.J.: "It is not enough for them (the lessees the appellants) to convey passengers and goods across the river, unless they also bridge over the intervening space between the vessel and the landing-place. They are as much bound to furnish a safe slip for that purpose, as to furnish a safe vessel to cross the river." That is, the duty of a carrier of passengers is not limited to the mere act of carrying, but extends to all the incidents attending the safe reception and the safe discharge of passengers.

Ground of the decision stated by Jervis, C.J.

Special developments of contributory negligence as applicable to railway company.

The general legal principles involved in the constitution and proof of contributory negligence have been already examined; [4] there are, however, some special developments arising out of the exceptional position and dangers of railway passengers that require to be noted here.

Fordham v. *Richardson* and *Metropolitan Ry. Co.*

Fordham v. *L. B. & S. C. Ry. Co.*[5] and *Richardson* v. *Metropolitan Ry. Co.*[6] were both cases where the plaintiffs respectively were getting into railway carriages, and took hold of the edge of the door to assist them to enter, when the guard forcibly closed the door, and in each case crushed the plaintiff's hand between the door and the doorpost. In the latter case it was proved that before closing the door the porter called out, "Take your seats! Take your seats!" and the plaintiff admitted that he had his hand on the door for half a minute after he had entered the carriage; while in the earlier case "the guard shut the door prematurely before the plaintiff had got completely in." [7] A distinction in the decisions is based on this variation in the facts. In *Fordham's case* the majority of the Court of Common Pleas, and the Exchequer Chamber [8] unanimously, were in favour of the plaintiff; while in

1 *L.c.* 583. *Keith* v. *Ottawa, &c. Ry. Co.*, [1902] 5 Ont. L. R. 116.

2 12 C. B. 742, 746, 749; *Dodge* v. *Boston and Bangor Steamship Co.*, 148 Mass. 207, 12 Am. St. R. 541.

3 10 M. & W. 161.

4 *Ante*, 149 *et seqq.*

5 (1868) L. R. 3 C. P. 368.

6 Reported in the Law Reports in a note to *Fordham's case*, *l.c.* 374. See, too, *Maddox* v. *L. C. & D. Ry. Co.*, 38 L. T. (N. S.) 458.

7 Per Byles, J., 371.

8 L. R. 4 C. P. 619. In *Atkins* v. *S. E. Ry. Co.*, 2 Times L. R. 94, while the plaintiff was in the act of sitting down, her thumb was in the hinge of the door, and, according to the plaintiff's statement, the porter, who "was coming along and could see her."

Richardson's, in which there was no appeal, the Court unanimously nonsuited the plaintiff, holding that the porter had merely closed the door in the ordinary and proper execution of his duty, and that the accident was solely attributable to the plaintiff's own want of caution. The act done by the passenger in these cases was a lawful act if done properly. In the one case it was held to have been done properly, in the other not properly.

Drury v. *N. E. Ry. Co.*

In *Drury* v. *N. E. Ry. Co.*[1] a passenger neither getting in nor out of the carriage but sitting there had his finger in the hinge when the station-master coming along shut the door. The plaintiff's counsel was driven to contend that notice should have been given of an intention to shut the door; a contention that Lord Alverstone, C.J., very justly designated "an absurdity." "No railway servant could be supposed to assume that a passenger's finger was placed in a dangerous position unless the passenger was in the act of getting in or out of the carriage." The fact of getting in or out of a carriage does not warrant the assumption of negligence apart from the answer to the question proposed in *Cohen* v. *Metropolitan Ry. Co.*:[2] "What would the person whose duty it was to shut the doors reasonably have supposed the position of the plaintiff to be?" The plaintiff must shew "a clear *primâ facie* case that there was something which the person shutting the door had omitted to do."

Adams v. *Lancs. & Y. Ry. Co.*

Adams v. *Lancs. & Y. Ry. Co.*,[3] introduces us to a new class of case, where the way of doing the act was not questioned, but where the contention of the railway authorities was that the act should not have been done at all. In the result the Court of Common Pleas came to this conclusion—a conclusion afterwards repented of by one of the judges who arrived at it.[4] The door of a carriage in which the plaintiff was being carried flew open several times through the lock being defective. There was room in the carriage for the plaintiff to sit away from the door, and the train would have stopped at a station in three minutes. Nevertheless he shut the door three times. The fourth time the door opened while the plaintiff was endeavouring to shut it, he fell out and was hurt. The negligence of the defendants was undoubted. The jury having found for the plaintiff, leave was given to the defendants to move to enter a nonsuit on the ground that there was no evidence of negligence. The Court of Common Pleas made the rule absolute. The case was argued for the plaintiff on the principle laid down by Lord Ellenborough, C.J., in *Jones* v. *Boyce*,[5] that if a person be placed

Principle argued as applicable.

slammed the door. It was held there was evidence for the jury, leave to appeal being refused. But granted that the porter could see the plaintiff, was it either a necessary or a natural inference that he could see her thumb in the hinge of the door, or a conclusion of law that after she had got in she would leave it there? Accidents of this sort are more prone to happen with passengers who are late, just as the train starts. The alternative may be the undoubted negligence of leaving the door open. In *Catherall* v. *Mersey Ry. Co.*, 3 Times L. R. 508, where the question was twisted into an inquiry whether the plaintiff had put his hand in an unreasonable place, the hinge of a door that was immediately to be shut, which was solved by Mathew, J., thus: "It could not be unreasonable for the plaintiff to put his hand where he did, if he had no reason to expect the porter would act as he did," an aphorism of some obscurity, and involving several illicit assumptions. In *Cohen* v. *Metropolitan Ry. Co.*, 6 Times L. R. 146, the plaintiff was nonsuited on the ground that "in the Metropolitan Railway especially persons must be taken not to be leaving their fingers in danger."

[1] [1901] 2 K. B. 322.
[2] 6 Times L. R. 146.
[3] L. R. 4 C. P. 739.
[4] Per Brett, J., *Gee* v. *Metropolitan Ry. Co.*, L. R. 8 Q. B. 176.
[5] 1 Stark. (N. P.) 495. *Ante*, 48.

by the misconduct of another person in such a situation that he has to adopt one or other course of a perilous alternative, the person whose misconduct occasions the risk is responsible for the consequences of the course that the imperilled person takes. The Court failed to find evidence that the plaintiff was placed in such a situation, or that he was justified in undertaking the peril he voluntarily encountered; and held another principle applicable, that where a person in a position of entire safety voluntarily undertakes an act dangerous in itself in order to obviate a slight inconvenience from which he suffers, any injury he may sustain is not to be attributed to those whose act occasioned the slight inconvenience.

Principles applied by the Court to the decision of the case.

Brett, J.'s, comment on this in the Exchequer Chamber, in *Gee* v. *Metropolitan Ry. Co.*,[1] is: "I think if that case were to come into a court of error, I should be prepared now to say that, although the rule laid down was right, yet its application to the circumstances was wrong." The case rests on an assumption that the plaintiff "was obviously doing what was dangerous." Something more, then, than shutting a carriage door from the inside while a train is in motion must have been involved, for the Court could never have decided that merely to do this was dangerous; and, when it became a question of the manner of doing it, it would appear to be a question not to be lightly removed from a jury.

Brett, J.'s, subsequent expression of opinion in *Gee* v. *Metropolitan Ry. Co.*

However that may be, *Adams* v. *Lancs. & Y. Ry. Co.*[2] was greatly discredited in the Exchequer Chamber in *Gee* v. *Metropolitan Ry. Co.*[3] Plaintiff, a passenger on the Metropolitan Railway, in the course of the journey got up from his seat, put his hand on a bar that passed across the window of the carriage, and leant forward to look out, when the door flew open, and the plaintiff fell out and was injured. The plaintiff having obtained a verdict, a rule *nisi* to enter a nonsuit was discharged by the Court of Queen's Bench, whose decision was affirmed by the Exchequer Chamber. The principle applicable is put by Kelly, C.B.: [4] "Any passenger in a railway carriage, who rises for the purpose either of looking out of the window, or of dealing with, and touching, and bringing his body in contact with the door for any lawful purpose whatsoever, has a right to assume, and is justified in assuming, that the door is properly fastened; and if, by reason of its not being properly fastened, his lawful act causes the door to fly open, the accident is caused by the defendants' negligence." [5]

Gee v. *Metropolitan Ry. Co.*

Statement of the principle applicable by Kelly, C.B.

Passenger sitting with his arm out of window.

The apparently simple question of whether a passenger is disentitled to recover by reason of contributory negligence for an injury received through sitting with his arm out of window has been the occasion for great divergence in the American decisions

Pennsylvanian decisions.

On the one hand, the Pennsylvanian Courts [6] have held that the carrier is responsible for injuries received by a passenger in such circum-

1 L. R. 8 Q. B. 177. *Warburton* v. *Midland Ry. Co.*, 21 L. T. (N. S.) 835, and *Richards* v. *G. E. Ry. Co.*, 28 L. T. (N. S.) 711, are cases of imperfectly fastened doors. As to the fall of a window into its socket, *Murray* v. *Metropolitan District Ry. Co.*, 27 L. T. (N. S.) 762.

2 L. R. 4 C. P. 739.

3 (1873) L. R. 8 Q. B. 161; *Hamer* v. *Cambrian Ry. Co.*, 2 Times L. R. 508 (C. A.).

4 L. R. 8 Q. B. 171.

5 In *Dudman* v. *North London Ry. Co.*, 2 Times L. R. 365, the Court of Appeal held that there was evidence to go to a jury of negligence in a railway company where two boys were playing in a railway carriage, when the plaintiff, one of the boys, to avoid a blow, jumped up against the carriage door, which flew open, so that he fell out. Cp. the American case of *Peverly* v. *City of Boston*, 136 Mass. 366, and the Scotch case, *Cassidy* v. *North British Ry. Co.*, 11 Macph. 341.

6 *New Jersey Rd. Co.* v. *Kennard*, 21 Pa. St. 203.

stances, where the roof is so narrow as to endanger projecting limbs, unless the windows of the cars are so barricaded with bars as to render it impossible for the passenger to put his limbs outside the window.

On the other hand, the Massachusetts Courts [1] have adopted the rule that if a passenger's elbow extends through the open window beyond the place where the sash would have been if the window had been shut, the passenger's conduct would indicate such carelessness as to disentitle him from recovering. Massachusetts decisions.

The point has not arisen in England, where there is no reason to doubt that, should it, the Massachusetts rule would be adopted.[2] Probable English view.

In Scotland no right to recover was held to exist on the part of the representatives of a woman, who, seized by sudden illness, put her head out of the window of a railway carriage and was struck and killed by a mail-bag hanging on an apparatus supplied and erected at the side of the railway by the Postmaster-General, to whom the railway company were bound by statute to give all reasonable facilities for the delivery of mails. The majority of the jury had, however, negatived the claim, and the case must not be stretched to the length of inferring that in all cases a passenger thrusting his head out of window will be disentitled to recover in the event of injury happening to him through doing so. A railway constructed with projections which prevent passengers in any circumstances putting their heads out of the carriage windows and acting in the nature of a trap would probably be held so negligently constructed as to give a passenger injured thereby a right of action in respect thereof. This was pointed out by Lord Adam, who directed the jury,[3] that "by the Act of Parliament the railway company were bound to give all reasonable facilities at their stations to Her Majesty's officers with reference to these matters, and the question came to be, whether, when Her Majesty's Postmaster-General demanded that the railway company should allow the erection of this machine, it was a reasonable facility that they were bound to give; that was the question, I think, for the jury." "I told the jury that if they thought it was a source of danger to the public, the railway company had no right to allow it to continue where it was, and I told them further that the question was whether the railway company, in giving permission to Her Majesty's Postmaster-General to erect this apparatus, were or were not giving a reasonable facility which they were bound to give, or, in other words, whether the railway company ought to have refused to allow the erection of this apparatus when it was erected some thirty years ago." On the other hand, the same case is an authority for the proposition that there is no duty on a railway company to construct their line so as to afford passengers a right of lolling out of window.[4] Scotch decision. Case considered. Lord Adam's direction to the jury.

Notice should here be taken of a *dictum* of the Lord Chancellor (Cairns) in *Metropolitan Ry. Co.* v. *Jackson*: [5] "The officials"—*i.e.*, of Railway officials not bound to prevent intending passengers opening the carriage doors to see if there is room.

[1] *Todd* v. *Old Colony, &c. Rd. Co.*, 89 Mass. 207. See *Dun* v. *Seaboard, &c. Rd. Co.*, 49 Am. R. 388, a Vermont case to the same effect. The point was decided the other way in *Summers* v. *Crescent City Rd. Co.*, 34 La. Ann. 139.

[2] Since the above was in type *Simon* v. *London General Omnibus Co.*, 23 Times L. R. 463, and *Hase* v. *The same*, 23 Times L. R. 616, have been decided in accordance with the above forecast. *Ante*, 550.

[3] *Pirie* v. *Caledonian Ry. Co.*, 17 Rettie, 1166

[4] *Pirie* v. *Caledonian Ry. Co.* is important for another point which was there considered very fully, viz., the inadmissibility of the evidence of jurymen to show that the verdict does not correctly express the result at which they have arrived.

[5] 3 App. Cas. 198. Cp. *Camden Rd. &c. Co.* v. *Hoosey*, 99 Pa. St. 492. See also two cases, *Hogan* v. *S. E. Ry. Co.*, 28 L. T. (N. S.) 271, and *Cannon* v. *Midland G. W. Ry. (Ireland) Co.*, 6 L. R. Ir. 199, where accidents happened through unusual crowding on platform.

a railway company—" cannot, in my opinion, he held hound to prevent intending passengers on the platform opening a carriage door with a view of looking or getting into the carriage."

Passenger not negligent in not foreseeing unusual movements.

A passenger is not negligent in not foreseeing movements which are not common in the business as ordinarily carried on, though with the particular carrier they may he habitual. Thus, in *Gordon* v. *Grand Street, &c. Rd. Co.*,[1] plaintiff, seeing a car coming towards her at the terminus of a tram company, went to enter it, when the car, being transferred from one line to another hy means of a movable slide, her foot was caught and she was seriously injured, As no one without previous knowledge could he expected to provide against the contingency of this sidelong movement, a duty of greater care and circumspection was held to he imposed on the company resorting to such a method. " Care," says the learned judge who delivered the judgment of the Court,[2] " in avoiding danger implies that there is or would he with all prudent persons a sense, or something to create a sense, of danger ; for if the circumstances are not such as would put a prudent and cautious person upon his guard, the omission to exercise more than ordinary attention is not the negligence which contributes to an accident."

Company not bound to anticipate extraordinary pressure.

As with the provision of railway porters at a station,[3] so with the provision of accommodation for passengers a company is not hound to anticipate extraordinary pressure. In a ferry-boat case,[4] where a passenger was injured hy being thrown down in the hoat consequent on its humping against a bridge, the negligence alleged against the proprietor of the ferry was that he had not provided seats enough for all the passengers whom he was transporting. But his duty was held to extend no further than to provide seats " customary and sufficient for those who ordinarily preferred to he seated while crossing," [5] and till failure in this respect was shown no liability arose.

Loss primarily due to carelessness of a passenger does not affect the company with liability.

A loss primarily due to the carelessness of the passenger will not affect the company with liability where no duty is neglected hy them, though their refusal to act on the application of the passenger may he the cause of considerable loss which had else heen avoided. Thus a lady passenger, while attempting to shut the window of the carriage in which she was travelling, dropped a bag containing valuables which she had in her hand. The guard refused to stop the train before it arrived at the next station, and in consequence the bag and its contents were lost. The company were sued; but the Court were of opinion that even though no negligence were attributable to the passenger in attempting to shut the window with the bag in her hand, yet the dropping the bag out of the window was not an act the defendants were hound to foresee or guard against ; and further that she had no legal right for the purpose of relieving herself from the consequences of her conduct to require them to stop the train short of a usual station to the delay and inconvenience of other passengers and the possible risk of collision with other trains.[6]

Cobb v. *G. W. Ry. Co.*

Considerations such as these greatly assist in solving such a case as *Cobb* v. *G. W. Ry. Co.*,[7] where the plaintiff was robbed while travelling

[1] 40 Barb. (N. Y.) 546. [2] *L.c.* 550.

[3] *Metropolitan Ry. Co.* v. *Jackson*, 3 App. Cas. 205, that is when no more than ordinary traffic is to be anticipated.

[4] *Burton* v. *West Jersey Ferry Co.*, 114 U. S. (7 Davis) 474.

[5] *L.c.*, per Harlan, J., 476.

[6] *Henderson* v. *Louisville and Nashville Rd. Co.*, 123 U. S. (16 Davis) 61. In the case of a person falling out of a train it would be otherwise.

[7] [1893] 1 Q. B. 459 ; in H. of L. [1894] A. C. 419.

in one of the defendants' trains by a gang of men who had entered the carriage where he was. The plaintiff forthwith complained to the station-master and he refused to detain the train to permit the plaintiff to give the men into custody, and have them searched. The breach of duty alleged was that immediately on the plaintiff's complaint being made to the station-master "he negligently and improperly, and in breach of the duty owed by the defendant company to the plaintiff as a passenger on their line, to protect him in person and property, and to oppose no obstacle to his recovering the property whereof he had while on their line been wrongfully deprived, gave the signal for the said train to leave and it left accordingly; and the plaintiff was thereby prevented, without any negligence on his part, from having the said men searched and his aforesaid property recovered." There was another claim based on the company's negligence in allowing the carriage to be overcrowded "and so facilitating the hustling and robbing of the plaintiff." This last may be at once disposed of by reference to the well-recognised principle: "Every one has a right to suppose that a crime will not be committed and to act on that belief,"[1] so that a loss arising from a robbery is not a direct and natural consequence of the breach of obligation not to crowd a carriage.[2] The matter then must be dealt with on the assumption that the defendants were not guilty of negligence in respect of anything directly pertaining to the contract of carriage. They were not responsible for the robbery; yet it was urged they were responsible for doing nothing to recover the proceeds of the robbery. But as Bowen, L.J., points out, there was no allegation of any act done which *hindered* the plaintiff—a line of conduct involving different consequences; the gravamen of the charge was a mere refusal to act. To support this a duty to act must be shown. The duty they undertook was to carry the plaintiff safely, and this duty they had performed. No term can be implied in a contract of carriage to make pursuit of thieves. If then the company, as seems undoubted, were not responsible for the robbery, neither were they bound to make pursuit of the thieves, or to impede the working of their system to aid one of their passengers in pursuing robbers. "Whatever was done to him" [the plaintiff], says Lord Esher, M.R.,[3] "was done and over;" the robbery was finished when he complained to the station-master, and the robbery being over without any duty being arised against the company, there was nothing to show any new duty subsequently constituted. The language of Chalmers, J., in *New Orleans, St. Louis, and Chicago Rd. Co.* v. *Burke*,[4] was urged as meeting the case. But that, as pointed out by Lord Esher, M.R.,[5] referred to the duty to protect a passenger whom they had notice was being assaulted by fellow passengers. In the case before the Court the duty asserted was the arrest of those of whose wrongdoing the company had no notice before its completion. In the House of Lords the decision was affirmed[6] on the ground that, in the words of Lord Selborne,[7] "taking it in the manner most favourable to the plaintiff, I cannot myself hold that starting the train in the ordinary course was 'opposing an obstacle to the recovery of the plaintiff's property' of such a kind as to make the company responsible in the same way as if their

Opinion of Bowen, L.J.

Opinion of Lord Esher, M.R.

[1] *Baxendale* v. *Bennett*, 3 Q. B. D., per Bramwell, L.J., 530.
[2] *Metropolitan Ry. Co.* v. *Jackson*, 3 App. Cas. 193.
[3] [1893] 1 Q. B. 463.
[4] 24 Am. R. 689.
[5] [1893] 1 Q. B. 461.
[6] [1894] A. C. 419.
[7] *L.c.* 425.

negligence had caused or contributed to the robbery. If it was a duty to give opportunity for the arrest and search of the persons charged with the crime, that was, in my opinion, not a duty of the company to the plaintiff as a passenger on their line, but a duty to public justice, for failure in which, by one of their station-masters or any other person in their employment, the company are not liable in an action for damages."

Chalmers, J., in *New Orleans, St. Louis, and Chicago Rd. Co.* v. *Burke.*

On the important matter of the right and duty of the officers of a railway to preserve order thereon, some extracts may be made from the admirable judgment of Chalmers, J., in the above-cited case of *New Orleans, St. Louis, and Chicago Rd. Co.* v. *Burke.* If, says the learned judge,[1] an officer of a railway in charge of a train "sees one passenger making upon another an assault, unprovoked at the time, he may command the peace, and without regard to the merits of the quarrel compel it, if necessary, by an ejection of the unruly party. In so doing he decides nothing as to the merits of the quarrel and will no more be liable for an honest and impartial mistake than a police officer would be under similar circumstances. . . . But if he may do this voluntarily at his option, is he not compelled to do it when requested by those for whose benefit the power has been conferred upon him? Powers and duties are usually reciprocal, and may be said to be uniformly so when the power is of a public, official character conferred for the benefit of others. The failure or refusal of the official to exercise such a power in a proper case, when called upon by those for whose protection he has been invested with it, amounts to negligence or to wilful misconduct as the circumstances of the case may indicate.[2] . . . We conclude then, that the undoubted power which is vested in railroad officials to preserve peace and good order on their trains, and, if necessary for this purpose, to eject therefrom turbulent and disorderly persons, carries with it the absolute duty to exercise the power, when called on so to do in a proper case, by the other passengers; that a failure to discharge this duty stands, to some extent, upon the same footing as the omission to perform any other official duty, and upon the maxim, *Respondeat superior*, renders the Corporation liable."

Pounder v. *N. E. Ry. Co.*

The principles thus forcibly enunciated are in direct opposition to those which prevailed in *Pounder* v. *N. E. Ry. Co.*[3] There the question raised was whether there is a duty on a railway company to use the means they have available for the safeguarding a passenger after receiving notice of a danger likely to happen to such passenger while actually travelling on their line, notwithstanding that the danger to which he is exposed arises from circumstances peculiar to him personally, and is not communicated to the railway company till *after* the passenger has taken his ticket. A Divisional Court (Mathew and Smith, JJ.) held there was no such duty, because the duty of a railway company to its passengers "arises out of the contract, and

[1] 24 Am. R. 695.

[2] That in England the servants of a railway company have power and also a duty to preserve order, is clear from *Jackson* v. *Metropolitan Ry. Co.*, 3 App. Cas. 193. That where there is a power there is also an absolute duty to exercise the power when called on by those entitled to the benefit of its exercise, is plain: *Julius* v. *Bishop of Oxford*, 5 App. Cas. 214. See per Lord Blackburn, 244: "The enabling words are construed as compulsory whenever the object of the power is to effectuate a legal right." "One *private person* has no right to give another in charge after the disturbance has ceased": per Lord Campbell, *Price* v. *Seeley*, 10 Cl. & F. 34.

[3] [1892] 1 Q. B. 385. So are those in *Adderley* v. *G. N. Ry. Co.*, [1905] 2 I. R. 378.

must be determined upon the facts known to the contracting parties at the time of the making of the contract." [1]

The plaintiff, who was personally obnoxious to certain people in his neighbourhood, was assaulted by some of them who got into the carriage in which he was travelling on the defendants' line. He applied for assistance to their servants, who refused to help or protect him.

Obligation of the railway company to the plaintiff.

On these facts it may be accepted that the plaintiff's contract with the railway company was the ordinary contract to carry safely; [2] and the duty they thus undertook is unvarying in the case of all passengers.[3] The circumstance that he needed, as things turned out, exceptional protection did not operate to deprive him of any protection. The defendants refused to use the means of protection at their disposal, because the plaintiff was personally objectionable to others of their passengers; that is, if the company had known less about him they would have protected him, but because they knew more they refused him the ordinary means they had available.

The authorities are overwhelming in holding—to state the point in the words of Blackburn, J.—"that the right which a passenger by railway has to be carried safely does not depend on his having made a contract, but that the fact of his being a passenger casts a duty on the company to carry him safely." [4]

Flint v. *Norwich and New York Transportation Co.*

The rule in the United States may be added: [5] "The defendants were bound to exercise the utmost vigilance and care in maintaining order and guarding the passengers against violence from whatever source arising, which might reasonably be anticipated or naturally be expected to occur in view of all the circumstances, and of the number and character of persons on board." [6]

Smith, L.J.'s, comment on *Pounder* v. *N. E. Ry. Co.* in *Cobb* v. *G. W. Ry. Co.*

In *Cobb* v. *G. W. Ry. Co.*,[7] when Smith, L.J., took occasion to mention *Pounder* v. *N. E. Ry. Co.*, his remark was that he was still of the opinion he was when that case was decided that "it is not the natural consequence of such negligence [the overcrowding of carriers] that a passenger should be assaulted by an independent tort-feasor." [8] There could never have been any doubt of this since the decision of *Metropolitan*

[1] The error is the same that Mathew, J., fell into in *Meux* v. *G. E. Ry. Co.*, 11 Times L. R. 315, and which was corrected in the C. A., [1895] 2 Q. B. 387.

[2] "If," says Lord Campbell, C.J., in *Collett* v. *L. & N. W. Ry. Co.*, 16 Q. B. 989, "they" (*i.e.*, the railway company) "are bound to carry they are bound to carry safely." Cp. *Rose* v. *Hill*, 2 C. B. 877; and per Lord Halsbury, C., *East Indian Ry. Co.* v. *Kalidas Mukerjee*, [1901] A. C. 402.

[3] *Ante*, 958.

[4] *Austin* v. *G. W. Ry. Co.*, L. R. 2 Q. B. 445. The line of uniform authorities (see preface to 9 R. R.) starts, in 1817, with *Ansell* v. *Waterhouse*, 2 Chitty (K. B.) 1, where Bayley, J., says at 3: "Declarations against carriers in tort are as old as the law, and continued till *Dale* v. *Hall* (1 Wils. (C.P.) 281), when the practice of declaring in assumpsit succeeded; but the practice does not supersede the other," and goes down to 1880, in *Foulkes* v. *Metropolitan District Ry. Co.*, 5 C. P. D. 164, where Baggallay, L.J., says: "Irrespective of any such questions," *i.e.*, whether there was a contract, "a duty or obligation was imposed upon the District Company, when they accepted the plaintiff as a passenger by their train, not only to carry him safely," &c.; and Thesiger, L.J., says: "The responsibilities are not directly founded on contract." See also *Readhead* v. *Midland Ry. Co.*, L. R. 2 Q. B. 412; *Wilkinson* v. *Lindo*, 3 B. & B. 54 (Ex. Ch.), and *Marshall* v. *The York, Newcastle, and Berwick Ry. Co.*, 11 C. B. 655, also *ante*, 746 and 970, and the United States case of *Hannibal Rd.* v. *Swift*, 12 Wall. (U. S.) 262, 270. The Regulation of Railways Act, 1868 (31 & 32 Vict. c. 119), s. 22, has also no little bearing on the duty of railway companies in circumstances similar to those in the case discussed in the text.

[5] *Flint* v. *Norwich and New York Transportation Co.*, 34 Conn. 557, affirmed in the Supreme Court of the United States, 13 Wall. (U. S.) 3.

[6] *Pounder* v. *N. E. Ry. Co.* is discussed in an article in the Law Magazine (4th ser.), vol. xviii. 49.

[7] [1893] 1 Q. B. 459.

[8] *L.c.* 465.

Ry. Co. v. *Jackson* [1] more than fourteen years previously; and so far as criticism of *Pounder's case* has gone it has never been, and is not likely to be, questioned. The debated point in *Pounder* v. *N. E. Ry Co.*,[2] whether the plaintiff was entitled to such protection as the company could afford when they had notice of the danger to which the plaintiff was exposed in their train, Smith, L.J., does not touch, despite the allusions to it by Lord Esher, M.R.[3]

Lord Selborne's opinion on *Pounder* v. *N. E. Ry. Co.* in *Cobb* v. *G. W. Ry. Co.* in the House of Lords

In *Cobb* v. *G. W. Ry. Co.*,[4] in the House of Lords, the plaintiff's argument seems to have laid stress on the circumstance that *Pounder's case* was relied on by judges in the Courts below as authority for the decision in *Cobb's case*, and reasoning from the unsoundness of that decision it was sought to impugn the decision in *Cobb's case*. Referring to this Lord Selborne said: [5] "How far they (Collins, J., and Smith, L.J.) may have considered it an authority to govern the case before them, I cannot say; but for my own part, if I thought it necessary in the present case to consider the correctness of that decision, I doubt whether I should be prepared to follow it. . . . I am unable at present to see a distinction satisfactory to my own mind, between such a case and that which the Master of the Rolls justly distinguished from the present, when he said that (in this case) it 'was not alleged that the plaintiff was being ill-used or assaulted in the train, and that the fact being known to the defendants' servants, they did not interfere to prevent it.'" [6]

Blain v. *Canadian Pacific Ry. Co.*

Pounder's case was very fully considered in the Canadian courts in *Blain* v. *Canadian Pacific Ry. Co.*[7] A passenger from motives of private animosity savagely assaulted another passenger in one of the defendants' trains. Requests to the company's officer to afford such protection as was within his power were refused, and two other distinct and subsequent assaults were made. The plaintiff brought his action in respect of the assaults. Falconbridge, C.J., charged the jury [8] that the conductor "had the right to preserve order on the train and if necessary to eject therefrom persons in a state of intoxication, riotous or disorderly persons, or persons infringing the reasonable rules of the company; that such being his right, it was his duty to exercise that right with reference to the comfort and safety of the passengers under his charge; that he might enforce order and maintain peace in his train with such force as he deemed necessary even to the ejection of the unruly person; that he was responsible only for the fair and careful discharge of the duty cast upon him; that it was not necessary in order to fix liability on the defendants to find that the conductor must have seen the assault; that liability might arise if the person who claimed to have been attacked brought home to the conductor knowledge or the opportunity of knowing, that an injury was threatened to a passenger, and that further trouble might be anticipated, or made it apparent that the conductor could by prompt intervention have prevented, or at any rate have mitigated, the second and third assaults." "The law required nothing unreasonable, but the law did require that the conductor should act reasonably." The jury found negligence against the defendants and awarded damages in respect of the three

[1] 3 App. Cas. 193. [2] [1892] 1 Q. B. 385.
[3] The allusions to *Pounder's case* by Lord Esher, M.R., are [1893] 1 Q. B. 461 and 463.
[4] [1894] A. C. 419. [5] *L.c.* 423.
[6] Lord Morris, however, said: "As at present advised I should not be disposed to dissent from it," *i.e.*, *Pounder* v. *N. E. Ry. Co.*: [1894] A. C. 426.
[7] 5 Ont. L. R. 334; 34 Can. S. C. R. 74. [8] 5 Ont. L. R. 339.

assaults. The verdict was upheld on appeal to the Court of Appeal for Ontario.[1]

In the Supreme Court of Canada,[2] Sedgewick, J., delivering the judgment of the Court, said: "We are of opinion that the following statement in 5 Am. & Eng. Ency. 553, embodies the correct rule upon the question in controversy: 'Whenever a carrier through its agents or servants knows or has the opportunity to know of the threatened injury, or might reasonably have anticipated the happening of an injury, and fails or neglects to take the proper means to prevent or mitigate such injury, the carrier is liable.'" The decision in *Pounder's case* was dissented from, and the judgments below were affirmed; but as the defendants had no reason to anticipate the first assault being made on the plaintiff, damages in respect of that were not recoverable, but they were in respect of the second and third assaults. In the Supreme Court of Canada.

The Privy Council was then moved to grant special leave to appeal[3] but without success. Lord Davey, however, read out with approbation the passage cited above from the American Encyclopædia as embodying the correct principle. The fact that the danger impending is extraordinary does not justify a railway company in inaction. If they have not at hand the means of grappling effectually with the danger they are not on that score entitled to refrain from using what means they have.[4] Application to the Privy Council.

Lord Hatherley, C., sums up the company's duty as to their passengers in *Daniel* v. *Metropolitan Ry. Co.*:[5] "They are bound to see that everything under their own control is in full and complete and proper order. They are bound to see, also, if there be a certain and definite risk as to which they have any knowledge or can reasonably be supposed to have any knowledge that it is sufficiently guarded against. For instance, a trench may be dug across a road through no fault of theirs, and in such a case they could not be held liable; but if there is any ground for apprehending that extraordinary precaution is wanted, they would be liable." Lord Hatherley, C., in *Daniel* v. *Metropolitan Ry. Co.*

Alighting from or getting on a vehicle while in motion is in itself an act of neutral complexion. The circumstances may show it to be either negligent or careful.[6] Thus if, as appears to be the case in some parts of America,[7] there is a practice for the drivers of horse-cars not to come to a full stop to take up or put down male passengers, the act of getting on a car while in motion would not be such contributory negligence as would disentitle the intending passenger to recover; neither, on the other hand, would the failure to stop and the fall of the passenger be evidence of such negligence as would enable him to recover.[8] Again, if the conductor directed or advised a Alighting from or getting on a vehicle while in motion.

[1] 5 Ont. L. R. 334. [2] 34 Can. S. C. R. 74, 79.

[3] [1904] A. C. 453. The fact of the reading of the extract from the Encyclopædia is derived from the shorthand report *penes me*.

[4] *Pittsburg, &c. Ry. Co.* v. *Hinds*, 53 Pa. St. 512; *Lambkin* v. *S. E. Ry. Co. of Canada*, 5 App. Cas. 352. [5] L. R. 5 H. L. 55.

[6] *Louisville, &c. Rd. Co.* v. *Crunk*, 12 Am. St. R. 443.

[7] Shearman and Redfield, Law of Negligence, § 519, citing *Evansville, &c. Rd. Co.* v. *Duncan*, 28 Ind. 441, and *Phillips* v. *Rensselaer, &c. Rd. Co.*, 49 N. Y. 177, 182; where it is added, "but should he make the attempt and fail [to get on the car], and then hang on, running outside of the car until he came in collision with a vehicle, the case would be different;" but the contrary was held in *Ginnon* v. *Harlem Rd Co.* 3 Robertson (Sup. Ct. N. Y.), 25.

[8] This was held by the Queen's Bench Division in *Baird* v. *South London Tramways Co.*, 2 Times L. R. 756, on the ground that merely calling out the name of the place where the car was going to stop was no invitation to the passenger to alight; but was overruled by *Hall* v. *London Tramways Co.*, 12 Times L. R. 611. At any rate,

passenger to get on or off a car while moving at a moderate pace, and the passenger, acting on the advice, fell and was injured, the passenger would not be disentitled by reason of his act.[1] And so in other cases that may be put; the mere act may be indifferent, and the complexion is put upon it by the circumstances.

Passenger on tramcar.

In travelling on a tramcar it is the duty of the passenger to place himself in a safe position in that portion of the car set apart for passengers. It is no excuse for his placing himself in an unsafe or unusual position when the unsafeness is known to the passenger that the driver or the conductor does not dislodge him therefrom. Thus the footboard of a car is not a proper place for passengers to ride on, and obviously less safe than a seat inside. If the passenger makes reasonable efforts to get inside the car, and fails to do so, and is in these circumstances permitted to ride on the platform, he is not unlawfully there; as where the conductor takes his fare in that position when it is impossible for him to get another place; then in the event of injury he can recover, but probably not before payment of his fare if he has taken his place without the knowledge of the conductor.[2] A tram company will be held liable for injury resulting from a drunken man being allowed on the car by the conductor.[3] "What," says Lord Ashbourne, C.,[4] "is the duty of the conductor when an intoxicated man tries to force his way into a tramcar? To keep him out. If he tries to force his way whilst the tramcar is in motion—what is his duty? . . . Is it not his duty, avoiding reckless and intemperate action, to use all fair efforts to keep him out?"

Tram conductor kicking boy off street car.

Where the conductor of a street car, kicking at a boy trespassing on the platform of a car caused him to jump off the car and fall before another car, whereby he was injured, the company were held liable to answer.[5] What perhaps is more to the point is that in similar case they would be held liable in England; for it is not the violence of the act, nor even the irregularity of it, which determines whether it is within the scope of the servant's authority, but the motive which induces it; whether it was done with a view to advance the master's interest

it is some evidence to go to the jury. In *Briggs* v. *Union Street Ry. Co.*, 148 Mass. 72, 12 Am. St. R. 518, it was held not negligence as a matter of law to attempt to get on a tramcar going at the rate of about four miles an hour, even if it be known that the driver had not seen the signal to stop. See a note to the case as cited from the American State Reports.

[1] Shearman and Redfield, Negligence, § 520; *Filer* v. *New York Central Rd. Co.*, 49 N. Y. 42, 59 N. Y. 351, 68 N. Y. 124; *Pennsylvania Rd. Co.* v. *Kilgore*, 32 Pa. St. 292; *Burrows* v. *Erie Ry. Co.*, 63 N. Y. 556.

[2] *Clark* v. *Eighth Avenue Rd. Co.*, 36 N. Y. 135; *Caldwell* v. *Murphy*, 1 Duer (Sup. Ct. N. Y.), 233, where a passenger was on the top of an omnibus where there were seats for passengers provided; *Keith* v. *Pinkham*, 43 Me. 501, 504, where it is said: "It may be true that the plaintiff, by riding outside, incurred the peculiar risks, if any there were, arising from his exposed situation. But that is all. He did not assume those resulting from the negligence of the defendant or those in his employ." See also *Camden and Atlantic Rd. Co.* v. *Hoosey*, 99 Pa. St. 492.

[3] *Murgatroyd* v. *Blackburn and Over Darwen Tramway Co.*, 3 Times L. R. 451; *Delany* v. *Dublin United Tramways Co.*, 30 L. R. Ir. 725, *ante*, 146. As to what is an "impending danger" from a tram-engine, *Downing* v. *Birmingham and Midland Trams*, 5 Times L. R. 40. In *Annand* v. *Aberdeen District Tramways Co*, 17 Rettie, 808, a tramway company was held liable for the negligence of the driver of a tramcar going on, before a woman with a clothes-basket on the front of the car, and who was allowed to have it there by the regulations of the company, had time to remove it.

[4] *Delany* v. *Dublin United Tramways Co.*, 30 L. R. Ir. 743.

[5] *McCann* v. *Sixth Avenue Rd. Co.*, 117 N. Y. 505, 15 Am. St. R. 539. Cp. *Biddle* v. *Hestonville, &c. Ry. Co.*, 112 Pa. St. 551. The contract of carriage terminates so soon as the passenger of his own accord leaves the car; *Central Ry. Co.* v. *Peacock*, 9 Am. St. R. 425.

and was within the class of acts which might be done. The starting of a car while the passenger is alighting is *primâ facie* evidence of negligence.[1]

Duty of a tramcar driver.

The duty of a tram-car driver is, so it is said in an American case,[2] "to keep entire control of his team as far as practicable; to be in a position to speedily apply the brake; and to be vigilant in observing the track, so as to enable him, as far as practicable, to avoid inflicting injury upon others." But this specification must not be taken as exhaustive.

Regulation of Railways Act, 1868, two provisions. I. Arbitrator to determine claim to compensation. II. Order for personal examinations.

With regard to persons injured by an accident on a railway, the Regulation of Railways Act, 1868,[3] makes two important provisions. The first,[4] which is rarely resorted to, enables the Board of Trade, upon the application in writing of the company from whom compensation is claimed, and the person claiming compensation if he is injured, or his representatives if he is killed, to appoint an arbitrator who shall determine the claim to compensation. The second,[5] which is constantly made available, provides for the making an order that the person injured may be examined by a "duly qualified medical practitioner named in the order and not being a witness on either side." Outside this enactment there appears to be no power to order an examination of a person injured [6] and whose injuries are the subject of legal proceedings; though the strong comment that a refusal to submit to examination would elicit at the trial is a considerable safeguard against the want of such a power working practical injustice.

Passengers' Luggage.

The liability of common carriers of passengers for the luggage of their passengers remains to be considered.

Early law. Carriers of passengers were not liable for luggage.

The law on this subject seems to have undergone a complete revolution. In the earliest cases it was twice held by Holt, C.J., that carriers of passengers were not liable for the luggage of their passengers, unless a distinct price was paid for it.[7] These decisions were probably due to the requirements of the mode of carriage in use in the time of Holt, C.J.[8]

View of the law taken in *Robinson* v. *Dunmore*.

In *Robinson* v. *Dunmore*,[9] the result was different; for there Chambre, J., held that "if a man travel in a stage-coach and take his portmanteau with him, though he has his eye upon the portmanteau yet the carrier is not absolved from his responsibility, but will be liable if the portmanteau be lost," which, says Willes, J., in *Talley* v. *G.W. Ry. Co.*,[10] "has been considered by eminent authorities to be in general

1 *Birmingham Union Ry. Co.* v. *Hale*, 24 Am. St. R. 748.

2 *Mangam* v. *The Brooklyn Rd. Co.*, 38 N. Y. 455, 456.

3 31 & 32 Vict. c. 119. 4 By sec. 25. 5 By sec. 26.

6 The English common law is exhaustively considered in *Union Pacific Ry. Co.* v. *Botsford*, 141 U. S. (34 Davis) 250, where it is decided that a Court of the United States cannot order a plaintiff in an action for injury to the person to submit to a surgical examination before the trial. See also *Alabama, &c. Rd. Co.* v. *Hill*, 30 Am. St. R. 65, where an examination was had.

7 *Middleton* v. *Fowler*, 1 Salk. 282, *Upshare* v. *Aidee*, 1 Com. R. (K.B.) 25. The other extreme, where carriers were held liable for a hand-bag left in a street car, and which they did not hold themselves out to carry, but which when left they had, under a regulation, taken in charge, and without negligence handed over to one not entitled to receive it, is illustrated by *Morris* v. *Third Avenue Ry. Co.*, 1 Daly (N. Y.) 202.

8 Per Mellish, L.J., *Cohen* v. *S. E. Ry. Co.*, 2 Ex. D. 258.

9 2 B. & P. 419. 10 L. R. 6 C.P. 50.

equally applicable to railway carriages." The contract, however, was a special contract to "carry safely." Besides this, the fact that a passenger *sees* his luggage by no means argues that he has undertaken to look after it. Indeed, from certain places in coach travelling it would be impossible to avoid seeing luggage entirely in the charge of the carrier.[1]

Macrow v. *G. W. Ry. Co.*

By the time that *Macrow* v. *G. W. Ry. Co.*[2] was decided the law had changed completely round; for there Cockburn, C.J., says: "The law, however, is now too firmly settled to admit of being shaken, that the liability of common carriers in respect of articles carried as passengers' luggage is that of carriers of goods as distinguished from that of carriers of passengers."[3] In *Cohen* v. *S. E. Ry. Co.*,[4] again, the Court of Appeal decided that a passenger's luggage is "articles, goods or things" within the Railway and Canal Traffic Act, 1854.[5]

What is personal luggage?

This liability for personal luggage must obviously be limited by some ascertainable bounds. Nearly all the railway companies in their Acts have provisions limiting the weight and the bulk of the luggage that they are compelled to carry; but within the limits thereby marked out there have often occurred occasions of controversy. These are cited in the argument in *Hudston* v. *Midland Ry. Co.*,[6] where the inquiry was what is "ordinary luggage"—the words of the company's private Act—of a first-class passenger who was, by the regulations of the company, varying the wording of the company's private Act, allowed to carry "112 lbs. of personal luggage" free of charge. "The statute," says Lush, J.,[7] "speaks of 'ordinary luggage'; it must have been intended that the passenger should be allowed to carry something more than that which he requires for his own personal use and convenience. The only definition I can think of, and one which is sufficient for this case, is, that the words of the statute describe a class of articles which are ordinarily or usually carried by travellers as their luggage. That definition must also be taken to apply to the company's regulation because, when the company were fixing the description of goods for which they would consider the passenger had paid the carriage when he paid for his ticket, they must have had regard to the usual habits of mankind, and to that description of goods which is usually carried by passengers travelling."[8]

Hudston v. *Midland Ry. Co.*

Ordinary luggage.

[1] Cp. *Hannibal Rd.* v. *Swift*, 12 Wall. (U. S.) 262.

[2] (1871) L. R. 6 Q. B. 612, 618; *Dixon* v. *Richelieu Navigation Co.*, 15 Ont. App. 647.

[3] See *Munster* v. *S. E. Ry. Co.*, 4 C. B. N. S. 676; *Williams* v. *G. W. Ry. Co.*, 10 Ex. 15. The Carriers Act, 1830, applies to passengers' luggage; *Dyke* v. *S. E. & C. Rys. Managing Committee*, 17 Times L. R. 651; *The Stella*, [1900] P. 161; *Caswell* v. *Cheshire Lines Committee*, 23 Times L. R. 580.

[4] 2 Ex. D. 253, overruling *Stewart* v. *L. & N. W. Ry. Co.*, 3 H. & C. 135.

[5] 17 & 18 Vict. c. 31, s. 7. [6] L. R. 4 Q. B. 366. [7] *L.c.* 370.

[8] In *Cahill* v. *L. & N. W. Ry. Co.*, 13 C. B. N. S. 818; and in *Belfast Ry. Co.* v. *Keys*, 9 H. L. C. 556, merchandise for sale has been held not "personal luggage"; so in *Phelps* v. *L. & N. W. Ry. Co.*, 19 C. B. N. S. 321, were deeds and money of a client carried by a solicitor. In the argument are collected a number of cases deciding what is and what is not luggage, 19 C. B. N. S. 326. "That which one traveller," says Erle, C.J., in the last-cited case, 330, "would consider indispensable would be deemed superfluous and unnecessary by another. But the general habits and wants of mankind must be taken to be in the mind of the carrier when he receives a passenger for conveyance." In *Hudston* v. *Midland Ry. Co.*, L. R. 4 Q. B. 366, a spring-horse; a quantity of sheets, blankets, and quilts, in *Macrow* v. *G. W. Ry. Co.*, L. R. 6 Q. B. 612; pencil sketches of an artist, in *Mytton* v. *Midland Ry. Co.*, 4 H. & N. 615; a reasonable quantity of tools for a working watchmaker, *Kansas, &c. Rd. Co.* v. *Morrison*, 55 Am. R. 252; an invalid chair, in *Cusack* v. *L. & N. W. Ry. Co.*, 7 Times L. R. 452; a bicycle in *Britten* v. *G. N. Ry. Co.*, [1899] 1 Q. B. 243, were held not

Passengers' rights extended by the development of railway travelling.

The change in the mode of travelling from coach to railway has carried with it an extension of the rights of the traveller in relation to luggage proportioned to the increase of space and power available. Parliament has fixed the minimum limit of luggage that is to be allowed in the case of railway carriers, and has imposed an obligation to carry; but there is no such statutory limit with regard to stage-coaches nor any obligation to carry; and the smaller accommodation for luggage necessarily lessens the amount the passenger can be said to have carried. Still, the test applicable in the case of luggage loaded on a stage-coach need not, and probably does not, differ in kind from that which is applied in the case of a railway passenger. Regard must be had to the usual habits of mankind, the object and length of the journey, and to the description of goods which are usually taken by passengers of similar rank when travelling in that way. In addition, regard must be had to the capacity of the conveyance, and the number of persons who may reasonably be expected to avail themselves of its convenience for luggage.

As there is no statutory obligation on the part of a stage-coach proprietor to carry luggage, the terms of his profession may possibly be such that he declines to carry any. Whatever these terms may be, assuming that they are sufficiently communicated to intending passengers, they are binding.[1]

Where the terms of his profession involve the reception of luggage he does not carry as a gratuitous bailee for the accommodation of the passenger as a courtesy, but he carries for the reward which is paid for the carriage of the passenger and his luggage, and thus is a common carrier of goods for hire; that is, he is an insurer liable for losses happening from any causes except the act of God or the enemies of the State.

Onus of proving suitability of goods on the plaintiff.

The *onus* of proving that the goods carried are ordinary and personal luggage is on the plaintiff;[2] though in the absence of conduct on the part of the passenger misleading the carrier as to the value of his baggage, the Court cannot lay down as matter of law that the mere failure of the passenger unasked to disclose the value of his baggage is a fraud upon the carrier which will defeat all right of recovery.[3]

When in the custody of the carrier luggage does not differ in the amount of care it demands from ordinary merchandise.

Ordinary or personal luggage, when in the custody of the carrier, is regarded in the same light as goods entrusted to a common carrier. But,

(1) The passenger may exercise control over the luggage during the time of its conveyance;

(2) The luggage claimed to be conveyed may be of a different character from ordinary or personal luggage as it has just been defined; and,

(3) The luggage may not come into or pass from the custody of the carrier in his capacity of carrier.

These limitations we shall now consider in their order.

Three cases of variation from the rule. (1) When the passenger exercises control.

(1) The passenger may exercise control over the luggage during the time of its conveyance.

"personal luggage." See also *Bruty* v. *Grand Trunk Ry. Co.*, 32 Upp. Can. Q. B. 66. Dr. Thompson, Negligence, devotes twelve sections, §§ 3414–3425, to setting forth what has been decided to be or not to be "baggage."

[1] *Hannibal Rd.* v. *Swift*, 12 Wall. (U. S.) 262; *Railroad Co.* v. *Fraloff*, 100 U. S. (10 Otto) 21.

[2] *Elwell* v. *Grand Junction Canal Co.*, 5 M. & W. 369.

[3] *Railroad Co.* v. *Fraloff*, 100 U. S. (10 Otto) 24.

Le Conteur v. L. & S. W. Ry. Co.

In *Le Conteur* v. *L. & S. W. Ry. Co.*,[1] the plaintiff, who had just landed at Southampton from the Jersey boat, and who was to be carried to London, went with a chronometer in his hand to a railway carriage going to London, and gave the chronometer to a porter of the defendant, who then, in the presence of the plaintiff, placed it on the seat of the carriage. Both the porter and the plaintiff immediately after this left the platform together, the porter to attend to his other work and the plaintiff to see after the rest of his luggage. When the plaintiff returned in a few minutes the chronometer had gone, and was not recovered. "It is not," said Cockburn, C.J.,[2] "because the article that is part of the passenger's luggage to be conveyed with him is, by the joint consent of the passenger and the company, placed in a carriage with him that the company are necessarily released from their obligation to carry safely. Nothing could be more inconvenient than that the practice of placing small articles, which it is convenient to the passenger to have with him in the carriage in which he is about to ride, should be discontinued; and if the company were, from the mere fact of articles of this description being placed in a carriage with a passenger, to be at once relieved from the obligation of safely carrying such articles, it would follow that no one who has occasion to leave the carriage temporarily would be able to have them with him with any degree of safety. I cannot think, therefore, we ought to come to any conclusion, which would relieve the company under such circumstances from the obligation, as carriers, to carry the luggage safely, which, for general convenience, ought certainly to attach to them. I cannot help thinking, therefore, we ought to require very special circumstances indeed, and circumstances leading irresistibly to the conclusion that the passenger takes such personal control and charge of his luggage as to altogether give up all hold upon the company, before we can say that the company, as common carriers, would not be liable in the event of the loss."

Judgment of Cockburn, C.J.

Considered.

The expressions here made use of are very strong, but it must be borne in mind that they proceed on an assumption of fact that the passenger has not so acted as to release the railway company; and that the railway company has been guilty of negligence, while owing a duty to the plaintiff in respect of the supervision and care, as contradistinguished from the conveyance of his luggage. On these assumptions the law is unquestionable; and the rule that Cockburn, C.J., lays down, that the *onus* of proving a discharge from the duty as common carriers should lie strongly upon the carrier, is founded in sound sense and right principle. Whether the facts to which the principle was applied in this case were facts which warranted the inference is another and more doubtful matter; but it must be remembered, in criticising the case, that the postulate for the right understanding of it is, that the porter had been guilty of a negligent act, which, in the circumstances supposed—of the passenger still holding the company to a portion at least of their duty of supervision—fixed them with liability.

Talley v. G. W. Ry. Co.

Talley v. *G. W. Ry. Co.*[3] presents very similar facts, but with the omission of the one fact of want of due diligence on the part of the defendants or their servants, and the additional finding of negligence

[1] L. R. 1 Q. B. 54. *Leach* v. *S. E. Ry. Co.*, 34 L. T. (N. S.) 134; *L. & S. W. Ry. Co.* v. *James*, L. R. 8 Ch. 241.

[2] L. R. 1 Q. B. 59.

[3] L. R. 6 C. P. 44.

on the part of the plaintiff; which, as explained by Willes, J.,[1] could not accurately be called contributory negligence, "all the negligence having flowed from one source, viz., the conduct of the passenger."

Facts.

The plaintiff, a passenger by the defendants' railway, had his portmanteau put into the same carriage with him. At a suitable point in his journey he left the carriage for refreshments. Upon returning to the train he failed to find his carriage, and completed his journey in another. On subsequently regaining possession of his portmanteau, he found that a portion of its contents had been stolen. Willes, J., in delivering the judgment of the Common Pleas, did not appear to think the complexion of the facts, where luggage is placed in a carriage with a passenger, warranted the inference that Cockburn, C.J., drew from them in *Le Conteur's case*. "It is obvious at least that with respect to articles," says he,[2] "which are not put in the usual luggage van, and of which the entire control is not given to the carrier, but which are placed in the carriage in which the passenger travels, *so that he and not the company's servants has de facto the entire control of them whilst the carriage is moving*, the amount of care and diligence reasonably necessary for their safe conveyance is, in fact, considerably modified by the circumstance of their being during that part of the journey in which the passenger might, under ordinary circumstances, be expected to be in the carriage intended by both parties to be under his personal inspection and care."

Willes, J.'s judgment.

Discussed.

The terms in which this is expressed seem chosen with reference to *Le Conteur's case*, and in order to cover the expressions there used, while taking a view not perfectly coincident with the view there taken. The decision in *Le Conteur's case* involved a duty on the part of the company to protect the property till the passenger took charge of the goods in the place he had chosen for them. Willes, J., is content to assume that this is so; though why it should be so may be (apart from a decision to be noted presently) a difficult matter to explain. The distinction he takes is that, in *Talley's case*, if the passenger kept the portmanteau to go with him, he was not excused (there being no negligence on the railway's part) if he did not go with it. And having occupied his seat for a part of the journey, there was no act on the company's part interfering with his occupancy all through, and no resumption of a carrier's responsibility over his luggage. As he had chosen to remove his goods from the sole charge of the company as common carriers, and, to place them in a situation he himself had selected, and had then unreasonably left them, some act of negligence on the part of the company must be shown to make them liable (admitting a still existent duty on their part in conjunction with the owner); instead of which there was only negligence on the plaintiff's part.

Bergheim v. *G. E. Ry. Co.*

In *Bergheim* v. *G. E. Ry. Co.*[3] it was urged upon the Court that where luggage is taken into a carriage with a passenger, the company must be liable on their contract for loss occurring while the owner is reasonably absent from the carriage at stations during the journey; as the contract must be regarded as a contract of insurance, with an exception in favour of a lesser liability, while the train is in motion and the owner in the carriage has some charge of the goods. The view of the Court of Appeal was thus expressed by Cotton, L.J.: [4] "The company undertake to carry the passenger; they equally undertake to carry his

Judgment of Cotton, L.J.

[1] *L.c.* 52. [2] *L.c.* 51. [3] 3 C. P. D. 221. [4] *L.c.* 225.

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." [1]

G. W. Ry. Co. v. *Bunch.*

Bergheim's case was the subject of discussion in *G. W. Ry. Co.* v. *Bunch*;[2] and though the decision in no way necessarily involves the considering of the point decided there, yet expressions of Lord Halsbury, C., and Lords Watson, Herschell, and Macnaghten will certainly be taken as overruling *Bergheim's case*.

Bergheim v. *G. E. Ry. Co.* discussed in *G. W. Ry. Co.* v. *Bunch.*

In *Bergheim* v. *G. E. Ry. Co.*[3] the Court of Appeal decided that where a passenger takes luggage into a railway carriage to be conveyed with him, he thereby releases the railway company from their position of insurers as common carriers, and leaves them liable in respect of the luggage so conveyed to the same extent that they are liable to the passenger himself for his own safe conveyance—that is, they are not liable except in respect of negligence.

In *G. W. Ry. Co.* v. *Bunch*[2] the principle laid down is that, where a passenger takes luggage into a railway carriage to be conveyed with him, the contract of the railway company with him as common carriers in regard to the conveyance of the luggage is modified only to the extent that, if loss happens by reason of want of care on the part of the passenger himself, who has taken within his own immediate control the goods which are lost, the contract of the railway company as insurers does not apply to that loss.

Difference between the views taken in the two cases.

The difference between these views is—the Court of Appeal charges the railway company in those circumstances only where they have been guilty of negligence; the House of Lords extends the obligation to all cases where the passenger has not been guilty of negligence.

Examined.

Opinions of Lord Halsbury, C., and Lord Macnaghten said by them to be based on the view of Willes, J., in *Talley* v. *G. W. Ry. Co.*

For their doctrine the Lord Chancellor and Lord Macnaghten in the House of Lords vouch the authority of Willes, J., delivering the judgment of the Court of Common Pleas in *Talley* v. *G. W. Ry. Co.*[4] "I prefer," says Lord Macnaghten,[5] "the view expressed by Willes, J., in *Talley* v. *G. W. Ry. Co.*" "In *Bergheim* v. *G. E. Ry. Co.*,"[6] says Lord Halsbury, C., "the Court of Appeal, commenting upon the case of *Talley* v. *G. W. Ry. Co.*, do not, I think, quite accurately represent the judgment of the Court of Common Pleas. In *Talley* v. *G. W. Ry. Co.*, 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." [7] It will be observed that this statement of the effect of *Talley's case* by no means supports the proposition for which it is vouched. That proposition is "that a railway company, in accepting a passenger's

[1] Cp. per Pollock, C.B., *Stewart* v. *L. & N. W. Ry. Co.*, 3 H. & C. 139. See as to this case, *ante*, 961.

[2] 13 App. Cas. 31.

[3] 3 C. P. D. 221.

[4] L. R. 6 C. P. 44. The four reports of the judgment are practically identical, L. R. 6 C. P. 44; 40 L. J. C. P. 9; 23 L. T. (N. S.) 413; 19 W. R. 154.

[5] 13 App. Cas. 57.

[6] 3 C. P. D. 221.

[7] 13 App. Cas. 42.

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," [1] the company is not liable. That is, the company is liable except in one event—the negligence of the passenger. The proof Lord Halsbury, C., gives, is that "the general liability of the company as common carriers . . . was modified by the implied condition that the passenger should use reasonable care." That is, the company is generally liable; but *one*—not necessarily the only—condition that exonerates them is "that the passenger should use reasonable care." So much, then, for what Willes, J., is assumed to say.

Opinion actually expressed by Willes, J.

But Willes, J., does not leave the matter to be dealt with as matter of inference; he expresses his opinion on the point directly.[2] After stating various circumstances in which the negligence of the passenger would discharge the railway company, he says: [3] "There is great force in the argument that where articles are placed, with the assent of the passenger, in the same carriage with him, and so in fact remain in his own control and possession, the wide liability of the common carrier, which is founded on the bailment of the goods to him and his being entrusted with the entire possession of them, should not attach, because the reasons which are the foundation of the liability do not exist. *In such cases, the obligation to take reasonable care seems naturally to arise, so that when loss occurred it would fall on the company only in the case of negligence in some part of the duty which pertained to them.*" [4] The judgment in which this passage occurs was apparently a written one, since with the exception of an occasional change from the definite to the indefinite article all the reports of it are absolutely at one.[5] It is somewhat hard then on Willes, J., that, when his only expression of opinion is that where goods are not in the "entire possession" of the railway company loss "would fall on the company only in the case of negligence" on their part, he should be cited as the authority for a doctrine that the company is liable in any event unless the passenger is guilty of negligence.[6]

Lord Watson's and Lord Herschell's opinions.

Lord Watson and Lord Herschell take different ground. The former, after quoting the passage from the judgment of Cotton, L.J.,

[1] 13 App. Cas. 42. [2] L. R. 6 C. P. 51. [3] *L.c.* 52.

[4] This is the view taken in *Whitney* v. *Pullman Palace Car Co.*, 143 Mass. 243. Cp. *Kinsley* v. *Lake Shore and Michigan Southern Rd. Co.*, 125 Mass. 54, where *Bergheim* v. *G. E. Ry. Co.* is cited with approbation.

[5] The case was argued in the Court of Common Pleas on the 23rd and 24th June, 1870, and the judgment was not delivered till the 11th November following.

[6] The speech of Lord Halsbury, C., follows almost verbally the head-note of the report in the Law Reports. The head-note in the Law Journal Report (*G. W. Ry. Co.* v. *Talley*, 40 L. J. C. P. 9) is absolutely inconsistent with it, and is in accord with the law as laid down by the Court of Appeal in *Bergheim's case*. The material portion of the head-note in the Law Reports is as follows: "When a passenger's luggage is at his request placed by a railway company's servants in the carriage in which he is travelling, the company's contract to carry it safely is subject to an implied condition that the passenger takes ordinary care of it, and if his negligence causes its loss the company are not responsible." The corresponding passage in the head-note in the Law Journal is: "The liability of common carriers to insure the safe delivery of goods does not attach to a railway company in respect of passengers' luggage which is not put in the usual luggage van under the entire control of the company, but is placed in the carriage with the passenger and under his own control. With respect to luggage so placed, the obligation of the railway company is only to take reasonable care of it, and consequently the company will not be responsible for its loss unless occasioned by their negligence." Whether, after *Bunch's case*, the head-note in the Law Journal represents the correct view of the law is more doubtful than whether it correctly represents Willes, J.'s, opinion, which it purports to summarise.

Adopt the principle in *Richards* v. *L. B. & S. C. Ry. Co.* and *Butcher* v. *L. & S. W. Ry. Co.*

already cited, and commenting on it, says :[1] "However that may be, I prefer the principle which appears to me to have been adopted in *Richards* v. *L. B. & S. C. Ry. Co.*[2] and *Butcher* v. *L. & S. W. Ry. Co.*[3] 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." And Lord Herschell[4] is "disposed to agree with my noble and learned friends in preferring the view of this duty to be derived" from the cases cited by Lord Watson.

Inquiry into the principle adopted in those cases.

(*a*) *Richards* v. *L. B. & S. C. Ry. Co.*

The first of these is *Richards* v. *L. B. & S. C. Ry. Co.*[5] Plaintiff's wife became a passenger on the defendants' railway, taking with her in the carriage various articles of luggage, amongst others a dressing-case, that was put under the seat. On arriving at the terminus, the maid was about to remove them to the coach, when some porters of the company desired her not to trouble herself, as they would see to the luggage. The dressing-case was subsequently lost, for which loss the company were held liable.

Judgment of Wilde, C.J.

Wilde, C.J., said :[6] "On the part of the defendants it is contended that the goods *were* carried. But the allegation is, that they (the goods) were received by the company to be carried and conveyed *and delivered* at the terminus in London, and they were not *delivered*. I think it was clearly established that the dressing-case was delivered to the company." "The fact of the dressing-case having been placed under the seat of the carriage, and so under the more immediate control and inspection of the passenger, in my opinion makes no difference." The duty of the company was not only to carry the goods, but to deliver them. The fact that the passenger had the goods with him during the carriage did not render the duty to deliver any the less. As was said by Cresswell, J. :[7] "They [the company] could not be said to have fulfilled their contract without delivery; and, if it was the usual course to deliver the luggage of passengers at a particular part of the platform, that was the sort of delivery the defendants took upon themselves to make."

Effect of the case.

No expression goes further than to affirm that, assuming the passenger to have taken upon himself responsibility in the carriage, the obligation of the company was resumed when the period came for performance of that portion of the contract that related to delivery. In any event there was *default* on the part of the company.[7]

(*b*) *Butcher* v. *L. & S. W. Ry. Co.*

The other case is *Butcher* v. *L. & S. W. Ry. Co.*[8] The facts are only distinguishable from *Richards's case* in this, that the plaintiff retained a carpet-bag in his own possession, and alighted from the carriage with the bag in his hand; whereas Mrs. Richards never personally interfered with the missing article. The bag was subsequently taken from his hand by a person wearing the ordinary dress of a porter, and lost. Jervis, C.J., in giving judgment for the plaintiff, said :[9]

[1] 13 App. Cas. 48. [2] 7 C. B. 839. [3] 16 C. B. 13.

[4] 13 App. Cas. 55. His Lordship, however, prefaces this statement with the qualifying words: "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."

[5] 7 C. B. 839. [6] *L.c.* 858.

[7] *L.c.* 859; also see per Williams, J., 861.

[8] 16 C. B. 13. [9] *L.c.* 22.

" The case of *Richards* v. *L. B. & S. Co. Ry. Co.* establishes 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. Parties may, however, if they choose, agree to accept a delivery short of such ordinary delivery; and it is possible the facts here might have warranted the inference of a delivery short of that which I have referred to. But that would be a question for the jury." The judgments of Cresswell, Williams, and Crowder, JJ. —went on the ground that the duty of the company was " to convey it [the luggage] from the railway carriage to a cab, if required to do so "; [1] that they were required to do so, failed, and so were rendered liable. Judgment of Jervis, C.J.

In both cases it is to be observed there was default in the company; while in both the goods lost were *expressly* left to the company to fulfil their duty of delivery with regard to them. It is a somewhat unusual stretch of reasoning to argue from cases of negligence to one where there is no negligence; from cases of actual remissness in duty to a case of implied remissness; from the assertion of the principle that, where there is positive evidence that a passenger entrusts his goods to a railway company, in whose charge they ought to be when the loss occurs, the liability is that of a common carrier; to the assertion of a principle that where there is positive evidence that the passenger has taken goods under his own care, the liability of the company is that of a common carrier, unless and until they can affix the imputation of negligence on the passenger, and when no act has been done notifying the company of a change of intention, or even when there has been no change of intention. Consideration of the cases.

The results of our examination, then, show that the decision in *Bergheim* v. *G. E. Ry. Co.* is not in conflict with the previous decisions, or with the *dicta* of the judges giving those decisions, and cited by the Law Lords in the House of Lords in *G. W. Ry. Co.* v. *Bunch*; though the decision of *Bergheim* v. *G. E. Ry. Co.* is certainly inconsistent with expressions used in the judgments in *Le Conteur* v. *L. & S. W. Ry. Co.*,[2] which case, strangely enough, was neither cited in argument nor in the speeches in *Bunch's case*. The expression of opinion against the rule laid down in *Bergheim* v. *G. E. Ry. Co.* by the majority in the House of Lords in *Bunch's case* was so distinct that the rule there indicated will have to be followed by all Courts other than the House of Lords. Yet as the rule indicated is not necessary for the actual decision of *Bunch's case* the House of Lords itself is not precluded from reconsidering the question of principle when a case raising the question comes before them.[3] Result.

[1] *L.c.* 23, 25.

[2] L. R. 1 Q. B. 54.

[3] In *Louisville, &c. Rd. Co.* v. *Katzenberger*, 57 Am. R. 232, 234, a sleeping-car case, it is said to be " well settled, and that in accord with the nature of the contract that all reasonable liberality is allowed to the passenger in control of his luggage for the purpose of its use upon the journey without releasing the carrier from his obligation to see to its safety. Especially would this be true as to the character of luggage involved in this case, a valise containing clothing for use on the journey." But there the plaintiff, so far from taking charge of his luggage, " gave his satchel or valise to the porter of the sleeper on entering the car." And this is the ground on which the case is declared by Thayer, J., in *Bevis* v. *Baltimore Rd. Co.*, 56 Am. R. 850 n., " not to be in conflict " with a whole list of cases which he cites. The law in America is stated in the head-note to *Illinois Central Rd. Co.* v. *Handy*, 56 Am. R. 846, as follows: " If a passenger on a sleeping car leaves his money in the car on leaving the car without

In the American Courts *Bergheim's case* is quoted with approbation.[1]

(2) Where the luggage is not ordinary or personal luggage.

(2) The luggage claimed to be conveyed may be of a different character from ordinary or personal luggage.

Tho law, as fixed by the carrier's private Act of Parliament—if the carrier is a railway company, as now most frequently happens—is that the passenger is allowed to take with him a certain specified amount of luggage free. If he has more a payment is to be made, which is fixed by scale.

Point raised by the cases

The liabilities of the carrier for goods lost that have heen carried as personal luggage, but which are not so in fact, has been the matter principally mooted, and the general effect of the decisions is that since they are carried in fraud of the company no duty arises with regard to them, save only to refrain from wilful or wanton damage.

G. N. Ry. Co. v. *Shepherd.*

The first case to note is *G. N. Ry. Co.* v. *Shepherd*,[2] an appeal from a county court heard before Parke and Platt, BB. Plaintiff and his wife were third-class passengers on the defendants' railway, and brought with them, along with other luggage, two paper parcels which contained merchandise. The porters of the company did not interfere in any way. The plaintiff and his wife themselves deposited the parcels in the carriage and took charge of them. A collision occurring during the journey, the plaintiff and his wife were both much hnrt, and, upon being assisted into another train to continue their journey, the plaintiff asked one of the porters ahout the luggage, who told him not to make himself uneasy, it would he all right. The merchandise, however, was lost. The Court gave judgment for the company.

Duty of the company as laid down by Parke, B.

"In this case," said Parke, B.,[3] "there being no special contract, the defendants were hound to carry the plaintiff and his *luggage*, which term, according to the true modern doctrine on the subject, comprises clothing and such articles as a traveller usually carries with him for his personal convenience; perhaps even a small present or a hook for the journey might he included in the term. . . . Now, if the plaintiff had carried these articles [124 dozen of ivory handles, *inter alia*] exposed, or had packed them in tbe shape of merchandise, so that the company niight have known what they were, and they had chosen to treat them as personal luggage, and carry them without demanding any extra remuneration, they would have heen responsihle for the loss. . . . If, indeed, they had notice, or might have suspected from the mode in which the parcels were packed, that they did not contain personal luggage, then they ought to have objected to carry them; but the case finds that they had no notice of what the packages contained. Whether this was done for any fraudulent purpose it is not necessary to inquire; because, even if there was no fraudulent intent, the plaintiff has so conducted himself that the company were not aware that he

the knowledge of the company, and it is stolen hy some one not employed by the company, if the company has kept a reasonahle guard and watch it is not liable for the loss." And this not upon the ground of the negligence of the passenger, but of the absence of negligence in the company. See an article on *Bunch's case* in the Court of Appeal in L. Q. R. (1886) vol. ii. 469, with a note on the foreign law, the author of which seems doubtful of the *policy* of the decision on the point discussed in the text (see at 479).

[1] Besides in the Massachusetts decisions before noted, *ante*, 1003, n. 4, the rule in *Talley's case* as understood in *Bergheim's case* has been adopted in Pennsylvania: *American Steamship Co.* v. *Bryan*, 83 Pa. St. 446. In his huge magazine of decisions Mr. Thompson does not seem to have noticed *Bunch's case*. He adopts *Talley's case*, § 3442, but not the gloss of the slovenly headnote in the Law Reports.

[2] (1852) 8 Ex. 30. Cp. *Cusack* v. *L. & N. W. Ry. Co.*, 7 Times L. R. 452.

[3] 8 Ex. 33.

was not carrying luggage, and therefore the loss must he horne hy him."

Keys v. *Belfast and Ballymena Ry. Co.*

The effect of the rule thus laid down was much considered in the Irish case of *Keys* v. *Belfast and Ballymena Ry. Co.*[1] The plaintiff, with knowledge that no merchandise was allowed as luggage, took a hox of merchandise in the carriage with him when travelling hy the defendants' line. During the journey a guard demanded and took it to carry in the luggage van. One of the company's servants stole it. The Irish Court of Common Pleas gavo judgment for the plaintiff. The Exchequer Chamher were equally divided. On the ono hand, the case of *G. N. Ry. Co.* v. *Shepherd* was considered in point; on the other hand, it was distinguished, hecause the decision of Parke, B., was not that the company had no notice, but that the plaintiff had so conducted himself that the company were not aware of the nature of the articles; while in the case beforo the Court "the nature of the articles was patent; fraud and concealment on the part of the plaintiff is negatived, and the avoidance of the contract is pressed, to the extent not merely of the liahility for the mode of performing it, hut *in toto*, and to the extent of transferring property."[2]

Opinion of the Lord Chancellor (Westbury).

In the House of Lords, the judges heing consulted, judgment was unanimously given for the defendant, the plaintiff in error, Lord Westhury, C., summing up his remarks as follows:[3] "In suhstance, therefore, it comes to this, that the plaintiff intended to have the goods carried in the carriage with him and escape the ohligation of the paying for their carriage as merchandise, and, under those circumstances, there could not exist, in law or in reason, any contract whatever between the plaintiff and the company touching those goods, upon the breach or in default of the performance of which contract the plaintiff could have a right against the company; and I think that any man of ordinary understanding would have had no difficulty whatever in disposing of the case if the plaintiff had appeared in court to urge his claim, and the Court had addressed to him the question, 'For what do you claim against the company?' 'I claim for certain goods I took with me as passenger in the railway carriage.' Had the question been put to him, 'Did you know the rule of the company?' he would have been ohliged to answer, 'I did know that rule.' 'Is it possihle, then,' the judge would answer, 'that you can claim against a company for goods which you took into the carriage of the company in violation of the rule which you knew they had established, and which their servants were hound to ohserve?'"

Cahill v. *L. & N. W. Ry. Co.*

Contention advanced in order to take the case out of *G. N. Ry. Co.* v. *Shepherd.*

While *Keys* v. *Belfast and Ballymena Ry. Co.* was going through the courts *Cahill* v. *L. & N. W. Ry. Co.*[4] was decided hy the Common Pleas on tne authority of the *G. N. Ry. Co.* v. *Shepherd.*[5] The plaintiff's contention was that a contract for hire over and heyond what was paid for the conveyance of himself and his personal luggage must he implied from the fact that the porter in the employ of the company must have

[1] 8 Ir. C. L. R. 167, 11 Ir. C. L. R. 145, in the House of Lords under the name of *Belfast Ry. Co.* v. *Keys*, 9 H. L. C. 556.

[2] Per Fitzgerald, B., 11 Ir. C. L. R. 157.

[3] This quotation is from the Law Times Report, 4 L. T. (N. S.) 844. In 9 H. L. C. 573, the report of the Lord Chancellor's opinion stops at the sentence, "the plaintiff could have a right against the company." The conclusion of the passage is represented by this sentence: "The plaintiff ought to know that there can be but one opinion entertained upon the merits and suhstance of the case."

[4] (1861) 10 C. B. N. S. 154.

[5] 8 Ex. 30.

seen, from the external appearance of the package (which had the word "Glase" painted on the lid of the box), that the package contained goode other than personal luggage. To this Willes, J., replied:[1] "It is impossible to infer that the porter did or could make any such contract so as to bind the company. I think that would be pushing to an absurdity the rule that a principal is bound by the acts of his agent within the scope of his ordinary employment." The decision was affirmed by the Exchequer Chamber,[2] where Cockburn, C.J., delivering the judgment of the Court, said: "That which was said[3] by Parke, B., in *The G. N. Ry. Co.* v. *Shepherd*, is in perfect conformity with the view which we now take of the question."

Met by Willes, J.

Whose view was affirmed in the Exchequer Chamber.

The law is accordingly now settled that if a passenger, who knows, or ought to know, that he is only entitled to take his ordinary personal luggage free of charge, chooses to carry with him merchandise for which the company are entitled to make a charge and abstains from giving notice of the fact, the company are not liable to compensate him in respect of loss or injury; but if the company choose to take merchandise as ordinary luggage, it is not competent to them, in the event of a loss, to claim exemption from liability on the ground that the loss is of merchandise and not of ordinary luggage. To constitute notice by which the railway company's rights are waived, notice to a porter is not sufficient.[4] The circumstances must be such as to show notice to some one in sufficient authority to affect the course of the company's business.

The law as now settled.

This last point has been more fully considered in the American than in the English cases. Thus, in *Hannibal Rd.* v. *Swift*[5] the rule laid down is: "Where a railroad company receives for transportation, in cars which accompany its passenger trains, property of this character [statuary, pictures, &c.] in relation to which no fraud or concealment is practised or attempted upon its employés, it must be considered to assume with reference to it the liability of common carriers of merchandise." "If property offered with the passenger is not represented to be baggage, and it is not so packed as to assume that appearance, and it is received for transportation on the passenger train, there is no reason why the carrier shall not be held equally responsible for its safe conveyance as if it were placed on the freight train, as undoubtedly he can make the same charge for its carriage."

Question of notice more fully considered in the American cases. *Hannibal Rd.* v. *Swift.*

The question of what is notice that goods are not personal luggage was raised in *Sloman* v. *G. W. Ry. Co.* (of New York);[6] where a lad of eighteen had two large trunks filled with samples, different from ordinary travelling trunks, and had a valise for his personal baggage. He delivered the trunks to a baggage-master, and, when asked where he wanted them checked to, replied that he did not then know, as he had sent a despatch to a customer at F. to know if he wanted any goods; if not, he wanted them to go to R., where he expected to meet some customers. Soon after, he had them checked to R., paying two dollars, and receiving a receipt ticket for them, headed, "Receipt ticket for extra baggage." They were not weighed, and no evidence was given as to any regulation of the company in reference to charging extra compensation for passengers' luggage. The jury found there the company had notice. On appeal the Court of Appeals held there

Sloman v. *G. W. Ry. Co.*

[1] 10 C. B. N. S. at 175.

[2] 13 C. B. N. S. 818, distinguished *Wilkinson* v. *Lancs. & Y. Ry. Co.* [1907] 2 K. B. 222.

[3] Referring to the passage quoted *ante*, 1006.

[4] Per Willes, J., 10 C. B. N. S. 175.

[5] 12 Wall. (U. S.) 273.

[6] 67 Y. 208.

was evidence warranting the finding. The conjunction of facts here existing has never been found in an English case, viz., first, the delivery to a "baggage-master"—most probably the officer authorised to make all proper arrangements; secondly, the appearance of the packages; thirdly, a distinct statement of the purpose for which they were being carried; fourthly, an extra charge made not referable to excess of luggage. Distinctive features of the case.

In a Massachusetts case—*Blumantle* v. *Fitchburg Rd. Co.*[1]—the plaintiff offered and delivered certain bundles as his personal luggage, which the "baggage-master" spoke about at the time as containing merchandise, yet gave him checks for them, as he was bound to do for personal baggage of passengers. The Court, following the English decisions, held that the plaintiff could not recover for the loss, since "evidence tending to show that the baggage-master knew or supposed the bundles to contain merchandise, or that other passengers had similar bundles, would not warrant the jury in finding that the defendant agreed to transport the plaintiff's merchandise, or became liable therefor as a common carrier." This decision warrants the inference that, in America at least, knowledge and acquiescence by the responsible officer is not sufficient to raise the presumption of a contract, apart from contractual words or a payment or arrangement, from which a contract can "more probably be implied than not." *Blumantle* v. *Fitchburg Rd. Co.*

(3) The luggage may not come into or pass from the custody of the carrier in his capacity of carrier. (3) Where the possession is in another character than that of carrier.

The distinction between the cases where a railway company holds luggage as warehouseman, and where it holds luggage in the transit to or from the train and preparatory to delivery to the passenger, is plain, and has already been pointed out.[2] There are, however, questions of difficulty on the border-line between the two classes of cases. For example, in *G. W. Ry. Co.* v. *Goodman*,[3] a delivery to the company's servants of luggage was shown, but no booking of the luggage under a by-law providing "that every first-class passenger will be allowed 112 lb., and every second-class passenger 56 lb., of luggage free of charge; but the company will not be responsible for the care of the same unless booked and paid for accordingly." In the absence of evidence of arrangements for booking, the defendants were held liable for the loss as carriers, and without proof of negligence. Distinction between a holding as warehouseman and a holding as carrier. *G. W. Ry. Co.* v. *Goodman.*

So, in the cases we have already noticed, *Richards* v. *L. B & S. C. Ry. Co.*[4] and *Butcher* v. *L. & S. W. Ry. Co.*,[5] the company were in each case held liable; because their contract was not merely to carry, but to deliver, and after the goods were in the hands of their porters in course of delivery they were lost. The unsuccessful contention in the first of these cases was that the company were only liable as carrier during the transit; in the second, that the man who received the bag was not at all authorised by them. The conclusion from them is that the liability of the company, though it may be broken by the passenger assuming the care or supervision of his own goods, is a liability capable of reviving at any period intermediate between the time of the reception of the goods to the time they are delivered over for the further prosecution of his journey. *Richards* v. *L. B. & S. C. Ry. Co.* *Butcher* v. *L. & S. W. Ry. Co.*

[1] 127 Mass. 322, 326.

[2] *Harris* v. *G. W. Ry. Co.*, 1 Q. B. D. 515; *Parker* v. *S. E. Ry. Co.*, 2 C. P. D. 416. *Ante*, 908.

[3] 12 C. B. 313.

[4] 7 C. B. 839.

[5] 16 C. B. 13.

G. W. Ry. Co. v. Bunch.

G. W. Ry. Co. v. *Bunch*[1] must be referred to in this connection. Plaintiff's wife arrived at Paddington Station 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 there. She then said she wished the bag to be put into a carriage with her, and asked the porter if it would be safe to leave it with him. The porter replied that it would be quite safe; 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, 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 a county court the plaintiff recovered £18. In the Divisional Court, Day, J., gave judgment for the defendants, A. L. Smith, J., who was of opinion that the plaintiff was entitled to recover, withdrawing his judgment. In the Court of Appeal, Lord Esher, M.R., and Lindley, L.J., reversed the judgment of the Queen's Bench Division, Lopes, L.J., dissenting; and their decision was upheld by the House of Lords, Lord Bramwell dissenting.

Contention of the railway company.

The railway company contended:

(1) That the bag was handed to the porter, not for transit, but to take charge of.

(2) That if it were received for transit the company were only liable for negligence, and were not insurers.

Principle of the decision as expressed by Lord Watson.

The principle of the decision of the majority is expressed by Lord Watson:[2] "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."[3]

[1] 13 App. Cas. 31. In the Court of Appeal, *Lovell* v. *L. C. & D. Ry. Co.*, 45 L. J. Q. B. 476, was cited, which seems precisely in point, and in which the test was adopted of inquiring whether the acts done by the porters were done with a view to put the luggage in the train for the purposes of the journey. *Hickox* v. *Naugatuck Rd. Co.*, 31 Conn. 281, where four hours before the time of the train starting was held a "reasonable time" to leave luggage, shows the American Courts to have arrived at a similar decision five-and-twenty years earlier. *Agrell* v. *L. & N. W. Ry. Co* (Ex. Ch.), 34 L. T. (N. S.) 134 *n.*, is distinguishable as the case of luggage given to the porter not for the purposes of the journey, but for the convenience of the passenger. In *Welch* v. *L. & N. W. Ry. Co.*, 34 W. R. 166, *Bunch's case* is distinguished and the railway company held not liable. There the passenger having missed his train left his luggage in charge of a porter, saying he would travel by the next train which did not start for an hour, and then went to a billiard-room to spend the interval.

[2] 13 App. Cas. 45.

[3] See per Lord Herschell, 53.

Further, the House of Lords were unanimous in holding that when luggage is received by the servants of a railway company, and continues in their possession for the purpose of being conveyed to the train or retained while the passenger is taking his ticket, the liability of the company is that of a common carrier.

House of Lords hold that luggage received by a railway company for purposes of transit is held in their capacity of common carrier.

The view of Lord Bramwell was [1] that it is not part of the employment of a porter to take charge of luggage except during the transit from the cab to the train; and that the interval between the arrival of the passenger and the starting of the train, in the case before the House—forty minutes—was much too long a period to warrant the inference that this was the purpose the porter had in view.

Lord Bramwell's view on scope of porter's employment.

The effect of the decision is to leave to the jury the determination in each case of what is a reasonable time prior to the starting of a train within which, if luggage is delivered to the company's porters, the company are fixed with the liabilities of common carriers and hold the luggage for the purpose of transit and not of storage.[2]

Effect of the decision.

The test of "a reasonable time" had before been laid down in *Patscheider* v. *G. W. Ry. Co.*,[3] where a lady's maid, having seen her box taken from the luggage-van and placed on the platform with other luggage of her mistress, went for the porter of the hotel to take the luggage to the hotel, but on her return with him could not find her box. The plaintiff was held entitled to recover; and the rule laid down in Redfield on Carriers [4] was cited with approbation, that it is the duty of a railway company, in regard to the baggage of a passenger which has reached its destination, to have the baggage ready for delivery upon the platform, at the usual place of delivery, until the owner, in the exercise of due diligence, can call and receive it; and it is the owner's duty to call for and remove it within a reasonable time.

Test of reasonable time; *Patscheider* v. *G. W. Ry. Co.*

G. W. Ry. Co. v. *Bunch* and *Patscheider* v. *G. W. Ry. Co.* practically exhaust the subject. The one points out the rule for the reception, the other for the delivery of luggage. *Hodkinson* v. *L. & N. W. Ry. Co.*[5] is the necessary pendant to *Patscheider* v. *G. W. Ry. Co.*, which, while indicating the rule applicable, leaves untouched the question of what constitutes delivery.

What constitutes delivery.

Hodkinson v. *L. & N. W. Ry. Co.* is an authority for the proposition that actual removal from the railway's premises, or even actual

Hodkinson v. *L. & N. W. Ry. Co.*

[1] 13 App. Cas. 51.

[2] *Cutler* v. *North London Ry. Co.*, 19 Q. B. D. 64, suggested the question of what liability there is in a railway company where luggage is carried on after the passenger had left the train short of his destination. The point is not decided. *Bunch's case* would, however, require the application of the test whether the passenger was negligent. See *ante*, 1002. As to a *passenger* waiting in a station after the train by which he proposed to travel is gone, see *Heinlein* v. *Boston, &c. Rd. Co.*, 147 Mass. 136, 9 Am. St. R. 676; as to when one ceases to be a passenger, and the duty to him while he remains one, *Commonwealth* v. *Boston and Maine Rd.*, 129 Mass. 500, 37 Am. R. 382: there is no duty to keep a station lighted for the protection of one who, after learning that the last train has gone, chooses to remain there. A passenger is one who has bought a ticket and is proceeding on his journey; and he remains a passenger from the time when he starts to take his seat till he has reached his destination, and a reasonable time has elapsed with reasonable opportunity to leave the station at his destination. *Ante*, 949 and 953. There is a duty to an intending passenger *before* he has taken his ticket, for there is an invitation to him to enter the company's premises to get a ticket, and a representation that he can do so without being exposed to risks other than those that are obvious.

[3] 3 Ex. D. 153. *Ante*, 834.

[4] § 73.

[5] 14 Q. B. D. 228. Cp. *Stallard* v. *G. W. Ry. Co.*, 2 B. & S. 419, where a person deliberately left his personal baggage on the platform of a railway station and did not call for it till the following day, the railway company were held not chargeable as carriers but as warehousemen or bailees only: *Vineberg* v. *Grand Trunk Ry. Co.*, 13 Ont. App. 93. *Howell* v. *Grand Trunk Ry. Co.*, 92 Hun (N.Y.) 423, 71 N.Y. (S. C.) 640.

corporal possession, is not necessary to constitute a delivery that will relieve the railway of its carrier's liability; but it is enough if there is a dealing with it inconsistent with the continuance of the transit. This was hinted at by Jervis, C.J., in *Butcher* v. *L. & S. W. Ry. Co.*,[1] in circumstances where the action of the porter was susceptible of either view, and which were therefore to be left to the jury.

Facts.

The circumstances in *Hodkinson's case* were wholly unequivocal. On the arrival of the plaintiff's train at the station, the porter asked if he should engage a cab for her and her luggage—two boxes—which was taken from the luggage-van. She said she would walk to her destination, and would leave her boxes at the station for a short time and send for them. The porter said, "All right; I'll put them on one side and take care of them." Some hour or two after, the plaintiff claimed her boxes, one of which had been delivered by mistake to a woman who had asked for it. The Court held that by leaving the boxes "in the custody of the porter," who had ceased to be acting as the company's agent, the plaintiff had received delivery, and exonerated the company from their common law liability. The correctness of this decision is unquestionable. The porter was not the agent of the company for custody; left luggage is to be deposited in the cloak-room; and there was no transit in which the company could have any concern for which he could be agent. In *Bunch's case* the decision was that there was evidence of a delivery to the porter as ancillary to the transit. In the present case the delivery to the porter was subsequent to delivery on the completion of the transit; and that delivery marks the termination of the carrier's contract.[2] The only method of arguing the case successfully seems to be to contend that delivery was not made; then the luggage could not have been placed by the plaintiff in the custody of the porter.

Transfer from one station to another. *Midland Ry. Co.* v. *Bromley.*

An earlier case, *Midland Ry. Co.* v. *Bromley*,[3] deals with the transfer of luggage from one station to another. Plaintiff was a passenger by the Midland Railway to Bristol, and his portmanteau was placed in the luggage-van. On the arrival of his train at Bristol the plaintiff told one of the porters that he wished to go on by the Bristol and Exeter Railway. The porter got the plaintiff's portmanteau, and put it with other luggage on a truck to take it across to the Bristol and Exeter station. At the trial plaintiff said he saw the porter with the truck enter the Bristol and Exeter station, pass down a decline and then cross the station, but he did not see the portmanteau after he saw it on the Midland platform. A county court judge held on this evidence that there was no delivery of the plaintiff's portmanteau either to himself or to the Bristol and Exeter Ry. Co., according to the plaintiff's contract with the defendants, so as to determine the defendants' liability, and he accordingly gave judgment for the plaintiff. The Court of Common Pleas reversed this, holding there was no case made out to go to a jury. "It is quite clear," said Jervis, C.J.,[4] "that the plaintiff thought the portmanteau was on the truck when he saw it pass from the one railway to the other, or he would have made more particular inquiry after it. It being equally probable that the loss occurred on the Bristol and Exeter Railway as that it took place on the

Judgment of Jervis, C.J.

[1] 16 C. B. 22: "Parties may, however, if they choose, agree to accept a delivery short of such ordinary delivery."

[2] *Richards* v *L. B. & S. C. Ry. Co.*, 7 C. B. 839.

[3] 17 C. B 372.

[4] *L.c.* 381.

Midland Railway, and the *onus* of showing a breach of the contract resting upon the plaintiff, I think he has failed to show that he was entitled to recover."

With this must be considered *Kent* v. *Midland Ry. Co.*[1] The Midland Ry. Co. had the use of the London and North-Western's station at Birmingham, to which they conveyed the plaintiff, with his luggage, in prosecution of a portion of a journey which he was to complete on the London and North-Western Co.'s line. The plaintiff's luggage was removed by one of the porters from the Midland train across the station in the direction of the line of the London and North-Western, whence the train in which the plaintiff purposed to pursue his journey was to start. There was nothing to show that the luggage which was lost to the plaintiff was ever delivered into the custody of the London and North-Western Ry. Co. Plaintiff brought an action against the Midland Ry. Co. in respect of the loss. The Midland Ry. Co. set up a condition which provided they should not be liable for loss arising off their own lines. Plaintiff had a verdict with leave for the defendant to move, but the Court refused a rule; as "it was the defendants' duty to carry it (the luggage) from one platform to the other, for it must be taken that by their contract they were bound to take the luggage from their own train to that of the North-Western train: and they were entitled to the services of the porters at the station. Consequently the porter, while he was taking the luggage from one platform to the other, was acting as the defendants' agent or servant."[2] "I think," said Blackburn, J.,[3] "'off the line' must be understood as equivalent to out of their custody and in the custody of some other company. If the plaintiff had sued the London and North-Western Co. (assuming that company could have been liable to the plaintiff), they would have said: 'We did not take the plaintiff's luggage; it never was in our custody, but was still in the control of the Midland Co. and under their orders when last seen, and it was never shown to have been delivered to us.' I cannot put such a construction as to make nobody liable at all; and I think that unless it be shown to be on the line of another company—it must be held not to be 'off the line' of the defendants." *Kent* v. *Midland Ry. Co.*

This case was decided on the ground of the defendants' failure to discharge the *onus* upon them. In similar cases it might be contended that the company's undertaking is to deliver on their platform or to cabe within their station, and that when a transfer is required this must be effected by means of special porters, whose receipt of goods is a delivery by the railway company the journey on whose line is terminated to the railway company by which the journey is to be prosecuted.

The points of distinction between *Midland Ry. Co.* v. *Bromley* and *Kent* v. *Midland Ry. Co.* should be noted in view of the difference of the result in the two cases. Distinction between *Midland Ry. Co.* v. *Bromley* and *Kent* v. *Midland Ry. Co.*

First, in *Bromley's case* the journey for which the plaintiff took his ticket had ended. When his luggage was lost he was beginning a new journey, and had given his luggage a new destination. In *Kent's case* the loss occurred in the prosecution of a journey for the whole of which the plaintiff had taken a ticket from the defendants, and in the course of which his contract implied a delivery of the luggage to the other company.

Secondly, in *Bromley's case* the truck on which plaintiff's luggage

[1] L. R. 10 Q. B. 1. [2] *L.c.*, per Cockburn, C.J., 4. [3] *L.c.* 5.

was seen by him to be placed was also seen by him to enter the station of the company on whose line he was about to travel. In *Kent's case* there was nothing to show that the luggage was ever delivered into the custody of the London and North-Western Ry. Co. at all; consequently the defendants' contract was unperformed.

Cases considered.

In *Bromley's case* the plaintiff himself gave sufficient evidence of the delivery of the luggage to put himself out of court by showing circumstances from which delivery in accordance with his instructions was the more natural inference to draw. He therefore had to show facts which raised an implication of negligence. The actual decision, however, is "that the *onus* of showing a breach of the contract" rested the plaintiff,[1] while "the evidence set out in the case is manifestly as consistent with the one view as the other."

Now as to this it must be borne in mind that a railway company is a common carrier of passengers' luggage;[2] and the rule is that, if goods entrusted to a common carrier be lost or damaged, the law conclusively presumes the carrier guilty of negligence unless he can bring himself within the exceptions. Thus the loss or damage of luggage raises a *primâ facie* inference of want of care of the carrier, which in the absence of evidence to the contrary will render him liable to an action.[3] *Bromley's case*, then, so far as it lays down that there is an *onus* on the plaintiff to show some breach of contract beyond the mere fact of the loss, cannot be treated as law; and the proposition in *Kent's case*—that when luggage is shown to have been delivered to a railway company the *onus* lies on them to show that they have delivered it, failing in which they remain liable—is a subsequent decision, in accordance both with the authorities and with the principle governing in this branch of law, which regards the carrier as an insurer, and his liability as independent of default of any kind.

Distinction between the conveyance of luggage in prosecuting a journey already begun, and the transfer of luggage for starting a new journey.

There appears, in addition, to be a manifest distinction between the cases where luggage is to be conveyed over to another station in prosecution of a journey already begun, as in *Kent's case*, and the mere transfer of luggage to another station after the completed journey, as in *Bromley's case*, for the purpose of starting on a new one. In the former the contract is most usually to deliver over to the company with whom the passenger was continuing his journey the luggage which the company with whom he has completed his journey hold with a common carrier's liability; and till that is completely done the company will not be discharged. In the latter the transfer to the second company's line may be in very various circumstances. The circumstance, that to enable the luggage to be conveyed to the other company's station a new destination has to be designated by the owner, nevertheless, seems essential. This may be effected by the delivery into a cab or carriage, or by delivery to "transfer porters"—a special class of men whose intervention may be either as agents of the receiving

[1] Per Jervis, C.J., 17 C. B. 381.

[2] *Macrow* v. *G. W. Ry. Co.*, L. R. 6 Q. B. 618. See Redfield, Carriers, § 71. The author continues: "It is considered that, as railways have made their checks evidence in regard to the delivery of baggage, the possession of such check by a passenger is evidence against the company of the receipt of the baggage. In one case, the Court say, 'It stands in the place of a bill of lading' (*Dill* v. *Ry. Co.* (7 Rich. 158))." Cp. *Wilton* v. *Atlantic Royal Mail Steam Navigation Co.*, 10 C. B. N. S. 453, on the construction of a condition as to luggage on a passenger ticket.

[3] 1 Taylor, Evidence (10th ed.), 181, citing *Ross* v. *Hill*, 2 C. B. 890; *Cogge* v. *Bernard*, 2 Ld. Raym. 909, 918; *Harris* v. *Costar*, 1 C. & P. 636; *G. N. Ry. Co.* v. *Shepherd*, 8 Ex. 30.

company, or possibly as agents of the passenger. The tendency of the decisions is to regard delivery as incomplete until the luggage is unequivocally transferred from the control of the carrier.

It is not to every train that the passenger's right to carry luggage attaches. *Rumsey* v. *N. E. Ry. Co.*[1] decides that there is nothing in the company's private act enacting that "every passenger travelling upon the said railways may take with him his ordinary luggage," nor any principle of public policy which prevents a passenger from foregoing his right to carry luggage with him free of charge in consideration of a reduction in the fare. A passenger by an excursion train, for which the fare was 5*s.* as against the ordinary fare of 9*s.*, and which was run subject to a condition that the company would not carry luggage for those availing themselves of it, was accordingly held bound to pay the ordinary goods rate (if demanded) for the carriage of luggage which he had procured to be carried in the excursion train in contravention of the conditions of the journey. "It is undoubtedly," said Erle, C.J., "competent to any man to renounce a privilege which is given to him by a statute.[2] The plaintiff is, as it seems to me, in the same situation as he would have been in if, having got a 9*s.* ticket, he had gone back to the clerk and got him to exchange it for a 5*s.* excursion ticket, on his agreeing to go without luggage, and had then, without the knowledge of the company's servants, put his portmanteau into the van again."

Rumsey v. *N. E. Ry. Co.*

Opinion of Erle, C.J.

The proposition that the carrier by reason of his contract is only liable to those with whom his contract was made would *primâ facie* seem a proposition so indisputable, and according to general principles of law, as to need no authority. In *Becher* v. *G. E. Ry. Co.*[3] it was in terms laid down. A servant having his master's portmanteau with him, took a ticket to travel on the defendant's line. In the course of the journey the portmanteau was lost. The master sued the defendants, but was held not entitled to recover, as there was nothing to impose any duty beyond the existence of the contractual relation by which the company had agreed to take the servant and his personal luggage free of charge. "If," said Lush, J., "they had been informed that the portmanteau was not his luggage, they would not have been bound to take it, and in all probability they would have not taken it. It was taken as the servant's own luggage, and if any action can be maintained it must be in the name of the servant."

Becher v. *G. E. Ry. Co.*

In *Martin* v. *Great Indian Peninsular Ry. Co.*[4] there was a count in tort, and though the contract was not made with the plaintiff, but with the Indian Government, of which he was an officer, it was held on de murrer that he could recover for a wrong done by which he was affected in his property, and for which, independently of contract, he had a right to obtain redress. Kelly, C.B., was disposed to think that the breach of duty charged was only a breach of duty constituted by contract, and that the contract being made with other people, that the plaintiff was not available for him. "But," he added, "my learned brothers take a differ nt view, and think that the second count charges

Martin v. *Great Indian Peninsular Ry. Co.*

[1] 14 C. B. N. S. 641.

[2] *L.c.* 649, citing *Markham* v. *Stanford*, 14 C. B. (N. S.) 376. *Ante*, 725.

[3] L. R. 5 Q. B. 241. In New York it has been held that where goods are paid for as excess baggage by an agent the owner may recover on the special contract whether the ownership of the goods was revealed or not: *Trimble* v. *New York, &c. Rd. Co.*, 162 N. Y. 54.

[4] L. R. 3 Ex. 9, 13. Cp *Marshall* v. *York, Newcastle, and Berwick Ry. Co.*, 11 C. B. 655.

a wrong done by which, therefore, independently of contract he has a right to obtain redress. I do not wish to dissent from this view; and our judgment will, therefore, be for the plaintiff."

The reconciliation of these views is to be found by the principle laid down in *Alton* v. *Midland Ry. Co.*[1] The action was by a master to maintain an action *per quod servitium amisit* against a railway company for an injury to the servant whilst a passenger through breach of their contract safely to carry.[2] Willes, J., says:[3] "To sustain, therefore, such an action as this, we must hold that a person can sue in respect of a contract to which he was no party either by himself or his agent. It has been argued for the plaintiffs that the cause of action is founded on a wrong; but this is not so; the law does not treat this cause of action as founded simply on a wrong, but it gives the person injured the election of proceeding by a form of action either in contract or in tort. Here, however, a third person, who seeks to sue in respect of an injury to his servant, takes upon himself to exercise the election which the law gives to the servant and which it does not give to a stranger." "The duty is superadded by law to the contract to carry, and the passenger as it were purchases of the railway company the duty which the law says arises out of the contract." In *Becher's case* there was no duty to carry the master's luggage, and the passing it off as the servant's luggage was in fraud of the rights of the railway company.[4] In *Martin's case*, as in *Meux's case*,[5] the luggage was lawfully on the company's premises, and they had a duty to it which they failed to discharge, and thus gave a right of action to the owner of the property injured through their negligence.

Meux v. *G. E. Ry. Co.*[5] is concluded by *Hayn* v. *Culliford*,[6] and by Bramwell, L.J.'s, reasoning there on the hypothesis of the non-existence of a contract. "The goods were lawfully with the defendants' licence in their ship [station] and they tortiously so dealt with them that the goods were injured."[7] Kay, L.J., raises a more difficult point:[8] "Whether, if the goods had not belonged to the servant at all, but to some one else, and were in his portmanteau, they would have been lawfully upon the premises of the company." The answer to this depends on the capacity in which they were carried; if to defraud the company and to evade just payment the company would not be responsible for loss or negligence; for there can be no negligence where by hypothesis there is no duty; yet they would be liable for wilful misconduct; but if the luggage is carried for the passenger's own use the question of title can raise no complication; the railway allows the passenger to carry his personal luggage quite irrespectively of whether the property in the articles is in the passenger or in any other.[9] The sole test is whether they are such as are ordinarily used in the class of life to which the passenger belongs, and whether they are carried with the view to such use.

[1] 34 L. J. C. P. 292; 19 C. B. N. S. 213, and *ante*, 970, n. [2]. The form in which *Alton's case* came before the Court was on a demurrer to a declaration alleging the contract of carriage with the railway company on which the plaintiff, the master of the injured man, claimed a right to sue.

[2] The contract was outside the scope of the servant's authority, consequently the master can in no case sue on it; neither can he be sued. [3] *L.c.* 297.

[4] Cp. Lord Westbury, *Keys* v. *Belfast and Ballymena Ry. Co.*, 4 L. T (N. S.) 844. *Ante*, 1007. [5] [1895] 2 Q. B. 387. [6] 4 C. P. D. 182.

[7] *L.c.* 185. [8] [1895] 2 Q. B. 393.

[9] Cp. *The Winkfield*, [1902] P. 42. *Ante*, 735.

CHAPTER IV.

COMMON CARRIERS BY WATER.

1. *OF GOODS.*

THERE are two theories with regard to common carriers by water. One, as stated by Brett, J., in *Nugent* v. *Smith*,[1] is that "every shipowner or master who carries goods on board his vessel for hire, is, in the absence of express stipulation to the contrary, subject, by implication, by the common law of England, adopting the law of Rome, by reason of his acceptance of the goods to be carried, to the liability of an insurer, except as against the act of God, or the Queen's enemies. It is not only such shipowners as have made themselves in all senses common carriers who are so liable, but all shipowners who carry goods for hire, whether inland, coastwise, or abroad, outward or inward. They are all within the exception to the general law of bailments, which (as before observed) was adopted into the common law from the Roman law."

Two theories with regard to common carriers by water.

I. That of Brett, J.

The other is expressed by Parsons in his Law of Shipping: [2] "The true rule undoubtedly is, that one who carries by water, in the same way and on the same terms as a common carrier by land, is also a common carrier; or, in other words, it is not the land or the water which determines whether a carrier of goods is a common carrier, but other considerations, which are the same in both cases." What the considerations essential to the constitution of a common carrier are we have already seen.[3]

II. That stated in Parsons's Law of Shipping.

The rule as laid down by Parsons is adopted by Cockburn, C.J., in the Court of Appeal in *Nugent* v. *Smith*.[4] As the defendant in that case was without question a common carrier, the necessity for fixing the definition did not arise; and, as the other members of the Court refrained from giving any indication of their opinion, the view there taken by the Chief Justice, although commanding attention from the reasoning and learning by which it is fortified, is, strictly speaking, only an *obiter dictum*.

This latter theory approved by Cockburn, C.J.

Brett, J., supported his view by the following considerations: First, that "no one who has read the treatise of Mr. Justice Story on Bailments, the essay of Sir William Jones, and the judgment of Lord Holt, in *Coggs* v. *Bernard*, can doubt that the common law of England as to bailments is founded upon, though it has not actually adopted, the Roman law." [5]

Arguments in support of Brett, J.'s, theory: 1. That the English law of bailments is founded on the Roman law;

[1] 1 C. P. D. 33. [2] Vol. i. 245.
[3] *Ante*, 845, 869 *et seqq.* [4] 1 C. P. D. 427. [5] 1 C. P. D. 28.

2. The Prætor's edict comprehended all ships;

Secondly, that all ships were included in the Prætor's edict: *Ait Prætor, Nautæ, caupones, stabularii, &c.*

3. So do the English cases;

Thirdly, that the English cases recognised a universal, and not a mere partial, inclusion.

4. Ambiguous words to be extended favourably to the hypothesis;

Fourthly, that where, as in *Elliot* v. *Rossell*,[1] ambiguous phrases, such as, "it must be regarded as a settled point in the English law that masters and owners of vessels are liable in port, and at sea and abroad, to the whole extent of inland carriers," &c., occur, "certainly, these are terms which seem to show that, in the mind of the Chief Justice,[2] *all* masters of *all* sea-going vessels were so liable, and not only those who had made themselves common carriers, and thereby liable to carry the goods of all persons."

5. Impossible, on other grounds, to account for the use of bills of lading, &c.

Fifthly, that "it seems impossible to account for the almost universal use of bills of lading by all sea-going ships, if a great number of them—viz., all who were not common carriers—would only be answerable for negligence, for which they are answerable notwithstanding the bill of lading."

First proposition. Denied by Cockburn, J.

Brett, J.'s, first proposition is denied by Cockburn, C.J., in the Court of Appeal from two points of view. "In the first place," he says,[3] "it is a misapprehension to suppose that the law of England relating to the liability of common carriers was derived from the Roman law; for the law relating to it was first established by our courts with reference to carriers by land, on whom the Roman law, as is well known, imposed no liability in respect of loss beyond that of other bailees for reward."[4]

Denied from another point of view by Mr. Holmes.

Brett, J.'s, position in this regard is also denied, though from another point of view, by Mr. Holmes in The Common Law.[5]

Cockburn, C.J.'s, second point.

Cockburn, C.J.'s, second point is that, as a matter of fact, the recognised law of England differs from the Roman law in that the Roman law afforded exemption to the carrier in all cases of unforeseen and unavoidable accident,[6] while the English law holds him liable, except in the case of the much narrower ground of exemption known as act of God; and Cockburn, C.J.'s, reasoning is that, one main point of the analogy sought to be established between the two systems of Roman and English law being shown to be incorrect, the whole argu-

[1] 10 Johns. (Sup. Ct. N. Y.) 18. [2] *I.e.*, Kent, C.J. [3] 1 C. P. D. 428.

[4] This statement is supported by a reference to the early law. But see Malynes, Lex Mercatoria, Part I. c. 17, "Of the begining of Sea Laws"; c. 18, "Of the manner of Proceedings in Seafaring Causes"; c. 21, "Of the fraighting of Ships, Charter-parties, and Bills of Lading"; also "The Jurisdiction of the Admiralty of England asserted" by Dr. Zouch, a treatise bound up with Malynes's Lex Mercatoria (3rd ed.). Assertion I. That in all places where navigation and trade by sea have been in use and esteem, and particularly in England, special laws have been provided for regulating the same. Assertion II. That generally where laws have been provided for businesses concerning the sea, as also in England, several judges have been appointed to determine differences, and redress offences concerning the same. Assertion III. That in all places where judges have been appointed for sea businesses, as also in England, certain causes—viz., such as have relation to navigation, and negotiation by sea, have been held proper for their conusance. Assertion IV. That the jurisdiction of the Admiral of England, as it is granted by the King, and is usually exercised in the Admiralty Court, may consist with the Statutes and Laws of this realm. There are other theses not necessary here to be noticed. Cp. Admiralty, 12 Co. Rep. 79; Articuli Admiralitatis, 4 Co. Inst. 134; Com. Dig. Admiralty; Vin. Abr. Court. The Court of Admiralty.

[5] 167, 175, 199. *Ante*, 746.

[6] *Damna, quæ imprudentibus accidunt, hoc est, damna fatalia, socii non cogentur præstare. Ideoque si pecus æstimatum datum sit, et in latrocinio aut incendio perierit, commune damnum est, si nihil dolo aut culpa acciderit ejus, qui æstimatum pecus acceperit. Quod si à furibus subreptum sit proprium ejus detrimentum est:* D. 17, 2, 52, § 3.

ment of Brett, J., on the point fails.[1] Assuming the validity of Cockburn, C.J.'s, contention, Brett, J.'s, second proposition thereupon becomes irrelevant, though this reasoning also is not quite satisfying.[2] Second proposition.

As to the third, the Chief Justice examines the cases, to show that the conclusion drawn by Brett, J., that all shipowners who carry goods for hire are common carriers, does not necessarily follow from them. In *Liver Alkali Co.* v. *Johnson*[3] the defendant was held to incur the liability of a common carrier because he "was waiting for hire by any one."[4] The argument was that to make him liable he should ply between two particular places; or that, because the course of his business was to carry the whole lading of his ship for one person, his liability should be less than the liability of one who carries the lading in different parcels for different people. It is plain from this that the point as to whether all ships were common carriers was not necessarily raised. There is, however, a *dictum* of Blackburn, J., that the decision in *Morse* v. *Slue*[5] "has always been understood to apply equally to all ships employed in commerce and sailing from England."[6] Third proposition.

The attention of Lord Russell of Killowen, C.J., was directed to this point in the later case of *Hill* v. *Scott*;[7] and he, after examining the competing views in *Liver Alkali Co.* v. *Johnson*,[8] of Blackburn, J., and Brett, J., concludes: "I prefer of the two the language of Blackburn, J., although there is really no essential difference"; and Blackburn, J.'s, view is:[9] "It is too late now to speculate on the propriety of this rule, we must treat it as firmly established that, in the absence of some contract, express or implied, introducing further exceptions, those who exercise a public employment of carrying goods do incur this liability," *i.e.*, of a common carrier. Lord Russell of Killowen, C.J., in *Hill* v. *Scott*.

Fourthly: In *Elliot* v. *Rossell*[10] the question was whether the fact of defendants being carriers to a foreign port made any difference in their liability. The nature of the case necessitated the admission that if they were within the jurisdiction they would be carriers. Consequently the ambiguous words used by Kent, C.J., can be no further extended than to mean that masters and owners of vessels are liable as common carriers on the high seas as well as in port—*i.e.*, if they are carriers in one place, they are in the other. Nothing is said as to whether all masters of ships are common carriers or not. Fourth proposition.

The fifth consideration in favour of his suggested rule, Brett, J., draws from "the almost universal use of bills of lading by all sea-going ships,"[11] which he asserts as a fact and uses as an argument. Admitting the existence of the fact, the argument from it is of no particular cogency. What there is a practice to do, is done without curious inquiry into the need to do it, or even as to its advisability. To press the argument back. How came bills of lading to be almost universally used? Those shipowners who were not common carriers Fifth proposition.

[1] Mr. Holmes's conclusions coincide with those of Cockburn, C.J., The Common Law, 199.

[2] Parsons, Law of Shipping, vol. i. 245, says: "That all ships which carry goods are to be treated as common carriers cannot be true; and the language used in relation to this subject is either inaccurate and loose, or is misunderstood because it is not interpreted by a reference to the facts of the case in which it is used."

[3] L. R. 7 Ex. 267; L. R. 9 Ex. 338.

[4] Per Blackburn, J., L. R. 9 Ex. 340.

[5] 1 Vent. 190, 238, 2 Keb. 806, 3 Keb. 72, 112, 135, Sir T. Raym. 226; Holmes, The Common Law, 192.

[6] L. R. 9 Ex. 341.

[7] (1895) 2 Q. B. 371, 376.

[8] L. R. 9 Ex. 338.

[9] L. R. 9 Ex. 340.

[10] 10 Johns. (Sup. Ct. N. Y.) 1.

[11] 1 C. P. D. 33.

would probably be in the first instance an inconsiderable proportion of the whole, and the minority would tend to assimilate their practice to that of the majority in all cases where an independent course did not carry with it any particular advantage.[1]

The fact that a regular business of common carriers by sea existed would be some reason for persons, not common carriers but purposing to undertake carrying by sea, forming their terms of carriage with reference to the existing practice of common carriers. It would be a natural thing for those not legally liable to the obligations of a common carrier to express the terms on which they carried, by reference to the document accustomed to be used by common carriers to define and limit the terms of carriage, rather than to rest satisfied with the indefinite obligations that legal interpretation might attach to their undertaking. It plainly does not follow that because a practice is generally observed, such observance is attributable to any one exclusive cause.

Parsons's contention that all general ships would be excluded from the liability of the common carrier.

Parsons, in his Law of Shipping, contends that all general ships would be excluded from the liability of common carriers by the terms of his rule.[2] This conclusion he arrives at,[3] through the definition of the contract made by the master or owner of a general ship, given in Abbott's Law of Merchant Ships[4]—viz., a contract "by which the master or owners of a ship destined on a particular voyage engage separately, with a number of persons unconnected with each other, to convey their respective goods to the place of the ship's destination." The point in view of Dr. Parsons seems to be attained by looking upon this definition of the contract as assuming a voyage altogether unaccustomed, not merely in direction, but in character. There is another view, which, while recognising the distinctive marks of the particular voyage, involves an assumption that the particular voyage is one voyage, with its own distinctive marks, in a series of voyages, all of which are concerned with the common purpose of carrying goods. Now in either view the definition is imperfect, as it fails to indicate the possible ambiguity. If the former meaning is that which alone is to be imposed, the proposition is true, but insignificant. The man who carries a few kegs of spirits for several friends in his yacht would seem no more thereby to constitute his vessel a general ship than the person who packs up knick-knacks for his friends in his travelling carriage would thereby constitute himself a common carrier. If the latter is the meaning, then the conclusion indicated does not follow—that is, that shippers so engaged are not common carriers.

Ground of such an opinion.

Examined.

The ground of such an opinion seems to be that the course of business of a shipowner engaged in carrying goods with a general ship is not the performance of a *quasi* public duty, but the contracting of an engagement whose terms are not supplied by law independently of the act of the parties. Now to constitute the employment of a common carrier, in England at least, the carrying, on any invariable set of conditions expressed or implied, is not necessary. We have seen[5] that the discriminating mark of the common carrier is "whether he

[1] The answer to Brett, J., is, that a bill of lading "is assignable in its nature; and by indorsement the property is vested in the assignee": *Caldwell* v. *Ball*, 1 T. R. 216. This is an advantage attaching to the giving a bill of lading which is adequate to explain its universal use.

[2] Parsons, Law of Shipping, vol. i. 248, and the whole of section viii., Of Ships as Common Carriers. See also 3 Kent, Comm. (12th ed.), 217, note 1.

[3] *L.c.* 249. [4] At 155 (14th ed.). [5] *Ante*, 845, 869.

carries for particular persons only, or whether he carries for every one";[1] and, in the more obvious meaning of the terms we are considering, that is precisely what happens with regard to a general ship. The carrier does not hold himself out to make a *particular* bargain with a particular person, but rather a particular bargain with any person of, may be, a particular class. This, however, Dr. Parsons denies, as matter of fact, ever to happen. He says, "it is by no means unusual for the master or owner of a general ship to refuse to take the goods of all who offer."[2] But the common carrier is only bound to take goods for carriage *according to his profession*. As Parke, B., points out in the case of innkeepers, an innkeeper may keep an inn only for those who come in their carriages.[3] By parity, the same may be the case with a general carrier. If it is asserted that a general carrier refuses to take the goods of all who offer (1) when the offer is within the limits of his profession, (2) when he has room, (3) the goods are suitable, and (4) the price is secured, Dr. Parsons' proposition is proved. If anything short of this is set up, the proof is irrelevant; as it stands the so-called proof is a mere *petitio principii*. The shipowner, such is the argument, is not carrier in law, because he is not in fact; while of this assertion that he is not a carrier in fact, no proof is attempted.

In England the point settled by authority. *Laveroni* v. *Drury*. *Liver Alkali Co.* v. *Johnson*.

However the matter may be in general reasoning, in this country it is settled by authority. Thus, in *Laveroni* v. *Drury*,[4] Pollock, C.B., says: "By the law of England, the master and owner of a general ship are common carriers for hire, and responsible as such." The point is also directly involved in *Liver Alkali Co.* v. *Johnson*,[5] where a large owner let out vessels for the conveyance of the goods of any customer who applied to him, and the fact that he only took the goods of one person in one vessel was held not to make any difference in the liability he was under. True, in this case, the decision only goes to the extent that the "defendant has the liability of a common carrier," without deciding that he is one; and the point that would arise out of Dr. Parsons' assertion of fact, that it is by no means unusual for the master or owner of a general ship to refuse to take the goods of all who offer, as a ground of liability was left undetermined. The course of the case indicates this to be rather a test than *the* test.[6]

Law in the United States. *The Montana* case.

The conclusion arrived at in America is the same. "By the settled law," says Gray, J., delivering the unanimous decision of the Supreme Court of the United States in *Liverpool and Great Western Steam Co.* v. *Phenix Insurance Co.*,[7] "in the absence of some valid

[1] *Ingate* v. *Christie*, 3 C & K. 61, cited, with approval, in *Liver Alkali Co.* v. *Johnson*, L. R. 9 Ex. 338, 343.

[2] Vol. i. 249 n.

[3] *Johnson* v. *Midland Ry. Co.*, 4 Ex. 371. *Ante*, 851.

[4] 8 Ex. 166, 170. In *Kay* v. *Wheeler*, L. R. 2 C. P. 302, the Ex. Ch. avoided giving an opinion, whether *Laveroni* v. *Drury* was rightly decided in this respect.

[5] L. R. 9 Ex. 338. *Ante*, 872.

[6] See Story, Bailm. § 501; *Sewall* v. *Allen*, per Savage, C.J., 2 Wend. (N. Y.) 342; 6 Wend. 335; *Gage* v. *Tirrell*, 91 Mass. 299, per Bigelow, C.J., 302; *Nugent* v. *Smith*, 1 C. P. D. 423, per Cockburn, C.J., 430. "Where a ship is not chartered wholly to one person, but the owners offer her generally to carry the goods of any merchants who may choose to employ her, or where one merchant to whom she is chartered offers her to several sub-freighters for the conveyance of their goods, she is called a general ship": 1 Maude and Pollock, Merchant Shipping (4th ed.), 338. The dispute may very probably be resolved into a question of definition, for there is no doubt that a "general ship" may be so defined as to exclude the notion of liability as a common carrier, while equally undoubtedly the definition is often so framed as to include the liability; and, whatever the definition, the notion of liability of a common carrier most commonly attaches.

[7] 129 U. S. (22 Davis) 437.

agreement to the contrary, the owner of a general ship carrying goods for hire, whether employed in internal, in coasting, or in foreign commerce, is a common carrier with the liability of an insurer against all losses except only such two irresistible causes as the act of God and public enemies." [1]

Jury to find whether the holding out is that of a common carrier.

The determination of whether the inference is to be drawn that the carrier has held himself out as a common carrier, and whether an agreement between the parties constitutes the relation in a particular case, is for the jury,[2] subject of course to there being any evidence from which the conclusion *can* he drawn.[3] If goods are received by a common carrier without any arrangement, the legal inference ie that he received them, according to his profession.

Liability most largely determined by special contracts.

The liability of shipowners and masters is largely limited by the use of bills of lading as records of the terms on which goods are contracted to be conveyed. Under bills of lading precisely identical obligatione attach to the owners and the master in regard to shipments, whether they act as general or common carriers, or simply as carriers *pro hac vice;* eince bills of lading ascertain and fix and control the liability, and the exceptions therein contained cover the usual risks not taken by the owners.[4]

Jettison.

Jettison.

Before considering them there is one state of things peculiar to the maritime law, on the occurrence of which the shipower is not liable for damage to the shippers; that is, where goods have been intentionally thrown overboard during the course of a voyage in order to eavc the ship and the remainder of the cargo from a danger common to the whole adventure. Where this happens, the owner whose goods are sacrificed has a right to contribution towards his loss from those whose property is saved, including the ship itself.[5]

Definition in "Termes de la Ley."

In "Termes de la Ley" is the following: "Jetsam is, when a ehip is in danger to be cast away, and to disburthen the ship, the marincrs cast the goods into the sea; and although afterward the ship perish, none of those goods called jetsam, flotsam, or lagan are called wreck as long as they remain in or upon the sea; but if any of them are driven to land by the sea, there they shall be reputed wreck and pass by the grant of wreck." [6]

"The principle of this general contribution," says Abbott, "is known to be derived from the ancient law of Rhodes, being adopted into the Digest of Justinian with an express recognition of its true origin." [7]

1 For his proposition he cites Molloy, bk. 2, c. 2, § 2; Bac. Abr. Carriers (A); *Barclay* v. *Cuculla y Gana*, 3 Doug. 389; 2 Kent, Comm. 598, 599; Story Bailm. § 501; *The Niagara*, 21 How. (U. S.) 7, 23; *The Lady Pike*, 21 Wall. (U. S.) 1, 14.

2 *Tamvaco* v. *Timothy*, C. & E. 1. The marginal note, which is not borne out by the case, is inaccurate. Cp. *Tate* v. *Hyslop*, 15 Q. B. D. 368. In the Admiralty Division there is no absolute right to a jury in cases where there was no right before the passing of the Judicature Acts, but the judge has a discretion. *The Temple Bar*, 11 P. D. 6. In *The Orwell*, 13 P. D. 80, the plaintiff was allowed a jury in an action under Lord Campbell's Act under R. S. C. 1883, Order xxvii. r. 4.

3 *Ante*, 134.

4 *Pope* v. *Nickerson*, 3 Story (U. S.), per Story, J., 473; *Commander-in-Chief*, 1 Wall. (U. S.) 43. *Post*, 1054.

5 3 Kent, Comm. 232, and (12th ed.), Mr. Holmes's note, 234, General Average; Abbott, Merchant Ships (14th ed.), 753 *et seq.*

6 The reference for this is *Sir Henry Constable's case*, 5 Co. Rep. 106 a; see also *Butler* v. *Wildman*, 3 B. & Ald. 398; *Dickenson* v. *Jardine*, L. R. 3 C. P. 639; Parsons, Law of Shipping, vol. i. 347.

7 (14th ed.), 752, where the authorities are collected. See also Black, Book of

To justify the application of the rule as to average contributions the sacrifice must be made in conformity with certain conditions:

In jettison the sacrifice must conform to five conditions.

(1) The danger must not have been produced by the thing sacrificed. This requirement is made on the ground of the manifest injustice of permitting him whose act or default imperilled the whole adventure to claim recompense from those whose property he had jeopardised.[1]

(2) The danger must have threatened not a part merely, but the whole adventure.[2]

(3) The danger must be apparently inevitable if the sacrifice is not made.[3]

(4) The danger must have caused the casting away. It is not sufficient if the casting away was of something that could not be saved at the time it was cast away.[4]

(5) The mind and agency of man must be employed.[5]

Deck cargo.

If the goods are on the deck, which is not generally the proper

the Admiralty (Twiss's ed.), vol. ii., Judgments of the Sea, 219, §§ 8–11, vol. iv., The Amalphitan Table, 31, §§ 47–49, where is the following: "Likewise, if the merchants be avaricious persons, such as are found in the world, who would rather die than lose anything, who from extreme avarice would not consent to the jettison, but oppose it, thereupon the master with the mate and the other officers of the vessel, having held a council, ought to insist on it," &c. The rest of the leading codes of ancient sea laws are set out in the same volume. *Lege Rhodiâ cavetur ut, si levandæ navis gratiâ factus mercium jactus sit, omnium contributione sarciatur, quod pro omnibus datum est:* D. 14, 2, 1. This title of the Digest—*De Lege Rhodia De Jactu*—may be here generally referred to as containing the doctrines of the civil law on the subject. See also Paul, Sent. Rec. 2, 7. Moyle, Just. Inst. 2, 1, 48, refers to Aristotle, Ethics, 3, 1, containing the general definition of the Voluntary. The authority, or rather the lack of authority of these foreign codes is very forcibly pointed out by Lord Esher, M.R., in *The Gas Float Whitton*, (No. 2), [1896] P. 47. The derivation of the Admiralty law of England and Scotland from the laws of Oleron supplemented by the civil law is asserted by Lord Halsbury, C., *Currie* v. *M'Knight*, [1897] A. C. 102, also per Lord Watson, 104; and explained by him, *Sailing Ship Blairmore Co.* v. *Macredie*, [1898] A. C. 605. The first mention of contribution towards jettison in the English law, and that only incidentally, is in *Mouse's case*, 12 Co. Rep. 63. See, for the history of the law, *Birkley* v. *Presgrave*, 1 East, 220, Tudor, L. C. on Mercantile Law (3rd ed.), 92 *cum notis*; *Pirie* v. *Middle Dock Co.*, 44 L. T. 426, 428. There is a conflict of authority as to whether this right of jettison arises from an implied contract or is founded on natural justice alone. The former view is advocated by Bramwell, L.J., *Wright* v. *Marwood*, 7 Q. B. D. 67; the latter by Brett, M.R., *Burton* v. *English*, 12 Q. B. D. 220. See *The Marpessa*, [1891] P. 403, considered in *The Minnetonka*, [1905] P. 206. *The Brigella*, [1893] P. 189, overruled *Montgomery* v. *Indemnity Mutual Marine Insurance Co.*, [1902] 1 K. B. 734; *De Hart* v. *Compañia Anonima de Seguros* "*Aurora*," [1903] 2 K. B. 503. General Average is ably treated in Bell, Comm. vol. i. (7th ed.), 629–638. *The Leitrim*, [1902] P. 256. The Marine Insurance Act, 1906 (6 Edw. VII. c. 41), s. 66.

[1] *Schloss* v. *Heriot*, 14 C. B. N. S. 59; *Johnson* v. *Chapman*, 19 C. B. N. S. 563, which is considered in *Wright* v. *Marwood*, 7 Q. B. D. 62; *Burton* v. *English*, 10 Q. B. D. 426; 12 Q. B. D. 218; *Strang, Steel & Co.* v. *Scott*, 14 App. Cas. 601; *Ruabon SS. Co.* v. *London Assurance*, [1900] A. C. 6, 10.

[2] *Nesbitt* v. *Lushington*, 4 T. R. 783; *Walthew* v. *Mavrojani*, L. R. 5 Ex. 116 (Ex. Ch.). There must be a danger, actual or impending, common to both ship and crew: *Whitecross Wire Co.* v. *Savill*, 8 Q. B. D. 653. *Royal Mail Steam Packet Co.* v. *English Bank of Rio de Janeiro*, 19 Q. B. D. 362, compares the English and American law of general average. *Svendsen* v. *Wallace*, 10 App. Cas. 404, 417, discusses *Atwood* v. *Sellar*, 5 Q. B. D. 286; *Rose* v. *Bank of Australasia*, [1894] A. C. 687.

[3] *Harrison* v. *Bank of Australasia*, L. R. 7 Ex. 39; *Laurence* v. *Minturn*, 17 How. (U. S.) 100. As Blackburn, J., says in *Wilson* v. *Bark of Victoria*, L. R. 2 Q. B. 213, there must be "expenditure which is not only extraordinary in its amount, but is incurred to procure some service extraordinary in its nature."

[4] *Shepherd* v. *Kottgen*, 2 C. P. D. 578, 585. It must be "a voluntary and intentional sacrifice . . . under the pressure of imminent danger, and for the benefit, and with a view to secure the safety, of the whole adventure then at risk": *Stewart* v. *West India and Pacific Steamship Co.*, L. R. 8 Q. B. 93; in Ex. Ch. L. R. 8 Q. B. 362. But, says Benecke, Marine Insurance, 171: "The moment of the greatest distress cannot be waited for." See *The Bona*, 11 Times L. R. 40, affirmed 209.

[5] Abbott, Merchant Ships (14th ed.), 753.

place for the stowage of cargo, this does not entitle their owner to contribution.[1]

Notwithstanding this, however, the owner of deck goods jettisoned, though not entitled to general contribution, may still have a good claim for indemnity against the master and owners who received his goods for carriage upon deck; and he may have a good claim against the other owners, (1) in cases where the established custom of navigation permits deck cargoes, and (2) where the other owners of cargo have consented that the goods jettisoned should be carried as deck cargo.[2]

The earliest statement of the law of jettison in *Mouse's case*.

Mouse's case [3] has been cited as the earliest decision in the English law as to jettison. A casket was cast into the river in order to lighten a ferry boat caught by a great storm and tempest, whereby the passengers' safety was jeopardised. It was held that, "if a tempest arise in the sea, *levandi navis causa*, and for salvation of the lives of men, it may be lawful for passengers to cast over the merchandises," &c. The act in question was done by the interference of a passenger, and not by the master, by whom the act is more usually determined on, and who is responsible for what is done;[4] nevertheless it was held to be "lawful to the defendant, being a passenger, to cast the casket of the plaintiff out of the barge, with the other things in it; for *quod quis ob tutelam corporis sui fecerit, jure id fecisse videtur.*"

Absence of negligence.

There must be no negligence on the part of the responsible person, either in the act of jettison[5] or in guarding against the perils which in the last resort render it necessary;[6] and this absence of negligence

[1] *Gould* v. *Oliver*, 4 Bing. N. C. 134; *Milward* v. *Hibbert*, 3 Q. B. 120. As to a custom to carry deck cargo, *Wright* v. *Marwood*, 7 Q. B. D. 62; *Burton* v. *English*, 12 Q. B. D. 218; *Royal Exchange Shipping Co.* v. *Dixon*, 12 App. Cas. 11; Lowndes, Law of General Average (4th ed.), 62. See also *Hurley* v. *Milward*, Jones and Carey (Ir. Ex.), 224. Goods stowed on deck without the consent of the owner are understood to be at the risk of the master. In the case of loss he cannot exempt either himself or the vessel from liability under a contract within the exception of dangers of the seas, unless the dangers were such as would have occasioned the loss had the goods been safely stowed under deck: *The Rebecca*, Ware (U. S. Dist. Ct.), 188, 211; *Dodge* v. *Bartol*, 5 Greenleaf (Me.), 286, where it is said, at 289, citing Valin, Ordonnance de la Marine, liv. 3, tit. 8, art. 13: "This rule does not apply to boats and small vessels, which sail from port to port; where it is customary to load goods on deck, as well as in the hold"; *Pontifex* v. *Hartley*, 8 Times L. R. 657. In *Royal Mail Steam Packet Co.* v. *English Bank of Rio de Janeiro*, 19 Q. B. D. 362, cargo discharged before the commencement of extraordinary measures for getting off a stranded ship was held not liable to contribute to expenses. See sec. 451 of Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), with reference to deck loads of timber.

[2] *Strang, Steel & Co.* v. *Scott*, 14 App. Cas. 601; *Apollinaris Co.* v. *Nord Deutsche Insurance Co.*, [1904] 1 K. B. 252. Chalmers, Marine Insurance Act, 1906, 151.

[3] 12 Co. Rep. 63. *Sir Henry Constable's case*, 5 Co. Rep. 106*a*, in which the nature of jettison or, as it is there spelled, jetsam is considered, is an action for taking wreck in prejudice of the rights of the lord of the manor. See *Bird* v. *Astcock*, 2 Bulst. 280.

[4] *The Gratitudine*, 3 C. Rob. (Adm.) 240, 258, Tudor, L. C. on Mercantile Law (3rd ed.), 34; *Dupont de Nemours & Co.* v. *Vance*, 19 How. (U. S.) 162. *Price* v. *Noble*, 4 Taunt. 123, where the question of whether goods can be jettisoned by other than the master, was distinctly raised and decided affirmatively. See *Butler* v. *Wildman*, 3 B. & Ald. 398, as to the extent to which the right is recognised; also *Notara* v. *Henderson*, L. R. 7 Q. B. 225, 236; *Whitecross Wire Co.* v. *Savill*, 8 Q. B. D., 653.

[5] "If under the pretence of preserving the adventure cargo is jettisoned without due cause, the owner will have a right of action against the shipowner for the whole of his loss:" *Whitecross Wire Co.* v. *Savill*, 8 Q. B. D. per Brett, L.J., 663.

[6] *Clark* v. *Barnwell*, 12 How. (U. S.), per Nelson, J., 280: "although the loss occurs by a peril of the sea, yet if it might have been avoided by skill and diligence at the time, the carrier is liable. But in this stage and posture of the case, the burden is upon the plaintiff to establish the negligence, as the affirmative lies on him;" citing *Muddle* v. *Stride*, 9 C. & P. 380; or, as the principle is stated, *General Mutual Insurance Co.* v. *Sherwood*, 14 How. (U.S.) 365: "if damage be done by a peril insured against, and the master neglects to repair that damage, and in consequence of the

is exacted, not merely in this instance, but in all cases where there is an exception to the ordinary carrier's liability, whether on land or sea.[1]

Lien of owner of goods sacrificed.

"It is settled law that in the case of a general ship, the owner of goods sacrificed for the common benefit has a lien upon each parcel of goods saved belonging to a separate consignee for a due proportion of his individual claim. The cargo not being in his possession or subject to his control, his right of lien can only be enforced through the shipmaster, whom the law of England, following the principles of the Lex Rhodia, regards as his agent for that purpose. The duty being imposed by law upon the master, he is answerable for neglect of it";[2] and in *Crooks* v. *Allan*[3] the defendants, who had neglected to perform their duty in this respect, were compelled to pay the whole amount of the contribution.

Right for *pro rata* contribution.

Besides this remedy, each owner of jettisoned goods has a direct claim against each owner of cargo for a *pro rata* contribution towards his indemnity, which may be recovered by action at law.[4] Yet where the negligence of the master has occasioned the peril necessitating the jettison, the shipowners are not entitled to recover against the owners of cargo, but will be liable to the owners of the goods jettisoned for the damage caused by the wrongdoing of the master,[5] unless the ordinary relations of the goods' owner to the shipowner has been altered by a contract that the shipowner shall not be responsible for the negligence of his servants.[6]

Seaworthiness.

Ship presumed to be fit for the purpose to which it is applied

We have seen that the law regards common carriers of goods as insurers;[7] and thus as against the carrier the ship is presumed to be fit for the purpose for which it is used.[8] The principle is stated by Lord Blackburn in *Steel* v. *State Line Steamship Co.*,[9] "to be quite clear, both in England and in Scotland, that, where there is a contract to carry goods in a ship, whether that contract is in the shape of a bill of lading, or any other form, there is a duty on the part of the person who furnishes or supplies that ship, or that ship's room, unless something be stipulated which should prevent it, that the ship shall be fit for its purpose. That is generally expressed by saying that it shall be seaworthy; and I think, also, in marine contracts, contracts for sea carriage, that is what is properly called a 'warranty,' not merely that

want of such repairs the vessel is lost, the neglect to make repairs and not the sea damage has been treated as the proximate cause of the loss." See also *Siordet* v. *Hall*, 4 Bing. 607, and Lord Lindley's reference to it, *Fenton* v. *Thorley*, [1903] A. C. 454; *The Freedom*, L. R. 3 P. C. 594 commented on as to a passage at 601, in *The Chasca*, L. R. 4 A. & E. 446; and per Lindley, L.J., *Chartered Mercantile Bank of India* v. *Netherlands India Steam Navigation Co.*, 10 Q. B. D. 542.

[1] *Czech* v. *General Steam Navigation Co.*, L. R. 3 C. P. 14; *The Figlia Maggiore*, L. R. 2 A. & E. 106. *Taylor* v. *Liverpool and Great Western Steam Co.*, L. R. 9 Q. B. 546, was decided on the ground of a failure to prove that the loss for which defendant was *primâ facie* liable, was within the exceptions.

[2] Per Lord Watson, *Strang, Steel & Co.* v. *Scott*, 14 App. Cas. 606, where *Hallett* v. *Bousfield*, 18 Ves. 187, is considered.

[3] 5 Q. B. D. 38.

[4] *Dobson* v. *Wilson*, 3 Camp. 480.

[5] *Strang* v. *Scott*, 14 App. Cas. 601.

[6] *The Carron Park*, 15 P. D. 203.

[7] *Ante*, 876.

[8] "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": per Lord Ellenborough, in *Lyon* v. *Mells*, 5 East, 437.

[9] 3 App. Cas. 86; *Owners of Cargo on Ship "Maori King"* v. *Hughes*, [1895] 2 Q. B., per Kay, L.J., 557. Cp. *Gilroy* v. *Price*, [1893] A. C. 56.

they should do their best to make the ship fit, but that the ship should really be fit."[1]

Parke, B.'s, definition of seaworthiness in *Dixon* v. *Sadler*

Parke, B.'s, definition of seaworthiness in *Dixon* v. *Sadler*.[2] is the one most often referred to. The term, he says, implies that the ship "shall be in a fit state as to repairs, equipment, and crew, and in all other respects to encounter the ordinary perils of the voyage . . . at the time of sailing upon it."

Seaworthiness for the jury.

Lord Blackburn's opinion in *Steel* v. *State Line Steamship Co.*

In the House of Lords, in *Steel* v. *State Line Steamship Co.*,[3] the question of seaworthiness, the determination of whether the duty or obligation to make the ship reasonably fit for the voyage has been discharged, was agreed to be one for the jury. "I think," continues Lord Blackburn,[4] "that there are some views of the case in which, though it would still be a question of fact for the jury, there could not be much doubt about it one way or the other. If, for example, this port was left unfastened, so that when any ordinary weather came on, and the sea washed as high as the port, it would be sure to give way and the water come in, unless something more was done—if in the inside the wheat had been piled up so high against it and covered it, so

[1] See 6 Edw. VII. c. 41, s. 39, Chalmers, Marine Insurance Act, 1906, 53. Cp. *The Carron Park*, 15 P. D. 203; *The Accomac*, 15 P. D. 208; *Milburn & Co.* v. *Jamaica Fruit Importing, &c. Co.*, [1900] 2 Q. B. 540. The American view is that the fundamental principle upon which the law of common carriers was established, was to secure the utmost care and diligence in the performance of their duties; an end secured in regard to goods by charging the common carrier as an insurer, and in regard to passengers by exacting the highest degree of carefulness and diligence; so that a carrier who stipulates not to be bound to the exercise of care and diligence, in the view of American law seeks to put off the essential duties of his employment; and this endeavour the law invalidates as against public policy. See this view stated by Gray, J., in *Liverpool and Great Western Steam Co.* v. *Phenix Insurance Co.*, 129 U. S. (22 Davis) 439–441. But an insurance by the common carrier against loss arising from the negligence of his own servants has been held good by the highest authority: *Phœnix Insurance Co.* v. *Erie Transportation Co.*, 117 U. S. (10 Davis) 312, approved *California Insurance Co.* v. *Union Compress Co.*, 133 U. S. (26 Davis) 387.

[2] 5 M. & W. 414; in Ex. Ch. 8 M. & W. 895, Tudor, L.C., on Mercantile Law (3rd ed.), 127 *cum notis*. *Davidson* v. *Burnand*, L. R. 4 C. P. 117; *The Quebec Marine Insurance Co.* v. *The Commercial Bank of Canada*, L. R. 3 P. C. 234, where Lord Tenterden's *dictum* in *Weir* v. *Aberdeen*, 2 B. & Ald. 320, is commented on. *The Vortigern*, [1899] P. 140. See *Gilroy* v. *Price*, [1893] A. C. 56; Abbott, Merchant Ships (14th ed.), 488; *Hedley* v. *Pinkney*, [1894] A. C. 222.

[3] (1877) 3 App. Cas. 72, where, at 77, Lord Cairns, C., says: "By seaworthy—I do not desire to point to any technical meaning of the term, but to express that the ship should be in a condition to encounter whatever perils of the sea a ship of that kind, and laden in that way, may be fairly expected to encounter in crossing the Atlantic"; and at 89, Lord Blackburn describes the owner's obligation as to seaworthiness as "the duty or obligation to make the ship reasonably fit for the voyage." See *The Carron Park*, 15 P. D. 203; *Tattersall* v. *National Steamship Co.*, 12 Q. B. D. 297; *Adam* v *Morris*, 18 Rettie, 153, 150; *Gilroy* v. *Price*, [1893] A. C. 56. Under sec. 3 of the "Harter Act" the duty to make a ship seaworthy is not incumbent only on the owner, but tends to the acts of his servants, so that the negligence of a ship's carpenter prevents the exemption from liability applying: *Dobell* v. *SS. Rossmore Co.*, [1895] 2 Q. B. 408. The protection of the Act extends "to damage or loss resulting from faults or errors in navigation or management of the said vessel." This covers the period of unloading: *The Glenochil*, [1896] P. 10; *The Rodney*, [1900] P 112. Mismanagement of refrigerating apparatus was held within the section in *Rowson* v. *Atlantic Transport Co.*, [1903] 2 K. B. 696. The incorporation of the Harter Act does not cut down the absolute obligation at common law to an undertaking to exercise due diligence: *McFadden* v. *Blue Star Line*, [1905] 1 K. B. 697; *Morris* v. *Oceanic Steam Navigation Co.*, 18 Times L. R. 533.

[4] *L.c.* 90. A covenant of seaworthiness is not to be construed as a condition precedent where the freighter has taken the ship into his service and used her. "If," said Lord Ellenborough, *Havelock* v. *Geddes*, 10 East, 563, "this were a condition precedent, the neglect of putting in a single nail for a single moment after the ship ought to have been made tight, staunch, &c., would be a breach of the condition, and a defence to the whole of the plaintiff's demand." This was followed in *Inman Steamship Co.* v. *Bischoff*, 7 App. Cas. 670, 673, 683.

that no one would ever see whether it had been so left or not, and so that if it had been found out or thought of, it would have required a great deal of time and trouble (time above all) to remove the cargo to get at it and fasten it—if that was found to be the case, and it was found that at the time of sailing it was in that state, I can hardly imagine any jury finding anything else than that a ship which sailed in that state did not sail in a fit state to encounter such perils of the sea as are reasonably to be expected in crossing the Atlantic. I think, on the other hand, if this port had been, as a port in the cabin or some other place would often be, open, and when they were sailing out under the lee of the shore remaining open but quite capable of being shut at a moment's notice, as soon as the sea became in the least degree rough, and in case a regular storm came on capable of being closed with a dead light—in such a case as that no one could, with any prospect of success, ask any reasonable people, whether they were a jury or judges, to say that that made the vessel unfit to encounter the perils of a voyage."

Seville Sulphur and Copper Co. v. Colvils.

But when the criteria of Lord Blackburn came to be applied in another Scotch case,[1] there was a difference of opinion amongst the judges. The action was by charterers against shipowners for damages for loss of cargo. The vessel was lost in consequence of the breakdown of the boiler through the amount of mud in the water, which was drawn from the Guadalquiver, a river of exceptional muddiness. The Lord Justice-Clerk (Moncreiff) held that the facts proved made out "a stronger case than that of *Steel*, for in that case there was no structural defect, only careless stowage of the cargo, which prevented one of the port-holes from being closed. But the propelling power of a sea-going ship is of its essence, and if this vessel for the time had none it could not be seaworthy."[2] On the other hand, Lord Young said:[3] "Of course the muddy state of the river may be so had at certain times that the shipmaster, instead of taking in the water from the river, should send elsewhere for it. Whether this mistake of taking water from the river amounts to an error of navigation in the sense of the charter-party[4] is a question which has never been decided. I think it was a mistake to take water into the boiler in a muddy condition, and the evidence shows that this muddiness caused or contributed to the loss of the ship, but I have a doubt as to whether it brought about what the sheriff-substitute calls unseaworthiness in a 'legal sense.' . . . That the presence of that muddy water in her boiler constituted unseaworthiness is a proposition by no means clear to my mind." The rest of the Court concurred with the Lord Justice-Clerk.

Considered.

The deposit of mud in the boiler seems clearly a falling short of that condition of fitness in equipment that Parke, B., regarded as seaworthiness; and to scour a boiler free from mud, at the point of departure on a voyage, would further appear to be a matter requiring that "great deal of time and trouble (time above all),"[5] which Lord Blackburn marks as indicating a defect of seaworthiness rather than

[1] *Seville Sulphur and Copper Co.* v. *Colvils*, 15 Rettie, 616; cp. *The Southgate*, [1893] P. 329. *Blackburn* v. *Liverpool, Brazil, and River Plate Steam Navigation Co.*, [1902] 1 K. B. 290; *McFadden* v. *Blue Star Line*, [1905] 1 K. B. 697.

[2] 15 Rettie, 625.

[3] *L.c.* 626.

[4] The charter-party freed the owner from liability from "the act of God, the Queen's enemies, fire, and all and every other dangers and accidents of the seas, rivers, and or errors of negligence, of navigation of whatsoever nature and kind, during the voyage."

[5] 3 App. Cas. 90.

a mere temporary incommodity. If, then, *Seville Sulphur and Copper Co.* v. *Colvile* [1] is an instance of a shortcoming that amounts to unseaworthiness, the defective fastening of the rail in *Hedley* v. *Pinkney* [2] is an instance, on the other hand, of that negligence on the part of the crew which is not to be regarded as amounting to unseaworthiness of the ship.

Stipulation excepting liability for shipowner's negligence.

But a stipulation excepting the shipowner from liability for his own negligence is not invalid as against public policy or for any other cause.

This principle has been plainly and shortly stated by Bigham, J.: "The common law obligation of a shipowner is to provide a ship reasonably fit to carry the cargo that is shipped upon it. If a shipowner desires to avoid this responsibility he must, I think, use very plain and distinct words to give notice of his intention to get out of this obligation"; for example, an exception from defects latent on beginning voyage or otherwise has been held not to cover a defect obvious at the commencement of the voyage. [3]

Exception construed against shipowner.

It is a general rule of construction that exceptions in a bill of lading are to be construed against the shipowner; [4] and where a bargeowner contracted for carriage of goods with an exemption from liability "for any loss of or damage to goods which can be covered by insurance" he was still held liable where the barge containing the goods was sunk by the negligence of his servants. [5] Sometimes the bill of lading and the charter-party differ. Then the consignee is bound only by the conditions of the bill of lading which alone is his contract. Sometimes the bill of lading affects to incorporate by general words the conditions of the charter-party, *e.g.*, "they (the consignees) paying freight for the said coals, *and all other conditions as per charter*." [6] Then the incorporating words are to be interpreted to mean "all those conditions of the charter-party which are to be performed by the consignee of the goods." [7] Where the incorporation of an excepted peril in the bill of lading from the charter-party is clear, reference is to be made to this latter and the shipowner is excused. [8] In any case the question is one of construction, and the rule is that to excuse the shipowner for his own negligence the words used must be express and unambiguous.

The rule in the United States is the same, or perhaps in the decisions of even greater stringency. It has been expressed: Where the bill of lading is ambiguous or there is a reasonable doubt as to which of two

[1] 15 Rettie, 616; but see *Cunningham* v. *Colvile*, 16 Rettie, 205, where Lord Adam said, at 309: "We were referred to the case of the *Seville Sulphur and Copper Co.* against the present defenders" . . . "in which the Second Division arrived at a different conclusion from that at which I have arrived, but it is enough to say that the evidence we have had to consider is materially different from the evidence in that case." [2] [1892] 1 Q. B. 58; in H. L. [1894] A. C. 222.

[2] *Owners of Cargo on Waikato* v. *New Zealand Shipping Co.*, [1898] 1 Q. B. 647, cited and adopted by Williams, L.J., *Rathbone Brothers* v. *D. MacIver*, [1903] 2 K. B. 384; and by Lord Alverstone, C.J., in C. A., *Borthwick* v. *Elderslie Steamship Co.*, [1904] 1 K. B. 319, affd. [1905] A. C. 93. *Wade* v. *Cockerline*, 21 Times L. R. 206.

[4] *Phillips* v. *Clark*, 2 C. B. (N. S.) 156; *Hayn* v. *Culliford*, 4 C. P. D. 182: exemption from negligence of "captain, officers and crew" does not extend to the default of a stevedore. 6 Edw. VII. c. 41, s. 55.

[5] *Price & Co.* v. *Union Lighterage Co.*, [1904] 1 K. B. 412, followed in *Nelson* v. *Nelson Line*, [1906] 2 K. B. 804; in C. A. [1907] 1 K. B. 769. *The Pearlmore*, [1904] P. 286. Cp. *The Mary Thomas*, [1894] P. 108

[6] *Serraino* v. *Campbell*, [1891] 1 Q. B. 283.

[7] *Diederichsen* v. *Farquharson*, [1898] 1 Q. B. 150, 162; *Moel Tryvan Ship Co.* v. *Krueger*, [1906] 2 K. B. 792; [1907] 1 K. B. 809; affirmed in H. of L. [1907] A. C. 272.

[8] *The Cressington*, [1891] P. 152. Cp. *The Northumbria*, [1906] P. 292.

constructions will best accord with the intention of the parties, the Courts will adopt the construction most favourable to the shipper." [1]

Want of knowledge of defects does not excuse the shipowner.[2] His obligation is absolute unless he is prevented by perils of the sea or unavoidable accident, and will be implied where there is no express contract.[3] Yet the stipulation of seaworthiness is not so far a condition precedent that the hirer is discharged on breach of his contract by the shipowner from payment of any of the charter-money. The charterer is bound to pay for the use of the ship to the extent to which it goes. Again, if a defect, without any apparent cause, be developed, there is a presumption that it existed when the service began.[4] Unless the shipowner has contracted himself out of his common law liabilities, he undertakes responsibility for all defects, even those undiscoverable by the closest and most careful scrutiny,[5] if their existence is incompatible with the reasonable fitness of the ship.

Want of knowledge no excuse.

The condition of the ship must be suitable with regard to the particular purpose to which it is to be put,[6] and not only structurally fit, but furnished with a competent crew, officers, and general arrangements.[7] Thus, in *Kopitoff* v. *Wilson* [8] the plaintiff sought to recover damages for the loss of a large number of iron armour plates, which were lost by reason of one of the plates breaking loose after the ship had been out to sea for some hours, causing the loss of the ship and the plates. The plaintiff contended that the breaking loose of the plates was caused by improper stowage; the defendants, that it was a direct consequence of the roughness of the sea, which was a peril excepted in the bill of lading. The Queen's Bench Division held, that the merchant, by his contract with the shipowner, is protected against the damage arising from such perils acting upon a seaworthy ship. "We hold," said Field, J.,[9] "that in whatever way a contract for the conveyance of merchandise be made, where there is no agreement to the contrary the shipowner is, by the nature of the contract, impliedly and necessarily held to warrant that the ship is good, and is in a condition to perform the voyage then about to be undertaken, or, in ordinary language, is seaworthy, that is, fit to meet and undergo the perils of the sea and other incidental risks to which she must of necessity be exposed in the course of the voyage."

"Suitable" means not only structurally fit, but furnished with competent crew, officers, and general arrangements. *Kopitoff* v. *Wilson*.

Judgment of Field, J.

The shipowner is not bound to provide a perfect vessel—one that is the best and fittest for the purpose for which it has to serve—but, to adopt the definition given by Erle, J., in the House of Lords in *Gibson* v. *Small*,[10] one that before setting out "is fit in the degree which

Erle, J.'s, test of efficiency.

[1] Thompson, Negligence, § 6482.

[2] *The Edwin I. Morrison*, 153 U. S. (46 Davis) 199.

[3] 3 Kent, Comm. 205. In *The Schooner Sarah*, 2 Sprague (U. S. Adm.), 31, a ship was held unseaworthy where only the master was on board: "He should either have kept his crew with him or, if it was necessary to let them go home for any purpose, he should have procured suitable and competent persons in their place."

[4] *Work* v. *Leathers*, 97 U. S. (7 Otto) 379.

[5] *The Glenfruin*, 10 P. D. 103; *Backhouse* v. *Snead*, 1 Murph. (N. Ca.) 173, cited Parsons, Law of Shipping, vol. i. 285, where the rudder of the ship was internally defective, although outwardly sound, and it breaking in a storm, the ship was wrecked and some corn, which was on board, was lost. The shipowner was held liable. See also *Dupont de Nemours & Co.* v. *Vance*, 19 How. (U. S.) 162, 167. As to the law where there is a bill of lading with a clause "*warranted* seaworthy only so far as ordinary care can provide": *Cargo ex Laertes*, 12 P. D. 187.

[6] *Stanton* v. *Richardson*, L. R. 7 C. P. 421; L. R. 9 C. P. 390, affirmed in the House of Lords (see per Field, J., 1 Q. B. D. 381).

[7] *Clifford* v. *Hunter*, M. & M. 103; *Forshaw* v. *Chabert*, 3 B. & B. 158.

[8] 1 Q. B. D. 377.

[9] *I.c.* 380.

[10] 4 H. L. C. 384. In *Dudgeon* v. *Pembroke*, 2 App. Cas. 293, Lord Penzance,

a prudent owner uninsured would require to meet the perils " of such a voyage as it is reasonable to anticipate for it. Extraordinary perils are excepted. It is manifest that as the arts of naval construction improve, this ability to resist the perils of the sea must be constantly rising. What in one age would be looked on as the act of God, so that loss arising therefrom would be excused as within the exception, may, in a succeeding age, come to be regarded as a loss resulting from an unfitness to encounter perils, which it would be usual and prudent and of course to provide against at the commencement of a voyage.[1]

Seaworthiness to be determined at the time the goods were received on board.

The seaworthiness of the ship is to be determined at the time the goods were received on board, as well as at the time of sailing with the cargo, and includes unfitness to carry the cargo in addition to unfitness for navigation purposes.[2] So that if, in the interval between the reception of the goods and the commencement of the voyage, the ship becomes unfit, the liability attaches,[3] though

in negativing the implication of a warranty of seaworthiness in a time policy, said: "I do not propose to trouble your Lordships by reviewing the arguments on this question, because I consider that the case of *Gibson* v. *Small* (4 H. L. C. 353), supplemented as it was by the two cases of *Thompson* v. *Hopper* (6 E. & B. 172), and *Fawcus* v. *Sarsfield* (6 E. & B. 192), must be considered to have set at rest the controversies on this subject, and to have finally decided that the law does not, in the absence of special stipulations in the contract, infer in the case of a time policy any warranty that the vessel at any particular time shall have been seaworthy. In pronouncing the judgment of the majority of the Court in the latter case, Lord Campbell said: 'For the reasons which I gave in the case of *Gibson* v. *Small*, and which I have given in the case of *Thompson* v. *Hopper*, I think there is no implied warranty of seaworthiness in any time policy.'"

[1] *Burgess* v. *Wickham*, 3 B. & S., per Blackburn, J., 693, commenting on and approving the remark of Story, J., in *Tidmarsh* v. *The Washington Fire and Marine Insurance Co.*, 4 Mason (U. S.) 441, that "the standard of sea-worthiness has been gradually raised within the last thirty years." In *Knill* v. *Hooper*, 2 H. & N. 283, Watson, B., delivering the judgment of the Court, said: "The term 'sea-worthiness' is a relative term: there is no positive condition of the vessel recognised by the law to satisfy the warranty of sea-worthiness." Cp. *Readhead* v. *Midland Ry. Co.*, L. R. 2 Q. B. 440. As to seaworthiness with regard to deck cargo, see *Daniels* v. *Harris*, L. R. 10 C. P. 1; *Lawrence* v. *Minturn*, 17 How. (U. S.) 100.

[2] *Tattersall* v. *National Steamship Co.*, 12 Q. B. D. 297. *Owners of Cargo on "Maori King"* v. *Hughes*, [1895] 2 Q. B. 550, implied warranty of reasonable fitness of refrigerating apparatus; *Queensland National Bank* v. *Peninsular and Oriental Steam Navigation Co.*, [1898] 1 Q. B. 567, implied warranty that a bullion-room was reasonably fit to resist thieves; *Rathbone Brothers* v. *D. MacIver*, [1903] 2 K. B. 378, implied warranty of reasonable fitness to receive a cargo of sheepskins; *Elderslie SS. Co.* v. *Borthwick*, [1905] A. C. 93.

[3] *Cohn* v. *Davidson*, 2 Q. B. D. 455; *Dudgeon* v. *Pembroke*, 2 App. Cas. 296, per Lord Penzance: "The underwriters would be at liberty in every case of a voyage policy to raise and litigate the question whether, at the time the loss happened the vessel was, by reason of any insufficiency at the time of last leaving a port where it might have been repaired, unable to meet the perils of the seas, and was lost by reason of that inability." *Steel* v. *State Line Steamship Co.*, 3 App. Cas. 72. But though the owner is not bound to repair during the voyage, if he elect to do so he ought not to proceed with the vessel in an unseaworthy condition: *Worms* v. *Storey*, 11 Ex. 427. "Although the *onus* of proving unseaworthiness is on the underwriters, yet I agree that, if a vessel were shown to be lost by leaking as soon as she left the port, the *onus* of proving her capacity for the sea would be shifted": per Willes, J., *Davidson* v. *Burnand*, L. R. 4 C. P. 120. "A defect of seaworthiness arising after the commencement of the risk, and permitted to continue from bad faith or want of ordinary prudence or diligence on the part of the insured or his agents, discharges the ordinary insurer from liability for any loss which is the consequence of such bad faith, or want of prudence or diligence; but does not affect the contract of insurance as to any other risk or loss covered by the policy and not caused or increased by such particular defect": *Union Insurance Co.* v. *Smith*, 124 U. S. (17 Davis) 427. *Thiodon* v. *Tindall*, 60 L. J. Q. B. 526, was a claim against the Committee of Lloyd's by the purchaser of a yacht with a certificate classing her as A1 for eleven years; subsequently to the purchase it was discovered that she was not entitled to the classification, and the purchaser sued the committee, alleging that he had been induced to purchase by their misrepresentation in the certificate. He was held disentitled to recover.

not if the unseaworthiness is posterior to the commencement of the voyage,[1]

Evidence of unseaworthiness.

If a ship is seaworthy at the commencement of the voyage, though she become otherwise only an hour after sailing, the warranty is complied with.[2] It is manifest that in a case of this sort the difficulty is not with the law, but to fit the facts to it, or rather to draw the correct inference from the facts. The failing within an hour of starting would raise so high a probability of unseaworthiness immediately before starting that much evidence would be needed to displace it. "The burden of proof upon a plea of unseaworthiness to an action on a policy of marine insurance lies upon the defendant." "But when facts are given in evidence, it is often said certain presumptions which are really inferences of fact arise, and cause the burden of proof to shift; and so they do as a matter of reasoning and as a matter of fact, for instance, where a ship sails from a port and soon after she has sailed sinks to the bottom of the sea, and there is nothing in the weather to account for such a disaster, it is a reasonable presumption to be made that she was unseaworthy when she started; and a jury may be properly told that upon such uncontradicted evidence they may presume as a matter of reasoning and inference from the facts the vessel must have been in an unseaworthy condition when she started; that is, when she started she was not in a fit state to encounter the ordinary perils of the voyage, and if a jury, with no other evidence than that I have stated, were to find the contrary, it would not be a finding against any principle of law, but it would be such a finding against the reasonable inference from the facts that it would amount to a verdict against evidence."[3]

Effect of resort to steam power on the rule of seaworthiness.

The altered conditions of navigation caused by the resort to steam power have resulted in a modification of the rule as to seaworthiness. In the case of a long voyage the warranty is not broken because the steamer does not start fully provisioned with coal for the whole. The warranty is held to be complied with if at each stage in the voyage coal is taken in adequate to fulfil the succeeding stage.[4]

Overheated stove.

Proximity to a danger was ineffectually urged in *The Diamond*[5] to prevent the shipowner relying on the statutory exemption from liability, under sec. 502, sub-s. 1, of the Merchant Shipping Act, 1894, where loss or damage happened "without his actual fault or privity" to goods damaged "by reason of fire on board the ship." A stove was placed too near a bulkhead without any means of insulation, and was negligently overheated so that a fire broke out. The ship could not be called unseaworthy when she was safe if properly used; neither was overheating the stove negligence to which the owner could be said to be privy.

[1] *The Rona*, 51 L. T. 28. As to dunnage, see Abbott, Merchant Ships (14th ed.), 504. It is sufficient if the master provides the kind of dunnage ordinarily used at the port of shipment for goods of the kind shipped: *The Ville de l'Orient*, 2 L. T. (N. S.) 62; *Hogarth* v. *Walker*, 15 Times L. R. 467.

[2] *Watson* v. *Clark*, 1 Dow (H. L.) 336.

[3] Per Brett, L.J., *Pickup* v. *Thames Insurance Co.*, 3 Q. B. D. 600. "The law on this point was finally settled in *Pickup* v. *Thames Insurance Co.*, which followed *Anderson* v. *Morice*, L. R. 10 C. P. 58," per Lord Lindley, delivering judgment in *Ajum Goolam Hossen & Co.* v. *Union Marine Insurance Co.*, [1901] A. C. 366. See *Pacific Coast SS. Co.* v. *Bancroft-Whitney Co.*, 94 Fed. Rep 180.

[4] *The Vortigern*, [1899] P. 140; *Darling* v. *Raeburn*, [1907] 1 K. B. 846; *Greenock SS. Co.* v. *Maritime Insurance Co.*, [1903] 2 K. B. 657; *McIver* v. *Tate Steamers*, [1903] 1 K. B. 362.

[5] [1906] P. 282.

Seaworthiness "at the time of sailing." *Biccard* v. *Shepherd.*

What is seaworthiness "at the time of sailing" was considered by the Privy Council in *Biccard* v. *Shepherd*,[1] where the voyage was divided into stages. Lord Wensleydale there laid down the rule by reference to his own judgment in *Dixon* v. *Sadler*[2] as follows:[3] "If the voyage be such as to require a different complement of men or state of equipment, in different parts of it, as if it was a voyage down a canal or river, and thence to and on the open sea, it is enough if the vessel be at each stage of the navigation in which the loss happens properly manned and equipped for it"; and the Court of Appeal, in *Thin* v. *Richards*,[4] adopted this statement of the law.

Meaning of "during the voyage."

Some difference of judicial opinion has existed as to the signification of a stipulation expressed to be "during the voyage," a phrase the meaning of which may be noted conveniently in the present connection, though it is not primarily applicable to seaworthiness. In *Crow* v. *Falk*[5] the words were held to apply only to the time after the voyage began, and it was held that the voyage could not begin before the ship's loading was completed. In *Bruce* v. *Nicolopulo*,[6] Pollock, C.B., dissented from this decision, and it was held in that case that a preliminary voyage was to be considered part of the voyage contemplated by the contract. Again, in *Barker* v. *M'Andrew*,[7] where a ship described as then at N., was to proceed at the usual place of loading at N., and there load and proceed to A., with the usual exceptions "during the said voyage," the exceptions were held to apply to the preliminary transit to the port of loading. In a similar sense was the decision of Sir James Hannen in *The Carron Park*,[8] where the cases of *Bruce* v. *Nicolopulo* and *Barker* v. *M'Andrew* are considered "conclusive"; while in the succeeding case of *The Accomac*[9] the words in a charter-party, "negligence" "in the navigation of the ship in the ordinary course of the voyage," were held not to cover negligence while going into dock to discharge cargo after arrival.

Goods must be stowed so as not to cause damage to other goods.

Besides the duty to provide a seaworthy vessel for the carriage of goods there is an obligation implied on the shipowner to place goods which are entrusted him to be conveyed and which are likely to cause injury to other goods conveyed in the ship, in a position where they are not harmful to the rest of the cargo; even though the injurious goods are placed on board in a condition to do mischief, and by the shippers of the goods they are calculated to injure.[10] If the shipper of goods in a general ship sustains loss from damage done to his goods by other goods, he has an action against the shipowner without proof of negligence. But it is incumbent upon the shipper to see that his goods are of such a character and in such condition that they will bear the voyage upon which he sends them, if conducted in the usual and accustomed manner.[11] The presumption is that he has done so; and the *onus* is therefore on the carrier to show circumstances suggesting default.[12]

1 14 Moo. P. C. C. 471. 2 5 M. & W. 405, 414. 3 14 Moo. P. C. C. 493.
4 [1892] 2 Q. B. 141. *The Vortigern*, [1899] P. 140. 5 8 Q. B. 467.
6 11 Ex. 129. 7 34 L. J. C. P. 191.
8 15 P. D. 203, approved *Milburn & Co.* v. *Jamaica Fruit Importing, &c. Co.*, [1900] 2 Q. B. 540; 6 Edw. VII. c. 41, s.s. 42, 49, Sched. I. Rules for Construction of Policy.
9 15 P. D. 208. *The Glenochil*, [1896] P. 10. 10 *Alston* v. *Herring*, 11 Ex. 822.
11 *Gillespie* v. *Thompson*, 6 E. & B. 477 *n.*; *The Bark Colonel Ledyard*, 1 Sprague (U. S. Adm.), 530.
12 In *Snow* v. *Carruth*, 1 Sprague (U. S. Adm.), 324, 327, Sprague, J., said: "I am satisfied that the great loss in this case (above the necessary leakage) was partly attributable to the negligence of the carrier, and partly to the negligence or misfortune

In the absence of something to qualify his obligation, the undertaking of the merchant to furnish a cargo is absolute.[1] And the shipper's or charterer's obligation is "to have his cargo ready when the ship is bound to receive it in ordinary course." He is not bound "to be prepared for a contingency or fortuitous circumstances not contemplated by either of the parties."[2]

Damage to cargo no ground for refusal to pay freight.

The obligation to put goods in a suitable place,[3] and to take requisite measures to preserve them,[4] at common law does not entitle the consignee to resist payment of freight on the ground that the goods were damaged, if he had not specially contracted for the right to do so. The negligence of the master in this respect is matter for a cross-action.

Dakin v. *Oxley*.

The leading case for this proposition is *Dakin* v. *Oxley*,[5] where Willes, J., in a considered judgment, examines the law on the subject, and concludes that a plea averring that through the fault of the shipowner goods shipped had become worthless, and were abandoned by the owner, who was thereby discharged from the payment of the freight is had. Willes, J.,[6] citing "Professor Parsons in his learned work upon Maritime Law, vol. i. p. 172," states the law in America to be, that "if the cargo arrives in specie, notwithstanding that it is damaged, whether fortuitously or culpably, so as to be worthless, the freight[7] is earned although in case of culpable damage set-off is allowed." The contrary is nevertheless held in *Snow* v. *Carruth*,[8] in which the decision of Story, J., in *Willard* v. *Dorr*,[9] is cited as an authority; and that decision has been followed in not a few cases.[10]

Judicature Acts enable counter-claim to be set up.

Though the common law on the point remains unaltered, its effect is neutralised by the provisions of the Judicature Acts, 1873, 1875, by which (and the rules made under them[11]) a defendant may set up a counter-claim to an action. A claim for freight may therefore be met by a counter-claim for damage to the cargo.[12]

Goods furtively put on board.

If goods are furtively put on board a presumption may arise that the owner wished to defraud the carrier. This would rebut the

of the shipper or consignee, and that it is not practicable to ascertain for how much of the loss the one party, or the other, is, in fact, responsible. I am, therefore, obliged to adopt some arbitrary rule in determining the amount to be allowed the respondents. An analogy may be found in the rule adopted by Courts of Admiralty, in cases of collision where both parties are in fault."

[1] Per Lord Blackburn, *Postlethwaite* v. *Freeland*, 5 App. Cas. 619.

[2] Per Lord Davey, *Ardan Steamship Co.* v. *Andrew Weir & Co.*, [1905] A. C. 512, explaining *Little* v. *Stevenson*, [1896] A. C. 108.

[3] *The Oquendo*, 38 L. T. (N. S.) 151; *Hayn* v. *Culliford*, 3 C. P. D. 410; 4 C. P. D. 182.

[4] *Notara* v. *Henderson*, L. R. 5 Q. B. 346; L. R. 7 Q. B. 225, 235; *Tronson* v. *Dent*, 8 Moo. P. C. C. 419; *Australasian Steam Navigation Co.* v. *Morse*, L. R. 4 P. C. 222; *De Cuadra* v. *Swann*, 16 C. B. N. S. 772. *Hingston* v. *Wendt*, 1 Q. B. D. 367, affirms the existence of a lien on cargo preserved, though the charges were incurred without authority from the owner. This is on the analogy of general average or salvage.

[5] (1864), 15 C. B. N. S. 646.

[6] *L.c.* 664.

[7] "The inception of freight," says Eyre, C.J., "is breaking ground": *Curling* v. *Long*, 1 B. & P. 636. But see Beawes, Lex Mercatoria (6th ed.), vol. i. 189; and the civil law in D. 14, 2, 10, § 2; and D. 19, 2, 61, § 1. Demurrage ceases on the day of sailing (or readiness to sail, *Pringle* v. *Mollett*, 6 M. & W. 80), and if subsequently the ship is detained, the freighter is not liable: *Jamieson* v. *Laurie*, 6 Bro. P. C. 474.

[8] 1 Sprague (U. S. Adm.), 324.

[9] 3 Mason (U. S.), 161, 171.

[10] See the whole controversy summarised in Parsons, Law of Merchant Shipping, vol. i. 206, note 2, which is in fact a new edition of "the work on maritime law," cited by Willes, J. It is strange that though the Law of Merchant Shipping was not published till 1869, there is no notice in it of the decision of *Dakin* v. *Oxley*, though that case was reported in 1864, and the English cases are largely drawn upon in the note referred to.

[11] See R. S. C. 1883, Order xix. r. 3.

[12] The definition of "freight" is considered by Willes, J., in *Dencon* v. *Home and Colonial Insurance Co.*, L. R. 7 C. P. 348; 6 Edw. VII. c. 41, s. 90. See also Beawes, Lex Mercatoria (6th ed.), vol. i. 187; Kay, Law relating to Shipmasters and Seamen

presumption of an implied contract,[1] though if freight were received by the carrier it would more probably operate as a waiver of the surreptitious dealing, and the carrier would thereupon be clothed with his normal responsibilities.

Pothier's view as to goods furtively put in a vessel.

Pothier is of opinion that the master who finds goods in his vessel furtively put there is at liberty to put them ashore and charge the expense of unloading to the owner. If he does not find them till after he has sailed, he may discharge them at an intermediate port before the end of the voyage, leaving them in the hands of some solvent merchant and giving the owner notice; yet if the vessel is able, he ought to carry them to their destination.[2]

By the Code de Commerce[3] the master may only discharge the goods at the point where they are laden; or if he prefers to carry them he may charge the highest freight paid for merchandise of the same quality.[4]

Time for loading.

If the time of loading is not the subject of special contract, the implication of law is that each party is to use reasonable diligence[5] in performing his part. Failure by either resulting in loss creates a right of action in the other party.[6] Where the performance of the contract is prevented by a cause over which neither party has any control, as by a threatened bombardment of the port of loading or delivery, an action is not maintainable.[7] But it is established law that the mere existence of circumstances beyond the control of the skipper which make it impracticable for him to have his cargo ready will not relieve him from paying damages for breach of his obligation.[8]

Master's Duty.

Master's duty.

The master[9] is the general agent of the owner for the purpose of the voyage; and for the exercise of that agency is entrusted with

(2nd ed.), §§ 268–297. "Freight is a payment to be made to the ship for carriage and delivery, and until there has been carriage and delivery the shipowner is not, under ordinary circumstances, entitled to demand freight at all": per Lord Russell of Killowen, C.J., *Weir* v. *Girvin*, [1899] 1 Q. B. 196; [1900] 1 Q. B. 45. Freight under a charter-party is not an incident to the ownership of the vessel, so that an underwriter on the ship cannot claim any part of the damages recovered from the owners of the wrongdoing vessel on account of loss of prospective freight: *The Sea Insurance Co.* v. *Hadden*, 13 Q. B. D. 706. For the payment of freight, Abbott, Merchant Ships (14th ed.), 567–712; 3 Kent, Comm. 219–230 (12th ed.), with Mr. Holmes's note, 228. As to the procedure for enforcing shipowners' right to freight see secs. 492–501 of Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), and *White* v. *Furness*, [1895] A. C. 40. *Montgomery* v. *Foy, Morgan & Co.*, [1895] 2 Q. B. 321, explained *McCheane* v. *Gyles* (No. 2), [1902] 1 Ch., per Buckley, J., 916.

1 *The Huntress*, Daveis (U. S. Adm.), 82, 91.

2 Pothier, Traité de Contrat de la Charte-partie, nos. 10, 12.

3 Code de Commerce, Art. 292; Boulay-Paty, Droit Maritime, vol. ii. 373; Alauzet, Commentaire, vol. iii. 191.

4 Valin, Ordonnance de la Marine, liv. 3, tit. 3, art. 7.

5 *Jackson* v. *Union Marine Insurance Co.*, L. R. 10 C. P. 125; *Poussard* v. *Spiers*, 1 Q. B. D., per Blackburn, J., 414. If the delay, though caused by something for which neither party is responsible, is so great and long as to make it unreasonable to require the parties to go on with the adventure, either may treat it, at least so long as it is executory, as determined: *Dahl* v. *Nelson*, 6 App. Cas. 38, 53. Cp. however, *Hurst* v. *Usborne*, 18 C. B. 144, approved *French* v. *Newgass*, 3 C. P. D. 163. As to continuing warranty, *Tully* v. *Howling*, 2 Q. B. D. 182. *Ante*, 834.

6 *Fowler* v. *Knoop*, 4 Q. B. D. 299.

7 *Ford* v. *Cotesworth*, L. R. 5 Q. B. 544 (Ex. Ch.); *Hick* v. *Rodocanachi*, [1891] 2 Q. B. 626, in H. of L. *sub nom. Hick* v. *Raymond*, [1893] A. C. 22.

8 *Ardan Steamship Co.* v. *Andrew Weir & Co.*, [1905] A. C. 501, 512.

9 *Reverendum honorem sumit quisquis magistri nomen acceperit*: Cleirac, Jugemens

powers to be used at his discretion.[1] The owners are moreover held liable[2] if the master exercises a power which circumstances might justify, so that did the circumstances in fact exist, although the facts do not warrant its exercise in the particular case, the act would be within the general scope of his functions, for instance, if he unnecessarily throw goods overboard in a panic or sell goods without justifying need.

Master bound to reasonable care.

The master is bound to take all reasonable care of goods entrusted to him, even though there are special conditions exonerating his owner from the consequences of his defaults; and where accidents have happened for which neither he nor his owners are liable, he is still bound to take all reasonable precautions to neutralise their effects and to save what of the cargo he can for its owners.[3]

Master's duty in the reception of cargo.

The master is bound to attest by his signature the date as well as the fact of the shipment of goods. He is not indeed bound to superintend in person the receipt and the stowage of them; yet if he is not personally cognisant of the fact and time of shipment, it is his personal duty to inform himself upon both those points by examining the mate's receipts or the log-book before he signs bills of lading for the goods: and he can only discharge himself by showing either that he was relieved of his duty or that he made an honest attempt to perform it and failed through no fault of his own.[4]

Powers of master for the maintenance of discipline.

The powers of the master of a ship for the maintenance of discipline[5] are very large—even to admitting a liberty of exercising "the power of administering wholesome personal correction," but not extending to authorise "mere passionate violence."[6] In the Scotch case[7] just

d'Oleron, c. 1. Beawes, Lex Mercatoria (6th ed.), 155–166, Master of Ship; Malynes, Lex Mercatoris, c. xxii., Of the Master of the Ship, his power, and duty of the Master to the Merchants; Bell, Comm. (7th ed.), 554–557, Of the Shipmaster or Captain.

[1] Duty of master to load, *Anglo-African Co.* v. *Lamzed*, L. R. 1 C. P. 226.

[2] *Notara* v. *Henderson*, L. R. 7 Q. B. 225; *Ewbank* v. *Nutting*, 7 C. B. 797. Under 24 Vict. c. 10, s. 10, and 17 & 18 Vict. c. 104, s. 191, it was held that the master had a maritime lien on the ship for disbursements: *The Mary Ann*, L. R. 1 A. & E. 8; *The Glentanner*, Swa. (Adm.) 415; and that he could maintain an action *in rem* for "disbursements" without previous payment in respect of such liabilities: *The Sara*, 12 P. D. 158. This was overruled in *The "Sara,"* 14 App. Cas. 209, where the House of Lords held that 24 Vict. c. 10, did not give the master a lien on the ship for disbursements. The result of this decision was the passing of 52 & 53 Vict. c. 46. The old decisions were thereby again made applicable: *Morgan* v. *Castlegate Steamship Co.*, [1893] A. C. 38. The enactments referred to in this note are now consolidated as sec. 167 of the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60). *Post*, 1095 n.[5]. The judgment of Story, J., in *Pope* v. *Nickerson*, 3 Story (U. S.), 465, 473, discusses the liability of the owners and the powers of the master. The limits of the master's authority to bind the owner for repairs is defined by Dr. Lushington in *The Alexander*, 6 Jur. 241; *Benson* v. *Chapman*, 2 H. L. C. 696; *Rankin* v. *Potter*, L. R. 6 H. L. 83, 122.

[3] *Notara* v. *Henderson*, L. R. 7 Q. B. 225; *Adam* v. *Morris*, 18 Rettie, 153. See *ante*, 1024; and *post*, 1037.

[4] *Stumore* v. *Breen*, 12 App. Cas. 698, 702.

[5] Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), ss. 220–238. There is a conflict between the English and Scotch courts as to whether these statutory powers exclude other remedies; cp. *The Great Northern Steamship Fishing Co.* v. *Edgehill*, 11 Q. B. D. 225, with *Sharp* v. *Rettie*, 11 Rettie, 745, where the English case is considered and dissented from. The master's powers for the maintenance of discipline, and also the rights and duties of mariners, are considered, Beawes, Lex Mercatoria (6th ed.), vol. i. 172.

[6] Per Curiam, *Reekie* v. *Norrie*, 5 Dunlop, 369.

[7] *Reekie* v. *Norrie*, 5 Dunlop, 368. In *United States* v. *Colby* (1846), 1 Sprague (U. S. Adm.), 119, it was held that if the master of a ship at sea, in the exercise of a sound and honest judgment, believes danger to be imminent, and to require the use of a dangerous weapon to reduce to obedience a seaman in open mutiny with weapons in his hand, and threatening the lives of the officers, and the master should use such a weapon from honest motives, he would be justified. The owners have been held not liable for an assault by the master on a seaman after the emergency had passed and by way of punishment for an act of disobedience: *Spencer* v. *Kelley*, 32 Fed. Rep.

cited the master of a ship was sued for striking the pursuer, and a defence that the blow was struck in making head against a mutiny would, it seems, have been sustainable, had not the facts shown a violence that caused "effusion of blood;" so that in the circumstances the defence was held not to have been made out, and the defender, on whom the *onus* of proving a justification lay, was held liable. Still it is manifest that even "effusion of blood" may be justified in extreme circumstances. The main point is that personal constraint is justifiable, although only up to and in accordance with necessity.[1]

The master is bound to sail so soon as wind and tide permit—but not in tempestuous weather.[2] If the ship is under a charter-party which provides for sailing on a given day the time must be kept unless necessity prevents. The master must besides proceed to the port of delivery without delay, and must not deviate unless to save life.[3] If the ship is so disabled as not to admit of repair the master may procure another vessel to carry the cargo and save the freight—or he may adopt other means of transportation if they are available. If the freighter will not consent to the new means of transportation the master is entitled to so much freight as is earned.[4] Whether it is the *duty* as well as the *right* of the master to procure another vessel if he can to forward the cargo was a point left open by Lord Denman, C.J., in *Shipton* v. *Thornton*;[5] but in *The Bahia*,[6] Dr. Lushington laid down:

Transhipping.

(1) That the master is under no absolute obligation towards the owner of goods to forward them in the original vessel.

(2) That it has never been decided that the master in any case is bound to tranship.[7]

But it is the opinion of Lord Tenterden [8] that if the master's "own

838. For a malicious and wilful assault on a sailor by the master the owners have been held not responsible in New York *Gabrielson* v. *Waydell*, 135 N. Y. 1. Cp. *ante*, 578.

[1] In *Vallance* v. *Falle*, 13 Q. B. D. 109, an action was held not to lie against the master for refusing to give a seaman the certificate of discharge directed to be given under the sec. 172 of The Merchant Shipping, 1854; see Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 128. The master may discharge seamen for just cause, and even put them ashore in a foreign country (57 & 58 Vict. c. 60), ss. 186–189; *The Exeter*, 2 C. Rob. (Adm.) 261, 272. See The Master's duty to the Mariner, c. x. of A Collection of all Sea Laws, bound up with Malynes's Lex Mercatoria (3rd ed.).

[2] Abbott, Merchant Ships (14th ed.), 511, 522.

[3] *Searamanga* v. *Stamp*, 5 C. P. D. 295. Delay to avoid imminent danger of capture is justifiable: *The "San Roman,"* L. R. 5 P. C. 301. As to deviation as a ground of avoiding a policy of insurance, 6 Edw. VII. c. 41, s. 46; 3 Kent, Comm. (13th ed.), 312 *et seqq*. Park, Marine Insurances (8th ed.), 619, 658; Marshall, Marine Insurance (4th ed.), 138–163.

[4] Molloy, bk. 2, c. 4, s. 5. Valin (Ordonnance de la Marine, liv. 3, tit. iii., du Fret ou Nolis, art. 12), and Pothier (Charte-partie, n. 68) contend that the master is no further bound to procure another vessel, than by losing his freight for the entire voyage, if he omits to do it. But Emerigon (Traité des Assurances [ed. Boulay-Paty], vol. i. 425) considers them mistaken, and says that the master is guilty of a breach of duty if he refuses to procure another vessel and take on the cargo. See Code de Commerce, 296: *Si le capitaine n'a pu louer un autre navire, le fret n'est dû qu'à proportion de ce que le voyage est avancé*; Boulay-Paty, Cours de Droit Commercial Maritime, vol. ii. 400–405: *mais le nouveau Code de Commerce, comme nous venons de le voir, impose au capitaine l'obligation de louer un navire en pareil cas.*

[5] 9 A. & E. 314. [6] B. & L. 292, at 304, 305.

[7] Referring to *The Hamburg*, B. & L. 253. In *Wilson* v. *Bank of Victoria*, L. R. 2 Q. B. 211, Blackburn, J., says: "Inasmuch as the master could, by the expenditure of a comparatively small sum on temporary repairs and coals, bring the ship and cargo safely home, it was his duty to do so; and though we do not decide a point which does not arise, we are not to be taken as deciding that his owners would not have been liable to the owner of the cargo if he had not taken this course." The point was, however, decided in *The Assicurazioni Generali and Schenker & Co.* v. *SS. Bessie Morris Co.*, [1892] 2 Q. B. 652, a case of a charter-party. *The Savona*, [1900] P. 252.

[8] Abbott, Merchant Ships (5th ed.), 240; (14th ed.), 528.

ship can be repaired, he is not *bound* to send the cargo by another, but may detain it till the repairs are made, and even hypothecate it for the expense of them; that is, supposing it not to be of a perishable nature; if it be of such a nature, and there be not time or opportunity to consult the merchant, he ought either to tranship or sell it, according as the one or the other will be most beneficial to the merchant."

Degree of care required in dealing with cargo.

We have noted that during the voyage the master must use all reasonable exertion to preserve the cargo.[1] In *Laurie* v. *Douglas*,[2] Pollock, C.B., expresses this duty to be, that he is bound "to take the same care [of the goods] as a person would of his own goods, that is an ordinary and reasonable care." Lord Tenterden says "the master must during the voyage take all possible care of the cargo."[3] The apparent difference of these views may be harmonised by considering the care a person would take of his own cargo to be the very greatest.[4]

Cargo to be delivered over to the consignee.

On the arrival of the ship the cargo is to be delivered to the consignee or to the order of the shipper on production of the bill of lading and payment of the freight; and the master has no right to detain the goods for wharfage if the consignee tenders the freight and requires them to be delivered over the ship's side.[5]

Power of master to sell ship in a case of extreme necessity.

The master may even sell the ship for the benefit of the owners,[6] in a case of extreme necessity; for instance, where a ship is aground and in the opinion of competent judges cannot be raised.[6]

Personal liability of master.

The master is personally liable for all acts of negligence or misfeasance of his crew causing injury to cargo or property. The reason given by Molloy[7] is: "for that the mariners are of his own choosing, and under his correction and government, and know no other superior on shipboard but himself; and if they are faulty he may correct and punish them and justify the same by law; and likewise, if the fact is apparently proved against them, may reimburse himself out of their wages." He is not liable for their wilful torts nor for acts beyond the scope of their employment causing injury to other vessels.[8]

[1] *Ante*, 1035. *Notara* v. *Henderson*, L. R. 7 Q. B. 225, 232.

[2] 15 M. & W. 749, approved, 754.

[3] Merchant Ships (14th ed.), 547. For this he cites Emerigon, Traité des Assurances (ed. Boulay-Paty), vol. i., 372: *Le capitaine est un mandataire à gage qui répond de la faute très légère.* Cp. 3 Kent, Comm. 213 n. (*c*); Story, Bailm. § 509 *et seqq.* As to carriage of grain, Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), ss. 452–456, and sch. xviii.

[4] *Ante*, 28 and 755.

[5] Abbott, Merchant Ships (14th ed.), 562.

[6] *Hayman* v. *Molton*, 5 Esp. (N. P.) 65. The *onus probandi* undoubtedly lies on the purchaser from the master to show the necessity: *The Australia*, in the Privy Council, Swa. (Adm.) 480, 484. As to the master's authority to sell and what constitutes "necessity," see *Australasian, &c. Co.* v. *Morse*, L. R. 4 P. C. 222; *Acatos* v. *Burns*, 3 Ex. D. 282; *Atlantic Mutual Insurance Co.* v. *Huth*, 16 Ch. D. 474; and the note to *The Gratitudine*, Tudor, L. C. on Mercantile Law (3rd ed.), 84.

[7] Molloy, bk. 2, c. 3, s. 13. Thus, an infant has been held liable in Admiralty: Roll. Abr. Court de Admiraltie (C), Admirall Ley, pl. 3; and an owner has been convicted under 54 Geo. III. c. 159, s. 11, of the offence of throwing ballast into navigable rivers, when not even on board: *Michell* v. *Brown*, 1 E. & E. 267. In *The Queen* v. *Judge of City of London Court*, [1892] 1 Q. B. 295, Lord Esher, M.R., says: "I think it cannot be denied that the Admiralty Court has exercised jurisdiction over the master with regard to certain complaints; but, whether the Admiralty Court can exercise, or ever has exercised, jurisdiction over the master in respect of a collision, so as to make him liable to the full extent of the damage, I will not decide on the present occasion, though the strong inclination of my opinion is, that the Court of Admiralty has never exercised such a jurisdiction against the master." The position of a master of a ship, with his powers and duties, is exhaustively dealt with, Vin. Abr. Master of a Ship, and from the point of view of American law, in Parsons, Law of Shipping, vol. ii. 1–32.

[8] *Boucher* v. *Noidstrom*, 1 Taunt. 568. See *The Druid*, 1 W. Rob. (Adm.) 391, and the cases there cited. No action will lie at the suit of a sailor on the promise of the captain to pay extra wages in consideration of his doing an extra share of work:

Captain of Queen's ship not liable.

The captain of a Queen's ship is, as we have seen, not liable for acts that he has not directly been concerned in.[1]

Managing Owner.

Managing owner.

By the Merchant Shipping Act, 1894,[2] s. 59 (1), the name and address of the managing owner of every British ship is to be registered at the port of the slup's registry. The object of this is "to insure the safety of people who go on board ship—to insure that the ship should he safe; and it puts certain liabilities for that purpose on the person who is the ship's manager, and prevents his saying when those liabilities arise that he is not managing owner."[3] There is no definition in the Act of the term "managing owner."[4] As to his position, Lord Esher, M.R., in the case just cited, adopts the language of Bowen, J., in *Frazer* v. *Cuthbertson*.[5] "The 36th section of the Act[6] nowhere creates new agents, new functions, new capacities, nor clothes existing agents with enlarged powers. The section is part of the machinery designed to secure adequate protection for lives and property at sea. . . . A managing owner registered under the Act is no more and no less than a managing owner before the Act. He hinds those whose agent he is, he binds nohody besides." Consequently, where the registered managing owner divested himself hy a charter-party of all

Lord Esher, M.R., in *Baumwoll Manufactur von Scheibler* v. *Gilchrest*.

Harris v. *Watson*, Peake (N. P.) 72; followed in *Stilk* v. *Myrick*, 2 Camp. 317; and distinguished, *Hartley* v. *Ponsonby*, 7 E. & B. 872. The master has a lien on the goods and on the freight to the extent of his engagement: *White* v. *Baring*, 4 Esp. (N. P.) 22. The legal position of the master of a vessel disabled from carrying on the cargo, at an intermediate port, is stated by Cockburn, C.J., *Metcalfe* v. *Britannia Ironworks Co.*, 1 Q. B. D. 625; 2 Q. B. D. 423, following Lord Stowell in *The Gratitudine*, 3 C. Rob. (Adm.) 240.

[1] *Nicholson* v. *Mouncey*, 15 East, 384. *Ante*, 242.

[2] 57 & 58 Vict. c. 60.

[3] *Baumwoll Manufactur von Scheibler* v. *Gilchrest*, [1892] 1 Q. B., per Lord Esher, M.R., 260, referring to the incorporated Act, 39 & 40 Vict. c. 80, s. 36. As to the duty of "managing owner," *Williamson* v. *Hine Brothers*, [1891] 1 Ch. 390; *The Mount Vernon*, 64 L. T. 148. As to his authority, *The Huntsman*, [1894] P. 214; and *Steele* v. *Dixon*, 3 Rettie, 1003, dealing with the authority of the managing owner without specific authority, when a vessel is in a home port and the owners easily accessible, to bind them for the cost of extensive structural alterations. The policy of the Registry Acts is discussed by Lord Eldon, *Ex parte Yallop*, 15 Ves. 60. The modern Acts are discussed, *Chasteauneuf* v. *Capeyron*, 7 App. Cas. 127. As to registered owners, see Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 11; *Hibbs* v. *Ross*, L. R. 1 Q. B. 534; Abbott, Merchant Ships (14th ed.), 76 *et seqq*. *The Hopper No. 66*, [1906] P. 34.

[4] As to whom see Abbott, Merchant Ships (14th ed.), 130 *et seqq*. The ship's husband or managing owner is an agent appointed by the owners to do what is necessary to enable the ship to prosecute her voyage and to earn freight. He may be either a part owner or a stranger, and empowered to act on the return of the ship to port, or having a more general agency. His duty is generally to see to the proper outfit of the vessel; but he has no authority to insure or borrow money for the owners, or to bind them to the expenses of lawsuits; he has "to act discretionally for them all": *French* v. *Backhouse*, 5 Burr. 2727; *Sims* v. *Brittain*, 4 B. & Ad. 375; *Coulthurst* v. *Sweet*, L. R. 1 C. P. 649; nor to bind them by an agreement to cancel the charter-party and to pay the charterers a sum in lieu of commission, although such agreement is for the benefit of the owners: *Thomas* v. *Lewis*, 4 Ex. D. 18; *Barker* v. *Highley*, 15 C. B. (N. S.) 27. All the joint owners of a ship were held liable for the neglect of the master to furnish proper medical aid to a seaman in *Scarff* v. *Metcalf*, 107 N. Y. 211. Where there is an exception of "the neglect and default of master in navigating the ship," and the defendant was master and part owner, but the negligence which caused the loss was that of the defendant in his capacity as master, the exception applies: *Westport Coal Co.* v. *McPhail*, [1898] 2 Q. B. 130.

[5] 6 Q. B. D. 99; *Miles* v. *McIlwraith*, 8 App. Cas. 120.

[6] 39 & 40 Vict. c. 80, repealed by the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), sch. xxii.

control and possession of a vessel for the time being, he was held not liable for the alleged negligence of the captain in taking the vessel to sea in an unseaworthy condition, though he was registered as managing owner.[1] And in the House of Lords, Lord Herschell, C., said:[2] "I cannot think that this legislation altered in any way the liabilities or the rights of a person who was registered as the managing owner, or who in fact was the managing owner, except so far as the legislature created new liabilities. It did, no doubt, create them, because it rendered the person registered as managing owner liable to penal consequences in case of the unseaworthiness of the vessel and his inability to prove that he had taken proper precautions. . . . But beyond that it seems to me that it would be improper to impose any liability which the Legislature has not by enactment clearly shown its intention to impose."

Opinion of Lord Herschell, C.

As the master is liable for the tortious acts of the crew, so the owners are liable for the tortious acts of the master,[3] even where the vessel is sailing under a charter-party, and is under the direction of an agent of the charterers—if, that is, the master is appointed by the owners.[4] This liability is, of course, subject to the usual limitations; the act for which the owners are sought to be charged must be neither wilful nor outside the scope of authority.[5]

Owners liable for tortious acts of master.

The owners of a ship are under the same obligation apart from statute, to make the vessel, its tackle and appliances, safe for the use of the sailors as the law places upon any other employers of labour; so that a sailor who is directed to work any dangerous or defective machinery has the right to rely on the presumption that it is reasonably safe for the purposes for which it is to be applied. For accidents of the sea the owners are not responsible. They are the ordinary risks of the employment. The old theory, not now applicable to any employment, that mere continuance in the service after knowledge of a change in the conditions involving additional danger, was always inapplicable to sea service.[6]

Liability of shipowners to make their tackle and appliances safe is the same as that of other employers.

[1] *Baumwoll Manufactur von Scheibler* v. *Gilchrest*, [1892] 1 Q. B. 253; in H. of L. [1893] A. C. 8. As to the inability of sailors to refuse to act in circumstances of danger: *Rothwell* v. *Hutchison*, 13 Rettie, 403, a decision on 39 & 40 Vict. c. 80, s. 5, repealed by the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 745, sch. xxii.; but re-enacted by sec. 458. For the limits of "compensation for loss or damage sustained by reason of detention" under sec. 10 of the former Act, now sec. 460 of 57 & 58 Vict. c. 60; see *Dixon* v. *Calcraft*, [1892] 1 Q. B. 458. [2] [1893] A. C. 20.

[3] *The Excelsior*, L. R. 2 A. & E. 268; *Davis* v. *Garrett*, 6 Bing. 716; *Scaramanga* v. *Stamp*, 5 C. P. D. 295; *Newall* v. *Royal Exchange Steamship Co.*, 33 W. R. 342, 868; *Malpica* v. *McKown*, 1 La. Rep. 248; *Arayo* v. *Currel*, 1 La. Rep. 528. *O'Neil* v. *Rankin*, 11 Macph. 538, is an exception to this liability, where the master acts under the powers conferred by s. 240 of 17 & 18 Vict. c. 104, re-enacted by s. 223 of the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60).

[4] *Fletcher* v. *Braddick*, 2 B. & P. (N. R.) 182; *Fenton* v. *Dublin Steam Packet Co.*, 8 A. & E. 835. Whether the owner or the charterer is liable for injuries caused by the negligence or unskilful management of the vessel is to be determined by the terms of the instrument of charter as explained by the circumstances of each individual case: *Schuster* v. *McKellar*, 7 E. & B. 704; 3 Kent, Comm. (13th ed.), 133–138. See *post*, 1056. *Whitewood* v. *Andorsen*, 11 Times L. R. 47, is the case of an unsuccessful attempt by a stevedore's labourer to charge shipbrokers and agents with liability for personal injuries received while engaged in unloading a cargo.

[5] *The Druid*, 1 W. Rob. (Adm.) 391. "No suit," says Dr. Lushington, "could ever be maintained against a ship where the owners were not themselves personally liable, or where their personal liability had not been given up, as in bottomry bonds, by taking a lien on the vessel." See this passage cited and explained by Sir J. Hannen, *The Tasmania*, 13 P. D. 115. Cp. *The Ida*, Lush. 6; *The Princess Royal*, L. R. 3 A. & E. 41; *The Waldo*, Davcis (U.S. Adm.), 161; *Ewbank* v. *Nutting*, 7 C. B. 797; *Schuster* v. *McKellar*, 7 E. & B. 704. See *post*, 1097.

[6] *Eldridge* v. *Atlas SS. Co.*, 134 N. Y. 187.

Injury done by the negligent or unskilful management of a ship, the possession and control of which has so completely passed to the charterer that he has appointed the master and crew, and directed the mode of her navigation, affects the charterer and not the owner with liability.[1]

Owners liable for pilot.

At common law the owners are liable for all the tortious or negligent acts of the pilot but with the same limitations as we have just expressed.[2] The master is an intermediary and so not liable.[3]

Owner's liability for necessaries.

The owner is personally liable for necessaries [4] furnished or repairs made to a ship by order of the master; if, that is, the supplies furnished are reasonably fit and proper for the occasion.[5] The *onus* of proof is on the plaintiff.[6] If the owner has not the control and management of the vessel, or the right to receive her freight and earnings, he is not responsible. The master may bind his owners for the supply of necessaries. "Whatever is fit and proper for the service on which a vessel is engaged, whatever the owner of the vessel as a prudent man would have ordered if present at the time, comes within the meaning of the term 'necessary' as applied to those repairs done or things provided for the ship by order of the master, for which the owners are liable." [7]

Who is owner.

By owner is not necessarily meant registered owner; in most cases ownership signifies legal ownership and the question is "upon whose credit was the work done." [8] The fact of a person's name appearing on the register as owner is, unexplained, some evidence of liability for work done or orders given within the scope of a master's general authority, although the question is not concluded thereby, and is whether owner or charterer, or intended purchaser by authority of whom the master gave the order, is liable upon them.[9]

The mate.

In the absence of the master the mate succeeds to the master's

1 *Scott* v. *Scott*, 2 Stark. (N. P.) 438.

2 Cp. *Bussy* v. *Donaldson*, 4 Dallas (Pa.) 206. *Post*, 1041.

3 *Aldrich* v. *Simmons*, 1 Stark. (N. P.) 214; *Boucher* v. *Noidstrom*, 1 Taunt. 568. See note to 3 Kent, Comm. 176, on pilotage, its duties and responsibilities.

4 *Cary* v. *White* (1710), 5 Bro. Parl. Cas. 325. Sir Wm. Scott, in *The Gratitudine*, 3 C. Rob. (Adm.) 274, doubts whether the master has authority, even in a case of uttermost distress and in a foreign port, to bind the owners beyond the value of the ship and freight; yet after considerable discussion he admits the master's power to hypothecate cargo in a foreign port; and it is said in Abbott, Merchant Ships (14th ed.), 107: "It has been always held that the master, if he cannot otherwise obtain money, may sell a part of his cargo to enable him to convey the residue to the destined port." The owner's personal liability seems now undoubted: *Arthur* v. *Barton*, 6 M. & W. 138; *Gunn* v. *Roberts*, L. R. 9 C. P. 331. As to Brett, J.'s, comment on Dr. Lushington's *dictum* in *The Faithful*, 31 L. J. (P. M. A.) 81, the point is discussed and the authorities cited in Abbott, Merchant Ships (14th ed.), 175 *et seqq.*, where the correctness of Dr. Lushington's *dictum* is maintained. The owners are never personally responsible where a bottomry bond is given: Abbott, Merchant Ships (14th ed.), 193. As to bottomry bonds, see *The Karnak*, L. R. 2 A. & E. 289; *Kleinwort, Cohen & Co.* v. *The Cassa Marittima of Genoa*, 2 App. Cas. 156, and especially the note to *The Gratitudine*, Tudor, L. C. on Mercantile Law (3rd ed.), 59–83. The lender is bound to exercise a reasonable diligence to see that the supplies are at least apparently necessary. He must act with good faith. A regular survey is *primâ facie* evidence of the necessity of repairs so as to justify the master as well as the lender. The presumption is in their favour; the *onus probandi* of the contrary lies on the owner who resists the bottomry bond: 3 Kent, Comm. 170, n. (*a*), 354–363.

5 Abbott, Merchant Ships (14th ed.), 107 *et seqq.*

6 *Mackintosh* v. *Mitcheson*, 4 Ex. 175.

7 Per Abbott, C.J., *Webster* v. *Seekamp*, 4 B. & Ald. 354; *The Riga*, L. R. 3 A. & E. 516; *The "Liddesdale,"* [1900] A. C. 190.

8 Per Lord Tenterden, *Jennings* v. *Griffiths*, Ry. & M. (N.P.), 43; *Reeve* v. *Davis*, 1 A. & E. 312; *The Great Eastern*, L. R. 2 A. & E. 88.

9 *Mitcheson* v. *Oliver*, 5 E. & B. 419. For liability of trading owners, *The Vindobala*, 13 P. D. 42.

authority, without, however, losing his character and privileges as mate; as Lord Stowell says:[1] "The mate is *hæres necessarius* to the employment of master in case of necessity." But since by the Merchant Shipping Act, 1894, s. 167, the master is given the same remedy for wages as seamen have, the position of the mate in command does not seem to differ from that of the master.[2]

The charterer is bound to use the ship in a lawful manner, and only for the purposes for which it is let. The command of the ship is most commonly reserved to the owner,[3] and to his master; and the charterer has no power to detain the ship beyond the stipulated time or to employ her in services other than those contracted for;[4] and if prohibited or contraband goods are put on board by him, or those acting under him, he will be answerable for the consequences of doing so.[5] The charterer.

To obviate a grievance suffered by consignees through short delivery of goods brought to England in foreign ships, against the owners of which, as they were resident abroad, the common law courts could afford no adequate remedy, it was provided by the Admiralty Court Act, 1861,[6] that the High Court of Admiralty should have jurisdiction over "any claim by the owner, or consignee, or assignee, of any bill of lading of any goods carried into any port of England or Wales, in any ship, for damage done to the goods or any part thereof by the negligence or misconduct of or for any breach of duty or breach of contract on the part of the owner, master, or crew of the ship, unless it is shown to the satisfaction of the court that at the time of the institution of the cause any owner or part owner of the ship is domiciled in England or Wales."[7] Jurisdiction of Admiralty.

Certain statutory limitations to liability must be here noticed.

By the Merchant Shipping Act, 1894,[8] s. 502, "The owner of a British sea-going ship[9] or any share therein, shall not be liable to make good to any extent whatever any loss or damage happening without his actual fault or privity[10] in the following cases: Provisions of the Merchant Shipping Act, 1894.

(1) Where any goods, merchandise, or other things whatsoever taken in or put on board his ship[11] are lost or damaged by reason of fire[12] on board the ship; or

[1] *The Fanourite*, 2 C. Rob. (Adm.) 237. See *The Segredo*, 1 Ecc. & Ad. (Spinks) 36, 40; *The Cynthia*, 16 Jur. 748; *The Tecumseh*, 3 W. Rob. (Adm.) 144; *Hansson* v. *Royden*, L. R. 3 C. P. 47.

[2] 57 & 58 Vict. c. 60. In *The Exeter*, 2 C. Rob. (Adm.) 261, the position of the mate is considered. "It would require a case of flagrant disobedience, negligence, or palpable want of skill to authorise the captain to displace a mate:" 3 Kent, Comm. 183. As to the position of seamen sick and disabled on the voyage, *Harden* v. *Gordon*, 2 Mason (U. S.), 541; *Reed* v. *Canfield*, 1 Sumn. (U. S. Circ. Ct.) 195.

[3] *The Omoa Coal and Iron Co.* v. *Huntley*, 2 C. P. D. 464.

[4] *Lewin* v. *East India Co.*, Peake (N. P.) 241.

[5] *Brass* v. *Maitland*, 6 E. & B. 470; *Pierce* v. *Winsor*, 2 Sprague (U. S. Adm.), 35.

[6] 24 Vict. c. 10, s. 6.

[7] *The St. Cloud*, B. & L. 4, 14. Dr. Lushington's view as to the limitations of this section was dissented from in *The Nepoter*, L. R. 2 A. & E. 375. The soundness of the view there taken is recognised by Lord Blackburn in *Sewell* v. *Burdick*, 10 App. Cas. 74. On the other hand, an expression in the judgment of the Court of Common Pleas delivered by Brett, J., in the case of *Simpson* v. *Blues*, L. R. 7 C. P. 297, supports Dr. Lushington's view; citing which case in *The Rona*, 7 P. D. 247, Sir Robert Phillimore says of the decision therein: "it was admitted (it) could now not be relied on." See *Cargo ex "Argos,"* L. R. 5 P. C. 134, approved in *The Alina*, 5 Ex. D. 227. But see per Lord Esher, M.R., *The Queen* v. *Judge of the City of London Court*, [1892] 1 Q. B. 290.

[8] 57 & 58 Vict. c. 60.

[9] For definition, see sec. 742. *Ex parte Ferguson and Hutchinson*, L. R. 6 Q. B. 280; *The C. S. Butler*, L. R. 4 A. & E. 238; *The Mac*, 7 P. D. 126, decided on the corresponding section (503) of the Act of 1854.

[10] *The Obey*, L. R. 1 A. & E. 102.

[11] "Ship" is defined 57 & 58 Vict. c. 60, s. 742.

[12] *The Diamond*, [1906] P. 282; *Moorewood* v. *Pollok*, 1 E. & B. 743; *Schmidt* v.

(2) Where any gold, silver, diamonds, watches, jewels, or precious stones, taken in or put on board his ship, the true nature and value of which have not at the time of shipment been declared[1] by the owner or shipper thereof to the owner or master of the ship in the bills of lading or otherwise in writing, are lost or damaged by reason of any robbery, embezzlement, making away with or secreting thereof."

By sec. 508, "Nothing in this part of this Act shall be construed to lessen or take away any liability to which any master or seaman, being also owner or part owner of the ship to which he belongs, is subject in his capacity of master or seaman,[2] or to extend to any British ship which is not recognised as a British ship within the meaning of this Act."[3]

The limitation of liability section of the Merchant Shipping Act, 1894,[4] is considered subsequently under Collisions on Water.[5]

Another statutory limitation to the liability of the shipowner is where the ship, at the time of the damage done to goods, is in charge of a pilot whom he is compelled to employ. In considering the position of a ship in relation to compulsory pilotage it must be borne in mind that compulsory pilotage is not a charge upon vessels, but rather a regulation for their benefit.[6]

Pilotage.

Pilotage.

We shall presently note the statutory provision with regard to compulsory pilotage. Independently of that the English courts have uniformly held that where a pilot[7] is employed under statutory sanction the owners and master are not liable for injuries arising from his acts.[8]

Law in the United States as to shipper's lien on ship.

In the United States the ship has been held liable though the employment of the pilot is compulsory.[9] In another respect, too, the law of the United States merits notice. There it has been decided[10]

The Royal Mail Steamship Co., 45 L. J. Q. B. 646; *Crooks* v. *Allan*, 5 Q. B. D. 38. The scope of limitation actions is discussed in *The Kara*, 13 P. D. 24; cp. *Constable* v. *National Steamship Co.*, 154 U. S. (47 Davis) 51, 62.

1 *Williams* v. *The African Steamship Co.*, 26 L. J. Ex. 69, is a decision on the similar words of the previous Act. Cp. *Gibbs* v. *Potter*, 10 M. & W. 70.

2 *The Cricket*, 5 Mar. Law Cas. (N. S.) 53.

3 See ss. 1, 2, and 3.

4 57 & 58 Vict. c. 60, s. 503.

5 *Post*, 1108.

6 *The Hanna*, L. R. 1 A. & E. 283.

7 Abbott, Merchant Ships (14th ed.), Of Pilots, 299 *et seqq.* Kay, Shipmasters and Seamen (2nd ed.), §§ 550-555. See also Beawes, Lex Mercatoria (6th ed.), vol. i. 203-236, for a great collection of information relative to pilots.

8 *Carruthers* v. *Sydebotham*, 4 M. & S. 77; *Bennet* v. *Moita*, 7 Taunt. 258; *The Maria*, 1 W. Rob. (Adm.) 95, 107; *The Annapolis*, Lush. 295; *The Hibernian*, L. R. 4 P. C. 511; *The Princeton*, 3 P. D. 90; *The Mercedes de Larrinaga*, [1904] P. 215; *The Ole Bull*, [1905] P. 52; *The Assaye*, [1905] P. 280. Where pilotage is not compulsory the employment of a pilot does not relieve a shipowner of his responsibility: *The Sutherland*, 12 P. D. 154; *Courtney* v. *Cole*, 10 Q. B. D. 447. In Arnould, Marine Insurance (4th ed.), 598, the opinion is expressed that except where required to take a compulsory pilot by Act of Parliament, the captain's negligence in not having a pilot on board, whereby a loss accrues, will not discharge underwriters from their liability if the loss be proximately caused by perils insured against. In the 7th ed. § 704 the quotation is omitted. The charterer is not the master of the pilot: *Fraser* v. *Bee*, 17 Times L. R. 101.

9 *The China*, 7 Wall. (U. S.) 53; 3 Kent, Comm. 176, where the duty to employ a pilot is minutely considered. Story, Agency, § 456 *a*; Parsons, Law of Shipping, vol. ii. 106-119.

10 *The Rebecca*, Ware (U. S. Dist. Ct.), 188.

that a merchant who ships merchandise in a vessel on freight has a lien on the vessel for the loss of his goods or any damage they may sustain from the fault or neglect of the master or the insufficiency of the vessel. We are also told by the same high authority that this was always the rule even under the Admiralty law of England, where, however, it "ceased to be of any practical use for the want of an appropriate process to enforce the lien," that is, the common law courts of the country interposed all the difficulties they could in the way of the exercise of the Admiralty jurisdiction. The rule in the United States is expressed to be that the ship is bound to the merchandise in the same manner as the merchandise is bound to the ship.

Compulsory pilotage.

By the Merchant Shipping Act, 1894,[1] s. 633, an owner or master of a ship shall not be answerable to any person whatever for any loss or damage occasioned by the fault or incapacity of any qualified pilot acting in charge of that ship within any district where the employment of a qualified pilot is compulsory by law.[2]

Only exonerates where shipowner and master are free from blame.

The protection of the section is given only where the shipowner and the master are free from blame; for the presence of the pilot is not the exoneration of the crew. The proposition ought rather to be stated—the intervention of the pilot is not the augmentation of the responsibilities of the owner or the master.[3] The pilot is on the ship to take charge of the steering, and when the pilot is proved to have given orders, which were obeyed, from which damage has arisen, a *primâ facie* case of negligence is made against him, though not against the owners. Yet if the proof is no more than that the pilot gave the orders without their being obeyed, *primâ facie* negligence is not made out, nor the owners exonerated.[4] If it be proved that a qualified pilot was acting in charge

1 57 & 58 Vict. c. 60.

2 This is a question the solution of which now depends on the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), Part x. ss. 572–633, or on the local statutes governing in the place where the act was done or negligence permitted, from which the proceedings arise. It is only necessary that the vessel should still be in charge of a pilot who has been compulsorily taken on board, even although the ship, at the time of the matter forming the cause of action arising, was outside the district of compulsion: *General Steam Navigation Co.* v. *British and Colonial Steam Navigation Co.*, L. R. 3 Ex. 330; L. R. 4 Ex. 238; *The Guy Mannering*, 7 P. D. 132. In *The Stettin*, B. & L. 199, the pilot was taken on board where there was no compulsion, *i.e.*, by a passenger ship when no passengers were on board (see sec. 625 of 57 & 58 Vict. c. 60), and therefore the rule did not apply; *The Lion*, L. R. 2 P. C. 525; *The Hankow*, 4 P. D. 197. See *The "Earl of Auckland,"* Lush. 164, 387, 15 Moo. P. C. 304, held binding and followed in *The Cayo Bonito*, [1903] P. 203; *The Warsaw*, [1898] P. 127; *The Glanystwyth*, [1899] P. 118. For the commencement and termination of compulsory pilotage services: *The Servia—The Carinthia*, [1898] P. 36. Sec. 603 of 57 & 58 Vict. c. 60, preserves all the exemptions that existed under 6 Geo. IV. c. 125, s. 59: *The Vesta*, 7 P. D. 240. As to the liability of harbour trustees appointed "pilotage authority" by virtue of a local Act for employing "hobblers," instead of appointing pilots, see *Holman* v. *Irving Harbour Trustees*, 4 Rettie, 406. As to who is a qualified pilot duly licensed within the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 586, which reproduces s. 345 of the Act of 1854; the definition of "qualified pilot" is from s. 2 of that Act: *The Carl XV.*, [1892] P. 132; C. A. 324.

3 *Clyde Navigation Co.* v. *Barclay*, 1 App. Cas. 790, explained as to *onus* of proof; *The Indus*, 12 P. D. 46. The "person in charge" under 25 & 26 Vict. c. 63, s. 33, is the ship's master. Subsequent misconduct of the master in not rendering assistance in the case of a collision caused by the neglect of a compulsory pilot will not render owners liable: *The Queen*, L. R. 2 A. & E. 354, followed in *The Sussex*, [1904] P. 236; *The Ole Hull*, [1905] P. 52. This section is re-enacted 30 & 37 Vict. c. 85, s. 16, and incorporated in the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 422. As to "fault or privity" of master under 25 & 26 Vict. c. 63, s. 54, now incorporated in the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 503, see *The Obey*, L. R. 1 A. & E. 102; *The Empusa*, 5 P. D. 6.

4 *The Indus*, 12 P. D. 46, 48.

of a ship; secondly, that the charge was compulsory; thirdly, that the damage happened through the pilot's fault;[1] it lies upon the plaintiff to show that other causes existed for which the owner is responsible. Having done this, the *onus* is upon the defendant to explain the circumstances so alleged, and to show that the *primâ facie* conclusion from them is not correct.[2]

Dr. Lushington's judgment in *The Diana.*

Previously to the decision in *Clyde Navigation Co.* v. *Barclay*,[3] which established this procedure, some misapprehension existed as to the relations between the master and crew and the pilot. This arose from an inaccuracy of expression in the judgment of Dr. Lushington in *The Diana*.[4] Speaking of the immunity of the shipowners, under the compulsory pilotage clauses of the Pilot Act, 1826,[5] from liability for the negligence of the pilot, the learned judge said: "That the exception under the Act ought to be construed strictly; and that if the accident was occasioned by the joint misconduct of the pilot and crew, I am bound to hold that the liability still attaches to the owners." This appears substantially accurate; but the expression left open the construction that not only must the defendant show compulsory pilotage and negligence of the pilot, but also must negative any negligence on the part of the master and crew. And this construction, after being favourably regarded for some time, was definitely enunciated in the judgment of the Privy Council in *The "Iona"*:[6] "It is not enough for them" (the owners) "to prove that there was fault or negligence in the pilot; they must prove, to the satisfaction of the Court which has to try the question, that there was no default whatever on the part of the officers and crew of their vessel, or any of them, which might have been in any degree conducive to the damage."

The "Iona."

Clyde Navigation Co. v. *Barclay.*

In *Clyde Navigation Co.* v. *Barclay*,[7] commenting on this passage Lord Chelmsford said: "The learned Vice-Chancellor"—the judgment in the Privy Council case was delivered by Sir Richard Kindersley—"imposes upon the owners a species of negative proof which it is impossible for them to give. If instead of saying 'they must prove,' &c., he had said, 'it must be proved that there was no fault on the part of the officers and crew,' he would have been perfectly correct. . . . The owners, having proved fault on the part of the pilot sufficient to cause, and in fact causing, the calamity, must therefore, in absence of proof of contributory fault of the crew, be held to have satisfied the condition on which exemption depends, and are not to be called on to adduce proof of a negative character, to exclude the mere possibility of contributory fault. It may be that in the course of the evidence of the owners to fix the responsibility solely upon the pilot, certain acts or omissions on the part of the crew may come out; and it will then be incumbent on

[1] It must be exclusively his fault, even though proof is given that he gave the orders and they were obeyed: *The "Iona,"* L. R. 1 P. C. 426; applied in *The Minna*, L. R. 2 A. & E. 97, and *The "Culabar,"* L. R. 2 P. C. 238; *The "Velasquez,"* L. R. 1 P. C. 494.

[2] Per Lord Selborne, *Clyde Navigation Co.* v. *Barclay*, 1 App. Cas. 790, 796. As to the circumstances in which the master may be called on to interfere with the pilot, *The Lochlibo*, 3 W. Rob. (Adm.), per Dr. Lushington, 321; approved *Wood* v. *Smith*, *The City of Cambridge*, L. R. 5 P. C. 451; *The Oakfield*, 11 P. D. 34; *The Tactician*, [1907] P. 244.

[3] 1 App. Cas. 790.

[4] 1 W. Rob. (Adm.) 135; 4 Moo. P. C. C. 11.

[5] 6 Geo. IV. c. 125, s. 55; see per Dr. Lushington, *The Earl of Auckland*, Lush. 177, comparing 17 & 18 Vict. c. 104, s. 353 with 6 Geo. IV. c. 125, s. 59; and now the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 598 (2). *The Cayo Bonito*, [1903] P. 203.

[6] L. R. 1 P. C. 426, 432, referring with approbation to *The Christiana*, 7 Moo. P. C. C. 160, and to *The "Schwalbe,"* 14 Moo. P. C. C. 250.

[7] 1 App. Cas. 792.

the owners to show satisfactorily that those acts or omissions in no degree contributed to the accident." Lord Selborne,[1] adapting the expression of the Lord Justice-Clerk,[2] states the law thus: "It is not enough for the owners to show that the damage arose through the fault of the pilot, if there is reasonable ground [3] for saying there was contributory fault on the part of the master or crew," and goes on to say: "The proof of circumstances which *primâ facie* show such reasonable ground for saying that there was contributory fault on the part of the master or crew, no doubt would throw upon the defender the burden of explaining those circumstances, so as to satisfy the Court that in point of fact the *primâ facie* conclusion from those circumstances is not correct. If he fails to do that he fails altogether." [4] Lord Selborne's statement of the law.

The pilot is personally liable for his own negligence.[5] There is, moreover, a duty to the pilot from the master, of *uberrima fides* to disclose all particulars affecting the efficiency of the ship; failing which the master is liable.[6] Pilot personally liable.

Though the exoneration of the owners for damage caused by the incapacity of the pilot is sufficiently amply expressed in sec. 633 of the Merchant Shipping Act, 1894, there is probably (for there is no decision in point) a state of things where the master or the owners would be liable for permitting plain incompetency; drunken incapacity, for instance, would call for an exercise of the master's authority to frustrate reckless or suicidal action by the pilot; and the section would not give immunity where acquiescence in the pilot's direction would mark pure folly. Still the evidence of the need of independent action would have to be of undoubtful cogency. if then the master fail to act, he and the owners would be liable.[7] In other matters the law is clearly so. Surgeons, even, have had to be led from the operating table in the crisis of their work, and hideous risks to be faced, rather than allowed to continue at it while in a state of incapacity. Sudden illness or incapacity.

[1] *L.c.* 797. [2] 2 Rettie, 845.

[3] Lord Selborne substitutes the phrase "reasonable ground" for the Lord Justice-Clerk's expression of "reasonable room"; for the rest the quotation follows the Lord Justice-Clerk's words.

[4] *Ante*, 143. As to the scope of the pilot's authority, see *Burrell* v. *MacBrayne*, 18 Rettie, 1048. It extends to determining the proper time of the ship leaving her moorings and to the deciding on all precautions advisable for prudent navigation, per Lord Kinnear, 1057.

[5] *The Queen* v. *Judge of City of London Court*, [1892] 1 Q. B. 273. In *The Octavia Stella*, 57 L. T. 632, a pilot was held liable for anchoring a ship in an oyster-bed, of the position of which he is presumed to have knowledge; *The Swift*, [1901] P. 168; *Petrie* v. *Owners of SS. "Rostrevor,"* [1898] 2 I. R. 556; *Foster* v. *Warblington Urban Council*, [1906] 1 K. B. 648. *Post*, 1074. As to the duties of a pilot, see *The "Iona,"* L. R. 1 P. C. 426; *The Guy Mannering*, 7 P. D. 132, 134; *The "Calabar,"* L. R. 2 P. C. 238; for his duties when the ship is at anchor, *The "City of Cambridge,"* L. R. 5 P. C. 451. As to the pilot's relation with the master, *The Diana*, 1 W. Rob. (Adm.) 131, 136; 4 Moo. P. C. C. 11; *The City of Cambridge*, L. R. 5 P. C. 451; *The Rigborgs Minde*, 8 P. D. 132; *The Ripon*, 10 P. D. 65 By Belgian law, though a pilot must be paid for, whether in charge or not, in either case the master is responsible for negligent navigation: *The Dullington*, [1903] P 77; the Dutch law is similar: *The Prins Hendrik*, [1899] P. 177. As to the distinction between salvage and pilotage, *Akerblom* v. *Price*, 7 Q. B. D. 129. "Salvage" "is the service which those who recover property from loss or danger at sea, render to the owners, with the responsibility of making restitution and with a lien for their reward:" per Lord Stowell, *Thetis*, 3 Hagg. (Adm.) 48. Salvage is a reward for services actually conferred and not for services attempted to be rendered: *The "Chetah,"* L. R. 2 P. C 205. See *The "Amérique,"* L. R. 6 P. C. 468; *The Cargo ex Schiller*, 2 P. D. 145; *The Renpor*, 8 P. D. 115; *The City of Chester*, 9 P D. 182; *Wells* v. *Owners of Gas Float Whitton* (No. 2), [1897] A. C. 337; *The Cargo ex Port Victor*, [1901] P. 243. Compensation may be given in respect of injury sustained while rendering salvage services: *SS. Baku Standard* v. *SS. Angele*, [1901] A. C. 549. Marine Insurance Act, 1906 (6 Edw. VII. c. 41), s. 65.

[6] *"The Meteor,"* Ir. R. 9 Eq. 567.

[7] *Girolamo*, 3 Hagg. (Adm.) 169. 176. Cp. *The Niobe*, 13 P. D. 55.

Towage.

Towage.

The case of towage involves some complications. A steam tug, it is said in a well-known United States case,[1] which engages to tow a vessel into a port, though not a common carrier nor an insurer (the highest possible degree of skill and care is therefore not required of her), is still bound to exercise reasonable skill and care in everything relating to the work till it is accomplished. The want of either skill or care in such cases is a gross fault, and she is liable for the want of either to the extent of the damage sustained. She is bound to know the channel of her home port, how to reach it, and whether in the state of the wind and water it is safe and proper to attempt to enter with a tow.

The obligation undertaken by one supplying a tug was considered by the House of Lords in *The* "*Ratata*,"[2] and is in accord with the principles just noted. There is no warranty but an undertaking to use reasonable care and skill; knowledge of the state of the tide is required, if the operation to be performed depends on it, and an adequate adjustment of means to ends in the provision of steam or other force to work out the object desired.

Law as between towing vessel and towed vessel. *The* "*Julia*."

The law as between the towing and towed vessel is stated by Lord Kingsdown, delivering the judgment of the Privy Council in *The* "*Julia*:"[3] "When the contract," *i.e.*, of towage, "was made, the law would imply an engagement that each vessel would perform its duty in completing it; that proper skill and diligence should be used on board of each; and that neither vessel, by neglect or misconduct, would create unnecessary risk to the other, or increase any risk which would be incidental to the service undertaken. If, in the course of the performance of this contract, any inevitable accident happened to the one, without any default on the part of the other, no cause of action could arise. Such an accident would be one of the necessary risks of the engagement to which each party was subject, and could create no liability on the part of the other. If, on the other hand, the wrongful act of either occasioned any damage to the other, such wrongful act would create a responsibility on the party committing it, if the sufferer had not by any misconduct or unskilfulness on her part contributed to the accident."[4]

Spaight v. *Tedcastle*.

This rule of law is illustrated in *Spaight* v. *Tedcastle*,[5] where the

[1] *The* "*Margaret*," 94 U. S. (4 Otto) 494.

[2] [1898] A. C. 513.

[3] 14 Moo. P. C. C. 210, 230, Lush. 224. The law is laid down in very similar terms in *Sturgis* v. *Boyer*, 24 How. (U. S.) 110; *Smith* v. *St. Lawrence Tow-Boat Co.*, L. R. 5 P. C. 308; *The Energy*, L. R. 3 A. & E. 48; *The Altair*, [1897] P. 105; *The Harvest Home*, [1904] P. 409; [1905] P. 177.

[4] The tug must be seaworthy: *The United Service*, 8 P. D. 56; 9 P. D. 3. If the tug supplies the tow-rope, it must be sufficient: *The Robert Dixon*, 4 P. D. 121; 5 P. D. 54. In *The Undaunted*, 11 P. D. 46, it was held that the implied obligation that the tug shall be efficient is not set aside by a proviso against negligence of the master.

[5] 0 App. Cas. 217. The duty of the tug is discussed in *The Steamer Webb*, 14 Wall. (U. S.) 406, and in *Sewell* v. *British Columbia Towing and Transportation Co.*, 9 Can. S. C. R. 527, where the conclusions arrived at coincide with those in *Spaight* v. *Tedcastle*, *supra*. As to when towage should be employed, see *The* "*Nevada*," 106 U. S. (16 Otto) 154. There is no maritime lien for ordinary towage services: *Westrup* v. *Great Yarmouth Steam Carrying Co.*, 43 Ch. D 241. The legal effect of a contract to tow, and of misconduct or negligence of the tug occasioning danger, are treated at length by Lord Kingsdown in *The Minnehaha*, Lush. 335, 347; also when the contract of

plaintiff's ship was in the charge of a licensed pilot, under whose recommendations a tug was engaged. While being towed the plaintiff's ship took the ground and sustained serious damage. The accident was found to have arisen from the misconduct of the tug, though the ship, by misconduct on her part, contributed to the accident. The House of Lords, reversing the Irish Courts, held that the plaintiff could recover; and overruled the contentions of the respondents, that if those in charge of the ship had, in some earlier stage of the navigation, taken a course or exercised a control over the course taken by the tug, which they did not actually take or exercise, a different situation would have resulted, in which the same danger might not have occurred. The immediate cause of the accident was the negligently starboarding the tug's helm. The negligence alleged on the part of the ship was that the compulsory pilot was negligent, and that the captain of the plaintiff's ship was to blame in quitting the deck. Assuming that to be so, the ground of the judgment is thus stated by Lord Blackburn: [1] "No negligence which was over before the tug negligently starboarded her helm, could be contributory negligence in the sense which is required to relieve the tug from the consequences of that negligence. Be it that there was negligence in the ship, and those for whom the ship was responsible, in letting her get so dangerously near the bank before the helm was ported, as complete as the negligence of those who, in *Davies* v. *Mann*,[2] left the fettered donkey dangerously rolling in the road, it forms no defence to an action against the persons who, by want of proper care, have injured the ship. To make a defence on this ground it must be shown that the injured party, or those with whom for this purpose he is identified, might, by proper care subsequently exerted, have avoided the consequences of the defendant's want of proper care." [3]

Ground of the judgment of the House of Lords stated by Lord Blackburn.

Where the wrongful act done by a pilot on board by compulsion of law is the cause of a collision, we have seen [4] that, neither at common law nor by statute,[5] does liability attach to the owner who has been constrained to employ such person. The question, then, arises, what is the effect of his act upon the amount of damage that should be paid by another ship coming into collision with the ship employing a compulsory pilot, when the injury arises from the negligence of the pilot and the master and crew of the other ship co-operating. It would seem that the owners of the ship employing the pilot not being in any way to blame, and the colliding ship being in fault, the ship in fault should pay the whole of the damages. The rule of the Admiralty, adopted by the Court of Appeal,[6] is different, and is that, where it is found that the navigation of one ship was had through the wrongful act of the compulsory pilot, her owners recover only half the damage. It must be noted that where the pilot is to blame, though he is personally liable

Negligence of pilot co-operating with that of master and crew of colliding ship.

towage passes into a claim for salvage, *The Liverpool*, [1893] P. 154. Where tow and tug come into collision with a third vessel, both tow and tug being to blame, no claim by the tug in respect of services rendered to free the tow from its difficulties is maintainable: *The Duc d'Aumale* (No. 2), [1904] P. 60. The contract of towage is indivisible, and if unfulfilled the tug owners are not entitled on a *quantum meruit*: *The Madras*, [1898] P. 90.

[1] 6 App. Cas. 226. [2] 10 M. & W. 546.

[3] *Hoffman* v. *Union Ferry Co.*, 47 N. Y. 176, is the case of negligence in the tug in using lights, which were not the lights prescribed by Congress, with negligence in a stranger causing injury to the tow.

[4] *Ante*, 1043. [5] 57 & 58 Vict. c. 60, ss. 503 (1), (2), 633.

[6] *The Hector*, 8 P. D. 218, 225; *The Quickstep*, 15 P. D. 196.

at common law, yet the Court of Admiralty cannot exercise its peculiar jurisdiction over him in an action for damages.[1]

Liability of owners for act of any one on board while the vessel is in charge of a compulsory pilot.

Notwithstanding the responsibility of the pilot for the navigation, the owners are responsible for the negligence or fault of any one on board while the vessel is in charge of a compulsory pilot, but acting in it independently of him.[2] Nor in a case of joint blame are the owners exempted from liability by having a compulsory pilot on board.[3]

Divided culpability.

In summing up to the Trinity Masters in *The Massachusetts*,[4] Dr. Lushington thus expresses his view of the law in the case of a divided culpability: "If you are of opinion that the accident arose partly from the fault of the pilot in not coming to an anchor in sufficient time, and partly from the defective weight of the anchor, the legal consequence is, that the damage having arisen from the joint default of the pilot and the owners, the responsibility of the loss must fall upon the owners of the ship"—that is, if the accident is in any degree to be imputed to the master, his liability is not affected by the immunity the statute confers on him from responsibility for the defaults or neglects of the pilot.[5]

Liability of owner where ship does injury when getting into dock under harbour-master's direction in pursuance of statutory powers.

The owner is not liable for damage caused by a collision brought about while his ship is going into dock under a harbour-master's directions, in pursuance of a statutory authority.[6]

To release themselves from liability where a collision is occasioned through the fault of a vessel in charge of a compulsory pilot, the owners have not only to show that the crew was under the pilot's orders at the time of the order being given which produced the collision, but also that the order was such as the pilot was "solely" responsible for;[7] of this the proof should be strict;[8] when it is proved, the defendants are entitled to costs.[9]

Collision while in the charge of compulsory pilot.

There remains to consider the relation between the towed vessel and any independent vessel with which the towing vessel may come into contact during the operation of towing.[10]

Relation between the towed vessel and any independent vessel with which it may come into contact.

The judgment in *The Cleadon*[11] concludes that the towing and the towed vessel with regard to strangers may be considered as a single

1 *The Urania*, 10 W. R. 97; *The Alexandria*, L. R. 3 A. & E. 574; *Flower* v. *Bradley*, 44 L. J. Ex. 1; *The Queen* v. *Judge of City of London Court*, [1892] 1 Q. B. 273.

2 *Yates* v. *Brown*, 25 Mass., per Parker, C.J., 23; cp. *Bussey* v. *Donaldson*, 4 Dallas (Pa.), 206.

3 *Netherland Steamboat Co.* v. *Styles*, *The Batavier*, 9 Moo. P. C. C. 286.

4 1 W. Rob. (Adm.) 373. 5 *Girolamo*, 3 Hagg. (Adm.), 169, 176.

6 *The Bilbao*, Lush. 149; *The Cynthia*, 2 P. D. 32; and *The Belgic*, 2 P. D. 57 n. As to refusal to obey the dockmaster, *The Excelsior*, L. R. 2 A. & E. 268. As to a plea of custom, *The Hand of Providence*, Swa. (Adm.) 107. As to a harbour-master's liability, see *The Rhosina*, 10 P. D. 24, 131; *Shaw, Savill and Albion Co.* v. *Timaru Harbour Board*, 15 App. Cas. 429; *The Apollo*, [1891] A. C. 499; *Reney* v. *Magistrates of Kirkcudbright*, [1892] A. C. 264; *Wright* v. *Lethbridge*, 7 Times L. R. 125 (C. A.); *Niven* v. *Ayr Harbour Trustees*, 24 Rettie, 883; *Parker* v. *North British Ry. Co.*, 25 Rettie, 1059.

7 *The Schwalbe*, 14 Moo. P. C. C. 241; *The Velasquez*, L. R. 1 P. C. 494; *The Livia*, 25 L. T. (N. S.) 887. The position of the anchor is a matter within the scope of the pilot's responsibility: *The Monte Rosa*, [1893] P. 23.

8 *The Carrier Dove*, 2 Moo. P. C. C. (N. S.) 260. The burden of proof of compulsory pilotage is on those setting up the defence: *The Hanna*, L. R. 1 A. & E. 283.

9 *The Royal Charter*, L. R. 2 A. & E. 362.

10 3 Kent, Comm. (12th ed.), 232, n. (*d*), by Mr. Holmes, Vessels in Tow.

11 14 Moo. P. C. C. 92; *The Ticonderoga*, Swa. (Adm.) 215, explained in *The Tasmania*, 13 P. D. 110, 117, where *The Druid*, 1 W. Rob. (Adm.) 391, is considered. *The Druid* was the case where a master of a tug, in order to exact payment of a sum of money he demanded, recklessly towed a vessel into collision. It was held the tug was not responsible. See also *The Leamington*, 32 L. T. (N. S.) 69; *The Sinquasi*, 5 P. D. 241; *The Bianca*, 8 P. D. 91.

whole of which the motive power is in the tug and the governing part in the tow. In the case we have just been considering the duty of the tug is said to be to carry out the directions received from the ship.[1]

A distinction is pointed out in *The "American" and The "Syria,"*[2] where the "governing power" is in the tug, and not in the vessel towed. As it is the presence of this power in the towed vessel that establishes the rule of liability, so, when that power is absent, the liability ceases. Distinction where "governing power" is in the tug.

Allowance must be made for the diminished power of manœuvring consequent on having a ship in tow;[3] but, if the pilot on the ship is guilty of negligence, the tug is not of necessity discharged; for it then becomes the duty of those on the tug to act on their own responsibility for the avoiding of injury. This is pointed out in *The "Civilta"* and *The "Restless,"*[4] where a ship with a pilot on board and being towed, came into collision with a schooner. "Both vessels," said the Court,[5] "were responsible for the navigation, as has already been seen, the ship because her pilot was in general charge, and the tug because of the duty which rested on her to act upon her own responsibility in the situation in which she was placed. The tug was in fault, because she did not on her own motion change her course so as to keep both herself and the ship out of the way; and the ship, because her pilot, who was in charge both of ship and tug, neglected to give the necessary directions to the tug, when he saw or ought to have seen that no precautions were taken by the tug to avoid the approaching danger. Had either the ship or the tug done its duty, under the circumstances there could have been no collision." *The "Civilta" and The "Restless."*

The decision in *The Niobe*[6] is the necessary outcome of these principles.[7] There Sir James Hannen held that, where a tug with a vessel in tow comes into collision with another vessel, the towed vessel is liable; since the towed vessel is bound to exercise control over the tug, and not merely to allow herself to be drawn, or the tug to go, in a course which will cause damage to another vessel. To this, again, there is an exception where the accident is caused by some sudden manœuvre of the tug which the towed vessel could not control. In the case of *The Niobe* it was further contended that *The Niobe* was not liable because the mischief was not done by contact with her. The basis of the liability, however, is not physical impact, so much as a neglect of the duty to use that directing and forewarning agency which is rendered necessary by the position assumed.[8] *The Niobe.*

[1] *Spaight* v. *Tedcastle*, 6 App. Cas. 217, 133.

[2] L. R. 6 P. C. 127.

[3] *The La Plata*, Swa. (Adm.) 220, 298; *The "Independence,"* Lush. 270, 14 Moo. P. C. C. 103.

[4] 103 U. S. (13 Otto) 699. As to the rule of damages, *The "Virginia Ehrman" and The "Agnese,"* 97 U. S. (7 Otto) 309; *The "City of Hartford" and The "Unit,"* 97 U. S. (7 Otto) 323.

[5] 103 U. S. (13 Otto), per Waite, C.J., 702.

[6] 13 P. D. 55. In *The Isca*, 12 P. D. 34, the relative duties of the master of the vessel and the master of the tug are explained. In *The Devonian*, [1901] P. 221, the tow was held liable for misleading lights on the tug, but in *The Harvest Home*, [1904] P. 409, it was held that notwithstanding the tow's duty there was besides an independent duty on the tug to exercise reasonable care and skill.

[7] *The Mary*, 5 P. D. 14; *The Jane Bacon*, 27 W. R. 35.

[8] As to the duty of a tug in charge of canal boats in America, *Arctic Fire Insurance Co.* v. *Austin*, 69 N. Y. 470; *The "Margaret,"* 94 U. S. (4 Otto) 494; *The Quickstep*, 9 Wall. (U. S.) 665. As to the law in England where two or more ships are in tow of the same tug, *Harris* v. *Anderson*, 14 C. B. N. S. 499; *Smith* v. *St. Lawrence Tow-Boat Co.*, (1873) L. R. 5 P. C. 308, followed in *The Altair*, [1897] P. 105.

Question, whether, when the tow is under compulsory pilotage, the immunity extends to the tug.

Moreover, if the negligence is that of the compulsory pilot, though the tow is clearly not liable, a question has been raised whether the exoneration extends to the tug.[1] On the analogy of the cases, where a pilot, not compulsory, is in charge of the tow, there would appear no just ground for this as a universal contention; since, in the event of manifest negligence in the pilot, those in charge of the tug are to act on their own responsibility. In the case of no orders being given, this is clearly so;[2] while, in the case of definite orders being given, very probably it is otherwise; since, as Sir James Hannen points out in *The Niobe*,[3] in addition to the presence of the pilot, "the officers of the tow are usually . . . of a higher class, and better able to direct the navigation, than those of the tug"; and, allowing for exceptional cases of palpably wrong orders, the liability seems a harsh one. Dr. Lushington, in *The Duke of Sussex*,[4] followed by *The Christina*,[5] was of the opinion that the tug should be as much under the control of the pilot as the tow, and that the owner of the tug should be equally protected.

The Mary.

In *The Mary*,[6] Sir Robert Phillimore distinguishes the two last-mentioned cases, though, in the case before him, the tug does not seem to have acted under the orders of the pilot, and further was guilty of independent negligence.[7] "It has been said, indeed, in various cases," says Sir Robert Phillimore,[8] "that the tug and the vessel she has in tow are to be regarded as one vessel, but this rule has only been laid down for the purpose of rendering a ship in tow subject to the rules of navigation applicable to steamers; in that sense only can they be treated as one vessel. The master of the tug has a separate contract and a separate responsibility from the pilot. In one sentence, it is by the exercise of free will that the ship takes the tug; by compulsion of law that she takes the pilot." That the tug may have a separate responsibility from the tow is undoubted; and it seems necessarily to follow that when this separate responsibility exists a liability apart from the tow arises. Yet in the present state of the authorities there may be great doubt as to what facts will constitute separate responsibility.

The Niobe in the House of Lords.

The decision in *The Niobe* received the approval of the House of Lords in an appeal in the same matter from the Court of Session on an insurance policy.[9] The policy provided that "if the ship hereby insured shall come into collision with any other ship or vessel and the insured shall in consequence thereof become liable to pay, and shall pay, to the persons interested in such other ship or vessel any sum or sums of money," the underwriters should pay a certain proportion. The House of Lords held that the collision of the tug with the damaged vessel must be taken to have been a collision of *The Niobe* within the meaning of the policy.

Opinion of Lord Selborne.

Referring to Lord Kingsdown's words in *The "Independence"*[10] that

1 *The Lochlibo*, 7 Moo. P. C. C. 427, approved in *The Oakfield*, 11 P. D. 34; *The "Ocean Wave,"* L. R. 3 P. C. 205.

2 *The "Civilta" and The "Restless,"* 103 U. S. (13 Otto) 699; *The Sinquasi*, 5 P. D. 241.

3 13 P. D. 55, 59.

4 1 W. Rob. (Adm.) 270.

5 3 W. Rob. (Adm.) 27.

6 5 P. D. 14.

7 As to the responsibilities involved in employing a tug, see *The Julia*, 14 Moo. P. C. C. 210, Lush. 224. Where there is a thick fog, so that the vessel ought not to move at all, the having a compulsory pilot on board does not release from responsibility: *The Borussia*, Swa. (Adm.) 94, the case of towing a vessel at night from dock to dock. *Post*, 1100.

8 5 P. D. 16

9 *M'Cowan* v. *Baine*, [1891] A. C. 401. *In re Margetts* v. *Ocean Accident and Guarantee Corporation*, [1901] 2 K. B. 792.

10 14 Moo. P. C. 115.

the tug "may, for many purposes, be considered as a part of the ship to which she is attached"; and in "*The Cleadon*," [1] that "*The Cleadon*," being in tow of the tug, it is admitted she and the tug must be considered to be one ship; the motive power being in the tug and the governing power in the ship that was being towed," Lord Selborne [2] adopted the view that "where a ship in tow has control over, and is answerable for, the navigation of the tug, the two vessels—each physically attached to the other for a common operation, that of the voyage of the ship in tow, for which the tug supplies the motive power," may for many purposes properly be regarded as one vessel; and was of opinion that they were so for the purpose in question.

Opinion of Lord Watson.

Lord Watson,[3] after stating that the decision went "upon a special rule of law, which has admittedly no application except as between a ship and her tug," said: "The ship and her tug must be regarded as identical, in so far as the two vessels with their connecting tackle must be navigated as if they were one ship, and, the motive power being with the tug, must, in order to comply with the regulations for preventing collision at sea, be steered and manœuvred as if they formed a single steamship; and also, in so far as the ship towed, when she has (as in this case) the control of the tug, and the duty of directing the course of the tug, in accordance with these regulations, is responsible for the natural consequences of the tug being wrongly steered, through the neglect of her officers or crew to perform that duty."

Grounds of dissent of Lord Bramwell.

Lord Bramwell dissented, refusing to recognise an exception to the ordinary rules of the construction of contracts: [4] "I think an Act of Parliament, an agreement, or other authoritative document, ought never to be dealt with in this way, unless for a case amounting to a necessity, or approaching to it. It is to be remembered that the authors of the document could always have put in the necessary words if they had thought fit. If they did not, it was either because they thought of the matter and would not, or because they did not, think of the matter. In neither case ought the Court to do it."

The Quickstep.

In *The Quickstep* [5] it was admitted that there was no interference in fact by those on the tow with those on the tug; and the Court held that as to the relations of tow and tug "no general rule can be laid down," [6] and that the question of liability must depend on the circumstances of each case—the principle being that stated by Lord Tenterden, C.J., in *Laugher* v. *Pointer*,[7] that the liability exists only where the men navigating are to be deemed the servants of the hirer. Where, too, a tug in charge of her own master and crew undertakes to transport another vessel which, for the time being, has neither her master nor crew on board, the tug is necessarily responsible for the proper navigation of both vessels; and the principle is unaffected if "a part or even the whole of the officers and crew of the tow are on board, provided it clearly appears that the tug was a seaworthy vessel properly manned and equipped for the enterprise, and from the nature of the undertaking and the usual course of conducting it, the master and crew of the tow were not expected to participate in the navigation of the vessel." [8]

[1] 14 Moo. P. C. C. 97. [2] *M'Cowan* v. *Baine*, [1891] A. C. 401. [3] *L.c.* 407.
[4] *L.c.* 409. [5] 13 P. D. 196. *The Devonian*, [1901] P. 221. [6] *L.c.* 200.
[7] 5 B. & C. 578, adopted and approved by the Court of Exchequer in *Quarman* v. *Burnett*, 6 M. & W. 499. *Ante*, 601.
[8] Per Butt, J., 15 P. D. 201, adopting the language of Clifford, J., in *Sturgis* v. *Boyer*, 24 How. (U. S.) 110, 122.

Canal boats and barges in tow.

It is well settled that canal boats and barges in tow are in charge of the tug, and that the latter is liable.[1]

The L. P. Dayton.

In *The L. P. Dayton*[2] the question of the relative liability of tow and tug was complicated by the tow charging both its own tug and another with negligence. In their defence the tugs, while refraining from imputing negligence to the tow, each sought to exculpate itself by inculpating the other. It was contended on behalf of the tow that a *primâ facie* case of negligence arose, without the necessity of proof of specific acts of negligence by either or both tugs; and that the plaintiff was entitled to a decree, the terms of which, as affecting each of the tugs respectively, would be dependent upon the nature of the evidence which they were bound to produce for the apportionment of the liability between them. In short, that the tow was entitled to stand by secure of the judgment, while the two tugs were fighting out the question of the proportion of damages they were to contribute to the tow. This view did not commend itself to the Court, which considered the burden of proof to rest entirely on the tow to establish a case against either or both of the tugs; and further, that the rule presuming fault in case of collision against a vessel in motion, in favour of one at anchor, was not applicable. So far as the other tug's liability went, the tow was identified with her own tug, "so far, at least, that she cannot escape the consequences if the collision was caused wholly or in part by the fault of that tug." So far as her own tug was concerned, there is no presumption in favour of the tow, "because on her behalf all the alleged negligence is denied, and the contrary allegations of the libel cannot be legally maintained merely by corresponding allegations" in the defence of the other. "To hold otherwise," the Court decided, "would require that in every case, as between the tow and its tug, the latter should be required affirmatively to establish its defence against the presumption of its negligence. There is no ground in reason or authority, for making such an exception to the general rule, which requires the plaintiff, in the first instance, to establish by proof the allegations of its complaint." And in considering this it must also be borne in mind that "as between the tow and its tug the contract of towage involves a responsibility for loss upon the tug, only by reason of the want of ordinary care; for a tug is not a common carrier, and does not insure the safety of its tow."[3]

Liability of owner of tug limited by statute.

The liability of the owner of a tug for damage done to the tow by improper navigation of the tow is limited by statute, as in other cases.[4]

Negligence must be shown to found liability.

An engagement to tow does not impose the liability of a common carrier. The burden is always on him who alleges the breach of the contract of towage to show that there has been negligence or unskilfulness in the performance of the contract. Damage sustained by the tow does not of itself raise the presumption of fault in the tug; and the degree of care required of the tug is no more than "that degree of caution and skill which prudent navigators usually employ in similar services"; and "there may be cases in which the result is a safe criterion by which to judge of the character of the act which has caused it."[5]

[1] *The Express*, (1848), 1 Blatchf. (C. C. U. S.) 365; Parsons, Law of Shipping, vol. i. 536 *n*. [2] 120 U. S. (13 Davis) 337. [3] *L.c.* 351.

[4] *Wahlberg* v. *Young*, 45 L. J. C. P. 783. See Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 503 (1), (2).

[5] *The Steamer Webb*, 14 Wall. (U. S.), 406, 414, followed in *The Propeller Burlington*, 137 U. S. (30 Davis), per Fuller, C.J., 391.

Where the towage contract is partially in the nature of salvage the towing ship is not the less liable for a collision caused by negligence,[1] though the Courts incline to regard error or negligence in the salvor more leniently than in ordinary cases.[2] Of course the salvor can recover if he is not guilty of negligence;[3] but where a collision occurs through the negligent navigation of the salving vessel the damage caused is matter for deduction from the award of salvage.[4]

Where the towage contract partakes of the nature of salvage.

There is no common employment between the servants of the tug and of the tow.[5] But where it was sought, in accordance with what was stated to be the American usage, to limit the liability of a tug and tow, each of which was to blame for a collision with a third vessel, to judgment for one-half of the entire damage, Butt, J., said he was clearly of opinion that to do so would contravene the law. "It is the right of every one who has sustained damage by the joint negligence of two individuals, and who sues them in tort and obtains judgment against them, to enforce it by execution against one or the other of the defendants, or both of them. That is the right of a plaintiff in a common law action. I see no reason why there should be a different one in an Admiralty action."[6] All the damage is to be divided even when some is due to a collision by one of the defendants with some third vessel and thus arises out of a tort.[7]

No common employment between servants of the tug and those of the tow.

Charter-parties and Bills of Lading.

So far the common law or statutory aspect of the shipowner's or master's liability has been principally considered. This, however, is most frequently varied by the terms of the charter-party or of the bill of lading.

Liability of shipowner or master limited by charter-party or bill of lading.

A charter-party[8] is an agreement in writing by which a shipowner agrees to let an entire ship or part thereof to a merchant for the carriage of goods on a specified voyage or during a specified period for a sum of money which the merchant agrees to pay as freight for their carriage.[9]

Definition of a charter-party.

A charter-party is an agreement between the shipowner and the shipper with regard to the carriage of goods. Unless it is a demise of

[1] *The Thetis*, L. R. 2 A. & E. 365. Towage is defined, "the employment of one vessel to expedite the voyage of another, when nothing more is required than the accelerating her progress": *The Princess Alice*, 3 W. Rob. (Adm.), per Dr. Lushington, 140. As to salvage, see *ante*, 1045.

[2] *The C. S. Butler* (No. 4), L. R. 4 A. & E. 178.

[3] *Mud-Hopper* (No. 4), 40 L. T. 462; *The City of Chester*, 9 P. D. 182.

[4] *The Dwina*, [1892] P. 58; *The Cheerful*, 11 P. D. 3.

[5] *The Julia*, Lush. 224. *Ante*, 657.

[6] *The Avon and Thomas Jolliffe*, [1891] P. 7, 8. See also *The Englishman and The Australia*, [1894] P. 239, distinguished in *The Morgengry and The Blackcock*, [1900] P. 1, because in that case there was a finding that the tow could and should, but did not, restrain the speed of the tug, and therefore both were jointly to blame for the collision; and *ante*, 970 n. [2].

[7] *The Frankland*, [1901] P. 161.

[8] 3 Kent, Comm. (12th ed.), 206 note, The Charter-Party. Pothier says: *Le contrat de charte-partie est le contrat de louage des navires et bâtiments de mer.* Traité des Contrats des Louages Maritimes, n. 1. See also his derivation of the term in the next paragraph. See Code de Commerce, Art. 273; also for the earlier English law, Beawes, Lex Mercatoria (6th ed.), 187; Malynes, Lex Mercatoria (3rd ed.), 97.

[9] Wharton, Law Dictionary, *sub voce*; Abbott, Merchant Ships (14th ed.), 328 *et seqq.* The construction of a charter-party should be liberal to effectuate the intention of the parties, *Dimech* v. *Corlett*, 12 Moo. P. C. C. 199. For the construction of charter-parties, *Dahl* v. *Nelson*, 6 App. Cas. 38; *Tharsis Sulphur and Copper Co.* v. *Morel Brothers*, [1891] 2 Q. B. 647.

the ship, it gives him the use of no particular part which he can fix upon. The shipowner has a right to put the cargo into any part of the ship he chooses. He has a right, if he can do it without damage to the cargo, to alter the place of the stowage even during the voyage. There is not one single inch of the ship to which the charterer has an exclusive right. His only right is to have his goods carried.[1]

Definition of a bill of lading.

"A bill of lading,"[2] says Buller, J.,[3] "is an acknowledgment under the hand of the captain, that he has received such goods, which he undertakes to deliver to the person named in that bill of lading. It is assignable in its nature; and by indorsement the property is vested in the assignee."[4]

A bill of lading "is an instrument of a twofold character. It is at once a receipt and a contract. In the former character it is an acknowledgment of the receipt of property on board his vessel by the owner of the vessel. In the latter, it is a contract to carry safely, and deliver. If no goods are actually received there can be no valid contract to carry or to deliver." "The doctrine is applicable to transportation contracts made in that form by railway companies and other carriers by land, as well as carriers by sea."[5]

According to mercantile custom bills of lading are drawn in sets of three, "one of which being accomplished the others to stand void." The handing over the bill of lading for any advance under ordinary circumstances, as completely vests the property in the pledgee as if the goods had been put into his own warehouse; and the first person who for value gets the transfer of a bill of lading acquires the property. All subsequent dealings with the other two bills must in law be subordinate to the first, and though possibly circumstances might arise justifying the shipowner in delivering the goods to the holder of the second in the absence of the first, yet "the legal ownership of the goods must still remain in the first holder for value of the bill of lading, because he had the legal right in the property."[6] Before the Bills of Lading Act the indorsee of a bill of lading could only sue in the name of the shipper. By the Act the rights and liabilities of the shipper pass to him. The contract therefore must receive the same construction it would bear between the shippers and the shipowners.[7]

Bill of lading a symbol only of the ownership of goods covered by it.

A bill of lading is not a negotiable instrument in the sense that a bill of exchange is[8] so as to become available in the hands of a holder without title, since it is not a representative of money but a contract

[1] Per Lord Esher, M.R., *The Queen* v. *Judge of City of London Court*, [1892] 1 Q. B. 291, where note also his remark on *The Alina*, 5 Ex. D. 227.

[2] 3 Kent, Comm. (12th ed.) 207.

[3] *Caldwell* v. *Ball*, 1 T. R. 216. Cp. *Pollard* v. *Vinton*, 105 U. S. (15 Otto) 7.

[4] See Bills of Lading Act, 1855 (18 & 19 Vict. c. 111), ss. 1, 2, commented on by Brett, L.J., *Glyn* v. *East and West India Dock Co.*, 6 Q. B. D. 482; see also *Burdick* v. *Sewell*, 13 Q. B. D. 159; 10 App. Cas. 74. For the effect of a mortgage of a bill of lading under the Act, see per Lord Blackburn, 10 App. Cas. 97, who also (at 93) criticises unfavourably certain *obiter dicta* on the effect of the Bills of Lading Act in *The "Freedom,"* L. R. 3 P. C. 594. Cp. Code de Commerce, arts. 281-285; Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), Part iv., ss. 38-48; also the Factors Act, 1889 (52 & 53 Vict. c 45). As to redelivery to pledgor of bill of lading to sell goods for pledgee, *North-Western Bank* v. *Poynter*, [1895] A. C. 56.

[5] *St Louis Iron Mountain, &c. Ry. Co.* v. *Knight*, 122 U. S. (15 Davis) 87, citing Miller, J., *Pollard* v. *Vinton*, 105 U. S. (15 Otto) 8; *Missouri Pacific Ry. Co.* v. *McFadden*, 154 U. S. (47 Davis) 155, 182.

[6] Per Lord Westbury, *Barber* v. *Meyerstein*, L. R. 4 H. L. 336.

[7] *Cox* v. *Bruce*, 18 Q. B. D. 147.

[8] The intention of the whole transaction has to be regarded: *Coxe* v. *Harden*, 4 East, 211; *Shepherd* v. *Harrison*, L. R. 5 H. L. 118; *Pease* v. *Gloahec*, *The "Marie Joseph,"* L. R. 1 P. C. 219, 227; *Thompson* v. *Dominy*, 14 M. & W. 403.

for the performance of a certain duty, and a symbol merely of the ownership of the goods covered by it; and if it is lost or stolen, the ownership of the loser will not be divested thereby. The bill of lading only represents the goods; and in this instance the transfer of the symbol does not operate more than a transfer of what is represented.[1]

Glyn, Mills, & Co. v. East and West India Dock Co.

In *Glyn, Mills, & Co.* v. *East and West India Dock Co.*,[2] Lord Selborne, C., says: "The primary office and purpose of a bill of lading, although by mercantile law and usage it is a symbol of the right of property in the goods, is to express the terms of the contract between the shipper and the shipowner." And Lord Hatherley says, in *Barber* v. *Meyerstein*:[3] "When the vessel is at sea and the cargo has not yet arrived, the parting with the bill of lading is parting with that which is the symbol of property, and which, for the purpose of conveying a right and interest in the property, is the property itself."

Bill of lading collusively signed.

As then a bill of lading is but the symbol of goods, a bill collusively signed between the agent of the defendants and a third party, in the absence of goods, will not charge the principal.[4] There is an exception to this rule where the negligence of the true owner has put it in the power of another ostensibly to occupy his position; he may thereby become estopped from asserting his right as against a purchaser, who has been misled to his hurt by reason of such negligence.[5]

Master's signature to bills of lading *primâ facie* evidence of the truth of their contents.

Since the master is the shipowner's agent in the making of every usual contract, his signature to the bills of lading is sufficient evidence of the truth of their contents to throw upon the shipowner the *onus* of falsifying them; so that, though the master has no authority to sign for a greater quantity of goods than is actually put on board, yet if he has done so, the bill is presumptive evidence that the goods stated have been actually shipped till it is displaced by other evidence.[6] But when it is shown that the goods or some of them were not put on board, the shipowner is discharged from this *primâ facie* liability;[7] yet till this is done the *onus* is on the shipowner.[8]

[1] *Gurney* v. *Behrend*, 3 E. & B., per Lord Campbell, C.J., 634.

[2] 7 App. Cas. 591, 600. See 18 & 19 Vict. c. 111; *Jessel* v. *Bath*, L. R. 2 Ex. 267; *Fraser* v. *Telegraph Construction Co.*, L. R. 7 Q. B. 566, 571; *Sewell* v. *Burdick*, 10 App. Cas. 74; *Bristol and West of England Bank* v. *Midland Ry. Co.*, [1891] 2 Q. B. 653; *Leduc* v. *Ward*, 20 Q. B. D. 475. For interpretation of deviation clause, see *Glynn* v. *Margetson*, [1893] A. C. 351.

[3] L. R. 4 H. L. 326, quoted per Lord Blackburn, 7 App. Cas. 604. For the duty of the seller in dealing with the bill of lading, *Sanders* v. *Maclean*, 11 Q. B. D. 327. Apart from express contract or mercantile usage there is no legal duty on the charterer to deliver all the bills of lading or copies of them to the shipowner, though without them the consular manifest cannot be drawn up: *Dutton* v. *Powles*, 2 B. & S. 174.

[4] *Cox* v. *Bruce*, 18 Q. B. D. 147; *Grant* v. *Norway*, 10 C. B. 665; *British Mutual Banking Co.* v. *Charnwood Forest Ry. Co.*, 18 Q. B. D. 714; *Whitechurch* v. *Cavanagh*, [1902] A. C. 117. In *Companía Naviera Vasconzada* v. *Churchill*, [1906] 1 K. B. 237, the shipowner was held estopped by a misstatement of the master that goods which were damaged before shipment were shipped in good order and condition.

[5] *Gurney* v. *Behrend*, 3 E. & B. 634.

[6] *McLean* v. *Fleming*, L. R. 2 H. L. Sc. 128; *Hubbersty* v. *Ward*, 8 Ex. 330. Cp. *Missouri Pacific Ry. Co.* v. *McFadden*, 154 U. S. (47 Davis) 155.

[7] *Brown* v. *Powell Duffryn Steam Coal Co.*, L. R. 10 C. P. 562, where the effect of sec. 3 of the Bills of Lading Act, 1855 (18 & 19 Vict. c. 111), making the master's signature to a bill of lading conclusive evidence against him when in the hands of a *bonâ fide* consignee for value, was discussed. *Mediterranean and N. Y. Steamship Co.* v. *A. F. & D. Mackay*, [1903] 1 K. B. 297.

[8] *Smith & Co.* v. *Bedouin Steam Navigation Co.*, [1896] A. C. 70; *Parsons* v. *New Zealand Shipping Co.*, [1901] 1 Q. B. 548, a case argued on the ground of estoppel under sec. 3 of Bills of Lading Act, 1855, *supra*. Defendants were held not precluded from showing a mistake in the margin of the bill of lading, which did not affect the "nature, quality or quantity of the goods," as the section was concerned only with "the identity of the goods shipped with those represented as shipped."

Where the master signs a bill of lading without anything in the document to show that he signs as agent he becomes personally liable to the shipper. The shipowner who has authorised the signature is also liable. Thus there are two separate liabilities for the performance of one contract. But the shipper does not obtain concurrent remedies; he has his right of election, and as either master or owner may be sued by, so either may sue the shipper.[1]

Acknowledgment by master as to condition of goods.

An acknowledgment by the master as to the condition of goods received on board extends only to the external condition of the cases, excluding any implication as to the quantity or quality of the article, its condition when received on board, or whether properly packed or not in the boxes; and if the defendant's evidence raises a reasonable inference of damage resulting from imperfection in the goods themselves when packed, or before, the burden is thrown upon the plaintiff to rebut this.[2]

Charter-party may defeat claim of shipper against shipowner.

In some cases the claim of the shipper against the shipowner is defeated by the charter-party. Lord Tenterden,[3] delivering the judgment of the House of Lords in *Colvin* v. *Newberry*,[4] enunciated two propositions: first, that in the common case of goods shipped on board a vessel, of which the shipment is acknowledged by a bill of lading signified by the master, if the goods are not delivered, the shipper has a right to maintain an action against the owner of the ship; second, "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." The House of Lords held that the case before them came within the second proposition. Yet *primâ facie* the shipowner is responsible,[5] and his liability continues till a demise of the ship is shewn;[6]

[1] *Repetto* v. *Millar's Karri and Jarrah Forests*, [1901] 2 K. B. 306.

[2] *Clark* v. *Barnwell*, 12 How. (U. S.) 272. When there is no bill of lading the mere receipt of the goods will bind. This is agreeable to the Civil Law. *Recipit autem salvum fore, utrum si in navem res missæ, ei assignatæ sunt, an etsi non sint assignatæ*, (whether there is a bill of lading or not) *hoc tamen ipso quod in navem missæ sunt, receptæ videntur:* D. 4, 9, 1, § 8. Where goods are received, "weight, value and contents unknown," the acknowledgment of the master as to the condition of the goods extends only to the external condition of the case:" Parsons, Law of Shipping, vol. i. 197, cited by Brett, J., *Lebeau* v. *General Steam Navigation Co.*, L. R. 8 C. P. 92. For the law of stoppage *in transitu*, see Abbott, Merchant Ships (14th ed.), 811 *et seqq.*, also per Lord Blackburn, *Kemp* v. *Falk*, 7 App. Cas. 585. *Bethell* v. *Clark*, 20 Q. B. D. 615, approved *Lyons* v. *Hoffnung*, 15 App. Cas. 391; *Delaurier* v. *Whyllie*, 17 Rettie, 167. If during the transit the property in goods is transferred by the consignee's indorsement and delivery of the bill of lading, the consignor loses his right to stop in transit: *Cuming* v. *Brown*, 9 East, 506. The earliest reported case appears to be *Wiseman* v. *Vandeputt* (1690), 2 Vern. 203.

[3] In common with the other judges of the K. B. he had joined in a judgment in this case which had been overruled in the Exchequer Chamber. In the Lords he was the only Law Lord present, and moved to affirm the judgment of the Exchequer Chamber, adding, "I am inclined to think that the judgment of the Court of Exchequer Chamber is right."

[4] 1 Cl. & F. 283, 297; *Wagstaff* v. *Anderson*, 5 C. P. D. 171.

[5] *The St. Cloud*, B. & L. (Adm.) 4, 15.

[6] *Sandemann* v. *Scurr*, L. R. 2 Q. B. 86. In the *Omoa, &c. Coal and Iron Co.* v. *Huntley*, 2 C. P. D. 464, the master and crew were held servants of the shipowner under a charter-party giving the charterers very extensive powers, because the master "remained in all respects accountable for the manner in which the vessel might be navigated." Cp. *Wagstaff* v. *Anderson*, 5 C. P. D. 171.

but when this is established the charterer is liable to the exoneration of the owner.[1] "I know of no principle or authority," says Lord Watson,[2] "which requires that notice must be given when an owner parts, even temporarily, with the possession and control of his ship in order to prevent the servant of the charterer from pledging his credit." Liability when demise of ship is established

In *Manchester Trust* v. *Furness*[3] an attempt was made to bring the terms of the charter-party within the doctrine of *Colvin* v. *Newberry*[4] and *Baumwoll Manufactur von Carl Scheibler* v. *Furness*.[5] There the Court of Appeal held that the charter-party was binding only between the owners and the charterers and did not affect the liability of the owners to the shippers—the holders of the bills of lading. *Furness's case* was distinguished in that there the hiring of the master was by the charterer and not by the shipowner. *Colvin's case* was described as "a very curious case." "The master there, so far as I[6] understand it, had no principal at all. He was the charterer and he was the person navigating the ship; he was the master, and he was doing everything on his own account subject to some payment to the shipowner." The test that is to be applied in each case is: "Whose servant is the master? Who is his undisclosed principal when he signs the bill of lading?" In the case before the Court, Lindley, J., answers: "My answer to that question is, that upon the true construction of these documents he was the servant of the shipowner."[7]

Many years previously the same result had practically been arrived at in *Dean* v. *Hogg and Lewis*.[8] Defendant Lewis hired a steamboat for a pleasure party to Richmond. As the vessel was about to start, plaintiff, an attorney, not a member of defendant's party, stepped on board, "his embarkation being countenanced by the captain." "By the time *The Adelaide* had reached Battersea, it was generally bruited about [the "party" was one "not exceeding fifty persons"] that a stranger was on board. The ladies became alarmed; and Hogg, as the plaintiff alleged, in an imperious tone ordered him to quit the vessel." In the result the plaintiff was assaulted (his coat tails were torn off), for which he brought his action. Ultimately, his right to succeed came to hang on the solution of the question whether the contract secured exclusive possession of the vessel for defendant Lewis. The Court of Common Pleas held that it did not. "The captain and the crew who continued in the management of the vessel were the servants of the owners, not of Lewis. If any injury had been occasioned by the vessel the owners, not Lewis, would have been answerable for the damages. There were some parts of the vessel manifestly not in the possession of the defendant Lewis, and some parts to which he had even no right of access or entry; such as the parts occupied by the crew, the room containing the machinery, and the like. If the captain had carried goods to Richmond for other persons, to any extent short of incommoding the defendant Lewis and his friends, the defendant could not have prevented it, either by removing the goods or by action against the owners; all which considerations tend to show the possession was never given up."[9] *Dean* v. *Hogg and Lewis.*

[1] *Baumwoll Manufactur von Carl Scheibler* v. *Gilchrest*, [1892] 1 Q. B. 253; [1893] A. C. 8. The cases are collected and discussed, 3 Kent, Comm. (13th ed.) 133–138.
[2] [1893] A. C. 21.
[3] [1895] 2 Q. B. 539.
[4] 1 Cl. & F. 283.
[5] [1893] A. C. 8.
[6] Lindley, L.J., *l.c.* 540.
[7] Cp. *Weir* v. *Union Steamship Co.*, [1900] A. C. 525.
[8] (1834), 10 Bing. 345.
[9] Per Tindal, C.J., *l.c.* 351.

Master *primâ facie* agent of the shipowner.

As the master is *primâ facie* the agent of the shipowner, a contract made by the shipper with the master concludes the shipowner till the existence of a charter is shown, in effect demising the ship, and means of knowledge of this on the part of the shipper.[1]

Shipowner liable where voyage abandoned, unless there is utter unreasonableness in continuing it.

In the case of an agreement by charter-party to deliver goods, unless prevented by excepted perils, the shipowner remains liable to an action for breach of the charter-party, where the ship is compelled to put into port to repair, and the voyage is then abandoned, unless physical inability to complete the journey is shown, or at least the utter unreasonableness of doing so from a business point of view.[2]

Negligence clause in bill of lading when no corresponding clause in charter-party.

Once more—a difficulty sometimes arises between shipowners and charterers with reference to the application of a negligence clause in the bill of lading limiting the liability of shipowners, when there is no such clause in the charter-party. In *Wagstaff* v. *Anderson*,[3] Bramwell, L.J., expresses his opinion that a bill of lading is not a contract "superseding, adding to, or varying the former contract under the charter-party;" and again, in *Sewell* v. *Burdick*,[4] in the House of Lords, speaking of the expression "the contract contained in the bill of lading," he says: "To my mind there is no contract in it. It is a receipt for the goods, stating the terms on which they were delivered to and received by the ship, and therefore excellent evidence of those terms, but it is not a contract. That has been made before the bill of lading was given." These expressions were adopted by the Court in *Rodoconachi* v. *Milburn*[5] as correctly stating the law, Lord Esher, M.R., there adopting what was said by Lord Bramwell in *Sewell* v. *Burdick*, and holding "that as between the shipowner and the charterer the bill of lading, although inconsistent with certain parts of the charter, is to be taken only as an acknowledgment of the receipt of the goods." And in the Scotch case of *Delaurier* v. *Wyllie*[6] the proposition was formulated "as between the shipowners and the charterers, the charter-party always overrides the bill of lading."

Personal liability of shipowner.

On a bill of lading a question may arise as to the personal liability of the shipowner over and above his liability for the negligence of the master or mariners and which is ordinarily excepted under the negligence clause of the bill. This clause does not usually except his personal liability. If, for example, the shipowner "employs as master of the ship a person who was known to be of drunken habits, and it is shown that the collision or loss is the result of the drunkenness of the captain on a particular occasion, that I should say would be personal negligence on the part of the shipownor, and he would be liable. Or if in order to favour some relation of his own he appoints as master of the ship a person who has not reasonable knowledge, skill, and capacity, and if

[1] *The St. Cloud*, B. & L. (Adm.) 4, 15. See *Baumwoll Manufactur von Carl Scheibler* v. *Gilchrest*, [1892] 1 Q. B. 263; [1893] A. C. 8. In an action on a charter-party it was held that where defendante prevent the performance of a condition precedent by neglect or default the plaintiff is placed in the same position as if the condition had been performed by him: *Hotham* v. *The East India Co.*, 1 T. R. 638.

[2] See judgment of Collins, J., *Assicurazioni Generali* v. *SS. Bessie Morris Co.*, [1892] 1 Q. B. 571 (where the cases are collected and reviewed), affirmed [1892] 2 Q. B. 652.

[3] 5 C. P. D. 177.

[4] 10 App. Cas. 105.

[5] 18 Q. B. D. 75; in Divisional Court, 17 Q. B. D. 320. *Hansen* v. *Harrold*, [1894] 1 Q. B. 612; *Moel Tryvan Ship Co.* v. *Kruger*, [1906] 2 K. B. 792; [1907] 1 K. B. 809, affd. in H. L. [1907] A. C. 272. Cp. *Gledstanes* v. *Allen*, 12 C. B. 202.

[6] 17 Rettie, 192. *De Clermont* v. *General Steam Navigation Co.*, 7 Times L. R. 187, is a judgment by Wright, J., on the liability for the loss of goods received "subject to the conditions contained in bill of lading to be issued for the same," and lost before the bill of lading is exchanged for mate's receipt, when the bill of lading contains an exception covering the loss but not known to the shipper. *The Hibernian*, [1907] P. 277.

the loss is shown to have resulted from that want of reasonable knowledge, skill, and capacity, the shipowner would be liable. Or if the shipowner gives written instructions to his captain that upon the vessel entering into a certain port, although he should have a pilot before entering that port, he is not to have one on board, and by reason of his not having a pilot the ship he lost, there would be negligence on the part of the shipowner and he would be liable." [1]

These instances of the shipowner's personal liability are, of course, illustrative only and not exhaustive.

The early bills of lading do not contain any exceptions to the risks of the adventure.[2] The first set of exceptions in use was only of "the act of God, the King's enemies, and dangers of the sea." Exceptions in bill of lading.

As the result of the case of *Smith* v. *Shepherd* [3] (in which, however, there does not seem to have been any bill of lading), the words of the exceptions were extended to "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."

Of late years the number and extent of exceptions have greatly increased, till they now provide against almost every occurrence. But "exceptions in a bill of lading must be clear and unambiguous if the shipowner is to be relieved from the liability which he has otherwise undertaken therein." [4] The "negligence clause" in a bill of lading most usually protects the carrier from liability for loss or damage occasioned

(1) By causes beyond his control;
(2) By the perils of the sea or other waters;
(3) By fire from any cause;
(4) By barratry of the master or crew;
(5) By enemies;
(6) By pirates or robbers;
(7) By arrest and restraint of princes, rulers, or people, riots, strikes, or stoppage of labour;
(8) By explosion, bursting of boilers, breakage of shafts, or any latent defect in hull, machinery, or appurtenances;
(9) By collision;
(10) By stranding or other incidents of navigation of whatsoever kind, even when occasioned by the negligence, default, or error of judgment in the pilot, master, mariners, or other servants of the shipowner, not resulting, however, in any case, from want of due diligence by the owners of the ship or any of them, or by the ship's husband or manager.[5]

(1) We have already considered what are the constituents of an act of God.[6] (1) Act of God.

(2) The dangers of the sea are also usually excepted.[7] Under these words, as was said in an American case, where the import of the phrase, "the dangers of the river," was considered, "the perils of the sea, and of the river, are so nearly allied, that they may be considered the same, (2) Dangers of the sea.

[1] Per Brett, L.J., *Chartered Mercantile Bank of India* v. *Netherlands India Steam Navigation Co.*, 10 Q. B. D. 532. As to the law of liability of the master to his other servants for employing incompetent servants, *ante*, 646 *et seqq.*

[2] Scrutton, Charter-parties and Bills of Lading (5th ed.), 181, referring to West, Symboleography (eds. 1632 and 1647), printing a bill of lading dated 1598; at 1 659 in the edition of 1647, which is the only one in the Inner Temple Library.

[3] Abbott, Merchant Ships (14th ed.), 578.

[4] *Owners of Cargo on Board SS. Waikato* v. *New Zealand Shipping Co.*, [1899] 1 Q. B. 56, 58.

[5] Scrutton, Charter-parties and Bills of Lading (5th ed.), 351. Abbott, Merchant Ships (14th ed.), Exceptions in Bills of Lading and Charter-parties, 577 *et seqq.*

[6] *Ante*, 879. [7] As to perils of the sea, Abbott, Merchant Ships (14th ed.), 608.

except in the few instances in which the reason differs,—nor is the distinction always clear, between the dangers of either, and those arising from the 'acts of God or the public enemies.'"[1]

Not co-extensive with inevitable accident or dangers of the seas.

Some American cases have gone further and assumed an identity between an "act of God" and "dangers of the sea," as, for example, *Crosby* v. *Fitch*,[2] where the Court says: "The act of God, inevitable accident, dangers of the sea, &c., are expressions of very similar legal import, and excuse a loss, whether they are repeated in a bill of lading or not." This identification is not correct in English law. An "act of God" is undoubtedly a peril of the seas, but a peril of the sea is by no means an act of God. For example, a man rolled a rock into the channel of a river whereon the first vessel that came along struck; this was held a "danger of the river," though certainly not the "act of God."[3]

Importance of the distinction.

The importance of the distinction is seen in this, that where loss occurs through the act of God it is immaterial whether there be a bill of lading or not, since the shipowner is excused by the common law; on the other hand, if a loss occur through a peril of the sea the shipowner is liable if he does not show some special contract of carriage; of which the most usual evidence is a bill of lading.

Foundering.

Foundering is the most obvious instance of loss by a peril of the sea;[4] and proof of a ship having sailed from a given port, and never having arrived at the announced port of her destination, with the existence of a rumour at the port of departure that she has foundered, has been held sufficient *primâ facie* evidence of the fact.[5]

Shipwreck.

Shipwreck[6] is also a case of loss by a peril of the sea, and so are the losses consequential upon it.[7] So are losses brought about by stranding,[8] pirates,[9] a sunken rock, an iceberg, a swordfish,[10] wreckers,[11] dangers received in docking the ship in the course of the voyage,[12] but not otherwise.[13]

Definition by Lopes, L.J., of danger or accident of the sea.

The definition of peril of the sea given by Lopes, L.J., has been approved—"sea damage occurring at sea, and nobody's fault."[14]

1 *Jones* v. *Pitcher*, 3 Stew. & P. (Ala.) 135, 176. The admirable and exhaustive judgment of Saffold, J., in this case should be referred to, 142–181.

2 12 Conn. 410, 419. *Fish* v. *Chapman*, 2 Kelly (Ga.), 349, 356. Nisbit, J's., judgment is set out in a note, Story, Bailments (8th ed.), § 435.

3 *Chouteaux* v *Leech*, 18 Pa. St. 224. See per Cockburn, C.J., *Nugent* v. *Smith*, 1 C. P. D. 423; and per Lord Esher, M.R., *Pandorf* v. *Hamilton*, 17 Q. B. D. 675.

4 Cp. Pothier, d'Assurance, nos. 110, 122.

5 *Koster* v. *Reed*, 6 B. & C. 19; Park, Marine Insurances (8th ed.), vol. i. 147.

6 As to whom goods wrecked belong, Vin. Abr. Wreck. Beawes, Lex Mercatoria (6th ed.), vol. i. 236–240.

7 *Dent* v. *Smith*, L. R. 4 Q. B. 414; *The* "*Norway*," B. & L. (Adm.) 404; 3 Moo. P. C. C. (N. S.) 245.

8 In order to constitute a stranding the ship must be stationary, "so that the ship may, *pro tempore*, be considered as wrecked": *McDougle* v. *Royal Exchange Assurance*, 4 M. & S. 503; if she gets off again, however much she is injured, she is not stranded: *Harman* v. *Vaux*, 3 Camp. 429; 3 Kent, Comm. 323. See further, *Fletcher* v *Inglis*, 2 B. & Ald. 315; *Phillips* v. *Barber*, 5 B. & Ald. 161; *Carruthers* v. *Sydebotham*, 4 M. & S. 77; all cited and considered in Lord Herschell's opinion in *Thames and Mersey Marine Insurance Co.* v. *Hamilton, Fraser & Co.*, 12 App. Cas. 495–7. *Corcoran* v. *Gurney*, 1 E. & B. 456, and *De Mattos* v. *Saunders*, L. R. 7 C. P. 570, may also be referred to, both cited in *Letchford* v. *Oldham*, 5 Q. B. D. 538, where the definition of "stranding" in *Wells* v. *Hopwood*, 3 B. & Ad. 20, and *Kingsford* v. *Marshall*, 8 Bing. 458, is adopted.

9 *Pickering* v. *Barkley*, Style (K.B.) 132; Roll. Abr. Parolls. (C) Exposition, pl. 10. Mutinous seizure by passengers has been held piracy, *Palmer* v. *Naylor*, 10 Ex. 382. See also per Lord Kenyon, C.J., *Nesbitt* v. *Lushington*, 4 T. R. 783; *Kleinwort* v. *Shepard*, 1 E. & E. 447; and Lord Blackburn's remarks, *Cory* v. *Burr*, 8 App. Cas. 402. *Ante*, 882.

10 *Arguendo* in *Hamilton* v. *Pandorf*, 12 App. Cas. 522.

11 *Bondrett* v. *Hentigg*, Holt (N. P.) 149.

12 *Lawrie* v. *Douglas*, 15 L. T. & W. 746.

13 *Phillips* v. *Barber*, 5 B. & Ald. 161.

14 *Pandorf* v. *Hamilton*, 16 Q. B. D. 635.

Hamilton v. Pandorf.

The case in which this was said—*Hamilton* v. *Pandorf*[1]—is valuable as settling the often litigated point whether damage done by rats on shipboard constitutes a peril of the sea. In the earlier cases, like *Laveroni* v. *Drury*[2] and *Kay* v. *Wheeler*,[3] damage done by rats to cargo was not held to constitute a peril of the sea excusing the shipowner under a bill of lading. In *Hamilton* v. *Pandorf* rats gnawed a hole in a pipe on board ship whereby sea water damaged a cargo of rice without neglect or default of the shipowners or their servants. The House of Lords, reversing the Court of Appeal, held this to constitute a danger of the sea for which the shipowner was not liable.

Distinction between Hamilton v. Pandorf and the earlier cases.

The distinction between this and the earlier cases was pointed out to be, that in them the damage was done to the cargo by rats in a manner indistinguishable whether in a warehouse or by sea; while in the present case the damage would not have happened except at sea, so that it was brought within the definition of Lopes, L.J.: "In a seaworthy ship damage to goods caused by the action of the sea during transit, not attributable to the fault of anybody, is in my opinion a 'danger or accident of the seas,' intended to come within the exception, and exonerating the shipowner."[4]

Thames and Mersey Marine Insurance Co. v. Hamilton.

In connection with *Hamilton* v. *Pandorf* must be noticed *Thames and Mersey Marine Insurance Co.* v. *Hamilton*,[5] also in the House of Lords, and in which judgment was delivered on the same day. While a donkey-engine for the purpose of pumping water into the main boilers of a steamer was in use, through the stoppage of a valve the pump burst. This was contended to be a loss from a peril of the sea; since it was necessary to fill the boiler to enable the ship to prosecute her voyage. The reply was that the accident had nothing to do with the sea, as it might have happened anywhere. "Sea perils or the like," said the Lord Chancellor,[6] referring with disapproval to the contrary effect of a then recent decision of the Court of Appeal,[7] "become enlarged into perils whose only connection with the sea is that they arise from machinery which gives motive power to ships." "I cannot think that such casualties were in the contemplation of the parties when using the old familiar words of this policy"—perils of the sea and all other perils, &c. "I think the subject-matter, marine risks, limits the meaning of the general words. I think the genus 'perils of the sea,' limits the meaning."[8]

[1] 12 App. Cas. 518; *The Bedouin*, [1894] P. 1.

[2] 8 Ex. 166, approved 12 App. Cas. 523. See per Lord Halsbury, C., *l.c.*, referring to *Laveroni* v. *Drury* as reported in 22 L.J. Ex. 2.

[3] L. R. 2 C. P. 302. See per Bowen, L.J., *Pandorf* v. *Hamilton*, 17 Q. B. D. 683.

[4] 16 Q. B. D. 633. In *The Cressington*, [1891] P. 152, mischief from the inflow of water to the hold of a vessel in the course of navigation was held a peril of the sea and an accident of navigation.

[5] 12 App. Cas. 484.

[6] *l.c.* 491.

[7] *West India and Panama Telegraph Co.* v. *Home and Colonial Marine Insurance Co.*, 6 Q. B. D. 51. The course of the authorities is marked and the cases criticised by Lord Herschell, in *Thames and Mersey Marine Insurance Co.* v. *Hamilton, Fraser & Co.*, 12 App. Cas. 495-498.

[8] The following have been held to be not losses by "peril of the sea": Injuries to the ship's hull by worms, *Rohl* v. *Parr*, 1 Esp. (N. P.) 445—see this case discussed per Lord Esher, M.R., *Pandorf* v. *Hamilton*, 17 Q. B. D. 677; by reason of members of a crew being taken by a pressgang, *Hodgson* v. *Malcolm*, 2 B. & P. (N. R.) 336; by a vessel firing on another by mistake, *Cullen* v. *Butler*, 5 M. & S. 461 (as to this, however, Lord Herschell says: "I think this expression of opinion stands alone, and has not been sanctioned by subsequent cases": *The* "*Xantho*," 12 App. Cas. 509); by damage from war, *The* "*Patria*," L. R. 3 A. & E. 436; by damage from want of ventilation arising from the necessity of keeping the hatches closed in bad weather: *The* "*Freedom*," L. R. 3 P. C. 594; by barratry, *The* "*Chasca*," L. R. 4 A. & E. 448.

Question whether a loss by collision is a peril of the sea.

Considerable controversy has existed whether a loss by collision is a "peril of the sea" within the exception in a bill of lading that excuses the shipowner.

Parsons[1] states the law as follows: "When the cargo is lost or damaged by a collision between the carrier vessel and another, the liability of the carrier depends upon the nature of the collision, and also upon the obligation he has assumed. A collision may be caused by the fault of neither ship, that is, by inevitable accident; by the fault of the carrier ship, by the fault of the other ship, and by the fault of both. If neither vessel is in fault, the collision is clearly a peril of the seas,[2] and under some circumstances may clearly be an act of God. If the carrier vessel is in fault, she is clearly liable. If the other vessel is entirely in fault, the loss is not an act of God, but is a peril of the seas, and the liability of the carrier depends in such a case upon the obligation he has assumed."[3]

Fault or negligence not in the carrier ship, but in the other vessel. *Chartered Mercantile Bank of India* v. *Netherlands India Steam Navigation Co.*

Of the cases put, those where there is no negligence, and where there is negligence of the carrying ship, are undisputed. With regard to the third—where there is fault or negligence in the other vessel—Brett, L.J., in *Chartered Mercantile Bank of India* v. *Netherlands India Steam Navigation Co.*,[4] taking a view different from that of Parsons in the passage just set out, expressed the opinion that if a collision was caused without any fault on the part of the carrying ship, but by reason of

As to the exception of "robbers," see *De Rothschild* v. *Royal Mail Steam Packet Co.*, 7 Ex. 734; of "thieves," *Taylor* v. *Liverpool and Great Western Steam Co.*, L. R. 9 Q. B. 549, and *Steinman & Co.* v. *Angier Line*, [1891] 1 Q. B. 919; 3 Kent, Comm. 303; Abbott, Merchant Ships (14th ed.), 608. *Ante*, 881. As to loss by "improper navigation," where damage was done to cargo by water coming into the hold through a port negligently left open, though the navigation of the ship was not injured thereby, *Carmichael* v. *Liverpool Sailing Shipowners', &c. Association*, 19 Q. B. D. 242; *Canada Shipping Co.* v. *British Shipowners' Mutual Protecting Association*, 22 Q. B. D. 727; 23 Q. B. D. 342; *The Ferro*, [1893] P. 38; Abbott, Merchant Ships (14th ed.), 952. Damage by sea water from opening a wrong valve was held a "peril of the sea" in *Blackburn* v. *Liverpool, &c. Navigation Co.*, [1902] 1 K. B. 290; *The Torbryan*, [1903] P. 194. *Ante*, 1925. Failure to case pipe, whereby water got amongst the cargo, was held "default in the navigation of the ship," in *Gilroy* v. *Price*, [1893] A. C. 56. Damage by a rivet working loose, whereby the cargo was damaged by sea water, was held a "peril of the sea," in *The Cressington*, [1891] P. 152. "Peril of the sea" is discussed in *Ionides* v. *Universal Marine Insurance Co.*, 14 C. B. N. S. 259; *Thompson* v. *Whitmore* (1819), 3 Taunt. 227; *Andersen* v. *Morten* [1907] 2 K. B. 248. Loss occasioned by another ship running down the ship insured through gross negligence is a loss by "peril of the sea": *Smith* v. *Scott*, 4 Taunt. 126. Marine Insurance Act, 1906, (8 Edw. VII. c. 41), Sched. I., Rule 7.

[1] Law of Shipping, vol. i. 259. *Woodrop Sims*, 2 Dodson (Adm. Cas.) 83, 85; also *post*, 1979, Collisions on Water.

[2] Per Lord Kenyon, *Buller* v. *Fisher*, Peake Add. Cas.) 183.

[3] *Hoye* v. *Kennedy*, 41 Pa. St. 378; *The Steamboat New Jersey*, Olcott (U. S. Adm.), 444, 448. "Collision or stranding is doubtless a 'peril of the seas'": *Liverpool Steam Co.* v. *Phenix Insurance Co.*, 129 U. S. (22 Davis) 397, 438. Loss occasioned by detention from ice is not a peril of the seas: *Great Western Insurance Co.* v. *Jordan*, 14 Can. S. C. R. 734. As to "all other perils": *Cullen* v. *Butler* (1818), 5 M. & S. 461; *Davidson* v. *Burnand* (1868), L. R. 4 C. P. 117. "Risks" is equivalent to "perils": *Nigel Gold Mining Co.* v. *Hoade*, 6 Com. Cas. 268. *Jacob* v. *Gaviller*, 18 Times L. R. 402, is the case of a fox terrier insured for the voyage to India for £150 "against all risks, including mortality from any cause, jettison and washing overboard, but walking at Lahore, Punjab, to be deemed a safe arrival." The dog on landing walked on three legs. Defendant was, of course, held liable. In the negligence clause the words "in navigating the ship or otherwise" are general, not limiting the exemption to loss or damage arising in matters akin to navigation: *Baerselman* v. *Bailey*, [1895] 2 Q. B. 301. *Packwood* v. *Union-Castle Mail SS. Co.*, 20 Times L. R. 59, is another case of the loss of a dog, the words of the negligence clause excepting liability for loss from any act, neglect, or default of the master, officers, crew or any servant of the shipowner "in providing, despatching and navigating the vessel or otherwise." The dog was lost through the negligence of the butcher when it was let loose for exercise. The shipowner was held protected.

[4] 10 Q. B. D. 521, 530.

negligence on the part of those responsible for the other ship, that was not "an accident of the sea," [1] and consequently the shipowner would not be protected.

This expression of opinion was not necessary for the decision; since both ships were in fault; while, further, there was a stipulation in the bill of lading that the shipowners should be exempted from liability for any consequences of neglect or default of the master or crew in the navigation of the vessel; and thus there was a definite contract. The decision was upon the effect of this contract, which exonerated the defendants in the event that happened, viz., the negligence of the crew, of the carrying ship, and was held valid.

Woodley v. *Michell*, Brett, L.J., reiterates the opinion expressed in the former case; which is adopted by the rest of the Court, and re-affirmed in *The "Xantho."*

In the subsequent case of *Woodley* v. *Michell*,[2] the point arose and Brett, L.J., reiterated his view, that "although a collision when brought about without any negligence of either vessel is or may be a peril of the sea, a collision brought about by the negligence of either of the vessels, so that without that negligence it could not have happened, is not a peril of the sea within the terms of that exception in a bill of lading." The rest of the Court [3] concurred. The Court of Appeal [4] re-affirmed its decision in *The "Xantho"*,[5] where Brett, L.J., formulated the rule laid down in *Woodley* v. *Michell*:[6] "if the cause of the loss was the negligence of the crew of either vessel without the winds or waves or any extraordinary difficulty of navigation contributing to the accident, such a loss, the cause being negligence, did not fall within the exceptions in the bill of lading." [7]

The "Xantho" reversed in the House of Lords. Lord Herschell's opinion in the House of Lords.

The *"Xantho"* was taken to the House of Lords [8] as an appeal against *Woodley* v. *Michell*, and the decision of the Court of Appeal reversed. The *ratio decidendi* of the House of Lords is thus expressed by Lord Herschell:[9] "I am unable to concur in the view that a disaster which happens from the fault of somebody can never be an accident or peril of the sea; and I think it would give rise to distinctions resting on no sound basis, if it were to be held that the exception of perils of the seas in a bill of lading was always excluded when the inroad of the sea which occasioned the loss was induced by some intervention of human agency."

Statement of the law as settled by the decision in *The "Xantho"*

This decision brings the English law again into conformity with the American law, as stated by Parsons. If a collision is in no way the default of defendants, they are entitled to judgment whether there be fault in third parties, or there be no fault anywhere. The rule seems to work out as follows: In an action by cargo-owners, the plaintiffs would have to prove the non-delivery of goods at the end of the voyage. The defendants would then be put to show that they were prevented from delivering the goods by some cause covered by an exception in the bill of lading. They might show, for example, that the loss was from a collision. This, however, would not be enough, since loss by collision is perfectly consistent with a loss by their negligence; from which, as the *onus* would be on them, they would have to clear themselves. So soon as they show that the collision was without negligence on the part

[1] "An accident is that which happens without the fault of anybody, and consequently a collision, which is the fault of somebody, is not an accident of the sea," per Brett, L.J., *l.c.* 530. See *Brazin* v. *The Steamship Co.*, 3 Wall. Jr. (U. S. Circ. Ct.), 229, 239.

[2] 11 Q. B. D. 47.

[3] Cotton and Bowen, L.JJ.

[4] Fry, L.J., was sitting in place of Cotton, L.J.

[5] 11 P. D. 170.

[6] 11 Q. B. D. 47.

[7] 11 P. D. 172.

[8] 12 App. Cas. 503, under the name of *Wilson, Sons & Co.* v. *Owners of Cargo, per The "Xantho."*

[9] *L.c.* 511.

of their vessel, a conclusive defence is proved; since it is immaterial whether there is no negligence or negligence by a third person over whom they have no control; as in either event they have brought themselves within an excepted peril of the sea.[1]

Limitation in *Chartered Mercantile Bank of India* v. *Netherlands India Steam Navigation Co.*

An important limitation to this is suggested by *Chartered Mercantile Bank of India* v. *Netherlands India Steam Navigation Co.*,[2] where both vessels colliding happened to be the property of the defendants. The action was by the owners of the cargo, who were held disentitled to recover on the contract of carriage, as there was an exception against the negligence of master or crew; and the jury found that the loss was partly due to such negligence. The plaintiffs also sued the defendants in tort, as the owners of the other ship, for the negligence of their servants, the master and crew of that vessel, whereby the collision was mainly occasioned. The Queen's Bench Division decided in favour of the plaintiffs, on the ground that defendants had not shown that the loss was occasioned wholly by the neglect or default of their servants on the carrying ship. This was held erroneous in the Court of Appeal; it then became necessary to consider the other point. The fact that both ships were the property of the same owner was decided not to affect the ordinary rule that a shipowner is liable for the negligence of the master and crew of his ship[3] (the provisions in the bill of lading had reference only to the carrying ship, and not generally to all ships and crews of the defendants), and the law applicable to cases of collision on the high seas is the maritime law as administered in England, and not the law of the flags.[4] Thus, whether the collision were within the realm or without the realm on the high seas, the defendants were equally liable. But the bill of lading of the carrying ship provided that the defendants were not to be liable for negligence of the master or crew of that ship. Therefore they were relieved from that portion of the loss attributable to the carrying vessel, by virtue of the exception. By the rule of the Admiralty Court, preserved by the Judicature Act, 1873,[5] however, where both ships are in fault, each ship becomes

Case in the Court of Appeal.

[1] See per Lord Bramwell, 12 App. Cas. 513.

[2] 10 Q. B. D. 521.

[3] *The Milan*, Lush. 388.

[4] *The Johann Friedrich*, 1 W. Rob. (Adm.) 35; *The Leon*, 6 P. D. 148. The principles governing in Courts of Admiralty in dealing with maritime causes arising between foreigners and others on the high seas, are elaborately considered in *The Belgenland*, 114 U. S. (7 Davis) 355. The conclusions arrived at are:

1. Any Court of Admiralty which first obtains jurisdiction of the rescued or offending ship at the solicitation in justice of the meritorious or injured parties may inquire into the case though both ships are foreigners.
2. The Court should not do so where the ships are governed by the laws of the country to which the parties belong and there is no difficulty in resorting to those Courts, or where they have agreed to resort to no other tribunals.
3. In the cases last mentioned Courts of Admiralty will not decline jurisdiction because they do not possess it, but from motives of convenience or international comity they will use a discretion whether to exercise jurisdiction or not.
4. Where the question in dispute is one *communis juris*, the strong presumption is in favour of the exercise of jurisdiction.
5. The law applicable between parties or ships of different nationalities, is the general maritime law as understood and administered in the Courts of the country in which the litigation is prosecuted, subject to this, that there is no liability for following the sailing rules of one's own government. The general sailing regulations are presumed to bind unless the contrary appears.
6. If the maritime law of both nations is the same with respect to any matter of liability or obligation, such law if shown to the Court should be followed in that matter in respect of which they so agree, though it differ from the maritime law as understood in the country of the forum.

See *The Queen* v. *Judge of City of London Court*, [1892] 1 Q. B. 273.

[5] 36 & 37 Vict. c. 66, s. 25, sub-s. 9.

liahla for half of the joint loss ; in the present case, as to the half that was referahle to the negligence of the carrying ship the owners were exeused hy virtue of the exception in the hill of lading ; there remained then, the half attributed to the other ship ; for which judgment was given for tho plaintiffs.

Summary.

Thus, to the rule that where there is no negligence hy the carrying ship in the event of a collision, when the ship is sailing with a hill of lading excepting perils of the sea, there is a limitation that when both ships, the carrying ship and the colliding ship, are the property of the same owners, the owners are liable for the colliding ship, irrespectively of the existence or non-existence of negligence on the part of the carrying ship. If there he no negligence on the part of the carrying ship, then the common owners arc liahle to the owner of the cargo to the full extent, hy virtue of their ownership of the negligent ship : if hoth ships are negligent, the owner's liability hy virtue of the Admiralty rule is limited to one-half, provided that there is an exception in the hill of lading of the negligence of the master and crew of the carrying ship.

Effect of the decision in *The Bernina*.

Since the case of *The Bernina* in the House of Lords,[1] the cargo-owner can recover at common law the whole loss that he may sustain either from the ship in which his cargo is carried or from the ship that collides against it. The effect of the provision of the Judicature Act just cited is, that tbe rule of Admiralty is to govern ; by that the innocent owner of cargo proceeding against one only of two delinquent ships may recover only half tbe damage, and will be left with respect to the other half to the remedy against the other delinquent vessel. This was continuously held to be the Admiralty rule, even during the period that *Thorogood* v. *Bryan*[2] was followed in the common law Courts. Even then Dr. Lushington refused to be bound hy that case, " because it is a single case ; because I know upon inquiry that it has been doubted hy high autbority ; because it appears to me not reconcilahle with other principles laid down at common law ; and, lastly, because it is directly against *Hay* v. *Le Neve*, and the ordinary practice of the Court of Admiralty."[3]

Simpson v. *Thomson*.

With these cases *Simpson* v. *Thomson*[4] deserves notice. Two ships, the property of one owner, came into collision. The underwriters paid the insurance effected on the lost ship, and then claimed to rank with the owners of cargo destroyed, in the distribution of the fund lodged in Court hy the owner on account of the ship which did tbe damage. The First Division of the Court of Session sustained this claim, hut their judgment was reversed in the House of Lords. " Either," said Lord Cairns, C., " the policy hy which tbe underwriters are hound is sn insurance against perils of the sess arising from the negligent nsvigation of any other vessel, even altbough tbat vessel helong to the person insured, or it is not. If it is not an insurance against such a

Lord Cairns's ststement of the law.

[1] *Mills* v. *Armstrong*, 13 App. Cas. 1. *Ante*, 176.

[2] 8 C. B. 115.

[3] *The Milan*, Lush. 388; *Hay* v. *Le Neve*, 2 Shaw (H. L. Sc.), 395, 405. The rule in the United States is thus stated in *The " City of Hartford " and The " Unit,"* 97 U. S. (7 Otto) 329 : " That wrongful acts done by the co-operation and joint agency of two or more parties constitute them all wrongdoers, and that parties in a collision case, such as shippers and consignees, bear no part of the loss in such a disaster, and sre entitled to full oompensation for the damage which they suffer from the wrongdoers, except in the case where their loss exceeds the amount of the interest which the owners of the offending ship or ships have in them, and in the freight then pending."

[4] 3 App. Cas. 279, 286.

peril of the sea, the underwriters should defend themselves accordingly and decline to pay for the loss. If, on the other hand, the insurance is a contract to indemnify against the consequences of the negligent navigation of any other ship of the insured, it would be little short of an absurdity that the underwriters should, in the first place, indemnify the insured for the consequences of that negligent navigation according to their contract, and immediately afterwards recover the amount back from the insured as damages occasioned by this negligent navigation."

Effect of payment of a total loss by the insurer.

The effect of payment of a total loss by the insurer may be stated to be that of working an equitable assignment to the insurer both of the property and also of all remedies which the insured has against the carrier for the recovery of its value.[1]

Occasioned by the negligence of the master or crew.

Busk v. _Royal Exchange Assurance Co._

In insurance cases it was for a long time matter of dispute whether a loss occasioned by the negligence of the master or crew discharged the insurers. The liability has now been decided to attach both here and in America, though the decisions are not altogether uniform.[2] In England the point was settled by *Busk* v. *Royal Exchange Assurance Co.*,[3] upon the general ground that *causa proxima non remota spectatur*; so that a loss whose proximate cause is one of the enumerated risks in the policy is chargeable to the underwriters, although the remote cause is traceable to the negligence of the master and mariners. In that case the risk of barratry [4] was also assumed by the underwriters; but the judgment of the Court went on the general principle, which was, in a later case, thus formulated by Bayley, J.:[5] "Underwriters are liable for a loss, the proximate cause of which is one of the enumerated risks, though the remote cause may be traced to the negligence of the master and mariners."

Negligent navigation of a ship, therefore, by a person not the assured affords no defence to an action on a policy of marine insurance against perils of the sea; for the peril is no less a peril of the sea because it is induced by negligent navigation. *In jure non remota causa sed proxima spectatur.* But this left open the question, the negligent navigator is also part owner? "Negligent navigation has never been held to be equivalent to '*dolus*' or the misconduct which is spoken of by Lord Campbell in *Thompson* v. *Hopper*;[6] nor is it the negligence referred to by Lord Ellenborough in *Bell* v. *Carstairs*, the case of insurance against capture."[7] "The risk undertaken by an underwriter upon a policy

1 *Mobile and Montgomery Ry. Co.* v. *Jurey*, 111 U. S. (4 Davis) 584.

2 *Busk* v. *Royal Exchange Assurance Co.*, 2 B. & Ald. 73; per Parke, B., *Dixon* v. *Sadler*, 5 M. & W. 414; per Tindal, C.J., *s.c.* 8 M. & W. 898. The American cases are found in 3 Kent, Comm. 303-304. The words "direct loss or damage by fire," in a policy, are pointed out in *California Insurance Co.* v. *Union Compress Co.*, 133 U. S. (26 Davis) 415, to mean "loss or damage occurring directly from fire as the destroying agency, in contradistinction to the remoteness of fire as such agency." "Remoteness of agency is the explosion of gunpowder, gases, or chemicals, caused by fire; the explosion of steam boilers; the destruction of buildings to prevent the spread of fire, or their destruction through the falling of burning walls; and so forth." As to when a ship is "burnt," *The Glenlivet*, [1893] P. 164; [1894] P. 48. In *Gordon* v. *Rimmington*, 1 Camp. 123, the captain burnt the ship to prevent her from falling into the hands of the enemy. This was held a loss by fire within the meaning of a policy of insurance.

3 2 B. & Ald. 80; the principle was affirmed in *Walker* v. *Maitland*, 5 B. & Ald. 171, and in *Bishop* v. *Pentland*, 7 B. & C. 219. 3 Kent, Comm. 300.

4 See *post*, 1070.

5 *Bishop* v. *Pentland*, 7 B. & C. 223.

6 6 E. & B. 937.

7 14 East, 374. *Trinder, Anderson and Co.* v. *Thames and Mersey Marine Insurance Co.*, [1898] 2 Q. B. 114, 123.

covering perils of the sea is that, if the subject-matter insured is lost or damaged immediately by a peril of the sea, he will be responsible, and, in my judgment, it matters not if the loss or damage is remotely caused by the negligent navigation of the captain or crew, or of the assured himself, *always assuming that the loss is not occasioned by the wilful act of the assured.* In this last case the maxim above referred to, *causa proxima non remota spectatur*, does not apply for the reasons pointed out by Lord Campbell in *Thompson* v. *Hopper*[1] for there not only does the maxim contravene the principles of insurance law and the manifest intentions of the parties, but is qualified by another legal maxim, *Dolus circuitu non purgatur.*"[2]

Pink v. *Fleming.*

The same principle was emphasised, though in different circumstances, in the case of *Pink* v. *Fleming*,[3] where perishable goods were insured by a marine policy against damage consequent on collision. The ship in which they were insured was injured by a collision, rendering it necessary to put into port for repairs, the execution of which necessitated the unloading a portion of the goods. When the repairs were completed the goods were re-shipped, and the ship continued her journey. On arriving at her destination the goods were found to be damaged by handling. The insured brought an action on the policy in respect of this, but were held disentitled to recover; Lord Esher, M.R., in the Court of Appeal, pointing out[4] the distinction between cases of marine insurance and those of other liabilities: "In the case of an action for damages on an ordinary contract, the defendant may be liable for damage of which the breach is an efficient cause or *causa causans*; but in cases of marine insurance only the *causa proxima* can be regarded."[5] . . . "According to the law of marine insurance, the last cause only must be looked to and the others rejected, although the result would not have been produced without them. Here there was such a succession of causes. First, there was the collision. Without that, no doubt, the loss would not have happened. But would such loss have resulted from the collision alone? Is it the natural result of a collision that the ship should be taken into a port for repairs, and that the cargo should be removed for the purposes of the repairs, and that, the cargo being of a kind that must be injured by handling, it should be injured in such removal? A collision might happen without any of these consequences." . . . "To connect the loss with any peril mentioned in the policy, the plaintiffs must go back two steps, and that, according to English law, they are not entitled to do."

Distinction pointed out by Lord Esher, M.R.

Total loss.

"To constitute a total loss within the meaning of a policy of marine insurance, it is not necessary that a ship should be actually annihilated or destroyed; it may, as in the case of capture and sale upon condemnation, remain in its original state and condition; it may be capable of being repaired if damaged; it may be actually repaired by the purchaser, or it may not even require repairs. If it is lost to the owner by an adverse valid and legal transfer of his right of property and possession to a purchaser by a sale under a decree of a Court of

[1] 6 E. & B. 947.

[2] Per Smith, L.J., *Trinder, Anderson and Co.* v. *Thames and Mersey Marine Insurance Co.*, [1898] 2 Q. B. 124.

[3] 25 Q. B. D. 396, which is distinguished by Walton, J., *Schloss Brothers* v. *Stevens*, [1906] 2 K. B. 665.

[4] *L.c.* 397. *Greenock Ss. Co.* v. *Maritime Insurance Co.*, [1903] 2 K. B. 657; *Shelbourne and Co.* v. *Law Investment and Insurance Corporation*, [1898] 2 Q. B. 626.

[5] *Ante*, 82.

competent jurisdiction in consequence of a peril insured against, it is as much a total loss as if it had been totally annihilated."[1]

Distinction between the interpretation of the exceptions in a policy of insurance and in a bill of lading.

Notice may here be taken of a distinction often urged as the basis of argument between the interpretation of exceptions in a policy of insurance and in a bill of lading. The former is an absolute contract to indemnify for loss by any of the perils insured against; the latter is to carry with reasonable care, unless prevented by excepted perils. In an action on the former, then, "it is only necessary to see whether the loss comes within the terms of the contract, and is caused by" any peril insured against; while in an action on the latter, "if the goods are not carried with reasonable care, and are consequently lost by perils of the sea, it becomes necessary to reconcile the two parts of the instrument, and this is done by holding that, if the loss through perils of the sea is caused by the previous default of the shipowner, he is liable for this breach of his covenant."[2]

Woodley v. *Michell*.

In *Woodley* v. *Michell*[3] the Court of Appeal acted on the principle

[1] *Coseman* v. *West*, 13 App. Cas. 169, citing *Mullett* v. *Shedden*, 13 East, 304; 6 Edw. VII c. 41, ss. 61-63, and note, Chalmers, Marine Insurance Act, 1906, 167. The law of abandonment is discussed by Lord Abinger, delivering the judgment of the Exchequer Chamber, in *Roux* v. *Salvador*, 3 Bing. N. C. 275; *Fleming* v. *Smith*, 1 H. L. C. 513; per Lord Campbell, as to constructive total loss, *l.c.* 519. "A constructive total loss in insurance law is that which entitles the insured to claim the whole amount of the insurance, on giving due notice of abandonment": *Western Assurance Co. of Toronto* v. *Poole*, [1903] 1 K. B. 383; *Sailing S. "Blairmore" Co.* v. *Macredie*, [1898] A. C. 593; *Rankin* v. *Potter*, L. R. 6 H. L. 83, 121, 127, 129. The law of abandonment is, says Lindley, J., *Pitman* v. *Universal Marine Insurance Co.*, 9 Q. B. D. 190, elaborately examined in *Peele* v. *Merchants' Insurance Co.*, 3 Mason (U. S. Circ. Ct.) 27. The chief of the earlier English cases are *Goss* v. *Withers*, 2 Burr. 683; *Hamilton* v. *Mendes*, 2 Burr. 1198; *Milles* v. *Fletcher*, 1 Doug. 231. In *American Insurance Co.* v. *Ogden*, 20 Wend. (N. Y.) 287, it was held that if ground for abandonment is the result of culpable negligence or want of due diligence on the part of the owner or his agent, the insurer is not liable, and if there was a want of ordinary prudence in the owner in furnishing funds or credit to the master to enable him to make the necessary repairs, and the master was without funds available, an abandonment cannot be made as for a constructive or technical total loss. 3 Kent, Comm. 322. On abandonment either of vessel or cargo the master becomes the agent of the insurer, and the insured is not bound by his subsequent acts unless he adopts them: 2 Phillips, Ins. §§ 1707 *et seqq.* It is the master's duty to act with good faith and care and diligence for the protection of the property in the interests of whomever it may concern. He may sell the ship in case of necessity: *e.g.*, when the ship is where it is impossible to repair her or to repair her except at a rate exceeding her value; or when he is without money and the means of raising money: *Somes* v. *Sugrue*, 4 C. & P. 276. *Ante*, 1034 and 1037. In the case of capture both master and mariners are bound, if neutral, to remain and assert the claim till condemnation or till recovery is hopeless: *Marshall* v. *Union Insurance Co.*, 2 Wash. (U. S. Circ. Ct.) 452; *The Saratoga*, 2 Gall. (U. S. Circ. Ct.) 164. If the abandonment be accepted, the underwriter becomes owner for the voyage, and is liable for the seamen's wages and entitled to the freight subsequently earned: *Hammond* v. *Essex Fire and Marine Insurance Co.*, 4 Mason (U. S. Circ. Ct.) 196. Lord Campbell's doctrine in *Knight* v. *Faith*, 15 Q. B. 649, that notice of abandonment must be given in all cases except in cases of total loss, was rejected by the House of Lords in *Rankin* v. *Potter*, L. R. 6 H. L. 83, 156, in favour of Lord Abinger's view in *Roux* v. *Salvador*, 3 Bing. N. C. 266, that notice of abandonment is not in all cases necessary, even though the subject-matter insured remains *in specie*. The true rule is that no abandonment is necessary, and no notice required where there is nothing to abandon, when there is nothing to pass to or be of value to the underwriter. Thus, on a policy on freight there need be no abandonment of freight, and no notice of abandonment is required where the ship is damaged to such an extent, or under such circumstances, as would authorise an abandonment of the ship on a policy on the ship, and where there is no cargo on board the ship, or if on board, where none is saved with the chance of its being forwarded in a substituted ship. The requirement of notice of abandonment is confined to those cases where the underwriters could take some productive step if they had notice. In *Kaltenbach* v. *Mackenzie* (1878), 3 C. P. D. 467, the more stringent rule in the case of insurance on a ship (not upon freight) is noticed. *Trinder, Anderson and Co.* v. *Thames and Mersey Marine Insurance Co.*, [1898] 2 Q. B. 114.

[2] Per Willes, J., *Grill* v. *General Iron Screw Collier Co.*, L. R. 1 C. P. 611, 612.

[3] 11 Q. B. D. 47.

that, where perils of the sea are excepted in a bill of lading, the Court are to go behind the *causa proxima* and look at what is the real or efficient cause of the loss; and then came to the conclusion that, negligence being involved, the plaintiffs were entitled to recover. In *The* "*Xantho*," Lord Herschell dissents from this view:[1] "If that which immediately caused the loss was a peril of the sea, it matters not how it was induced [that is, in the case of a marine policy], even if it were by the negligence of those navigating the vessel. It is equally clear that in the case of a bill of lading you may sometimes look behind the immediate cause, and the shipowner is not protected by the exception of perils of the sea in every case in which he would be entitled to recover on his policy on the ground that there has been a loss by such perils. But I do not think that this difference arises from the words 'perils of the sea' having a different meaning in the two instruments, but from the context or general scope and purpose of the contract of carriage excluding in certain cases the operation of the exception. It would, in my opinion, be very objectionable, unless well-settled authority compelled it, to give a different meaning to the same words occurring in two maritime instruments."

Opinion of Lord Herschell in *The* "*Xantho*."

In the course of the same opinion Lord Herschell[2] said: "Much argument was addressed to your Lordships on the question, whether when the plaintiffs had proved that the goods had not been delivered, thus throwing the *onus* on the defendants of excusing their non-delivery, proof by them that the vessel had been sunk in a collision would be sufficient to shift the *onus* and render it incumbent on the plaintiffs to establish that the collision was due to the defendants' negligence, or whether the defendants, to bring themselves within the exception, must show that the loss was not due to a cause induced by their own negligence. I do not think that this point is now before your Lordships for decision." The learned Lord then intimated that the inclination of his opinion would have been to hold that to bring themselves within an exception of a peril of the sea the defendants must show that the cause inducing the loss was not one arising from their negligence. This was made the ground of the argument in *The Glendarroch*,[3] but was not accepted by the Court there, who held "that if the loss apparently falls within the exception, the burden of showing that the shipowner is not entitled to the benefit of the exception on the ground of negligence is upon the person so contending."[4]

In the United States the law is settled in almost identical terms. It is there laid down that "a policy of insurance against perils of the seas covers a loss by stranding or collision, although arising from the negligence of the master, or crew, because the insurer assumes to indemnify the assured against losses from particular perils, and the assured does not warrant that his servants shall use due care to avoid them."[5] On the other hand, it is held that the ordinary contract of a

Liverpool Steam Co. v. *Phenix Insurance Co.*

[1] 12 App. Cas. 510; *Trinder, Anderson and Co.* v. *Thames and Mersey Marine Insurance Co.*, [1898] 2 Q. B. 114, 120; *The Southgate*, [1893] P. 329.

[2] *L.c.* 512. [3] [1894] P. 226. [4] Per Lord Esher, M.R., *l.c.* 232.

[5] *Liverpool Steam Co.* v. *Phenix Insurance Co.*, 129 U. S. (22 Davis) 397, 438, cited and adopted *Richelieu Navigation Co.* v. *Boston Insurance Co.*, 136 U. S. (29 Davis) 421. "It is conclusively settled, in this country and in England, that a policy of insurance, taken out by the owner of a ship or goods, covers a loss by perils of the sea or other perils insured against, although occasioned by the negligence of the master or crew or other persons employed by himself": *Phenix Insurance Co.* v. *Erie Transportation Co.*, 117 U. S. (10 Davis) 312, 323; *California Insurance Co.* v. *Union Compress Co.*, 133 U. S. (26 Davis) 387.

carrier involves an obligation to use due care and skill in navigating the vessel and in carrying the goods; while an exception in the bill of lading of perils of the sea or other specified perils does not excuse the carrier from that obligation or exempt him from liability for loss or damage from one of those perils to which the negligence of himself or his servants has contributed.[1] But in the same Court it was decided that where a vessel is stranded while going at full speed in a fog the burden of proof is on the insured to show that the loss is not through want of ordinary care in navigation in a case where such want of care is an excepted peril; for though the fog may be the cause of the accident, the other circumstance—the going at full speed—raises a stronger counter presumption; and in the case in question this was even more undoubtedly the case, since going at speed in a fog was contrary to a statutory regulation.[2]

(3) Loss by fire.

(3) Another exception incorporated into special contracts for the conveyance of goods by sea is against liability for loss by fire. A fire caused by lightning, of course, brings no liability, since it is referable to the act of God.[3]

Negligence for which shipowner is responsible producing fire.

In a bill of lading or a charter-party, the exception against loss by fire will only protect where the damage is not attributable to negligence; for which the shipowner is responsible; since an undertaking by the shipowner is implied that the master and the crew shall use ordinary care with regard to the carriage of the goods.[4] If, however, the case set up is that there has been negligence, the burden of proof will be on the shipper; unless the facts of the case themselves shift the burden of proof, as in the illustration put by Willes, J., in his judgment in *Czech* v. *General Steam Navigation Co.*[5]

(4) Barratry.

(4) Barratry[6] has been defined as "not confined to the running away with the ship," but as comprehending "every species of fraud, knavery, or criminal conduct in the master by which the owners or freighters are injured."[7] Ignorance or mere negligence is not sufficient; there must be fraud,[8] or at least wilful misconduct.[9]

The cases of loss or damage occasioned

(5) King's enemies.

(5) By the King's enemies,

(6) Pirates.

(6) By pirates or robbers,

have already been considered.[10]

[1] See 120 U. S. (22 Davis) 438.

[2] *Richelieu &c. Navigation Co.* v. *Boston Insurance Co.*, 136 U. S. (29 Davis) 408.

[3] *Ante*, 879.

[4] *Lloyd* v. *General Iron Screw Collier Co.*, 3 H. & C. 284; *Chartered Mercantile Bank of India* v. *Netherlands India Steam Navigation Co.*, 10 Q. B. D. 521.

[5] L. R. 3 C. P. 19; *Transportation Co.* v. *Downer*, 11 Wall. (U. S.) 129. There was no negligence clause in the contract of carriage in *Cunard SS. Co.* v. *Marten*, [1903] 2 K. B. 511, where it is held that the suing and labouring clauses are inapplicable to the contract of insurance there.

[6] For definitions of all these terms see the First Schedule to 6 Edw. VII., c. 41: and s. 30, sub.-s. (1) (2). Abbott, Merchant Ships (14th ed.), 244; 3 Kent, Comm. (12th ed.) 305; Vin. Abr. Barretors; Com. Dig. Barretry; Bac. Abr. Merchant and Merchandise (I), Of Marine Insurance, Loss by Barratry, 462.

[7] *Vallejo* v. *Wheeler*, 1 Cowp. 143, 155. Where through the negligence of the shipowner the mariners barratrously smuggled goods on board whereby the ship was seized and forfeited, underwriters were held not liable on a policy of insurance: *Pipon* v. *Cope*, 1 Camp. 434.

[8] *Phyn* v. *The Royal Exchange Assurance Co.*, 7 T. R. 505. See note, Negligence of Assured, by Mr. Holmes, 3 Kent, Comm. (12th ed.), 302.

[9] *Earle* v. *Rowcroft*, 8 East, 126. A barratrous act of the master, followed by capture and seizure is not, as is erroneously supposed by Arnold, Insurance (1st ed.), vol. ii. 838, an exception to the rule that "in insurance you look to the proximate cause, and not to the remote one": *Cory* v. *Burr*, 8 App. Cas. 393.

[10] *Ante*, 881.

(7) Arrests or restraints of princes, rulers, and peoples, riots, strikes or stoppage of labour, are terms of limitation often added in bills of lading and charter-parties. (7) Arrests or restraints of princes, &c.

This class of exceptions has reference to embargoes,[1] or blockades,[2] or to the decrees of prize courts,[3] or other processes resulting in the detention[4] of the cargo; as, for instance, the German investment of Paris.[5] It does not include ordinary civil process,[6] nor the act of tumultuous mobs, since "peoples" means "the governing power of the country."[7] But it includes the risk of seizure and does not require actual seizure.[8] In the case just cited it was held that apart from this exception in a bill of lading the master would be justified to refuse from encountering a peril such as in that case; where the voyage was from Hong-Kong to Yokohama and war between China and Japan had just been declared, and several Chinese ships of war were in the neighbourhood of Hong-Kong. The rule of the master's duty is laid down in *Notara* v. *Henderson*:[9] "a fair allowance ought to be made for the difficulties in which the master may be involved. . . . The place, the season, the opportunity and means at hand, the interests of other persons concerned in the adventure whom it might be unfair to delay for the sake of the part of the cargo in peril: in short all circumstances affecting risk, trouble, delay and inconvenience must be taken into account."

The legal effects of a restraint by a blockading force and a restraint arising from the operation of a sanitary law are not distinguishable.[10]

(8) The cases of loss by damage occasioned by explosion, bursting of boilers, breakage of shafts or any latent defect in hull, machinery, or appurtenances, have already been sufficiently dealt with.[11] (8) Loss by explosion, &c.

[1] *Rotch* v. *Edie*, 6 T. R. 413; *Aubert* v. *Gray*, 3 B. & S. 163.

[2] *Geipel* v. *Smith*, L. R. 7 Q. B. 404, where the question of the right of the charterer to throw up the contract was considered. See also *Jackson* v. *Union Marine Insurance Co.*, L. R. 8 C. P. 572 (where Bovill, C.J., dissented), affirmed in the Ex. Ch. L. R. 10 C. P. 125.

[3] *Stringer* v. *English and Scottish Marine Insurance Co.*, L. R. 5 Q. B. 599.

[4] "Detention" is "a taking with intent to return the thing taken; as where a ship is arrested by an embargo, or stopped for search, or detained in port by an actual blockade thereof, or, perhaps, by being lawfully restrained from entering her port of destination by a blockading force": Parsons, Marine Insurance, vol. i. 584.

[5] *Rodoconachi* v. *Elliot*, L. R. 9 C. P. 518; *Smith* v. *Rosario Nitrate Co.*, [1893] 2 Q. B. 323; [1894] 1 Q. B. 174.

[6] *Finlay* v. *Liverpool and Great Western Steamship Co.*, 23 L. T. (N. S.) 251.

[7] *Nesbitt* v. *Lushington*, 4 T. R. 783, but Lord Kenyon, C.J., says: "I think that this loss falls within a capture by pirates." See, however, *Johnston* v. *Hogg*, 10 Q. B. D. 432, where the meaning of the terms "capture" and "seizure" are considered, and *Cory* v. *Burr*, per Lord Selborne, C., 8 App. Cas. 395; *Robinson Gold Mining Co.* v. *Alliance Insurance Co.*, [1904] A. C. 359; *Dunn* v. *Bucknall Brothers*, [1902] 2 K. B. 614. The restraints must be actual, not merely anticipated, though the anticipation is reasonable: *Atkinson* v. *Ritchie*, 10 East, 530; in this case there was "a general rumour of a hostile embargo being laid on British ships." In *The "Teutonia,"* the master was informed by the pilot, though incorrectly, that war had been actually declared two days before; it was held that he "was entitled to *pause and take a reasonable time* to make further inquiries," and "was guilty of no unreasonable delay in not returning to Dunkirk before the 19th July, when war was actually declared": L. R. 4 P. C. 171, 179, 180. In *Atkinson* v. *Ritchie*, 10 East, 530, the master on a general inquiry sailed away without cargo. The exception does not apply to vessels arrested on civil process: *Crew Widgery & Co.* v. *Great Western Steamship Co.*, W. N. 1887, 161. In *Janson* v. *Driefontein Consolidated Mines*, [1902] A. C. 484, loss before the beginning of the war, though by an act leading up to it, was yet held not within the exception of a policy.

[8] *Nobel's Explosives Co.* v. *Jenkins & Co.*, [1896] 2 Q. B. 326.

[9] L. R. 7 Q. B. 225.

[10] *Miller* v. *Law Accident Insurance Co.*, [1903] 1 K. B. 712.

[11] *Ante*, 1025 and 1061.

(9) Collision.

(9) Collision is so large a subject that it will require a chapter to itself.[1]

(10) Stranding.

(10) The case of stranding has been already considered.[2]

Exception only exempts the shipowner from the liability of a common carrier.

Lastly, the law is now thoroughly settled that the exception in a bill of lading only exempts the shipowner from the liability of a common carrier, and not from the want of reasonable skill, diligence, and care. "This," says Willes, J.,[3] "is settled, so far as the repairs of the ship are concerned, by the judgment of Lord Wensleydale in *Worms* v. *Storey*;[4] as to her navigation, by a series of authorities collected in *Grill* v. *General Iron Screw Collier Co.*;[5] and as to her management, so far as affects the case of the cargo itself, in *Laurie* v. *Douglas*;[6] where the Court (in a judgment unfortunately not reported at large) upheld a ruling of Pollock, C.B., that the shipowner was only bound to take the same care of the goods as a person would of his own goods, viz., 'ordinary and reasonable care.' These authorities, and the reasoning upon which they are founded, are conclusive to show that the exemption is from liability for loss which could not have been avoided by reasonable care, skill, and diligence, and that it is inapplicable to the case of a loss arising from the want of such care, and the sacrifice of the cargo by reason thereof."

Willes, J., in *Notara* v. *Henderson*.

Effect of the words "all other conditions as per charter."

The words "all other conditions as per charter" do not, on the principles already enunciated, incorporate into a bill of lading the exception of "stranding occasioned by the negligence of the master"; and a casualty which proper foresight and skill in the commanding officer might have avoided—*e.g.*, if a compass on an iron vessel was not protected so as to travel correctly and an accident resulted—is not to be considered an "accident of the sea."[7]

Law summarised.

The law we have been considering may be thus summarised: If goods are lost or damaged while being carried by sea with the common law liability of a common carrier, the common carrier is liable in any event, unless, that is, he brings himself within the common law exceptions of the act of God, or the king's enemies; or to revert to the expression of the old law, unless the loss was through some cause which left the carrier no remedy over. If the contract of carriage is regulated by a bill of lading the shipowner, by proving that the loss is within one of the perils excepted by his contract, will be discharged, though not absolutely; since it is within the rights of the plaintiff to prove that the shipowner was negligent. Thus, the attribution of loss to an excepted peril will only exonerate from liability where there has been no negligence; or, if there has been negligence, then there must be a clear exception to that effect to excuse; while in cases outside the exceptions the shipowner is liable even apart from negligence.[8]

[1] *Post*, 1070. [2] *Ante*, 1060 n[s]. [3] *Notara* v. *Henderson*, L. R. 7 Q. B. 236.
[4] 11 Ex. 430. [5] L. R. 1 C. P. 600; L. R. 3 C. P. 476. [6] 15 M. & W. 746.
[7] *Bazin* v. *Steamship Co.*, 3 Wall. Jun. (U. S. Circ. Ct.) 229; *Richelieu, &c. Navigation Co.* v. *Boston Marine Insurance Co.*, 136 U. S. (20 Davis) 408; *The Kestrel*, 6 P. D. 182.
[8] *Ante*, 1025. *Davis* v. *Garrett*, 6 Bing. 716, approved *Royal Exchange Shipping Co.* v. *Dixon*, 12 App. Cas. 11, 19; and *Scaramanga* v. *Stamp*, 5 C. P. D., per Cockburn, C.J., 299. In *The* "*Norway*," 3 Moo. P. C. C. (N. S.) 245, it was assumed that, had the pilot been negligent, the owner would be liable; but the decision was, that the facts did not indisputably point to the conclusion of negligence. In *Czech* v. *General Steam Navigation Co.*, L. R. 3 C. P. 19, Willes, J., says: "The liability of the defendants for their negligence, notwithstanding the general words of the exception in the bill of lading, has been fully gone into in many cases which have been referred to by my Lord, and I will only add that the law so laid down by our Courts is consistent with the views of modern jurists, and will be found in many of the maritime codes of Europe. The authorities are referred to in a note to the report, most probably by the learned judge

The general rule of law prevails in this branch of law also—it is for the judge to say whether any facts have been established by evidence from which negligence may be reasonably inferred, but it is for the jury to say whether from these facts negligence ought to be inferred.[1]

Judge to decide whether any evidence of negligence, jury to decide where there is negligence.

Delivery.

As to delivery—the rules of delivery after sea carriage are in the main identical with those relating to delivery after land carriage; so that to the general considerations which have been already presented,[2] little need here be added.

Delivery

Delivery must be according to the practice and custom usually observed in any port or place of delivery—*i.e.*, the goods are most usually sent to the wharf with directions to the wharfinger not to part with them until the freight and other charges are paid,[3] provided the master be doubtful of payment; since by parting with the possession, the master loses his lien for the freight.[4]

The master must in any event allow a reasonable time[5] for the consignee to receive goods, and is not justified in putting them on the quay as soon as he arrives.[6] The duty of making proper provision for the discharge of cargo is usually by custom on the consignee;[7] but the master is bound to give up the goods to the holder of the bill of lading if he presents it (for it is in the nature of a title-deed[8]) at a reasonable time;[9] and is justified in delivering the goods to the first person who presents a bill of lading (though three have been signed) if it is produced to him in good faith; and he is not to embarrass himself by considering what has become of the others.[10] If he has any notice or

Master's duty.

[1] *Metropolitan Ry. Co.* v. *Jackson*, 3 App. Cas. 197.

[2] *Ante*, 898.

[3] *Tharsis Sulphur and Copper Co.* v. *Morel Brothers*, [1891] 2 Q. B. 647; *Good* v. *Isaacs*, [1892] 2 Q. B. 555. As to conditions, &c., *ante*, 892.

[4] Abbott, Merchant Ships (5th ed.), 247, (14th ed.), 563.

[5] *Ante*, 834.

[6] *Houlder* v. *General Steam Navigation Co.*, 3 F. & F. 170.

[7] Per Tindal, C.J., *Gotliffe* v. *Bourne*, 4 Bing. N. C. 314, 329; *Ford* v. *Cotesworth*, L. R. 4 Q. B. 127; L. R. 5 Q. B. 544; *Cunningham* v. *Dunn*, 3 C. P. D. 443; *Fowler* v. *Knoop*, 4 Q. B. D. 299; *Hick* v. *Rodocanachi*, [1891] 2 Q. B. 626, considered by Wright, J., *Castlegate Steamship Co.* v. *Dempsey*, [1892] 1 Q. B. 54, where charter-parties in common use are divided into three classes: 1st, those in which a limited time is prescribed within which the unloading is to be completed; 2nd, those in which no time is prescribed; 3rd, those in which time is fixed not directly but by reference to the custom of the port of discharge. Wright, J.'s, judgment was reversed in the Court of Appeal, [1892] 1 Q. B. 854, on the ground that the case was governed by *Postlethwaite* v. *Freeland*, 5 App. Cas. 599, that discharge must be with all reasonable despatch in the circumstances. Under a charter-party providing for discharge at the usual berth as customary, the obligation to unload does not commence till the ship is in the usual berth, with the assent of the proper authorities; and "customary" has reference to the course of business at the port: *Good* v. *Isaac*, [1892] 2 Q. B. 555, and has no reference to time. *Tapscott* v. *Balfour*, L. R. 8 C. P. 46; *Lockhart* v. *Falk*, L. R. 10 Ex. 132, followed in *Dunlop* v. *Balfour*, [1892] 1 Q. B. 507, and *Gardiner* v. *Macfarlane*, 16 Rettie, 658, where the signification of the word "demurrage" is considered. See also *Wytlie* v. *Harrison*, 13 Rettie, 92; and *The Jaederen*, [1892] P. 351, where the words to be construed were "steamer to be discharged as fast as she can deliver." *The Lyle Shipping Co.* v. *Cardiff Corporation*, [1900] 2 Q. B. 638: *Hulthen* v. *Stewart*, [1903] A. C. 389; *The Arne*, [1904] P. 154.

[8] *Postlethwaite* v. *Freeland*, 5 App. Cas. 599; *Bourne* v. *Gatliffe*, 11 Cl. & F. 45.

[9] *Erichsen* v. *Barkworth*, 3 H. & N. 601.

[10] Per Lord Cairns, *Glyn, Mills & Co.* v. *East and West India Docks*, 7 App. Cas. 598; *Barber* v. *Meyerstein*, L. R. 4 H. L., per Lord Westbury, 336. As to the unlimited proposition stated in *Fearon* v. *Bowers*, 1 H. Bl. 364, see per Baggallay, L.J., 6 Q. B. D. 503, and in the House of Lords per Lord O'Hagan, 7 App. Cas. 691, per Lord Blackburn, 610 *et seqq.*, per Lord Fitzgerald, 616, who unite in condemning it.

knowledge of the whereabouts of the other parts of the bill of lading he "must interplead, or deliver to the one who he thinks has the better right at his peril if he is wrong." [1]

Master may warehouse the goods in certain contingencies.

If the consignee or the holder of the bill of lading does not claim delivery within a reasonable time, the master may land and warehouse the goods in a statutable warehouse [2] at the expense of the owner.[3] The general rule is that delivery at the wharf, in the absence of special directions to the contrary, discharges the master.[4] There must, notwithstanding, be a delivery at the wharf to some person authorised to receive the goods, or due previous notice must be given to the consignee of the time and place of delivery; and the master cannot discharge himself by leaving them exposed and unprotected there. So, too, if the master gives a receipt for goods left on the quay for shipping, they are as much at the risk of the ship as if actually put on board. The master's responsibility continues till actual delivery or some act equivalent to, or a substitute for delivery; as if the consignee has previously assumed charge of the goods; or has notice of the time and place of delivery and the goods have been duly separated and designated for his use.[5] If there is loss through the delay or default of the consignee, the consignee is liable for the same.[6]

Implied power of the master to warehouse goods.

Where goods can neither be landed nor remain where they are, it seems a legitimate extension of the implied agency of the master to hold that, in the absence of all advices, he has authority to carry or send them on to such other place as, in his judgment, prudently exercised,

[1] Per Lord Blackburn, L. R. 7 App. Cas. 613.

[2] Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), ss. 493, 494. These sections are considered, *Furness* v. *White*, [1894] 1 Q. B. 483, reversed in H. of L., [1895] A. C. 40, and are reproductions of ss. 67 and 68 of 25 & 26 Vict. c. 63. Where there is no such warehouse, see *Mors le Blanch* v. *Wilson*, L. R. 8 C. P. 227. In this case the rule was also laid down that a plaintiff may recover against a defendant, costs incurred in defending an action in respect of matters as to which the defendant is under liability to the plaintiff. "As a general rule," said Bovill, C.J., at 233, "he must not recklessly defend the action, and so heap upon the person eventually liable, unnecessary expense. But, on the other hand, if he places all the facts before the person whom he seeks to charge, and that person declines to intervene, and leaves him to take his own course, it surely must be for the jury to say whether it was reasonable to defend, and whether the defence was conducted in a reasonable manner" This had previously been held in *Broom* v. *Hall*, 7 C. B. (N. S.) 503; but this case was not referred to, nor is it in *Baxendale* v. *L. C. & D. Ry. Co.*, L. R. 10 Ex. 35, in the Exchequer Chamber, where *Mors le Blanch* v. *Wilson* was disapproved (Lush, J., dissenting). But in *Hammond & Co.* v. *Bussey*, 20 Q. B. D. 79, the two earlier cases were discussed, and *Baxendale* v. *L. C. & D. Ry. Co.* was distinguished and explained on the ground that in the Ex. Ch. the one point discussed was whether the defence in the action, the costs of which were the subject of dispute, was reasonable; and the Court decided it was not. That being so, the costs sued for could not be recovered. The proposition of law that was negatived in *Baxendale's case* was, therefore, that costs of unreasonably defending an action could be recovered if the incurring such costs had been of use, in leading to the assessment of damages which could be recovered over in the second action against the defendant. But it is at least doubtful whether *Mors le Blanch* v. *Wilson* did decide this. What that case undoubtedly decided is that costs could be recovered where the action was reasonably defended; and this is good law. It is good policy, however, for the surety to let his principal know, and to take directions from him: *Smith* v. *Compton*, 3 B. & Ad. 407; for notice operates as an estoppel: *Parker* v. *Lewis*, L. R. 8 Ch., per Mellish, L.J., 1058, citing Butler, J., *Duffield* v. *Scott*, 3 T. R. 377. *Agius* v. *Great Western Colliery Co.*, [1899] 1 Q. B. 413, in the C. A., where *Hammond* v. *Bussey* was followed. Cp. *Oliver* v. *Bank of England*, [1901] 1 Ch. 652, 664; *The Millwall*, [1905] P. 155. Costs of an appeal not authorised by the party against whom indemnity is claimed are not recoverable: *Maxwell* v. *British Thomson Houston Co.*, [1904] 2 K. B. 342. *Assicurazioni Generali de Trieste* v. *Empress Assurance Corporation*, 23 Times L. R. 700.

[3] *Howard* v. *Shepherd*, 9 C. B. 297, 321: *Erichsen* v. *Barkworth*, 3 H. & N. 601, in Ex. Ch. 894.

[4] *Hyde* v. *Trent and Mersey Navigation Co.*, 5 T. R. 389.

[5] 3 Kent, Comm. 215. *Ante*, 904.

[6] *Shirwell* v. *Shaplock*, 2 Chit. Rep. (K. B.) 397.

appears most convenient for their owner, and to charge the expenses, properly incurred in doing so, on him.[1]

If the master refuses to discharge the cargo the shipowner will be responsible; but, if the shipowner is prevented from carrying out his share of the discharge by the acts of persons over whom he has no control, the case comes within the same category as the case of non-delivery caused by some physical misfortune over which he has no control.[2]

The master cannot rightfully refuse to land the cargo before the freight is paid or secured; for the consignee has a right after the goods are unloaded to examine them, and see whether they are damaged, and to have any damage ascertained; and after the discharge the shipowner has the right to detain the cargo in custody until payment or security of the freight.[3]

2. *CARRIERS OF PASSENGERS BY SEA.*

Definition.

"Passengers," says M'Culloch,[4] "are individuals conveyed for hire from one place to another on board ship." This definition is, however, varied by the Merchant Shipping Act, 1894,[5] s. 267, which says that the expression "passenger" shall include any person carried in a ship other than the master and crew, and the owner, his family and servants.[5]

Authority of master.

Since the position of the master of a ship involves such arduous responsibilities, the authority he is empowered to exercise over passengers in his ship is altogether exceptional; and their duty of conformity to his directions is most strictly binding.[6] The master's control is absolute in all things necessary for the safe and proper conduct of the ship;[7] and he may use force if the safety of the ship or of those on board seems to require it.[8] Thus, if a master were sued for not

[1] *Cargo ex "Argos,"* L. R. 5 P. C. 134, 165. As to where goods had been partially landed under a bill of lading and the consignee claimed delivery to himself of other goods not landed, but was refused, see *Wilson* v. *London, &c. Steam Navigation Co.*, L. R. 1 C. P. 61; *Oliver* v. *Colven*, 27 W. R. 822; *The "Energie,"* L. R. 6 P. C. 306.

[2] *Budgett* v. *Binnington*, [1891] 1 Q. B. 35. Cp. *Castlegate Steamship Co.* v. *Dempsey*, [1892] 1 Q. B. 54; (C. A.) 854.

[3] Abbott, Merchant Ships (14th ed.), 570; 3 Kent. Comm. 220, *n.* (*c*), where Story, J.'s, judgment in *The Volunteer and Cargo*, 1 Sumn. (U. S. Circ. Ct.) 551, is dissented from. Freight is payable concurrently with the delivery of the goods, which must be within a reasonable time after arrival: *Paynter* v. *James*, L. R. 2 C. P. 348, 355; *Duthie* v. *Hilton*, L. R. 4 C. P. 138. The law as to delivery of goods and lien for freight is consolidated in the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), ss. 492–501. The moment that the freight has been paid over by the consignees to persons entitled to receive it, the shipowner's lien is gone: *Togart, Bouton & Co.* v. *James Fisher & Sons*, [1903] 1 K. B. 391: *Wehner* v. *Dene Shipping Co.*, [1905] 2 K. B. 92.

[4] Dictionary of Commerce, *sub voce*. See *The Hanna*, L. R. 1 A. & E. 283. The payment of a fare was held necessary to constitute a passenger within the meaning of the compulsory pilotage sections of 17 & 18 Vict. c. 104: *The "Lion,"* L. R. 2 P. C. 525, where the wife and father-in-law of the captain who were on the ship by invitation of the captain and without the privity of the owners, were held not to be passengers within the meaning of the Act, so as to exonerate the owners from liability for damage caused by the pilot's default. See the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), ss. 267, 625.

[5] 57 & 58 Vict. c. 60. Part III., ss. 267–308. *Ellis* v. *Pearce*, E. B. & E. 431. See 6 Edw. VII. c. 48, Part II.

[6] Dana, Seaman's Manual (9th ed.), 132, and c. X. 220–229; Abbott, Merchant Ships (14th ed.), 960. Parsons, Law of Shipping, vol. i. 609–617.

[7] *King* v. *Franklin*, 1 F. & F. 360; *Noden* v. *Johnson*, 16 Q. B. 218.

[8] *Aldworth* v. *Stewart*, 14 L. T. (N. S.) 862, 4 F. & F. 957; *Boyce* v. *Bayliffe*, 1 Camp. 58, citing Molloy, Bk. 2, c. 3.

furnishing good and fresh provisions, to prove some trifling inconvenience is not enough; it is necessary to show a real grievance;[1] but if the master, without adequate justification, causes the passenger to be disembarked, and uses contemptuous and insulting language to him, an action is maintainable.[2]

Story, J., in *Chamberlain* v. *Chandler*.

The master is liable for arbitrary acts not justified by the necessities of discipline or of providing for the safety of his ship. His duty is summarised, perhaps a little too rhetorically, by Story, J., in *Chamberlain* v. *Chandler*;[3] "In respect to passengers, the case of the master is one of peculiar responsibility and delicacy. Their contract with him is not for mere ship room and personal existence on board; but for reasonable food, comforts, necessaries, and kindness. It is a stipulation, not for toleration merely, but for respectful treatment, for that decency of demeanour which constitutes the charm of social life, for that attention which mitigates evils without reluctance, and that promptitude which administers aid to distress. In respect to females, it proceeds yet farther, it includes an implied stipulation against general obscenity, that immodesty of approach which borders on lasciviousness, and against that wanton disregard of the feelings which aggravates every evil, and endeavours by the excitement of terror and cool malignancy of conduct to inflict torture upon susceptible minds." The law "is rational and just. It gives compensation for mental sufferings occasioned by acts of wanton injustice, equally whether they operate by way of direct or of consequential injuries. In each case the contract of the passengers for the voyage is in substance violated; and the wrong is to be redressed as a cause of damage. I do not say that every slight aberration from propriety or duty, or that every act of unkindness or passionate folly, is to be visited with punishment; but if the whole course of conduct be oppressive and malicious, if habitual immodesty is accompanied by habitual cruelty, it would be a reproach to the law if it could not award some recompense."

Duty of passengers.

The passengers, on their part, must render assistance, if necessary, and they are called upon in cases of peril, whether from the sea or from enemies.[4] They are not entitled to claim salvage for services rendered unless their services are exceptional,[5] as for navigating the ship after the master and crew, or some of them, have left her in peril,[6] or for rescuing the ship after capture by an enemy.[7]

Where there is an express contract[8] the rights of the passenger

1 *Young* v. *Fewson*, 8 C. & P. 55; *Prenderyast* v. *Compton*, 8 C. & P. 454; *Jencks* v. *Coleman*, 2 Sumn. (U. S. Circ. Ct.) 221.

2 *Coppin* v. *Braithwaite*, 8 Jur. 875.

3 3 Mason (U. S.) 245.

4 *Boyce* v. *Bayliffe*, 1 Camp. 58.

5 *Branston*, 2 Hagg. (Adm.) 3 *n.*; *The Vrede*, Lush. 322, where it is said that even seamen may be entitled to salvage when an abandonment of the ship has put an end to their contract. The law was laid down to the same effect in *The Le Jonet* L. R. 3 A. & E. 556, affirming the general principle stated by Lord Stowell. in *Neptune*, 1 Hagg. (Adm.) 227, and was re-affirmed by Dr. Lushington in *The Warrior*, Lush. 476. See *ante*, 1045 n 5. *Still* v. *Myrick*, 2 Camp. 317; *Hartley* v. *Ponsonby*, 7 E. & B. 872; 3 Kent, Comm. 185, 196; *The Two Catharines*, 2 Mason (U. S.), 319. In *Newman* v. *Walters*, 3 B. & P. 612, a passenger was held entitled to sue the owner for salvage. *Nourse* v. *Liverpool SS. Association*, [1896] 2 Q. B. 16.

6 *The Vrede*, Lush. 322.

7 *The Two Friends*, 1 C. Rob. (Adm.) 271.

8 Such a contract is a personal contract, and not cognisable in Admiralty. *Brackett* v. *Brig Hercules*, Gilpin (U. S. Dist. Ct.), 184; *Adderley* v. *Cookson*, 2 Camp. 15; *Gillan* v. *Simpkin*, 4 Camp. 241; *Leman* v. *Gordon*, 8 C. & P. 392; *Yates* v. *Duff*, 5 C. & P. 369; *Siordet* v. *Brodie*, 3 Camp. 253.

will of course be determined hy it; and whether express or not, the passenger's rights are to he construed with reference to usage.[1]

Duty of shipowner.

The shipowner is bound to provide reasonable accommodation for his passengers; and a shipowner has been held liable where an accident happened to a passenger through want of means to descend from a berth.[2]

Luggage of passengers.

The law with regard to the luggage of passengers hy sea does not appear to differ from that we have already considered as to the luggage of passengers by land.[3]

The circumstances of the transit may vary the details of the transit; they do not affect the principles of responsibility. A condition exonerating the carrier even from the consequence of his own or his servant's negligence is usually imposed with the proviso, now familiar from the terms of the Harter Act, that reasonable diligence has been used hy the carrier to render the ship at starting seaworthy and fit for the voyage.[4]

Liahility, however, was held to attach where, the usual accommodation for passengers' luggage having been appropriated for other goods, the luggage was placed in a disused lavatory which communicated for the purpose of flushing the floor with one adjoining, where an overflow occurred damaging the plaintiff's property. The plaintiff was held entitled to recover. "Considering the crowded state of the ship and the risk of pilfering to which the luggage might have heen exposed if placed on deck under tarpaulins, the lavatory was not in itself an improper or unsuitable place in which to put it. Having regard, however, to the contingency of an overflow from the other lavatory, and a consequent ingress of water under the dividing bulkhead, the place was not a proper place, and the ship, in sailing with the luggage so stowed, was not seaworthy in the sense that she was not properly fit to carry out the contract with regard to the plaintiff's luggage."[5]

Pardee v. *Drew.*

In America it has heen decided that though steamhoat proprietors who are common carriers of passengers for hire are liahle for the baggage of passengers, they are only liable for such things as are usually carried by travellers for necessity or personal convenience.[6] This decision, which was arrived at on the ground "that a reasonable amount of baggage hy common usage was deemed to be included in the fare of the passenger," is identical with what has heen decided under the provisions about luggage in the English Railway Acts.[7]

Master has lien on the luggage of passengers.

The master of the ship has a lien on the luggage of the passenger for his passage-money, but not for the clothes he is wearing when about to leave the ship.[8]

[1] *Hulton* v. *Warren*, 1 M. & W. 466, 475.

[2] *Andrews* v. *Little*, 3 Times L. R. 544 (C. A.).

[3] *Ante*, 997. See *Wilton* v. *Atlantic Royal Mail Steam Navigation Co.*, 10 C. B. N. S. 453; *Taubman* v. *Pacific Steam Navigation Co.*, 26 L. T. (N. S.) 704, which would very probably not be followed in an English Court (*Le Blanche* v. *L. & N. W. Ry. Co.*, 1 C. P. D. 286), and certainly not in an American Court (*Railroad Co.* v. *Lockwood*, 17 Wall. (U. S.) 357), is noteworthy for an expression of opinion by Bramwell, B., that the Railway and Canal Traffic Act, 1854, "has been already [1872] the cause of more dishonest transactions than any Act of Parliament."

[4] *Acton* v. *Castle Mail Packets Co.*, 11 Times L. R. 518.

[5] *Upperton* v. *Union-Castle Mail SS. Co.*, 19 Times L. R. 123.

[6] *Pardee* v. *Drew*, 25 Wend. (N. Y.) 459. Cp. *Hawkins* v. *Hoffman*, 6 Hill (N. Y.), 586, 589. *Ante*, 897 and 1005.

[7] *Macrow* v. *G. W. Ry. Co.*, L. R. 6 Q. B. 612. *Ante*, 998.

[8] *Wolf* v. *Summers*, 2 Camp. 631.

Medical man on board passenger ship.

Every emigrant ship [1] must carry a duly qualified medical practitioner rated on the ship's articles, if there are more than fifty steerage passengers on board; and in all cases, where the number of persons on board exceeds three hundred.[2] All proper and necessary medicines must also be provided; of the sufficiency of which the emigration officer at the port of clearance is the judge; [3] who further has the duty imposed on him of appointing a medical practitioner to inspect and report on the sufficiency of the medicine and other requisitions in the Act specified; and it is on the certificate of such medical practitioner that the emigration officer is to act.

Allan v. *State Steamship Co.*

The position and responsibility of the shipowner with reference to the ship's medical officer, under the Act, was considered in *Allan* v. *State Steamship* Co.[4] A woman passenger having asked for quinine, got calomel, and sued the shipowner for the injury sustained through the doctor's negligence. The liability of the shipowner was, however, negatived, on the ground that, when he has engaged a suitably qualified person as required by law, and has placed in his charge a supply of medicines sufficient in quantity and quality for the purposes required (and this is evidenced by the certificate of the medical practitioner called in at the port of clearance, and the approval of the emigration officer), and has furnished to the qualified person so engaged a proper place in which to keep the medicines, the shipowner has performed his duty to his passengers, and is not liable for the medical officer's negligence. The medical officer is liable for his own negligences, and independently of whether his services are gratuitous or remunerated.[5]

Emigrants.

The most important regulations with regard to emigrants are statutory, and reference must be accordingly made to Part III. of the Merchant Shipping Act, 1894,[6] and to Part II. of the Merchant Shipping Act, 1906,[7] to ascertain their rights and liabilities.

Personal assault on passenger.

A personal assault by the master of a vessel on a passenger on the high seas may form the subject of a suit in Admiralty.[8]

1 Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 268.

2 Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 303. Under s. 324 these regulations may be modified by Order in Council.

3 Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 300.

4 132 N. Y. 91, 28 Am. St. R. 556.

5 See *post*, 1156, Medical Men.

6 57 & 58 Vict. c. 60.

7 6 Edw. VII. c. 48, ss. 13 24.

8 *Mulloy* v. *Backer*, 5 East, 316. As to implied assumpsit for passage-money, *The Ruckers* (1801), 4 C. Rob. (Adm.) 73. As to damages to seaman in respect of assaults and ill-treatment by the master, *Agincourt*, 1 Hagg. (Adm.) 271; *Louther Castle*, 1 Hagg. (Adm.) 384; *Enchantress*, 1 Hagg. (Adm.) 395. In *Watson* v. *Christie*, 2 B. & P. 224, Lord Eldon, C.J., held that where a beating might be possibly justified on the ground of the necessity of maintaining discipline on board ship, yet such a defence could not be resorted to unless put upon the record in the shape of a special justification; for the master has a right in case of gross misbehaviour, to inflict corporal punishment upon the delinquent mariner. The rules under which this may be done are given in the leading case of *Agincourt*, *supra*. A statutory provision for seamen's food is made by 6 Edw. VII. c. 48, ss. 25-27.

CHAPTER V.

COLLISIONS ON WATER.[1]

THE Roman law dealing with nautical collisions is shortly summed up in a few paragraphs of the Lex Aquilia,[2] and turns entirely on the presence or absence of *culpa*. If the collision is through the fault of the sailors, then an action lies irrespectively of whether the collision was of the vessels, *aut ferraculum ad navem ducendo, an tua manu damnum dederis*. But *si fune rupto, aut cum a nullo regeretur navis, incurrisset, cum domino agendum non esse*. Again, *si cum vi ventorum navis impulsa esset in funes anchorarum alterius et nautæ funes præcidissent, si nullo alio modo, nisi præcisis funeribus explicare se potuit nullam actionem dandam*. One more instance will suffice to illustrate the principle: *si navis alteram contra se venientem obruisset, aut in gubernatorem, aut in ducatorem, actionem competere damni injuriæ*. In English law also the foundation of liability is fault—negligence. Roman Law.

"In common understanding and as understood in the Court of Admiralty," says Montague Smith, J.,[3] "damage by collision is damage sustained by a ship from another ship coming in contact with it." Damage by collision defined.

If by this the learned judge intended to convey that damage sustained by a ship from another ship is the sole damage that can be sued on in the Court of Admiralty,[4] his inference is corrected by *The "Zeta"*[5] in the House of Lords. The conclusion from the decision in which case is, that no ground either on principle or authority exists for holding the Admiralty jurisdiction in the case of damage received by a ship limited to damage received by collision with another vessel. That being so, the term "damage by collision," as used in 31 & 32 Vict.

[1] For a complete treatise on this very technical subject, see Marsden, Law of Collisions at Sea (5th ed. 1904). Collision is very fully treated by Parsons, Law of Shipping, vol. i. 525-598. In Abbott, Merchant Ships, there was no chapter on Collisions till one was supplied by Serjeant Shee in his edition, the 10th.

[2] D. 9. 2. 29. §§ 2-5.

[3] *Everard* v. *Kendall*, L. R. 5 C. P. 432, adopted *Robson* v. *The Owner of The "Kate,"* 21 Q. B. D. 13, and cited per Lopes, L.J., *The Zeta*, [1892] P. 291.

[4] What is here said has reference to the jurisdiction of the Court of Admiralty apart from the Judicature Act, 1873 (36 & 37 Vict. c. 66).

[5] [1893] A. C. 468. The various instances of damages that have been sued on in the Court of Admiralty are collected in the appellant's argument, 471. In *The Theta*, [1894] P. 284, Bruce, J., says: "Damage done by a ship is, I think, applicable only to those cases where, in the words of the Master of the Rolls in *The Vera Cruz* (9 P. D. 55), the ship is the 'active cause' of the damage. The same idea was expressed by Bowen, L.J., who said, the damage 'done by a ship means damage done by those in charge of a ship, with the ship as the noxious instrument.'"

c. 71 s. 3, is not so limited; nor the term "damage to ships whether by collision or otherwise" in 32 & 33 Vict. c. 51 s. 4.[1]

It may accordingly now be taken as settled law that County Courts under the two Acts above mentioned having Admiralty jurisdiction may, in the exercise of that jurisdiction, entertain any suit for damage done by a ship and to a ship, whether by collision or otherwise, to the extent of all claims not exceeding £300, without any necessity of showing that the body receiving or doing the damage shall be a ship.[2]

Admiralty Court Act, 1840.

By section 6 of the Admiralty Court Act, 1840,[3] the jurisdiction of the High Court of Admiralty (now the Admiralty Division), which was always exerted in matters arising on the high seas, is extended to cases where a ship is within the body of a county when the services are rendered or damage received or necessaries furnished in respect of which the claim sued on is made.

Sea the common highway of nations.

The sea has been often, and not improperly, termed "the common highway of nations"; and the common rights and duties of those responsible for ships traversing the sea do not in many respects substantially differ from the rights and duties of those responsible for vehicles on land.[4] There are, nevertheless, points of contrast; such, for instance, as that, while a traveller may in no circumstances encamp on a highway, there is a necessary right to anchor vessels even in the most frequented roadsteads.[5]

Sunken Vessels.

Liability based on negligence.

Liability for injury is accordingly based on negligence. Every person navigating the seas or rivers must use reasonable skill and care to prevent mischief to other vessels.[6] This duty is, says Maule, J.,[7] "incident to the possession and control of the vessel." He who is in possession or control may make the vessel fast, or proceed while it is afloat, or remain as long as he pleases if aground; of course subject to navigation rules.

1 The House of Lords held that even had the jurisdiction of the Court of Admiralty been limited as was contended, the terms of the Acts of Parliament above cited would have given to County Courts a wider jurisdiction than that possessed by the old Court of Admiralty. The decision in *The Queen* v. *The Judge of the City of London Court*, [1892] 1 Q. B. 273, which holds that the Court of Admiralty had no jurisdiction to entertain an action for negligence against a pilot *in personam*, is unaffected by the decision in *The "Zeta,"* [1893] A. C. 468. A steamer struck a barge which had just been sunk by collision with another vessel; yet as she became navigable as soon as she was raised the collision was held to have been between two navigable vessels: *Chandler* v. *Blogg*, [1898] 1 Q. B. 32. Damage done by a ship to a pier is not "damage by collision" within s. 3, sub-s. 3, of 31 & 32, Vict. c. 71; *The Normandy*, [1904] P. 187.

2 In consequence of the provision of the Judicature Act, 1873 (36 & 37 Vict. c. 66), the consideration of the jurisdiction of the Old Court of Admiralty is only important as it affects the jurisdiction of County Courts with Admiralty jurisdiction.

3 3 & 4 Vict. c. 65. Cp. *The Mecca*, [1895] P. 95. See an article by Dana, On the History of Admiralty Jurisdiction, Am. Law Rev., vol. v. 581; also 1 Kent. Comm. (12th ed.) 354–380. In the United States the Admiralty jurisdiction of the Supreme Court extends over all the great lakes and the rivers so far as they are navigable: *The Genesee Chief*, 12 How. (U. S.) 443; *The Hine* v. *Trevor*, 4 Wall. (U. S.) 555, 569. As to what rivers are navigable, *The Daniel Ball*, 10 Wall. (U. S.) 557, 563, distinguishing the American test from the English, that of the ebb and flow of the tide.

4 *River Wear Commissioners* v. *Adamson*, 2 App. Cas., per Lord Blackburn, 767. *Ante*, 541. See, too, *Fletcher* v. *Rylands*, L. R. 1 Ex. 265, 286; *The Khedive*, 5 App. Cas. 876, 890; *Cayzer* v. *Carron Co.*, 9 App. Cas. 873, 882.

5 *Post*, 1099.

6 *Brown* v. *Mallett*, 5 C. B. 599.

7 *L. c.* 617.

Liability where vessel has been abandoned.

In the case just referred to, *Brown* v. *Mallett*,[1] the liability of the person having the possession and control of a vessel, which sinks so as to obstruct a public navigable river, was considered with reference to other vessels navigating. When the vessel sunk the owner abandoned her. The Court held (Maule, J., giving the judgment) that as the liability of the original owner did not continue where the possession and control had been transferred, so where they had been not transferred, but abandoned: "We do not think that the duty *always* arises and continues for an indefinite time. Where the navigation of a river has become obstructed by a vessel which has sunk and been lost to the owner, without any fault of his, the public inconvenience of the obstruction is one in respect of which the owner differs from the rest of the public only in having sustained a private calamity, in addition to his share of a public inconvenience; and this difference does not appear to be any reason for throwing on him the cost of remedying or mitigating the evil."[2]

Maule, J.'s, judgment in *Brown* v. *Mallett*.

In *White* v *Crisp*,[3] Alderson, B., speaking of the judgment of Maule, J., in *Brown* v. *Mallett*, said:[4] "From the principles there laid down by him (which, however, were not all absolutely necessary for the decision of that individual case) we do not disagree at all. He there lays it down thus—that it is the duty of a person using a navigable river with a vessel of which he is possessed and has the control and

White v. *Crisp*.

[1] 5 C. B. 599, followed in *Hancock* v. *York, Newcastle, and Berwick Ry. Co.*, 10 C. B. 348. In *Jolliffe* v. *Wallasey Local Board*, L. R. 9 C. P. 62, the anchors were part of the permanent works of the defendants, and constituted a concealed danger when they omitted to buoy them in a sufficient manner.

[2] 5 C. B. 618. In *The King* v. *Watts*, 2 Esp. (N. P.) 675, Lord Kenyon held that the owner of a ship sunk in the Thames without default was not liable to an indictment for not removing the obstruction. *Virian* v. *Mersey Docks and Harbour Board*, L. R. 5 C. P. 19, is a case on the construction of The Mersey Dock Acts Consolidation Act, 1858 (21 & 22 Vict. c. xcii.), s. 59. Under 10 & 11 Vict. c. 27 (The Harbours Act, 1847), s. 50, the "owner" of a wreck becoming an obstruction to any harbour, is to repay the harbour master the expense of removing it. *Earl of Eglinton* v. *Norman*, 16 L. J. Q. B. 557, decided that "owner" refers to the owner at the time the wreck became an obstruction. This decision was overruled in the H. of L. in *The "Crystal,"* [1894] A. C. 508. The appellants had abandoned their vessel as derelict on the high seas without any intention of resuming possession or ownership. They also gave notice of abandonment to the underwriters. The House of Lords on these facts held that "where the owner of the vessel which is wrecked gives the harbour authority to understand that he retains his right of property in the wreck, and they remove it so as to be in a position to return it to him substantially in the same condition in which it was when they commenced operations, they can charge him, I think, with the cost of removal, though the cost may exceed the value of the thing removed. Where he tells them plainly that he has abandoned the wreck, they may deal with it as they please, without regard to him; but they cannot make him personally liable for their expenditure. The defects, such as they were, in sec. 56, are remedied by the Removal of Wrecks Act, 1877 (40 & 41 Vict. c. 16). Under that Act the harbour authorities may destroy the wreck if they think fit, although there be an owner claiming an interest in it, and they may do the work of destruction without regard to the owner's interest": per Lord Macnaghten, *l.c.* 533. The "owner" is *personally* liable for the repayment of the expenses of removal. See The Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), ss. 518–537. *The "Crystal"* is distinguished in *Howard Smith* v. *Wilson*, [1896] A. C. 579, on the ground of the different wording of s. 13 of the Victorian Marine Act, 1890, from s. 56 of the English Act, but is followed and applied in *Barraclough* v. *Brown*, [1897] A. C. 615.

[3] 10 Ex. 312. "It is a rule of maritime law from the earliest times 'that if a ship run foul of an anchor left without a buoy, the person who placed it there shall respond in damages'": *Philadelphia, Wilmington, and Baltimore Rd. Co.* v. *Philadelphia and Havre de Grace Steam Towboat Co.*, 23 How. (U. S.) 216. A ship negligently allowed to drag her anchor and thereby drifting down upon another, which has to take steps involving expense to keep clear, is liable to pay the expenses incurred, namely, the value of an anchor and chain lost and coals and stores consumed, as the measure of the damage caused: *The Port Victoria*, 18 Times L. R. 165.

[4] 10 Ex. 320.

management, to use reasonable skill and care to prevent mischief to others; and he adds that his liability is the same whether his vessel be in motion or stationary, floating or aground, under water or above it. For in all these circumstances, the vessel may continue to be in his possession and under his management and control. This duty arises out of the possession and control of the vessel being in him. And it is clearly also laid down in the same judgment that this liability may be transferred with the transfer of the possession and control to another person. And further, that on the abandonment of such possession, control, and management, the liability also ceases." In that case the facts showed that at the time of the injury to the plaintiff's vessel the defendants, to whom the sunken ship had been transferred, had exercised control. The conclusion is that it was the duty of the owner, so long as he is in possession, to take precautions to prevent injury.[1]

The Douglas.

In *The Douglas*,[2] a ship had sunk in the Thames in consequence of a collision with another ship through her own negligence; subsequently a third ship had come into collision with the sunk ship as she lay in mid-channel with one of her masts above water. In an action by the owner of the third ship it was contended that it was the duty of the owners of the sunk vessel to warn approaching vessels of the wreck, and as no such warning was given, the owners of the sunk ship were responsible for the damage. This contention was sustained in the Admiralty Division by Sir Robert Phillimore, on the authority of a *dictum* of Maule, J.'s, in *Brown* v. *Mallett*[3]—"it is the duty of a person using a public navigable river with a vessel of which he is possessed, and has the control and management, to use reasonable skill and care to prevent mischief to other vessels." This liability "is the same whether his vessel be in motion or stationary, floating or aground, under water or above it."[4] There was a finding of fact that the sunk ship "*The Douglas* was not abandoned by her master and crew."[5]

Dictum of Maule, J., in *Brown* v. *Mallett*.

In the Court of Appeal Sir Robert Phillimore's decision was reversed, because "there was no negligence of which the plaintiff can take advantage." "I incline to agree," said Brett, L.J.,[6] "that if the owners of a wreck abandon it their liability ceases. But here the defendants claim the ownership of the wreck. It may be that the defendants did not hear of the accident for some time; as to those employed by them, the captain is *primâ facie* to act; it is for the plaintiff to prove that there was negligence." To the argument, that the reason of *The Douglas* being in the position where she did the injury was her negligent collision with the first ship, therefore the primary negligence affected all her future conduct, the answer of the Lord Justice was:[7] "To wilfully scuttle a ship in a tide-way so as to cause an obstruction may possibly be an indictable offence; but what the defendants did was no indictable offence. Their own ship sank. It seems to me clear that no greater liability can exist against the defendants than if their steamship had sunk without negligence." The decision seems plain, and inevitable

Brett, L.J.'s, judgment.

[1] These cases are discussed in *Taylor* v. *Atlantic Mutual Insurance Co.*, 37 N. Y. 275, by Davies, C.J., and approved (286) as eminently sound. See *Harmond* v. *Pearson*, 1 Camp. 515, as to what was the proper mode of giving notice of a sunken barge. Cp. *White* v. *Phillips*, 33 L. J. C. P. 33.

[2] 7 P. D. 151, noticed in *Dormont* v. *Furness Ry. Co.*, 11 Q. B. D. 496, 501. See *The Ettrick*, 6 P. D. 127.

[3] 5 C. B. 616.

[4] *Ibid.*

[5] 7 P. D. 155.

[6] *L.c.* 160.

[7] *L.c.* 160.

upon well-recognised principles; since "traffic on the highways, whether by land or sea, cannot be conducted without exposing those whose persons or property are near it to some inevitable risk"; [1] subject to the liability to which they have the user; while negligence to be actionable must be *incuria dans locum injuriæ*.[2] The only relevant inquiry left would be as to the fact of whether there was default on the part of the defendants after the ship had settled into the river. The Court found there was not, and entered judgment for the defendants.

Two of the judges seemed to reflect on *Brown* v. *Mallett*[3] and *White* v. *Crisp*.[4] Lord Coleridge, C.J., was of opinion that "these cases may be good law," [5] and Brett, L.J., said,[6] "I say nothing" as to them "except that they were decided on demurrer." Notwithstanding this, the *dictum* on which Sir Robert Phillimore based his judgment appears quite sufficient to comprehend the judgment in *The Douglas* without any inconsistency. Even though it is the duty of a person using a navigable river, with a vessel either "under water or above it," to use "reasonable skill and care," [7] the *onus* is on the plaintiff to show absence of skill and care in the circumstances of traffic on a highway. This *onus*, according to Brett, L.J., was not discharged in *The Douglas* by the facts proved by the plaintiff, and thus *The Douglas* would be only an instance of the rule laid down in *Brown* v *Mallett*. In *Brown* v. *Mallett* it might be made to appear that while there is possession and control there is liability; but the decision only lays down this where there is a collision "from the improper manner in which one of the two [vessels in collision] is managed, the owner of the vessel properly managed is entitled to recover damages from the owner of that which was improperly managed." [8] The general law, as we have seen, requires proof of this improper management in order to found liability. The expression used in *Brown* v. *Mallett*, "We think that it cannot be universally affirmed, that, in all cases where the possession and control of the owners have ceased, such a duty arises," [9] is of extreme cautiousness, and is even consistent with the duty as a practical matter never arising; since the only case that the Court was called to give judgment on was a case where the duty did not arise; and with the propositions necessary to establish the rule outside the scope of the actual case before them the Court thus carefully refrained from committing themselves. Possession and control by no means *always* import liability, though they do where there is negligence.[10]

The cases considered.

The result of the cases was summed up in *The "Utopia,"* [11] in the

The "Utopia."

1 Per Blackburn, J., *Fletcher* v. *Rylands*, L. R. 1 Ex. 280.

2 Per Lord Cairns, *Metropolitan Ry. Co.* v. *Jackson*, 3 App. Cas. 198. See per Brett, L.J., in *The Margaret*, 6 P. D. 79: "In order to establish a cause of action, the Court must find, not only that there was a collision, and that it was the result of the negligence of the defendants, but that some damage was done; these being found, the liability is made out and the cause of action is established."

3 5 C. B. 599. 4 10 Ex. 312. 5 7 P. D. 159.

6 *L.c.* 160. 7 Per Alderson, B., *White* v. *Crisp*, 10 Ex. 321.

8 5 C. B. 616. 9 *L.c.* 618.

10 In *The Douglas*, 7 P. D. 160, Cotton, L.J., held that under the Removal of Wrecks Act, 1877 (40 & 41 Vict. c. 16), s. 4, by which a harbour master has power to put up lights, it becomes his duty to remove a dangerous obstruction. See the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 530. The American law as to abandoning a sunken vessel is discussed and stated by Agnew, J., in *Winpenny* v. *Philadelphia*, 65 Pa. St. 135.

11 [1893] A. C. 492. In *Tatham, Bromage & Co.* v. *Burr—The "Engineer,"* [1898] A. C. 382, the construction of a proviso to a collision clause negativing liability to pay sums for removal of obstructions under statutory powers was "that this clause shall

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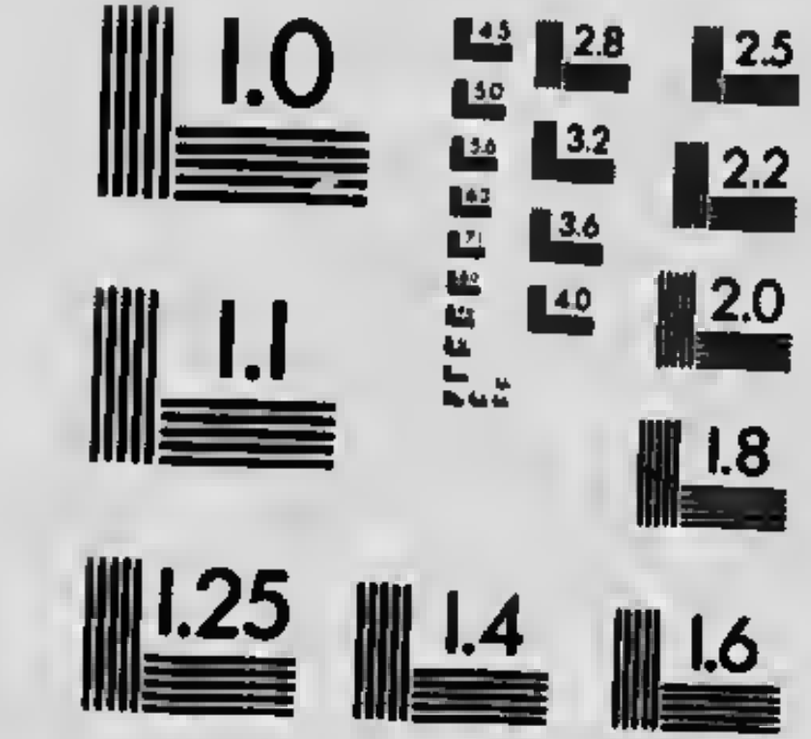

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Privy Council as follows :[1] "The owner of a ship sunk whether by his default or not (wilful misconduct probably giving rise to different considerations) has not, if he abandon the possession and control of her, any responsibility, either to remove her or to protect other vessels from coming into collision with her. It is equally true that so long as, and so far as, possession, management, and control of the wreck be not abandoned or properly transferred, there remains on the owners an obligation in regard to the protection of other vessels from receiving injury from her. But in order to fix the owners of a wreck with liability two things must be shown, first, that in regard to the particular matters in respect of which default is alleged, the control of the vessel is in them, that is to say, has not been abandoned or legitimately transferred, and secondly, that they have in the discharge of their legal duty been guilty of wilful misconduct or neglect." In the case of *The Utopia* it was held that the liability of the shipowners was diverted by reason of the undertaking of the port authorities to safeguard the wreck.

The Snark.

In *The Snark*[2] a dumb-barge was sunk in the fairway of the river Thames, without negligence. A proper person was employed on the salvage operations, but the guardship placed by him to mark the submerged barge was negligently allowed to get out of position, and the plaintiff's steamship coming up the river without negligence ran on the wreck and was injured. The passage just cited from *The Utopia* was relied on by both sides. For the plaintiff it was contended, following cases we have elsewhere examined,[3] that the defendants were not able to divest themselves of their obligation of care; and this view was adopted by the Court. A vessel sunk in a public navigable river is a nuisance. The owner is not bound to remove it. If he abandon it his liability ceases. If he does not abandon it he either retains possession and control, or he may be temporarily forced away from the wreck. In the former case he is under an obligation to use reasonable care to warn other vessels of her position, and to remove the obstruction with reasonable diligence. In the latter it would seem that his duty is the same, though the circumstances will affect the manner of its discharge.[4] If actual possession and control be resumed, the owner's obligation remains as when he retains possession and control. If the owner transfer the wreck to some other person who takes from him the possession and control thereof, that person takes over the duties and liabilities of the owner.[5] If, as in this case, the owner employs some one to remove the wreck for him, there is no transfer of the wreck in the sense of the judgment in *The Utopia*, and the owner does not get rid of his liability by employing some one to perform it for him.

Large vessels swamping small craft.

In navigating harbours and roadsteads accidents may often happen from the mere disturbance of the water caused in certain circumstances by the movements of huge vessels which may sometimes swamp small

in no case extend to any sum which the assured may become liable to pay or shall pay for removal of obstructions under statutory powers"; and the proviso was held not to be confined to payments made directly by the assured to the persons who caused the obstruction to be removed, but to include indirect payments, as for example, the moiety of the sum which the owners of the insured vessel had paid to commissioners for the expenses of the removal of the sunk vessel, so that the underwriters were not liable to pay it. *The North Britain*, [1894] P. 77, was approved. *Burger* v. *Indemnity Mutual Marine Assurance Co.*, [1900] 2 Q. B. 348.

[1] *L.c.* 498. [2] [1899] P. 74; [1900] P. 105. [3] *Ante*, 421.

[4] Cp. *The Douglas*, 7 P. D. 151, which was a case of this kind.

[5] *White* v. *Crisp*, 10 Ex. 312.

craft. There is therefore a duty upon those navigating large vessels so to moderate the force at their command as not to be injurious to small vessels using the waters. A vessel approaching her landing-stage must do so with all usual precautions.[1] So, too, in emerging from a crowded slip, as in *The "Nevada,"* [2] where an ocean steamer with the motion of her propeller made such a tumult in the water as to cause a canal boat to break her fastenings and, swinging round, to come into collision with the propeller, whereby she was sunk. There was no look-out on the steamer, else the accident might have been prevented. A duty to keep a look-out was accordingly laid down. The duty was also asserted "to observe extraordinary care and watchfulness when surrounded by feebler craft in a crowded harbour," [3] and in some circumstances the requirement "to dispense with the use of its ordinary means of locomotion, and resort to the employment of towage or other safe and quiet means of changing its position and effecting its necessary movements" is reasonable.

The "Nevada."

The same had substantially been previously held by the Privy Council in *The Netherlands Steam Boat Co.* v. *Styles* [4] in a judgment peculiarly careful to avoid enunciating any general principle whatever, though approval is given to the general law laid down in the Court below by Dr. Lushington that at whatever rate a ship is going, if she is going at such a rate as to make it dangerous to any craft which she ought to have seen, or might have seen, she has to take care with reference to such craft, and is bound to stop if it is necessary to do so in order to prevent damage being done by the swell caused by the rapidity of her motion.[5] The same principle would seem to hold good with reference to a swell caused on a tow-path or going over an embankment.

"The Batavier."

Cases of Collision.

In the *Woodrop Sims* [6] Lord Stowell states four possibilities under which a collision may occur.

Judgment of Lord Stowell in the Woodrop Sims.

First, a collision may occur without blame to either party; as where the loss is occasioned by a storm or any other *vis major*. The misfortune then lies on the party on whom it happens to light.[7]

Four possibilities of collision.

Secondly, a collision may occur where both parties are to blame; as where there has been a want of due diligence or of skill on both sides.[8]

[1] *The J. E. Trudeau*, 48 Fed. Rep. 847. [2] 106 U. S. (16 Otto) 154.

[3] *L.c.* 159. *The Despatch*, 120 Fed. Rep. 856.

[4] *The "Batavier,"* 0 Moo. P. C. C. 286.

[5] See *Luxford* v. *Large*, 5 C. & P. 421. Cp. *The Duke of Cornwall*, 1 Pritch. Adm. Dig. (3rd ed.), 201—sinking of barge partly caused by the swell of a steamboat.

[6] 2 Dodson (Adm. Cas.), 85. See Bell, Comm. vol. i. (7th ed.), 626. For an American standpoint, see *The "Atlas,"* 93 U. S. (3 Otto) 302.

[7] *Stainback* v. *Rae*, 14 How. (U. S.) 532; 3 Kent, Comm. 231 *et seqq.* *Post*, 1091.

[8] 3 Kent, Comm. 231, speaks of the rule in this case as *rusticum judicium*, adopting the expression of Cleirac, Us et Coutumes de la Mer, 56 (ed. 1671), *judicium rusticorum*. But, says Valin, as translated or, more accurately, summarised in Abbott, Merchant Ships (13th ed.), 829, there is "no better means of making the masters of small vessels, which are liable to be injured by the slightest shock, attentive to avoid collision, than to keep the fear of paying for half the damage constantly before their eyes. And if it be said that it would have been a shorter and more simple mode of adjustment to let each party bear the loss he has sustained as arising from *casus fortuitus*, the answer is, that then the masters of large vessels would make light of collision with those of smaller burthen. Upon the whole, therefore, no rule is so just as that of equal partition." This passage is omitted in the 14th ed. Valin, Ordonnance de la Marine, liv. 3, tit. 7, art. 10, at 179.

The rule of law then is that the loss must be apportioned between them.[1]

Thirdly, a collision may occur by the misconduct of the suffering party only ;[2] when the sufferer must bear his own burthen.

Lastly, a collision may occur through the fault of the ship which runs the other down. Then the injured party is entitled to an entire compensation from the other.[3]

Lord Blackburn in *Cayzer* v. *Carron Co.*

In *Cayzer* v. *Carron Co.*,[4] Lord Blackburn affirms the identity of the common law with the Admiralty in the first, second, and fourth of these cases, and points out that in the third the rule of the common law is that, as each occasioned the accident, neither shall recover, and the loss shall lie where it falls, as against the Admiralty rule that if both contributed to the loss it shall be brought into hotchpot and divided ; he continues thus :[5] "Until the case of *Hay* v. *Le Neve*,[6] which has been referred to in the argument, there was a question in the Admiralty Court whether you were not to apportion it according to the degree in which they were to blame ; but now it is, I think, quite settled, and there is no dispute about it, that the rule of the Admiralty is, that if there is blame causing the accident on both sides they are to divide the loss equally, just as the rule of law is that if there is blame causing the accident on both sides, however small that blame may be on one side, the loss lies where it falls."

***The Khedive* (No. 2).**

In *The Khedive* (No. 2),[7] overruling *Chapman* v. *Royal Netherlands Steam Navigation Co.*,[8] the rule of division of damages in Admiralty in collision where both ships were to blame was held to be that each ship proved for a moiety of the damage that it had sustained less a moiety of the damage sustained by the other ship, so that in an equality of damage neither ship paid or received anything from the other. But when there is inequality of damage the sum payable by the less injured to the more injured is "a moiety of the difference of the aggregate loss, beyond the point at which the one loss balances the other."[9] There is only one liability and only one payment. "The amount of the conjoint damage has to be divided equally, and in order to do this, there must be a sum in arithmetic stating the amounts respectively ; but as the result of the arithmetic, there is only one liability, not cross-liabilities."[10]

Law in America.

In America the law has been clearly laid down in *The "Clara"*[11] to the same effect. Where the fault is wholly on one side, the party in fault must bear his own loss and compensate the other party, if such party has sustained any damage. If neither be in fault, neither is entitled to compensation from the other. If both are in fault, the damages will be divided.[12]

Questions of collisions are *communis juris*.

"All questions of collision are questions *communis juris*",[13] and

[1] Per Lord Selborne, C., *The Khedive*, 7 App. Cas. 800. *Post*, 1093.

[2] *Strout* v. *Foster*, 1 How. (U. S.) 89 ; *The Massachusetts*, 1 W. Rob. (Adm.) 371.

[3] This passage was cited with approval by Lord Gifford in the House of Lords in *Hay* v. *Le Neve*, 2 Shaw (H. L. Sc.), 395, 401.

[4] 9 App. Cas. 873. [5] *L.c.* 881.

[6] 2 Shaw (H. L. Sc.), 395. This case is considered and treated in *The Khedive*, 7 App. Cas. 804, 817. [7] 7 App. Cas. 796. [8] 4 P. D. 157.

[9] Per Lord Selborne, C., 7 App. Cas. 800.

[10] Per Lord Esher, M.R., *London Steamship Owners' Insurance Co.* v. *Grampian Steamship Co.*, 24 Q. B. D. 667.

[11] 102 U. S. (12 Otto) 200 ; Parsons, Law of Shipping, vol. i. 525 *et seqq.*

[12] A rule in the United States, not confined to ships, but extended to persons, in *The Max Morris*, 137 U. S. (30 Davis) 1. See this case considered, *ante*, 179.

[13] *The Johann Friedcrich*, 1 W. Rob. (Adm.) 37 ; "but," Dr. Lushington adds,

therefore, where in an action *in personam* brought by the owners of a British vessel against the owners of a Spanish vessel, the defendants pleaded that they were Spanish subjects, and that if there was any negligence in this navigation of their ship it was negligence for which the master and crew alone were liable by the law of Spain, they were held to disclose no defence [1] in law.

Effect of the Judicature Act.

By the Supreme Court of Judicature Act, 1873,[2] s. 25, sub-s. 9, where the rules of the Admiralty Court and the common law courts are different, the rule of the Admiralty is to be followed. So that in the case of a collision between two ships,[3] where there has been a want of due diligence or of skill on both sides, whether the action is brought in the Admiralty Division or in the Queen's Bench Division, in both cases the loss is to be divided equally.

Caution.

One caution must be observed. The actual transgression imputed must be ascertained to have been in fact to some extent—to what extent is immaterial [4]—the cause of the accident. This is matter of proof. The question of *onus* then becomes of importance.

The "*Fenham*" [5]

The "Fenham."

was the case of a collision between a steamship and a sailing vessel where the steamship was in fault. It was proved that the sailing vessel had not complied with certain Admiralty regulations about lights; and it was contended that this made the negligence contributory. Lord Romilly, delivering the judgment of the Privy Council, considered that the omission to exhibit lights might be immaterial if the absence of lights was shown not to have conduced to the collision. Proof having been given of the absence of regulation lights, the burden lay on the ship so in default to show that the default was not the cause of the collision.

Lord Blackburn, in *The* "*Margaret*," [6] though not dissenting from this rule as applied in the case of *The* "*Fenham*," did not consider it

Lord Blackburn in *The "Margaret."*

" in cases of mariners' wages, whoever engages voluntarily to serve on board a foreign ship, necessarily undertakes to be bound by the law of the country to which such ship belongs."

[1] *The Leon*, 6 P. D. 148; *The Wild Ranger*, Lush. 553; *The Zollverein*, Swa. (Adm.) 96.

[2] 36 & 37 Vict. c. 66.

[3] By the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 742, "ship" includes every description of vessel used in navigation not propelled by oars. *The Andalusian*, 3 P. D. 182. *The Mac*, 7 P. D. 126. The Merchant Shipping Act, 1894, ss. 2, 4, and 24, only applies to British ships, but not so the Bills of Sale Acts. *Union Bank of London* v. *Lenanton*, 3 C. P. D. 243; *Gapp* v. *Bond*, 19 Q. B. D. 200; *The Spirit of the Ocean*, 34 L. J. (Adm.) 74. What passes to a mortgagee under the word "ship" is considered *Coltman* v. *Chamberlain*, 25 Q. B. D. 328. By 24 Vict. c. 10, s. 2, "ship" means "any description of vessel used in navigation not propelled by oars." A "dumb-barge" is not a vessel within 27 & 28 Vict. c. clxxviii., though it is such within the Harbours, Docks and Piers Clauses Act, 1847 (10 & 11 Vict. c. 27), s. 3; *Hedges* v. *London and St. Katharine Docks Co.*, 16 Q. B. D. 597. See also *Sewell* v. *British Columbia Towing and Transportation Co.*, 9 Can. S. C. R. 527, 550. In *Ex parte Ferguson and Hutchinson*, L. R. 6 Q. B. 291, Blackburn, J., [illegible] orted thus: "The argument against the proposition is one which I have hea[rd] frequently—viz., where an Act says certain words shall include a certain th[ing] at the words must apply exclusively to that which they are to include. That [is] so; the definition given of a 'ship' is in order that 'ship' may have a more extensive meaning." In that case a "coble" was held to be a ship. Blackburn, J.'s, principle of construction is also explained by Lord Selborne, C., in *Robinson* v. *Barton Eccles Local Board*, 8 App. Cas. 801. *Mayor, &c. of Southport* v. *Morriss*, [1893] 1 Q. B. 359, considers what is "a vessel used in navigation." A gas-float shaped like a boat, but neither intended nor fitted to be navigated, is not a "ship": *Wells* v. *Owners of Gas Float Whitton* (No. 2), [1897] A. C. 337. As to Admiralty jurisdiction, *The* "*Zeta*," [1893] A. C. 468. *Ante*, 1080.

[4] *Dowell* v. *General Steam Navigation Co.*, 5 E. & B. 195. [5] L. R. 3 P. C. 212.

[6] (*Cayzer* v. *Carron Co.*), 9 App. Cas. 873, 882, cited by Smith, L.J., in *H.M.S. Sans Pareil*, [1903] P. 283, showing that the common law doctrine was applicable there.

applied in the case then before the House of Lords, where the contributory negligence was non-observance of a regulation about rate of speed. There, nevertheless, Lord Watson held that: "A vessel which is proved to have disregarded these precautions," that is, those pointed out by the rule there under discussion, "must accept the *onus* of showing that the neglect of them did not contribute to any collision or damage which may have occurred at the time or subsequently."

The Ovingdean Grange.

The "Margaret" was distinguished in *The Ovingdean Grange*,[1] on the ground that the ship with which *The Ovingdean Grange* came into collision, *The Forsete*, was wrongly where she was at the time of the collision, and by being so hampered *The Ovingdean Grange*. This wrongful act "did in fact contribute to the difficulty of *The Ovingdean Grange*, and cast upon her a burden greater than in point of law she is bound to bear; that is to say, cast upon her the burden of using more than ordinary care to avoid collision with *The Forsete*; in other words, he [the judge in the court below] finds that *The Ovingdean Grange* could not by ordinary care have avoided collision with *The Forsete*. If that be the fact it does not matter that *The Ovingdean Grange* was negligent, because had she been diligent, had she used ordinary care, the collision would nevertheless have occurred." Both ships were accordingly held to blame.[2]

Breach of rules of navigation imports liability.

There is another class of cases where the rule is statutory, and there is a provision that a breach of the rules of navigation shall in itself be deemed evidence of negligence.[3] Even here, though the party guilty of infringement is deemed to be blameworthy, he may still exonerate himself by showing that the infringement could not possibly have contributed to the collision,[4] or that his action was the result of necessity.[5]

The "Arklow."

In *The "Arklow,"*[6] Sir James Hannen, delivering the judgment of the Privy Council in the case of a non-statutory regulation, stated the principle applicable to be "that if the absence of due observance of the rule can by any possibility have contributed to the accident, then that the party in default cannot be excused."[7] To this, as we have just seen, there must be a rider, or rather, perhaps, the expression of a condition implied in the rule, that the party infringing is not to be shut out from showing that the infringement could not have contributed to the injury; failing this, he is to be held liable; and, in addition, a limitation of the phrase "any possibility"[8] to a possibility working out

A rider to the rule in *The "Arklow."*

1 [1902] P. 208, 214.

2 Cp. *Owners of SS. Chittagong* v. *Owners of SS. Kostroma*, [1901] A. C. 597.

3 *The Khedive*, 5 App. Cas. 876, where Lord Blackburn discusses s. 17 of 36 & 37 Vict. c. 85, re-enacted as s. 419 of the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60); *The Love-Bird*, 6 P. D. 80, ship without a fog-horn having sailed before regulations requiring one to be supplied had come into force, with knowledge that the regulations were coming into force within a few days and before her return; *The Pennsylvania*, 23 L. T. (N. S.) 55; *The Steamship Westphalia*, 24 L. T. (N. S.) 75; *The Devonian*, [1901] P. 221; *The Emmy Haase*, 9 P. D. 81; "The Court is not bound to hold that a man should exercise his judgment instantaneously, a short, but a very short, time must be allowed him for this purpose": *The "Ngapoola,"* [1897] A. C. 391, 393.

4 *The "Fanny M. Carvill,"* reported as a note in 13 App. Cas. 455, is approved in *The "Hochung,"* 7 App. Cas. 512. *The Englishman*, 3 P. D. 18, is a case of failure to comply with the regulations, but no possibility of the collision occurring therefrom. In *The Mary Hounsell*, 4 P. D. 204, infringement was deemed to show fault; *The Hermod*, 62 L. T. 670. *Post*, 1091.

5 *The "Arratoon Apcar,"* 15 App. Cas. 37.

6 9 App. Cas. 136.

7 *L.c.* 139.

8 *The Breadalbane*, 7 P. D. 186; cp. *The Vera Cruz*, 9 P. D. 88; *The Khedive*, 5 App. Cas., per Lord Watson, 991.

in the normal course of things. The cases then come out quite consistently. The violation of a regulation, *e.g.*, the absence of lights,[1] which suggests a contributing cause to the accident, throws the *onus* on the plaintiff.[2] The rule stated.

If the breach is the breach of a regulation which in the natural sequence of cause and effect would not conduce to the accident,[3] the *onus* of proof is unaffected. The law regards only those things that are normal, not the extraordinary.[4] But if the breach is by statute deemed blameworthy, the *onus* is on the plaintiff to disprove such alleged breach, whether it would or would not in the natural sequence of cause and effect have conduced to the accident.[5] The effect, then, of the breach of an Admiralty regulation is to bring under the head of negligence those cases which, but for the regulation, are equally consistent with the absence of negligence; leaving unaffected those cases where the facts negative the presumption of negligence except in the case of statutory enactment. Effect.

In *Dundee*[6] Lord Stowell defined nautical negligence as "a want of that attention and vigilance which is due to the security of other vessels that are navigating the same seas, and which, if so far neglected as to become, however unintentionally, the cause of damage of any extent to such vessels, the maritime law considers as a dereliction of bounden duty, entitling the sufferer to reparation in damages." Nautical negligence defined in the *Dundee*.

The "attention and vigilance" necessary is not "extraordinary skill or extraordinary diligence, but that degree of skill and that degree of diligence which is generally to be found in persons who discharge their duty";[7] or, to quote Lord Blackburn,[8] "to take reasonable care and to use reasonable skill to prevent it [the ship] from doing injury." Reasonable skill is not a fixed but a variable quantity, increasing with the need. "The law throws upon those who launch a vessel the obligation of doing so with the utmost precaution, and giving such a notice as is reasonable and sufficient to prevent any injury happening from the launch; and, moreover," "the burden of showing that every reasonable precaution has been taken, and every reasonable notice given, lies upon her and those managing the launch."[9] "Reasonable precaution" is "the utmost precaution under such circumstances."[10] Rule of diligence. Reasonable skill a relative term.

[1] *The "Fenham,"* L. R. 3 P. C. 212.

[2] Per Sir James Colville, *The "Velasquez,"* L. R. 1 P. C. 494, 499.

[3] *Cayzer* v. *Carron Co.*, 9 App. Cas. 873.

[4] Per Parke, B., *Hawtayne* v. *Bourne*, 7 M. & W. 598. *Ad ea quæ frequentius accidunt leges adaptantur*, 2 Co. Inst. 137. Cp. D. 50, 17, 64: *ea quæ raro accidunt, non temere in agendis negotiis computantur.*

[5] *The Khedive*, 5 App. Cas. 876. *The Pennsylvania*, 19 Wall. (U. S.) 125, decides that where there has been a positive breach of a statute, it must be shown, not merely that it probably did not contribute to the accident, "but that certainly it did not." In the case in question this was apparently impossible, and so the liability was fixed. Cp. *The Chilian*, 4 Mar. Law Cas. N. S. 473. In *The Benares*, 9 P. D. 16, the Court of Appeal distinguished *The Khedive*, and held that "it must be shown to the satisfaction of the Court, if there has been an infringement, that the circumstances of the case made a departure from the regulations necessary. It is not enough, perhaps, to show that what the captain did was reasonable and advisable; it must be shown to be necessary"; so that where a collision is inevitable from the first, the regulations do not apply: *The Buckhurst*, 6 P. D. 152.

[6] 1 Hagg. (Adm.) 120.

[7] Per Dr. Lushington, *The Thomas Powell* v. *The Cuba*, 2 Mar. Law Cas. 344.

[8] *The Khedive*, 5 App. Cas. 876, 890. Lord Blackburn adds: "A man may not do the right thing, nay may even do the wrong thing, and yet not be guilty of neglect of his duty, which is not absolutely to do right at all events, but only to take reasonable care and use reasonable skill."

[9] *The Andalusian*, 2 P. D. 231, 233.

[10] Per Butt, J., *The George Roper*, 8 P. D. 120.

Common law rule of negligence applies.

There is no essential difference between negligence at common law and negligence by the rules of the Admiralty; if a rule of common sense "what may be called the common law" is transgressed, liability attaches, though no Admiralty rule has been made in the matter.[1]

Perilous alternatives.

The principle that a person, who causes another to be so placed by his fault, as to constrain him to choose between perilous alternatives, thereby renders himself liable for those consequences[2] is of frequent application in Admiralty cases, and must be taken as limiting the rule just mentioned—of reasonable skill in the mariner; since, if one is suddenly jeopardised by the fault of another, that other is responsible for the consequences of the action of the imperilled person in the peril in which he has placed him.[3] And "any Court ought to make the very greatest allowance for a captain or pilot suddenly put into such difficult circumstances; and the Court ought not, in fairness and justice to him, to require perfect nerve and presence of mind enabling him to do the best thing possible."[4] "With this," said Lord Herschell,[5] "I entirely agree, though, of course, the application of the principle laid down must vary according to the circumstances." And in the same case Lord Morris observed:[6] "In my opinion, large allowance should be made for sudden consideration whether directory rules should be disobeyed in order to avoid collision, and when such collision is caused by the misconduct of the party complaining, there should, in my opinion, be very clear proof of contributory negligence."

Rule approved by Lord Herschell and by Lord Morris.

American rule stated.

In America the same rule has been laid down, though the expression is different. "If," it is said,[7] "one vessel is brought into immediate jeopardy by the fault of another, the fact that an order other than that which was given might have been more fortunate will not prevent the recovery of full damages."

Imminency and nature of the peril to be taken into account.

The imminency and the nature of the peril are alike to be taken into account in estimating the amount of allowance that is to be made for

1 Per Lord Blackburn, *Cayzer* v. *Carron Co.*, 9 App. Cas. 880.

2 *Jones* v. *Boyce*, 1 Sturk. (N. P.) 493, 495.

3 *Kissam* v. *The Albert*, cited Parsons, Law of Shipping, vol. i. 533, where a vessel was thrown against another vessel by the swell caused by a passing steamer, and was held not liable, though she ripped up the timbers of the vessel through carrying her anchor in a way prohibited by the harbour regulations of the port. See, further, *The Sisters*, 1 P. D. 117; *The Industrie*, L. R. 3 A. & E. 303; *The Hibernia*, 31 L. T. (N. S.) 805; *The* "*Marpesia*," L. R. 4 P. C. 212; *The Adalia*, 22 L. T. (N. S.) 74; *The C. M. Palmer*; *The Laraax*, 2 Mar. Law Cas. N. S. 94.

4 Per Lord Esher, M.R., *The Bywell Castle*, 4 P. D. 220. Cp. *The Utopia*, [1893] A. C. 492. In *The* "*Agra*" *and* "*Elizabeth Jenkins*," L. R. 1 P. C. 504, it is said, "if a ship bound to keep her course under the 18th rule justifies her departure from that rule under the words of the 19th rule, she takes upon herself the obligation of showing both that her departure was at the time it took place necessary, in order to avoid immediate danger, and also that the course adopted by her was reasonably calculated to avoid that danger." *The* "*Jesmond*" *and The* "*Earl of Elgin*," L. R. 4 P. C. 1; *The* "*Rhondda*," 8 App. Cas. 549; *The Servia*, 149 U. S. (42 Davis) 144; *The Thorsa*, 20 Rettie, 876, affd. [1894], A. C. 116.

5 *The* "*Tasmania*," 13 App. Cas. 226.

6 *L.c.* 238. *The* "*Ngapoota*," [1897] A. C. 391; *Hine Brothers* v. *Clyde Trustees*, 15 Rettie, 498.

7 *The Maggie J. Smith*, 123 U. S. (16 Davis) 355; *The Elizabeth Jones*, 115 U. S. (5 Davis) 514; and *The Blue Jacket*, 144 U. S. (37 Davis) 371, where, at 394, distinguishing the earlier case of *The Manitoba*, 122 U. S. (15 Davis) 97, it is said, "in the former [case] the question was between two steam vessels, while in the latter, it is between a steam vessel and a sailing vessel. In the case of *The Manitoba*, the courses of the two steam vessels were not such as to make it the duty of the one more than of the other to avoid the other, or to make it the duty of the one rather than of the other to keep her course; and there was, in regard to the courses of both the steam vessels, such risk of collision that the obligation was upon both to slacken speed, or, if necessary, stop and reverse. But in the present case the duty was wholly on the ship to keep her course, and wholly on the tug to keep out of the way of the ship."

departing from the right course in a critical position. Lord Blackburn, in *The Khedive*,[1] says:[2] "I agree that when a man is suddenly and without warning thrown into a critical position, due allowance should be made for this, but not too much. If, to take the example Lord Justice James gives, the driver of a van cracking his whip makes the horses of a carriage suddenly unmanageable, the fact that the driver of the carriage pulled the wrong rein would be much less cogent evidence of want of reasonable skill or of reasonable care on his part, than if he did the same thing when driving along in the ordinary way, but it would still be evidence."[3]

James, L.J.'s, illustration in *The Khedive*.

But the plea of necessity must be made out. Where, for example, a vessel which is navigated with reckless negligence by an ignorant and incompetent crew, comes into collision with another vessel, whose only fault is not slackening speed in face of the irregularities of the oncoming vessel, such other vessel cannot be absolved from the statutory penalties.[4]

Neither ship is liable where the damage has arisen from inevitable accident.[5]

Inevitable accident.

"Inevitable accident" has been defined:[6] "Where one vessel doing a lawful act, without any intention of harm, and using proper precaution to prevent danger, unfortunately happens to run into another vessel." To constitute an inevitable accident, "it was necessary that the occurrence should have taken place in such a manner as not to have been capable of being prevented by ordinary skill and ordinary diligence. We were not to expect extraordinary skill or extraordinary diligence, but that degree of skill and that degree of diligence which is generally to be found in persons who discharge their duty."[8] In *The "Marpesia,"*[9] the definition is something "done or omitted to be done which a person exercising ordinary care, caution and maritime skill, in the circumstances, either would not have done or would not have left undone, as the case may be."

"Ordinary care and ordinary skill" the test.

The prominent consideration in these cases is not the inevitability of the accident, viewed from the point of the actual motive power that caused it, so much as whether the exertion of "ordinary care and ordinary skill" could have prevented it; not by reference merely to the moment of the occurrence, but to any earlier stage in which the adoption of measures reasonably might have been counted on to render the occurrence less probable.[10]

A collision is said to occur by inevitable accident when both parties have used every means in their power with adequate nautical skill and due care and caution to prevent its occurrence, and have been unable to do so.[11]

1 5 App. Cas. 876. 2 *L.c.* 891.

3 In *The Bywell Castle*, 4 P. D. 226, Brett, L.J., sums up the rule: "The captains of ships are bound to show such skill as persons of their position with ordinary nerve ought to show under the circumstances." 4 *The "Arratoon Apear,"* 15 App. Cas. 37.

5 *Ante*, 1085; *Woodrop Sims*, 2 Dodson (Adm. Cas.), 83, 85; Abbott, Merchant Ships (14th ed.), 908. 6 Per Dr. Lushington, *The Europa*, 14 Jur. 629.

7 *The Thomas Powell* v. *The Cuba*, 2 Mar. Law Cas. 344; *Lack* v. *Seward*, 4 C. & P. 106. 8 Adopted in *Fawkes* v. *Poulson*, 8 Times L. R. 725 (C. A.).

9 L. R. 4 P. C. 220, where, also, the definition in *The Virgil*, 2 W. Rob. (Adm.) 205, is cited. The definition in *The "Marpesia"* was adopted by Fry, L.J., in *The Merchant Prince*, [1892] P. 190.

10 *The Virgil*, 2 W. Rob. (Adm.) 201; *The Uhla*, 37 L. J. Adm. 16 *n.*; *The Hibernia*, 4 Jur. (N. S.) 1244.

11 *The Lochlibo*, 3 W. Rob. (Adm.) 310; *The Calcutta*, 21 L. T. (N. S.) 768; *The "Marpesia,"* L. R. 4 P. C. 212, 220; *The Secret*, 26 L. T. (N. S.) 670. Collision was

Lord Esher, M.R.'s, contention in *The Schwan.*

In *The Schwan—The Albano*,[1] Lord Esher, M.R., wished to depart from the definitions of "inevitable accident" above cited, and to hold, on the authority of *The Annot Lyle*[2] and *The Indus*,[3] that the true definition is the happening of something over which the injurious person "had no control, and the effect of which could not have been avoided by the greatest care and skill."[4] If this were so, a curious state of things would arise. To render a defendant ship liable, negligence—that is, want of reasonable care and skill—must be proved by the plaintiff. If, however, the defendant were to set up "inevitable accident" as his defence, he would thereby take on himself the obligation of proving considerably greater diligence than if he refrained, and contented himself with showing he used all reasonable care and skill in the circumstances. On showing he used "ordinary care and ordinary skill," he would be exonerated. If, however, he set up "inevitable accident," and proved facts which showed he was not negligent, he might still be held to have failed in his defence, if Lord Esher, M.R.'s, view is right, and possibly to be liable for the costs of proving a defence which, though inadequate under one name, would still effectually dispose of the suit against him. The majority of the Court (Fry and Lopes, L.JJ.), however, adhered to the definition adopted by the Privy Council in *The "Marpesia"*;[5] Lopes, L.J., added: "I know no distinction as regards inevitable accident between cases which occur on land and those which occur at sea."[6]

Overruled by Fry and Lopes, L.JJ.

Onus.

The *onus* of proof, where the defendant alleges inevitable accident, is, in the first instance, on the plaintiff, who has to establish a *primâ facie* case either of negligence or want of seamanship. It is not till this is done that any case is raised against the defendant. Then the *onus* of proving inevitable accident lies upon him.[7] He has to show that the cause of the accident was one he could not avoid. "If he cannot tell you what the cause is, how can he tell you that the cause was one the result of which he could not avoid?"[8] "The burden," says Fry, L.J.,[9] "rests on the defendants to show inevitable

held to have occurred through "inevitable accident" in the following cases: *The Shannon*, 1 W. Rob. (Adm.) 463, where a steamer going against the stream collided against a brig coming down at night; *The "William Lindsay,"* L. R. 5 P. C. 338, where a ship fastened to a buoy in pursuance of port regulations came into collision through the parting of a hand round the buoy; *The Peerless*, Lush. 30, the catching of the cable on the windlass when the anchor was let go; *The London*, 1 Mar. Law Cas. 398, cable parting in wind; *The Virgo*, 3 Mar. Law Cas. N. S. 285, breaking of steerage gear through latent defect; *The Buckhurst*, 6 P. D. 152, sailing ship dragging anchor with rudder damaged; *The Swallow*, 3 Mar. Law Cas. N. S. 371, dumb-barge driving with the tide; *The Duke of Cornwall*, 1 Pritch. Adm. Dig. (3rd ed.), 201, steamer navigating at proper rate causing a swell whereby barge in exposed position was made to sink; *The Merchant Prince*, [1892] P. 9, in (C. A.) 179, steam steerage gear getting jammed. For the American cases see *The Morning Light*, 2 Wall. (U. S.) 550; *The Java*, 14 Wall. (U. S.) 189; *The Merrimac*, 14 Wall. (U. S.) 199. If there is negligence the accident is not inevitable, *The Platda*, 2 P. D. 34; *Sherman* v. *Mott*, 5 Bened. (U. S. Dist. Ct.) 372; *The Merrimac*, 14 Wall. (U. S.) 199; *The Chickasaw*, 41 Fed. R. 627. Master was held not to blame where moorings supplied by river authorities were insufficient in a storm, *Owners of the S.S. "Toward"* v. *Owners of the S. "Turkistan,"* 13 Rettie, 342. Injury to ship in harbour: *Mackenzie* v. *Stornoway Pier, &c. Commission*, 1907, S. C. 435; *SS. Fulwood* v. *Dumfries Harbour Commissioners*, 1907, S. C. 456.

[1] [1892] P. 419. *In re Ship Albano*, 8 Times L. R. 425 (C. A.). [2] 11 P. D. 114.

[3] 12 P. D. 46. [4] [1892] P. 429. [5] L. R. 4 P. C. 212, which Lopes, L.J. cites from the head note, and which is not identical with the judgment, at 220.

[6] [1892] P. 434; for a limitation of this statement, see per Dr. Lushington, *The Bolino*, 3 Notes of Cases, 210; *The "Marpesia,"* L. R. 4 P. C. 212, 219, where the suggested limitation did not arise; *The Annot Lyle*, 11 P. D. 114; *The Indus*, 12 P. D. 46. *The Benmore*, L. R. 4 A. & E. 132, overrules *The Thomas Lea*, 38 L. J. (Adm.) 37.

[7] *The "Marpesia,"* L. R. 4 P. C. 212.

[8] Per Lord Esher, M. R., *The Merchant Prince*, [1892] P. 188. [9] *L.c.* 189.

accident. To sustain that, the defendants must do one or other of two things. They must either show what was the cause of the accident, and show that the result of that cause was inevitable; or they must show all the possible causes, one or other of which produced the effect, and must further show, with regard to every one of these possible causes, that the result could not have been avoided. Unless they do one or other of these two things, it does not appear to me that they have shown inevitable accident." [1]

The second case put by Lord Stowell [2] is where there is blame on both sides; as to which the law "is now universally accepted as he stated it." [3] The Admiralty rule differs from the rule of the common law, and renders each liable to contribute half of the joint damage.[4] A further distinction from the rule of the common law has been sought to be made. By the common law, though the plaintiff has contributed to the accident, he is not disentitled to recover if the negligence of the defendant was the proximate, and that of the plaintiff the remote, cause of the injury—that is, if the defendant could in the result, by the exercise of ordinary care and diligence, have avoided the mischief which happened, the plaintiff's negligence will not excuse him.[5] It has been contended that, by Admiralty law, where there has been any negligence on the part of the plaintiff, that negligence is *primâ facie* to be reckoned as the cause in the event of a subsequent collision occurring.[6] As we have already incidentally seen,[7] there is no ground for this attempted distinction. Blame on both sides.

But before a vessel can be held in fault for a collision, negligence contributing to the accident, and not negligence merely, must be shown.[8]

The cases have been summed up as follows: [9] Cases summed up.

(1) A ship, A, may recover full damages against another, B, though she (A) has been guilty of negligence contributing to the collision, provided B could, with ordinary care, exerted up to the moment of the collision, have avoided it;

(2) A can recover nothing, though B was guilty of negligence contributing to the collision, if A, by ordinary care exerted up to the moment of the collision, could have avoided it.

(3) A may recover half her loss, though she has been guilty of negligence contributing to the collision, and rendering the collision unavoidable except by extraordinary care on B's part, if B has been guilty of negligence contributing to the collision and rendering it unavoidable except by extraordinary care on A's part; and

(4) In the last case B may also recover half her loss.

Where the injuring vessel is alone in fault the owners of the injured vessel are entitled to full compensation—*restitutio in integrum* [10]—as nearly as may be for the injury their vessel has suffered. They may recover for the loss of her use while laid up for repairs; and, the market price for her use where such exists, is the test of what they may Injuring vessel alone in fault.

[1] In the case cited the alleged inevitable accident arose from failure to act of steam steering gear. [2] *Woodrop Sims*, 2 Dodson (Adm. Cas.), 85. *Ante*, 1085.

[3] Abbott, Merchant Ships (14th ed.), 911. [4] *Vaux* v. *Schaffer*, 85 Moo. P. C. C. 7.

[5] *Radley* v. *L. & N. W. Ry. Co.*, 1 App. Cas. 754.

[6] *The "Fenham,"* L. R. 3 P. C. 212; *Hay* v. *Le Neve*, 2 Shaw (H. L. Sc.), 395.

[7] *Ante*, 1092

[8] *Cayzer* v. *Carron Co.*, 9 App. Cas. 873; *The "Lord Summarez,"* 6 Notes of Cases, 699.

[9] Marsden (5th ed.), Collisions at Sea, 21; *The Monte Rosa*, [1893] P. 23, 30.

[10] *The "City of Peking,"* 15 App. Cas. 438, 442. *Post*, 1111.

recover under this head. Where there is no market price evidence is admissible of what she would have earned if not disabled; from this must be deducted the cost of earning it. In no case may the damages exceed the net profit, and the *onus* to prove them lies on the plaintiff.[1]

Onus.

Lord Wensleydale in *Morgan* v. *Sim.*

As to the *onus probandi* in cases of collision by the fault of both parties, Lord Wensleydale says, in *Morgan* v. *Sim*:[2] "There is no question or doubt about the law. The party seeking to recover compensation for damage must make out that the party against whom he complains was in the wrong. The burden of proof is clearly upon him, and he must show that the loss is to be attributed to the negligence of the opposite party. If at the end he leaves the case in even scales, and does not satisfy the Court that it was occasioned by the negligence or default of the other party, he cannot succeed."[3]

Rule in Court of Admiralty.

No costs.

The rule of the Admiralty was that where both vessels were to blame neither of them should gain by any litigation in the matter,[4] and so no costs should be awarded to either. The Privy Council took that view, and adopted the rule in the case of appeals arising in exceptional circumstances.[5] After the coming into operation of the Judicature Acts, in *The Swansea* v. *The Condor*,[6] James, L.J., in giving the judgment of the Court of Appeal on a question of costs, doubted whether it could be right that the rule as to costs should differ in two branches of the High Court of Justice, and said that "in future, the rule will be that the costs in every case follow the result, as in other branches of the

The Swansea v. *The Condor.*

The Milanese.

High Court." In the subsequent case of *The Milanese*[7] the same Lord Justice said: "We are of opinion that, wherever we vary the decision of the Court below by finding both vessels to blame, the rule should be that no order is made as to costs either below or on appeal—that is, that each party should bear their own costs of the whole litigation."

The Hector.

Subsequently, in *The Hector*,[8] Brett, L.J., said: "The better way to solve the matter is, I think, to say that in order to enforce care at sea, where it is so important that care should be observed, the Court of Appeal will adopt the rule of the Court of Admiralty and the rule of the Privy Council to this extent, that, unless in some exceptional cases, such as I have mentioned"—*i.e.*, where the judgment of the Court below has been that both vessels are to blame, and that judgment is affirmed—"they will not, where both sides have been to blame, allow either ship to gain anything by the litigation." This rule has been said to be a "matter of discipline,"[9] but Cotton, L.J., preferred to regard

[1] "*The Argentino*," 13 P. D. 191, affd. H. of L. 14 App. Cas. 519; *The Gazelle*, 2 W. Rob. (Adm.) 279; *The Clarence*, 3 W. Rob. (Adm.) 283; *The* "*Potomac*," 105 U. S. (15 Otto) 630. For damages to a dredger in collision, see *The Marpessa*, [1907] A. C. 241.

[2] 11 Moo. P. C. C. 311; *Ligo*, 2 Hagg. (Adm.) 356. See, too, per Dr. Lushington, *The* "*Sunuland*," 2 Ecc. & Ad. (Spinks), 107.

[3] As to the burden of proof on an allegation that a ship in a collision was in stays, *The Sea Nymph*, Lush. 23. But a ship so placed ought to execute any practicable manœuvre to avoid a starboard tacked vessel; *Wilson* v. *Canada Shipping Co.*, 2 App. Cas. 389, *s.c. sub nom. The Lake St. Clair* v. *The Underwriter*, 36 L. T. (N. S.) 155. Where a fishing boat was fast to her nets, see *The Columbus*, 1 Pritchard, Adm. Dig. (3rd ed.) 239; *The Bottle Imp*, 42 L. J. Adm. 48. Where the ship had hove to, see *The Eleanor* v. *The Alma*, 2 Mar. Law Cas. 240. *The Rosalie*, 5 P. D. 245. As to *onus* of proof, *ante*, 114.

[4] *Tennall* v. *Garner*, 1 Cr. & M. 21.

[5] *The* "*Marpessa*," L. R. 4 P. C. 212; *The* "*Islay*" v. *Patience*, 20 Rettie, 221.

[6] 4 P. D. 115, 120. *The Naples*, 11 P. D. 121.

[7] 43 L. T. 110, affirmed in H. of L. 45 L. T. 151.

[8] 8 P. D. 218, 220.

[9] *L.c.*, per Bowen, L.J., 221. In *The Quickstep*, 15 P. D. 196, 202, the rule laid down in *The Hector* was followed. *The* "*Octo*," 14 App. Cas. 670, followed in *The London*, [1905] P. 152, allowed a successful appellant the costs of his appeal.

the rule as established rather by authority than by reason or sound principle.

If by the negligence of one vessel another is driven against a third, both vessels will have an action against the negligent ship.[1] The third will only have an action against the second if she were guilty of negligence; and allowance must be made for a captain or pilot suddenly put into difficult circumstances; for the Court does not require perfect nerve or presence of mind, and exact from the responsible person the doing in an emergency suddenly arising the very best thing possible.[2]

Where through the negligence of one vessel another is driven against a third.

There are cases where the plaintiff is unable to identify the guilty ship, as in *The* "*Evangelismos*,"[3] where the vessel causing the damage got away. Subsequently, from the appearance of a vessel in port, the owners of the damaged vessel caused an arrest to be made, but failed to identify the vessel seized, and the Admiralty Court dismissed the action with costs, though they refused to award damages for the wrongful arrest. The Privy Council sustained this decision, holding, nevertheless, that "undoubtedly there may be cases in which there is either *mala fides* or that *crassa negligentia*, which implies malice, which would justify a Court of Admiralty giving damages, as in an action brought at common law damages may be obtained." "The real question in this case, following the principles laid down with regard to actions of this description, comes to this—Is there or is there not, reason to say, that the action was so unwarrantably brought, or brought with so little colour or so little foundation, that it rather implies malice on the part of the plaintiff, or that gross negligence which is equivalent to it?" This view was approved in *The* "*Strathnaver*."[4]

Where the injurious vessel cannot be identified. *The* "*Evangelismos*."

Approved in *The* "*Strathnaver*."

Beyond all doubt the owners of a ship or vessel injured by collision may proceed to recover compensation, at their election, either against the owners or against the master personally, or against the ship herself.[5]

Remedies of owners of ships injured by collision.

[1] *The Sisters*, 1 P. D. 117; *The Industrie*, L. R. 3 A. & E. 303; *The Kjobenhavn*, 2 Mar. Law Cas. N. S. 213. *The Englishman and The Australia*, [1894] P. 239: a tug while towing a vessel comes into collision with a third.

[2] *The Bywell Castle*, 4 P. D. 219, see per Brett, L.J., 226: "Any Court ought to make the very greatest allowance for a captain or pilot suddenly put into such difficult circumstances." *Ante*, 48.

[3] 12 Moo. P. C. C. 352.

[4] 1 App. Cas. 58.

[5] *The Volant*, 1 W. Rob. (Adm.) 383, 387; Maude and Pollock, Merchant Shipping (4th ed.), 619, 620; *The* "*Atlas*," 93 U. S. (3 Otto) 302. The law and practice in a proceeding in Admiralty *in rem* are laid down in *The* "*Bold Buccleugh*," 7 Moo. P. C. C. 267, which is considered in *The* "*Rio Tinto*," 9 App. Cas. 356; *The City of Mecca*, 6 P. D. 106, and *Currie* v. *M'Knight*, [1897] A. C. 97, and there held to apply to Scotland; *The Ripon City*, [1897] P. 226. *The Veritas*, [1901] P. 304, is a decision on priorities between two salvors and the owners of property damaged by the wreck in the course of salvage operations. Maritime lien is treated in *The Henrich Björn*, 11 App. Cas. 270; *The* "*Sara*," 14 App. Cas. 209. For the law in the United States, see *The J. E. Rumbell*, 148 U. S. (41 Davis) 1. A maritime lien is not indelible, but may be lost by negligence or delay where the rights of third parties are compromised; where reasonable diligence is used (which is a question of fact determinable upon the particular circumstances), and the proceedings are had in good faith, the lien travels with the thing into whatsoever possession it may come: *The Fairport*, 8 P. D. 48. The Merchant Shipping Act, 1889 (52 & 53 Vict. c. 46), was passed to restore the law to the state it was supposed to be in with regard to maritime lien previously to the decision in *The* "*Sara*," 14 App. Cas. 209. *Morgan* v. *Castlegate Steamship Co.*, *The* "*Castlegate*," [1893] A. C. 38, is a decision of the House of Lords on the meaning of "disbursements made by the master on account of the ship" under sec. 1 of the Act. In *The Oriental*, [1894] P. 271, affirmed [1895] P. 49, the lien conferred by the Act is said to be only in respect of those disbursements with regard to which a lien was supposed to have been created by the Admiralty Court Act, 1861 (24 Vict. c. 10), s. 10, and the test of whether disbursements are within this class is, whether they are such as would, without express authority, have pledged the owners' credit. Sec. 1 of the Act of 1889

The ship's liability, it may be noted, is only to the extent of her value at the time she is arrested, and not for the added value of repairs done upon her.[1] It is equally beyond doubt that where neither party is in fault and the damage results from unavoidable accident, the loss lies where it falls, and has to be borne by the injured vessel.[2] A further exception has to be noted where the vessel in fault is the property of the Sovereign of a foreign State and in the hands of officers employed by him.[3]

The Parlement Belge.

In *The Parlement Belge*,[4] it was contended, in accordance with analogies in the old law,[5] that a ship may be treated as a delinquent *per se* without reference to the liability of the owners in respect of negligence. If the law ever admitted a liability of this sort it no longer allows it. In giving judgment, Brett, L.J., says: "In a claim made in respect of a collision, the property is not treated as the delinquent *per se*. Though the ship has been in collision, and has caused injury by reason of the negligence or want of skill of those in charge of her, yet she cannot be made the means of compensation if those in charge of her were not the servants of her then owner, as if she was in charge of a compulsory pilot. That is conclusive to show that the liability to compensate must be fixed, not merely on the property but also on the owner through the property." And this is cited with approbation in the House of Lords in *The "Castlegate"* [6] and in the Privy Council in *The "Utopia"* [7] as correctly expressing the English law.

Opinion of Brett, L.J.

Law in the United States.

In the United States there is very high authority the other way. Story, J., in giving the judgment of the Supreme Court in *United States* v. *The Cargo of the Brig Malek Adhel*, quotes Marshall, C.J.,[8] as follows: [9] "This is not a proceeding against the owner; it is a proceeding against the vessel for an offence committed by the vessel; which is not the less an offence and does not the less subject her to forfeiture because it was committed without the authority and against the will of the owner. It is true that inanimate matter can commit no offence. But this body is animated and put in action by the crew, who are guided by the master. The vessel acts and speaks by the master. She reports herself by the master. It is therefore not unreasonable that the vessel should be affected by this report"; and again: "The thing is here primarily considered as the offender, or rather the offence is primarily attached to the thing." [10]

Opinion of Marshall, C.J., adopted by Story, J.

is embodied in the consolidating Act, the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 167, sub-s. (2). The master's lien does not take priority of that of seamen, who are entitled to recover their wages from him: *The Salacia*, Lush. 545; nor of a bottomry bond, on which he is personally liable: *The William*, Swa. (Adm.) 346; *The Jonathan Goodhue*, Swa. (Adm.) 524. The seamen's lien for wages is secured by the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), ss. 164–167.

1 *The St. Olaf*, L. R. 2 A. & E. 360.

2 *The Shannon*, 1 W. Rob. (Adm.) 463, 470; *The Itinerant*, 2 W. Rob. (Adm.) 236, 243. As to costs, see *The "Marpesia,"* L. R. 4 P. C. 212, 221, commenting on *The London*, B. & L. 82; *The Lochlibo*, 3 W. Rob. (Adm.) 310, 318; *The Oakfield*, 11 P. D. 34.

3 *The Parlement Belge*, 5 P. D. 197; *The Jassy*, [1906] P. 270. But where a foreign Sovereign is a plaintiff, whose vessel cannot be seized, he may yet be ordered to give security for damages: *The Newbattle*, 10 P. D. 33.

4 5 P. D. 197, 218.

5 Holmes, The Common Law, 26–33.

6 [1893] A. C. 38, 52.

7 [1893] A. C. 492, 499.

8 *United States* v. *The Schooner Little Charles*, 1 Brock (U. S.) 347, 354.

9 2 How. (U. S.) 210, 234. *The Mars*, 6 C. Rob. (Adm.), 79, 87.

10 *The Palmyra*, 12 Wheat. (U. S.) 14.

Rules of Navigation.

In considering cases of collision the precautions taken by the vessel that is run down must have very considerable weight in determining the rights and liabilities of the respective parties. These precautions are to be judged partly by reference to considerations of nautical care and skill, and partly to general or national usage.[1] There are some general and broad rules the neglect or observance of which goes far to determine the liability or immunity respectively.

Precautions taken of weight in estimating liability.

The cardinal principle is that the master is bound to take all reasonable precautions—material as well as moral—against his ship doing damage to others.[2] "The true rule," as laid down in *The "William Lindsay,"*[3] "is that he must take all such precautions as a man of ordinary prudence and skill, exercising reasonable foresight, would use to avert danger in the circumstances in which he may happen to be placed." He is to use all due and proper care that his ship is free from defects likely to cause peril or in any way to render it unfit for the voyage that it is to go; but his obligation does not extend to render the ship secure against defects which no competent skill or care or foresight can detect or avert;[4] since, as Montague Smith, J., says in *Readhead* v. *Midland Ry. Co.*,[5] this would be "to promise the performance of an impossible thing, and would be directly opposed to the maxims of Law, *Lex non cogit ad impossibilia*[6]—*Nemo tenetur ad impossibilia.*"[7]

Duty of master in taking precautions.

Following this cardinal principle is another, that the rule of the road must be observed. British ships are rendered subject to certain statutory rules, now consolidated in the Merchant Shipping Act, 1894.[8]

Rules as to British ships.

Formerly, in the case of a collision occurring on the high seas between two foreign ships or between a British and a foreign ship, the statutory rules were not applicable, and the question of negligence had to be tried by the rules of general maritime law. This is stated by Best, C.J.:[9] "The custom proved is, that the ship which has the wind at large may go either to leeward or to windward, but that, as a general rule, she ought to expect that the ship which is close-hauled will keep to windward, and therefore she ought to go to leeward unless it is quite clear that she can go to windward with safety."

Collisions in which a foreign ship is concerned.

Lord Blackburn in *The Khedive*,[10] summarises the general duties applicable, apart from statutory enactment. "The duty which the

Lord Blackburn in *The Khedive*.

[1] Story, Bailm. § 611; *The Friends*, 1 W. Rob. (Adm.) 478, affirmed *sub nom. General Steam Navigation Co.* v. *Tonkin*, 4 Moo. P. C. C. 314; *The Lochlibo*, 3 W. Rob. (Adm.) 310, 319.

[2] Abbott, Merchant Ships (14th ed.) 953. The master's duties are not confined to avoiding injury to other vessels. As to submarine telegraphs, *Submarine Telegraph Co.* v. *Dickson*, 33 L. J. C. P. 139. As to oyster beds, *The Octavia Stella*, 6 Mar. L. Cas. N. S. 182; *The Swift*, [1901] P. 168. *Ante*, 1035.

[3] L. R. 5 P. C. 343; *The "Ocean Wave,"* L. R. 3 P. C. 205; *The Virgo*, 3 Mar. Law Cas. N. S. 285. In the earlier stages of *Clyde Navigation Co.* v. *Barclay*, 1 App. Cas. 790, it was contended that the ship was not properly manned, because, though the number of seamen on the trial ship was sufficient, yet they were not regularly constituted officers and crew. This point was abandoned in the House of Lords. *The C. M. Palmer*; *The Larnax*, 2 Mar. Law Cas. N. S. 94.

[4] *Lack* v. *Seward*, 4 C. & P. 106.

[5] L. R. 4 Q. B. 385.

[6] Co. Litt. 231 b. See per Willes, J., in *Lloyd* v. *Guibert*, L. R. 1 Q. B. 121; *Baily* v. *De Crespigny*, L. R. 4 Q. B. 185; *In re Arthur, Arthur* v. *Wynne*, 14 Ch. D., per Jessel, M.R., 608. *Ante*, 795.

[7] Cp. D. 50, 17, 185: *Impossibilium nulla obligatio est*; Story, Eq. Jur. § 1308.

[8] 57 & 58 Vict. c. 60, ss. 418–426.

[9] *Handayside* v. *Wilson*, 3 C. & P. 528, 531.

[10] 5 App. Cas. 890.

Court casts upon him who has the management and control of a ship at sea is the same as that which the law casts on those who have the management of a carriage on shore—viz., to take reasonable care and to use reasonable skill to prevent it from doing injury, yet that the different nature of the two things makes a great difference in the practical application of the rule. Much greater care is reasonably required from the crew of a ship who ought to keep a look-out for miles, than from the driver of a carriage who does enough if he looks ahead for yards; much more skill is reasonably required from the person who takes the command of a steamer than from one who drives a carriage."

International regulations.

The inconvenience felt by the occasional inconsistency of the statutory rule with the rule of the maritime law (which was sometimes even productive of collisions), led to the adoption of international regulations, by which the former difficulties are now obviated. Local usages as to ships, lights, and rules to be observed in navigating foreign waters are still to be observed; and although they have not the force of law in the English Courts, yet failure to conform to them is cogent evidence of negligence.[1]

Ship at anchor. American decision. *The Schooner Marcia Tribou.*

If a vessel whether properly or improperly [2] be at anchor, it is the bounden duty of a vessel in motion to avoid collision.[3] This has been differently laid down in America; where, in the case of *The Schooner Marcia Tribou*,[4] a schooner going out of Boston harbour ran into a sloop that was anchored in the channel; both vessels were held in fault—the schooner for not keeping a proper look-out, and the sloop for being improperly anchored. This decision is clearly not maintainable in England, and on the principle already enunciated—that there must be not merely negligence, but negligence as a contributory cause of the accident.

Strout Foster.

The absence of negligence on the part of the moving vessel distinguishes the case of *The Schooner Marcia Tribou* from *Strout* v. *Foster*,[5] where the judges of the Supreme Court of the United States were equally divided, and the judgment of the Circuit Court was consequently maintained, holding that where there is no negligence in the moving ship, and a collision occurs with a ship improperly anchored, the third rule laid down by Lord Stowell in the *Woodrop Sims*[6] applies; and the misconduct on the part of the master of the ship so improperly anchored imports a liability where there is no fault or want of skill on the part of those responsible for the other ship. This decision is an *a fortiori* case, assuming *The Marcia Tribou*[7] to be rightly decided. On the contrary assumption, the case seems one of inevitable accident—that is, an accident "which the party charged with the offence could not possibly prevent by the exercise of ordinary care, caution and maritime skill";[8] and further appears to be covered by Lord

1 In *General Steam Navigation Co.* v. *Mann*, 14 C. B. 133, Maule, J., is reported saying: "The only effect of the Admiralty regulation is to substitute the sailing directions there given for the rule of practice which existed before, to make it more effective; not to alter the proof of negligence."

2 *The Steamboat New York* v. *Rea*, 18 How. (U. S.) 223.

3 *The Batavier*, 2 W. Rob. (Adm.) 407; *The "City of Peking" and The Compagnie des Messageries Maritimes*, 14 App. Cas. 40.

4 2 Sprague (U. S. Adm.) 17.

5 How. (U. S.) 89. Cp. *Harris* v. *Anderson*, 14 C. B. N. S. 499; *The Douglas*, 7 P. D. 151.

6 1 Dodson (Adm. Cas.) 83. *Ante*, 1085.

7 2 Sprague (U. S. Adm.) 17.

8 Per Dr. Lushington, *The Virgil*, 2 W. Rob. (Adm.) 201, 205. *Ante*, 1091.

Selhorne, C.'s, *dictum* in *Spaight* v. *Tedcastle*:[1] "Contributory negligence" "cannot be established merely by showing that, if those in charge of the ship had in some earlier stage of navigation taken a course, or exercised a control" "which they did not actually take or exercise, a different situation would have resulted, in which the same danger might not have occurred."[2]

Dictum of Lord Selborne, C., in *Spaight* v. *Tedcastle*.

A vessel is to blame for placing herself at single anchor in such a position that, if the slightest accident arise to interrupt or embarrass a manœuvre, it is almost impossible to avoid a collision.[3]

General rule.

When a collision takes place between a vessel under sail and one at anchor, the *primâ facie* presumption, if there be any fault, is that it is on the part of the vessel which is under sail; and "the *onus probandi* lies with the vessel that is in motion, and she is *primâ facie* bound to show a sufficient cause why she came in contact with the vessel which was stationary, and which was consequently comparatively helpless."[4] The vessel under sail must accordingly clear herself from the imputation by showing that every practicable effort was made to avoid the collision; and this obligation is not altered by the fact that at the time of the collision the moving ship was drifting in consequence of a prior collision.[5]

Collision between vessel under sail and one at anchor

Dredgers, whether stationary or working, are regarded as vessels at anchor;[6] but not so a derrick; and proof of collision with such a vessel is not *primâ facie* evidence of negligence as it would be in the case of collision with a wharf or a vessel at her moorings. A dredger ought to keep its position and maintain an efficient look-out.[7]

Another rule, "admitting perhaps of no exception," is that when a vessel enters a harbour in the night time it must use the utmost vigilance; more especially when the harbour is one greatly frequented.[8]

Vessel entering a harbour in the night time.

The obvious precaution is to exhibit a light, both when sailing and when at anchor. In *The Victoria*,[9] Dr. Lushington held that there is no general and unqualified obligation to do this; though, where the exhibition of a light would tend to prevent collision, there is an obligation to show one, on the ground that "no man can justly complain of an accident that happens to himself if by reasonable and proper precaution he could have prevented it."[10] But in *The Saxonia*[11] the

Question whether there is an unqualified obligation to exhibit a light.

Dr. Lushington in *The Victoria* denies its existence.

[1] 6 App. Cas. 219.

[2] *Cayzer* v. *Carron Co.*, 9 App. Cas. 873; *H.M.S. Sans Pareil*, [1900] P. 267, applying the common law doctrine of contributory negligence; *The Owingdean Grange*, [1902] P. 208. *Ante*, 149.

[3] *The "Egyptian,"* 1 Moo. P. C. C. N. S. 373.

[4] *The Victoria*, 3 W. Rob. (Adm.), per Dr. Lushington, 52. *The Scioto*, Daveis (U. S. Adm.), 359, 363; "A vessel entering a harbour under the circumstances of *The Scioto* is responsible *de levissima culpa*." *The "City of Peking" and The Compagnie des Messageries Maritimes*, 14 App. Cas. 40. The burden is on the moving ship to excuse herself. *The Culgoa*, 9 Times L. R. 564 (C. A.). In *The Hirondelle*, 22 Times L. R. 146, the injured vessel was a torpedo boat, one of whose lights was obscured by an awning 3 ft. higher than the after light, and thus suggested a length less than 150 ft. when only one light is prescribed; but her length was greater than 150 ft., hence the collision. The colliding vessel was held to have made out a good excuse.

[5] *The Annapolis*, 5 L. T. (N. S.) 326; *The George Arkle*, Lush. 382.

[6] *The "Virginia Ehrmann" and The "Agnese,"* 97 U. S. (7 Otto) 309. *The D. H Miller*, 76 Fed. Rep. 877.

[7] *The Chauncey M. Depew*, 59 Fed. Rep. 791; *The New York Dredging Co.* v. *The Norge*, 55 Fed. Rep. 347.

[8] *The Scioto*, Daveis (U. S. Adm.), 359; *The Ariadne*, 13 Wall. (U. S.) 475. Angel, Law of Carriers (5th ed.) 624. *The Kaiser Wilhelm der Grosse*, [1907] P. 36 affd. 23 Times L. R. 554.

[9] 3 W. Rob. (Adm.) 49.

[10] *L.c.* 54.

[11] Lush. 410. Cp. *The C. M. Palmer*; *The Larnax*, 2 Mar. L. C. N. S. 94.

Such an absolute obligation held to exist in *The Saxonia.*

Privy Council affirms this absolute obligation. "A vessel at anchor, or a fishing-boat, is bound by the general rules of the sea to exhibit a light so as to afford to the vessels whose duty it is to avoid her, the means of doing so." [1] And this, even apart from authority, seems the preferable opinion. *Primâ facie*, in a collision between a vessel at anchor and one in motion in the daytime, the collision raises a presumption of the negligence of the ship in motion which has to be rebutted.[2]

Obligation on a vessel under weigh to exhibit a light.

It has always been held to be a duty on the part of a vessel under way [3] or weigh to exhibit a light. "It is, I apprehend, the bounden duty," says Dr. Lushington,[4] "of the vessel under weigh, whether the vessel at anchor be properly or improperly anchored, to avoid if it be possible, with safety to herself, any collision whatever. This is not only the doctrine of the maritime law, but it is also the doctrine of the common law with respect to carriages on the high road." If there is an obligation for a vessel at anchor to exhibit a light, *à fortiori* a vessel in motion must do so; and this has been definitely held by the Privy Council.[5]

Rules as to lights.

By the various regulations for preventing collisions at sea, by which ships of various countries are bound, specified lights must be carried in all weathers from sunset to sunrise,[6] and in the precise way that is necessary for giving the warning enjoined by the regulation.[7]

Duty in Fog.

Fog or darkness.

The duty to use care in the case of fog or darkness is in proportion to the need for care.[8] In *The Itinerant* [9] this obligation is expressed

[1] Lush. 422.

[2] *The Annot Lyle*, 11 P. D. 114; *The Indus*, 12 P. D. 46; *The Merchant Prince*, [1892] P. 179.

[3] There is some uncertainty in the spelling of this expression "under weigh" or "under way." A writer in the Times some few years since decided that the latter only is correct. Captain Mahan, in his Life of Nelson (popular edition), has both forms, "under weigh" at 589, and a few pages earlier; but "under way" at 608.

"Under we'gh
Each vessel held the course appointed her."
Æschylus, The Persians,
translated into English verse by Lewis Campbell, lines 380–1.

"The Athenians . . . got under weigh."
Jowett's Thucydides (2nd ed.), vol. ii. 292 (vii. 40).

"Weigh the vessel up,
Once dreaded by our foes."—Cowper.

Possibly both may be correct. The one regarding the results of weighing the anchor, the other the ship going on her way. In the Regulations for Preventing Collisions at Sea, 1897, "under way" is the form adopted throughout.

[4] *The Batavier*, 2 W. Rob. (Adm.) 407. As to a vessel being launched coming into collision, see *The Cachapool*, 7 P. D. 217; also *The Vienna*, Swa. (Adm.) 405; *The United States*, 12 L. T. (N. S.) 33; *The Glengarry*, 2 P. D. 235. The "utmost precaution" must be used and reasonable notice of the launch given: *The Andalusian*, 2 P. D. 231. It must not be a mere general notice that a launch is to take place on a particular day: *The Blenheim*, 2 W. Rob. (Adm.) 421. The notice must so specify the time of the launch that vessels navigating up and down the river may not be damaged or incur danger: *The Glengarry*, 2 P. D. 235, 236.

[5] *The Saxonia*, Lusb. 410, 422.

[6] *The City of New York*, 147 U. S. (40 Davis) 72. See Art. 2, Regulations of 1884; *Ex parte Ferguson and Hutchinson*, L. R. 6 Q. B. 280; also Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), ss. 418 (1), (2), 419 (1), (2), 424; which Act, by s. 745, preserves the Regulations as they were at the time of the passing of the Act.

[7] *The Palinurus*, 13 P. D. 14; *The Patroclus*, 13 P. D. 54; *The Imbro*, 14 P. D. 73; *The Talbot*, [1891] P. 184.

[8] Abbott, Merchant Ships (14th ed.), 933.

[9] 2 W. Rob. (Adm.) 236. See also *The Mellona*, 3 W. Rob. (Adm.) 7; *The Pennsylvania*, 23 L. T. (N. S.) 55; *The SS. Westphalia*, 24 L. T. (N. S.) 75; *The Magna Charta*, 25 L. T. (N. S.) 512; *The "Frankland" and The "Kestrel,"* L. R. 4 P. C. 529. A

to be "to exercise the utmost vigilance";[1] still, by this no more must be understood than a duty to use the amount of vigilance which a master of competent skill would judge called for by the circumstances; for there is no invariable rule of conduct. Thus, in *The Virgil*,[2] sailing on a dark and foggy night with topmast studding sails set was held to be negligence; while in the case of the *Ebenezer*,[3] where in dark and thick weather a vessel running with a fair wind on a foggy night carrying her square sail, topmast studding sail, fore and aft mainsail, and gaff topsail set, came into collision, she was yet held not liable for a collision, on the ground of inevitable accident.[4] In this latter case the sail was carried to prevent vessels immediately in the wake of the colliding vessel running into her; and conduct that otherwise had been negligent thereby became justified.

The Virgil.

If the fog is very dense a steam vessel should anchor as soon as possible.[5] When in such a fog a whistle or fog-horn is heard on either bow, and approaching, by a steam vessel not anchored, "it may be laid down as a general rule of conduct that it is necessary to stop and reverse."[6] The rule as laid down by Bowen, L.J., is stricter:[7] "It cannot be absolutely laid down that a steamer is to stop when she hears a whistle or horn in a fog, yet she ought to do so, *when there is nothing to show that it is safe to go on.*"[8]

Steam vessel to anchor if fog very dense.

In *The "Ceto,"*[9] Lord Herschell, C., thus states the facts:[10] "Two vessels approaching each other in a dense fog without the means of ascertaining the course which either ship is pursuing, continue to approach each other, and when one of them which has pursued a correct course finds that the other is pursuing a wrong one, which must almost inevitably lead to a collision, she still continues a course which was originally right, but which on these facts it appears to me threw upon her the duty of stopping and reversing." The conclusion the Lord Chancellor draws is: "Inasmuch as she did not pursue that course I think she was to blame." Lord Selborne[11] gives his opinion that to fix such a vessel with contributory negligence even though she had not ceased herself to pursue a right course it was merely necessary to make out "that she had sufficient knowledge of the wrong course which the other ship was taking within sufficient time to enable her

The "Ceto." Lord Herschell, C.'s, opinion.

Lord Selborne's opinion.

sailing vessel when hove to in a fog should ring a bell, and not use a horn: *The Alfredo*, 30 Fed. Rep. 842. As to duty of steamer before entering fog, *The N. Strong*, [1892] P. 105. *The Oravia*, 23 Times L. R., 358 C. A., affd. in H. of L. *l.c.* 663.

[1] 2 W. Rob. (Adm.) 243. [2] 2 W. Rob. (Adm.) 201.

[3] 2 W. Rob. (Adm.) 206. What is "moderate speed" in a fog is considered in *The Ebor*, 11 P. D. 25. "In my opinion a vessel approaching another from aft, and being more than two points abaft the beam of the foremost ship—a position from which the coloured side lights of the foremost vessel would not be visible—is an overtaking vessel within the meaning of Art. 11, and a vessel is not an overtaking vessel, within the meaning of this article, unless she is more than two points abaft the beam of the other vessel": per Butt, J., *The Imbro*, 14 P. D. 77. [4] *Ante*, 1091.

[5] *The Otter*, L. R. 4 A. & E. 203; *The Lancashire*, L. R. 4 A. & E. 198; *Little* v. *Burns*, 9 Rettie, 118, is a case of two steam vessels in a fog.

[6] Per Brett, M.R., *The John McIntyre*, 9 P. D. 136. [7] *L.c.* 137.

[8] Cp. *The "Lancashire,"* [1894] A. C. 1, 6; *The Koning Willem I.*, [1903] P. 114. In a canal, *e.g.*, Manchester Ship Canal, supposing it within the regulations, those hearing the whistle are absolved from their obligation to stop engines, since the assumption may be made that an approaching vessel is on her right side; *The Hare*, [1904] P. 331.

[9] 14 App. Cas. 670.

[10] 14 App. Cas. 675. Cp. the American cases: *The "Colorado,"* 91 U. S. (1 Otto) 692; *The Nacoochee*, 137 U. S. (30 Davis) 330.

[11] 14 App. Cas. 677. A tow with a tug is not to be deemed a steamship for all purposes under the rules, and thus in *The Lord Bangor*, [1896] P. 28, was exonerated for not stopping under Art. 18 of the regulations.

officer or officers in charge to perceive that they ought to alter or stop their own course in order to avoid the risk of collision, and that by doing so, that risk would certainly be diminished and might perhaps be avoided." [1]

Rule in fog.

The regulations prescribe that in a "fog, mist, falling snow or heavy rainstorms" a vessel should go at a "moderate speed." In *The Campania* [2] the question was what is a moderate speed in a thick fog for a "twin-screw mail and passenger steam vessel." The evidence was that she could not safely be navigated at less speed than she was going. But the Court held that in that case the duty of the captain was to stop the engines. The law is well put by Lord Hannen: [3] "If a vessel is so constructed that she cannot go at a moderate pace she must take the consequences. I quite accept the view that there is great difficulty in dealing with a vessel by checking her speed from time to time—that is, by stopping and taking the way off her—and that it has a tendency to throw a vessel out of her course and lead to difficulties. But I have to deal with the matter as a lawyer, and I have to say what is a moderate speed; and I say if it be necessary to reduce the speed of a vessel below that which is its lowest speed, though it may cause inconvenience, yet it must be done in what appears to me to be the only practicable way of doing it, namely, by stopping from time to time." [4]

Moderate speed.

Vessel on open sea in fog.

If a vessel is on the open sea in a fog and not on any particular track of ships, until she hears something, it may be assumed no ship is near her. If she hears a whistle astern there is no reason why she should stop, nor yet if the whistle sounds on either beam; if, however, a whistle is heard on either bow, "then the ship hearing that sound ought to be brought to a moderate speed though the sound be apparently distant. But if the whistle is ahead, it then becomes necessary to take extreme precautions." [5] There is no hard-and-fast rule that in a fog a vessel having warning of the proximity of another is not to alter her helm until the signals of the other give a clear indication of her direction. Each case must depend on its own circumstances; and these may afford reasonable ground for believing what the direction is. [6]

English and American rule in accord.

In *The Martello*, [7] the English and American courts were said to be in perfect accord with regard to the duty of a vessel hearing a horn blown in a fog. The law is thus expressed: [8] "In *The Kirby Hall*, [9] it was held to be the duty of a steamship hearing the steam whistle of another steamship in close proximity, in a dense fog, but unable to ascertain her course and position, to stop and reverse her engines, so as to take all way off of her, and bring her to a standstill. So, in *The John McIntyre* [10] it was held that while the master of a steamship was not at once bound the moment he heard a whistle, wherever it might be, to stop and reverse his engines; yet, if in a dense fog he hears the

[1] Also per Lord Watson, *l.c.* 686.

[2] [1901] P. 289. *The Ebor*, 11 P. D. 25. "Moderate speed" is a relative term "according to the circumstances."

[3] *The Irrawaddy*, June 15th, 1887, reported in the Shipping Gazette; noted [1901] P. 294.

[4] *The London*, [1905] P. 152; *The Britannia*, [1905] P. 98; *The Challenge and Duc d'Aumale*, [1905] P. 198, illustrate the duty to stop engines.

[5] Per Lord Esher, M.R., *The Ebor*, 11 P. D. 27; *The Kirby Hall* 8 P. D. 71; *The "Lancashire,"* [1894] A. C. 1.

[6] *The "Vindomora,"* 14 P. D. 172; [1891] A. C. 1.

[7] 153 U. S. (46 Davis) 64. [8] *L.c.* 72. [9] 8 P. D. 71.

[10] 9 P. D. 135.

whistle or fog-horn of another vessel more than once on either bow, and in the vicinity, from such a direction as to indicate that the other vessel is nearing him, it is his duty to at once stop and reverse, so as to bring his vessel to a standstill. In *The Dordogne*,[1] it was said to be the duty of a steamer, on hearing the first whistle, to reduce her speed, and as the vessels get nearer to bring the ship to as complete a standstill as is possible without putting her out of command, and when the other vessel has come close to, even though not in sight, to stop and reverse the engines."[2]

Sailing vessel and steam vessel

A vessel with the wind free is bound to give way to a vessel close hauled, and a steam ship is a vessel with the wind free.[3] Thus, in all situations a steam vessel is bound to give way to a sailing vessel;[4] or, to state the rule somewhat differently, whatever a sailing vessel going with a free wind would be required to do with reference to any sailing vessels she meets,[5] in that manner should a steam vessel in any situation be required to act, with reference to any sailing vessel whatever.[6] It is equally imperative for the sailing vessel to keep her course.[7]

Duty on steamer.

To render a steamer liable for an omission there should, says Lord Westhury,[8] be proof of three things—first, that the thing omitted to be done was clearly within the power of the steamer to do; secondly, that if done it would in all probability have prevented collision; and thirdly, that it was an act which would have occurred to any officer of competent skill and experience in command of the steamer. The duty on the person in command is to use ordinary care; that care which an ordinary ship's officer in the circumstances might reasonably be expected to display.

Steam ships mutually approaching.

When steam ships are approaching each other neither is to be excused from responsibility merely because it was the duty of the other to adopt similar precautions, if it appears that the party setting up that excuse enjoyed equal opportunity of conforming to the requirements of the regulation; for the law requires both to adopt every necessary precaution and will not tolerate an apportionment of this duty.[9]

[1] 10 P. D. 6.

[2] Cp. *The* "*Frankland*," L. R. 4 P. C. 529. The rule as to whistling is not limited to the case of vessels meeting in narrow waters. "I hope that, in future, masters of vessels will err, if they err at all, on the side of whistling": per Sir F. Jeune, *The Uskmoor*, [1902] P. 255, a decision on Art. 28 of the regulations.

[3] *The Saxonia*, Lush. 410.

[4] *The Warrior*, L. R. 3 A. & E. 553; *The* "*Velasquez*," L. R. 1 P. C. 494; *The* "*Adriatic*," 107 U. S. (17 Otto) 512. In *Crockett* v. *Isaac Newton*, 18 How. (U. S.) 581, 583, it is said that though this rule should not be observed when circumstances are such that it is apparent its observance must occasion a collision, while a departure from it will prevent one, yet it must be a strong case which will put the sailing vessel in the wrong for obeying the rule. See *The Britannia*, 153 U. S. (46 Davis) 130, 144.

[5] As to this duty, see *The Peckforton Castle*, 3 P. D. 11. As to "overtaking" ships and ships "being overtaken," see *The Main*, 11 P. D. 132. See *The Essequibo*, 13 P. D. 51; *The Talabot*, 15 P. D. 194; *The Molière*, [1893] P. 217.

[6] *The Gazelle*, 2 W. Rob. (Adm.) 515, 518; *The Columbine*, 2 W. Rob. (Adm.) 27; *The Aleppo*, 35 L. J. Adm. 9.

[7] *The* "*Illinois*," 103 U. S. (13 Otto) 298.

[8] *The* "*City of Antwerp*," L. R. 2 P. C. 34. Cp. *The* "*City of Peking*" v. *Compagnie des Messageries Maritimes*, 14 App. Cas. 40.

[9] *The* "*America*," 92 U. S. (2 Otto) 432. See *Maclaren* v. *Compagnie Française de Navigation à Vapeur*, 9 App. Cas. 640; *The Manitoba*, 122 U. S. (15 Davis) 97, where the fault was not stopping and reversing, though the collision was mainly caused by the fault of the other vessel. Cp. *The Stanmore*, 10 P. D. 134. A trawler's light should apprise other vessels that she is not able to get out of the way: *The Tweedsdale*, 14 P. D. 164; but if she has got in her trawl, and is able to manœuvre, she is to be treated as a steam vessel under command: *The Upton Castle*, [1906] P. 147. The duty on a trawler is treated in *The King's County*, 20 Times L. R. 202.

Ships meeting.

It is not the law that a steamer must change her course or must slacken her speed the instant she comes in sight of another vessel, no matter in what direction it may be.[1] Other things being equal, it is the duty of a vessel going against the tide to stop to avoid a collision, since her movements can be controlled with less difficulty than those of the other vessel.[2] If, however, two steamers are meeting each other end on or nearly so, where there is plenty of sea room, and are at a considerable distance from each other, it is not the duty of either to stop, reverse, or slacken. The duty of each is to pass on the port side, and the rate of speed is not an element in the case.[3] The duty of a steamer to keep out of the way of a sailing ship implies a correlative obligation on the part of the ship to keep her course and to do nothing to mislead the steamer.[4] The steamer is not called to act except when she is approaching a sailing ship in such a direction as to involve a risk of collision. She is not required to take precautions where there is no apparent danger.[5]

Regulations.

The law on these matters is settled in the Regulations to which allusion has already been made, and to the text of which reference must be had.[6]

General Principles.

Where the rules are not applicable.

The rules are not an unfailing test of the obligation of the master; as their application is limited by the consideration that the circumstances are "such that it ought to have been present to the mind of the person in charge, that it [the rule] was applicable."[7] In the event of a case occurring provided for by a rule the applicability of which is not apparent to a competent navigator, the person failing to follow it is discharged, notwithstanding conformity to the rule would have obviated the accident. But admitting the application of the rule, and supposing a departure from it in circumstances where its relevancy ought to be present to the mind of the person responsible, the sequence of cause and effect is not narrowly to be scrutinised; for the governing consideration is "that if the absence of due observance of the rule can by any possibility have contributed to the accident, then that the party in default cannot be excused."[8]

The J. R. Hinde.

Again the literal observance of a rule will not discharge from liability when an observance of the spirit of it would have ensured precautions that would have obviated danger. Thus in *The J. R. Hinde*[9] the rule was that "no vessel shall be navigated or lie in the river with

[1] *The "Jesmond" and The "Earl of Elgin,"* L. R. 4 P. C. 1, explained *Sciclunna* v. *Stevenson, The "Rhondda,"* 8 App. Cas. 558. Cp. *The Britannia*, 153 U. S. (46 Davis) 130; *The Servia*, 149 U. S. (42 Davis) 144.

[2] *The "Galatea,"* 92 U. S. (2 Otto) 439.

[3] *The "Free State,"* 91 U. S. (1 Otto) 200.

[4] *The Highgate*, 62 L. T. 841.

[5] *The Scotia*, 14 Wall. (U. S.) 170. As to circumstances under which a steamship is "not under command," *The "P. Caland,"* [1893] A. C. 207; *The Port Victoria*, [1902] P. 25.

[6] The Regulations for Preventing Collisions at Sea in force on and after the 1st day of July, 1897, are printed in the Law Reports, [1896] P. 307, and are made under ss. 418, 434, of The Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), and an Order in Council, dated 27th November, 1896. The history of the International Rules in the United States which are the outcome of the English Orders of Sailing of 1863, is given in *The Albert Dumois*, 177 U. S. (70 Davis) 240.

[7] Per Lord Herschell, *The Theodore H. Rand*, 12 App. Cas. 250, citing Lord Esher, M.R., *The Beryl*, 9 P. D. 138.

[8] Per Sir James Hannen, *The "Arklow,"* 9 App. Cas. 139.

[9] [1892] P. 231.

its anchor or anchors hanging by the cable perpendicularly from the hawse unless the stock shall be awash." The rule was complied with; and with the anchor in this position in a collision damage was done by it. The rule was interpreted to mean that "stock awash is the minimum"; but that no liability attached, for that though the injury might probably have been averted "if the anchor had been lowered in time"; yet it "would have been a very smart thing to have lowered the anchor when the collision was imminent"; and the rule of duty in such an emergency is no more than that of ordinary diligence. But in *The Six Sisters*[1] those in charge were in fault in having their anchor "so high in the water as to be likely to do damage to other barges with which this barge was in company," and following the interpretation of the rule in the earlier decision[2] the principle was extracted that "if barges are navigating together their anchors should be placed sufficiently low so as not to be a source of danger to each other in case any contact takes place between them." This is obviously correct whatever interpretation of the rule is admitted. *The Six Sisters.*

The duty of a master of a ship, where the intention of not conforming to the rules is manifested by another ship with which a collision subsequently ensues, was considered by Dr. Lushington in *The Commerce*,[3] the principle laid down was that, when those on board one vessel approaching a collision find that those on the other vessel are not going to perform their duty, they ought not pertinaciously to adhere to the letter of the rule, when by varying from the rule some manœuvre might be executed which might probably avert an impending collision. This principle was considered by the Privy Council in *The Byfoged Christensen*,[4] where it was said that, though in itself a sound one, great caution is necessary in its application; since "to leave to masters of vessels a discretion as to obeying or departing from the sailing rules is dangerous to the public; and that to require them to exercise such discretion, except in a very clear case of necessity, is hard upon the masters themselves, inasmuch as the slightest departure from these rules is almost invariably relied upon as constituting a case of at least contributory negligence."[5] Where intention of not conforming to rules is manifested by another ship. *The Commerce.* *The Byfoged Christensen.*

On the other hand, the principle enunciated is no more than the common law doctrine that one is guilty of contributory negligence who seeing a way of obviating a peril yet refuses to adopt it because the other person is in default. A captain seeing a collision imminent and hesitating to break a rule even to escape from an accident will assuredly have his conduct most leniently considered on the score that he is placed in a situation of peril by the wrongful act of another person. If the precautionary measure is obvious and simple he will not be excused from taking it because the literal observance of some regulation could be urged in his defence for his action producing the injury.

Before the decision in *The Khedive*[6] the rule was that when two vessels are approaching near to each other under steam, each steering a proper course, and one is suddenly, by a wrong manœuvre of the other, Rule of action in emergency.

[1] [1900] P. 302.
[2] *Ante*, 1104.
[3] 3 W. Rob. (Adm.) 287.
[4] 4 App. Cas. 669.
[5] *L.c.* 672. Cp. *New York and Liverpool, &c. Steamship Co.* v. *Rumball*, 21 How. (U. S.) 372, 383; *The Hibernia*, 2 Mar. Law Cas. N. S. 454; *The Magnet*, L. R. 4 A. & E. 417.
[6] 5 App. Cas. 876. See *The Main*, 11 P. D. 132; *The Imbro*, 14 P. D. 73, considered in *The Stakesby*, 15 P. D. 166.

placed in a position of critical danger, the one shall not be deemed to be in fault by reason of her captain not having given orders to slacken speed or to stop and reverse, if it is established that a captain of ordinary care, skill, and nerve might be fairly excused in the circumstances for not having given such order. But in *The Khedive*,[1] the House of Lords decided this to be no answer, when statutory rules have been infringed, to say that a master had acted from the best of motives and to the best of his judgment; for the law is not that the master is to do what seems to him best, but that he is to obey the Regulations. Actual necessity, not considerations of expediency merely, can alone excuse their non-observance. From that it was urged that success alone would justify departure from the observance of statutory rules.

The Khedive.

The Benares.

This argument was not acceded to in *The Benares*,[2] where the decision in *The Khedive* was explained not to be absolute, and to admit of a departure from the regulations, where "such departure is the one chance still left of avoiding danger which otherwise was inevitable."[3] There the Court refused to hold a ship to blame for a collision when the ship, being not otherwise in fault, with a collision all but inevitable, as a last chance adopted a course not pointed out by the Regulations.

The "Fanny M. Carvill."

In a previous case, *The "Fanny M. Carvill,"*[4] the contention that mere proof that the infringement of a regulation did not contribute to a collision was rejected, and the Privy Council adopted a view of 36 & 37 Vict. c. 85 s. 17,[5] which, while it excludes proof that infringement of a Statutory Regulation which might have contributed to a collision did not in fact do so, yet allows the party guilty of the infringement to show that it could not possibly do so. Thus, in *The Duke of Buccleuch*,[6] where it was proved that lights carried by one of two vessels which came into collision were partially obscured so as to infringe a Statutory Regulation, the Court of Appeal, reversing Butt, J., held it to be the duty of the Court to inquire into the position of the vessels; and if from the admitted relative positions of them the partially obscuring of the lights (the inculpating circumstance relied on in the case) could manifestly have no possible effect on the collision, or if from the evidence in case of a dispute the Court were of the opinion it could not, then the vessel with defective lights would not be held to blame on that account for the collision.

The Duke of Buccleuch.

In the House of Lords.

The Duke of Buccleuch was taken to the House of Lords,[7] and there on the construction of the facts, the judgment of the Court of Appeal was affirmed, the House being equally divided, Lord Herschell and

[1] 5 App. Cas. 876. [2] 9 P. D. 16.

[3] *L.c.*, per Bowen, L.J., 19. *The Khedive*, 5 App. Cas., per Lord Watson, 904 per Lord Hatherley, 908.

[4] Decided in 1875, and reported in a note to 13 App. Cas. 455, approved in *The "Hochung,"* 7 App. Cas. 512, referring to 2 Mar. Law Cas. (N. S.) 509. See *The Martello*, 153 U. S. (46 Davis) 64, where at 74, speaking of failure to provide a ship with the fog-horn prescribed by the International Regulations the Court said: "The presumption is that this fault contributed to the collision. This is a presumption which attends every fault connected with the management of the vessel, and every omission to comply with a statutory requirement, or with any regulations deemed essential to good seamanship. In *The Pennsylvania*, 19 Wall. (U. S.) 125, 136, it was said that 'in such a case the burden rests upon the ship of showing not merely that her fault might not have been one of the causes, or that it probably was not, but that it could not have been'"; *Richelieu, &c., Navigation Co.* v. *Boston Insurance Co.*, 136 U. S. (29 Davis) 408. *Owners of Sailing Ship Fortunato Figari* v. *SS. Coogee*, 29 V. L. R. 874.

[5] Repealed by the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), sch. xxii., but re-enacted by s. 419 (4). *The Dreadnought*, [1901] P. 221; *Boucher* v. *Clyde Shipping Co.*, [1904] 2 I. R. 129.

[6] 15 P. D. 86. [7] [1891] A. C. 310. See *The Love Bird*, 6 P. D. 80.

Lord Macnaghten being of opinion that the view of the Court of Appeal was the right one, while Lord Bramwell and Lord Ifannen were for restoring the judgment of Butt, J. On the point of law the House were unanimous that the true construction of sec. 17 of the Merchant Shipping Act, 1873, is that the infringement must be one having some possible connection with the collision ; [1] or, in other words, the presumption of culpability may be met by proof that the infringement could not by any possibility have contributed to the collision. The burden of showing this lies on the party guilty of the infringement, and proof that the infringement did not in fact contribute to the collision is to be excluded.[2]

Conduct during the crisis of a collision.

Where the master of a ship fails to use extraordinary skill or nerve, the exertion of which might have avoided the collision, his failure is not to be imputed to him as negligence, if he is placed in the position calling for the exertion of such unusual faculties by the conduct of those on the other vessel. " My opinion," says James, L.J.,[3] " is that, if, in that moment of peril and difficulty, such other ship happens to do something wrong so as to be a contributory to the mischief, that would not render her liable for the damage, inasmuch as perfect presence of mind, accurate judgment, and promptitude under all circumstances are not to be expected. You have no right to expect men to be something more than ordinary men." The same holds good in perils brought about by inevitable natural agencies ; for the obligation of the master is to use, not exceptional, but merely competent skill.[4] " The Court," says Butt, J.,[5] " is not bound to hold that a man should exercise his judgment instantaneously, a short, but a very short, time must be allowed him for this purpose."

Judgment of James, L.J., in *The Bywell Castle*.

Time of application of the Regulations.

" Another rule of interpretation of these Regulations," says Brett, M.R.,[6] " is (the object of them being to avoid risk of collision) that they are all applicable at a time when the risk of collision can be avoided— not that they are applicable when the risk of collision is already fixed and determined. We have always said that the right moment of time to be considered is that which exists at the moment before the risk of collision is constituted."

Rules to be read literally.

Yet, again, since they are issued for the guidance of masters of vessels, they are to be read literally.[7] By reading them literally is not to be understood the construction of a philologist, or that of one versed in the shades and niceties of meaning words may bear, " but according to a reasonable and business interpretation of *it* [them] with regard to the trade or business with which it is [they are] dealing." [8]

Presumption of negligence in the case of sailing away.

By the Merchant Shipping Act, 1894,[9] s. 422, where the master or person in charge of either vessel [10] sails away after collision without

[1] See note [4], 1106.

[2] Cp. *The* " *Tasmania*," 15 App. Cas. 223 ; *Wilson, Sons & Co.* v. *Currie*, [1894] A. C. 116 ; *The* " *Ngapoola*," [1897] A. C. 391 ; *The Bellanoch*, [1907] A. C. 269.

[3] *The Bywell Castle*, 4 P. D. 223. There is a valuable judgment by Clifford, J., in *The Seagull*, 23 Wall. (U. S.) 165.

[4] *The* " *City of Antwerp*," L. R. 2 P. C. 25 ; *The* " *Marpesia*," L. R. 4 P. C. 212, 220 ; *The Khedive*, 5 App. Cas., per Lord Blackburn, 894.

[5] *The Emmy Haase*, 9 P. D. 83. *Ante*, 1089, 1090.

[6] *The Beryl*, 9 P. D. 140, followed in *The Oporto*, [1897] P. 249 ; *The Gustafsberg*, [1905] P. 10.

[7] *The Libra*, 6 P. D., per Jessel, M.R., 142, explained in *The Margaret*, 9 P. D. 47 ; but see *s. c. sub nom. Cayzer* v. *Carron Co.*, 9 App. Cas. 873 ; *The Ovingdean Grange*, [1902] P. 208. Cp. *The Monte Rosa*, [1893] P. 23, 31 ; *SS. Albano* v. *Allan Line SS. Co.* [1907], A. C. 193.

[8] *The Duncim*, 9 P. D., per Brett, M.R., 171.

[9] 57 & 58 Vict. c. 60, reproducing with verbal alterations 30 & 37 Vict. c. 85, s. 16.

[10] Vessel is defined to include any ship or boat, or any other description of vessel used in navigation, 57 & 58 Vict. c. 60, s. 742.

first ascertaining whether the other vessel has need of assistance, and rendering to the other vessel such assistance as may be practicable, and furnishing particulars as to his own, the master or person in charge of the ship so sailing away shall be presumed guilty of negligence,[1] and damage may be recovered without further proof.[2] Further, if the master or person in charge fails without reasonable cause to comply with this section, he shall be guilty of a misdemeanour. But a ship is not compelled to remain alongside another which has been injured, and thus to run a risk of capture by an enemy's fleet, nor is the owner liable for consequential damage which might have been averted by the exercise of ordinary skill and courage.[3]

Limitation of Liability.

Statutory limitation of liability.

The Merchant Shipping Act, 1894,[4] s. 503, provides that "the owners of a ship,[5] British or foreign,[6] shall not, where all or any of the following events occur without their actual fault or privity[7]—that is to say:

a. Where any loss of life or personal injury is caused to any person being carried in the ship;

b. Where any damage or loss is caused to any goods, merchandise or other things whatsoever on board the ship;[8]

[1] *The Queen*, L. R. 2 A. & E. 354—a decision on 25 & 26 Vict. c. 63, s. 33, see now 57 & 58 Vict. c. 60 s. 42[2]; *Ex parte Ferguson and Hutchinson*, L. R. 6 Q. B. 280; *The Adriatic*, 3 Mar. Law Cas. N. S. 16, 33 L. T. (N. S.) 102; *The Sussex*, [1901] P. 230. See note on Statutory Limitations, 3 Kent, Comm. (12th ed.), 217.

[2] As to the law previous to statutory enactment, *Celt*, 3 Hagg. (Adm.) 321. As to the law under s. 16, of 25 & 26 Vict. c. 85, *The Adriatic*, *supra*. The rule as to damages naturally flowing from the wrongful act is the same in Admiralty as at common law, *ante*, 104. In *The Mellona*, 3 W. Rob. (Adm.) 7, where a vessel having been run down, subsequently became unmanageable and got upon a sandbank and was lost, Dr. Lushington ruled that the presumption of law is that eventual loss is attributable to the effects of the collision, and not to any new cause, as the mismanagement of the persons on board. In *Smith* v. *Condry*, 1 How. (U. S.) 28, actual damage at the time and place of injury is said to be the measure of damages in cases of collision, as in insurance cases, and not the probable profits at the port of destination; but see Parsons, Law of Shipping, vol. i. 540, 544, where the cases are collected. The rule of damages in collision in the United States will be found in *The Baltimore*, 8 Wall. (U. S.) 377, where the leading maxim is said to be *restitutio in integrum*; and this is reiterated in *The "Atlas,"* 93 U. S. (3 Otto) 302. *Post*, 1111. There is no principle of law which requires a person to contribute to an outlay merely because he has derived a material benefit from it. To render him liable it must be incurred on his account, and with his authority; but when repairs attributable to one interest have been executed simultaneously with repairs attributable to another interest (both of which are necessary), an expense thus incurred, and necessary for either purpose, is not to be attributed solely to either, but is a factor in the cost of each, and must be divided proportionably. *Ruabon SS. Co.* v. *London Assurance*, [1900] A. C. 6, distinguishing *Marine Insurance Co.* v. *China Transpacific SS. Co.*, 11 App. Cas. 573; *The Acanthus*, [1902] P. 17; *The Haversham Grange*, [1905] P. 307.

[3] *The Thuringia*, 41 L. J. (Adm.) 44.

[4] 57 & 58 Vict. c. 60. See also Merchant Shipping (Liability of Shipowners) Act, 1898 (61 & 62 Vict. c. 14), and Merchant Shipping (Liability of Shipowners and Others) Act, 1900 (63 & 64 Vict. c. 32); Shipowners' Negligence (Remedies) Act, 1905 (5 Edw. VII. c. 10); Merchant Shipping Act, 1906, (6 Edw. VII. c. 48).

[5] *The Amalia*, B. & L. 151; *The Spirit of the Ocean*, B. & L. 336; *Hughes* v. *Sutherland*, 7 Q. B. D. 160; *The Volant*, 1 W. Rob. (Adm.) 383. Charterers by demise are not owners, and cannot claim limitation of liability in respect of loss or damage caused by improper navigation of a ship by their servants; *The Hopper No. 66*, [1906] P. 34, affd. 23 Times L. R. 414. As to liability under 25 & 26 Vict. c. 63, s. 54, of master who is also owner, *The Obey*, L. R. 1 A. & E. 102; *The Cricket*, 5 Mar. Law Cas. N. S. 53. See per Kay, L.J., *The Queen* v. *Judge of City of London Court*, [1892] 1 Q. B. 308.

[6] *Ex parte Ferguson and Hutchinson*, L. R. 6 Q. B. 280; *The Mac*, 7 P. D. 38, 126.

[7] *Wilson* v. *Dickson*, 2 B. & Ald. 2; *The Empusa*, 5 P. D. 6.

[8] *Glaholm* v. *Barker*, L. R. 2 Eq. 598; L. R. 1 Ch. 223.

c. Where any loss of life or personal injury is caused to any person carried in any other vessel by reason of the improper navigation [1] of the ship;

d. Where any loss or damage is caused to any other vessel, or to any goods, merchandise, or other things whatsoever on board any other vessel by reason of the improper navigation of the ship;

be liable [2] to damages beyond the following amounts; (that is to say), (i) in respect of loss of life or personal injury, either alone or together, with loss of or damage to vessels, goods, merchandise, or other things, to an aggregate amount not exceeding £15 for each ton of their ship's tonnage; [3] and (ii) in respect of loss of or damage to vessels, goods, merchandise, or other things, whether there be in addition loss of life or personal injury or not, an aggregate amount not exceeding £8 for each ton of the ship's tonnage.[4] For the purposes of this section the tonnage of a steamship shall be her registered tonnage with the addition of any engine room space deducted for the purpose of ascertaining that tonnage,[5] and the tonnage of a sailing ship shall be her

[1] "Improper navigation" is defined in *The Warkworth*, 9 P. D. 20, 145; *Guy* v. *London Steamship Owners' Association*, L. R. 6 C. P. 563; *Wahlberg* v. *Young*, 45 L. J. C. P. 783; *Carmichael* v. *Liverpool Sailing Ship Mutual Indemnity Association*, 19 Q. B. D. 242; *Canada Shipping Co.* v. *British Shipowners' Mutual Protection Association*, 22 Q. B. D. 727; 23 Q. B. D. 342. "Negligent stowage" was held not to be "default in the management of the ship" in *The Ferro*, [1893] P. 38. The distinction drawn was "between want of care of cargo and want of care of vessel indirectly affecting the cargo": *The Glenochil*, [1896] P. 10.

[2] *L. & S. W. Ry. Co.* v. *James*, L. R. 8 Ch. 241; also L. R. 7 Ex. 187; *The Normandy*, L. R. 3 A. & E. 152. In *Wahlberg* v. *Young*, 45 L. J. C. P. 783, damage to a tow by improper navigation of the tug is held within the section. Brett, J., added at 786: "A mere breach of the towing contract would not bring the case within the 54th section of the Merchant Shipping Amendment Act, 1862, but I am of opinion that if there had been such an improper navigation as would bring it within that section, the case is not ousted out of that section because there has also been a breach of the towing contract." In *The Stella*, [1900] P. 161, liability was negatived by reason of the deceased travelling with a free pass, the terms of which excluded liability for negligence. As the deceased had parted with his rights his representatives had no claim under Lord Campbell's Act (9 & 10 Vict. c. 93).

[3] *Nixon* v. *Roberts*, 1 J. & H. 739, 30 L. J. Ch. 844.

[4] *Chapman* v. *Royal Netherlands Steam Co.*, 4 P. D. 157; *The Ettrick*, 8 P. D. 127; but see *The Khedive*, 7 App. Cas. 795. This provision was held to be excluded by the operation of a yacht club's rules in *Clarke* v. *Dunraven*, [1897] A. C. 59. As to liability to interest beyond the £8 on tonnage, *The Northumbria*, L. R. 3 A. & E. 6. As to measuring ship constructed with a double bottom, *The Zanzibar*, [1892] P. 233, which is followed and applied to a French vessel in *The Cordilleras*, [1904] P. 90. The history of the limitation of liability in maritime collision is given by Lord Stowell in the *Douglas*, 1 Hagg. (Adm.) 199, 120. The introduction of the principle is attributed to the Dutch. See Abbott, Merchant Ships (14th ed.), 1015.

[5] 6 Edw. VII. c. 48, s. 69 and Second Sched. *The Langdale*, 23 Times L. R. 683. For the law apart from the late Act, see *The Franconia*, 3 P. D. 164; *The Palermo*, 10 P. D. 21; *The Umbilo*, [1891] P. 118, distinguished in *The Pilgrim*, [1895] P. 117. As to the construction to be put on this, see per Abbott, C.J., *Gale* v. *Laurie*, 5 B. & C. 156, 163; *The Khedive*, 7 App. Cas. 795, where sec. 54 of the Merchant Shipping Act of 1862, which is reproduced in sec. 503 (1), (2) of 57 & 58 Vict. c. 60, is explained at 800 by Lord Selborne, at 815 by Lord Blackburn, and at 824 by Lord Bramwell; *Coltman* v. *Chamberlain*, 25 Q. B. D. 328; and in America in *The "North Star,"* 106 U. S. (16 Otto) 17; *The Manitoba*, 122 U. S. (15 Davis) 97; *In re Morrison*, 147 U. S. (40 Davis) 14. As to what ships it applies to, *The Warkworth*, 9 P. D. 20, 145; and in what situations, *The "Amalia,"* 1 Moo. P. C. C. N. S. 471. In a subsequent stage of this case, reported 34 L. J. (P. M. & A.) 21, Dr. Lushington says that in Admiralty "interest was given for this reason, namely, that the loss was not paid at the proper time," *i.e.*, "from the time when the loss ought to have been paid for." The words of the quotation are from the report of the case in the note to *Straker* v. *Hartland* (1864), 5 N. R. 164; see *The Northumbria*, L. R. 3 A. & E. 6; *The Kong Magnus*, [1891] P. 223. The *Amalia* also established that a limitation suit might be instituted and carried to a successful issue by a shipowner, without admitting his liability in the action. See the remark of Butt, J., *The Karo*, 13 P. D. 29.

registered tonnage."[1] Provided that there shall not be included in such tonnage any space occupied by seamen or apprentices and appropriated to their use which is certified under the regulations scheduled to this act with regard thereto.[2] The section also provides for the measurement of foreign ships.[3]

Liability for injuries arising on distinct occasions.

By a further sub-section of the same section,[4] the owner of every sea-going ship or share therein shall be liable in respect of every such loss of life, personal injury, loss of or damage to vessels, goods, merchandise, or things as aforesaid, arising on distinct occasions, to the same extent as if no other loss, injury, or damage had arisen.

This liability is independent of the consideration that the ship is sunk,[5] though in America, under the local statutes, the law seems otherwise.[6] Cargo laden on board at the time of a collision is in no case liable,[7] though the freight on it may be ordered to be paid into court.[8]

Limitation of £8 per ton.

The limitation of £8 per ton of the tonnage is in respect of damage "arising on distinct occasions."[9] The test of what constitutes a distinct occasion was explained by Lord Esher, M.R.,[10] not to be the time at which the damage occurred, but the consideration whether in the case of damage to two ships "both are the result of the same want of seamanship," and, "if they are not, the Act does not apply except as to each of them separately." An order under secs. 503, 504, limiting liability, and fixing the value of the ship is not conclusive on cargo owners who are not parties to the proceedings.[11]

Seaworthiness of ship to be implied in every contract between owner and seaman.

Here also may conveniently be noted the provision in The Merchant Shipping Act, 1894,[12] that in every contract of service between the owner of a ship, and the master or any seaman thereof, and in every instrument of apprenticeship whereby any person is bound to serve as an apprentice on board any ship, an obligation to "use all reasonable means to insure the seaworthiness of the ship" shall be implied, notwithstanding any agreement to the contrary, as well as a further obligation to keep the ship in a seaworthy condition for the voyage she is undertaking.

Hedley v. *Pinkney & Sons' Steamship Co.*

The meaning of the term "seaworthiness" in this enactment was sought to be extended in the interest of the preservation of human life, in the case of *Hedley* v. *Pinkney & Sons Steamship Co.*[13] so as to be synonymous with "safe"; but both the Court of Appeal and House of Lords refused to accede to the argument that it included the result of carelessness on the part of master or crew causing loss of life, and held that the definition was no wider than that given by Parke, B., in

The Court may marshal assets: *The Victoria*, 13 P. D. 125. For the effect of payment into Court of the £8 a ton, see *The Ettrick*, 6 P. D. 127.

[1] *The Andalusian*, 3 P. D. 182; *The John McIntyre*, 6 P. D. 200. The method of measurement and calculating tonnage is considered in *The Brunel*, [1900] P. 24.

[2] Sch. vi. *The Petrel*, [1893] P. 320. [3] Cp. ss. 77–87.

[4] 57 & 58 Vict. c. 60, s. 503, sub-s. (3). *The Rajah*, L. R. 3 A. & E. 530; *The "American" and The "Syria,"* L. R. 6 P. C. 127.

[5] *The Normandy*, L. R. 3 A. & E. 152; *Brown* v. *Wilkinson*, 15 M. & W. 391.

[6] Parsons, Law of Shipping, vol. ii. 120; *Norwich Steamboat Co.* v. *Wright*, 13 Wall. (U. S.) 104. [7] *The Victor*, Lush. 72; *The "Atlas,"* 93 U. S. (3 Otto) 302.

[8] *The Leo*, Lush. 444; *Stewart* v. *Rogerson*, L. R. 6 C. P. 424. As to liability of tow for tug, see *ante*, 1046 *et seqq.*

[9] Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 503, sub-s. (3).

[10] *The Schwan, The Albano*, [1892] P. 419, 439, following *The Creadon*. 5 Mar. Law Cas. N. S. 585.

[11] *Van Eijck and Zoon* v. *Somerville*, [1906] A. C. 489.

[12] 57 & 58 Vict. c. 60, s. 458; sec. 457 makes it a misdemeanour to send or attempt to send a British ship to sea in such unseaworthy state that the life of any person is likely to be endangered thereby. [13] [1892] 1 Q. B. 58; [1894] A. C. 222.

Dixon v. *Sadler*,[1] and illustrated by Lord Blackburn in *Steel* v. *State Line Steamship Co.*[2]

Restitutio in integrum[3] is the leading maxim in cases of collision; and, where repairs are practicable, the rule followed by the Admiralty Courts is that damages assessed against a respondent shall be sufficient to restore the injured vessel to the condition in which she was when the injury was inflicted.[4] There seem to have been competing methods of reckoning this loss. One to calculate the value of the property destroyed at the time of the loss, and to pay it to the owners as a full indemnity for all that has happened. The other, to calculate the probable value of the ship at the end of her voyage, and of the freight which she would have earned, making at the same time certain deductions as to the expenses which the owners must have incurred in order to complete the voyage, such as the wages of the crew, &c., and also making a deduction for discounts if the value found were paid before the probable end of the voyage. If there was no cargo, then interest was to be given on the value of the ship from the day of collision. In *The Kate*,[5] Sir Francis Jeune, P., having commented on these two methods and after remarking that in the case before him their pecuniary results would be identical, laid down the rule that "the proper measure of damage in this case[6] is the value of the vessel at the end of her voyage plus the profits lost under the charter-party."[7] This was followed and approved in *The Racine*,[8] where there were a succession of charter-parties existing on the ship; but it was pointed out that where there is "a chain of charter-parties" the possibility of earning the profit is exposed to larger chances of being defeated than where there is only one; consequently the full amount is liable to be discounted. *Restitutio in integrum.*

The United States rule is stated in *The "Atlas"*[9] as follows:[10] "Satisfaction . . . for the injury sustained is the true rule of damages in a cause of collision, by which is meant that the measure of compensation shall be equal to the amount of injury received, and that the same shall be calculated for the actual loss occasioned by the collision, upon the principle that the sufferer is entitled to complete indemnification for his loss, without any deduction for new materials used in making repairs, as is prescribed in the law of marine insurance. Complete recompense for the injury is required; nor is the guilty party in such a case entitled to deduct from the amount of the damages any sum which the libellant has received from an underwriter on account of the same injury, the rule being that a wrongdoer in such case cannot claim the benefit of the contract of insurance if effected by the person whose property he has injured." This is also good English law, and is established by the cases, despite certain scruples of Brett, J., which we have already noted and considered.[11] *The "Atlas."*

[1] 5 M. & W. 405.
[2] 3 App. Cas. 72, 86. *Ante*, 1025.
[3] *The Northumbria*, L. R. 3 A. & E. 6, 12. *The Black Prince*, Lush. 568, was distinguished in *The "City of Peking,"* 15 App. Cas. 438.
[4] *The Clyde*, Swa. (Adm.) 23; *The Gazelle*, 2 W. Rob. (Adm.) 279; see as to damages, Sir R. Phillimore's judgment in *The "Halley,"* L. R. 2 A. & E. 3, reversed on another point, L. R. 2 P. C. 193; *"The Argentino,"* 13 P. D. 61; 191; 14 App. Cas. 519. *Ante*, 106.
[5] [1899] P. 165.
[6] Of a ship proceeding in ballast under charter to load a cargo.
[7] *L.c.* 175.
[8] [1906] P. 273.
[9] 93 U. S. (3 Otto) 302, where the English cases are reviewed.
[10] *L.c.* 310.
[11] *Ante*, 192.

Amount of damage recoverable in respect of personal injury.

The Court of Appeal have determined that the liability of the owners of the ship which has occasioned loss of life to the crew of another vessel is limited to £15 on the registered tonnage.[1]

Lord Campbell's Act in Reference to Merchant Shipping Legislation.

Lord Campbell's Act affected by Merchant Shipping legislation.

A further question was raised in the same case, whether the damages which could be claimed under Lord Campbell's Act (9 & 10 Vict. c. 93)[2] by the widows and children of the seamen killed was limited to £30, by virtue of the operation of 17 & 18 Vict. c. 104, ss. 510–516, and 25 & 26 Vict. c. 63, ss. 54–56, for each man killed, whatever might be the actual damage sustained by the family.[3] This was decided in the negative. The effect of the legislation on the matter is thus worked out by Lord Romilly, M.R., in *Glaholm* v. *Barker*:[4] "Suppose the tonnage of the wrongdoing vessel to be 100 tons, then the extent of the liability of the owners is £1500, and suppose 100 persons to be drowned by the fault of this vessel, the family of each person would get £15, that amount being clearly less than the damage actually sustained; but suppose two persons only were drowned, it would not therefore follow that the whole £1500 was to be divided amongst the families of each person so destroyed. It might be the opinion of a jury or a judge that the damage sustained by the loss of one of those persons did not exceed £200, whilst the damage sustained by the loss of the other amounted to £500; in that case these two sums would be the amount of the damages which the owner would have to make good; in other words, the damages were to be ascertained in the same way as if the liability of the owner was unlimited, and, when this had been done, the sum for which the owner was liable was to be applied in payment of the damages so ascertained if less than the amount of his liability; or it was to be distributed rateably amongst the claimants if the damages so ascertained exceeded the amount of his liability."

Limited responsibility of shipowners in America.

In America also the limited responsibility of shipowners is now established, and covers the case of injuries to the person as well as that of injuries to goods and merchandise. This is put on the ground of encouragement to shipbuilding and of employment of ships in

[1] *Glaholm* v. *Barker*, L. R. 1 Ch. 223; *L. & S. W. Ry. Co.* v. *James*, L. R. 8 Ch. 241. When damage is done by a ship both to persons and goods, the ship is to be estimated at no less than £15 per ton, for the purpose of adjusting the compensation to be paid to claimants in respect of loss of life or personal injury; but where the only claimants are the owners of property which has been damaged, the ship is not to be estimated at more than her actual value, although loss of life or personal injury may in fact have occurred; yet where claimants of both kinds appear, the owners of property are entitled to have compensation marshalled so as to throw that for loss of life and personal injury primarily on the excess, if any, of the value at £15 per ton over the actual value of the ship: *Nixon* v. *Roberts*, 1 J. & H. 739, 30 L. J. Ch. 844; *The Alma*, [1903] P. 55.

[2] *Ante*, 180.

[3] See now Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), ss. 502–508. An action brought in the King's Bench under Lord Campbell's Act (9 & 10 Vict. c. 93), by a widow against shipowners for the loss of her husband through their negligence, will not be transferred to the Admiralty Division: *Roche* v. *L. & S. W. Ry. Co.*, [1899] 2 Q. B. 502. Ss. 507–513 of 17 & 18 Vict. c. 104, relating to the institution of proceedings by the Board of Trade for the recovery of damages in the case of loss of life or personal injury, and the procedure thereunder, are repealed by the Act of 1894, and are not re-enacted.

[4] 35 L. J. (Ch.) 658; the passage cited in the text is better given than in the report, L. R. 2 Eq. 604. As to limitation of liability, see *Rankine* v. *Raschen*, 4 Rettie, 725.

commerce, on which accounts the owners are not to be rendered liable beyond their interest in the ship and freight for the acts of the master and crew done without their privity or knowledge ;[1] this limitation is by statutory enactment. But in the celebrated judgment delivered in *The Rebecca*[2] it is affirmed that the law of England and America differed, apart from the statutes, in this respect from the general maritime laws of Europe. By that general maritime law the liability of owners for the wrongful acts of the master was always limited to the interest they have in the ship; so that by abandoning the ship and freight to the creditor they discharged themselves from all personal responsibility. In the law of France this was known as *contrât de pacotille*. The rule of the civil law, however, is *omnia enim facta magistri debet præstare qui eum præposuit.*[3] *Non autem ex omni causa prætor dat in exercitorem actionem, sed ejus rei nomine, cujus ibi præpositus fuerit, id est, si in eam rem præpositus sit.*[4] *Aliquatenus culpæ reus est, quod opera malorum hominum uteretur ; ideo quasi ex maleficio teneri videtur.*[5] The rule of the English common law is the same; but on the petition of merchants and shipowners it was established in England by various Acts of Parliament that the common law liability should be limited as we have seen.[6] The first of these is no earlier than 7 Geo. II. c. 15. *The Rebecca.*

The right of a ferry-boat on the score of public convenience to cross a river in a very dense fog, with the knowledge that vessels were lying in her track, was contended for in *The Lancashire.*[7] "If," said Sir Robert Phillimore,[8] "this ferry steamer think herself justified in going across the river in such a dense fog as this, she takes upon herself all the responsibility incident to such a course." The rules governing crossing vessels are applied to ferry-boats.[9] A ferry-boat has not an exclusive right of way, and a steam ferry-boat must keep out of the way of sailing vessels.[10] In *The Relief*[11] it was indeed laid down that ferry-boats had a right to an undisturbed passage between their landing-places, and that there was a duty on other vessels "to keep as near as possible the centre of the stream" so that the entrance and exit from the ferry slips should not be impeded; but in *The Manhasset*[12] it was said that ferry-boats have no prior right of navigation. In *The Exchange*[13] again, ferry-boats were declared entitled to more than ordinary diligence on the part of other vessels. Ferry-boats as an accustomed part of the navigation of any district, going in a defined track and probably frequently, affect other vessels with knowledge of their course of navigation; and to this extent they are entitled to a higher degree of care from other ships than the mere casual navigator; insomuch as the presence and crossing of the ferry-boat is a constant and calculable incident of the navigation, while the presence of any other particular vessel is only occasional. While *The Lancashire* stands as an authority, any higher privilege than this cannot be asserted for ferry-boats in this country. Ferry-boat.

[1] *Butler* v. *Boston Steamship Co.*, 130 U. S. (23 Davis) 527; *The "Scotland,"* 105 U. S. (15 Otto) 24, where the exemptions and limitations of the American Act corresponding to the clauses above noticed were held to apply to foreign as well as domestic vessels. See also *Constable* v. *National Steamship Co.*, 154 U. S. (47 Davis), 51, 59.

[2] Ware (U. S. Dist. Ct.), 188.

[3] D. 14, 1, 1, § 5.

[4] D. 14, 1, 1, § 7.

[5] Inst. 4, 5 3; D. 44, 7, 5, § 6.

[6] Abbott, Merchant Ships (14th ed.), 637.

[7] L. R. 4 A. & E. 198.

[8] *L.c.* 202.

[9] *The Breakwater*, 155 U. S. (48 Davis) 252. Rowing-boats for the purpose of carrying a white light are specifically included in the Regulations of 1897, Art. 7, 4.

[10] *The Elizabeth*, 114 Fed. Rep. 757.

[11] Olcott (Adm.), 104.

[12] 34 Fed. Rep. 408.

[13] 10 Blatchf. 168.

A custom was alleged in *The Mohegan*[1] for ferry-boats to yield their privilege in crossing to larger steamers, or of the latter to exact such a privilege and to take the right of way, to excuse a collision; of course it was disallowed.

Queen's ship.

Where damage is done by a vessel the property of the Crown the responsibility rests with the actual wrongdoer,[2] and where a collision was caused by the commander of a Queen's ship anchoring too near a vessel in squally and tempestuous weather, he was condemned in the damage.[3]

[1] 91 Fed. Rep. 810.

[2] *The Mentor*, 1 C. Rob. (Adm.), per Sir W. Scott, 181: "The actual wrongdoer is the man to answer in judgment; to him responsibility is attached in this Court. He may have other persons responsible over to him; and that responsibility may be enforced. As, for instance, if a captain make a wrong seizure, under the express orders of an admiral, that admiral may be made answerable in the damages occasioned to the captain by that improper act; but it is the constant practice of this Court to have the actual wrongdoer held the party before the Court." *The Athol*, 1 W. Rob. (Adm.), per Dr. Lushington, 331.

[3] *The Volcano*, 2 W. Rob. (Adm.) 337.

CHAPTER VI.

TELEGRAPHS AND TELEPHONES.

THE duties of telegraph and telephone companies may conveniently be treated here in connection with the duty of carriers; though the relations arising out of them are not to be considered as a portion of the law of bailments.

Statutory law.

The law in England relating to telegraphs is regulated by the Telegraph Act, 1868,[1] consolidated with the Telegraph Act, 1869.[2] Under these Acts the Postmaster-General has the exclusive privilege of sending telegrams within the United Kingdom of Great Britain and Ireland, with the exception of:

Exceptions from the Postmaster-General's privileges.

(1) Telegrams transmitted by a telegraph maintained or used solely for private use for the business of the owner.

(2) Telegrams transmitted by a telegraph maintained for private use, and in respect of which no money or valuable consideration passes; that is, apparently, telegrams relating to the owner's friends sent gratuitously.

(3) Telegrams licensed by the Postmaster-General.

(4) Telegrams transmitted to or from any place out of the United Kingdom of Great Britain [3] and Ireland.

A.-G. v. *Edison Telephone Co.*

Attorney-General v *Edison Telephone Co.*[4] decides that a telephone is a telegraph within the meaning of these Acts. In the judgment in that case Professor Stokes is quoted [5] as saying: "If a single word is to be used to include both a telephone and a telegraph it must, in my opinion, be wide enough to cover every instrument which may ever be invented which employs electricity transmitted by a wire as a means for conveying information."

In America there are a number of cases asserting the practical identity of the rules binding telephone and telegraph companies.[6]

Effect of the Telegraph Acts with regard to liability for negligence.

An effect of the Telegraph Acts vesting telegraphs in the Postmaster-General is that no liability for negligence exists except against the person or persons actually in default.[7]

Divergence of the English and American law

The law in England and in America on the subject has very widely diverged. In England it has been established that the liability of telegraph companies arises entirely out of the contract between the

[1] 31 & 32 Vict. c. 110.

[2] 32 & 33 Vict. c. 73, extended 33 & 34 Vict. c. 88, which is amended 41 & 42 Vict. c. 76, ss. 10, 11; 48 & 49 Vict. c. 58; 55 & 56 Vict. c. 59; 60 & 61 Vict. c. 41; The Wireless Telegraphy Act, 1904 (4 Edw. VII. c. 24); 6 Edw. VII. c. 13.

[3] Sec. 5 of 32 & 33 Vict. c. 73.

[4] 6 Q. B. D. 244.

[5] *L.c.* per Stephen, J., 251.

[6] Thompson, Negligence, § 2392 n. 3.

[7] See *ante*, 241.

company and the sender.[1] In America it has been equally clearly decided that the liability of a telegraph company depends on some principle much wider than the contract entered into with the sender.[2] As to what that principle is there is considerable difference of opinion.

Dr. Wharton's view.

"Since," says one learned writer,[3] "a telegraphic company, wielding a power for good or evil, only transcended by railway corporations, is eminently within the scope of the rule *sic utere tuo ut alienum non lædas*," a telegraph company should be liable apart from contract. But the maxim vouched is, after all, not of universal application; and there seems a marked difference between those acts in the management of property which, when done by me, work harm to my neighbour (and even these are not universally actionable; for instance, interfering with his prospect), and those acts which, as done by me, are innocuous, but which may become injurious if my neighbour pleases to make them so by using them for his own end.

Messrs. Shearman and Redfield's view.

Again, telegraph companies are said to be liable as common carriers. "We entertain no doubt," say the authors of a recognised American treatise on the subject,[4] "that they [telegraph companies] are common carriers of messages, subject to all the rules which, in their nature and by fair analogy, are applicable to all cases of common carriers." They preface this with the statement: "of course they are not subject to the stringent liability of goods carriers as insurers."

Principle stated by Holt, C.J.

The position of telegraph companies, however, seems more readily referable to a wider principle extending through all the more common and useful employments, and which is thus stated by Holt, C.J.:[5] "If a man takes upon him a public employment, he is bound to serve the public as far as the employment extends; and for refusal an action lies, as against a farrier for refusing to shoe a horse, against an innkeeper refusing a guest when he has room, against a carrier refusing to carry goods when he has convenience, his waggon not being full. . . . So an action will lie against a sheriff for refusing to execute process"; and is not to be set down to their being included in the class of common carriers, with an exemption (apparently quite arbitrary) from some of the most onerous incidents of the position.

No analogy between a consignment of goods through a carrier and the transmission of a telegram.

The objection of the Queen's Bench to considering telegraph companies as common carriers, that there is no analogy between a consignment of goods through a carrier and the transmission of a telegram, even apart from its authority, is of no little cogency. "We cannot see," say the Court, "how the person to whom a telegraphic message is sent can be said to have a property in the message, any more than he could have if it had been sent orally by the servant of the sender."[6]

[1] *Dickson* v. *Reuter's Telegraph Co.*, 3 C. P. D. 1, affirming 2 C. P. D. 62; *Playford* v. *United Kingdom Electric Telegraph Co.*, L. R. 4 Q. B. 706.

[2] Shearman and Redfield, Negligence, § 528 *et seqq.*; Wharton, Negligence, § 756 *et seqq.*; Redfield, Carriers, Part IV., Telegraph Companies, §§ 541-571; Thompson, Negligence, §§ 2392-2529.

[3] Wharton, Negligence, § 758.

[4] Shearman and Redfield, Negligence, § 534. This view is powerfully combated by Hunt, J., in *Leonard* v. *New York, &c. Telegraph Co.*, 41 N. Y. 544, 571.

[5] *Lane* v. *Cotton*, 1 Ld. Raym. 654. If this be so, a considerable amount of rhetoric in Shearman and Redfield, Negligence, § 535, becomes purely ornamental.

[6] *Playford* v. *United Kingdom Telegraphic Co.*, L. R. 4 Q. B. 714. See Holmes, The Common Law, 203. See, too, per Bigelow, C.J., in *Ellis* v. *American Telegraph Co.*, 95 Mass. 226, 231: "Under this provision, an owner or manager of such a line becomes to a certain extent a public servant or agent. He is bound, under a heavy penalty, to the due and faithful execution of the service which he holds himself out as ready to perform. He cannot refuse to receive and forward despatches; nor can he select the

Once more, telegraph companies are said to be bailees, and the receipt of messages a bailment;[1] but a bailment implies the delivery of property,[2] and that which the company receives is never delivered.

Messrs. Scott and Jarnagin's view.

They are also said to make themselves the agents of both the sender and the receiver of messages by a profession "to transmit for hire messages for individuals, and to deliver faithfully to others such messages as are entrusted to them."[3] This view is refuted in Bigelow's Leading Cases on Torts.[4] The learned author of that work favours two other hypotheses for fixing the position of telegraph companies: "Their liability for negligent mistakes (and perhaps delays) arises either on the ground of a misrepresentation of agency or on the broad principle that a person must so conduct his business as not to injure others." As to the first of these, in England at least, it is clear that no action is maintainable for a mere untrue statement, although acted on to the damage of the person to whom it is made; unless that statement is false to the knowledge of the person making it, and made with the view of its being acted on.[5] As to the second, in the unlimited way in which it is expressed, there is no such principle;[6] and the act of the company is not injurious without an intervening act of another to give it force and effect.[7]

La Grange v. *South-Western Telegraph Co.*

Dr. Bigelow's suggestions.

From this elementary difference in the estimate of the position of telegraph companies flows a variety of consequences that greatly differentiate the law in the two countries.

In England, the liability of telegraph companies, being based upon contract alone, falls under the rule prevailing in cases where a person undertaking the performance of work requiring skill, is held to owe a duty to the person employing them, but not to third persons, though

English rule as to contract between the company and the sender same as American.

persons for whom he will act. He cannot transmit messages at such times or in such order as he may deem expedient. He is required to send them for every person who may apply, at a usual or uniform tariff or rate, without any undue preference, and according to established regulations applicable to all alike."

[1] Scott and Jarnagin, Law of Telegraphs, § 95.

[2] *Ante*, 730.

[3] *La Grange* v. *South-Western Telegraph Co.*, 25 La. Ann. 383, 384. See *New York, &c. Telegraph Co.* v. *Dryburgh*, 35 Pa. St. 298, 303.

[4] At 623 *et seqq.*

[5] *Pasley* v. *Freeman*, 3 Term. R. 51, 2 Sm. L. C. (11th ed.), 66. The English rule on misrepresentation of agency is thus stated by Lord Esher, M.R., in *Firbank's Executors* v. *Humphreys*, 18 Q. B. D. 60: "Where a person by asserting that he has the authority of the principal induces another person to enter into any transaction which he would not have entered into but for that assertion, and the assertion turns out to be untrue, to the injury of the person to whom it is made, it must be taken that the person making it undertook that it was true, and he is personally liable for the damage that has occurred." An action will not lie for a representation not intended by the defendant to induce the plaintiff to act on it: *Swift* v. *Winterbotham*, L. R. 8 Q. B. 244, 253; nor if intended to induce the plaintiff to act on it, if the defendant believed it to be true: *Evans* v. *Collins*, 5 Q. B. 804; *Richardson* v. *Silvester*, L. R. 9 Q. B. 34. To constitute a right of action the misrepresentation must be made knowingly or without belief in its truth, or recklessly without caring whether it is true or false: *Derry* v. *Peek*, 14 App. Cas. 337. For the distinction between the case of a telegraph company wrongly transmitting a message, and the principle of estoppel asserted in *Collen* v. *Wright*, 7 E. & B. 301, see per Brett, L.J., *Dickson* v. *Reuter's Telegram Co.*, 3 C. P. D. 8. *Salveson* v. *Rederi Aktiebolaget Nordstjernan*, [1905] A. C. 302.

[6] At least by the law of England, *Alton* v. *Midland Ry. Co.*, 19 C. B. N. S. 213. *Ante*, 1016. See also *Dickson* v. *Reuter's Telegraph Co.*, 2 C. P. D. 70.

[7] Dr. Bigelow reasons as follows, at 626: "Now the telegraph is resorted to only in cases of importance and urgency; so that the very fact of presenting a message for transmission indicates that it concerns a matter of importance. The company cannot, therefore, fail to know that a mistake in transmission will be likely to produce damage to the receiver by causing him to do that which otherwise he would not do. Knowing, then, the probably evil consequences of transmitting an erroneous message, they owe a duty to the receiver of refraining from such an act, and if (by negligence) they violate this duty they must, on plain legal principles, be liable for the damage produced," &c. In England probably the major premiss of this reasoning would be called in question.

the whole reason and benefit of the employment may be on their account.[1] So far as third persons go, by the law of England it is "plain that all they undertake to do is to deliver a message from the person who employs them, and that they perform the part of mere messengers; *primâ facie*, therefore, their only contract is with the person who employs them to send and deliver a message."[2]

Telegraph companies act bound to warrant the correct transmission of messages they undertake to send.

Telegraph companies are not bound to warrant the correct transmission of the messages they undertake to send. The nature of their business, dependent upon delicate apparatus, liable to disarrangement by atmospheric or electrical conditions and disturbances, renders the exaction of such a liability extremely onerous where there is any wide distribution of telegraphic agencies.[3]

but bound to fidelity and care.

While the law has not seen fit to fix telegraph companies with an universal duty, nor with one exacting more than ordinary care, they are yet bound to fidelity and care in the exercise of the business they undertake; and are liable for the consequences of carelessness or negligence in the conduct of it to those with whom they have contracted.[4] The standard applicable is that of the due and reasonable care that persons of average skill in the business that they have undertaken, and in similar circumstances, use in their ordinary affairs.[5]

Assessment of damages.

In the assessment of damages the rule in *Hadley* v. *Baxendale*[6] applies and those damages may be recovered, and only those, which can 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.[7] So far there is no difference between the American and the English law.

English law as to the relation between the company and the receiver.

Playford v. *United Kingdom Telegraph Co.*

When we come to consider the position of the receiver of a telegram a divergence becomes apparent. In *Playford* v. *United Kingdom Telegraph Co.*,[8] the Court of Queen's Bench were of opinion that at common law the position of a receiver of a telegraphic message is not distinguishable from that of a person receiving a message orally from the servant of the sender, against whom he would have no right of action in the absence of fraud; and this rule was adopted by the Court of Appeal in *Dickson* v. *Reuter's Telegram Co.*[9]

Canadian decision, *Feaver* v. *Montreal Telegraph Co.*

If the receiver is the real principal and the sender is his agent, it has been decided in Canada that the telegraph company who undertake the transmission of the message are liable for its miscarriage. "It would be a startling doctrine to persons engaged in commercial transactions," says the learned judge who delivered the judgment of the Court in the case referred to,[10] "to be told that no action can be maintained against a telegraph company for negligence, except the person injured was himself the party who actually took the message to the company's office." The case is then put of a merchant instructing his clerk at a distance to telegraph the state of the market to him, and

1 *Robertson* v. *Fleming*, 4 Macq. (H. L. Sc.) 167, 177.
2 Per Brett, L.J., *Dickson* v. *Reuter's Telegram Co.*, 3 C. P. D 7.
3 Per Denman, J., *Dickson* v. *Reuter's Telegraph Co.*, 2 C. P. D. 69.
4 *Kinghorne* v. *Montreal Telegraph Co.*, 18 Can. Q. B. 60, 64.
5 *Playford* v. *United Kingdom Electric Telegraph Co.*, L. R. 4 Q. B. 714: "The obligation of the company to use due care and skill in the transmission of the message." *Ellis* v. *American Telegraph Co.*, 95 Mass. 226, 233.
6 9 Ex. 341. *Ante*, 104.
7 *Sanders* v. *Stuart*, 1 C. P. D. 326.
8 L. R. 4 Q. B. 706; followed in Canada, *Feaver* v. *Montreal Telegraph Co.*, 23 Upp. Can. C. P. 150.
9 3 C. P. D. 1.
10 Galt, J., in *Feaver* v. *Montreal Telegraph Co.*, 24 Upp. Can. C. P. 258, 260.

through the negligence of the telegraph company erroneous information being transmitted whereby the merchant sustains loss. If, it is argued, the principle contended for is not good, then the clerk can maintain no action, because he suffers no loss; nor the merchant, because the contract is with the clerk. An action was therefore held to lie.] This decision seems in accord with *Playford* v. *United Kingdom Telegraph Co.*,[1] where the case of agents is expressly excluded, and the relation of the parties there is said to be "that of sellers and buyers, and not that of principal and agents."

Henkel v. *Pape.*

In one well-known English case [2] it was sought to render the sender liable for the mistake of the telegraph clerk. The defendant wrote a message ordering three rifles. The telegraph clerk telegraphed the word "the" for "three." The plaintiffs had previously been negotiating for the sale of fifty rifles; accordingly they sent fifty. The defendant declined to take more than three. Plaintiff then brought his action for the price of fifty, but was held disentitled to recover the price of more than three, as the Post Office authorities were only agents to transmit the message in the terms in which the sender delivered it. "The defendant cannot be made responsible because the telegraph clerk made a mistake in the transmission of the message" [3]

American law.

In America the receiver has an action against the telegraph company where there is negligence in the transmission of the message and loss results. This is said to be on the principle that if two persons make a contract expressly for the benefit of a third, such third person may sue upon it.[4] The soundness of this reasoning seems doubtful, even admitting the accuracy of the legal proposition on which it is based;[5] since it must be of frequent occurrence that the sender of a telegram not only has no intention to make a contract for the benefit of a third person, but in sending his telegram does not even entertain the probability of benefit accruing. A better ground seems to be that which is alleged by Woodward, J., in the leading case of *New York and Washington Printing Telegraph Co.* v. *Dryburg*:[6] "The wrong, then, of which the plaintiff complains, consisted in sending him a different message from that which they had contracted with Le Roy

Woodward, J., in *New York and Washington Printing Telegraph Co.* v. *Dryburg.*

[1] L. R. 4 Q. B. 706.

[2] *Henkel* v. *Pape*, L. R. 6 Ex. 7, followed in *Verdin* v. *Robertson*, 10 Macph. 35. In *Falck* v. *Williams*, [1900] A. C. 176, the contract was made by means of a telegraphic code. The Privy Council held that the plaintiff, in order to succeed, must make out that the construction he puts is the true one. If the message is ambiguous, he must fail.

[3] Per Kelly, C. B., *l. c.* 9. [4] Shearman and Redfield, Negligence, § 543.

[5] Pollock, Contracts (7th ed.), 212, says: "The rule is now settled that a third person cannot sue on a contract made by others for his benefit, even if the contracting parties have agreed that he may." *Tweddle* v. *Atkinson*, 1 B. & S. 393; *Gandy* v. *Gandy*, 30 Ch. D. 57. *Ante*, 294 n. 4. Sir Frederick Pollock adds at 215: "A different rule is prevalent in America, but there does not seem to be any general agreement as to its reason or its precise extent." And he has a note in the 6th ed. 202: "See the American Law Review, April 1881, Mr. Wald's note here in American edition, and 'The right of a third person to sue upon a contract made for his benefit,' by Mr. E. Q. Keasbey, Harv. Law Rev. viii. 93, maintaining that 'what is called the prevailing American rule is not in fact a general rule of law,' and the authorities are to be explained on special grounds." In the 7th ed. this is omitted, and instead is a reference to Harriman on Contracts (2nd ed.), 212–226.

[6] 35 Pa. St. 302. In the same case it is said to be "settled upon abundant authority that incorporated companies may be sued in their corporate character for damages arising from neglect of duty, and for trover; and a corporation is liable in tort for the tortious act of its agent though the appointment of the agent be not under seal, if the act be done in the ordinary service." For this last proposition, *Smith* v. *Birmingham Gaslight Co.*, 1 A. & E. 526, is cited.

to send. That it was wrong is as certain as that it was their duty to transmit the message for which they were paid. Though telegraph companies are not, like carriers, insurers for the safe delivery of what is entrusted to them, their obligations, as far as they reach, spring from the same sources—the public nature of their employment and the contract under which the particular duty is assumed." Best of all, if true in fact, is that advanced in argument in *Playford* v. *United Kingdom Telegraph Co.*,[1] that liability to third parties is imposed by the terms of the American statutes.[2] Whatever the reason for the conclusion, the American law seems settled, that in case of negligence or wrong the telegraph company is liable to the addressee where a message is delayed,[3] or is delivered in an altered form, and where it is not delivered at all, and also where a forged message is sent without proper inquiry.[4] "It follows that in case of negligence or wrong, the company is liable to the addressee where a message is delayed or is delivered in an altered form, and where it is not delivered to him at all."[5]

Conditions on which telegrams are sent.

The conditions on which telegraph companies send their messages have also been the subject of conflicting decisions in England and America.

MacAndrew v. *Electric Telegraph Co.*

The English law is expressed in *MacAndrew* v. *Electric Telegraph Co.*[6] Defendants' private Act provided for the sending and receiving of messages for all persons alike, without favour or preference, subject, amongst other things, "to such reasonable regulations as may be from time to time made or entered into by the company." The plaintiff sent a message to defendants' office, which was received by defendants subject to a condition that they would not "be responsible for mistakes in the transmission of unrepeated messages from whatever cause they may arise." In sending the message the word "Southampton" was by mistake substituted for "Hull." The plaintiff, the sender, who did not have the message repeated, sued for damages caused by the mistake. The question was whether the regulation was a reasonable one.

It was pointed out by the Court that it was perfectly immaterial whether the regulation was under the powers of the Act, or whether it was a condition limiting liability under the common law, since in either event the only question would be as to the reasonableness of it.

Judgment of Jervis, C.J.; and of Willes, J.

As to this, "I see no reason," said Jervis, C.J.,[7] "why the company should not be allowed to avail themselves of the same sort of protection that other persons in a similar position are by law entitled to do, by limiting their liability by fair and reasonable conditions, notice of which is duly brought home to the parties contracting with them." Willes, J.,[8] adds: "The repetition of a message necessarily imposes more labour upon the party sending it, and therefore it is but reasonable that that extra labour should be paid for. And it is also reasonable that the company should be paid more for taking upon themselves the risk of insuring the transmission against those accidents which are necessarily incident to a business of this sort. I think it is obviously reasonable that a man who requires the company to take upon themselves either a greater amount of labour or a greater amount of risk should pay them accordingly." The analogy suggested by the Chief Justice is to the

[1] L. R. 4 Q. B. 712.

[2] This was said with reference to the States of New York, Pennsylvania and Michigan.

[3] *Gulf, &c. Ry. Co.* v. *Levy*, 46 Am. R. 269, 278.

[4] *Elwood* v. *Western Union Telegraph Co.*, 45 N. Y. 549.

[5] Shearman and Redfield, Negligence, § 543, citing cases.

[6] (1855), 17 C. B. 3.

[7] *L.c.* 14.

[8] *L.c.* 16.

conditions which are reasonable in the case of common carriers, and these we have already discussed at length.[1]

American law.

In America the position of a telegraph company is likened in many of the cases to that of a common carrier, and we have already seen that the law as to carriers differs in several respects from the law in this country.[2] In the case just cited, for instance, the decision of the American Courts would have been different from that of the Common Pleas; since they forbid the limitation of a carrier's liability in any other way than by special contract for valuable consideration,[3] and even then subject to restrictions not imposed in England.[4]

Law in Massachusetts.

In Massachusetts, however, it is held[5] that the telegraph companies may lawfully prescribe reasonable rules and regulations for the management of business, or establish special stipulations for the performance of services, which if made known to those with whom they deal, and directly or by implication assented to by them, will operate to abridge their general responsibility at common law, and to protect them from being responsible for unusual hazards incident to particular kinds of business. The Courts, nevertheless, except the liability for fraud or "gross negligence" of the principal or his servants and agents.[6] Thus, where the plaintiff sent a signed message on a form of the defendants, which had printed on it certain conditions that limited their liability, he was held to be bound by the conditions, although he had not in fact read them.[7] In a subsequent case in the same State,[8] the condition was "it is agreed between the sender of the following message and this company that the said company shall not be liable for mistakes or delays in the transmission or delivery, or for non-delivery of any unrepeated message, whether happening by negligence of its servants or otherwise, beyond the amount received for sending the same." A message was detained and ultimately brought back undelivered by the messenger. On an action being brought for negligence in the carriage of the message, the Court held that there was no principle of public policy which should prevent the company from stipulating against responsibility for such negligence beyond a fixed amount, unless for reasonable compensation. "The only negligence shown in this case was an unexplained delay in delivering the message on the part of the messenger boy, to whom it was, after its receipt, entrusted for delivery." "But the negligence of the messenger boys in delivering messages was plainly contemplated by the parties, when they entered into the stipulation."[9]

Decision considered.

It will be gathered from what has gone before that the plaintiff had the alternative of paying the additional fee of half the price of the

[1] *Ante*, 892.

[2] *Ante*, 897.

[3] *E.g.*, *Smith* v. *New York Central Rd. Co.*, 24 N. Y. 222.

[4] *Railroad Co.* v. *Lockwood*, 17 Wall. (U. S.) 357; *Liverpool, &c. Steam Co.* v. *Phenix Insurance Co.*, 129 U. S. (22 Davis) 397. See *Camp* v. *Western Union Telegraph Co.*, 1 Metc. (Ky.), 164, referred to by Redfield, Carriers, § 557, as a case where "the rule of responsibility of telegraph companies seems to be as correctly laid down" "as in any other."

[5] The state of the American authorities is sho[illegible] in *Hart* v. *Western Union Telegraph Co.*, 56 Am. R. 119, and note at 124.

[6] *Ellis* v. *American Telegraph Co.*, 95 Mass. 234: "Of course, a party cannot in such way protect himself against the consequences of his own fraud or gross negligence, or the fraud or gross negligence of his servants or agents."

[7] *Grinnell* v. *Western Union Telegraph Co.*, 113 Mass. 299. Cp. *Breese* v. *United States Telegraph Co.*, 48 N. Y. 132.

[8] *Clement* v. *Western Union Telegraph Co.*, 137 Mass. 463.

[9] *L.c.*, per Morton, C.J., 466.

telegram, which was not disputed to be not more than a reasonable price for the services rendered, and having the message repeated with the safeguard of an insurer's liability attaching to the company; or of paying the lesser sum, which he actually paid, on the more onerous terms; and that he chose the latter alternative, to which the Court's decision held him bound. This apparently eminently reasonable decision is commented on as follows in a well-known American text-book:[1] "This case stands alone, and we think it would be difficult to support it by any sound reasoning. But Massachusetts has always enjoyed a 'bad pre-eminence' in matters of judicial decisions affecting the interests of corporations and employers."[2]

Messages transmitted over various lines.

Questions sometimes arise as to the liability of several connecting companies in respect of a message received by one to be transmitted over the connected lines. Here, again, the law as developed in the case of common carriers is applicable, and has been already considered.[3] In America the rule seems to be that the company actually in fault is liable to the injured party, whether sender or receiver, although he has no direct dealings with them; while the presumption is against the liability of the telegraph company first receiving the message, for the negligence of connecting lines. If the company first receiving the message contracts to transmit the message to its destination, it is liable for the negligence of all connecting lines.[4]

American authority for the proposition that the person who selects the telegraph must bear loss, as between him and the receiver, arising from errors in transmission.

There is an American authority[5] for the proposition that as between sender and receiver of telegrams the person who selects the telegraph as a means of communication must bear any loss occasioned by errors in transmission on the part of the telegraph company. This proposition is supported by the assumption that "if an agent receive instructions by telegraph from his principal, and in good faith act upon them as expressed in the message delivered him by the company, it would seem he ought to be held justified, though there were an error in the transmission." Assuming a telegraph company to stand in the position of an intermediary merely—a messenger—as it has been held they do in England,[6] or even of a special agent who misconstrues his authority and that the message to the ultimate agent has been misdelivered, the principal would not be liable for an act that he did not

Criticised.

[1] Shearman and Redfield, Negligence, § 555, note 3.

[2] For "sound reasoning" reference may be had to *Manchester, Sheffield, and Lincolnshire Ry. Co.* v. *Brown*, 8 App. Cas. 703, especially per Lord Bramwell, 711 *et seqq.* What the character of the "pre-eminence" of the Courts of Massachusetts is need not occupy us here. At least, no such decisions as *Thompson* v. *Western Union Telegraph Co.*, 54 Am. R. 644, or *Stuart* v. *Western Union Telegraph Co.*, 59 Am. R. 623, are to be looked for there. As to what is a "reasonable condition" in these telegraph cases, see *Western Union Telegraph Co.* v. *McGuire*, 54 Am. R. 295. There is a collection of cases that will well repay reference to them, on reasonable and unreasonable conditions, Stroud, Judicial Dictionary, *sub voce* "Reasonable."

[3] *Ante*, 931.

[4] Shearman and Redfield, Negligence, § 544; *La Grange* v. *South-Western Telegraph Co.*, 25 La. Ann. 383; *Leonard* v. *New York Telegraph Co.*, 41 N. Y. 544; *Baldwin* v. *United States Telegraph Co.*, 45 N. Y. 744. The American law as to cipher despatches is discussed at length in *Daughtery* v. *American Union Telegraph Co.*, 51 Am. R. 435. Damages recoverable for failure to transmit and deliver a message written in unexplained cipher are no more than nominal: *Western Union Telegraph Co.* v. *Wilson*, 37 Am. St. R. 125. In *Western Union Telegraph Co.* v. *Carter*, 34 Am. St. R. 826, it was contended, though unsuccessfully, that damages for the non-delivery of a message announcing the death of a person should include a sum for mental anguish caused by the manner and place of his burial, and for the expenses of exhuming the body.

[5] *Ayer* v. *Western Union Telegraph Co.*, 79 Me. 493, 1 Am. St. R. 353.

[6] Per Lush, J., in *Playford* v. *United Kingdom Telegraph Co.*, L. R. 4 Q. B. 714.

authorise, though done in assumed obedience to his instructions.[1] On the other hand, if the telegraph company occupy any position peculiar to themselves, first the position should be defined and then the consequences flowing from it should be deduced, not assumed.

Setting this analogy aside, the principle enunciated is as follows:[2] "It is evident that in case of an error in the transmission of a telegram either the sender or receiver must often suffer loss. As between the two, upon whom should the loss finally fall? We think the safer and more equitable rule, and the rule the public can most easily adapt itself to, is that, as between sender and receiver, the party, who selects the telegraph as the means of communication, shall bear the loss caused by the errors of the telegraph. The first proposer can select one of many modes of communication, both for the proposal and the answer. The receiver has no such choice, except as to his answer. If he cannot safely act upon the message he receives through the agency selected by the proposer, business must be seriously hampered and delayed. The use of the telegraph has become so general, and so many transactions are based on the words of the telegram received, any other rule would now be impracticable." Principle enunciated.

It is difficult to believe that this doctrine, which seems very readily to admit of application to the case of undelivered letters, will find acceptance in any other State than that of its nativity. It seems specially adapted to produce circuity of action. It assumes that where one of two parties suffers loss there must be some legal method of shifting it upon the other: that the receiver of a telegram may act on it, without troubling himself to verify its authenticity; that the sender is liable for a mistake made without negligence, and not merely for negligence of the telegraph company in making a mistake; and that, consequently, the right of the receiver against the sender is greater than any right of the sender against the telegraph company, who would at least be under no liability to the sender where the error in transmission is caused by act of God, even if the analogy of the carrier's liability is the correct one. Criticised.

The Maine Court impose two limitations on their rule: first, the receiver must have acted in good faith; and secondly, the message must be actually sent, not forged.[3]

[1] *Smout* v. *Ilbery*, 10 M. & W. 1; Story, Agency (9th ed.), § 264 and note: *Thomson* v. *Davenport*, and notes, 2 Sm. L. C. (11th ed.), 379.

[2] *Ayer* v. *Western Union Telegraph Co.*, 79 Me. 499.

[3] As to liability on a forged message, see *Elwood* v. *Western Union Telegraph Co.*, 45 N. Y. 549. There is a long note on the Law of the Telephone, to *Central Union Telephone Co.* v. *Falley*, 10 Am. St. R. 114, at 128-136. The history of the invention of the electric telegraph is given in *O'Reilly* v. *Morse*, 15 How. (U. S.) 62.

BOOK VI.

SKILLED LABOUR.

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CHAPTER I.

SKILLED LABOUR.

GENERALLY.

Hiring of skill.

WE have already incidentally noticed the subject of skilled labour under the head of Bailments; where we sought to distinguish between those relations involving a bailment of goods, and those where the hiring was of care, experience, or skill. These cases we now proceed to consider,[1] bearing in mind that the general principles laid down are not applicable merely to the relations immediately dealt with, but that they hold generally good wherever work is done upon bailments.

General rule.

The rule applicable to all skilled labourers is *Spondet peritiam artis et imperitia culpæ adnumeratur*, or, as it is alternatively expressed, *Spondet diligentiam gerendo negotio parem*.[2] A person holding himself out to do certain work, impliedly warrants his possession of skill reasonably competent for its performance.[3] If he have not that skill he is liable as for negligence.

Jenkins v. *Betham*.

This rule is illustrated by *Jenkins* v. *Betham*,[4] a case where knowledge collateral to the special professional knowledge directly involved in doing the work undertaken was required—namely, a knowledge of law by country surveyors dealing with ecclesiastical dilapidations. The jury were asked to say on the evidence whether such knowledge could reasonably be expected from country surveyors and valuers. The question put to them was whether the defendants undertook to supply more skill than ordinarily current in the country at large, and

[1] The subject is well treated, though with some variations from what is advanced in the text, in the American case of *Leighton* v. *Sargent*, 27 N. H. 460.

[2] Inst. 4, 3, 7; D. 9, 2, 7; D. 9, 2, 8; D. 9, 2, 27, § 29; D. 50, 17, 132; Story, Bailm. § 433; Trayner, Latin Maxims (2nd ed.), 239, 570; Bell, Principles of the Law of Scotland (9th ed.), 141–156. *Ante*, 28 and 740.

[3] *Harmer* v. *Cornelius*, 5 C. B. N. S., per Willes, J., 246: *Duncan* v. *Blundell*, 3 Stark. (N. P.), per Bayley, J., 7: "Where a person is employed in a work of skill the employer buys both his labour and his judgment; he ought not to undertake the work if it cannot succeed, and be should know whether it will or not." *Gheen* v. *Johnson*, 90 Pa. St. 38, 47: "The law implies a promise from brokers, bankers, or other agents, that they will severally exercise competent skill and proper care in the service they undertake to perform, but it neither implies nor requires more."

[4] 15 C. B. 168, distinguished in *Pappa* v. *Rose*, L. R. 7 C. P. 32, 525. *Oliver* v. *Court*, 8 Price (Ex.) 127, may be referred to for the position of a land surveyor.

whether they were to bring to bear the knowledge that might be looked for in a lawyer or in a person who lives near the sources of knowledge? At the same time they were cautioned that the defendants could not be expected to supply minute and accurate knowledge of the law. A verdict being given for the defendants, a new trial was moved for; and the Court, while approving the method in which the judge (Parke, B.) had placed the matter before the jury, allowed the application; because "we think [1] that, under the circumstances, they (the defendants) might properly be required to know the general rules applicable to the valuation of ecclesiastical property, and the broad distinction which exists between the cases of an incoming and an outgoing tenant, and an incoming and an outgoing incumbent."

General rule.

This decision points the obligation of a person professing to act in a matter requiring skill to be conversant with the general principles of law applicable to his profession, and with the methods of practice of most ordinary occurrence, even though knowledge outside the actual scope of his profession is involved. A professional acquaintance with the refinements of the subject is not, however, required. This is expressed by Tindal, C.J.: [2] "Every person who enters into a learned profession undertakes to bring to the exercise of it a reasonable degree of care and skill. He does not undertake, if he is an attorney, that at all events you shall gain your case, nor does a surgeon undertake that he will perform a cure; nor does he undertake to use the highest possible degree of skill. There may be persons who have higher education and greater advantages than he has, but he undertakes to bring a fair, reasonable, and competent degree of skill."

Stated by Tindal, C.J.

Degree of skill to be expected.

The degree of skill requisite is such as may be expected, in the circumstances of time and place, from an average person in the profession—one neither specially gifted nor extraordinarily dull. Where this reasonable amount of information and skill proportioned to the duties that are undertaken is found, there is no liability for errors of judgment in the application of knowledge. Each case depends on its own circumstances; and when an injury has been sustained that could not have arisen unless from the absence of reasonable skill or diligence, then there is liability [3]

The plaintiff here, as always, must prove his case and show not mere lack of judgment on the part of the defendant, but ignorance of that common knowledge of his profession that all practitioners are assumed to have, or that carelessness or recklessness which is incompatible with the common standard of practice. The determination of whether the conduct impugned reaches this is for the jury, on the direction of the judge that the circumstances admit of the probability that it has not been attained.

Clydesdale Bank v. *Beatson*

Clydesdale Bank v. *Beatson* [4] may serve as an illustration; although the failure in duty there was rather a lack of the care that any intelligent man should have exercised in the matter than a want of special or technical skill. A teller in the plaintiff bank was sued for £900 on the ground that he had failed to account for money to that amount entrusted to him in the course of the business of the bank. The question was whether the loss was through an accident occurring where ordinary

[1] *L.c.*, per Jervis, C.J., 189.

[2] *Lanphier* v. *Phipos*, 8 C. & P. 479. Profession of a skilled employment raises a presumption of competence in the employment: Hare, Contracts, 155.

[3] *Hart* v. *Frame*, 6 Cl. & F. 193. Cp. *Speight* v. *Gaunt*, 9 App. Cas., per Lord Blackburn, 17.

[4] 10 Rettie, 88. Cp. *Melville* v. *Doidge*, 6 C. B. 450.

care and diligence were exercised, or caused through the absence of care and diligence. The Court were of opinion that the loss occurred through the defendant giving a parcel containing ten £100 notes in mistake for one of five £20 notes in change for a £100 note to a person unknown to him, and that this constituted gross negligence on his part. The rule of responsibility applied was that, "in contracts reciprocally beneficial, the care of a man of ordinary prudence is required, *culpa levis* will ground responsibility."[1] It was assumed in favour of the defendant that the *onus* was on the pursuers to prove more than the mere possession of the money and failure to account; though the decision does not go the length of enunciating this as a proposition of law.[2] "Ordinary care," we must note, is a phrase to be taken in connection with the subject dealt with. The ordinary care of a bricklayer is concerned with bricks, of a jeweller with precious stones and trinkets, of a doctor with patients, and of a solicitor with the deeds and the affairs of clients. Thus the ordinary care of a bank clerk has reference to the care and skill of that class with reference to the matters with which they are in the habit of dealing, and so of the rest. The rule of skilled diligence requires the attainment of the standard of the class in dealing with the material appropriate to it.

Who are comprehended under the rule.

Under the rule of diligence now being considered, professional men of all classes, equally with skilled artisans,[3] are comprehended in addition to those already mentioned, and, amongst others, engineers, machinists, shipmasters, builders, brokers,[4] patent and other agents.[5]

Test suggested by Bell in his Commentaries.

Bell[6] in his Commentaries suggests some tests of use to determine what is negligence by a skilled agent. The following propositions embody a portion of what there appears (the illustrations of the application of the principles being omitted):

First, where a specific act is ordered to be done, it must be done according to rule; neither neglected nor unskilfully done.

Secondly, where the act to be done may be safely done by following a known method, which is the plain and common rule of the profession, the professional man is responsible if he neglects to follow the method.

Thirdly, where an operation to be performed is complicated and difficult, a professional man may err and be unsuccessful, and yet not responsible if he fairly exert the best of his judgment.

The standard here proposed is too high. The skilled labourer is not bound to the highest level of his attainment. The line to be indicated is not a maximum but a minimum. He is not required to exercise the "best of his judgment." He is required only to act up to the average standard of competent men in the circumstances in which he is placed.

Judgment of Tindal, C.J., in *Chapman* v. *Walton*.

The particular inquiry that must be made is put by Tindal, C.J., in *Chapman* v. *Walton*:[7] "The point, therefore, to be determined is

[1] 10 Rettie, per Lord Craighill, 90, citing Bell, Principles of the Law of Scotland, § 234.

[2] Bell, Principles of the Law of Scotland, § 234. See, however, Story, Bailm. (8th ed.), § 416 a. *Ante*, 753.

[3] See D. 9, 2, 27, § 29.

[4] "A broker for sale is a person making it a trade to find purchasers for those who wish to sell, and vendors for those who wish to buy, and to negotiate and superintend the making of the bargain between them." Blackburn, Contract of Sale, 81 (2nd ed. at 78), quoted by Hannen, J., in *Mollett* v. *Robinson*, L. R. 7 C. P. 97, and by Mellor, J., *Hollins* v. *Fowler*, L. R. 7 H. L. 774.

[5] *Lee* v. *Walker*, L. R. 7 C. P. 121, approved *Ex parte Bailey*, L. R. 8 Ch. 69, 63.

[6] 1 Bell, Comm. (7th ed.) 489. *Ante*, 766 and 816.

[7] 10 Bing. 57, 63. *La Banque Provinciale* v. *Charbonneau*, (1903) 6 Ont. L. R. 302. In *The "William Lindsay,"* L. R. 5 P. C. 338, 343, it is said, with reference to the question

not whether the defendant arrived at a correct conclusion" "but whether" "he did or did not exercise a reasonable and proper care, skill, and judgment. This is a question of fact, the decision of which appears to us to rest upon the further inquiry—viz., whether other persons exercising the same profession or calling, and being men of experience and skill therein, would or would not have come to the same conclusion as the defendant. For the defendant did not contract that he would bring to the performance of his duty, on this occasion, an extraordinary degree of skill, but only a reasonable and ordinary proportion of it; and it appears to us, that it is not only an unobjectionable mode, but the most satisfactory mode of determining this question to show by evidence whether a majority of skilful and experienced brokers would have come to the same conclusion as the defendant. If nine brokers of experience out of ten would have done the same as the defendant under the same circumstances, or even if as many out of a given number would have been of his opinion as against it, he who only stipulates to bring a reasonable degree of skill to the performance of his duty, would be entitled to a verdict in his favour."

Where reasonable skill and diligence according to the accepted standard of skill has been applied, then no liability for loss by robbery, fire, or accident.

If reasonable skill and diligence, as tried by the test just indicated, have been used, the professional man or the skilled workman, as the case may be, is not liable for accidents, or losses, or damage happening without his default; for example, losses by robbery, by fire, or by other accident, either at sea or on land.[1]

Where unusual skill must be exerted.

But although the ordinary standard of attainment is that which is most usually required and must in the run of instances be reached, the case has been put of a skilled performer being employed on the ground of his possession of unusual and special skill. This often happens with engineers, architects, and persons peculiarly skilled in works of difficulty and delicacy. An extraordinary fee is given for a special degree of skill and experience. The recipient thereupon is undoubtedly bound to bring to bear a greater degree of skill than the ordinary expert. He becomes bound to a performance measured by the consummate skill attributed to him which secures the unusual fee. Wharton,[2] quoting Mommsen, cites the case of Luca Giordano, a Neapolitan painter of extraordinary talents, which he never fully displayed by reason of an execution as rapid as his talents were remarkable.[3] Any one employing him could not, therefore, look for a picture

Case cited by Mommsen.

of liability for mooring to a buoy approved by the port authorities without examining it, and which broke and caused the damage for which the plaintiff sued, "These questions of negligence must be decided by what a prudent and skilful seaman would do under the circumstances, and by what he is able to do. It is obvious that no man, however prudent and however desirous to be on the safe side, would be able to examine these buoys, so as to discover whether there were latent defects in them or not. He must, to a certain extent, trust to the sanction which has been given to them by the authorities of the port. No doubt that would not absolve him from all further precaution. He ought not implicitly to trust to that which he cannot to a certainty know is a safe buoy, and he ought to take reasonable precautions, in the event of its not holding him, to bring up and secure himself from danger." *Burrell* v. *Tuohy*, [1898] 2 I. R. 271. *Ante*, 946.

[1] Story, Agency (9th ed.), § 188.

[2] Negligence, § 51.

[3] "He was the son of Antonio Giordano, an obscure artist, whom he had surpassed when he was eight years old." "Such was the demand for his drawings and sketches, that his father continually urged him to despatch by repeating to him, '*Luca, fa presto*' ('Luke, make haste'), and hence he came to be designated by this phrase" (Bryan, Dictionary of Painters, *sub nom.*). "Giordano was the last of the great Italian painters. Some of his works show marks of genius, and with more conscientious labour he might have equalled the greatest masters, but owing to his fatal facility of execution he violated all the rules of good taste." (Champlin, Cyclopedia of Painters, *sub nom.*).

equal to Giordano's talents elaborated by an average man's care. The opinion of Mommsen, in which Wharton concurs, is that the skill exacted from such a man would be, not the skill he could exert, but the skill that he usually employed when working for others; and this seems to give a satisfactory test for the decision of these cases.

An opera singer, engaged on account of special and well-recognised powers, could not avoid liability for negligence by showing that her performance was up to the average of singers. The test would be whether her performance was equal to that which persons of similar powers in similar positions could be reasonably expected to give; or, if the performer were phenomenal, whether the performance was such as was to be expected from experience based on the result of the average performance of the artiste, or perhaps whether she had resorted to her *repertoire* and given an adequate specimen of her skill and talent.[1] Opera singer.

Accountants and Auditors.

The Oxford Dictionary[2] defines Accountant: "One who professionally makes up or takes charge of accounts." There are no legal conditions to be complied with preliminary to the practice of the profession, as is the case with medical men or solicitors, nor is a licence needed, as with auctioneers; although an "Institute of Chartered Accountants in England and Wales," incorporated by Royal Charter in 1880, and a "Society of Accountants and Auditors," incorporated and registered in 1885 under sec. 23 of the Companies Act, 1862, exist to establish and maintain a standard of professional efficiency in it; but neither has any coercive power over others than its members. Accountant defined.

The guiding principle with which to test the competence of practitioners is summed up in the maxim: *Spondet peritiam artis.* The value of a profession of reasonable skill varies according to the circumstances. Theoretically the standard to be attained is that of efficiency: *Spondet diligentiam gerendo negotio parem;* but this is to be estimated by the general average efficiency of the same class of people at the same time and place and in analogous circumstances. Any person setting up to possess skill must have his pretensions gauged by the proficiency of the general body of those with whom he holds himself out as competing for business. Thus, though the standard set up by the two bodies just noticed is in no way a prerequisite to the practice of the business of an accountant, still, if the members of these two bodies form such a proportion of practising accountants that their standard represents the average skill and competency of practitioners at large, so that one engaging an accountant would normally expect that he was retaining a practitioner with skill equal to the average of theirs, the standard of competent accountantship Rule of skill.

[1] In *Price* v. *Metropolitan House, &c. Co.*, 23 Times L. R. 630, an agency case, Cozens Hardy, M.R., adopted as "very accurately" stating the law (but somewhat unnecessarily, so far as the facts are reported), a direction to a jury by Lawrance, J.: "A man who is employed to act for another as his agent is bound to exercise all the skill and all the knowledge he has of a particular business, all the diligence, all the zeal, and all the energy that he is capable of, and any interests he may have himself he is bound to exercise to the fullest extent for the sole and exclusive benefit of the person for whom he is acting." This is admirable moral philosophy, but the law only requires "ordinary diligence." Story, Agency, § 183. *Post*, 1156, 1211.

[2] Dr. Murray's New English Dictionary, *sub voce.*

would not differ from their standard of qualification: not by direct reference to them, but because the proportion of practising accountants possessing their qualifications would coincide with the standard of efficiency prevailing amongst accountants generally: would indicate an amount of skill that one engaging an accountant would be in law entitled to look for. This applies merely to skill at the work of an accountant. The general educational qualification, which the examination papers set by the two societies show to be required from their members, is *nihil ad rem*.

If the person undertaking accountants' work, at the time of his employment, disavows possessing any indicated amount of business aptitude, or if the client knows who he is engaging and does so from any personal view apart from the consideration of professional ability, the rule of skill to be exacted loses its relation to the general standard of the art, and is determined by regard to the particular person. In short, the rule applicable in the case of the negligence of an accountant is identical with that we are presently to consider in more detail, of a medical practitioner; except that in the present case there is no complication of statutory requirements, and so while there is no disability to practise there is also no minimum statutory qualification to attain.[1]

Auditors defined.

The duties of an auditor are identical with those of an accountant; the two may be regarded as related as species to genus. An "auditor" is so named from the fact that accounts were formerly vouched for orally. An auditor is usually an official, but may be a private person, more or less skilled in accounts, "whose duty it is to receive and examine accounts of money in the hands of others" and "who verifies them by reference to vouchers and has the power to disallow improper charges."[2]

While the work of an auditor is most relevant to an accountant's business, there is no legal reason, apart from some quite exceptional statutory enactment,[3] why an auditor should be an accountant; indeed the legislature has in more than one case[4] assumed that an auditor should not be an accountant.

Duties.

An auditor[5] is generally identified with work done under statutory requirements, through the continually recurring provision in Acts of Parliament relating to Companies, Benefit Societies, Local Governmental authorities and the like purposes, that their accounts must be audited. Yet the employment is concerned as well with private business and comes under the rules of the common law. There is, however, a difference. An auditor engaged by a private firm to do work on their books, in the majority of cases would work under a special contract; he would be engaged to seek out some special source of error, or to prepare books for some purpose indicated to him; while the audit by statute is directed to more general, at any rate more uniform, considerations; its range is prescribed by the statute which further indicates its purpose. Apart, then, from any complication, either contractual or statutory, the duty of an auditor is "not to confine himself merely to the task of verifying the arithmetical accuracy of the balance sheet, but to inquire into its substantial accuracy."[6]

1 *Post*, 1156.

2 New English Dictionary, *sub voce*.

3 *E.g.*, 57 & 58 Vict. c. 47, s. 3.

4 *E.g.*, 8 & 9 Vict. c. 16, s. 108; 25 & 26 Vict. c. 89; First Sched. (1) Table A (93), now superseded by the Order of 30th July, 1906.

5 If there is more than one auditor, each has full independent power: *Steele* v. *Sutton Gas Co.*, 12 Q. B. D. 68.

6 *Leeds Estate Building and Investment Co.* v. *Shepherd*, 36 Ch. D., per Stirling, J., 802.

Yet "he is not bound to do more than exercise reasonable care and skill in making inquiries and investigations"; he must not certify what he does not believe to be true; and he must use reasonable care and skill before he accepts what he has to certify as true. What is reasonable care in any case must depend upon the circumstances of that case. "Where there is nothing to excite suspicion very little inquiry will be reasonably sufficient. . . . Where suspicion is aroused more care is obviously necessary; but still, an auditor is not bound to exercise more than reasonable care and skill, even in a case of suspicion, and he is perfectly justified in acting on the opinion of an expert where special knowledge is required."[1] Thus in *In re Kingston Cotton Mill Co.* (No. 2),[2] the Court of Appeal reversed Williams, J., and held that it is "no part of an auditor's duty to take stock." "He must rely on other people for details of the stock-in-trade on hand. In the case of a cotton mill he must rely on some skilled person for the materials necessary to enable him to enter the stock-in-trade at its proper value in the balance sheet."[3]

An auditor's duty is more extensive than to see whether there are vouchers apparently formal and regular, justifying each of the items placed before him. He is not only entitled but justified and bound to make fair and reasonable examination of the vouchers to see that there are not amongst the payments so made payments which are unauthorised or improper.[4]

An auditor must be honest; if he is that, a mere mistake does not render him liable for negligence, unless it is such as points to professional incompetence. Again, negligence alone does not render him liable to any one besides those with whom he has a contractual duty. Erroneous statements made by him and acted on to their damage by people who have not employed him, to subject him to liability must be fraudulent—false representations made with the intention they are to be acted on.[5] Generally, all that has been said hitherto about the duty of a non-statutory auditor holds where the auditor works under statutory obligation.

Special statutory powers and duties.

The statute imposing the obligation must, however, be closely looked at for the particular powers and duties conferred and imposed. Two or three instances are all that can be given here. The Companies Clauses Consolidation Act, 1845,[6] provides that directors are to deliver to the auditors, accounts and balance sheets before every ordinary meeting of shareholders. The auditors are either to report on or to confirm these, and their report or confirmation is to be read at the meeting. The accounts put before the auditors are to be proper accounts of the company of all moneys received or expended. The books of the company are to be balanced, and a balance sheet is to be made up which must exhibit a true statement of the capital, stock, credits and property of every description belonging to the company, and the debts due.

[1] *In re London and General Bank* (No. 2), [1895] 2 Ch., per Lindley, L.J., 683. See *In re Kingston Cotton Mill Co.* (No. 2), [1896] 2 Ch., per Lopes, L.J., 288.

[2] [1896] 2 Ch. 279.

[3] *I.c.* per Lindley, L.J., 286.

[4] *Thomas* v. *Devonport Corporation*, [1900] 1 Q. B., per Lord Russell, C.J., 21.

[5] *Le Lievre* v. *Gould*, [1893] 1 Q. B. 491. *Peacher* v. *Calder*, [1899] A. C. 451, is the case of an auditor not apprised of the purpose of his audit, and auditing on different principles from those he would have adopted had he been aware of its purpose, and whose audit was set aside on that ground.

[6] 8 & 9 Vict. c. 16, ss. 101 108 116 119.

Companies Act, 1900

The main provisions with regard to auditors under the Companies Acts are to be found in the Companies Act, 1900.[1] An auditor or auditors must be appointed at each meeting but must not be a director or officer of the company. An auditor has a right of access at all times to the books, accounts and vouchers of the company, and is entitled to require information and explanation from the directors and officers. He must certify on the balance sheet whether his requirements have been complied with or not. He must report to the shareholders on the accounts examined, and on every balance sheet presented, and whether it presents a true and correct view of the company's affairs.[2]

The statutory power just noticed giving an auditor power to require information or to have access to books and accounts does not impose on him the duty on all occasions to do so. There is a discretion conferred.[3] Yet if the report appears defective because the auditor has not availed himself of the sources of information open to him, he will expose himself to an action for negligence at the hands of those, whoever they may be, to whom he owes a duty of care and to the extent that the damage incurred flows in natural and immediate sequence from his neglect.[4]

Misfeasance under Companies (Winding up) Act, 1890.

There is, further, the remedy against the auditor for misfeasance[5] under sec. 10 of the Companies (Winding-up) Act, 1890,[6] if the company is in liquidation; since it has been held that a properly appointed auditor is an "officer" of the company within the section.[7]

If the auditor is not an officer of the company, or the company is not being wound up, his liability may still be enforced by the company by action;[8] and, if there is false and fraudulent representation, by any one injured, according to the rules of the common law.

Public Health Act audit.

The system of audit established by the Public Health Act, 1875[9] (where an urban authority is not the Council of a borough[10]), which is incorporated by the Local Government Act, 1888,[11] and applied to the London boroughs by the London Government Act, 1899,[12] must be independently noticed. The statute makes provision for an annual audit, and the appointment of an auditor, and gives power to the auditor by summons to require the production of all documents and papers, and also to require any person in whose power or possession they are or should be to appear at the audit and to sign a declaration as to the correctness of the same. Penalties are imposed in the case of default or false declaration.[13]

The auditor is to disallow every item of account contrary to law,

[1] 63 & 64 Vict. c. 48, ss. 30, 31; See 25 & 26 Vict. c. 89; First Sched. (1) Table A (Revised), 103-109; W. N. 11, 8, 66.

[2] See 45 Solicitor's Journal, 167. Cp. The Companies Act, 1876 (42 & 43 Vict. c. 76), ss. 7, 8, under which the auditors are entitled to a list of all the books kept by the company. The Act applies to every banking company registered as "limited" after the passing of the Act.

[3] *Julius* v. *Bishop of Oxford*, 5 App. Cas. 241.

[4] *Leeds Estate Building and Investment Co.* v. *Shepherd*, 36 Ch. D. 787. The penalty of s. 28, 63 & 64 Vict. c. 48, for false statements is in addition to the civil action.

[5] *In re Cardiff Savings Bank, Davies's Case*, 45 Ch. D. 537.

[6] 53 & 54 Vict. c. 63.

[7] *In re London and General Bank*, [1895] 2 Ch. 166 and 673. *In re Kingston Cotton Mill Co.*, [1896] 1 Ch. 6. Cp. *Western Counties, &c. Milling Co.*, [1897] 1 Ch. 617, where one acted as auditor without appointment.

[8] *Leeds Estate Building and Investment Co.* v. *Shepherd*, 36 Ch. D. 787.

[9] 38 & 39 Vict. c. 55, s. 247.

[10] For which case see 45 & 46 Vict. c. 50, s. 25; *Thomas* v. *Devonport Corporation*, [1900] 1 Q. B. 16; under this Act there is no power to surcharge, and an audit is no bar to an action disputing its conclusions: *A.-G.* v. *De Winton*, [1906] 2 Ch. 106.

[11] 51 & 52 Vict. c. 41, s. 71. [12] 62 & 63 Vict. c. 14, s. 14. [13] Sec. 247, sub-s. 5.

and to surcharge the person responsible for any illegal payment, and to charge against any person accounting the amount of any deficiency or loss incurred by his negligence or misconduct.[1] The auditor's decision may be reviewed either by means of a *certiorari* or by appeal to the Local Government Board,[2] which possesses the same powers as in the case of appeals against poor-law auditors.

In the event of the auditor's decision not being disputed, the auditor may recover the sum not paid as if it were a sum certified on the audit of poor-rate accounts.[3]

The multitudinous provisions respecting auditors, their powers and duties, are indicated in the Chronological Table and Index to the Statutes under the word "Audit"; to which any reader desirous of ascertaining the position of an auditor in any particular case is referred.

Architects, Surveyors, &c.

An architect is defined[4] as "a skilled professor of the art of building, whose business it is to prepare the plans of edifices, and exercise a general superintendence over the course of their erection." Definition.

When an architect is employed on the erection of a house he is expected usually to perform the following services: Services expected of him.

(1) To prepare all drawings[5] and a specification of the work.

(2) To arrange terms with the contractor.

(3) To superintend the work.

In this relation the architect must give "reasonable supervision." "To some extent an architect is an artist—that is, as regards the design and plan. But for the rest, his work is just ordinary tradesman's work—drawing specifications and supervising the work. He is not supposed to do all the supervision personally. His subordinates can do much of it as well as he can himself, but if he undertakes to do it, he is bound either to do it himself, or to have it done by some person whom he employs and in whom he has confidence. I think the meaning of the contract is that he shall see that the work is done well before he certifies it. If he does not do this then the interest of the employer is altogether neglected."[6]

(4) To certify what amount of money that is to be paid at the dates stipulated in the contract.[7]

[1] *L.c.* sub-s. 7.

[2] *L.c.* sub-s. 8. By the Audit of Parochial Accounts Act, 1848 (11 & 12 Vict. c. 91), s. 4, on appeal the case is to be decided "on the merits," and the Commissioners are to do what is "fair and equitable."

[3] Justices have no discretion in enforcing the auditor's certificate: *The Queen* v. *Fordham*, L. R. 8 Q. B. 501.

[4] Murray, English Dictionary, *sub voce*. Mr. Ruskin's conception, if adopted, would probably dispense with the consideration of the subject altogether through want of material to deal with; he says: "No person who is not a great sculptor or painter *can* be an *architect*. If he is not a sculptor or painter, he can only be a *builder*": Rusk. Lect. on Archit. Add. to Lect. ii. p. 108 of ed. of 1891.

[5] In *Gibbon* v. *Pease*, [1905] 1 K. B. 810, the architect claimed under an alleged custom that when plans had been prepared, but the work of building was subsequently abandoned, the building owner was bound to pay for the plans, though they were (so it was contended), the property of the architect. Following an unreported case of *Ebdy* v. *M'Gowan*, The Times, 17th Nov. 1870, the Court of Appeal held any such custom unreasonable, and that the plans were the property of the building owner.

[6] Per Lord Young, *Jameson* v. *Simon*, 1 Fraser, 1221.

[7] The Duties, Obligations, and Mutual Relations of Architect, Client, and Contractor with reference to English and Foreign Practice, by Arthur Cates—a paper

Surveyor to take out the quantities.

In extensive operations the usage is for architects to employ a quantity surveyor, whose charges are added to his contract by the successful competitor.[1] Where the architect does supply quantities he may thereby become personally liable for any loss occurring to a contractor through error on his part. In Mr. Glen's pamphlet, just cited,

Bolt v. *Thomas*, MS. case.

the following case[2] is given: Plaintiff sued the defendant, an architect, to recover damages for supplying to the plaintiff an inaccurate statement of the quantities of work and materials required for the erection of a building which the plaintiff contracted to erect. The defendant advertised for tenders for the erection of a Baptist chapel, stating that the plans and specifications could be seen, and that the quantities of work and material would be furnished. The plaintiff obtained from the defendant's office a table of such quantities, headed by a statement that it was to be paid for by the successful competitor. From this table the plaintiff calculated his tender, which was accepted.

Plaintiff's contention.

For the plaintiff it was contended that, independently of the computations, there was an implied undertaking in law that the bill of quantities paid for by the plaintiff should be reasonably correct.

Defendant's contention.

For the defendant it was contended that there was no contract between the architect and builder, that the committee had stipulated with the plaintiff that he should pay the architect, and that the architect was not liable to the builder for any inaccuracy in the quantities.

Direction of Byles, J., to the jury.

Byles, J., in summing up, directed the jury that the defendant had stipulated that the plaintiff should pay him for the calculation of the quantities, and, having been paid for them by him, the defendant was liable to compensate him if the bill was not reasonably correct. The jury thereupon found for the plaintiff.

Considered.

The direction of Byles, J., practically comes to telling the jury that, if they found in this particular case that a contract existed, the verdict should be for the plaintiff; and they so found. The case must not be stretched further than to affirm the right where there is a contract, and the more difficult question, whether there is a contract, is not affected by it.

Moneypenny v. *Hartland*. Abbott, C.J.'s, *dictum*.

In *Moneypenny* v. *Hartland*, an early case at *Nisi Prius*,[3] Abbott, C.J., laid down that, if a surveyor, who makes an estimate, sues those who employ him for the value of his services, and if it appear that he was so negligent that he did not inform himself, but went upon the information of others, which proved to be false or insufficient, he is not entitled to recover for his plans and specifications; "for every person employed as a surveyor, must use due diligence. Whether the plaintiff has used due diligence or not, is a question for the jury; and if the

read before the Royal Institute of British Architects, 6th May 1884; The Law in relation to the Legal Liability of Engineers, Architects, Contractors, and Builders, by W. C. Glen.

1 *Moon* v. *Guardians of the Witney Union*, 3 Bing. N. C. 814; where Tindal, C.J., regards the contract as conditional: "The expenses of making out the quantities should be paid by the successful competitor, if any; but if by the act of the defendants there should be no competitor, then, that the work which was done by their authority should be paid for by them"; *Nocetti* v. *Saunders*, 2 Times L. R. 761; *Kemp* v. *Rose*, 1 Giff. 258, 268, where it was held that it is neither the usual nor a safe course for the architect to prepare bills of particulars or quantities of the works to be executed. *Kemp* v. *Rose* is a case where the architect was made arbitrator by the building contract, but had so acted as to be liable to a charge of bias. In *Baron de Worms* v. *Mellier*, L. R. 16 Eq. 554, an injunction was refused against a builder suing for charges not certified by the architect's certificate, because this could be pleaded to the action.

2 *Bolt* v. *Thomas*, cited from a MS. report; reported also in Hudson, Building Contracts (3rd ed.), vol. ii. 4.

3 1 C. & P. 352.

plaintiff went on the statements of others, that is no excuse, as it was his duty to ascertain how the fact was, or to report to his employers that he only went on the information of others, or that the fact was uncertain." [1] This ruling was sustained *in banc* on the ground that, if the plaintiff "led his employers into a great expense by his want of care, his services would be worth nothing." [2] In a subsequent phase of the same case, Best, C.J.,[3] explains this by saying: "Supposing negligence or want of skill to be sufficiently made out, unless that negligence or want of skill has been to an extent that has rendered the work useless to the defendants, they must pay him, and seek their remedy in a cross-action. For if it were not so, a man by a small error might deprive himself of his whole remuneration." The learned Judge continues: "I grant that it is not a trifling deviation from an estimate that is to prevent a party's recovering. But if a surveyor delivers in an estimate greatly below the sum at which a work can be done, and thereby induces a private person to undertake what he would not otherwise do, then I think he is not entitled to recover." [4]

Explained by Best, C.J.

In this case the action was by the negligent person against those who had indubitably employed him, and the decision is merely that he is not to recover for worthless work. It follows that, if the employer brings an action for negligence in the performance of the work of the architect, and were to show that through his negligence he had been put to additional expense, he can recover; and this was held in *Columbus Co.* v. *Clowes*.[5] The plaintiffs had paid the defendant for the plans of a building to be erected on a stated site; subsequently the plaintiffs were unable to raise the necessary funds and the building was abandoned and the site parted with. They then found that the defendant had neglected to measure or survey the site and that his plans were prepared on the assumption that the land was of a less area than it was. The plaintiffs sued for the negligence. Wright, J., thought on the point as to the plans "the most that the plaintiffs can get is the reasonable cost of making the plans good." "The plaintiffs suffered no real damage, since they were never in a financial position to make use of the plans." "The question of quantities is, however, on a different basis. They were necessary in order to enable the plaintiffs to get tenders for the execution of the work, and I think that the plaintiffs are clearly entitled to the cost of adapting them."

Considered.

Columbus Co. v. *Clowes*.

A more difficult question arises in considering the relations of the builder to the architect and quantity surveyor.

Relation of the builder to the architect and quantity surveyor.

In *Scrivener* v. *Pask* [6] it was sought by builders to charge the employer for want of accuracy in bills of quantities furnished by his architect (who took them out himself) to the builders, through depending on which the builders were put to unexpected cost. The Exchequer Chamber decided, affirming the Common Pleas, that the architect was not employed to tell the builders that the quantities of materials required to complete the work would be so much and no more, and therefore the defendant was not liable. In the course of the argument in the Common Pleas, Erle, C.J., said: [7] "I should have thought it was the builder's duty to see to the accuracy of the quantities before he tenders. If he choose to trust to the accuracy of the information

Observation of Erle, C.J.

[1] *L.c.* 354. [2] *L.c.* per Bayley, J., 355. [3] 2 " " 380.
[4] Cp. *Nelson* v. *Spooner*, 2 F. & F. 613. [5] 1 " B. 244.
[6] 18 C. B. N. S. 785; Ex. Ch. L. R. 1 C. P. 715. [7] " " 794.

given to him by the architect, well and good" ; and in his judgment :[1] "there was evidence from the mouth of one of the plaintiffs' own witnesses that a careful builder always calculates the quantities for himself before he makes a tender." Blackburn, J., during the argument in the Exchequer Chamber, is reported as saying : "If there has been misconduct on the part of Paice [the surveyor], the plaintiffs have their remedy against him."[2] This seems inconsistent with Erle, C.J.'s, view, that there should be independent inquiry on the part of the builder. If there is no duty to test, the surveyor would be liable ; if there is a duty, he would not. The whole matter turns on the determination of this. Blackburn, J., however, limits his expression to "misconduct," and is speaking of fraud or misrepresentation, and it is in this limitation that his statement is to be taken. "To entitle the plaintiffs to recover," he says,[3] "they must make out three things —that Paice was the defendant's agent, that Paice was guilty of fraud or misrepresentation, and that the defendant knew of and sanctioned it."

Observation of Blackburn, J.

Thorn v. *Mayor, &c. of London.*

The responsibility of an employer for plans and specifications upon the basis of which the successful contractor had tendered was considered in the House of Lords in *Thorn* v. *Mayor, &c. of London.*[4] The plaintiff, a contractor, sought to make the defendants, his employers, liable as on an implied warranty that the work, the subject of his contract, could be inexpensively done with the means and appliances stated in the plans and specification prepared for the use of those who were asked to tender for its execution. The Court of Exchequer,[5] the Exchequer Chamber,[6] and the House of Lords were unanimous that no such liability existed. Lord Cairns[7] regarded the contention as raising "a very serious and a very alarming question." To affirm the proposition "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." Lord Chelmsford states the duty of a contractor in such circumstances to be to inform 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."[8] He adds : "It is also said that it is the usage

Lord Cairns's opinion.

Lord Chelmsford's statement of duty.

1 L. R. 1 C. P. 719.
2 *Pasley* v. *Freeman*, 3 Term. R. 51.
3 L. R. 1 C. P. 719.
4 1 App. Cas. 120.
5 L. R. 9 Ex. 163.
6 L. R. 10 Ex. 112.
7 1 App. Cas. 128.
8 *L.c.* 132.

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 a most unreasonable description." The law, then, seems to be that:

(1) As between builder and owner there is no warranty of the accuracy of bills of quantities.[1] Summary.

(2) As between owner and architect there is a warranty, not of absolute but of reasonable accuracy; possibly also between the owner and the quantity surveyor. If the incorrectness of the estimates arises from the inherent difficulty of the work there is no liability.[2] If the architect is negligent, he remains liable to the owner, despite his having given a certificate which as between the owner and the builder is final.[3]

(3) As between quantity surveyor and builder there is no liability for negligence in preparing quantities; since the quantities pass through the architect's hands before they are used by the builder or surveyor;[4] or if they do not, the builder is disentitled to charge any one for the consequences of his neglect of an obvious precaution.

(4) As between builder and architect, there is a duty on the builder's part to inquire as to the correctness of quantities.[5] If the builder has neglected to inquire and has entered upon the performance of the work on the faith of the accuracy of the quantities, which subsequently be discovers not to be justified, he should not continue the works under the contract in the expectation of something in addition to the contract price being allowed him, but he should require the requisite adjustment to be made there and then, or else repudiate the contract altogether.[6] Where there is fraud or misrepresentation the quantity surveyor is liable.[7]

(5) As between quantity surveyor and owner there is an usage entitling the architect to employ a surveyor, and in the event of no tender being accepted and no contract entered into with a builder, the owner is liable to the surveyor for the price of the work done under the implied authority of the owner to the architect;[8] but if the owner has accepted a tender with a builder in good faith for the execution of the

[1] *Moneypenny* v. *Hartland*, 1 C. & P. 352; 2 C. & P. 378.

[2] Addison, Contracts (9th ed.), 816.

[3] *Rogers* v. *James*, 8 Times L. R. 67 (C. A.), distinguished in *Chambers.* v. *Goldthorpe*, [1901] 1 K. B. 624, 633.

[4] *Priestley* v. *Stone*, 4 Times L. R. (C. A.) 730; more fully reported in Hudson, Building Contracts, vol. ii. (3rd ed.), 130. But a quantity surveyor may maintain an action against the builder on proof of a usage of the building trade that the builder whose tender is accepted is liable to the quantity surveyor for the amount due on the quantities. *North* v. *Bassett*, [1802] 1 Q. B. 333.

[5] *Scrivener* v. *Pask*, 18 C. B. N. S. 785, 797, L. R. 1 C. P. 715; *Thorn* v. *Mayor, &c. of London*, 1 App. Cas. 120.

[6] *Kimberley* v. *Dick*, L. R. 13 Eq. 1, 20.

[7] *Langridge* v. *Levy*, 2 M. & W. 519, 4 M. & W. 337; *Swift* v. *Winterbotham*, L. R. 8 Q. B. 244, overruled on one point, *sub nom. Swift* v. *Dewsbury*, L. R. 9 Q. B. 301. See, too, per Lord Esher, M.R., *Priestley* v. *Stone*, 4 Times L. R. 730. See *Robertson* v. *Fleming*, 4 Macq. (H. L. Sc.) 167, where the House of Lords, composed of Lords Campbell, Cranworth, Wensleydale, and Chelmsford, were agreed that the doctrine that where A employs B, a professional man, to do some act professionally, under which, when done, C would derive a benefit, and B is guilty of negligence, so that C loses the contemplated benefit, B is responsible to C, "is evidently untenable"; *Pinn* v. *Roper*, 2 F. & F. 783. *Cann* v. *Wilson*, 39 Ch. D. 39, is overruled by *Le Lievre* v. *Gould*, [1893] 1 Q. B. 491.

[8] *Moon* v. *Guardians of the Witney Union*, 3 Bing. N. C. 814; *Taylor* v. *Hall*, Ir. R. 4 C. L. 467. The builder may make a contract with the surveyor, on which he is liable notwithstanding abandonment of the building: *M'Connell* v. *Kilgallen*, 2 L. R. Ir. 119.

work, the owner has discharged his duty to the quantity surveyor, and is not liable for the "surveyor's charges." [1]

(6) As between quantity surveyor and builder there is a contract implied, that, on the builder obtaining the contract through using the surveyor's calculations, he will pay the surveyor his fees.[2]

(7) As between quantity surveyor and architect there is no liability, since the architect employs the surveyor as the agent for the owner, and not on his own account.

Lack of supervision by the employer raises no duty.

The contract with the builder often gives the employer the right of superintending the works. But no claim can be brought against the employer, nor can he be fixed with neglect of duty because he does not exercise this right. Where, for instance, the builder is guaranteed by a surety and then through failure of the employer to exercise his rights of superintendence, the builder has an opportunity to do and does his work in a defective manner, and then by fraudulently concealing the defective work obtains the money due on the completed contract, the surety remains liable. The employer is merely passively inactive. The mere fact of non-superintendence is no failure of any duty owed to the surety.[3]

Architect agent of employer.

On the retainer of an architect he becomes the agent of the employer, and the ordinary rules of law governing that relationship become applicable.[4]

Architect, although in a sense arbitrator, in Canada held liable for negligence to his employer.

In a Canadian case [5] an architect sued his employer for commission; the employer counterclaimed for negligence, and the plaintiff thereupon replied that by the contract he was constituted arbitrator as between his employer and the builder, and so was within the full protection of the principle enunciated in *Stevenson* v. *Watson*.[6] The Court of Appeal of Ontario [7] held that notwithstanding this, the liability to the employer for either negligence or unskilfulness in the performance of his duty as architect was unaffected." [8]

Chambers v. *Goldthorpe*.

The same distinction was sought to be drawn in *Chambers* v. *Goldthorpe*,[9] in a case the facts of which are undistinguishable from the Ontario case, which, however, does not appear to have been alluded to during the argument. An architect sued for commission

1 *Young* v. *Smith*, reported in Hudson, Building Contracts (3rd ed.), 57, cited *North* v. *Bassett*, [1892] 1 Q. B. 333.

2 *Taylor* v. *Hall*, Ir. R. 4 C. L. 467, 479. See also *North* v. *Bassett*, [1892] 1 Q. B. 333.

3 *Mayor, &c. of Kingston-upon-Hull* v. *Harding*, [1892] 2 Q. B. 494.

4 *Kimberley* v. *Dick*, L. R. 13 Eq. 1. As to the negligence of a surveyor in giving advice as to advancing money on mortgage of certain property, *Crabb* v. *Brinsley*, Law Journal newspaper, Nov. 3, 1888, 573. By the law of Lower Canada both architect and builder are liable for ten years after completion for *vices du sol*, and for defects in plan or construction: *Wardle* v. *Bethune*, L. R. 4 P. C. 33. See Code Civil, Arts. 1788–1793.

5 *Badgley* v. *Dickson*, 13 Ont. A. R. 494, where *Irving* v. *Morrison*, 27 Upp. Can. C. P. 242, is approved. In *Stafford* v. *Bell*, 6 Upp. Can. App. (Tupper) 273, a provincial surveyor, sworn "to survey agreeably to the directions of the statute," is held still liable for negligence to his employers, if he fails in "the faithful performance of his duties in the same manner as an attorney is sworn faithfully to perform his."

6 4 C. P. D. 148. This was an action by the builder against the architect.

7 Osler, J.A., who delivered the judgment, Hegerty, C.J., Burton and Patterson, JJ.A.

8 The principle enunciated was: "That where the exercise of judgment or opinion on the part of a third person is necessary between two persons, such as a seller and buyer, and in the opinion of the seller, that judgment has been exercised wrongly, or improperly, or negligently, or ignorantly, an action will not lie against the person put in that position where such judgment has been wrongly, or improperly, or ignorantly, or negligently exercised."

9 [1901] 1 K. B. 624.

payable under a contract for building houses for the defendant. The defendant counterclaimed against the plaintiff for negligence in ascertaining and certifying the amount payable to the contractor. Smith, M.R., and Collins, L.J., held that since in ascertaining and certifying the amount payable to the contractor the plaintiff was in the position of an arbitrator between the building owner and the contractor, he could not be sued; if, as in *Rogers* v. *James*,[1] he was merely in the position of an agent for the building owner, then the ordinary liability for negligence attached. Romer, L.J., dissented, holding that the architect does not "become in the position of an arbitrator in regard to his valuation or estimate, merely because he knows that his principal and the third person have by contract between them agreed that, in default of dispute previously arising with regard to the matter, his valuation or estimate is to be taken as conclusive, and as determining the price to be paid by his principal for the work to be done by the third person. In such a case in giving his valuation or estimate, he would still be acting for his principal, and so long as he acted without fraud, he would be under no obligation or liability to the third person, and acting as he would do for his principal, if he was guilty of negligence causing damage, would be liable to his principal in an action." Apart from authority there appears no reason why the contract made between the builder and the building owner should vary the independent contract between architect and building owner. The superstition that a judge is entitled to be negligent without possibility of pecuniary harm to himself is perhaps more a prejudice than a reason, and it is not immediately apparent why it should override his own contract made previously to entering on his judicial office, not to be negligent.

Decision of the Court.

Romer, L.J.'s, dissent.

The surveyor of a builder owes no duty to the mortgagees of his employer in the absence of any contract between himself and them to exercise care in the giving certificates of the progress of the work, and no action for negligence can be maintained for loss caused to the mortgagees through having advanced money on the faith of untrue statements contained in the certificates unless there is fraud proved.[2]

Surveyor of builder owes no duty to the mortgagees of his employer.

AUCTIONEERS.

An auctioneer is "one who conducts sales by auction";[3] and an

Definition.

[1] 8 Times L. R. 67.

[2] *Le Lievre* v. *Gould*, [1893] 1 Q. B. 491.

[3] Murray, English Dictionary, *sub voce*. Auction is defined by the same authority: "A public sale in which each bidder offers an increase upon the price offered by the preceding, the article put up being sold to the highest bidder." "I believe the word 'auction' has been always understood to be derived from *augendo*: it means that you are to bid": per Lord Cranworth, C., *Barlow* v. *Osborne*, 6 H. L. C. 571. An auctioneer is a person who is authorised to sell goods or merchandise at public auction or sale for a recompense or (as it is commonly called) a commission: Story, Agency (9th ed.), § 27; see also §§ 107, 108. As to auction sales of goods, see 56 & 57 Vict. c. 71, s. 58. See Dart, Vendors and Purchasers (7th ed.), vol. i. 198 *et seqq.* *Fowle* v. *Common Council of Alexandria*, 3 Peters (U. S.) 398, is a curious case, more properly perhaps to be considered in connection with the powers and liabilities of corporations, *ante*, 327. Plaintiff sought to recover from the Corporation of Alexandria the amount of the sales of the plaintiff's goods, lost by the insolvency and fraudulent conduct of an auctioneer, on an alleged liability, in consequence of the Corporation having omitted to take a bond from the auctioneer, who had a licence from the Corporation to carry on the trade of an auctioneer, which, however, the law did not empower that body to grant. Marshall, C.J., delivered the opinion of the Court as follows (409): "Is the town responsible for the losses sustained by individuals from the fraudulent conduct of the auctioneer? He is not the officer or agent of the Corporation, but is understood to

auction is [1] "a sale, however conducted, by which a person obliges himself to transfer property to the highest bidder within the conditions of the sale; it ordinarily denotes such a sale conducted in the usual manner."

"The mode in which contracts are made by an auctioneer, and which must be considered as recognised at law, is, that when an auctioneer is selling he has a catalogue to which are annexed the conditions of sale, and he has authority from the highest bidder to sign the catalogue on his behalf, and if the auctioneer signs the catalogue with the conditions, that is a sufficient memorandum in writing of a contract within the Statute of Frauds to bind the purchaser." [2]

Duty cannot be delegated. What the duty is.

The trust given to an auctioneer being special and involving discretion, cannot be delegated to a clerk or subaltern.[3] It is the duty of an auctioneer, says an early case, to take the same care of property entrusted to him for sale as he would of his own. This means as an average auctioneer would of his own. In the absence of a special contract, by which goods are entrusted to a man because of the possession of personal qualities, the auctioneer's undertaking is not to act by reference to his individual prudence, which may be greater or less than the average, but only to act up to the standard of care and diligence which other persons exercising the same calling, and being men of experience, are ordinarily expected to attain.

Rule of duty for an auctioneer stated by Lord Ellenborough, C.J.

The rule is accurately stated by Lord Ellenborough, C.J.: [4] "I pay an auctioneer, as I do any other professional man, for the exercise of skill on my behalf, which I do not myself possess; and I have a right to the exercise of such skill as is ordinarily possessed by men of that profession or business. If from his negligence or carelessness he leads

act for himself as entirely as a tavern-keeper or any other person who may carry on any business under a licence from the corporate body. Is a municipal corporation, established for the general purposes of government, with limited legislative powers, liable for losses consequent on its having misconstrued the extent of its powers, in granting a licence which it had not authority to grant, without taking that security for the conduct of the person obtaining the licence which its own ordinances had been supposed to require, and which might protect those who transacted business with the person acting under the licence? We find no case in which this principle has been affirmed. That corporations are bound by their contracts is admitted; that money corporations, or those carrying on business for themselves, are liable for torts is well settled; but that a legislative corporation established as a part of the government of the country, is liable for losses sustained by a non-feasance, by an omission of the corporate body to observe a law of its own, in which no penalty is provided, is a principle for which we can find no precedent. We are not prepared to make one in this case." An auctioneer is not a trader, so that the acceptance of a bill of exchange in the firm's name is within the implied authority of a partner: *Wheatley* v. *Smithers*, [1906] 2 K. B. 321.

1 Bateman, Law of Auctions. Cp. Dart, Vendors and Purchasers (7th ed.), 198. In *Walker* v. *Advocate-General*, 1 Dow 114, is the following: "The Chancellor [Lord Eldon] stated that when he was Attorney-General they had a case in the Exchequer of a female auctioneer. She continued silent during the whole time of the sale, but whenever any one bid, she gave him a glass of brandy. The sale broke up, and, in a private room, he that got the last glass of brandy was declared to be the purchaser. This was decided to be an auction."

2 Per Blackburn J. *Peirce* v. *Corf*, L. R. 9 Q. B. 214.

3 *Coles* v. *Trecothick*, 9 Ves. 251; *Bird* v. *Boulter*, 4 B. & Ad. 443; *Bell* v. *Balls*, [1897] 1 Ch. 663. Cp. *Catlin* v. *Bell*, 4 Camp. 183; *Cobb* v. *Becke*, 6 Q. B., per Lord Denman, C.J., 936. Notwithstanding this principle, authority to employ a deputy may be implied by the recognised usage of a trade; for instance, an architect may employ a quantity surveyor to make out the quantities of the building proposed to be erected. This limitation on the application of the maxim *delegata potestas non potest delegari* (2 Co. Inst. 597) is fully explained by Thesiger, L.J., delivering the judgment of the Court in *De Bussche* v. *Alt*, 8 Ch. D. 310. Cp. *White* v. *Proctor*, 4 Taunt. 209; *Cockran* v. *Irlam*, 2 M. & S. 301 n.

4 *Denew* v. *Daverell*, 3 Camp. 451.

me into mischief, he cannot ask for a recompense, although from a misplaced confidence I followed his advice without remonstrance or suspicion."

An auctioneer may not purchase for himself,[1] and may sell only for ready money, unless otherwise authorised;[2] if he sells with notice that what he is about to sell does not belong to his principal, he is personally liable for the real value of the goods.[3] Auctioneer not to purchase for himself.

If the auctioneer does nothing more than settle the price as between a vendor and a purchaser of the goods, and takes his commission, he is not liable for a conversion in the event of it turning out that the vendor has no right to sell; for the auctioneer there acts as a mere conduit-pipe.[4] Where, however, the auctioneer receives the goods into his custody, and affects to deal with them so as to pass the property in them, he becomes liable for a conversion, if they are not the property of the vendor.[5] Again, if the auctioneer does not disclose the name of his principal at the time of the sale, the purchaser is entitled to look to him personally Where the auctioneer is liable for a conversion.

[1] *Oliver* v. *Court*, 8 Price (Ex.) 127, 159. Cp. *Ex parte Hughes*, 6 Ves. 617. In this case the purchase was set aside after more than twelve years.

[2] *Williams* v. *Evans*, L. R. 1 Q. B. 352. An auctioneer, even though he contracted for an avowed principal, may sue in his own name: *Williams* v. *Millington*, 1 H. Bl. 81. "The auctioneer is nothing more than an agent for the vendor": per Lord Eldon, *Sanderson* v. *Walker*, 13 Ves. 602. Cp. per Bayley, J., *Kenworthy* v. *Schofield*, 2 B. & C. 947. "That an auctioneer is a general agent for the owner usually" "cannot be doubtful. He is so till the sale is completed. And though he may be agent of the buyer after the sale for some purposes, such as to take the case out of the Statute of Frauds, yet this does not affect the other principle, that till the sale, and before it, he acts for the vendor alone": *Veazie* v. *Williams*, 8 How. (U. S.) 152 (the authorities cited are omitted).

[3] 3 Chitty, Commerce and Manufactures, 218; *Harducre* v. *Stewart*, 5 Esp. (N. P.) 103. *Davis* v. *Artingstall*, 49 L. J. Ch. 609. How an auctioneer may make himself personally liable, is shown by *Warlow* v. *Harrison*, 1 E. & E. 295, affirmed *l.c.* 309, but distinguished in *Rainbow* v. *Howkins*, [1904] 2 K. B. 322, and *McManus* v. *Fortescue*, [1907] 2 K. B. 1. There is no contract that things shall be actually put up by auction by merely advertising the sale; the advertisement is only a declaration of intention: *Harris* v. *Nickerson*, L. R. 8 Q. B. 286. The effect of an offer accepted and acted on in creating a contract is in each case a question of the construction of the document containing the offer; not every declaration of intention, even though it assumes that persons will act on it, creates a contract: *Rainford* v. *James Keith and Blackman Co.*, [1905] 1 Ch. 296, 303. See 56 & 57 Vict. c. 71, s. 58, as to the right to bid. The strictness of the law as to the employment of a puffer in auctions of real estate as laid down by Lord Mansfield in *Bexwell* v. *Christie*, 1 Cowp. 395, and Lord Kenyon, C.J., in *Howard* v. *Castle*, 6 T. R. 642, was relaxed in *Smith* v. *Clarke*, 12 Ves. 477; but the remarks of Lord Cranworth, C., in *Mortimer* v. *Bell*, L. R. 1 Ch. 10, occasioned the passing of 30 & 31 Vict. c. 48. The cases apart from the statute are fully collected in *Veazie* v. *Williams*, 8 How. (U. S.) 134, 153. See Dart, Vendors and Purchasers (7th ed.), 208.

[4] *Cochrane* v. *Rymill*, 27 W. R. 776, considered with *National Mercantile Bank* v. *Rymill*, 44 L. T. 767. *Delaney* v. *Wallis*, 14 L. R. Ir. 31, 47. This is possibly the explanation of *Turner* v. *Bockey*, 56 L. J. Q. B. 301, but *quære*, is that case rightly decided? See per Romer, J., *Barker* v. *Furlong*, [1891] 2 Ch. 183, and the remarks of Collins, J., in *Consolidated Co.* v. *Curtis*, [1892] 1 Q. B. 502. See also per Holmes, J., *Robinson* v. *Bird*, 158 Mass. 357, 35 Am. St. R. 495.

[5] *Hollins* v. *Fowler*, L. R. 7 H. L. 757; *Barker* v. *Furlong*, [1891] 2 Ch. 172; *Consolidated Co.* v. *Curtis*, [1892] 1 Q. B. 495. In *Nulty* v. *Fagan*, 22 L. R. Ir. 604, an auctioneer who sold assets of a deceased person was held to be liable for the debts of the deceased as executor *de son tort*, failing proof that he acted under an executor who had proved the will. In *Ganly* v. *Ledwidge*, Ir. R. 10 C. L. 33, the Irish Court of Queen's Bench held that a "salesmaster"—salesmasters are "known agents for the sale of cattle, through whose agency the public usually deal," and "who are paid by the vendors by a percentage fee on the sales" (see at 39)—who publicly sells and delivers a stolen beast, is responsible to the true owner for the value of the beast, though he acts innocently and in the ordinary course of business. This is followed by the Irish Court of Appeal in *Delaney* v. *Wallis*, 14 L. R. Ir. 31. *Ante*, 751. The law in America appears to be the same; see *Swinn* v. *Wilson*, 25 Am. St. R. 110, 113.

for the completion of the contract and for damages for its non-performance.[1]

Position of an auctioneer.

"An auctioneer," says Lord Loughborough in *Williams* v. *Millington*,[2] "has a possession coupled with an interest in goods which he is employed to sell, not a bare custody like a servant or shopman. There is no difference whether the sale be on the premises of the owner or in a public auction-room; for on the premises of the owner an actual possession is given to the auctioneer and his servants by the owner, not merely an authority to sell. I have said a possession coupled with an interest; but an auctioneer has also a special property in him with a lien for the charges of the sale, the commission, and the auction duty, which he is bound to pay." From this it has been held to follow that in some circumstances the auctioneer is personally responsible for his neglect to deliver, although the principal's name has been disclosed to the buyer at the time of the sale.[3]

Neglect to deliver.

Neglect to obtain deposit.

In ordinary cases, where a deposit is to be paid, the auctioneer should ask the purchaser to pay the deposit; should he neglect to do so, and the purchaser go away without paying, the plaintiff is entitled to nominal damages,[4] if in the opinion of the jury there is a breach of duty, even though the seller suffer no real damage therefrom.

Retention of deposit till completion of contract.

The auctioneer should keep the deposit till the contract is completed, since he holds it not as agent but as stakeholder.[5] On completion he must immediately account for it and pay the balance due to the vendor;[6] though he is not in general liable to pay interest;[7] nor is he responsible for the purchase-money unless it is paid to him or his agent;[8] nor does he bind himself that the purchase shall be completed.[9]

Where auctioneer permitted rescission without particular instruction.

In *Nelson* v. *Aldridge*,[10] an auctioneer, having sold some horses sent to him in the course of his business, afterwards let the purchaser of one them rescind the contract on the ground that the horse was not truly described at the sale. He was held liable to his employer for the price at which the horse had been sold, since he had deviated from the course of his duty in taking upon himself to rescind the contract, and he could only be justified by showing particular instructions authorising his doing so; this he was not in a position to show. Where there were special conditions of sale proved the auctioneer was held not liable, though the purchase-money had been paid to him and returned to the purchaser.[11]

Where there were special conditions of sale proved.

[1] *Hanson* v. *Roberdeau*, Peake (N. P.), 120; *Wood* v. *Baxter*, 49 L. T. 45, where the cases are collected and commented on.

[2] 1 H. Bl. 81, 84. *Wood* v. *Baxter*, 49 L. T. 45.

[3] *Woolfe* v. *Horne*, 2 Q. B. D. 355, approved in *Rainbow* v. *Howkins*, [1904] 2 K. B. 322.

[4] *Hibbert* v. *Bayley*, 2 F. & F. 48.

[5] *Edwards* v. *Hodding*, 5 Taunt. 815; *Edgell* v. *Day*, L. R. 1 C. P. 80; *Gray* v. *Gutteridge*, 3 C. & P. 40. *Spittle* v. *Lavender*, 2 B. & B. 452. But payment of a deposit to the vendor's solicitor is equivalent to payment to the vendor: *Ellis* v. *Goulton*, [1893] 1 Q. B. 350.

[6] *Crosskey* v. *Mills*, 1 Cr. M. & R. 298; *Gray* v. *Haig*, 20 Beav. 219.

[7] *Turner* v. *Burkinshaw*, L. R. 2 Ch. 488.

[8] *Andrew* v. *Robinson*, 3 Camp. 199.

[9] *Kavanagh* v. *Cuthbert*, Ir. R. 9 C. L. 136.

[10] 2 Stark. (N. P.) 435.

[11] *Hardingham* v. *Allen*, 5 C. B. 793; *Murray* v. *Mann*, 2 Ex. 538. An auctioneer's implied authority to sign for the purchaser upon the sale of land by auction must be exercised at the time of the sale: *Buckmaster* v. *Harrop*, 7 Ves. 341. In *Webster* v. *Hoban*, 7 Cranch (U. S.), 399, there was a condition that the purchaser at a sale by auction should within thirty days secure the purchase-money with interest by his promissory notes with two approved indorsers, and that "in case of compliance he was to receive a good and complete title to the property, and on failing to comply within

If the auctioneer negligently misdescribe the property he has to sell, he will he liable to repay to the vendor the amount claimahle by the purchaser in respect of such misdescription.[1] Negligent misdescription.

In New Zealand an auctioneer has been held liahle where through negligence he failed to accept a bid, and in consequence the sale became abortive. The measure of damages was said to be the same as if the hid had been accepted and the hidder had afterwards repudiated the purchase.[2] Auctioneer failing to accept a hid.

An auctioneer selling goods on the premises of another is not responsible for the sufficiency of the premises or of appliances connected with them, so as to be liable in damages for injuries caused to his own servant by their insufficiency.[3] An auctioneer, says Lord Kenyon, C.J.,[4] is "bound only to take due care, such as he would do of his own goods; so that for a loss arising from misfortune or unavoidable accident he is not liable." Auctioneer selling on premises of another.

Where an auctioneer and house agent, who was instructed not to part with a licence to assign premises till the tenant had paid the last quarter's rent, which was in arrear, took a cheque drawn to his order which was subsequently dishonoured, he was held liable for negligence, and the measure of damages for which he was liahle was the full amount of the arrears of rent.[5] House agent not conforming to instructions.

A house agent letting a house for his employer is liable if he neglects to make reasonable inquiries as to the solvency of the tenant.[6] House agent letting house without making reasonable inquiries as to tenant.

STOCKBROKERS.

A stockbroker is a broker who deals in the purchase and sale of stocks and shares.[7] His business in London is carried on in connection with the Stock Exchange,[8] and under rules and regulations[9] imposed by the committee of that institution, binding universally on all members, and embodying certain usages which non-members doing business with stockbrokers are *primâ facie* considered to have knowledge of, and to be bound by. In some provincial towns there are also Stock Exchanges. Definition.

In the case of a dispute arising between members of the Stock Exchange in their capacity of stockbrokers, the decision must he given with reference to the rules to the observance of which they have bound Where a dispute arises between members of the Stock Exchange.

the thirty days the property was then to be resold on account of the first purchaser." On non-compliance with the condition by the purchaser, an action was brought by the vendor, who contended that the remedy by resale was merely comulative. The opinion of the Court was, however, adverse to his claim.

[1] *Parker* v. *Farebrother*, 1 C. L. R. 323. [2] *Logie* v. *Gillies*, N. Z. L. R. 4 S. C. 65.

[3] *Nelson* v. *Scott*, 19 Rettie, 425.

[4] *Maltby* v. *Christie*, 1 Esp. (N. P.) 341.

[5] *Papé* v. *Westacott*, [1894] 1 Q. B. 272. [6] *Hayes* v. *Tindall*, 2 F. & F. 444.

[7] Ogilvie's Dictionary, *sub voce*. See *Warren* v. *Shook*, 91 U. S. (1 Otto) 704. A Report of a Royal Commission on the origin, object, present condition, customs, and usages of the London Stock Exchange was presented to Parliament in 1878. A summary of it is to be found in M'Culloch, Dictionary of Commerce, Supplement III.

[8] Before 1773 stockbrokers conducted their business in and about the Royal Exchange. In that year they formed themselves into an association called the Stock Exchange, first having its headquarters in Sweeting Alley, Threadneedle Street, and then removing to Capel Court in 1801, where a building was erected, with a capital of £20,000, raised by means of four hundred shares of £50 each.

[9] These rules and regulations form an appendix to Melsheimer and Gardner, Law and Customs of the Stock Exchange; and to Brodhurst, Law and Practice of the Stock Exchange. See also M'Culloch, Dictionary of Commerce, Supplement III.

themselves by becoming members.[1] In questions with persons not members the general law of the land is paramount to any special regulations.[2] This principle is subject to the consideration that if there is at a particular place an established usage in the manner of dealing and making contracts, a person who is employed to deal or make a contract has an implied authority to act in the usual course of business, even though the employer may not actually know what that course of business is;[3] it is also subject to the further qualification that such course of business must neither be illegal nor unreasonable,[4] and must consist of usages of which the principal has knowledge either actually or constructively.

Blackburn, J.'s, judgment in *Mollett* v. *Robinson* in the Exchequer Chamber,

to be taken in connection with Lord Chelmsford's opinion in the House of Lords.

"I think," said Blackburn, J., in the Exchequer Chamber in *Mollett* v. *Robinson*,[5] "it is now thoroughly established that a person who deals in a general market is bound to inquire what its usages are; and that those who deal with him have a right to hold him bound by them to the same extent as they would have been entitled to hold a person bound who belonged to the place. He is precluded from setting up as against the persons he dealt with, his ignorance of that which he ought to have known." But with this must be taken the statement of Lord Chelmsford in the same case, giving the leading opinion in the House of Lords:[6] "No doubt a person employing a broker may engage his services upon any terms he pleases; and if a person employs a broker to transact for him upon a market with the usages of which the principal is unacquainted, he gives authority to the broker to make contracts upon the footing of such usages, provided they are such as regulate the mode of performing the contracts, and do not change their intrinsic character. . . ." In the case under discussion the custom alleged was neither necessarily nor probably incident to the relation of broker and principal, and the learned Lord thus concludes:[7] "I hesitate to say that it would not apply in the case of persons knowing of its existence, and employing a broker to act for them in the market where it prevails. But the usage is of such a peculiar character, and is so completely at variance with the relations between the parties, converting a broker employed to buy into a principal selling for himself, and thereby giving him an interest wholly opposed to his duty,[8] that I think no person who is ignorant of such an usage can be held to have agreed to submit to its conditions, merely by employing the services of a broker to whom the usage is known, to perform ordinary and accustomed duties belonging to such employment."

[1] *Duncan* v. *Hill*, L. R. 8 Ex. 242, distinguished in *Hartas* v. *Ribbons*, 22 Q. B. D. 254; *Lacey* v. *Hill, Scrimgeour's Claim*, L. R. 8 Ch. 921; *Ellis* v. *Pond*, [1898] 1 Q. B. 426. See *Lacey* v. *Hill, Crowley's Claim*, L. R. 18 Eq. 182, as to relations between broker and customer in the event of insolvency of the former.

[2] *Tomkins* v. *Saffery*, 3 App. Cas. 213; distinguished in *Ex parte Grant. In re Plumbly*, 13 Ch. D. 667; *Richardson* v. *Stormont, Todd & Co.*, [1900] 1 Q. B. 701: *Lamas* v. *Groves*, [1904] 2 K. B. 557; *Mendelssohn* v. *Ratcliff*, [1904] A. C. 456.

[3] *Bayliffe* v. *Butterworth*, 1 Ex. 425; *Bayley* v. *Wilkins*, 7 C. B. 886; *Sutton* v. *Tatham*, 10 A. & E. 27; *Grissell* v. *Bristowe*, L. R. 4 C. P. 36; *Coles* v. *Bristowe*, L. R. 4 Ch. 3; *Maxted* v. *Paine*, L. R. 6 Ex. 132. See, too, *Nickalls* v. *Merry*, L. R. 7 H. L. 530. The Stock Exchange differs from Lloyd's in being within the description of a general market, while Lloyd's is a mere private place of business: *Sweeting* v. *Pearce*, 7 C. B. N. S. 449; 9 C. B. N. S. 534.

[4] *Neilson* v. *James*, 9 Q. B. D. 546; *Mitchell* v. *City of Glasgow Bank*, 4 App. Cas. 624; *Perry* v. *Barnett*, 15 Q. B. D. 388.

[5] L. R. 7 C. P. 111.

[6] L. R. 7 H. L. 836.

[7] *L.c.* 838.

[8] *Maffett* v. *Stewart*, 14 Rettie, 506.

When a stockbroker is employed to make a bargain in the course of his business, his duty is not an absolute one to procure the stock in any event;[1] it is no more than to use due and reasonable diligence in endeavouring to procure it.[2] And where the plaintiff sought to recover against a stockbroker who had bought for him scrip certificates which were sold in the market as "Kentish Coast Railway Scrip," and were signed by the secretary of the railway company, the genuineness of which was afterwards denied by the directors, who alleged that they were issued by the secretary without authority, the proper question for the jury was held to be, not whether they were genuine or not, but whether they were what the plaintiff intended defendant to buy for him?[3]

Duty of stockbroker where he is employed to make a bargain in the course of his business.

Scrip certificates not genuine purchased for client.

On the other hand, a broker may be employed to buy shares in a particular market where there is an usage that, if the purchaser does not pay for his shares within a definite time, the vendor, after notice, may resell and charge the purchaser with the difference; in that event, if the broker be compelled to pay a difference on the shares through neglect of his principal to supply the requisite funds, the difference may be recovered by action.[4]

Where broker is employed to buy shares in a particular market, with particular usages as to payment.

The broker may render himself liable for negligence to the person with whom he has contracted on behalf of his principal as well as to his client. This was shown in *In re National Coffee Palace Co., Ex parte Panmure*.[5] A broker applied for shares in the company on behalf of one Lawrence, and which were allotted; in fact, the broker had mistaken his authority to make the application for them. In the liquidation the company claimed damages against him, and the Court of Appeal held them entitled to recover, on the authority of *Collen* v. *Wright*[6] that "a person professing to contract as agent for another, impliedly, if not expressly, undertakes to or promises the person who enters into such contract, upon the faith of the professed agent being duly authorised that the authority which he professes to have does, in point of fact, exist." And, further, that, as the company loses an allottee, the measure of damages which the broker would have to pay would be the value to the company of the contract with the particular person; which would of course differ as he was solvent or insolvent.[7]

Broker may render himself liable to the person with whom he has contracted on behalf of his principal.

A stockbroker who sells certificates of stock received by him for sale from one who stole them is guilty of a conversion, and liable to the true owner of the stock for its value,[8] on the ground that it is the duty of the defendant "to know for whom he acted, and, unless he was willing to take the chances of loss, he ought to have satisfied himself that his principal was able to save him harmless if in the matter of his agency he incurred a personal liability by the conversion of property not belonging to such principal."

Broker may be guilty of conversion.

[1] *Westropp* v. *Solomon*, 8 C. B. 345; *Young* v. *Cole*, 3 Bing. N. C. 724.
[2] *Fletcher* v. *Marshall*, 15 M. & W. 755; *Mitchell* v. *Newhall*, 15 M. & W. 308.
[3] *Lamert* v. *Heath*, 15 M. & W. 486.
[4] *Pollock* v. *Stables*, 12 Q. B. 765; *Davis* v. *Howard*, 24 Q. B. D. 691; *Macoun* v. *Erskine, Oxenford & Co.*, [1901] 2 K. B. 493.
[5] 24 Ch. D. 367, 374.
[6] 8 E. & B. 647, 657; *Starkey* v. *Bank of England*, [1903] A. C. 114, affirming *Oliver* v. *Bank of England*, [1902] 1 Ch. 610; *Bank of England* v. *Cutler*, [1907] 1 K. B. 889.
[7] *Meek* v. *Wendt*, 21 Q. B. D. 126; *Salvesen* v. *Rederi Aktiebolaget Nordstjernan*, [1905] A. C. 302.
[8] *Swim* v. *Wilson*, 25 Am. St. R. 110, 113; *Kimball* v. *Billings*, 55 Me. 147. *Ante*, 1143, and per Blackburn, J., *Hollins* v. *Fowler*, L. R. 7 H. L. 766.

Client not liable for fault of broker.

Where a loss is caused by the fault of the broker, of course the client is not liable; the broker has to pay out of his own pocket.[1]

Duty of broker.

It is the duty of the broker both to buy, and also to secure delivery of the security which he has bought for his principal, and to collect payments for securities sold within a reasonable time.[2] It is, however, not every delay that is negligent;[3] indeed, in some circumstances of the market—as, for instance, where there is none of the special stock for sale—delay is unavoidable.

Not the duty of a broker to get transfers registered.

It is not the duty of a broker to get transfers registered;[4] "all he has to do is to accept the transfer and pay the money." If it afterwards turns out that the transfer could not be completed by registration, though an action may lie against the seller, apart from actual negligence in the broker's conduct of the business, there is no liability upon him. The broad proposition may be laid down that, wherever the buyer can insist upon receiving transfers and certificates in circumstances that have occurred, there the broker is free from liability to the buyer for the purchase (that is, in the absence of actual negligence).[5]

Question what would be the effect of an illegal bargain binding by the rules of the Stock Exchange.

A question is suggested by Willes, J., in his judgment in *Chapman* v. *Shepherd*,[6] and not answered by him: what would be the effect where the purchase is in itself illegal, though by the rules of the Stock Exchange binding amongst members? The answer to this question differs as it applies to the case where the object of the prohibition is the contract itself in its essence; and as it applies to the case where the prohibition is directed against the contract unless accompanied with certain circumstances or formalities.

In the former case a transaction avoided by the law as contrary to common principles of justice, or policy, or to the interests of the State, cannot in any case be enforced.[7] The other case, of a contract made in an illegal manner about something which may be done in a prescribed manner, is different. In *Seymour* v. *Bridge*,[8] Mathew, J., was of opinion that, where a stockbroker has been engaged to deal in bank shares which there was a usage to make contracts with regard to on the Stock Exchange in a method contravening the requirements of Leeman's Act,[9] which prescribes a statement of the name of the registered proprietor of the shares in the bought and sold notes—his principal could not repudiate the purchase when made in accordance with the usages of the Stock Exchange, of which he had knowledge.

Seymour v. *Bridge.*

Perry v. *Barnett.*

In *Perry* v. *Barnett*,[10] an almost simultaneous case, Grove, J., held that, where knowledge of the usage could not be imputed to the principal, the contract could not be enforced. On appeal[11] the decision was affirmed, on the ground[12] that a man who employs a broker to deal on a

[1] *Bowlby* v. *Bell*, 3 C. B. 284; *Duncan* v. *Hill*, L. R. 6 Ex. 255; L. R. 8 Ex. 242.

[2] *Ante*, 834.

[3] *Fletcher* v. *Marshall*, 15 M. & W. 755.

[4] *Taylor* v. *Stray*, 2 C. B. N. S. 175, 195. It was held by the Court of Appeal in *London Founders Association* v. *Palmer*, 20 Q. B. D. 576, that the contract for the sale of shares on the Stock Exchange does not import an undertaking by the vendor that the company shall register the transferee.

[5] *Chapman* v. *Shepherd*, *Whitehead* v. *Izod*, L. R. 2 C. P. 228; *Biederman* v. *Stone*, L. R. 2 C. P. 504.

[6] L. R. 2 C. P. 239.

[7] *Ante*, 726 n. The Court will take judicial notice of an illegal contract if the evidence discloses illegality. *Ex turpi causa non oritur actio. Gedge* v. *Royal Exchange Assurance Corporation*, 16 Times L. R. 344; *Scott* v. *Brown, Doering McNab & Co.* [1892] 2 Q. B. 724; *Harris* v. *Runnels*, 12 How. (U. S.) 79, 83; 2 Parsons, Contracts (8th ed.), 746.

[8] 14 Q. B. D. 460.

[9] 30 & 31 Vict. c. 29.

[10] 14 Q. B. D. 467.

[11] 15 Q. B. D. 388

[12] Per Bowen, L.J., 396.

particular market is not bound to know an usage there to make an invalid instead of a valid contract, and "a usage according to which when he has ordered one thing, he is expected to take another thing. It would not be reasonable, I think, to hold that a person is bound by such a usage unless beforehand he was told or had knowledge of it. Such a usage, when applied not to brokers but to strangers who are ignorant of it, is inconsistent with the contract of employment. To bind outsiders by it would be unreasonable; and it is as regards such outsiders, and such outsiders only, that such a usage can be called unreasonable, for it would not be unreasonable as regards those who know of it, and desire to be bound by it." [1]

Breach of the provisions of Leeman's Act, 30 & 31 Vict. c. 29.

In *Neilson* v. *James* [2] the action was by the holder of bank shares against a broker for breach of duty in not making a contract for the sale of his shares in a form that would bind jobbers to take the shares of his employer. The defence set up a custom on the Bristol Stock Exchange to ignore the provisions of Leeman's Act.[3] The Court of Appeal held the plaintiff only bound by a custom both reasonable and legal, "for to that extent only can a person who is ignorant of a custom be assumed to acquiesce in and be bound by it." [4] Therefore the duty of the defendant was to make a contract valid notwithstanding the custom of the Stock Exchange; failing in which he was liable. Thus persons contracting with reference to a practice are bound by it; but a reference to it must be proved, else the law prevails and the contract does not admit of being enforced.

Where a letter of indemnity is given.

In *Loring* v. *Davis* [5] the matter was complicated by the defendant giving the brokers a letter of indemnity after a repudiation which the judge held "would have been an end" of their authority. The effect of this letter was held to operate as a continuance of the agency, so that when the agent accepted the transfer on defendant's behalf, he thereby became equitable owner of the shares, and liable, notwithstanding the repudiation.

[1] *L.c.* 397.
[2] 9 Q. B. D. 546.
[3] 30 & 31 Vict. c. 29.
[4] *L.c.*, per Brett, L.J., 552.
[5] 32 Ch. D. 625, 630.

CHAPTER II.

MEDICAL MEN.

In classical times medicine was practised principally by slaves.[1] During the Middle Ages the Jews were the great medical practitioners throughout Europe, while the lower ranges of the profession of healing were occupied by quacks and impostors of the most distinct type.[2] The Mediæval Church regarded the dissection of the human—or at least the Christian—body as sin.

Medical and surgical practitioners at common law.

At common law every man might use what trade he pleased ;[3] and the practice of medicine and surgery not being regarded as a trade which required an apprenticeship, was open more widely than any handicraft and without any objective qualification whatever.

3 Hen. VIII. c. 11.

The earliest statutory regulation of medical and surgical practice was 3 Hen. VIII. c. 11 ; by which no person was allowed to practise as a physician or surgeon within London or seven miles thereof without examination or licence. This Act applied equally to physicians and surgeons.

I. Physicians.

I. The first class of medical practitioners here referred to is that of physicians. Physicians are concerned with that division of practice which combats diseases by the application of medicines, and not by operative treatment.[4]

This branch of the medical profession was incorporated by charter of Henry VIII. in the year 1519, which was embodied in and extended by an Act of Parliament (14 & 15 Hen. VIII. c. 5). A legal controversy of considerable intricacy (which there is no need to consider in detail here) was waged as to the effect of this Act.[5] The conclusion arrived at was that the common law right of practising the profession of physic is left unaffected by anything save the condition that the practitioner must be competent ; of which competency the President and College of Physicians are the judges ; so that it is their duty to admit every person whom, upon examination, they think fit to be admitted ; and not only has the candidate himself, if found fit, a personal right, but the public has also a right to his services.[6] This duty of

1 Colquhoun, Roman Civil Law, § 798.

2 Evidence of this, with a legal bearing, may be met with in Lord Campbell's Life of Chief Justice Holt, Lives of the Chief Justices, vol. ii. 121, also Creighton, History of the Papacy (ed. 1897), vol. iv. 176.—Death of Innocent VIII. (Cibò) A.D. 1492.

3 1 Bl. Comm. 427.

4 *Hunter* v. *Clare*, [1899] 1 Q. B. 635 ; *Reg.* v. *Baker*, 66 L. T. 416.

5 *Dr. Bonham's case*, 8 Co. Rep. 107 a, 114 a ; *College of Physicians* v. *Dr. West*, 10 Mod. 353.

6 *Rex* v. *Askew*, 4 Burr. 2186.

admission being a judicial power requiring the exercise of discretion, cannot be delegated,[1] but requires to be exercised by the president and fellows, or the majority of those present, in the same manner as at the election of a fellow; though it is competent for the body at large to appoint particular persons of their own number to have the immediate direction of it; since the process of examination can be conducted by few only at the same time.[2]

II. Surgeons.

11. The second class of medical practitioners is that of surgeons. Their peculiar practice consists in the use of surgical instruments and in the cure of outward diseases, whether by external applications or by external or by internal medicines.

3 Hen. VIII. c. 11.

The Act of 3 Hen. VIII. applies to these also. By that Act alone can punishment be inflicted on a person for practising surgery without licence in any part of the kingdom except within London and Westminster and seven miles around these cities.[3] The Act imposes a penalty of £5 for every month during which he may so practise. Though unrepealed this Act is practically obsolete, since there is no instance of any person having obtained a licence under it for several centuries.[4]

Incorporation of barber-surgeons.

32 Hen. VIII. c. 42.

18 Geo. II. c. 15.

The Guild of Barbers had been incorporated in 1461. In 1541 the Guild of Barbers and the Society of Surgeons were amalgamated under the name of the Mystery and Commonalty of Barbers and Surgeons of London by 32 Hen. VIII. c. 42.[5] They received charters of privilege from James I. and Charles I. The surgeons' branch was, however, separated from the barbers' branch of the union by 18 Geo. II. c. 15, which relieved its members from the necessity of obtaining the licence under 3 Hen. VIII., and gave them an exclusive right to practise in and about London, and a concurrent right, with those licensed by the ordinary, of practising in all other parts of the kingdom.

The effect of 18 Geo. II. c. 15, seems to be to confine the right to practise surgery in London and seven miles round to those examined and admitted by the College of Surgeons. It divides those practising in the rest of the kingdom into two classes:

First, members of the College of Surgeons; who may practise in every part of the dominions of the Crown.[6]

Secondly, surgeons licensed under 3 Hen. VIII.; who may practise in any particular diocese in which they are licensed, except within London and Westminster and seven miles round.[7]

III. Apothecaries.

111. A third class of medical practitioners is that of apothecaries. The business of an apothecary was concerned with the mixing and dispensing of drugs, and was anciently carried on by grocers in conjunction with their ordinary business; but in 1615 grocers and apothecaries

[1] Vin. Abr. Deputy, 2, citing Bro. Abr. Deputie, 19.

[2] *Rex* v. *Askew*, 4 Burr. 2186. The duty of a medical school to its students (in the case cited—women) is discussed very fully in *Cadells* v. *Balfour*, 17 Rettie, 1138.

[3] 18 Geo. II. c. 15.

[4] Willcock, Laws relating to the Medical Profession, 58. Cp. *Davies* v. *Makuna*, 29 Ch. D. 596. *D'Allar* v. *Jones*, 26 L. J. Ex. 79, was on a point of pleading, and does not seem to have been carried further, so that the point was not argued, that since the Bishop of London and the Dean of St. Paul's have ceased to hold examinations in London, or the bishops in their dioceses, compliance with the statute was impossible.

[5] As to these see Stow, Survey of London (6th ed.), vol. ii. 295.

[6] The Medical Act, 1886 (49 & 50 Vict. c. 48), ss. 6, 24, 25. *Smiles* v. *Belford* (Tupper), 1 Upp. Can. App. 436.

[7] Willcock, Laws relating to the Medical Profession, 64. A physician who acts as a surgeon can recover for his services: *Little* v. *Oldaker*, Car. & M. 370; *Battersby* v. *Lawrence*, Car. & M. 277.

were formed into distinct corporations. Even subsequently to this period the Apothecaries' Company was looked upon as a mere trading company, and whoever thought fit to do so was at liberty to sell physic throughout the rest of the kingdom, provided he had conformed to the provisions of the Act of 5 Eliz. c. 4, about apprentices. Besides this, apothecaries on occasion prescribed the medicines they sold; a practice called in question by the College of Physicians, though held lawful by the House of Lords, overruling the Courts below [1] in the case of the *College of Physicians* v. *Rose*.[2]

The Apothecaries Act, 1815.

The Apothecaries Act, 1815,[3] in the words of Willcock:[4] "for the first time, placing them [apothecaries] as a body on the footing of a liberal profession."

This Act not only imposes a penalty for practising without the certificate of the court of examiners constituted by the Act,[5] but renders the act of practising without the certificate unlawful.[6] Cotton, L.J., in *Davis* v. *Makuna*,[7] thus indicates its scope: "The Act does not define the nature of an apothecary's employment, but dispensing, mixing medicine, giving medical advice, and attending the sick as medical adviser must be considered acting as an apothecary." The limitation expressed by Cresswell, J.,[8] must not be disregarded: "The mere fact of the defendant's having supplied medicines, does not necessarily show that he practised as an apothecary; for a surgeon may lawfully do that, if the medicines are administered in the cure of a surgical case. If, for instance, in the case of a broken leg it becomes necessary to administer medicine, no doubt the surgeon may lawfully do so; but, on the other hand, if a surgeon takes upon himself to cure a fever, he steps out of his lawful province, and is not authorised to administer medicine in such a case."[9] It does not appear that there is any difference between the prohibition of an act under a penalty (not being one merely for revenue purposes) and an enactment declaring it absolutely unlawful; since in both cases they are things "forbidden and absolutely void to all intents and purposes whatsoever."[10]

Scope of the Act indicated in *Davies* v. *Makuna*.

Limitation expressed by Cresswell, J.

No difference between prohibition under a penalty and an absolute prohibition.

Registration.

By the Medical Act, 1858, and its amending Acts[11] a system of registration of medical practitioners is provided for, so that none other than registered persons shall be entitled to claim the title of legally or duly qualified medical practitioners;[12] nor to recover any charge in

[1] 3 Salk. 17, 6 Mod. 44. [2] (1703), 5 Bro. Parl. Cas. 553.

[3] 55 Geo. III. c. 194. *Rex* v. *Kilderby*, 1 Wms. Saund., note (*b*), 309, 1 Wms. Notes to Saund., note (*c*), 513; *Apothecaries' Co.* v. *Jones*, [1893] 1 Q. B. 89, is a decision on the 20th section of the Act, that one penalty only can be recovered, though three several patients are treated on one day.

[4] Laws relating to the Medical Profession, 19. [5] Sec. 20.

[6] Sec. 14. As to an apothecary's qualifications, *Wogan* v. *Somerville*, 7 Taunt. 401. As to what constitutes practising, *Woodward* v. *Ball*, 6 C. & P. 577.

[7] 29 Ch. D. 606. [8] *Apothecaries' Co.* v. *Lotinga*, 2 Moo. & R. 499.

[9] *Allison* v. *Haydon*, 4 Bing. 619, 3 C. & P. 246; *Leman* v. *Fletcher*, L. R. 8 Q. B. 319.

[10] Per Lord Chancellor Hatherley, *In re Cork and Youghal Ry. Co.*, L. R. 4 Ch. 758; *Taylor* v. *Crowland Gas and Coke Co.*, 10 Ex. 293; *Mellies* v. *Shirley Local Board*, 16 Q. B. D. 446, 454; *Harris* v. *Runnels*, 12 How. (U. S.) 79.

[11] 21 & 22 Vict. c. 90, amended by 22 Vict. c. 21; 23 & 24 Vict. cc. 7 and 66; 25 & 26 Vict. c. 91; 31 & 32 Vict. c. 29; 38 & 39 Vict. c. 43; 39 & 40 Vict. cc. 40 and 41; 49 & 50 Vict. c. 48; s. 27 amended 5 Edw. VII. c. 14.

[12] The Court of Queen's Bench have held that the registration to be effectual must be before action brought: *Leman* v. *Houseley*, L. R. 10 Q. B. 66; though not necessarily at the time of the attendances: *Turner* v. *Reynall*, 14 C. B. N. S. 328. See, however, as to this last case, *Howarth* v. *Brearley*, 19 Q. B. D. 303. A book purporting

any court of law for any medical or surgical advice or attendance,[1] or for the performance of any operation, or for any medicine which they have both prescribed and supplied;[2] nor to hold any of the Government or other medical appointments specified in the Act;[3] nor to sign any certificate required by Act of Parliament to be signed by a medical practitioner;[4] and any one assuming a title implying that he is registered is liable to a fine of £20.[5]

By section 6 of the Medical Act, 1886,[6] "a registered medical practitioner shall, save as in this Act mentioned, be entitled to practise medicine, surgery, and midwifery in the United Kingdom and (subject to any local law) in any other part of Her Majesty's dominions, and to recover in due course of law in respect of such practice any expenses, charges, in respect of medicaments or other appliances, or any fees to which he may be entitled, unless he is a fellow of a college of physicians the fellows of which are prohibited by bye-law from recovering at law their expenses, charges, or fees, in which case such prohibitory bye-law, so long as it is in force, may be pleaded in bar of any legal proceedings instituted by such fellow for the recovery of expenses, charges, or fees." This proviso refers to the practice of physicians, whose employment, like that of barristers,[7] had always previously been held to be of a merely honorary description,[8] and not to support an action for fees unless by virtue of a special contract.[9] Medical Act, 1886.

The Act of 34 & 35 Hen. VIII. c. 8, providing that persons, being no common surgeons, may minister medicines notwithstanding the statute,[10] has an important bearing on what has gone before. The effect of it is summed up by Richardson, C.J., in *Le Colledge de Physitians case*[11] as follows: "We are of opinion, that this statute[12] does not extend, either in words or intent and meaning, to give liberty to any person to practise or exercise for gain or profit; it is evident from the preamble, and also the statute, that it was directed principally against surgeons who were covetous, &c. And therefore the statute has limited who shall practise, and for what diseases; and the parties licensed are such persons as shall be good honest people, as old women, and such as are inclined to give their neighbours physic through charity and piety, and not those who expect gain from it, as empirics, who do 34 & 35 Hen. VIII. c. 8. Richardson, C.J.'s, interpretation of the Act.

to be a copy of the Medical Register pursuant to 21 & 22 Vict. c. 90, and professing to be "published and sold at the Office of the General Council of Medical Education and Registration" is admissible under s. 27: *Pedgrift* v. *Chevallier*, 8 C. B. N. S. 240. *Stockwell* v. *Ryder*, (1907) 4 C. L. R. 469 (Australian).

[1] *De la Rosa* v. *Prieto*, 16 C. B. N. S. 578; *Leman* v. *Houseley*, L. R. 10 Q. B. 66; *Howarth* v. *Brearley*, 19 Q. B. D. 303.

[2] *Wright* v. *Greenroyd*, 1 B. & S. 758.

[3] Sec. 36.

[4] Sec. 37.

[5] Secs. 40–42. *Ellis* v. *Kelly*, 6 H. & N. 222; *Andrews* v. *Styrap*, 26 L. T. (N. S.) 704, both considered in *Hunter* v. *Clare*, [1899] 1 Q. B. 635.

[6] 49 & 50 Vict. c. 48. *A.-G.* v. *Apothecaries' Hall*, 21 L. R. Ir. 253, deals with the Irish Medical Schools.

[7] *Post*, 1200.

[8] *Ante*, 764.

[9] *Veitch* v. *Russell*, 3 Q. B. 928; *Chorley* v. *Bolcot*, 4 T. R. 317. Cp. *Gibbon* v. *Budd*, 2 H. & C. 92, as to presumption. This, however, does not extend to surgeons; *Lipscombe* v. *Holmes*, 2 Camp. 441; *Baxter* v. *Gray*, 4 Scott N. R. 374; *Simpson* v. *Ralfe*, 4 Tyr. (Ex.) 325; *Richmond* v. *Coles*, 1 Dowl. Prac. Cas. (N. S.) 560. Physicians can sue in America: see the somewhat declamatory judgment in *Judah* v. *M'Namee*, 3 Blackf. (Ind.) 269. In *Leighton* v. *Sargent*, 27 N. H. 460, it is laid down that a medical man may bind himself to be responsible for results.

[10] *I.e.*, 3 Hen. VIII. c. 11.

[11] Litt. (C. P.), 349. This case was twice previously argued, and is reported by Littleton, 168–173, 212–216, and 246–252. The translation of the passage from the judgment in the text is from Willcock, Laws relating to the Medical Profession, Appendix, cx.

[12] 34 & 35 Hen. VIII. c. 8.

nothing in piety and charity; so that this statute excludes all who take any money or gain." [1]

Gratuitous practitioners excepted from the operation of the statutes.

Gratuitous practitioners are thus specifically excepted out of the operation of the statutes. Even under the statutes the only right of action is for the penalties prescribed by them. The unqualified practitioner is not able to recover his charges,[2] and is in no case able to set up a contract in evasion of the Acts.[3]

Distinction between Acts void and Acts illegal.

Here a distinction must be indicated between acts void between the parties for purposes of suit and acts illegal in themselves. This is pointed out in an American case,[4] holding that though a physician is precluded from recovering for his services because he is unregistered, yet in an action for personal damage sustained by him he may recover for being rendered unable to continue his practice. If his practice were *per se* unlawful, he clearly could not recover in respect of it; and the ground of his being able to recover manifestly is that since his patients pay him voluntarily for his services, the amount of these voluntary payments becomes the measure of his gain from his practice and evidence of what his compensation should be.

Distinction between a practitioner not qualified under the Registration Acts and an irregular practitioner under the Apothecaries Act, 1815.

Criminal proceedings.

Once more, though a surgeon not qualified under the Registration Acts may not be able to sue for his fees, it does not follow that he stands in the same position as an irregular practitioner under the Apothecaries Act, 1815, on a criminal prosecution for negligence. In the former case—if the Act of Henry VIII. is to be considered inoperative—his act, though void for all purposes of obtaining remuneration or benefit, is not illegal. Consequently when he is proved to have practised, and evil results to have followed from his practice, the conclusion is not that he is liable without other evidence of negligence; for his act is not unlawful, and, though unregistered, he may be competent. In the case of practising under the Apothecaries Act, the action of practising is unlawful, and therefore the consequences are unlawful; for the law in effect says his act, however done, is incompetent, so that no further evidence is legally necessary to put the defendant to proof to exculpate himself, and, failing that, to entitle the Crown to judgment. The practical bearing of this view is less serious when it is borne in

[1] Cp. the same case before the King's Bench on writ of error, *Butler* v. *President of College of Physicians*, Cro. Car. 256, where the judgment of the Common Pleas was affirmed; "admitting the 34 Hen. VIII. c. 8, be in force, yet they all resolved the defendant's plea was naught, and not warranted by the statute; for he pleads that 'he applied and ministered medicines, plaisters, drinks, *ulceribus, morbis, et maladiis, calculo, strangurio, febribus, et aliis in statuto mentionatis*'; so he leaves out the principal word in the statute, viz., '*externis*'; and doth not refer and show, that he ministered potions for the 'stone, strangullion, or ague,' as the statute appoints to these three diseases only, and to no other. And by his plea his potions may be ministered to any other sickness; wherefore they all held his plea was naught." There is a well-known passage of Cicero discriminating *morbus*, disease, *ægrotatio*, illness, and *vitium*, defect, as follows: *Morbum appellant totius corporis corruptionem: ægrotationem, morbum cum imbecillitate; vitium, cum partes corporis inter se dissident; ex quo pravitas memorum, distortio, deformitas. Itaque illa duo morbus et ægrotatio, ex totius valetudinis corporis conquassatione et perturbatione gignuntur; vitium autem integra valetudine, ipsum ex se cernitur.* (Cic. Tuscul. Quæst. lib. iv. c. 13). Modestinus's distinction is neater: *Morbum esse temporalem corporis imbecillitatem; vitium vero perpetuum corporis impedimentum*: D. 50, 16, 101, § 2.

[2] *Steed* v. *Henley*, 1 C. & P. 574; *Allison* v. *Hayden*, 4 Bing. 619. Cp. *Gremaire* v. *Le Clerc Bois Valon*, 2 Camp. 144, with what was said in *Cope* v. *Rowlands*, 2 M. & W. 159.

[3] *Davies* v. *Makuna*, 29 Ch. D. 596.

[4] *McNamara* v. *Village of Clintonville*, 51 Am. R. 722; *Holmes* v. *Halde*, 43 Am. R. 567.

mind that some considerable negligence would be necessary to incur criminal consequences; and that, failing further evidence, the prosecution would drop, not because there was *no* evidence of negligence, but because there was *not sufficient* evidence *to establish criminal negligence*.[1] "To justify such a charge, it is not sufficient to show mere want of care and caution; there must be gross negligence and want of that degree of skill which every one, who undertakes the exercise of any particular art or profession, is bound to bring in each particular case."[2] "An injudicious and indiscreet administering of medicine will not make a man guilty of manslaughter. There must at least be gross negligence on his part."[3]

Civil proceedings.

The same distinction prevails in civil proceedings. Where the character of the act is neutral in law—that is, not prohibited—injurious consequences flowing from it will not, without some evidence of negligence, import an actionable wrong; where the act is unlawful, the injurious result will be in itself actionable without positive evidence of negligence. In civil proceedings the consent of the plaintiff to employ a prohibited practitioner makes a further difference; for the general principle is undoubted, that courts of justice will not assist a person who has participated in a transaction forbidden by statute to assert rights growing out of it, or to relieve himself of the consequences of his own illegal act. Whether, then, the form of the action is in contract or in tort, the test in each case is whether, when all the facts are disclosed, the action appears to be founded in a violation of law in which the plaintiff has taken part.[4] The plaintiff's act is something like contributory negligence, without which the injury could not happen; but this, though a defence in an action, will not avail against the Crown.

Presumption in favour of surgeon's competency.

Where the surgeon is registered and injury results from his treatment, the presumption is that he is competent and the treatment correct till the contrary is shown.[5]

Malpractice.

The negligence of medical and surgical practitioners is usually treated under the various heads of malpractice.[6] Malpractice the Court resolved, in *Dr. Groenvelt's case*,[7] to be "a great misdemeanour and offence at common law (whether it be for curiosity and experiment

[1] For a definition of Criminal Negligence, see *ante*, 7.

[2] Per Tindal, C.J., *Edsall* v. *Russell*, 4 Man. & G. 1099.

[3] Per Maule, J., *l.c.* 1103.

[4] *Hall* v. *Corcoran*, 107 Mass. 251; *Cranson* v. *Goss*, 107 Mass. 439, both "Lord's day" cases.

[5] *Regina* v. *Spencer*, 10 Cox C. C. 525.

[6] Willcock, Laws relating to the Medical Profession, 86 *et seqq.* *Imperitia quoque culpæ adnumeratur, veluti si medicus ideo servum tuum occiderit, quod eum male secuerit aut perperam ei medicamentum dederit:* Inst. 4, 3, 7. See D. 9, 2, 7, § 8. The cases under the Roman law of medicine given by mistake and through ignorance, and in what circumstances they are within the provisions of the *Lex Aquilia*, are treated in Dissertationes Juridicæ Thomasii, Diss. xi. c. 5, De Jure Circa Somnum et Somnia in Delictis, §§ 4, 5, & 6, 768–770. In Long, Decline of the Roman Republic, vol. ii. 19, is the following: "I find nothing about surgeons in the Roman army, and yet broken limbs and ugly wounds would require more skill and attention than a soldier could have from his comrades. The Fabri, who were able to use their hands, might give some help; but it is hardly possible that there were no surgeons or physicians in a Roman army, when they were employed to look after the health and wounds of gladiators. Cæsar on one occasion speaks of delaying some days on a battle-field to look after the wounded, but he does not say how this was done." See for the arrangements made under the Empire, Smith, Dictionary of Greek and Roman Antiquities (3rd ed.), art. "Exercitus," "Medici." For the general history of Greek and Roman medicine, see the articles "Medicina" and "Medicus" in the same work. See also the note in Rawlinson, Herodotus, bk. ii. 84.

[7] 1 Ld. Raym. 214.

or by neglect), because it breaks the trust which the party has placed in the physician, tending directly to his destruction." Into malpractice generally there is no call to enter here beyond the consideration of the relations constituted by malpractice caused through ignorance or remissness; for that large aspect which deals with malpractice "for curiosity and experiment" is wholly beyond the scope of the present book.

Principle.

The principle of most extensive scope, prevailing through all classes of skilled labour, and not confined to medical practitioners, is that he who undertakes the public practice of any profession undertakes that he has the ordinary skill and knowledge necessary to perform his duty towards those resorting to him in that character.[1]

No distinction between regular and irregular practitioners as to malpractice.

Where malpractice is found to have been used, whether the practitioner is qualified or unqualified, ignorant or negligent, matters nothing. The legal wrong is the incompetent or negligent treatment, not treatment by one wanting a qualification; and thus it is that a defence that the patient's treatment has been followed by improvement "as good as is usually obtained in like cases" is ineffectual where there has been negligence; for the patient is entitled to the chance of the better results that might have followed proper treatment. From the same principle flows the consequence that whether the service is remunerated or gratuitous, is immaterial.[2] Still the standard of care and competency is perpetually variable. Negligence in one man may be competent care in another. For instance, a specialist consulted in his specialty would be liable for negligence in respect of treatment which in a junior and ordinary member of the profession would more than pass muster; and that might be negligence in a doctor of repute in the west of London which would yet come up to the highest warrantable expectations of the patient of the village doctor in remotest Kerry or Sutherlandshire. Where the charge is of negligent treatment it is obvious that the question of competency or incompetency is irrelevant.

Standard of care and competency perpetually variable.

Various schools of theory and practice.

The difficulty of fixing a standard is furthermore increased by the many and conflicting schools of theory and practice. The law can enter into no minute examination of the merits of allopathy or homœopathy or any other system of treatment.[3] To constitute a school of medicine there must be a system of practice in respect of the diagnosis and treatment of disease; and proficiency in this is required of each practising member of the school.[4] The tests the law applies are—Is the practitioner a qualified man of his school, and so presumably competent, or is he unqualified, and presumably incompetent? If he is incompetent, the law infers that injury following treatment is the result of incompetency, and he must show sufficient grounds to warrant the inference that the injury was not the result of incompetency; if he is competent—that is, if he is a qualified and registered practitioner—injury subsequent to treatment must be shown, and some evidence also must be given of negligence in treatment before liability can be affixed.[5]

1 *Seare* v. *Prentice*, 8 East, 348. *Ante*, 27, 1127 and 1131.

2 Per Heath, J., in *Shields* v. *Blackburne*, 1 H. Bl. 161.

3 This is definitely held in an American case, where it was determined that the terms "physicians and surgeons" embrace homœopathists: *Raynor* v. *State*, 62 Wis. 289, United States, Digest, 1885, 521. See *Patten* v. *Wiggen*, 51 Me. 594.

4 *Nelson* v. *Harrington*, 7 Am. St. Rep. 900.

5 *Reg.* v. *Spencer*, 10 Cox, C. C. 525; Willcock, Law relating to the Medical Profession, 90.

Evidence of negligence is not suggested by an arbitrary standard. Given the presumptive competency of the practitioner, the standard of professional skill he is required to reach is that of the ordinary and average practitioner in the branch, or of the school, to which he professes himself to belong;[1] for a person professing to follow one system cannot be expected to practise any other. Where the amount of skill displayed in treatment is in dispute, the evidence of an experienced practitioner of the school professed by the person charged is admissible to show that the treatment was careful and skilful according to the standard of practitioners professing the tenets of the school.[2] Evidence of negligence.

But when the person who takes the responsibility of giving medical advice belongs to a sect or body having no fixed scientific principles or rules for the treatment of disease, he is held to the duty of treatment up to the ordinary skill and knowledge of physicians of average skill and position in places similarly circumstanced.[3] A person holding himself out as qualified and not being so, provided that the patient is ignorant of the hollowness of the pretence, will be required to show an equal amount of skill and care to one possessed of the qualifications he pretends to.[4] If the patient is aware of the lack of qualification, then only the care, skill and diligence that the circumstances admit of being attributable to the attendant are to be exacted;[5] he is liable for the lack of diligence and skill belonging to an ordinary unprofessional person of common sense.[6]

In illustration of this may be noted a case which Sir William Jones cites[7] from the Mahomedan law: "A man who had a disorder in his eyes, called on a *farrier* for a remedy; and he applied to them a medicine commonly used for *his* patients; the man lost his sight, and brought an action for damages; but the judge said: 'No action lies, for, if the complainant had not himself been an *ass*, he would never have employed a *farrier*.'" Or, as the law was stated by an English judge:[8] "If the patient applies to a man of a different employment or occupation for his gratuitous assistance, who either does not exert all his skill, or administers improper remedies to the best of his ability, such person is not liable" in damages. If, however, he applies to a *surgeon* and he treats him improperly, he is liable to an action, even though he undertook *gratis* to attend to the patient, because his situation implies skill in surgery.[9] Case cited by Sir William Jones.

The duty of a specialist is referable to a higher test than that of an ordinary practitioner. Special profession involves higher duty; and the standard to be attained is that of the specialist amongst medical men, and not that of the general practitioner, and this includes proper instructions to the nurses and to the patient for their conduct in the intervals of the doctor's attendance.[10] Specialist] standard.

[1] *Corsi* v. *Maretzek*, 4 E. D. Smith (N. Y.), 1, Brightly, New York, Digest, 2899—case of a homœopathist; Wharton, Negligence, 733.

[2] *Bowman* v. *Woods*, 1 G. Greene (Iowa), 441—case of a "hotanic physician."

[3] *Nelson* v. *Harrington*, 7 Am. St. Rep. 900, where a "clairvoyant physician" was held obliged to exercise "the ordinary skill and knowledge of a physician in good standing practising in the vicinity," and not of a "clairvoyant physician" merely.

[4] *Ruddock* v. *Lowe*, 4 F. & F. 510, 525.

[5] *Higgins* v. *McCabe*, 126 Mass. 13—case of a midwife undertaking cure of a disease of the eyes.

[6] Wharton, Negligence, § 29. *Ante*, 22.

[7] Bailm. 100.

[8] Heath, J., in *Shiells* v. *Blackburne*, 1 H. Bl. 161.

[9] *Seare* v. *Prentice*, 8 East, 348. In America it has been held that he who, knowing a medical man is of intemperate habits, yet continues to employ him, cannot set up such habits by way of defence to his bill: *McKleroy* v. *Sewell*, 73 Ga. 957, United States, Digest, 1886, at 506.

[10] *Feeney* v. *Spaulding*, 89 Me. 111—an eye case.

X-rays, standard of skill in its use.

The doctrine that treatment is to be tested by the principles of the physician's school does not apply where the question is of the use of apparatus for ascertaining a diseased condition, as where an X-ray apparatus is used. This being available for all schools of medicine and surgery, and for many purposes besides, the test of its efficient use is the ordinary standard of skill maintained by its competent manipulators.[1]

In the case of a quack.

If the practitioner is a quack, any mischance attending his ministration will raise a presumption of gross negligence; which Willes, J.,[2] describes as consisting "in rashness, where a person was not sufficiently skilled in dealing with dangerous medicines which should he carefully used, of the properties of which he was ignorant, or how to administer a proper dose." "A person," the learned judge further says, "who, with ignorant rashness and without skill in his profession, used such a dangerous medicine acted with gross negligence."[3]

Where there is divergence from the prevalent system the jury have to say—quack or no quack.

Where a divergence from the rules of the system of the majority exists, the jury have to determine whether the practitioner is a scientific inquirer, possessed of the principles of a system, and practising them (for knowledge without practice is unavailing), or a mere ignorant pretender;[4] of course subject to the instruction of the judge on the lines indicated above.

Injury following unlawful practice.

In the case of an Act of Parliament making the practice of any person unlawful, the *onus* would be on him to show the absence of connection between his unlawful practice and the injury following. Where the practice is not unlawful, whatever the disabilities to sue may be, it is conceived that if sued an unqualified practitioner stands in no worse position than a qualified man reasonably competent. To allow want of qualification to operate to diminish the liability for negligence would be to give an advantage to unqualified practitioners, while to raise the standard in such a case is manifestly unjust.

Sir Matthew Hale's opinion.

Anciently this distinction was sought to be made.[5] As to its validity, Sir Matthew Hale, says:[6] "If a physician gives a person a potion without any intent of doing him any bodily hurt, but with an intent to cure or prevent a disease, and contrary to the expectation of the physician it kills him, this is no homicide, and the like of a

[1] *Henslin* v. *Wheaton*, 103 Am. St. R. 504; *Gillette* v. *Tucker*, 93 Am. St. R. 661.

[2] *Regina* v. *Markuss*, 4 F. & F. 358.

[3] The distinction has been thus stated: "If a person assume to act as a physician, however ignorant of medical science, and prescribe with an honest intention of curing the patient, but through ignorance of the quality of the medicine prescribed, or the nature of the disease, or both, the patient die in consequence of the treatment, contrary to the expectation of the person prescribing, he is not guilty of murder or manslaughter. But if the party prescribing have so much knowledge of the fatal tendency of the prescription that it may be reasonably presumed that he administered the medicine from an obstinate wilful rashness, and not with an honest intention and expectation of effecting a cure, he is guilty of manslaughter at least, though he might not have intended any bodily harm": *Rice* v. *State*, 8 Mo. 561, cited in *State* v. *Schulz*, 39 Am. R. 187. Bishop, Criminal Law (8th ed.), § 664, also § 314, *n.*

[4] Cp. *Reg* v. *Wagstaffe*, 10 Cox C. C. 530. See 31 & 32 Vict. c. 122, s. 37, repealed by the Prevention of Cruelty to and Protection of Children Act, 1889 (52 & 53 Vict. c. 44). *The Queen* v. *Downes*, 1 Q. B. D. 25; *The Queen* v. *Morby*, 8 Q. B. D. 571: *The Queen* v. *Senior*, [1899] 1 Q. B. 283. See the Prevention of Cruelty to Children Act, 1894 (57 & 58 Vict. c. 41), amended by the Prevention of Cruelty to Children Act, 1904 (4 Edw. VII. c. 15).

[5] 4 Co. Inst. 251, quoting Britton, "that if one that is not of the mysterie of a physitian or chirurgion, take upon him the cure of a man and he dieth of the potion or medicine, this is (saith he) covert felony." See also 1 East, Pleas of the Crown, 264. Sect. iv. in this work, 260–271, is on "Homicide from Impropriety, Negligence, or Accident in the Prosecution of an Act lawful in itself, or intended by way of Sport or Recreation." *Ante*, 109.

[6] Pleas of the Crown, vol. I. 429.

chirurgeon, 3 E. 3, Coron. 163. And I hold their opinion to be erroneous, that think, if he be no licensed chirurgeon or physician that occasioneth this mischance, that then it is felony, for physic and salves were before licensed physicians and chirurgeons; and therefore, if they be not licensed according to the statute of 3 H. 8, cap. 11, or 14 H. 8, cap. 5, they are subject to the penalties in the statutes, but God forbid that any mischance of this kind should make any person not licensed guilty of murder or manslaughter." This view is accepted as correct by Pollock, C.B., in *Regina* v. *Crick*.[1] "It is no crime [2] for any one to administer medicine, but it is a crime to administer it so rashly and carelessly as to produce death; and in this respect there is no difference between the most regular practitioner and the greatest quack."[3] A Scotch case sets out how a medical practitioner undertook the charge of a patient's injured finger and having prescribed certain treatment went away for a holiday without giving his assistant requisite instructions; the assistant continued the prescription till his return with the result that the patient lost the finger; the practitioner was held responsible.[4]

Accepted as correct by Pollock, C.B., in *Regina* v. *Crick*.

Each practitioner, whether qualified or unqualified, is liable for *culpa levis*—the want of expert diligence.[5] The one *is* an expert, the other has put himself in the position of an expert.[6]

Diligence of an expert.

The law therefore provides that where criminal consequences are concerned, the mere want of qualification of the unauthorised practitioner will not warrant his being affected with criminal consequences;[7] though in the case of his professing to act as a qualified practitioner, and thereby inducing a patient to submit to his treatment, not knowing of his legal incapacity, in the event of injury following, proof of his lack of legal qualification is sufficient to cast on him the *onus* of showing that the injury did not result from the treatment. The opinion of Bayley, J., in *Rex* v. *Nancy Simpson*[8] seems inconsistent with this view. He regards the undertaking to administer medicine "which may have a dangerous effect," and "where medical assistance may be obtained," when the administration occasions death, as in itself evidence of negligence so gross as to found a criminal liability.[9] This principle of liability is, notwithstanding, too wide; since the administration, though followed by death, may be perfectly consistent with the strictest prudence and the rules of art; and on proof of this, though professional aid could have been obtained, and though a dangerous effect was produced, the presumption of negligence is effectually rebutted.

Mere unlawfulness of the unauthorised practitioner's act would not affect with criminal consequence.

Opinion of Bayley, J., in *Rex* v. *Nancy Simpson*.

[1] (1859), 1 F. & F. 519. The same is the law in America, *Commonwealth* v. *Thompson*, 6 Mass. 134.

[2] As to Criminal Negligence, see *ante*, 7 and 1155. There is a full discussion of what is required to constitute criminal negligence in a medical man in *Commonwealth* v. *Pierce*, 138 Mass. 165—case of reckless application of kerosene oil to a patient's body; *State* v. *Hardister*, 42 Am. R. 5.

[3] Cp. *Rex* v. *Williamson*, 3 C. & P. 635; *Regina* v. *Chamberlain*, 10 Cox, C. C. 486, before Blackburn, J., where the prisoner was acquitted; and *Regina* v. *Crook*, 1 F. & F. 521; *Rex* v. *Senior*, 1 Moo. C. C. 346, where there were convictions.

[4] *Furquhar* v. *Murray*, 38 Sc. L. R. 642.

[5] *Ante*, 28.

[6] *Jones* v. *Fay*, 4 F. & F. 525.

[7] Cp. *Rex* v. *Van Butchell*, 3 C. & P. 629; and per Park, J., in *Rex* v. *St. John Long*, 4 C. & P. 398, 405.

[8] 4 C. & P. 407 *n.*

[9] Bolland, B., *Rex* v. *Spiller*, 5 C. & P. 336, says: "If any person, whether he be a regular or licensed medical man or not, professes to deal with the life or health of His Majesty's subjects, he is bound to have competent skill to perform the task that he holds himself out to perform, and he is bound to treat his patients with care, attention and assiduity." As to the latter part it is clearly so. But if a man without competent skill treat a patient, he is neither liable to indictment nor action, unless he does him injury. And if he injures him, the liability is not for being incompetent, but for being negligent, or for making a false profession.

Effect of irregular treatment where proper assistance is at hand.

That qualified assistance is available is undoubtedly a fact of great weight in the determination of the character of an irregular practitioner's act; though it does not seem consistent with principle to regard it as an infallible test of negligence, as appears to be done by Bayley, J., in the case under consideration, and by Lord Lyndhurst, C.B., in *Rex* v. *Webb*;[1] it is rather a circumstance from which gross negligence will most usually be inferred than in itself an actual indication of negligence. Thus, the fact of the patient dying under such treatment will doubtless raise a presumption of negligence even criminal; but the presumption is rebuttable.[2]

Unqualified assistant of licensed practitioner.

The case frequently arises of a licensed practitioner having an unqualified assistant. The want of qualification in the one is not eked out by the possession of it by the other. In some cases the principal is even affected with a criminal liability where, through his negligence, his assistant's incompetency works harm. This is pointed out by Hawkins, J., in *Pharmaceutical Society* v. *Wheeldon*.[3] "We need hardly say that, if mischief arose by reason of a master negligently leaving an unqualified person in charge of his poisons, no punishment of the assistant under sec. 15 would exonerate his master from his civil liability to any person injured, nor, if death ensued through such negligence (if a jury found it to be of a criminally culpable character), would he be exonerated from a liability to a charge of manslaughter."

Where treatment involves danger, the patient must have a communication made, and signify assent to its application.

It is, moreover, clear that treatment involving probabilities of danger cannot be applied to a patient, whether by a licensed or unlicensed practitioner, without some communication to the patient, and some expression or signification of consent by him. The duty in this respect was treated so long ago as in *Slater* v. *Baker and Stapleton*.[4] Plaintiff employed the defendants, one of whom was a surgeon, the other an apothecary, to cure his leg, which had been broken and set, and the callus of the fracture formed. The defendants disunited the callus, and Baker fixed on the plaintiff's leg a heavy steel instrument with teeth to stretch or lengthen the leg. The evidence showed it to be improper to disunite the callus without consent, and heavy damages were given. The Court refused a motion to set aside the verdict, saying:[5] "It was ignorance and unskilfulness in that very particular to do, contrary to

[1] 1 Moo. & Rob. 405.

[2] Bishop, Criminal Law (6th ed.), § 664.

[3] 24 Q. B. D. 690. This is a case under the Pharmacy Act, 1868 (31 & 32 Vict. c. 121), s. 15.

[4] (1767) 2 Wils. (C. P.) 359. As to what is to be looked for from a surgeon employed to set a leg, see *McCandless* v. *McWha*, 22 Pa. St. 267, where Woodward, J., says: "The implied contract of a physician or surgeon is not to cure—to restore a fractured limb to its natural perfectness—but to treat the case with diligence and skill. The fracture may be so complicated that no skill vouchsafed to man can restore original straightness and length; or the patient may, by wilful disregard of the surgeon's directions, impair the effect of the best-contrived measures." "The principle is contained in the pithy saying of Fitzherbert that 'it is the duty of every artificer to exercise his art rightly, and truly as he ought.' This is peculiarly the duty of professional practitioners, to whom the highest interests of man are often necessarily intrusted. The law has no allowance for quackery. It demands *qualification* in the profession practised—not extraordinary skill such as belongs only to few men of rare genius and endowments, but that degree which ordinarily characterises the profession. And in judging of this degree of skill in a given case, regard is to be had to the advanced state of the profession at the time." "The physician or surgeon who assumes to exercise the healing art is bound to be up to the improvements of the day. The standard of ordinary skill is on the advance; and he who would not be found wanting, must apply himself with all diligence to the most accredited sources of knowledge." The judge at the trial in charging the jury made some very curious observations, well worth referring to. See also *Almond* v. *Nugent*, (1872) 11 Am. R. 147.

[5] (1767) 2 Wils. (C. P.) 362.

the rule of the profession, what no surgeon ought to have done; and, indeed, it is reasonable that a patient should be told what is about to be done to him, that he may take courage and put himself in such a situation as to enable him to undergo the operation." Yet to this candour there must be a limit; and the duty to forewarn the patient is discharged by a general intimation of likelihood of pain or danger arising in a particular direction, without a preliminary scientific dissertation on the case and its probabilities and peculiarities.[1]

Operation on a married woman without the consent of her husband.

A surgeon is justified in performing an operation upon a married woman with her consent if he deems it necessary for the prolongation of life, even though the husband were to refuse his, and the husband has no right to withhold from his wife such medical assistance as her case requires.[2] If the wife voluntarily submits to the operation, her consent is presumed, unless she is the victim of a false and fraudulent misrepresentation; and this is a fact which must be affirmatively established; so also it is presumed in favour of the surgeon that he has exercised that due and ordinary care which is a duty imposed by law, and that the operation was carefully and skilfully performed.[3]

No greater liability of the unlicensed than the licensed.

When adequate information has been given of the proposed treatment, and an indication of its danger or painfulness, it is not consistent with the authorities to say that in a civil action there are any other consequences attending the action of the unlicensed than of the licensed practitioner.[4] The law being thus, much more is a practitioner free from liability when the injurious act is an act collateral to medical or surgical treatment, done by some third person.[5]

No liability for collateral act of a third person.

Specific act of malpractice.

Where a specific act of malpractice is charged, evidence that the defendant is of skill in his profession is not admissible. The very nature of the charge involves either that he is of skill generally and did not exercise it, or that he represented himself to have skill which he did not in fact possess; the inquiry is not what he was able to do, but what he actually did. There is a difference where the quality of the act is in dispute. Is the specific thing charged malpractice or not? Then evidence of skill is admissible. If the thing done is admittedly malpractice, then whether the practitioner has the skill, which, by hypothesis, he did not use is irrelevant.[6] *Primâ facie* to sew up a sponge or an instrument in a patient after an operation is negligence. Very great care and method is to be observed in accounting for all appliances used, and this in proportion to the easiness with which they may escape observation; but even here the fact that some needle or portion of an instrument has been left in a wound is not conclusive, but the conclusion from the fact must be determined by a jury on a view of the whole circumstances.

General rule of amount of skill required considered by Erle, C.J.

The general rule of skill required from a medical or surgical practitioner is formulated by Erle, C.J.,[7] that a medical man is certainly not answerable merely because some other practitioner might possibly have shown greater skill and knowledge; he is bound to have a degree of skill and knowledge which is undefinable, but which must be a competent degree in the opinion of a jury. It is not enough that

[1] See *McClallen* v. *Adams*, 36 Miss. 333, where husband's authority to operate on wife is presumed. In the absence of evidence of consent the *onus* is on the plaintiff.
[2] *Harris* v. *Lee*, 1 P. Wms. 482.
[3] *State* v. *Housekeeper*, 70 Md. 162, 14 Am. St. R. 340.
[4] *Reg.* v. *Whitehead*, 3 C. & K. 202; *Reg.* v. *Spencer*, 10 Cox, C. C. 525; *Reg.* v. *Ball*, 2 F. & F. 201.
[5] *Perionowsky* v. *Freeman*, 4 F. & F. 977.
[6] *Holtzman* v. *Hoy*, 59 Am. R. 390, and note.
[7] *Rich* v. *Pierpont*, 3 F. & F. 35.

medical men of far greater experience or ability might have used a greater degree of skill, nor that the person charged himself might have used more care. The question is whether there has been "a want of competent care or competent skill" to such an extent as to lead to the bad result; or, as it was stated in an American case,[1] whether the amount of care and skill bestowed is up to "the average of the reasonable skill and diligence ordinarily exercised by the profession as a whole, not that exercised by the thoroughly educated, nor yet that exercised by the moderately educated, nor merely of the well-educated, but the average of the thorough, the well, and the moderate—all, in education, skill, diligence, &c."; and to this must be added—with allowance for particular circumstances of position, whether urban or rural, near a centre of population or remote.

Falconbridge, C.J.'s, statement of the relativity of the rule of skill required.

This point is brought out by Falconbridge, C.J.:[2] "It has been held in some American cases that the locality in which a medical man practises is to be taken into account and that a man practising in a small village or rural district is not to be expected to exercise the high degree of skill of one having the opportunities afforded by a large city; and that he is bound to exercise the average degree of skill possessed by the profession in such localities generally. I should hesitate to lay down the law in that way; all the men practising in a given locality might be equally ignorant and behind the times, and regard must be had to the present advanced state of the profession and to the easy means of communication with, and access to, the large centres of education and science." The professional man must "behind the times" must at some earlier portion of his career have qualified in a profession, admission to which is dependent on the attainment of a minimum standard of proficiency. At no stage in a medical man's career can reference to this standard be dispensed with wholly; not even the congregation of a knot of professional dunces in a district can attenuate their responsibility for ignorance greatly below the minimum standard of knowledge requisite to gain entry to the profession. It is against public interest as well as against sound morality that a man should be allowed to take advantage of his own ignorance, where his duty is to be well informed.[3]

Novel treatment.

The case of a departure from the recognised method of treatment presents difficulty. The fact that the case has been treated in a novel way in itself raises no presumption of negligence. Knowledge of science is progressive and daily advancing. The facts in each case must be for the jury. The new treatment proposed, if the risks are augmented by its adoption, should be generally indicated to the patient, even though the prospect of a cure is largely increased by its adoption; while the old method was only palliative, a mere ungrounded experiment must not be resorted to, but to put into operation for the first time a carefully thought out method is not malpractice.

Treatment not to be judged by reference to the particular constitution.

The want of care and skill must be in the treatment itself, and not in the treatment with reference to the particular constitution or circumstances of the patient, unless the treatment presupposes that knowledge. Thus, in *Hancke* v. *Hooper*,[4] the plaintiff, a whitesmith,

Hancke v. *Hooper*.

1 *Smothers* v. *Hanks*, 11 Am. R. 141.

2 *Town* v. *Archer*, 27 Canadian Practitioner's Review, 314, 318.

3 *Bulkley* v. *Wilford*, 2 Cl. & F. 102. *Post*, 1176. Cp. *Stevenson* v. *Rowand*, 2 Dow & Cl. 104.

4 7 C. & P. 81. *Van Mere* v. *Farewell*, 12 Ont. R. 285; *McQuay* v. *Eastwood*, 12 Ont. R. 402.

walked into the shop of the defendant, a surgeon, and asked to be bled, saying that he had found relief from it before. He was bled by the apprentice, and experienced considerable evil effects, for which he sued. Tindal, C.J., directed the jury [1] that "if, from some accident or some variation in the frame of a particular individual, an injury happens, it is not a fault in the medical man. It does not appear that the plaintiff consulted the defendant as to the propriety of bleeding him; he took that upon himself, and only required the manual operation to be performed. The plaintiff must show that the injury was attributable to want of skill; you are not to infer it. If there were no indications in the plaintiff's appearance that bleeding would be improper, the defendant would not be liable for the bleeding not effecting the same result as at other times, because it might depend on the constitution of the plaintiff."

Improper treatment is also a ground of defence to an action for fees for professional attendance. As Lord Kenyon said: [2] "If a man is sent for to extract a thorn which might be pulled out with a pair of nippers, and through his misconduct it becomes necessary to amputate the limb; shall it be said, that he may come into a court of justice to recover fees for the cure of that wound which he himself has caused?" [3] Improper treatment a ground of defence.

If the patient has aggravated his injuries [4] by his own conduct to an extent that will account for the mischief complained of, he cannot recover damages from the medical man in respect of treatment differing from the ordinary rule; the principles ruling where there is contributory negligence apply. If, however, the injury resulting from the patient's want of care can be separated from the effects of the doctor's incompetence or neglect, there is nothing to prevent recovery for injury thus isolated.[5] Aggravation of injury by patient's own act.

A medical man does not undertake for the infallibility of his treatment; and therefore he is only to be held to undertake to perform what can be ordinarily done in similar circumstances; thus, if a registered practitioner sues for his fees, and is met with the defence that his treatment was ineffectual, this is no defence to the claim.[6] Neither is it an answer that his treatment was mistaken; unless, also, it is shown to have been negligently or ignorantly so. If the medical man has employed the ordinary degree of skill current in his profession, he is entitled to his remuneration, though his treatment has failed of its effect.[7] A mistake in an opinion given when asked for, and after examination does not indicate recklessness; and for error in opinion a medical man is not liable.[8] Want of success not test of efficiency.

To enable a person injured by the malpractice of a medical or surgical practitioner to recover damages, it is not necessary that there should be privity of contract. This is pointed out by Garrow, B., in *Pippin* v. *Sheppard*,[9] who instances the case "of surgeons retained by Privity of contract not necessary to entitle to bring action.

[1] 7 C. & P. 84.

[2] *Kannen* v. *McMullen*, Peake (N. P.), 59.

[3] *Basten* v. *Butler*, 7 East, 479. Since the Judicature Acts the defendant can counterclaim for the loss of his limb.

[4] *Ante*, 101.

[5] *Hibbard* v. *Thompson*, 109 Mass. 286.

[6] See *Ely* v. *William* (N. J.), reported as a note to *Holtzman* v. *Hay*, 59 Am. R. 392.

[7] *Hupe* v. *Phelps*, 2 Stark (N. P.), 480; *Ely* v. *Wilbur*, 60 Am. R. 668. A different view seems to have been taken in *Jones* v. *King*, 81 Ala. 285, United States Digest, 1887, 518, where it is held that one sued for physician's services may show that they were of no value, and that the medicine prescribed was worthless. Cp. a lunacy case, *Pennell* v. *Cummings*, 75 Me. 163.

[8] *Urquhart* v. *Grigor*, 3 Macph. 283.

[9] 11 Price (Ex.), 400.

any of the public establishments,"[1] for whose negligence the patients would be precluded from recovering damages if a retainer were necessary, and the action were founded otherwise than upon tort; "for it could hardly be expected that the governors of an infirmary should bring an action against the surgeon employed by them to attend the child of poor parents who may have suffered from their negligence and inattention."[2]

The surgeon or medical man who undertakes the treatment of any patient (unless exceptionally) makes a representation of his possession of ordinary professional capacity and becomes bound to the exercise of ordinary professional care. If, then, by lack of capacity or care the patient is injured, he has an action against the doctor for the tort. The question of payment for the services does not enter into the consideration of the right of action; neither is the fact of treatment essential.[3]

Father of family held liable for medical attendance given in his absence.

On the other hand, a father residing away from his family has been held liable for medical attendance where he did not know the surgeon had been called in, and though the accident that was treated was caused by the negligence of a servant.[4]

If a master calls in his own medical man to attend his servant he cannot afterwards deduct the charge from the servant's wages; but he is not bound to provide a menial servant with medical attendance or medicine.[5] Lord Kenyon's "humanity" had led him to assert the master's liability,[6] and Lord Eldon lent the opinion some countenance,[7] but in *Wennall* v. *Adney*[8] the opinion was overruled, and the law there laid down has since been accepted, viz., that a master is not liable upon an assumpsit to pay for medical attendance on a servant who has met with an accident in his service.[9]

In absence of contract, action depends on duty.

Where there is no contract the action depends upon duty; and where there is no duty the plaintiff cannot recover; as in *Pimm* v. *Roper*[10] where the plaintiff sought to recover against the doctor of a railway company who examined the plaintiff on their behalf, and advised the plaintiff that his injuries were so slight that he should take compensation; the plaintiff accepted compensation, but afterwards, finding his injuries proving more considerable than he was told they were, sued the doctor, but was held not entitled to recover.

Physician not liable for mistake in druggist in making up prescription Stretton v. *Holmes.*

A Canadian case[11] must here be noted, where a physician wrote a prescription for the plaintiff, and directed it should be charged to himself by the druggist; which was done. The physician's fee, including the charge for making up the prescription, was paid by the plaintiff. In mistake, the druggist's clerk put prussic acid in the mixture, and the plaintiff in consequence suffered injury. The

1 *L. c.* 409. *Post*, 1065.

2 *Gladwell* v. *Steggall*, 5 Bing. N. C. 733; *Du Bois* v. *Decker*, 130 N. Y. 325, 27 Am. St. R. 529. Who pays is immaterial, the duty when undertaken being to use reasonable care and skill according to the ordinary standard: see per Parke, B., *Longmeid* v. *Holliday*, 6 Ex. 767. *Ante*, 1128.

3 In *Harriott* v. *Plimpton*, 166 Mass. 585, a prospective bridegroom recovered against a physician who had examined him at the instigation of his prospective father-in-law to ascertain whether he was affected with venereal disease, and who so negligently made his examination that the marriage engagement was broken off.

4 *Cooper* v. *Phillips*, 4 C. & P. 581.

5 *Sellen* v. *Norman*, 4 C. & P. 80.

6 *Scarman* v. *Castell*, 1 Esp. (N. P.) 270.

7 *Simmons* v. *Wilmott*, 3 Esp. (N. P.) 91.

8 3 B. & P. 247. *Newby* v. *Wiltshire*, 2 Esp. (N. P.) 739.

9 In *Watson* v. *Turner*, Bull. N. P. 147, under the Poor Law Acts overseers were held bound to provide medical attendance for the poor in their parishes.

10 2 F. & F. 783.

11 *Stretton* v. *Holmes*, 19 Ont. R. 286.

druggist was held liable, but the physician went free. Between the druggist and the dispenser the relation of master and servant existed, between the druggist and the physician the relation was that of employer and contractor. The druggist, moreover, was a skilled person, and care having been exercised in making a suitable appointment, there was no duty to examine his work incumbent on the physician,[1] who was not bound to supervise his work in his speciality.

Rule applicable to druggist

The rule of liability applicable to a druggist is the same as attaches generally to persons whose work requires special knowledge or skill. He is not legally responsible for any unintentional injury resulting from a lawful act, unless the failure to exercise due and proper care can be imputed to him,[2] and the burden of proving such lack of care, where the act is lawful, is on the plaintiff.

Liability of hospital governors

The liability of the board of governors or committee of a hospital or dispensary to any patient treated there for injuries arising from the negligence of the surgeon or medical practitioner whom they have appointed as their medical officer has been exhaustively discussed in the courts of America. In *McDonald* v. *Massachusetts General Hospital*,[3] the Supreme Court of Massachusetts held that where a hospital board had used due care in selecting a properly qualified medical officer, they were not liable for his negligences while acting as their officer. This case was decided, partially at any rate, on the authority of *Holliday* v. *St. Leonards, Shoreditch*,[4] which, after the remarks of Blackburn, J., in *Foreman* v. *Mayor, &c. of Canterbury*,[5] must be considered as overruled. In the subsequent case of *Glavin* v. *Rhode Island Hospital*,[6] the same point again came up for decision, and the Rhode Island Court, eliminating the doubtful elements in the earlier case, made a searching investigation into the principles applicable, where the trustees of a public hospital are sued for unskilful surgical treatment of a patient in the hospital. The reasoning of the Chief Justice is as follows: "The physicians or surgeons are selected by the corporation or the trustees. But does it follow from this that they are the servants of the corporation? We think not. If, A, out of charity, employs a physician to attend B, his sick neighbour, the physician does not become A's servant, and A, if he has been duly careful in selecting him, will not be answerable to B for his malpractice. The reason is that A does not undertake to treat B through the agency of the physician, but only to procure for B the services of the physician. . . . And so there is no such relation between the corporation and the physicians and surgeons who give their services at the hospital. It is true, the corporation has power to dismiss them, but it has this power, not because they are its servants, but because of its control of the hospital where their services are rendered. They would not recognise the right of the corporation while retaining them to direct them in their treatment of patients."

Glavin v. *Rhode Island Hospital*.

In New Zealand the point has been decided by the Court of Appeal as in *Glavin's case*, and on the authority of the reasoning therein.[7]

Approved and followed by the Court of Appeal of New Zealand.

[1] Cp. *Thomas* v. *Winchester*, 6 N. Y. 397; and *George* v. *Skivington*, L. R. 5 Ex. 1, *ante*, 50. [2] *Allen* v. *State Steamship Co.*, 132 N. Y. 91, 28 Am. St. R. 550.

[3] (1876) 120 Mass. 432, 21 Am. R. 529. *Ante*, 328.

[4] 11 C. B. N. S. 192. [5] L. R. 6 Q. B. 218. [6] 34 Am. R. 675, 679.

[7] *District of Auckland Hospital and Charitable Aid Board* v. *Lovett*, 10 N. Z. L. R. 597 (C. A.). *Perionowsky* v. *Freeman*, 4 F. & F. 977, held hospital surgeons not liable for ill usage of nurses in carrying out their prescriptions, of which they were personally not cognisant.

In England the principle was discussed in connection with an action brought against a nursing association which had supplied two nurses for attendance on the plaintiff after an operation. The plaintiff was injured through the negligence of the nurses and sued the Association from which they were supplied.[1] The Court of Appeal held that the Association undertook merely "to find and supply nurses, in selecting whom they had employed all reasonable care and skill in order to ensure their being competent and efficient."[2] That this is the contract is so universally the case that the *onus* would lie on one asserting a different arrangement.

Evans v. *Mayor, &c. of Liverpool.*

The principle was reiterated in *Evans* v. *Mayor, &c. of Liverpool*,[3] where the medical officer of a convalescent home maintained by the defendants under statutory powers improvidently discharged a fever patient whence damage resulted and the corporation were sued. The case was disposed of by the following unanswerable reasoning: "What the doctor really does is to advise the corporation, and he gives his opinion as a medical man. If the defendants have employed a competent, skilful and duly qualified medical man, they have done all that it was possible for them to do—they cannot control his opinion in any kind of way; indeed, it would be wrong for them to attempt to do so; all they can do is to employ a competent medical man, and to act upon his opinion and discharge the patient."[4]

Negligence in the care of or in certifying lunatics.

Negligence in the care of alleged lunatics must here be noticed.[5]

The adjuration of Lord Mansfield, "God forbid, too, that a man should be punished for restraining the fury of a lunatic when that is the case,"[6] has been referred to[7] as the authority for the statement that, at common law, any man may justify an assault when it may be to restrain the fury of a lunatic and prevent mischief. Justification for it may, however, be found much earlier—as early, indeed, as Y.B. 22 Edw. IV. 45, pl. 10.[8] But this protection was only allowed in the case of one "furiosus"; and where there was failure to prove that the alleged lunatic was actually insane at the time when he was interfered with, no justification was possible.[9] Yet, when it has been shown that the lunatic was in such a state at the time he was restrained that he was likely to do mischief to any one, the restraining him is justified, and also for so long in addition as is necessary to afford reasonable ground to believe that the danger is over.

Anderdon v. *Burrows.*

It seems that at common law,[10] if a physician were of opinion, from the relation of those interested, that a person should be confined as a

[1] *Hall* v. *Lees*, [1904] 2 K. B. 602. [2] *L.c.* 611. [3] [1906] 1 K. B. 160.

[4] *L.c.* 166. The Lord Chief Justice ignored this point of view in *De la Bere* v. *C. A. Pearson*, [1907] 1 K. B. 483, the case of a "city editor" of a paper of gossip giving financial advice, probably negligently, certainly disastrously; where, however, it seems very pertinent. *Ante*, 102. *Tunbridge Wells Local Board* v. *Bisshopp*, 2 C. P. D. 187, is an unsurpassed instance of the danger a wise and humane medical man may be exposed to by stupid obstinacy of local jacks in office.

[5] The older law as to lunatics may be gathered from the report of *Beverley's case*, 4 Co. Rep. 123 b; Bac. Abr. Idiots and Lunaticks; Vin. Abr. Lunatick Non-Compos and Idiot; Com. Abr. Idiot; Pleader (3 M 22.); 1 Spence, Eq. Jur. 618. *Ante*, 47.

[6] *Brookshaw* v. *Hopkins*, Lofft (K. B.), 243.

[7] Archbold, Lunacy (4th ed.), 447. [8] Bro. Abr. Faux Imprisonment, pl. 28.

[9] *Scott* v. *Wakem*, 3 F. & F. 328. *Fletcher* v. *Fletcher*, 1 E. & E. 420, where, on a plea alleging that the plaintiff conducted himself *as if* he were insane, Lord Campbell, C.J. says (423): "It would be most dangerous to the liberty of the subject if a man could be imprisoned under circumstances such as appear upon this plea. It would place in jeopardy the liberty of many persons of eccentric habits, though in perfect possession of their faculties. There must be actual insanity to justify confinement."

[10] *Anderdon* v. *Burrows*, 4 C. & P. 210.

lunatic in order to prevent his doing injury to himself or to others, he would be justified in taking measures to confine him, even though he himself did not visit the alleged lunatic.[1] If, however, the alleged lunatic were not in fact insane, whatever the representations, the action would be undefended, and the nature of the statements made would only go in mitigation of damages.

Common Law modified by statute.

The defects in the common law as to lunacy were sought to be redressed by 8 & 9 Vict. c. 100, and 16 & 17 Vict. c. 96; and it has been pointed out[2] that, while sec. 99 of the earlier of these Acts protects duly authorised persons acting under certificates and an order for the confinement of a lunatic, no protection is given to the person who makes the order. His liability, therefore, continues as at common law: "he is not protected unless the person confined be actually insane."

Hall v. *Semple*.

The leading case against a medical man under these early statutes is *Hall* v. *Semple*.[3] The declaration, as ultimately amended, charged that the defendant, being a physician, and without reasonable or probable cause, and with intent to cause the plaintiff to be imprisoned and put under bodily restraint, did as a physician sign a certain certificate according to the form prescribed by the Lunacy Acts, whereby it was certified among other things that the plaintiff was of unsound mind. The defendant pleaded "not guilty" under 16 & 17 Vict. c. 96. The law applicable was exhaustively stated by Crompton, J., in his summing up. As originally framed the declaration alleged malice. This the learned judge ruled not to be necessary to give the right of action. The true ground of action was negligence and want of due care. "I think," said he,[4] "that if a person assumes the duty of a medical man under this statute and signs a certificate of insanity which is untrue, without making the proper examination or inquiries which the circumstances of the case would require from a medical man using proper care and skill in such matter—if he states that which is untrue, and damage ensues to the party thereby, he is liable to an action." Turning to the question of the degree of care that must be observed, the learned judge said: [5] "One can hardly say precisely what that degree of care may be. It could not be said, perhaps, that the medical man is bound to examine every person connected with the party. The matter is for you" (the jury). "You are acquainted with the ordinary exigencies of life; you must judge as men of the world by the light of your own common sense." "We may take it, however, as clear, that considerable care ought to be used: and the question for you is whether the proper degree of care was used, or whether there was that culpable negligence which has been imputed to the defendant. It is not a mere mistake or error in judgment which would amount to such negligence, but you must be satisfied that there was culpable negligence." [6] "You are not inquiring into an error of judgment, but whether the defendant has been guilty of that culpable negligence which I have explained and described to you; negligence in not making sufficient inquiries, the examination not having been sufficient in his own judgment. It would be dreadful if a medical man were to suffer merely from an error of judgment. The question is, whether there has been a neglect of that duty, which a person in a case of this

Summing up of Crompton, J.

[1] The remarks made in *Lister* v. *Perryman*, L. R. 4 H. L. 521, may afford indication of what inquiries and statements would justify a medical man in so acting.

[2] *Fletcher* v. *Fletcher*, 1 E. & E. 421.

[3] 3 F. & F. 337.

[4] *L.c.* 354.

[5] *L.c.* 356.

[6] *L.c.* 357.

kind owes, not to interfere in a matter which touches the liberty of his fellow citizen without taking due care and making a careful examination and inquiry." [1]

Lunacy Act, 1890.

The rights and duties of medical men and others in certifying and taking care of lunatics are now regulated and determined by the Lunacy Act, 1890.[2] By sec. 330 protection is afforded those acting in good faith in proceedings for the security of lunatics. Any person who presents a petition for a reception order,[3] "or signs or carries out or does any act with a view to sign or carry out an order purporting to be a reception order or any report or certificate under this Act, or does anything in pursuance of this Act," is not to be liable to any civil or criminal proceedings, whether on the ground of want of jurisdiction or on any other ground, if he acts "in good faith and with reasonable care." [4]

Thompson v. *Schmidt*.

In *Thompson* v. *Schmidt* [5] an effort was made to render a medical man liable for setting in motion a relieving officer, who, acting under sec. 20, caused an alleged lunatic to be taken and confined in a workhouse. The defendant, who had been medical adviser to the plaintiff's family, had on the application of plaintiff's wife, given a note to the relieving officer in these terms: "I hereby certify that Mr. Thompson is a person of unsound mind and is dangerous to those about him." At the trial the judge held that the defendant's intervention was a proceeding under the Act. The jury found a verdict for the plaintiff. This was set aside by the Court of Appeal on two grounds: first, that there was no negligence, because there was no duty; secondly, that the act by which the plaintiff suffered was the act of the relieving officer in the exercise of his discretion.

Judgment of Lord Esher, M.R.

As to the former of these grounds Lord Esher, M.R., said: "A man could not be sued for negligence unless there was a duty imposed on him to take care. A medical man held himself out, to any one employing him for treatment as a medical man, as a person who would act with ordinary care and skill. To others a medical man had no duty to be careful or skilful. His duty was to his patients." The distinction indicated is that the fact that a man, whose duty towards his neighbour is regulated by the ordinary rules requiring unskilled diligence, happens also to be a medical man, does not impose on him a greater obligation than in the ordinary case of an unskilled person. His duty is to bring ordinary care to bear, not professional skill—the care of an ordinary common-sense business man, not the diagnosis of a scientific man and a specialist.

Dr. Wharton's statement adopted by the Court.

As to the second point, though the report does not so state, the Court adopted a passage from Wharton [6] which Lord Esher, M.R., read as follows: "Supposing that if it had not been for the intervention of a responsible third party the defendant's negligence would have

[1] *L.c.* 365. As to the examination required under the Lunatic Asylums Act, 1853 (16 & 17 Vict. c. 97), s. 68, see *The Queen* v. *Whitfield*, 15 Q. B. D. 122. See now the Lunacy Act, 1890 (53 Vict. c. 5), and the Lunacy Act, 1891 (54 & 55 Vict. c. 65).

[2] 53 Vict. c. 5.

[3] See definition in sec. 341: also Part I. ss. 4 to 38.

[4] The form of medical certificate is carefully provided for, sec. 28, and Sch. ii. Form 8, of the Lunacy Act, 1890 (53 Vict. c. 5). Form 9 is an additional paragraph to be incorporated in Form 8, where an "urgency order" is asked for; as to which see sec. 11.

[5] 8 Times L. R. 120 (C. A.).

[6] Negligence, § 134. The same passage is textually set out and adopted, *Howard* v. *Corporation of St. Thomas*, 19 Ont. R. 719, 728.

produced no damage to the plaintiff, is the defendant liable to the plaintiff? This question must be answered in the negative, for the general reason that casual connection between negligence and damage is broken by the interposition of independent responsible human action. I am negligent on a particular subject matter as to which I am not contractually bound. Another person, moving independently, comes in, and either negligently or maliciously so acts as to make my negligence injurious to a third person. If so, the person so intervening . . . is the one who is liable to the person injured. I may be liable to him for my negligence in getting him into difficulty, but I am not liable to others for the negligence which he alone was the cause of making operative." "The sole responsibility," said Lord Esher, M.R., "was upon the relieving officer, and he had to act upon his own responsibility. That being so, the opinion of the defendant was not the cause of the plaintiff's being taken to the infirmary. The act of the relieving officer was the cause. Even though it might possibly be true that the act of the defendant was the *causa sine qua non*, it was not the *causa causans*. In other words, the confinement was not the direct result of the defendant's act, but it was the direct result and the sole result of the act of the relieving officer. There was the intervention of an independent and responsible third person—namely, the relieving officer, who was responsible for what was complained of." It was not seriously contended that the "certificate" was a certificate under the Act.

Responsibility on the relieving officer.

The duty of certain public officers named in the Lunacy Act, 1890,[1] differs according as the lunatic is (1) dangerous, so that it is necessary "for the public safety or the welfare" of the alleged lunatic to place such alleged lunatic under care and control;[2] or (2) is a pauper;[3] or (3) is not a pauper and not under proper care and control.[4] In the first case the duty of the constable, relieving officer, or overseer, is *quasi*-judicial; he has to exercise a discretion. In the second case the duty imposed is only on the relieving officer and overseer, omitting the constable. The duty is absolute; within three days of obtaining knowledge of a pauper lunatic within his district he is to give notice to a justice. Failure in this duty renders him liable to a penalty not exceeding £10 a day "for each day or part of a day during which the default continues."[5] In the third case the duty of the constable, relieving officer, or overseer is, within three days of obtaining knowledge of facts, to "give information thereof upon oath to a justice being a judicial authority."[6] Here again the officer has apparently to exercise a discretion.

Duty of public officers under the Lunacy Act, 1890.

In view of the liability to action in these cases the protection given[7] to one who does "anything in pursuance of this Act" is important; since any person so acting "shall not be liable to any civil or criminal proceedings, whether on the ground of want of jurisdiction or on any other ground if such person has acted in good faith and with reasonable care." To found an action facts pointing to want of good faith and absence of reasonable care seem necessary. Where

Protection given.

[1] 53 Vict. c. 5. *Ante*, 243.

[2] Sec. 20. *Harward* v. *Hackney Guardians*, 14 Times L. R. 306; the satisfaction of the constable that is required by the section need not be on reasonable grounds if only it is satisfaction in fact, and in good faith: *Morris* v. *Atkins*, 18 Times L. R. 628. The protection of sec. 20 is confined to the cases when it is the duty to take proceedings under sec. 13 or sec. 15: *Welsh* v. *Duckworth*, 18 Times L. R. 633.

[3] Sec. 14. The duty being a statutory one, enforceable by penalties under sec. 220, there does not appear to be any personal duty to the lunatic or his relatives, other than not to be negligent in dealing with him.

[4] Sec. 13. [5] Sec. 320. [6] Sec. 13. [7] Sec. 330.

proceedings are commenced they may, "upon summary application to the High Court or a Judge thereof, be stayed upon such terms as to costs and otherwise as the Court or Judge may think fit, if the Court or Judge is satisfied that there is no reasonable ground for alleging want of good faith or reasonable cause." [1]

The analogy indicated seems to be to actions of false imprisonment and malicious prosecution. In considering the duty of the officer to ascertain the condition of the alleged lunatic it does not appear that there is any absolute obligation on him to make personal inquiries; if the officer can show he has acted on the information of a trustworthy informant his duty is discharged.[2]

A person giving notice to a relieving officer under sec. 14 does not seem to be under any further duty than an ordinary citizen is under in communicating to a neighbour information of a neighbour.

Dentists.

A step was taken to organise the practitioners of dentistry after the method adopted in the Medical Acts by the Dentists Act, 1878.[3] The success of the attempt is less satisfactory to dentists registered under the Act by reason of the two aspects of the occupation: in one, a branch of medical science; in the other, a mere mechanical calling of making and fitting artificial teeth. This distinction is illustrated in *Hennan & Co. v. Duckworth*,[4] an action by a limited company, whose agents were unregistered under the Act, to recover the agreed price for some artificial teeth. The defence was sec. 5 of the Act, disentitling any unregistered person to recover any fee "for the performance of any dental operation or for any dental attendance or advice." Nevertheless the plaintiffs recovered on the ground that making teeth was neither a dental operation nor dental advice. "Dental operation must mean an operation in the surgical sense upon a living patient and not work in making false teeth." The items of the claim which were in respect of fitting the teeth or operating in the patient's mouth were disallowed.

Hennan & Co. v. Duckworth.

Seymour v. Pickett.

In a subsequent case [5] a cheque that had been given to an unregistered person mainly for "making and supplying a dental bridge" was dishonoured; on action brought upon the cheque, the point was taken that a cheque given for dentist's fees and charges would be good consideration as there is nothing illegal in a contract to pay them, and the Act only prevents an unregistered dentist from bringing an action for his fees. The Court expressed no opinion on this point, as that part of the claim which had reference to a dental operation or attendance or advice was withdrawn by the plaintiff, who recovered the price of the "dental bridge" as for "goods supplied and work done outside the words of sec. 5."

Rule of skill.

The rule of skill to be used by a dentist is arrived at in the same way as with regard to a member of any other branch of the therapeutic art. The standard is that of the ordinary average registered practitioner, unless there are in the particular case circumstances that point to some other. An unregistered practitioner, if not known to the person operated upon to be unregistered, must attain the standard of skill of the registered practitioner at the place and in the circumstances where the services are rendered; if known to be unregistered, then the skill of his profession.[6]

[1] The section is considered in *Williams v. Beaumont*, 10 Times L. R. 543 (C. A.).
[2] *Lister v. Perryman*, L. R. 4 H. L. 521.
[3] 41 & 42 Vict. c. 33.
[4] 20 Times L. R. 436.
[5] *Seymour v. Pickett*, [1905] 1 K. B. 715.
[6] *Ante*, 1158.

Prohibition on sale of poisons.

We may in addition note that the selling of certain poisons (including all compounds [1] containing more than an infinitesimal amount [2] of such poisons) is prohibited to all persons unless registered by virtue of the 31 & 32 Vict. c. 121, the object of which "is, *beyond all other considerations*, to provide for the *safety of the public*";[3] and the sale of poisons is regulated by secs. 15-17 of that act, and by the 32 & 33 Vict. c. 117, s. 3. The prohibition extends to all proprietary medicines containing such poisons, but not to medicines made under letters patent.[4]

Veterinary surgeon.

The rule of diligence for a veterinary surgeon is laid down in *Barney* v. *Pinkham*[5] to be in accordance with the ordinary rule of *spondet peritiam artis*.[6]

[1] *Pharmaceutical Society* v. *Armour*, [1894] 2 Q. B. 720, approving *Pharmaceutical Society* v. *Piper*, [1893] 1 Q. B. 686.

[2] *Pharmaceutical Society* v. *Delve*, [1894] 1 Q. B. 71.

[3] Per Hawkins, J., *Pharmaceutical Society* v. *Wheldon*, 24 Q. B. D. 688, where the unregistered assistant of a chemist duly registered was held liable to a penalty under sec. 15. *Jaske* v. *Lahrmann* (1907) 4 C. L. R. 71 (Australia). *Pharmaceutical Society* v. *White*, [1901] 1 K. B. 601, considers who is a "seller" under sec. 15.

[4] *Pharmaceutical Society* v. *Armour*, [1894] 2 Q. B. 725.

[5] 20 Am. St. R. 389.

[6] *Ante*, 808 and 1127.

CHAPTER III.

SOLICITORS.

Introductory.

SOLICITORS, or, as they used to be called, Attorneys, hold the position both of public officers and of experts discharging contractual duties. The consideration of their relations might without impropriety have been undertaken in connection with public officers. Yet as the public functions of solicitors are, after all, only accessory to their private employments, and as their duties present more numerous points of similarity with those of architects and medical men than with those of sheriffs or officers of public bodies, it is more convenient to treat them under the heading of private persons mainly concerned with the performance of duties requiring trained and professional skill.

Three classes included under term solicitor.

The term solicitor of the Supreme Court in England designates what were originally three distinct classes of persons:

(*a*) Attorneys-at-law, who practised before the Courts of Common Law, and at one time had a privilege to be sued in these Courts, reference to which is still preserved in the County Courts Act, 1888.[2]

(*b*) Solicitors of the Court of Chancery.[3]

[1] Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 87.

[2] 51 & 52 Vict. c. 43, s. 175. *See Burnidale* v. *Nelson*, 14 C. B. 657-660. The learning on the privilege of attorneys is to be found Bac. Abr. Privilege (B). The particular Privileges in Suits allowed Officers and Attendants in the Courts of Justice. See Com. Dig. Attorney, and Bac. Abr. Attorney, for the historical law; also Termes de la Ley, Attorney.

[3] Pulling, Law relating to Attorneys (3rd ed.), 9. Pulling, Order of the Coif, 117 122. The general statutes relating to solicitors are 6 & 7 Vict. c. 73; 23 & 24 Vict. c. 127; 37 & 38 Vict. c. 68; 40 & 41 Vict. c. 25; 51 & 52 Vict. c. 65; 57 Vict. c. 9; 62 Vict. c. 4; 6 Edw. VII., c. 24. The origin of the legal profession must be sought for before the end of the thirteenth century. Its development was retarded by the rule of the ancient procedure, which required a litigant to appear and conduct his cause in his own words. As far back, however, as the *Leges Henrici* (46, 47, 48, 49, 61, §§ 18, 19), a litigant is allowed to bring his friends into Court with him, and to take 'counsel' with them before he pleads, except in a case of felony. The right to appoint an Attorney is a royal privilege. Stat. West. II. c. 10, gave a general right to appoint an attorney to appear in all causes which should come before the justices in a given eyre. The King appears to have retained a body, who may be the ancestors of the body of King's Counsel, and who are indicated by Matthew of Paris in the phrase "*eum famulos eidem tabulatum legistarum*": Chron. Maj. iii. 111; these seem to have been called *regulares*. "*quos narratores vulgariter appellamus*," *l.c.* 619. Stat. West. I., c. 29, threatens with imprisonment serjeant countors who are guilty of collusive or deceitful practices. "Apprentices," *apprentici ad legem*, are probably the pupils of the serjeants. In 1292 the King directed his justices to provide for every county a sufficient number of attorneys and apprentices from among the best, the most lawful, and the most teachable. Pollock and Maitland, Hist. of English Law, vol. i. (2nd ed.) 213. The distinction originally existing between attorneys and solicitors may be traced to the circumstances of the origin of chancery jurisdiction. Attorneys attending the King's Courts were under the surveillance of the justices in

(c) Proctors,[1] who practised before the Court of Admiralty and the Ecclesiastical Courts in which the Civil and Canon Law were administered.

An attorney[2] was either public or private. The former was usually termed an *attorney-at-law*, and was a person who might be employed generally by any person to prosecute and defend actions in courts of law; the latter is a person appointed for a particular purpose, usually by an instrument in writing called a letter of attorney, in which is expressed the particular act or acts for which he is appointed.[3] With this latter we have here no concern. The Judicature Act now comprehends attorneys, proctors, and solicitors alike under one name, that of solicitors. Definition of attorney.

An attorney-at-law, says Blackstone,[4] answers to the *procurator* or *proctor* of the civilians and canonists—using these words as if co-extensive and synonymous. These appear to have been of two kinds: the *pragmatici* and the *procuratores*.

The *pragmatici* are described as persons who assisted the advocates when they were pleading, and instructed them in points of law.[5] *Pragmatici.*

The *procuratores* seem to have resembled attorneys amongst us.[6] In the French Roman Law, *procurator* was the *nomen generalissimum*, answering to attorney in English law; while what Cicero calls *pragmatici* were designated *proctors*[7]—that is, attorneys-at-law with us. The analogy by Blackstone is therefore incomplete in likening attorneys-at-law to the *procuratores* of the ancients; since *procurator* is a much wider term, and corresponds with the English term attorney; and that description with which we are now to concern ourselves—attorneys- *Procuratores.*

early as the year 1402, see 4 Hen. IV. c. 18. The first statutory mention we have of solicitors is more than two hundred years later, in the Act of 3 Jac. I. c. 7. The ordinary jurisdiction of the Chancellor is of a date subsequent to the reign of Henry IV. (Dugdale, Origines Juridiciales (2nd ed.), 37), and not being invoked by writ, but by petition or bill (1 Spence, Eq. Jur. 367), and being of grace, not of right, those who set matters in motion seem to have been in the position of people at the present day petitioning any high officer of state. From applying to the Chancellor in one matter or for themselves, some came to offer to undertake generally for any one wishing to invoke the Chancellor's intervention, and quickly became recognised as a class, and as a particularly well-reputed one (see the definition of solicitor in Cowell, Interpreter), called solicitors. The abuses arising from their unregulated exertions probably occasioned the passing of the Act 3 Jac. I. c. 7; from the time of the passing of which Act solicitors are associated with attorneys.

[1] Burn. Ecc. Law, *sub voc. Proctor*; Domat, Public Law, Bk. 2 tit. 5, s. 2, where the definition is given: "Proctors are officers established to represent in judgment the parties who impower them to appear for them, to explain their rights, to manage and instruct their cause, and to demand judgment." See Pothier, Traité du Contrat de Mandat, *Des mandats qui ont pour objet quelque affaire judiciaire et des procureurs ad lites*, Nos. 121–113.

[2] "Attorney," says Sir E. Coke, Co. Litt. 51 b, "is an ancient English word, and signifieth one that is set in the turn, stead, or place of another." See Fitzh. De Nat. Brev. 156 D; *Combe's case*, 9 Co. Rep. 75 a; Jacob, Law Dictionary, Attorney.

[3] 3 Bl. Comm. 25; Jacob, Law Dictionary, Attorneys at Law.

[4] *Itaque, ut apud Graecos infimi hominum, mercedula adducti, suum cuique ut probent e judicis oratoribus, ii qui apud illos* πραγματικοὶ *vocantur* (Cic. De Orat. I. 15). And again: *Illi disertissimi hominum mercedem habent ut causis juris peritos, (eum ipsi sint imperitissimi) et qui, ut ubi te, paulo ante dictum est, pragmatici vocantur. In quo modici nonnihil melius multo, quid clarissimorum hominum auctoritate leges et jura tuta esse velit quam . . . Sed tamen nun fugisset hos Graecos hominos, si ita necesse esse arbitrati essent, oratorem ipsum evadire in jure civili non ut pragmaticum adjutorem dare* (Cic. De Orat. I. 59).

[5] *Legitimus procurator dicitur omnium rerum ejus, qui in Italiâ non sit absitve reipublicae causâ, quasi quidam pene dominus, hoc est, alieni juris vicarius* (Cic. pro Caecin. 20). Again: *Nihil videbatur esse in quo tantulum interesset, utrum per procuratores ageres, an per te ipsum; ut ubi tutius, ut tam longe ubi*; Cic. ad Attic. 1, 16. See Smith, Dictionary of Greek and Roman Antiquities (3rd ed.), "Procurator" and "Actio."

[6] Domat, Public Law, Bk. 2, tit. 5, s. 2.

at-law—is but a species of the larger class attorney, and answers to the *proctor* of Domat and the *pragmaticus* of Cicero.[1]

"Proctors are officers established to represent in judgment the parties who empower them (by warrant under their hand, called a proxy) to appear for them, to explain their rights and instruct their cause, and to demand judgment."[2]

The general character and nature of the office seems to be, that the proctor is to represent parties in judicial proceedings in the Courts in which he has been admitted as proctor; but independently of the particular duties strictly incident to the office of proctor, persons holding that office (as is also the case with attorneys and solicitors) perform various services more or less connected with the Courts of which they are officers; but many of those services and employments are wholly unconnected with any court—such as preparing letters of attorney, conveyances, settlements, and numerous other incidents.[3]

Purpose of the delegation of duties to these officers.

The purpose of the delegation of duties to these officers is said to have been "to remove from tribunals the liberty which parties had to vent their passions, their anger, and to commit irreverences and other abuses, which are consequences of the want of the respect that is due to judges."[4]

Duties.

Their chief duty is to look upon themselves as having espoused the interest of their clients in order to defend them, "as if they themselves were the parties concerned, but free from their passions, and capable of demanding justice with that respect and decency that is due to the tribunal."[5] It follows that they should rather abandon the defence of their clients than aid them in unlawful conduct.

Solicitors officers of the Supreme Court of Justice.

Solicitors as officers of the Supreme Court are amenable to the jurisdiction of the Court.[6] Thus the solicitor is not the mere *agent* of his client, but a responsible officer who may be made liable for disregarding the rights and interests of others.[7]

Summary jurisdiction exercised over solicitors by the Court.

The Courts have always exercised a summary jurisdiction over solicitors as officers of the Court in cases of gross neglect, ignorance, or misbehaviour in the conduct of the client's business, whereby the client has sustained a loss, or the solicitor has not complied with well-known rules and practices of the Court, or has acted extortionately or

1 Cp. Toullin, Law Dictionary, *sub voce* Proctor, Procurator.
2 Burn, Ecclesiastical Law, Proctor.
3 Per Lord Truro, C., *Stephenson* v. *Higginson*, 3 H. L. C. 686.
4 Domat, Public Law, Bk. 2 tit. 5, s. 2, art. 2, also Civil Law, Bk. 1 tit. 15.
5 *Ibid.* s. 2. Cp. *The Queen* v. *Coxe and Railton*, 11 Q. B. D. 153.
6 36 & 37 Vict. c. 66, s. 87. *In re Freston*, 11 Q. B. D. 545; approved *In re Bradley*, 12 Q. B. D. 44; and followed *In re H. A. Gray*, [1892] 2 Q. B. 440. In *Ex parte Secombe*, 19 How. (U. S.) 13, Taney, C.J., says: "It has been well settled, by the rules and practice of Common Law Courts, that it rests exclusively with the Court to determine who is qualified to become one of its officers, as an attorney and counsellor, and for what cause he ought to be removed. The power, however, is not an arbitrary and despotic one, to be exercised at the pleasure of the Court, or from passion, prejudice, or personal hostility; but it is the duty of the Court to exercise and regulate it by a sound and just judicial discretion, whereby the rights and independence of the bar may be as scrupulously guarded and maintained by the Court, as the rights and dignity of the Court itself." The formalities necessary to be observed in proceedings against attorneys for malpractice or unprofessional conduct are treated in *Randall* v. *Brigham*, 7 Wall. (U. S.) 523, an action against a judge for removing an attorney-at-law from the bar for malpractice and misconduct in his office; and in *Bradley* v. *Fisher*, 13 Wall. (U. S.) 335, where a threat of personal chastisement made by an attorney to a judge out of Court for his conduct during a pending trial was held good cause for striking his name off the list of attorneys practising in the Court. *Daniel Read's case* reported as a note to *Seymour* v. *Ellison*, 2 Cowen (N. Y.), 29.
7 *Ecart* v. *Lister*, 5 Beav. 385.

vexatiously [1] as solicitor; [2] and although where a solicitor is employed in a matter wholly unconnected with his professional character the Court will not interfere in a summary way to compel him to execute faithfully the trust reposed in him; yet where the employment is so connected with his professional character as to afford a presumption that his character formed the ground of his employment, by the client, the Court will exercise jurisdiction.[3]

No duty on client to ascertain solicitor's qualifications.

A client employing a person professing to be a solicitor, and to practise as such, is not bound to ascertain whether he is duly qualified; [4] hence proceedings taken by persons so acting are not ineffectual so far as they are taken on behalf of the client.[5]

Delegation of powers.

A solicitor may not delegate his powers, since they involve trust or discretion; [6] though he may do those acts which are done in the ordinary course of business by other (e) his servants or partners; [7] and for negligent or improper performance of these he is liable either to an action or to the summary process of the Court.[8] This liability does not extend to liability for auxiliary agents or experts employed by him when they are charged with a special discretion of their own.[9] In matters which have to be entrusted to such agents, the necessity of their employment should be communicated to the client; when this is done, the solicitor is only liable for *culpa in eligendo*, unless he is jointly negligent with the agent he has chosen; but if the client has been consulted, and has intelligently approved the appointment of the particular agent, even this liability is removed. The solicitor in selecting the agent must exercise adequate diligence and skill, or, failing to do so, must answer for his fault.[10]

May not take advantage of their own ignorance.

On grounds of public policy it has been held that those bound to advise, and who ought, therefore, to give sound and sufficient advice, are not to be allowed to take advantage of their own ignorance; so that where, through the ignorance of an attorney, or through his neglect, property descended upon him that otherwise would have been willed to other persons, he was not allowed to take any benefit from

[1] Merrifield, Law of Attornies, 77.

[2] *De Woolfe* v. ——, 2 Chit. (K. B.) 68; *In re G. Chitty*, 2 Dowl. Prac. Cas. 421.

[3] *In the matter of Aitken*, 4 B. & Ald. 47. As to the duties of solicitors as officers of the Court, see Merrifield, Law of Attorneys, 77; Cordery, Law of Solicitors (3rd ed.), 150. It is not necessary that the matter should arise in an action, so long as the employment is in the character of attorney: *In re Cridwell* v. *Fosbrooke*, 1 Jur. 757; the Courts will not interfere summarily where the matter is about the discounting of bills, or accounting in loan transactions: *Ex parte Schwalbacker*, 1 Dowl. Prac. Cas. 182; but see *In re Knight*, 1 Bing. 91.

[4] *Halleary* v. *Haugate*, 3 Dowl. Prac. Cas. 56.

[5] *Smith* v. *Wilson*, 1 Dowl. Prac. Cas. 545; *Hilleary* v. *Haugate*, 3 Dowl. Prac. Cas. 56; *Glynn* v. *Hutchinson*, 3 Dowl. Prac. Cas. 529; *Harding* v. *Parkiss*, 2 Marsh. (C. P.) 228. In *Hapward* v. *Adams*, 5 Burr. 2660, the Court of King's Bench set aside a judgment which had been entered up by an attorney's clerk, using the name of a regular attorney, without the knowledge or consent of the latter. It is not stated whether the plaintiff were privy to, or ignorant of, the informality.

[6] *Hemming* v. *Hale*, 7 C. B. N. S., per Williams, J., 498. *Hale*, 817 and 1142 n. 3.

[7] *Ex parte Sutton*, 2 Cox (Eq. Cas.), 84, where it was held that an authority given to A to draw bills in the name of B may be exercised by the clerks of A; *Rossiter* v. *Trawsfynydd Life Assurance Association*, 27 Beav. 377.

[8] *Floyd* v. *Nangle*, 3 Atk. 568; *Collins* v. *Griffin*, Barnes' Notes of Cases in Points of Practice, 37; *Re Ward, Simmons* v. *Ross*, 31 Beav. 1. As to partners, each individual member of the partnership is *primâ facie* liable and responsible for any misconduct: *Norton* v. *Cooper*, 3 Sm. & G. 375; *Blyth* v. *Fladgate*, [1891] 1 Ch. 337.

[9] *Watson* v. *Woodhead*, 57 Pa. St. 161, 167: This is on the question of the liability of conveyancer for negligence, in whose case the principle is "the rule of liability for errors of judgment as applied to them ought to be the same as in the case of gentlemen in the practice of law or medicine."

[10] Wharton, Agency, § 591.

it, and was held to be a trustee for the benefit of those entitled had he done his duty.[1] It is scarcely necessary to say that an erroneous answer to a mere casual inquiry to one not a client is not actionable.[2]

Liability arises from contract.

It is not the fact that the man giving advice to another is a lawyer that affects him with liability if the advice is wrong or foolish; there must in addition be the existence of a duty to advise skilfully; so that where there is no duty there is no liability; and where the duty is only that of a non-professional person the accident that the person discharging it is a professional person will not operate to increase his obligation. For example: a client goes to consult his solicitor. The advice tendered must be that of an expert in the matter of his specialty. If the client goes away, does what he is advised, which is ridiculously wrong, and loses thereby, he has his right of action; on the other hand, a person needing legal advice meets a man to whom he expounds his affairs and who advises him, which advice he follows to his ruin. The adviser proves to be a solicitor; but the advice he gives indicates complete want of acquaintance with the rudiments of legal technicalities, though it is such as an unprofessional man might give without incurring a charge of incompetence. No action lies. That the adviser is a solicitor is a separable accident. If any action lay at all (and it would not without more, since neither duty nor fraud is shown) the test applicable is not the skill of the expert but of the ordinary unprofessional man.[3]

Robertson v. *Fleming*.

Robertson v. *Fleming*,[4] indicates with considerable distinctness the rules applicable to determine the liability of a solicitor. An action was brought by the respondents against the appellant, a law agent, alleging that through his negligence they lost money, for which they were induced to become sureties for a third party, who to secure them agreed to give them security over property he had. The appellant was employed by the third party in the preparation of this document; through his negligence the security was not completed; the third party became bankrupt, and the respondents had to pay up the money. The defence was a denial of the employment by the sureties, or that any duty was owing to them from the appellants. A verdict was given for the sureties, and after several abortive proceedings, with a view to set it aside, the case came before the House of Lords on what was in substance the question whether in the absence of privity of contract there could be liability. The conclusion of the House of Lords is thus put by Lord Wensleydale:[5] "He only, who by himself, or another as his agent, employs the attorney to do the particular act in which the alleged neglect has taken place can sue him for that neglect, and that employment must be affirmed in the declaration in the suit in distinct terms."

Opinion of Lord Wensleydale;

"It is impossible to support by a single case so extraordinary a proposition as that persons, who were not, by themselves or their agents, employers of law agents to do an act, could have a remedy against them for the negligent performance of it."

of the Lord Chancellor.

"I never had any doubt," says the Lord Chancellor,[6] "of the unsoundness of the doctrine" "that A, employing B, a professional lawyer, to do any act for the benefit of C, A having to pay B, and there being no intercourse of any sort between B and C—if, through the gross negligence or ignorance of

1 *Bulkley* v. *Wilford*, 2 Cl. & F. 102. The judgment in this case is of interest, as it is the last delivered by Lord Eldon, 6 Cl. & F. 29.

2 *Fish* v. *Kelley*, 17 C. B. N. S. 194; *Pasley* v. *Freeman*, 3 T. R. 51.

3 See per Bowes, C.B., *Annesley* v. *Earl of Anglesea*, 17 How. St. Tr. 1239, cited *post*, 1184. *Ante*, 1168.

4 4 Macq. (H. L. Sc.) 167.

5 *L.c.* 199, 200.

6 Lord Campbell, *l.c.* 177. *Ante*, 60.

B in transacting the business, C loses the benefit intended for him by A, C may maintain an action against B, and recover damages for the loss sustained. If this were law, a disappointed legatee might sue the solicitor employed by a testator to make a will in favour of a stranger, whom the solicitor never saw or before heard of, if the will were void for not being properly signed and attested." It was also pointed out that the authority [1] most relied on to sustain a liability apart from contract, was in fact (and apart from an erroneous head-note) no authority at all in the matter; the simple proposition laid down being that, where a professional person is *de facto* agent for both lender and borrower, and is guilty of negligence, he is not liable merely to him who pays him, but to the other person for whom he acts as well.[2]

Tully v. *Ingram*.

This decision was acted on in *Tully* v. *Ingram*;[3] and the rule laid down was thus formulated by Lord M'Laren: [4] "that in order that a person taking a benefit should have a right of action founded on professional negligence he must be able to show that the agent was employed by him or with his authority." "When two persons are entering into a commercial agreement or an agreement by which some benefit is exchanged against another, then the ordinary course of business is that the agent of the one party draws the deed and the agent of the other revises it, so that each person should have the benefit of professional assistance directed towards his own interest exclusively. But, on the contrary, if a person is going to make a gift to a relative or friend, it is not in accordance with the ordinary practice, nor would it occur to one as a natural and reasonable measure, that there should be two agents employed, or that any one should act at all as professional adviser of the recipient of the benefit. In such a case the person making the gift employs his own agent" "to make his will, and never thinks of communicating with or intimating his intention to his legatees. If a father makes a settlement on his daughter in the event of her marriage, supposing that it is not to be put into her contract with her husband, but to benefit the daughter, her father would never think of asking her to name an agent in the preparation of a deed. Or supposing the father to give instructions to an agent, would the agent ever imagine that he had a claim against the daughter because the father had told her of his intentions?"

Judgment of Lord M'Laren.

I. As to the Court's dealings with a solicitor as its officer.

I. Court's dealings with a solicitor as its officer.

The Court will enforce by its summary jurisdiction all undertakings by a solicitor given in his character of solicitor [5]—as, for example, an undertaking to enter an appearance,[6] or to pay a debt and costs;[7] and will regulate its proceedings by considerations of good faith and not of contract merely, since its interference is with the view of securing honesty in its officers, and not for the purpose of expediting the means of redress for breach of contract or of duty.[8] If the solicitor is a party to the cause, the Court will not exercise the summary jurisdiction merely on the ground that he is the officer of the Court.[9] Farther, Pearson, J., in one case held that the Court has summary jurisdiction to make a solicitor liable for not properly discharging his

[1] *Lany* v. *Struthers*, 2 Wils. & Shaw (H. L. Sc.), 503.

[2] 4 Macq. (H. L. Sc.), per Lord Cranworth, 194. *In re The Upstone Pa. & Colliery Co., Brough's Claim*, 18 W. R. 285. *Garnett Botfield* v. *Garnett Botfield*, [1901] P. 335, discusses the case of clauses inserted in a will by the inadvertence of the solicitor. *Fulton* v. *Andrew*, L. R. 7 H. L. 448.

[3] 19 Rettie, 65.

[4] *L.c.* 76.

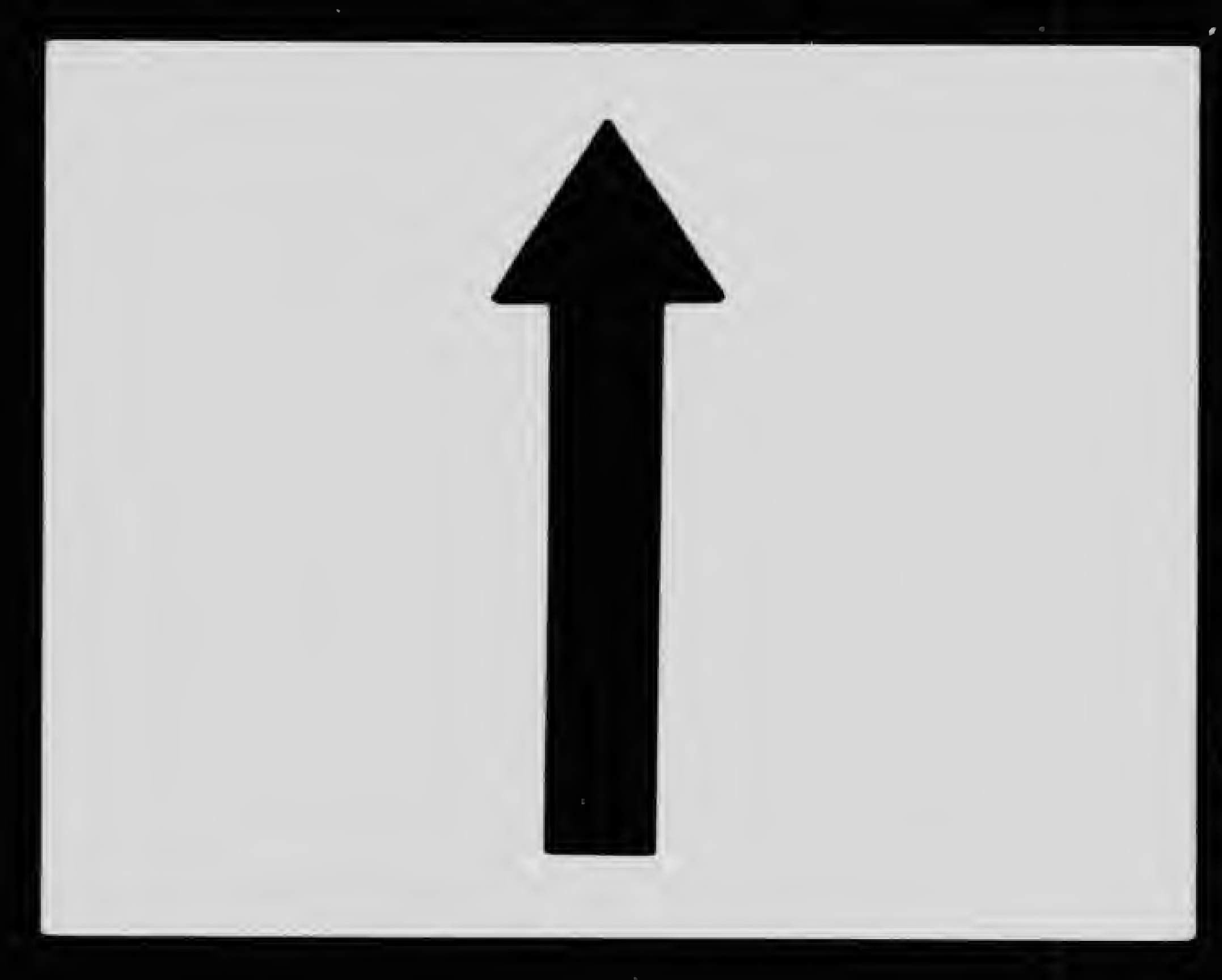
[5] *In re F.*, W. N. 1888, 77.

[6] *Lorymer* v. *Hollister*, 2 Str. 693. R. S. C. 1883, Order xii. r. 18.

[7] *In re Woodfin and Wray*, 51 L. J. Ch. 427.

[8] *In re Hilliard*, 14 L. J. Q. B. 225.

[9] *Northfield* v. *Orton*, 1 Dowl. Prac. Cas. 415.



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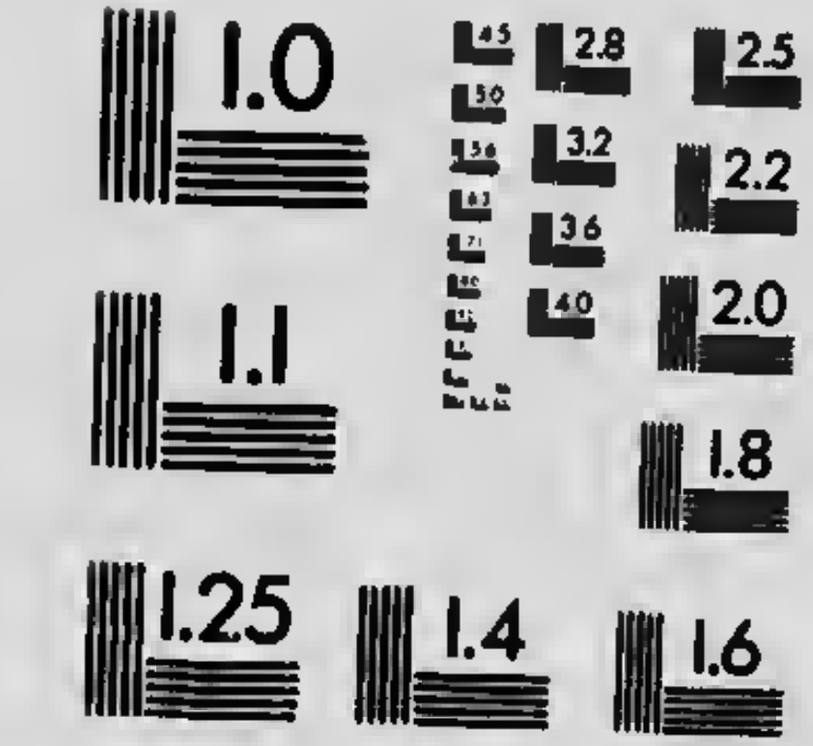

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duty by neglecting to leave an order for the payment of purchase-money at the paymaster's office, with a request to make the investment.[1] Cotton, L.J., in a subsequent case doubted this as a general proposition, and pointed out that the solicitor against whom the charge was made was there acting for other persons, and declined to express any opinion as to the general rule of jurisdiction.[2]

The cases were subsequently fully discussed by Stirling, J., who was of opinion that the current of opinion was clear and decisive as to the liability of solicitors for misfeasance; and after giving every weight to Cotton, L.J.'s, doubt expressed in *MacDougall* v. *Knight*, the learned judge held that solicitors are liable, who, knowing the true title of a fund, take an active part in getting it dealt within opposition to that title;[3] and in the case before him he made an order enforcing in a summary way this liability.

Court will interfere in case of fraud,

The Court will also interfere summarily where a transaction in which a solicitor is involved in his character as solicitor, is tainted with fraud;[4] or where the solicitor has been expressly paid beforehand for what he has omitted to do.[5]

but not in case of blunder.

Mere negligence in the conduct of a suit does not give the Court jurisdiction to interfere in its disciplinary capacity; unless something in the nature of fraud is shown, the client will be left to his remedy by action;[6] and in *Clark* v. *Girdwood*,[7] diverging from a number of earlier cases, the Court of Appeal held that it had no jurisdiction to do otherwise where the solicitor's conduct was merely a blunder. "The Court," said James, L.J.,[8] "has jurisdiction in cases of fraud, and where a person, against whom no relief could otherwise be asked, is made a party to a suit on the ground of fraud, it is because the Court has jurisdiction to indemnify the person injured at the expense of all persons, whether solicitors or not, who have been acting participators in the fraud, and it can, therefore, make any party to the fraud pay the costs of the proceedings which have been rendered necessary by the fraud in which he has taken part. But the Court has no jurisdiction to order a solicitor to pay the costs of a suit because it has been rendered necessary by his having made a blunder."

Misconduct in the conduct of proceedings the most frequent ground of the Court's exercise of jurisdiction.

The summary jurisdiction is most frequently resorted to where, in the conduct of proceedings in Court, a solicitor is guilty of misconduct in the matter before the Court; otherwise the procedure is to the disciplinary committee.[9] Where a solicitor is guilty of negligence or misconduct in a matter before the Court, the Court may, in

[1] *Batten* v. *Wedgwood Coal and Iron Co.*, 31 Ch. D. 346.

[2] *MacDougall* v. *Knight*, W. N. 1887, 68. [3] *In re Dangar's Trusts*, 41 Ch. D. 196.

[4] *In re William Jones*, 1 Chit. (K. B.) 651; in the case cited, which was one of "mere negligence," the Court refused to interfere. "Had fraud been imputed," said Best, J., it might be the foundation of this proceeding. In *Re Hill*, L. R. 3 Q. B. 543, the attorney was suspended for twelve months. *In re Blake*, 3 E. & E. 34, asserts the jurisdiction of the Court, "in all cases of gross misconduct." Cp. *In re Sparks*, 17 C. B. N. S. 727. *In re a Solicitor*, 25 Q. B. D. 17, decided that under the Solicitors Act, 1888 (51 & 52 Vict. c. 65), s. 13, the right to apply to the Committee of the Council of the Incorporated Law Society in respect of the misconduct of a solicitor is not confined to persons injured by such misconduct, but may be exercised by any person who alleges that it has taken place.

[5] *Garner* v. *Lanson*, (1728), 1 Barn. (K. B.), 101; *Rex* v. *Tew*, (1752), Sayer (K. B.), 50.

[6] *Barker* v. *Butler*, 2 Wm. Bl. 780; *Frankland* v. *Lucas*, 4 Sim. 586. *In re Dangar's Trusts*, 41 Ch. D. 178, 190, 191; *In re G. Mayor Cooke*, 5 Times L. R. 407; *Re Ward, Simmons* v. *Rose*, 31 Beav. 1, where a country solicitor was held liable for representations by his London agent.

[7] 7 Ch. D. 9. [8] *L.c.* 23.

[9] The Solicitors Act, 1888 (51 & 52 Vict. c. 65), ss. 12–15. The former jurisdiction of the Court is saved by sec. 19. *In re Gregg*, L. R. 9 Eq. 137.

the exercise of a summary jurisdiction, order him to pay the costs occasioned by his negligence or other misconduct;[1] and even where the Court has not noticed the matter the Taxing-master may disallow costs caused by the solicitor's negligence, though not where the whole proceedings have failed; then relief or punishment must be the subject of independent proceedings.[2]

Though the Court will interfere summarily, in gross cases of neglect or misconduct, to visit solicitors with the costs of their negligence,[3] it will not interfere summarily to compel compensation; that must be the subject of action.[4] The Court will also act summarily where an action is really a solicitor's action—where the plaintiff is a mere puppet, and the real party suing is the solicitor. In such a case the Court holds the solicitor liable for all the expenses to which he has put the other parties by his conduct.[5] Where a solicitor is personally ordered to pay costs as an officer of the Court, on the ground of negligence or misconduct, there is no need of leave to appeal, since the liability is contingent on negligence or misconduct being established.[6]

Case of solicitor's action.

The Court will also, summarily, on petition, and without requiring a separate action to be brought, order a solicitor to replace trust funds lost through his negligence; even though the petitioner sustaining the loss was never in a contractual relation with him. "There is no doubt," said Lord Langdale,[7] "of the principle, that if a solicitor, knowing that money which is in Court belongs to one person, presents a petition in the name of another, and obtains payment, he is personally chargeable with the amount. I go further, if he has not the knowledge of the fact, but has knowledge of circumstances which, if duly considered, would lead to a knowledge of the fact, he must be made personally answerable for that loss which his want of due consideration has occasioned." The rule was also stated by Turner, L.J., in *Dixon* v. *Wilkinson*,[8] and was based on the duty of solicitors as officers of the Court; who "must generally be responsible to it for the due discharge of the duties which they undertake." The Lord Justice was "not satisfied that in principle any sound distinction can be drawn between cases of malfeasance and cases of non-feasance," and strongly inclined to the opinion "that the jurisdiction is not limited to cases of malfeasance, but extends also to cases of mere neglect."[9]

Solicitor ordered to replace trust funds.

Principle stated by Lord Langdale, M.R., in *Ezart* v. *Lister*.

And by Turner, L.J., in *Dixon* v. *Wilkinson*.

On the authority of these cases Stirling, J.,[10] held a solicitor liable to make good the deficiency (after first exhausting the estate which had derived the benefit) of a trust fund that had been paid over, through his negligence, to the wrong person; and made a declaration to that effect without requiring a separate action to be brought.

Stirling, J., in *In re Dangar's Trusts*.

[1] R. S. C. 1883, Order lxv. rr. 5, 11; *Brown* v. *Burdett*, 37 Ch. D. 207. *In re Scrowby*, [1897] 1 Ch. 741, 752. Order liv. r. 7; *De Roufigny* v. *Peale*, 3 Taunt. 484; *Upton* v. *Brown*, 20 Ch. D. 731 (unreasonable references to the judge); *Ladywell Co.* v. *Huggons*, W. N. 1885, 55 (premature proceedings); *Martinson* v. *Clowes*, 33 W. R. 555.

[2] *In re Massey & Carey*, 26 Ch. D. 459.

[3] *In re William Jones*, 1 Chit. (K. B.) 651; *Floyd* v. *Nangle*, 3 Atk. 568, where there were "the strongest circumstances of the grossest neglect," and an attachment was granted.

[4] *Dixon* v. *Wilkinson*, 4 Drew. 614, 4 De G. & J. 508. See *British Mutual Investment Co.* v. *Cobbold*, L. R. 19 Eq. 627, 630; *Lydney and Wigpool Iron Ore Co.* v. *Bird*, 33 Ch. D. 85, 96.

[5] *In re Jones*, L. R. 6 Ch. 497. Cp. *In re E. S.* (a supposed lunatic), where no costs were given, 4 Ch. D. 301; *Cockle* v. *Whiting*, 1 Russ. & My. 43; *Rom Coomar Coondoo* v. *Chundra Canto Mookerjee*, 2 App. Cas. 186.

[6] *In re Bradford*, 15 Q. B. D. 635; *In re Hardwick*, 12 Q. B. D. 148.

[7] *Ezart* v. *Lister*, 5 Beav. 587.

[8] 4 De G. & J. 508, 522.

[9] *L.c.* 523.

[10] *In re Dangar's Trusts*, 41 Ch. D. 178.

The Court has, nevertheless, refused to interfere summarily to compel a solicitor to pay over money borrowed for a client on security; unless the security is by deed,[1] perused by the solicitor on behalf of his client; or to enforce a guarantee on which no action could be brought for money borrowed by the client.[2]

In an administration where it appeared that the trustee had lent trust funds without security to his solicitor who knew whence the loan was derived, Farwell, J.,[3] in the exercise of the summary jurisdiction of the Court, ordered the solicitor, though not a party to the action, to bring the money into Court, and in answer to an objection to the jurisdiction cited the expression of James, L.J., in *Re Clerihew's estate*:[4] "it would be a shocking thing if this order could not be made."

Solicitor may be attached under the Debtors Act, 1869.

A solicitor may be attached for misconduct; as, for example, under the Debtors Act, 1869,[5] s. 4, sub-s. 4, for default "in payment of costs when ordered to pay costs for misconduct as such, or in payment of a sum of money when ordered to pay the same in his character of an officer of the Court making the order."[6]

II. Solicitor's liability under his retainer.

II. The next branch of the subject to consider is the solicitor's liability to his client under his retainer.[7]

Rule laid down by Lord Mansfield.

The case most frequently cited on the rule of skill to be used by a solicitor is *Pitt* v. *Yalden*.[8] There Lord Mansfield laid down the principle, that "not only counsel, but judges, may differ, or doubt, or take time to consider. Therefore an attorney ought not to be liable in cases of reasonable doubt." This is somewhat amplified and enforced by Abbott, C.J., in *Montriou* v. *Jefferys*:[9] "No attorney is bound to know all the law; God forbid that it should be imagined that an attorney, or a counsel, or even a judge is bound to know all the law, or that an attorney is to lose his fair recompense on account of an error, being such an error as a cautious man might fall into." Nevertheless, the solicitor cannot shift the responsibility from himself by consulting counsel where the law would presume him to have the

Amplified and enforced *Montriou* v. *Jefferys*.

[1] *In re —— an Attorney*, 11 Jur. 396.
[2] *In re Kearns*, 11 Jur. 521.
[3] *In re Carroll*, [1902] 2 Ch. 175.
[4] 24 L. T. 861.
[5] 32 & 33 Vict. c. 62.
[6] If a man is once in a fiduciary position in respect of which he has acted, the fact that he has ceased to act will not relieve him from the liabilities he has incurred while acting in that capacity: *In re Strong*, 32 Ch. D. 342, followed in *In re Gent, Gent-Davis* v. *Harris*, 40 Ch. D. 190. See *Evans* v. *Bear*, L. R. 10 Ch. 76, as affected by the Debtors Act, 1878 (41 & 42 Vict. c. 54), s. 1; *Harris* v. *Ingram*, 13 Ch. D. 338; *In re Diamond Fuel Co.*, 13 Ch. D. 815. See *Buckley* v. *Crawford*, [1893] 1 Q. B. 105, as to the limits of the Debtors Act, 1869. As to liability of solicitor for not truly describing the residence of his client, whereby defendant did not obtain security for costs: *In the matter of a Solicitor*, 5 Times L. R. 339.

[7] A solicitor should obtain a written authority from his client before commencing a suit. If he is obliged to commence proceedings without such authority he should obtain it as soon afterwards as he can. "An authority may however be implied where the client acquiesces in and adopts the proceedings; but if the solicitor's authority is disputed it is for him to prove it; and if he has no written authority and there is nothing but assertion against assertion, the Court will treat him as unauthorised, and he must abide by the consequences of his neglect": per Lord Langdale, M.R., *Allen* v. *Bone*, 4 Beav. 493. Lord Tenterden, C.J., *Owen* v. *Ord*, 3 C. & P. 349, says: "Every respectable attorney ought, before he brings an action, to take a written direction from his client for commencing it." See *Eley* v. *Positive Government, &c. Assurance Co.*, 1 Ex. D. 20, 88. Where the relation of solicitor and client is constituted by construction, see *Morgan* v. *Blyth*, [1891] 1 Ch. 344, 359. See also two articles on Negligent Performance of Solicitor's Duty to Client in the Law Journal newspaper for 1890, 564 and 624, reprinted from the Irish Law Times.

[8] 4 Burr. 2060. *Goodwin* v. *Gibbons*, 4 Burr. 2107, 2109. See *Citizens' Loan, &c. Association* v. *Friedley*, 18 Am. St. R. 320.
[9] 2 C. & P. 113, 116.

knowledge himself;[1] though the fact that he has done so may still afford him protection.

Rule of the Civil Law as to drawing up writings.

Domat[2] lays down the rule of the civil law, as applied in France, to be, that proctors, officers equivalent to solicitors, are prohibited from drawing up "writings which may serve to establish and found the rights of their clients," which business is the province of advocates; and though the law in England is not nearly so stringent, still the solicitor is most generally protected where he has referred to counsel questions of law other than those which are purely elementary,[3] the form of the pleadings, the kind of evidence to be brought forward or any point of grave occurrence or special intricacy.[4]

Other duties of proctors according to Domat.

Domat[5] continues thus: "The other duties of proctors consist in acquiring a thorough knowledge of the rules of their profession, in applying themselves to the affairs committed to their charge, with such a vigilance, diligence, and care, as that their clients may not be in any way surprised, and that their causes be carried on without any delay; and likewise on their part that they observe with respect to the adverse party everything which the order of justice and a fair upright dealing may require. They are to content themselves with the ordinary fees and perquisites of their office, without exacting any more than what is settled by the rules and orders of the Court; they are to serve the poor for nothing, as they are required to do by law; they are to serve those who by reason of their poverty, or because of the power of their adversaries, are forced to apply to the judge to have a proctor assigned them; they are obliged to abstain from all manner of extortion, and to beware especially of the crime of compounding with their clients for what may be made of the causes with which they are charged, or for a share of it, and of treating with them in any manner which may directly or indirectly have the like effect."

Province of judge and jury. Lord Denman, C.J., in *Hunter* v *Caldwell*.

The province of judge and jury respectively, in questions of solicitor's negligence, has been marked out by Lord Denman, C.J.:[6] "It was proper to direct the jury positively as to the premises from which they were to draw their conclusion. Thus, it was the province of the judge to inform the jury for what species or degree of negligence an attorney was properly answerable," "but, having done this, it was right to leave to them to say, considering all the circumstances, and the evidence of the practitioners, whether, in the first place, the attorney had performed his duty, and in the second, in case of non-performance, whether the neglect was of that sort or degree which was venial or culpable in the sense of not sustaining, or sustaining, an action."[7]

Where the facts are undisputed the matter is for the Court.

If the facts are undisputed the Court can determine, as a matter of law, whether the defendant's conduct is negligent or not, for "the jury is not required as to that which is agreed on by the parties."[8]

[1] *Godefroy* v. *Dalton*, 6 Bing. 460. The authorities are collected in the argument in *Parker* v. *Rolls*, 14 C. B. 691, 698.

[2] Public Law, Bk. 2, tit. 5, s. 2, art. 8. *Stephenson* v. *Hippinson*, 3 H. L. C. 638.

[3] *Bulmer* v. *Gilman*, 4 M. & G. 108; *Kemp* v. *Burt*, 4 B. & Ad. 424; *Jacks* v. *Bell*, 3 C. & P. 316.

[4] *Manning* v. *Wilkin*, 12 L. T. (O. S.) 249; *Reacey* v. *Carter*, 12 A. & E. 373; *Laidler* v. *Elliott*, 3 B. & C. 738.

[5] Public Law, Bk. 2, tit. 5, s. 2, art. 9.

[6] *Hunter* v. *Caldwell*, 10 Q. B. 82.

[7] See *Reece* v. *Rigby*, 4 B. & Ald. 202. For damages, where plaintiff alleged he "was forced to pay" a certain sum, but where his liability was greater in consequence of the alleged negligence, *Jones* v. *Lewis*, 9 Dowl. Prac. Cas. 143.

[8] 2 Roll. Abr. Trial (R.), 1, cited by Lord Blackburn, in *Dublin, Wicklow, and Wexford Ry. Co.* v. *Slattery*, 3 App. Cas. 1201.

Amount of negligence.

The next point is to ascertain more in detail the amount of negligence that raises the presumption of liability. Some obscurity as to this exists, not through uncertainty of the law, but through ambiguity in its statement.

Crassa negligentia.

"An attorney," says Lord Ellenborough,[1] "is only liable for *crassa negligentia*"; and it was laid down in the House of Lords[2] that it is of the "very essence" of an action for negligence against a solicitor "that there should be negligence of a crass description, which we call *crassa negligentia*—that there should be gross ignorance." This expression must not be taken to indicate the absence of ordinary care, but the absence of that care which should be ordinary in the case of a solicitor, the negligence of an expert, not of the non-professional man. This is manifest, both on principle and from the remarks of Tindal, C.J., in *Godefroy* v. *Dalton*;[3] where he sums up the cases as establishing that a solicitor is in general "liable for the consequences of ignorance, or non-observance of the rules of practice of this Court;[4] for the want of care in the preparation of the cause for trial;[5] or of attendance thereon[6] with his witnesses;[7] and for the mismanagement of so much of the conduct of a cause as is usually and ordinarily allotted to his department of the profession.[8] Whilst, on the other hand, he is not answerable for error in judgment upon points of new occurrence, or of nice or doubtful construction,[9] or of such as are usually entrusted to men in the higher branch of the profession of the law"; and *à fortiori* not when he acts in accordance with a recent and authoritative decision.[10]

Godefroy v. *Dalton.*

Consideration of the meaning of *crassa negligentia.*

Crassa negligentia or *culpa lata*,[11] as understood by Lords Ellenborough and Brougham and the numerous other judges who use it in the sense we are now considering, is failure to use such skill as may be reasonably expected from a man's profession; and *culpa levis* is the legal expression of: to whom little in the way of skill is given, little is required. This is said to differ from the signification of the terms in the Roman law. There *crassa negligentia* is interpreted, not to understand what all men are supposed to understand; and *culpa levis*[12]

[1] *Baikie* v. *Chandless*, 3 Camp. 20; *Bulmer* v. *Gilman*, 4 M. & G. 108; *Godefroy* v. *Dalton*, 6 Bing. 460.

[2] *Purves* v. *Landell*, 12 Cl. & F., per Lord Brougham, 98; *Mahony* v. *Davoren*, 30 L. R. Ir. 664.

[3] 6 Bing. 468.

[4] That is, of any particular court in which the solicitor professes to practise (*e.g.*, Mayor's Court, *Cox* v. *Leech*, 1 C. B. N. S. 617); *Hunter* v. *Caldwell*, 10 Q. B. 69; *Frankland* v. *Cole*, 2 Cr. & J. 590; *Huntley* v. *Bulwer*, 6 Bing. N. C. 111; *Stokes* v. *Trumper*, 2 K. & J. 232; *Russel* v. *Palmer*, (1767) 2 Wils. (C. P.) 325.

[5] *Hawkins* v. *Harwood*, 4 Ex. 503.

[6] *Swannell* v. *Ellis*, 1 Bing. 347.

[7] *Reece* v. *Righy*, 4 B. & Ald. 202.

[8] *De Roufigny* v. *Peale*, 3 Taunt. 484; *Allison* v. *Rayner*, 7 B. & C. 441.

[9] *Pitt* v. *Yalden*, 4 Burr. 2060; *Baikie* v. *Chandless*, 3 Camp. 17. It was held in the House of Lords that "a solicitor is not liable for mistake in a nice and difficult point of law, for to such mistakes all lawyers must be liable"; but if he departs from the ordinary modes of practice he must be considered as undertaking to do what was necessary to render the mode which he adopted effectual for its purpose. "And if, whether from ignorance or inadvertence, he failed to do so, he must be held responsible for the consequences"; *Stevenson* v. *Rowand*, 2 Dow & Cl. 104, 119. See also *Kemp* v. *Burt*, 4 B. & Ad. 424; *Citizens' Loan, &c. Association* v. *Friedley*, 18 Am. St. R. 320.

[10] *Blair* v. *Assets Co.*, [1896] A. C. 409, 419.

[11] *Lata culpa finis est, non intelligere id, quod omnes intelligunt*: D. 50, 16, 223.

[12] Wood, Civil Law, 106. "Unskilfulness in any art comes almost under this head, and weakness or impotency in managing any matter which is undertaken, by which danger and damage happens to others." *Nec videtur iniquum, si infirmitas culpæ adnumeretur; cum affectare quisque non debeat, in quo vel intelligit, vel intelligere*

is fault, the result of unskilfulness in any art by its professor.[1] As soon as the sense in which the terms are used is apparent, all real difficulty disappears. In both cases, both by the civil law and the English law, the skilled labourer *spondet peritiam artis*. If he does not realise his engagement in both systems he is liable.[2] "That liability is called by Roman lawyers *culpa levis*, by some English judges of the highest authority *crassa negligentia* or *culpa lata*; by both Roman lawyers and English judges is meant unskilfulness in the execution of work undertaken on the assumption of the undertaker being possessed of customary and adequate skill for its performance."

Lord Campbell in *Parres* v. *Landell*.

That there is no difference in substance between the Roman and English law appears from the remarks of Lord Campbell in *Parres* v. *Landell*[3] when compared with Wharton's summary of the doctrine of the Roman law: "Against the attorney, the professional adviser, or the procurator, an action may be maintained. But it is only if he has been guilty of gross negligence, because it would be monstrous to say that he is responsible for even falling into what must be considered a mistake.[4] You can only expect from him that he will be honest and diligent; and if there is no fault to be found either with his integrity or diligence, that is all for which he is answerable. It would be utterly impossible that you could ever have a class of men who would give a guarantee binding themselves in giving legal advice, and conducting suits at law to be always in the right." That is, the attorney, clothed, as he must be, with a special capacity, must exercise it with average diligence and skill.

Dr. Wharton on the Civil Law.

Wharton[5] expresses the sense of the *Corpus juris* as distinguishing *culpa levis*, slight or special negligence, the lack of such diligence as a good business man would show in a transaction relating to his business, from *lata culpa*, gross or ordinary negligence, the neglect of the ordinary care that is taken by persons not specialists. *Non intelligere quod omnes intelligunt* is the test applicable in the case of the non-specialist. The specialist is judged by the standard of skill applicable to a specialist, and his actionable shortcoming is *culpa levis*; the non-specialist is thus judged by a less severe standard than that applied to the conduct of the specialist, and his default marks *culpa lata*. The English usage has probably grown from contrasting *levis* with *lata culpa* in the same class; as if they were synonymous with little and much negligence; whereas, if the interpretation of the civilians by Wharton be right (and there is at least the probability in its favour arising from its intrinsic plausibility) the distinction indicated by the two phrases is between different classes of negligence, and not a mere distinction in the grading of a particular class. The one is, according to this view,

debet, infirmitatem suam alii periculosam futuram: D. 9. 2. 8. § 1. See Campbell, Negligence, 11; Wharton, Negligence, §§ 45, 46; D. 50. 17. 36; D. 19. 2. 25. § 7.

[1] See some excellent remarks by Stone, J., in *Goodman* v. *Walker*, 30 Ala. 482, cited in Shearman and Redfield, Negligence, § 559, n. 2.

[2] "Even *Communis error*, and a long course of local irregularity, has been found to afford no protection to one *qui spondet peritiam artis*": per Lord Jeffrey, *Hart* v. *Frame*, 6 Cl. & F. 199; see per Lord Brougham, *l.c.* 209.

[3] 12 Cl. & F. 103. Cp. *Hamilton* v. *Emslie*, 7 Macph. 173.

[4] Or, as Stuart, V.C., says in *Chapman* v. *Chapman*, Ir. R. 9 Eq. 296: "In a question between solicitor and client as to loss from negligence, there must be negligence of a gross and palpable kind to give a right to relief." The judgment goes on to state that "imprudent or indiscreet" conduct is not actionable when standing alone.

[5] Negligence, § 59. See, to the same effect, Poste, Gains (4th ed.), 429 *et seq.*; Sanders, Justinian (8th ed.), 324.

applicable to men of business in their business transactions, the other to them in matters in which they do not profess skill.[1]

Remuneration does not affect liability.

If a solicitor acts as solicitor, the question whether he is remunerated or not does not affect his liability; in either event he is bound to discharge his duties with a care and diligence equal to that ordinarily required of solicitors of competent skill and care.[2] The same holds good whether he is certificated or not; even though in the latter event he employs a certificated solicitor in the work.[3]

General rule.

The general rule is that whatever is important for the client to know, it is the duty of the solicitor to report to him; and failure to report is a ground for the client refusing to pay costs where the proceedings are of a hopeless character; unless the solicitor can show that he had properly advised his client as to the absence of probability of success.[4]

When once a solicitor is retained he becomes disentitled to accept any business conflicting with his client's;[5] if he does, and his client is injured, the client has his remedy either by action or by invoking the summary jurisdiction of the Court. The fact that a solicitor is retained to defend an action being proved, coupled with the fact that he has done nothing and that judgment has been suffered to go by default, throws the *onus* on him to show that he was not negligent.[6]

Liability both in contract and tort.

A solicitor is liable for negligence both in contract and in tort. He is liable in contract where he fails to do some specific act to which he has bound himself.[7] He is liable in tort where, having accepted a retainer, he fails in the performance of any duty which the relation of solicitor and client as defined by the retainer imposes on him.[8] Where the liability is based upon tort in order to enable the client to recover,

[1] *Ante*, 27.

[2] *Donaldson* v. *Haldane*, 7 Cl. & F. 762; *Stevenson* v. *Rowand*, 2 Dow & Cl. 104. A solicitor cannot give up his client and act for the opposite party in any suit between them: *Lang* v. *Struthers*, 2 Wils. & Shaw (H. L. Sc.), 563.

[3] *Brown* v. *Tolley*, 31 L. T. (N. S.) 485.

[4] *In the matter of Clark*, 1 De G. M. & G. 13; *Foy* v. *Cooper*, 2 Q. B. 937.

[5] *Earl Cholmondeley* v. *Lord Clinton*, 19 Ves. 261; *Little* v. *Kingswood Collieries Co.*, 20 Ch. D. 733; but there is a distinction where the client has discharged his solicitor, and not on the ground of misconduct: *Johnson* v. *Marriott*, 2 Cr. & M. 183; *Grissell* v. *Peto*, 9 Bing. 1; *The Masons' Hall Tavern Co.* v. *Nokes*, 22 L. T. (N. S.) 503. For the acts a solicitor is bound to do when he has a special retainer: *Dawson* v. *Lawley*, 4 Esp. (N. P.) 65; and where he has an unlimited discretion: *Anderson* v. *Watson*, 3 C. & P. 214.

[6] *Godefroy* v. *Jay*, 7 Bing. 413; *Bourne* v. *Diggles*, 2 Chit. (K. B.) 311. The privilege of a solicitor not to be required to disclose his client's business is discussed in *Annesley* v. *Anglesea*, 17 How. St. Tr. 1224, where it is contended also to be a privilege of the client. In giving their decision the Court made a distinction (1239): "Nor," said Bowes, C.B., "do I see any impropriety in supposing the same person to be trusted in one case as an attorney or agent, and in another as a common acquaintance. In the first instance, the Court will not permit him, though willing, to discover what came to his knowledge as an attorney, because it would be in breach of that trust which the law supposes to be necessary between him and his employer; but where the client talks to him at large as a friend, and not in the way of his profession, I think the Court is not under the same obligations to guard such secrets, though in the breast of an attorney. If I employ an attorney and entrust to him secrets relative to the suit, that trust is not to be violated; but when I depart from that subject wherein I employed him, he is no more than another man." *Bullivant* v. *A.-G. for Victoria*, [1901] A. C. 196. *Ante*, 1168, 1176.

[7] *Turner* v. *Stallibrass*, [1898] 1 Q. B. 56, 59. Cp. *Blyth* v. *Fladgate*, [1891] 1 Ch. 337, 366.

[8] *E.g.*, *Fray* v. *Voules*, 1 E. & E. 839; see per Lord Campbell, C.J., *Brown* v. *Boorman*, 11 Cl. & F. 44; per Jervis, C.J., *Courtenay* v. *Earle*, 10 C. B. 83; per Maule, J., *Howard* v. *Shepherd*, 9 C. B. 319.

damage has to be shown;[1] further, the damage must result from the negligent act, and not be merely collateral to it. This is illustrated by what happened in *Hewitt* v. *Melton*,[2] an action for false representations by an attorney. The damage alleged was that in the suit out of which the action arose the plaintiff's debtor was discharged; however, the action was held not maintainable on it appearing that the discharge was not owing to the falsehood but to the informality of the document. *Hewitt v. Melton.*

If an action for negligence at common law can be brought, it has been decided that the Courts will not give a remedy in equity.[3] *Where action at common law no remedy in equity.*

The right of action for negligence survives to the personal representative,[4] or to the trustee in bankruptcy of the client,[5] against the solicitor's representatives;[6] and, if within the scope of partnership dealings, against the representatives of an innocent partner.[7] *Right of action.*

The measure of damages is the difference in the pecuniary position of the client from what it should have been had the solicitor acted without negligence.[8] *Measure of damage.*

In actions for negligence the Statute of Limitations[9] runs from the time of the doing of the injurious act, or from the earliest time at which an action could be brought.[10] The leading case on the subject is *Howell* v. *Young*.[11] Defendant had been retained in the year 1814 to ascertain whether a warrant of attorney and certain mortgages were sufficient security for a loan, and represented that they were. In the year 1820, the interest having been regularly paid to that time, the security was discovered to be insufficient. An action was then brought for negligence of the defendant in being satisfied with insufficient security. The defendant pleaded the Statute of Limitations[12] and succeeded on his plea. "I think," said Holroyd, J.,[13] "it makes no difference in this respect, whether the plaintiff elects to bring an action of assumpsit founded upon a breach of promise, or a special action on the case founded upon a breach of duty. The breach of promise or of duty took place as soon as the defendant took the insufficient security. Whether the plaintiff, therefore, elect to sue in one form of action or another, the cause of action, which in either form is substantially the same, accrued at the same moment of time. The *Statute of Limitations.* *Howell v. Young.* *Judgment of Holroyd, J.*

1 *Westaway* v. *Frost*, 17 L. J. Q. B. 286. See the note to *Hill* v. *Finney*, 4 F. & F. 616, 634.

2 1 Cr. M. & R. 232; *Miller* v. *Wilson*, 21 Pa. St. 114.

3 *British Mutual Investment Co.* v. *Cobbold*, L. R. 19 Eq. 627; *Brooks* v. *Day*, 2 Dick. (Ch.) 572; *Mare* v. *Lewis*, Ir. R. 4 Eq. 219. Cp. The Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 23.

4 *Knights* v. *Quarles*, 2 B. & B. 102, considered *Daly* v. *Dublin, Wicklow, and Wexford Ry. Co.*, 30 L. R. Ir. 514.

5 *Crawford* v. *Cinnamond*, 15 W. R. 996.

6 *Wilson* v. *Tucker*, 3 Stark. (N. P.) 154, followed *Davies* v. *Hood*, 19 Times L. R. 158; *Re Keeping and Gloag*, 58 L. T. 679, duty of a solicitor to deducing title.

7 *Morgan* v. *Blyth*, [1891] 1 Ch. 344; *Sawyer* v. *Goodwin*, 1 Ch. D. 351; *Thomson* v. *Robinson*, 16 Ont. A. R. 175.

8 *Whiteman* v. *Hawkins*, 4 C. P. D. 13; *Godefroy* v. *Jay*, 7 Bing. 413.

9 21 James I. c. 16.

10 *Heap* v. *Garland*, 4 Q. B. 519; *Rogers* v. *Butcher*, [1891] 2 Q. B. 509. If one plaintiff be away, but the others in the country, the action must be brought within six years of the cause arising: *Perry* v. *Jackson*, 4 T. R. 516.

11 5 B. & C. 259; *Smith* v. *Fox*, 6 Hare, 386; *Dooby* v. *Watson*, 39 Ch. D. 178; Bullen and Leake, Prec. of Plead. (3rd ed.) 83, 84; *Sawyer* v. *Goodwin*, 36 L. J. Ch. 578.

12 21 James I. c. 16.

13 5 B. & C. 266.

breach of duty, therefore, constituting a cause of action, it follows that the Statute of Limitations is a bar to this action, unless the special damage alleged in the declaration constitute a new cause of action."[1] This the Court decided it did not do.[2]

III. Client may raise the question of negligence by resisting the claim of the solicitor for his remuneration.

III. In addition to his remedy by action, the client may raise the question of negligence by resisting the claim of the solicitor for his remuneration on the ground of negligence. To do this effectually, not only must he show that he has derived no benefit from the services of the solicitor, but also that the failure results wholly from the plaintiff's negligence, and not partly from accident.[3] This is a question for the jury.[4]

Counter-claim.

Under the Judicature Acts the defendant can counter-claim; and thus, in the event of a failure to establish the worthlessness of the plaintiff's intervention, may secure an abatement from his bill proportioned to the inefficiency of the service rendered.

Heads of negligence.

We are now to consider in detail the chief heads of a solicitor's negligence in respect of his retainer, under the headings —

I. Negligence in managing litigation; and

II. Negligence in matters not in litigation.

I. In litigation.

I. Negligence in managing litigation.

A retainer to a solicitor in an action authorises him to conduct it to final judgment and execution.[5] A solicitor must get explicit instructions from his client before commencing an action. If it is not possible to have a personal interview with his client, the need of obtaining definite instructions is only made the more imperative.[6] The rule is that a special authority must be shown to justify instituting a suit, though a general authority is sufficient to warrant defending one.[7] If special authority is wanting, the solicitor taking legal proceedings is liable to the person for whom he thus professes to act

[1] *Hony* v. *Hony*, 1 S. & S. 568; *Whitehead* v. *Howard*, 2 B. & B. 372; *Fetter* v. *Beale*, 1 Salk. 11.

[2] The Statute of Limitations in cases of tort arising *quasi ex contractu* generally runs, as we have seen, from the date of the tort, and not from the occurrence of actual damage. There is an exception to this where the original act itself was no wrong, and only becomes so by reason of subsequent damage—*e.g.*, in the case of an excavation where damages have been recovered for the injury caused; but where there is a new subsidence proceeding from the original act of the defendant, till the occurrence of which there is no actionable injury, the statute runs from the new subsidence: *Darley Main Colliery Co.* v. *Mitchell*, 11 App. Cas. 127; *Crumbie* v. *Wallsend Local Board*, [1891] 1 Q. B. 503. Ignorance of the facts will be no excuse, nor is the success of dilatory tactics a ground for adopting another method of reckoning: *East India Co.* v. *Oditchurn Paul*, 7 Moo. P. C. C., per Lord Campbell, 110. The maxim *Ignorantia legis neminem excusat* is copiously treated and illustrated, 1 Story, Eq. Jur. §§ 111–139. In *Burrowes* v *Gore*, 6 H. L. C. 963, Lord St. Leonards, commenting on the facts before him, says: "It is because he is the hand to pay and the hand to receive that the Statute of Limitations does not run. The Statute never runs where there is the same hand to pay and the same hand to receive. There must be adverse possession. There must be adverse enjoyment. There must be one person to pay and another to receive."

[3] *Dax* v. *Ward*, 1 Stark. (N. P.) 409, and the cases cited in the note to *Pasmore* v. *Birnie*, 2 Stark. (N. P.) 59.

[4] *Bracey* v. *Carter*, 12 A. & E. 373.

[5] *Brackenbury* v. *Pell*, 12 East, 585; *Lawrence* v. *Harrison*, Style, 426. In America an attorney is not bound to move for a new trial upon a point of law; when the court has decided a question it is not negligence to accept the decision as correct: *Hastings* v. *Halleck*, 13 Cal. 203, United States Digest for 1860, Attorney and Counsel, pl. 40; nor to institute new collateral suits, such as actions against the sheriff and clerk for the failure of their duty, without instructions: *Pennington* v. *Yell*, 6 Eng. (Ark.) 212; United States Digest for 1853 (Putnam), Attorney and Counsel, pls. 24–32. An attorney of a Court of Record who appears for a party is regarded as having *primâ facie* an authority to appear for him: *Hill* v. *Meadowhall*, 21 Wall. (U. S.) 453.

[6] *Gill* v. *Laugher*, 1 Cr. & J. 170; *Barker* v. *Fleetwood Improvement Commissioners*, 62 L. T. 831. *Ante*, 1180.

[7] *Wright* v. *Castle*, 3 Meriv. 12.

without authority,[1] as well as to any one who is prejudiced by his action.[2]

A solicitor employed for a firm to defend an action against it, is empowered to enter an appearance in the name of each of the partners individually. He is not guilty of negligence in not informing each of the partners of the progress of the litigation. His duty is to the managing partner from whom his instructions came.[3]

Solicitor should acquaint his client with the prospect of failure, &c.

A solicitor is liable for negligence for not representing to his client the certainty of failure, where a cause of action is desperate, before committing the client to actual proceedings, even where he has the client's positive instructions to proceed,[4] or for proceeding before the facts have been so far ascertained as to determine whether there is a right of action.[5]

His client's interest his chief concern.

He is liable for proceeding under a wrong section of an Act of Parliament, even where justices have, in the first instance, actually committed the person charged.[6] He must communicate to his client any offer of compromise made in pending litigation, and is not allowed to go on for the purpose of recovering his own costs, and with the alternative remaining open that, failing in this, he may charge them to his own client. Since it is the solicitor's duty to communicate such an offer, he is presumed to have done his duty till the contrary is shown.[7] But, says Lord Campbell, C.J., in the course of the argument in *Fray* v. *Voules*,[8] "If an action were brought for £100, surely the plaintiff's attorney might accept an offer of £99 10*s.* without previously communicating with his client"; and, in giving judgment,[9] "An attorney retained to conduct a cause is entitled, in the exercise of his discretion, to enter into a compromise, if he does so reasonably, skilfully, and *bonâ fide* (as the defendant is to be taken as having done), provided always, that his client has given him no express directions to the contrary; but where these directions have been given, such a step, though perhaps binding as between him and third parties, is *ultra vires* as between him and his client."[10] This rule was followed by the Court of Common Pleas in *Chown* v. *Parrott*,[11] and again in *Prestwich* v. *Poley*,[12] and has been repeatedly recognised as established law.[13]

May compromise.

[1] *Westaway* v. *Frost*, 17 L. J. Q. B. 280; *Hubbart* v. *Phillips*, 13 M. & W. 702. The onus of proving authority is on the solicitor: *Hoskins* v. *Phillips*, 16 L. J. Q. B. 339; *Dupen* v. *Keeling*, 4 C. & P. 102. Where an attorney brings an action without the authority of the plaintiff, the plaintiff is entitled to have the proceedings stayed as against the defendant without payment of costs: *Reynolds* v. *Howell*, L. R. 8 C. B. 398. In any case a solicitor appearing for another without his assent is precluded from recovering his costs from the party himself: *Spurrier* v. *Allen*, 2 C. & K. 210; *Hall* v. *Laver*, 4 Y. & C. (Ex.) 216; or by lien: *Abbott* v. *Rice*, 3 Bing. 132.

[2] *Andrews* v. *Hawley*, 26 L. J. Ex. 323, a case where a third person instructed the attorney falsely pretending to be the plaintiff's partner. There must be an allegation that legal damage has been sustained: *Cotterell* v. *Jones*, 11 C. B. 713; but see *Quartz Hill, &c. Gold Mining Co.* v. *Eyre*, 11 Q. B. D. 674.

[3] *Tomlinson* v. *Broadsmith*, [1896] 1 Q. B. 386.

[4] *In the matter of Clark*, 1 De G. M. & G. 43. See *Jacks* v. *Bell*, 3 C. & P. 316, per Lord Tenterden, C.J., on the duty of the solicitor to dissuade his client; also the same judge as reported 2 Chitty, General Practice, p. i. 21 *n.*; *Ottley* v. *Gilby*, 14 L. J. Ch. 177; *Lawrence* v. *Potts*, 6 C. & P. 428.

[5] *Thwaites* v. *Mackerson*, 3 C. & P. 341; *De Montmorency* v. *Devereux*, 7 Cl. & F. 188.

[6] *Hart* v. *Frame*, 6 Cl. & F. 193; *Smith* v. *Grant*, 20 Dunlop, 1077.

[7] *Sill* v. *Thomas*, 8 C. & P. 762.

[8] 1 E. & E. 845, distinguished *Tucker* v. *Cotterell*, 34 W. R. 323; *Jeffries* v. *Mutual Life Insurance Co.*, 110 U. S. (3 Davis) 305.

[9] 1 E. & E. 847.

[10] *Wraight* v. *Johnston*, 1 F. & F. 128.

[11] 11 C. B. N. S. 74.

[12] 18 C. B. N. S. 806.

[13] *Stevens* v. *Francis*, L. R. 1 Q. B. 379, 382; *Matthews* v. *Munster*, 20 Q. B. D. 141.

In the latter case Montague Smith, J.,[1] thus expresses the principle: "The attorney is the general agent of the client in all matters which may reasonably be expected to arise for decision in the cause. Every one must reasonably expect that a cause may not be carried to its natural conclusion, and that it is proper and usual, and often necessary to compromise. The authorities seem to me to establish clearly that the attorney has power to compromise the action in a fair and reasonable manner." This statement has since been adopted by Farwell, J.,[2] with its necessary limitation: "It is within the scope of a solicitor's authority to compromise and if he uses all due diligence and acts *bonâ fide* and reasonably no action will lie against him; but if he has been expressly forbidden to compromise, and he does compromise, then, however beneficial that compromise be, an action will lie against him for disregarding that express negative direction."[3]

Provided that he exercises diligence and care in so doing.

Yet in making a compromise no greater latitude is allowed a solicitor than in conducting his other business; so that if the solicitor in compromising a suit acts in a way inconsistent with the diligence and care which good business men of his class are accustomed to show in that description of business, he exposes himself to an action for negligence;[4] notwithstanding this the compromise arrived at as against his client, holds good unless its features are such as to imply fraud.[5]

What preliminary investigation the solicitor is required to take.

In making the preliminary investigations before instituting proceedings the solicitor's duty is specially to consider:

(1) Whether there is any, and what, right of action;

(2) Whether it is affected by any Statute of Limitations;

(3) Whether any preliminary notice or demand is required; and

(4) Who are the proper parties against whom the action is to be brought.[6]

Palpable negligence in any of these particulars, whether arising from want of acquaintance with law or from defective apprehension of the facts, constitutes a cause of action against the solicitor; for the client is entitled to have the benefit of his solicitor's advice and judgment in the conduct of the suit; and the solicitor is required to be reasonably competent in its management.[7]

Difficult points of law.

Where difficult points of law arise, the solicitor is generally protected by counsel's opinion, though not as to the proper practical proceedings to be taken.[8] Even here, if anything crops up on which doubt can reasonably be entertained, he will not be held liable;[9] nor

[1] 34 C. B. N. S. 816.

[2] *In re Newen*, [1903] 1 Ch. 812.

[3] *L.c.* 817.

[4] *Chambers* v. *Mason*, 5 C. B. N. S. 59.

[5] Marshall, C.J., thus expresses the American rule in *Holker* v. *Parker*, 7 Cranch (U. S.), 452: "Although an attorney at law, merely as such, has, strictly speaking, no right to make a compromise; yet a Court would be disinclined to disturb one which was not so unreasonable in itself as to be exclaimed against by all, and to create an impression that the judgment of the attorney has been imposed on, or not fairly exercised in the case. But where the sacrifice is such as to leave it scarcely possible that, with a full knowledge of every circumstance, such a compromise could be fairly made, there can be no hesitation in saying that the compromise being unauthorised, and being therefore in itself void, ought not to bind the injured party. Though it may assume the form of an award or of a judgment at law, the injured party, if his own conduct has been perfectly blameless, ought to be relieved against it."

[6] Pulling, Law relating to Attorneys (3rd ed.), 175–179.

[7] *Hopkinson* v. *Smith*, 1 Bing. 13; *Harvey* v. *Mount*, 8 Beav. 439, 454; *Baker* v. *Loader*, L. R. 16 Eq. 49.

[8] *Russel* v. *Palmer*, 2 Wils. (C. P.) 325; *Swannell* v. *Ellis*, 1 Bing. 347.

[9] *Laidler* v. *Elliott*, 3 B. & C. 738; *Baikie* v. *Chandless*, 3 Camp. 17.

yet if he have *carefully* drawn a case and obtained an explicit opinion of an experienced counsel and acted strictly within his directions.[1]

Ordinary procedure in an action.

A solicitor has been held liable for blunders and mistakes in drawing up an order or rule[2] for neglect to deliver a pleading;[3] for bringing an action in a court which has no jurisdiction;[4] or for suing in a superior court when he should have brought the action in a county court;[5] for laying the venue in the wrong county;[6] for administering interrogatories for examination in chief, under the old Chancery practice, of an adverse witness already examined on the other side instead of cross-interrogatories;[7] for disobeying the lawful instructions of the client, though acting in good faith, and honestly thinking to advance the client's interest;[8] for not seeing that a foreign bill sued on complies with the formalities of the foreign law applicable;[9] for neglecting to deliver briefs to counsel in time for the trial;[10] for neglecting to furnish counsel with materials adequate for dealing with the case, failing which he withdrew the record;[11] for not subpœnaing the requisite witnesses;[12] for omitting to procure their attendance at the trial;[13] for not attending at the trial;[14] or before the arbitrator in the case of a reference;[15] for misreading the date of a notice of trial;[16] for not taking steps to set aside an irregular order for negligently making an erroneous statement to the Court, so that a wrongful order is procured;[18] for want of diligence in the prosecution of the decree;[19] for neglecting to compel a receiver to pass accounts;[20] for neglect in

[1] *Kemp* v. *Burt*, 4 B. & Ad. 424. In submitting a case to counsel he must have acted *bonâ fide*; *Andrews* v. *Hawley*, 26 L. J. Ex. 323; *Hewlett* v. *Cruchley*, 5 Taunt. 277.

[2] *In re Bolton*, 9 Beav. 272. [3] *In re Massey and Carey*, 26 Ch. D. 459, 461.

[4] *Williams* v. *Gibbs*, 5 A. & E. 208.

[5] *Lee* v. *Dixon*, 3 F. & F. 744. The report of this case is confused, the point of the report appearing best in the note of Bramwell, B.'s, summing up on the second trial in the note at 749. Cp. *Barker* v. *Fleetwood Improvement Commissioners*, 62 L. T. 831, where an action was brought in the Palatine Court that could have been brought in the County Court. It was held that the doing so was not negligence and imposed no penalty, either by deprivation of costs or otherwise upon suitors using its machinery: see *s.c.* 6 Times, L. R. 430 (C. A.).

[6] *Kemp* v. *Burt*, 4 B. & Ad. 424: but see now R. S. C. 1883, Order xxxvi. 1.

[7] *Stokes* v. *Trumper*, 2 K. & J. 232; see R. S. C. 1883, Order xxxvii. r. 1.

[8] *Cox* v. *Livingston*, 2 Watts & S. (Pa.) 103.

[9] *Long* v. *Orai*, 18 C. B. 610, a French Bill of Exchange not indorsed in the manner required by the French law.

[10] *Rex* v. *Tew*, Sayer, 50; *De Roufigny* v. *Peale*, 3 Taunt. 484, where a new trial was granted "upon payment by the defendant's attorney, out of his own pocket, of all costs as between attorney and client"; *Hoby* v. *Built*, 3 B. & Ad. 350; *Townley* v. *Jones*, 8 C. B. N. S. 289, where a new trial was granted on the terms of the attorney paying the costs of the day out of his own pocket," otherwise it will be discharged."

[11] *Hawkins* v. *Harwood*, 4 Ex. 503.

[12] *Price* v. *Bullen*, 3 L. J. K. B. (O.S.) 39.

[13] *Reece* v. *Rigby*, 4 B. & Ald. 202; *Dax* v. *Ward*, 1 Stark. (N.P.) 409. If it is the party's own act that they are not called he is not to be heard to complain, at any rate so far as any interference with the rights of the other party acquired under a judgment is involved: *Wright* v. *Soresby*, 2 Cr. & M. 671.

[14] *Nash* v. *Swinburne*, 3 M. & G. 630.

[15] *Swannell* v. *Ellis*, 1 Bing. 347; *Daintley* v. *Hyde*, 6 Jur. 133. The solicitor is not answerable for neglect of counsel: *Lowry* v. *Guilford*, 5 C. & P. 234. This was the case of counsel being in another Court and the attorney absent. In arguing for the defendant, Sir J. Scarlett said: "In the King's Bench if the attorney and counsel are both absent the case is lost, and no new trial will be granted; but if the attorney stays and says that his counsel is at the Rolls, or any other Court near, he would be sent for, instead of the cause being struck out." As to solicitor's duty with regard to sending to a reference, *Chapman* v. *Van Toll*, 27 L. J. Q. B. 1; also *Smith* v. *Troup*, 7 C. B. 757; *Fawell* v. *Eastern Counties Ry. Co.*, 2 Ex. 344.

[16] *Nash* v. *Swinburne*, 3 M. & G. 630. [17] *Frankland* v. *Cole*, 2 Cr. & J. 590.

[18] *In re Spencer*, 39 L. J. Ch. 841. [19] *Ridley* v. *Tiplady*, 20 Beav. 44.

[20] —— v. *Jolland*, 8 Ves. 72, where Lord Eldon, though not actually deciding the

complying with an order for passing publication;[1] for allowing judgment to go by default;[2] for discharging a defendant from custody without receiving satisfaction;[3] for not charging a prisoner defendant in execution;[4] for not duly entering up judgment,[5] and, *primâ facie*, issuing execution;[6] and for neglecting to set aside irregular proceedings.[7]

Where solicitor's negligence conduces to the conviction of his client.

Where the negligence alleged is that the plaintiff was convicted in previous proceedings through the default of the solicitor, the plaintiff is not bound to prove that the negligence was the exclusive reason of the conviction: "If the defendants' negligence *largely contributed* to the result, they would be answerable for such damages as" might be thought just in all the circumstances.[8]

The principle implied is doubtful. So long as the conviction stands it is conclusive that the man is rightly convicted. An action for negligence would seem to lie on the contract so far as the solicitor had failed to act up to the standard of duty implied by his retainer; but while the conviction stands, having "largely contributed to the result" seems to involve an irrelevant consideration. A difficulty would also arise, assuming that the conviction is conclusive, on the damages if the case got so far. By hypothesis the result arrived at is right. The solicitor has been guilty of a breach of contract; but the only damage probable is depriving the man—to adopt a common colloquialism—of "a run for his money"; and the damages would be only nominal. Any client in so unhappy a position would be well

point whether the receiver should not make good the loss so occasioned, adds: "It would at least be a very grave question; so also as to the solicitor who should permit such a transaction."

[1] *Frankland* v. *Cole*, 2 Cr. & J. 590. [2] *Godefroy* v. *Jay*, 7 Bing. 413.

[3] *Bevins* v. *Hulme*, 15 M. & W. 88. The alteration in the law makes this and the following decision obsolete.

[4] *Russel* v. *Palmer*, 2 Wils. (C. P.) 325.

[5] *Flower* v. *Bolingbroke*, 1 Str. 639. The proposition is not decided by, but is merely an inference from, the case. See, however, *Hett* v. *Pun Pong*, 18 Can. S. C. R. 290, where Strong, J., says at 295: "I am of opinion, however, that consistently with the authorities it cannot be held that a retainer to prosecute an action terminates with the recovery of the judgment, nor that such a retainer does not by itself make it the duty of the attorney or solicitor without further instructions to proceed after judgment and endeavour to obtain the fruits of the recovery" including the making it by registration a charge on the lands of the judgment debtor. For this he cites *Lady de la Pole* v. *Dick*, 29 Ch. D. 351, following *Lawrence* v. *Harrison*, Style, 426. As to the scope of a solicitor's authority to bind his principal, *Jarmain* v. *Hooper*, 6 M. & G. 827, distinguished in *Smith* v. *Keal*, 9 Q. B. D. 340, which was followed, *Morris* v. *Salbery*, 22 Q. B. D. 614. For the position of solicitor to trustees, *Staniar* v. *Evans*, 34 Ch. D., per North, J., 477: "He is not solicitor to the trust estate. He has no retainer from the trust estate, but he is the person employed by the trustee for his own purposes as trustee. His retainer is by the trustee personally. The trustee personally is liable to pay his costs, and the trustee personally is the only person to whom the solicitor can look for those costs."

[6] *Harrington* v. *Binns*, 3 F. & F. 942; *Union Bank of Georgetown* v. *Geary*, 5 Peters (U. S.), 99, 113. In the United States, an attorney at law is entitled in virtue of his general authority to take out execution upon a judgment recovered by him for his client, and to receive the money due, and thus discharge the execution. Further, "if the judgment debtor has a right to redeem the property sold under the execution within a particular period of time by payment of the amount to the judgment creditor, who has become the purchaser of the property, there is certainly strong reason to contend that the attorney is impliedly authorised to receive the amount, and thus indirectly to discharge the lien on the land": per Story, J., *Erwin* v. *Blake*, 8 Peters (U. S.), 25. Cp. *Dearborn* v. *Dearborn*, 15 Mass. 301, a case of neglecting seasonably to sue out a *scire facias* on a bail bond.

[7] *Godefroy* v. *Jay*, 7 Bing. 413. As to solicitor's liability for wrongly describing plaintiff's place of residence in writ of summons, *In the matter of a Solicitor*, 5 Times L. R. 339.

[8] *Hatch* v. *Lewis*, 2 F. & F., per Pollock, C.B., 485.

advised either to get the conviction quashed or to obtain a free pardon before he resorts to reprisals against his solicitor.[1]

When a solicitor is retained to conduct an action, unless he give reasonable notice of retiring from it or the client dies,[2] he is bound to carry it on to its termination;[3] thus it was held too late to refuse to deliver briefs four days before the commission day of the assizes.[4] Solicitor may not capriciously retire from a case he has undertaken.

If due notice is given by the solicitor, the fact that he is not furnished with money entitles him to be relieved of his duty.[5] The giving of reasonable notice is necessary, otherwise the absence of funds would not excuse him.[6]

A solicitor is not liable for advising his client not to go on with a case, unless the client can show not only that he had a good case, but also that the solicitor was, or ought to have been, aware of it.[7] It is doubtful whether even this is not too narrow a statement of the law; since it may well be that a man has a good case, of which his solicitor is aware, yet which it is in the highest degree inexpedient to prosecute, *e.g.*, a trifling claim against a crochety and wealthy customer. Where this is the case, another duty to his client—not to advise merely as to the legal, but as to the practical, aspects of the case[8]—would not be performed did the solicitor not dissuade him from its prosecution. Advice to discontinue a good case not necessarily negligent.

A solicitor is not liable for negligence when the damage arises from the error of the judge in making an order at chambers;[9] nor for pleadings, if drawn by a pleader;[10] nor for refusing to insert matter in pleadings against his own view at the instance of his client;[11] nor for a mistake in evidence if he has *bonâ fide* taken counsel's opinion;[12] nor for the absence of counsel at the trial;[13] nor because witnesses whose proofs have been taken are not called on the trial, since this is "entirely for counsel";[14] nor for anything within the province of counsel at the trial; nor for omitting to move for a new trial without instructions to do so;[15] nor for refusing to follow his client's instructions to do what is merely designed for delay;[16] nor for preparing a joint warrant of attorney from two, so as not to guard against the effects of one of them dying before the judgment;[17] nor for drawing under counsel's advice an agreement had for champerty, and for suing thereon;[18] nor when Where solicitor not liable for mistakes.

[1] Cp. *Bynoe* v. *Bank of England*, [1902] 1 K. B. 467; *Baseb*é v. *Matthews*, L. R. 2 C. P. 684, citing *Vanderberg* v. *Blake*, (1661) Hard. 194.

[2] *Whitehead* v. *Lord*, 7 Ex. 691. See *In re Cartwright*, L. R. 16 Eq. 469, and the limitation suggested by Lindley, L.J., *Beck* v. *Pierce*, 23 Q. B. D. 323, to "such continuous work as bringing and prosecuting an action."

[3] *Nicholls* v. *Wilson*, 11 M. & W. 106. Cp. *United States* v. *Curry*, 6 How. (U. S.), per Taney, C.J., 111.

[4] *Hoby* v. *Built*, 3 B. & Ad. 350; *Wadsworth* v. *Marshall*, 2 Cr. & J. 665; *Gleason* v. *Clark*, 9 Cowen (N. Y.), 57.

[5] *Rowson* v. *Earle*, M. & M. 538; *Van Sandau* v. *Browne*, 9 Bing. 402, explained in *Underwood* v. *Lewis*, [1894] 2 Q. B. 306.

[6] *Nicholls* v. *Wilson*, 11 M. & W. 106.

[7] *Hill* v. *Finney*, 4 F. & F. 616.

[8] *Jacks* v. *Bell*, 3 C. & P. 316; and 2 Chitty, General Practice, c. 1, 22. The whole of this chapter, Of the Retainer of a Legal Agent, may profitably be referred to.

[9] *Laidler* v. *Elliot*, 3 B. & C. 738.

[10] *Manning* v. *Wilkin*, 12 L. T. (O. S.) 249.

[11] *Ibbotson* v. *Shippey*, 23 Sol. Jour. 388.

[12] *Andrews* v. *Hawley*, 26 L. J. Ex. 323.

[13] *Lowry* v. *Guilford*, 5 C. & P. 234. In a Mayor's Court case, a solicitor acting as advocate was held liable to his client for failure to attend a police court: *Fergusson* v. *Lewis*, Law Journal Newspaper for 1879, at 700. See Solicitors as Advocates, *Clarke* v. *Couchman*, Law Journal Newspaper for 1885, at 318.

[14] *Hatch* v. *Lewis*, 2 F. & F. 482.

[15] *Fray* v. *Foster*, 1 F. & F. 681.

[16] *Johnson* v. *Alston*, 1 Camp. 176. In *Pierce* v. *Blake*, 2 Salk. 515, Holt, C.J., said: "If he [the attorney] puts in a false plea to delay justice, he breaks his oath, and may be fined for putting a decision upon the Court."

[17] *Kettle* v. *Wood*, 5 L. J. (O. S.) K. B. 173.

[18] *Potts* v. *Sparrow*, 6 C. & P. 749.

he accepts as a correct exposition of the law a decision of a competent court, even though in fact such decision is erroneous.[1]

Solicitor handing over papers.

In the case of a solicitor, acting merely as the officer of the Court, handing over papers which may be afterwards acted upon, with no more active intervention than that of a postman who conveys a letter, he is not liable if a warrant he may so hand over proves bad.[2] If, however, he deliberately directs the execution of a warrant, he thereby takes on himself the chance of all bad consequences.[3]

II. Negligence in matters not in litigation.

II. Negligence in matters not in litigation.

(1) In the course of business between vendors and purchasers.

(1) Vendors and purchasers.

The solicitor should inquire whether a thing proposed to be sold may legally be the subject of bargain and sale, that is, whether the bargain is not affected by fraud or immorality, or with regard to matters against public policy.[4] He is to ascertain whether the parties to the proposed contract have contractual capacity;[5] and must take care that his client does not enter into any covenant or stipulation that may expose him to a greater degree of responsibility than is ordinarily attached to the business in hand, or at least does not do so till the consequences have been explained to him;[6] and he must not voluntarily and unnecessarily divulge defects in his client's title.[7] On the other hand, a solicitor is liable if he allows his client to take a bare possessory title[8] without calling his attention to the fact.

Duty of solicitor with reference to abstract.

It is the duty of the vendor's solicitor to deliver a sufficient abstract of title where the necessary investigations are not made in the course of the negotiations; and of the purchaser's solicitor not merely to see that what is abstracted is correctly stated, but also that all that is material is stated.[9] Thus, a solicitor ought not to content himself with a particular extract of a will furnished by his client, unless something passes between him and his client which shows that it is unnecessary to consult the original.[10] There are expressions that would support the narrower duty in an early case;[11] they are, however, merely *obiter dicta*, negativing an alleged duty on the part of a pur-

[1] *Marsh* v. *Whitmore*, 21 Wall. (U. S.) 178; *Blair* v. *Assets Co.*, [1896] A. C. 409.

[2] *Carratt* v. *Morley*, 1 Q. B. 18, commented on in *Pease* v. *Chaytor*, 3 B. & S. 643, cited *Mayor of London* v. *Cox*, L. R. 2 H. L. 239, 263.

[3] *Green* v. *Elgie*, 5 Q. B. 99; see Law Mag. (N. S.) vol. iii. (1845) 339. The right of lien on law papers is treated, Bell, Comm. (7th ed.) vol. ii. 107–109.

[4] *E.g.*, as in *Fores* v. *Johnes*, 4 Esp. (N. P.) 97; *Hughes* v. *Done*, 1 Q. B. 294; *Græme* v. *Wroughton*, 11 Ex. 146.

[5] Pulling, Attorneys, 229, citing Co. Litt. 172 a.

[6] *Stannard* v. *Ullithorne*, 10 Bing. 491.

[7] *Taylor* v. *Blacklow*, 3 Bing. N. C. 235; *Barber* v. *Stone*, 50 L. J. C. P. 297. Cp. per Kelly, C.B., *Hardy* v. *Veasey*, L. R. 3 Ex. 111. Com. Dig. Action upon the Case for a Deceipt (A 5.).

[8] *Allen* v. *Clark*, 7 L. T. (N. S.) 781; *Brooks* v. *Day*, 2 Dick. (Ch.) 572; *Arnot* v. *Biscoe*, 1 Ves. Sen. 95. In *Potts* v. *Dutton*, 8 Beav. 493, a solicitor was made to bear the expense of drawing a conveyance where the title-deeds were out of the vendor's possession to his knowledge; and in consequence of which the sale went off. In *Bell* v *Marsh*, [1903] 1 Ch. 528, a solicitor investigated title, and prepared conveyance for land to part of which the solicitor had previously acquired an adverse title, and on which portion of a greenhouse was built; but at the time both solicitor and client were ignorant that any portion of the solicitor's premises was included in the property which the client afterwards purchased. The Court of Appeal, reversing Buckley, J., held that defendants were not estopped by the conduct of their testator from setting up against the plaintiff their testator's title by adverse possession.

[9] Sugden, Vendors & Purchasers (14th ed.), 411, citing *Kennedy* v. *Green*, 3 My. & K. 699; *Mahony* v. *Davoren*, 30 L. R. Ir. 664.

[10] *Wilson* v. *Tucker*, 3 Stark. (N. P.) 154; *Re Keeping and Gloag*, 58 L. T. 679.

[11] (1827), *Bryant* v. *Busk*, 4 Russ. 1.

chaser's solicitor to inform himself of the names of the attesting witnesses to title-deeds, with a view to the production of evidence in the event of the destruction of the deeds.

Liability of solicitor for loss occasioned by omission to make searches.

The solicitor's duty is only with reference to direct and immediate, and not to possible and future, requisites. In considering the effect of abstracts, he must avoid drawing wrong conclusions from the deeds laid before him; though there is no duty on him to know their legal operation. If he does not consult counsel, he assumes the risk of going wrong.[1] There is authority [2] for saying that a solicitor is liable to his client for loss occasioned by his omission to make any of the numerous searches which may by possibility disclose matter affecting the title. But it is pointed out in a work of great authority [3] that there is a general practice to make certain specified searches, and no more; and a doubt is expressed whether a solicitor would be liable for one of these omissions which are sanctioned by general practice. Tindal, C.J.,[4] solves this when he says: "This [what constitutes the exercise of reasonable and proper care, skill, and judgment] is a question of fact, the decision of which appears to us to rest upon this further inquiry—viz., whether other persons, exercising the same profession or calling, and being men of experience and skill therein, would or would not have come to the same conclusion as the defendant."

Opinion of Tindal, C.J.

Statutory searches.

The solicitor would, of course, be liable if he omitted to require the statutory searches to be made. And in the case of counsel advising a search for specified incumbrances, it is laid down in the above-cited learned treatise that the "solicitor need not make a more extensive search"; though the generality of the proposition is guarded by the reservation, "unless aware of some particular reason for so doing." [5] A further reservation may be suggested—that the duty of the solicitor would be dependent to no small extent on the form of the opinion.

Duty to inquire as to payment of past rent.

Primâ facie, the solicitor is bound to inquire as to the payment of the past rent. If, however, the client has made inquiries about the matter, and leads his solicitor to believe that he is satisfied about it, the marginal note in *Waine* v. *Kempster* [6] states that it is not negligence in the solicitor to omit to call for the receipts, or take other precautions which otherwise would be usual and necessary. Yet this does not appear from the report of what Blackburn, J., said; from which the inference rather seems to be that, failing an *employment* "to see whether the transaction was safe with the reference to the past rent," there would be no presumption raised whatever; nor does it appear just in principle; for the solicitor is not retained to tell the client what he knows, but what he does not know, and to discover any pitfalls in his path.

Solicitor may be liable where deed professes to be settled by the Court.

In cases in which a deed is settled in chambers there is the authority of Kay, J.,[7] for saying that the solicitor may be liable for negligence even though the deed professes to be settled by the Court. "The Court," says that learned judge, "acts always upon the instigation of

[1] *Ireson* v. *Pearman*, 3 B. & C. 799; *Whiteman* v. *Hawkins*, 4 C. P. D. 13.

[2] 1 Byth. & Jarm. Conv. (4th ed.) 100; *Watts* v. *Porter*, 3 E. & B. 743; *Cooper* v. *Stephenson*, 21 L. J. Q. B. 292; *Allen* v. *Clark*, 7 L. T. (N. S.) 781.

[3] Dart, Vendors and Purchasers (7th ed.), vol. ii. 1197.

[4] *Chapman* v. *Walton*, 10 Bing. 63.

[5] Dart, Vendors and Purchasers (7th ed.), vol. ii. 1197, citing *Cooper* v. *Stephenson*, 21 L. J. Q. B. 292.

[6] 1 F. & F. 695.

[7] *Stanford* v. *Roberts*, 26 Ch. D. 160. As to the duty of the *client* to examine bundle of deeds handed him by his solicitor, *Hunt* v. *Elmes*, 2 De G. F. & J. 578

the solicitors employed in the matter, and suppose that by reason of the exceeding negligence of the solicitor employed by the plaintiff in the action, a deed of settlement should be settled and passed in a form which omitted some of the provisions which the conveyancing counsel had recommended should be inserted in it, is it to be said that the solicitor is relieved from responsibility? I do not think so. There are many cases in which a solicitor would not be relieved from responsibility, although the deed was formally settled in Court, if the deed happened to be in a wrong form owing to his negligence." [1]

(2) Landlord and tenant.

(2) In the course of business between landlord and tenant.

The intervention of a solicitor is most often required in this case in the preparation of leases, a duty not infrequently complicated by the existence of settlements or special conditions. The lease and counterp rt are usually prepared by the solicitor of the lessor on behalf of both parties. The costs of surveyor's charges and counsel's fees for advising on title will not be allowed as part of the costs of the lease.[2] Leases should contain all the proper and usual covenants applicable to the subject-matter demised, the custom of the country and the most usual and probable contingencies.[3]

Usual covenants.

"Usual covenants," says Jessel, M.R.,[4] "may vary in different generations. The law declares what are usual covenants according to the then knowledge of mankind"; and these, whether the agreement in terms stipulates for them or not, should be inserted.[5] Though the way in which the case came before the Court left Jessel, M.R., to decide what were usual covenants, in an action for negligence the matter would have to be left to the jury on the question of what is reasonable and competent skill; and the jury would have to decide, but under the direction of the judge.

(3) Lenders and borrowers.

(3) In the course of negotiating between lenders and borrowers.

The duty of a solicitor in the case of negotiating a loan may fall under any one of the three following classes:

(a) Duty to invest in a particular security.

(a) He may receive a certain sum of money to invest in a particular security.

In this case all he does is the legal business. He receives the money, and has to see that the deeds are executed in proper time, and that the money is handed over to the borrower. He has no duty to inquire into the borrower's responsibility, nor into the sufficieny of the security [6] arising from the property being unencumbered or the borrower being insolvent.[7]

1 As to the vendor's duty to the purchaser in regard to deterioration of the property, see *Phillips* v. *Silvester*, L. R. 8 Ch. 173; *Clarke* v. *Ramuz*, [1891] 2 Q. B. 456.

2 *Lock* v. *Furze*, 19 C. B. N. S., per Erle, C.J., 119.

3 Pulling, Attorneys (3rd ed.), 234. *Stannard* v. *Ullithorne*, 10 Bing. 491. In *Barrow* v. *Isaacs and Son*, [1891] 1 Q. B. 417, there was a provision in a lease that the lessees should not grant an underlease without the lessor's consent in writing being obtained. The lessees underlet part of the premises without asking for the lessor's consent. The underlease was prepared by the solicitor, who omitted to look at the head-lease, and forgot that it contained the covenant, not to underlease without consent. It was held by the Court of Appeal that the negligence was not a mistake so as to make applicable the plea of equity, and that the Court would not relieve from the forfeiture.

4 *Hampshire* v. *Wickens*, 7 Ch. D. 561; *In re Lander and Bagley's Contract*, [1892] 3 Ch. 41. Cp. *James* v. *Couchman*, 29 Ch. D. 212.

5 *Church* v. *Brown*, 15 Ves. 264; *Propert* v. *Parker*, 3 My. & K. 280.

6 2 Chitty, Pleading, 281, *n.*; *Green* v. *Dixon*, 1 Jur. 137; *Howell* v. *Young*, 5 B. & C. 259.

7 *Dartnell* v. *Howard*, 4 B. & C. 345. Cp. *King* v. *Withers*, (1690) Prec. Ch. 19. The marginal note is: "A scrivener who was employed to examine into a title fails in his

(β) He may receive money in order that he may find a security to invest it upon, subject to the approval of his client, retaining the money in the meantime.

(β) Duty to find a security subject to the approval of his client.

In this case he must submit to his client the various securities proposed, advise on their eligibility, and ultimately see that the money is handed over, and a sufficient security given for it. He is not liable where the matter does not require the exercise of professional skill and the reasons for taking any step are submitted to the client, and are of a nature that any man should be able to form an opinion upon.[1] The receipt of money given for the purpose of general investment does not in itself create the relation of trustee and *cestui que trust* between a solicitor and his client.[2]

Where the client is a trustee the solicitor's duty is to call his attention "to the rules laid down by the Court for the guidance of trustees," and any matters known to him which materially affect the value of the property as a security.[3] But he may also recommend the investment, when his responsibility is increased, as is well shown in a Scotch case.[4] "For an agent," says Lord President Robertson,[5] "to bring an investment under the notice of a client is of course to a certain extent a recommendation—that is to say, it is the expression of the opinion that the investment is worthy of consideration. If besides thus introducing an investment an agent expresses a favourable opinion of it, he will be liable, if his opinion was either not honest or given when he had no adequate information entitling him to give an opinion at all. But then it is necessary to hear in mind that all this has to be considered in relation to the client in question, and to the kind of investment he is known to desire." "In order," says Lord M'Laren,[6] "to make good a case of liability in such circumstances as the present, it appears to me that the pursuer must establish three points. He must show, first, that the agent in the transaction undertook to act, not as a conveyancer, but as a valuator and adviser as to the sufficiency of the investment; second, that he gave bad advice either intentionally or without any sufficient reason for giving the advice; and third, that the information given by the agent was not in fact true information."

Where client is a trustee.

(γ) He may receive money to invest, and he empowered to act exclusively and without reference to his client; as if the client is abroad.[7]

(γ) Duty to invest without reference to his client.

In this case the solicitor has not merely to provide the securities, and conduct the legal business with reference to the settlement of the

d y by neglecting to make a thorough inquiry, &c., whereby his client is a sufferer"; but the facts show that Withers, the defendant, proposed the security to the plaintiff. On advising as to title, counsel suggested an inquiry, which Withers either never made, or "at least never gave any answer to the counsel, but told Sir Edward [the plaintiff] that Billingsly [the proposed lender] was a very honest man, and so prevailed on him to lend the money." In *Brinsden* v. *Williams*, [1894] 3 Ch. 185, solicitors of a mortgagee trustee were held not liable for the insufficiency of the security though the mortgage money was paid through them.

[1] *Chapman* v. *Chapman*, L. R. 9 Eq. 276, 296.

[2] *Mare* v. *Lewis* (1869), Ir. R. 4 Eq. 219.

[3] *Morgan* v. *Blyth*, [1891] 1 Ch. 344, 361, the case of an improper investment; *Sawyer* v. *Goodwin*, 1 Ch. D. 351.

[4] *Cleland* v. *Brownlie*, 20 Rettie, 152. [5] *L.c.* 162. [6] *L.c.* 163.

[7] *Bostock* v. *Floyer*, L. R. 1 Eq. 26 (recognised in *Speight* v. *Gaunt*, 9 App. Cas. 5), denies the competence of trustees to trust so far to solicitors. See, however, the gloss by Lindley, L.J., 22 Ch. D. 761: "As I understand it the *ratio decidendi* of the case was this, that it was not the ordinary course of business for a trustee to place money in the hands of a solicitor to invest. It was not a specific investment, it was handed to the solicitor, and in that point of view the case is intelligible enough upon the ground that it was not right for the trustee to hand over the money to the solicitor for the purpose of investment."

terms thereof loan; he also undertakes the responsibility to his client of seeing that they are good securities, on which money may be safely invested.[1] He becomes liable for the neglect of any precaution which a prudent man of competent skill would have taken—as for omitting to inquire if the proposing borrower has been bankrupt, or if any other circumstance of the case renders the security ineligible.[2] In no case does it appear that he has to caution his client against improbable contingencies of loss;[3] and the taking a mortgage without a power of sale has in an old case been held a precaution against so improbable a contingency of loss, that default in taking it should not affect a solicitor with liability for negligence.[4]

Blair v. *Bromley.*

It has been contended[5] that to receive money to lay out on mortgage for clients is not within the ordinary duty of a solicitor. Lord Lyndhurst overruled this contention. "for the duty of laying out the money was in the ordinary course of the business of the firm; and they had undertaken it [to lay out money]; and in that case I agree with what is laid down by the Master of the Rolls in *Sadler* v. *Lee*,[6] that all the partners become liable for the several acts of each";[7] and thus where a fraud was perpetrated by the solicitor's partner, the solicitor would himself be liable to make restitution.[8] In *St. Aubyn* v. *Smart*,[9] Malins, V.C., lays down that, though the ordinary course of business might not warrant any particular transaction, still a liability upon it would arise, binding all the members, so soon as it is shown that any duty has in fact been undertaken by the firm, quite apart from the question whether the duty is within the ordinary course of a solicitor's business; for thereby all and each of the partners becomes liable for any miscarriage in the discharge of that duty.

St. Aubyn v. *Smart.*

Comment.

It may be remarked that a liability of this sort does not strictly arise out of the partnership relation; but is rather a consequence of an estoppel to deny that the particular business undertaken is firm business, because the members of the firm have chosen to conduct themselves on the assumption that it is. *St. Aubyn* v. *Smart* is a decision rather illustrating the class of facts the presence of which will affect an innocent partner with liability for transactions not normally within the scope of the partnership, than the indication of a principle that a partner may constructively be bound for acts of his partner outside the ordinary course of business and carried on independently of him.[10]

1 *Dooby* v. *Watson*, 39 Ch. D. 178.

2 *Cooper* v. *Stephenson*, 21 L. J. Q. B. 292; *Smith* v. *Pococke*, 23 L. J. Ch. 545.

3 *Brumbridge* v. *Massey*, 28 L. J. Ex. 59.

4 *Badey* v. *Abraham*, 14 L. T. (O. S.) 219; Davidson, Conveyancing (4th ed.). vol. ii. part ii. 85.

5 *Blair* v. *Bromley*, 5 Hare, 542; 2 Ph. 354. 6 6 Beav. 330.

7 See *Dundonald* v. *Masterman*, L. R. 7 Eq. 504, 515, where James, V.C., considers and explains the expressions of Turner, L.J., in *Viney* v. *Chaplain*, 2 De G. & J. 468. Lord Campbell's remarks in *Harman* v. *Johnson*, 2 E. & B. 65, distinguish between the business of an attorney and a scrivener; while admitting that "attorneys frequently do act as scriveners in the full sense of the term"; and during the fifty years since Lord Campbell's *dictum* this frequency has probably grown into a custom judicially to be noticed. As to the business of a scrivener, see *Ex parte Malkin*, 1 Rose, 406; 2 Rose, 27; *Adams* v. *Malkin*, 3 Camp. 534; *Wilkinson* v. *Candlish*, 5 Ex. 91, 95; Vin. Abr. Scrivener.

8 *Sadler* v. *Lee*, 6 Beav. 324, 330, distinguishing *Marsh* v. *Keating*, 8 Bli. (H. L.) 651, and approved *Moore* v. *Knight*, [1891] 1 Ch. 547; Partnership Act, 1890 (53 & 54 Vict. c. 39), s. 11.

9 L. R. 5 Eq. 187; L. R. 3 Ch. 646.

10 This appears more clearly in the report of the case on appeal, L. R. 3 Ch. 646.

A solicitor's liability in this relation is that of any other agent similarly employed ;[1] although the circumstances of his employment may affect him with all the liability of a trustee.[2] As if he is engaged in any matter wherein his own personal interests are so involved that the right inference from the facts of the transaction is that he is acting, not as solicitor or agent alone, but as one who, being a solicitor, is taking advantage of his position to acquire a benefit for himself, though his doing so may hazard the trust, then the character of trustee will be imputed to him.[3] Short of this a solicitor is not constituted a trustee *de son tort*, even though he act in trust matters in an unfortunate way.[4]

Solicitor acting for both lender and borrower.

The solicitor for the lender not infrequently also acts for the borrower. Where this is the case a duty of great delicacy is cast upon the solicitor. The double relation may be constituted not merely by actual retainer, but by inference from conduct. In this latter case the decision is for a jury. Yet whatever the means of constituting the relation—whether by actual agreement or by implication—when it is constituted the agent is responsible to either of the parties who may suffer from his negligence in preparing the security.[5]

Where the solicitor acts for the borrower his duty is the converse of that where he acts for the lender.

(4) Partnership matters.

(4) In Partnership matters.

In drawing up partnership deeds and advising on matters arising out of partnership transactions, the same duty is owing as in matters we have before discussed at large.

(5) Principal and Surety.

(5) In matters affecting the relation of Principal and Surety.

In addition to the duties before set out, the solicitor must see that the contract of guarantee or indemnity is in writing,[6] and if not under seal is for a lawful consideration.[7]

(6) Debtor and Creditor.

(6) In arrangements between Debtor and Creditor.

These may be either under ordinary retainers, when the principles regulating work done under retainer apply ; or under arrangements between debtors and the general body of their creditors, when the provisions of the Bankruptcy Act define what are the duties of solicitors.[8]

(7) Matters Matrimonial and Testamentary.

(7) In matters Matrimonial and Testamentary.

Shortly, it may be said that the extreme confidence bestowed in these matters imposes a greater obligation of care and circumspection on the solicitor, though there seems no difference of principle involved from those relations we have already considered.

Custody of client's deeds.

In the course of any or all of these relations the solicitor may have the custody of his client's deeds. Since he is bound by his position in relation to his client "to use ordinary care that it" (any deed of his client's) "should be forthcoming when wanted," he is *primâ facie* liable if he fail in this. The matter, however, is not peculiar to

1 *Donaldson* v. *Haldane*, 7 Cl. & F. 762 ; *Hayne* v. *Rhodes*, 8 Q. B. 342.
2 *Dartnell* v. *Howard*, 4 B. & C. 345 ; *Craig* v. *Watson*, 8 Beav. 427
3 *Fyler* v. *Fyler*, 3 Beav. 550.
4 *Mara* v. *Browne*, [1896] 1 Ch. 199.
5 *Lang* v. *Struthers*, 2 Wils. & Shaw. (H. L. Sc.) 503 ; *Robertson* v. *Fleming*, 4 Macq. (H. L. Sc.) 167.
6 29 Car. II. c. 3, s. 4 ; 19 & 20 Vict. c. 97, s. 3
7 *Goodman* v. *Chase*, 1 B. & Ald. 297.
8 46 & 47 Vict. c. 52. In *Luddy's Trustee* v. *Peard*, 33 Ch. D. 500, it is laid down "that the obligations on a solicitor dealing with his client extend to the case of a dealing between a solicitor and the trustee in bankruptcy of his client." For the law where a former confidential legal adviser bought up charges on his former employer's estate, see *Carter* v. *Palmer*, 8 Cl. & F., per Lord Cottenham, 705

the relation of solicitor and client, and may be referred to its proper head of the general law of bailments.[1]

Solicitor making client's will in his own favour.

If a solicitor, or indeed if any person, prepares a will containing a legacy to himself, the law looks on it as a suspicious circumstance, of more or less weight according to the facts of each particular case, and as demanding the vigilant care of the Court to investigate and calling upon it not to grant probate without full satisfaction that the instrument did express the real intentions of the deceased.[2]

Lord Cairns's statement of the law.

"An attorney," says Lord Cairns,[3] "is not affected by the absolute disability to purchase which attaches to a trustee. But for manifest reasons, if he becomes the buyer of his client's property, he does so at his peril. He must be prepared to show that he has acted with the completest faithfulness and fairness; that his advice has been free from all taint of self-interest, that he has not misrepresented anything, or concealed anything, that he has given an adequate price, and that his client has had the advantage of the best professional assistance which, if he had been engaged in a transaction with a third party, he could possibly have afforded. And although all these conditions have been fulfilled, though there has been the fullest information, the most disinterested counsel and the fairest price, if the purchase be made covertly in the name of another, without communication of the fact to the vendor, the law condemns and invalidates it utterly. There must be *uberrima fides* between the attorney and the client, and no conflict of duty and interest can be allowed to exist."[4]

Property of client held by solicitor.

Property of a client held by a solicitor as trustee does not vest in the solicitor's trustee in bankruptcy,[5] and is not within the reputed ownership clause.[6] A solicitor must not mix it with his own property, though in any case it can be followed by the client so long as it can be traced.[7] Moreover, it appears settled that where a solicitor has had money from his client for the purpose of investing on a mortgage of specified property, and has taken the security in his own name, he will be held to be a trustee of the security for his client to the extent of the sum received from him even though the solicitor may have made a deposit of the title-deeds with his banker or other person;[8] and the client is not guilty of negligence in omitting to get his title-deeds from his solicitor who afterwards is found to have dealt with them on his own account.[9]

Bills of sale

With regard to bills of sale, the duties of solicitors are prescribed by the Bills of Sale Acts.[10]

It has been laid down[11] that a solicitor, who stated in the attestation

[1] *Reeve* v. *Palmer*, 5 C. B. N. S. 84; *Wilmot* v. *Elkington*, 2 L. J. (N. S.) K. B. 103; *Wilkinson* v. *Verity*, L. R. 6 C. P. 206. *Ante*, 740 *et seqq.* Where a solicitor deposits deeds without his client's knowledge as security for an advance to the client, he is liable for having *mislaid* them, and must deliver them up in a reasonable condition for use: *N. W. Ry. Co.* v. *Sharp*, 10 Ex. 451; the papers of the client must be delivered up, but not letters written by the client to the solicitor: *In re Thomson*, 20 Beav. 545.

[2] *Barry* v. *Butlin*, 2 Moo. P. C. C. 480; *Fulton* v. *Andrew*, L. R. 7 H. L. 448.

[3] *McPherson* v. *Watt*, 3 App. Cas. 266. [4] See also per Blackburn, J., *l.c.* at 270.

[5] 46 & 47 Vict. c. 52, s. 44, sub-s. 1. [6] Sub-s. 2 (iii.).

[7] *Dickson* v. *Murray*, 31 Sol. Jour. 493.

[8] *Harpham* v. *Shacklock*, 19 Ch. D. 207; cp. what is said by Lord Herschell, *Taylor* v. *Russell*, [1892] A. C. 253; *In re Richards*, 45 Ch. D. 589.

[9] *In re Vernon, Ewens, & Co.*, 33 Ch. D. 402; *Taylor* v. *London and County Banking Co.*, [1901] 2 Ch. 231, 261.

[10] 41 & 42 Vict. c. 31, s. 10; 45 & 46 Vict. c. 43. As to inadvertence in renewing registration of a bill of sale, *In re Parsons, Ex parte Furber*, [1893] 2 Q. B. 122.

[11] *Ex parte National Mercantile Bank, In re Haynes*, 15 Ch. D., per James, L.J., 52. As to how this duty should be performed, see per Hannen, J., *Morrell* v. *Morrell*, C.P. D. 70

clause to a bill of sale that he had explained the effect of the bill to the grantor when he had not done so, was liable both to an action by his client and also to penal proceedings.

Where a solicitor took a charge from a company for his costs, which charge was not registered, the Court of Appeal affirmed the Master of the Rolls in holding that the solicitor could not take advantage of the charge, as it was his duty to see that the register was properly kept.[1]

Personal liability to third person.

The personal liability of a solicitor to third persons is summarised by Lord Abinger, C.B.: [2] "The attorney is known merely as the agent—the attorney of the principal, and is directed by the principal himself. The agent, acting for and on the part of the principal, does not bind himself, unless he offers to do so by express words; he does not make himself liable for anything, unless it is for those charges which he is himself bound to pay, and for which he makes a charge." [3]

Agent in town and client in the country.

Further, the general rule is, that there is no privity between the agent in town and the client in the country; the former cannot maintain an action against the latter for his fees, nor the latter against the former for negligence. Something therefore is necessary beyond the mere relation of the parties to each other to make the agent in town liable to the client.[4] The town agent has been indeed held liable to account to the country client for money he had received; [5] but there the money was received in the course of the suit from the opposite party; and since it could not be said that the agent received it to the use of the country attorney, and as clearly it was not received on the agent's own account, of necessity it was treated as held to the use of the client.[6]

Solicitor may not derive an advantage at the expense of his client out of his client's business.

A solicitor can be allowed to do no act in the absence of his client, and without his consent, by which he may derive an advantage at the expense of his client; [7] and though no doubt a principal may ratify or adopt the act of his agent—for it is to the rules governing the relationship between principal and agent that the determination of this point is to be referred—in purchasing that which such agent has been employed to sell, or in taking to himself any other advantage from property he has to deal with; yet "before the principal can properly be said to have ratified or adopted the act of his agent or waived his right of complaint in respect of such acts, it should be shown that he has had full knowledge of its nature and circumstances, in other words, that he has had presented to his mind proper materials upon which to exercise his power of election, and it by no means follows that because" "he does not repudiate the whole transaction after it has been completed, he has lost a right actually vested in him to the profits derived by his agent from it." [8]

[1] *In re Patent Bread Machine Co., Ex parte Valpy and Chaplin*, L. R. 7 Ch. 289.

[2] *Robins* v. *Bridge*, 3 M. & W. 114, 119.

[3] See *Parrot* v. *Wells*, (1689) 2 Vern. 127, agreement binding on scrivener but not on his client; *Saxon* v. *Blake*, 29 Beav. 438; *Clark* v. *Lord Rivers*, L. R. 5 Eq. 91.

[4] *Cobb* v. *Becke*, 6 Q. B. 930, 935.

[5] *Moody* v. *Spencer*, 2 Dow. & Ry. 6.

[6] As to solicitor's lien generally, *In re Taylor, Stileman* v. *Underwood*, [1891] 1 Ch. D. 590. As to solicitor's lien on deeds of his client, see the judgment of Lord Chancellor Sugden, *Blunden* v. *Desart*, 2 Con. & Law. (Ir. Ch.) 111, 120.

[7] *Stockton* v. *Ford*, 11 How. (U. S.) 232, 247. See *Marsh* v. *Whitmore*, 21 Wall. (U. S.) 178, for what constitutes ratification.

[8] *De Bussche* v. *Alt*, 8 Ch. D. 313.

Barristers.

The duty of a barrister to his client may conveniently be noticed in this place, and in connection with the duties of solicitors; though a barrister is not, like a solicitor, an officer of the Court.

Roman practice.

The relation between barrister and client in England is an imitation of the practice followed at Rome.[1] For a considerable period of Roman history the conduct of suits was monopolised by the patricians, whose services were at first altogether *gratuitous*, or rather were requited *exclusively* by political support. The patron is described as walking in the forum for the convenience of suitors, who addressed him with *licet consulere, quære an existimes; id jus est necne;* and on getting the reply, *consule*, put the case, and were answered in the formula, *Secundum ea quæ proponuntur, existimo, placet, puto.*

When the connection between client and patron ceased, and the patron had no longer a claim on the services of the client, the practice arose of bringing an *honorarium* in lieu of a payment by support and services. Throughout the whole growth of the civil law, from the foundation of Rome to the time of the Digest of Justinian, not only was the advocate always under legal incapacity to make a contract for his remuneration, but also, throughout a part of that time, he was prohibited from receiving any gain for his services.[2]

Fees limited at Rome.

Though the advocate received no money for his assistance in the earliest times, yet in a later stage of the history of the city such extravagant sums were given him that they occasioned the enacting of the

[1] For an historical sketch of the office and functions of the advocate, see Forsyth, Hortensius, 94. Smith, Dictionary of Greek and Roman Antiquities (3rd ed.), arts. "*Advocati*" and "*Jurisconsulti*." Colquhoun, Roman Civil Law, §§ 499, 500, 2069, 2209. Domat, Public Law, Bk. 2, tit. 6, sec. 2, treats of the duties of advocates. To art. 5 (Strahan's ed.) there is a copious citation of authorities for the proposition that advocates "should embrace their functions upon other views than that of gain." The rights and duties of an advocate of the French bar are treated, Jones, History of the French Bar, 177. There is a note to *Horne Tooke's case*, 20 How. St. Tr. 687, on the powers of the Inns of Court to call to the bar, and also the proceedings of the benchers of the Inner Temple on Tooke's claim to a call to the bar by that society. The ground of his rejection was that he was in priest's orders. See further, Lettres sur la Profession d'Avocat, par Camus; Profession d'Avocat, par Dupin; and Histoire du Barreau de Paris depuis son Origine jusqu'à 1830, par Gaudry; Savigny, History of the Roman Law during the Middle Ages (Cathcart's translation), c. 6, State of Law Education during the Early Part of the Middle Ages.

[2] Per Erle, C.J., *Kennedy* v. *Broun*, 13 C. B. N. S. 677, 732. The tone of Roman sentiment may be illustrated by a quotation from Ovid, Amores, Bk. 1, Elegia x.: *Ad pudlam, ne pro amore præmia poscat;* he regards the accepting money for advocacy as a like baseness:

> *Turpe, reos empta miseros defendere lingua;*
> *Quod faciat magnas, turpe, tribunal opes.*

An et philosophi professorum numero sint? Et non putem; non, quia non religiosa res est; sed quia hoc primum profiteri eos oportet, mercenariam operam spernere. Proinde ne juris quidem civilis professoribus jus dicent; est quidem res sanctissima civilis sapientia; sed quæ pretio nummario non sit æstimanda nec dehonestanda, dum in judicio honor petitur qui in ingressu sacramenti offerri debuit. Quædam enim tam si honeste accipiantur inhoneste tamen petuntur: D. 50, 13, 1, §§ 4, 5. Among the Greeks the same feeling was very strong, Xenoph. Memor. 1, 6, 13. Plato thought it unworthy of a virtuous man to accept a salary for the discharge of any public duty, Repub. i. 347. See, too, Gorgias, 347, Sophistes, 223, 224, 225, 226, 231; Symp. 184, 185; Theæt. 165. The references to Plato are to Stallbaum's edition. The history of the honorarium is given by M. Grellet-Dumazeau in his work Le Barreau Romain, 97, Des Honoraires; also by Forsyth, Hortensius, c. 9, The Honorarium. Dante says that a lawyer, like a physician and most of the religious, cannot be a true philosopher when he loves wisdom not for herself, but for gain: Il Convito, iii. 11. *Ante*, 764 n. 4.

Lex Cincia de donis et muneribus ne quis ea ob causam orandam peteret, A.U.C. 550.[1] The prohibition of this law having fallen into neglect, was revived by Augustus,[2] with an additional clause by which the advocate who pleaded for hire was condemned to pay four times the sum he was to receive.[3] Later on, the Emperor Claudius relaxed this severity, and by a decree fixed the maximum which an advocate might lawfully receive by way of gift at £80, making him liable to refund if he took more.[4]

In what cases the *honorarium* was recoverable.

Dr. Wharton [5] points out that the *honorarium* could be recovered through a *cognitio extraordinaria* of the *Prases*. Erle, C.J.,[6] objects to this, that the sections of the Digest [7] vouched for this view prove no more than that an advocate could be made to refund so much of a fee already paid as exceeded the legitimate amount under the decrees of the Emperor Claudius; farther, he indicates how this amount was to be ascertained; and draws a distinction between a promise of remuneration during the pendency of litigation which does not bind, and a security given after the suit is at an end, which is enforceable, if, that is, it do not exceed the legitimate amount.

Practice in the Middle Ages.

In the Middle Ages, by the reduction of legal proceedings to writing, the ancient methods were superseded in the heart of the empire; oral proceedings, however, seem to have been retained in what were the barbarous provinces; so that the practice of the law in England in the Middle Ages came nearer the procedure of ancient Rome than that in use in Rome itself.[8]

[1] Smith, Dictionary of Greek and Roman Antiquities (3rd ed.), art. "*Lex Cincia.*"

[2] A.U.C. 732.

[3] Murphy, Tacitus, Annal. xi. c. 5, note. *Multaque arbitria senatus constituta sunt: Ne quis ad causam orandam mercede aut donis emeretur* (Tacitus, Annal. xiii. c. 5).

[4] *Capiendis pecuniis posuit modum usque ad dena sestertia, quem egressi repetundarum tenerentur* (Tacitus, Annal. xi. 7). Tacitus gives the arguments used on both sides in the debate before Claudius, which resulted in this limited liberty being allowed. Annal. xi. 5, 6, 7. In the Code (C. 3, 1, 14, § 1) the duties of the counsel are thus indicated: *Patroni autem causarum qui utrique parti suum præstantes auxilium ingrediuntur, quam lis fuerit contestata, post narrationem præpositam et contradictionem objectam . . . sacrosanctis evangeliis tactis juramentum præstent, quod omni quidem virtute sua omnique ope, quod verum et justum existimaverint, clientibus suis inferre procurabunt; nihil studii reliquentes quod sibi possibile est; nam autem, credita sibi causa cognita, quod improba sit, vel penitus desperata et ex mendaciis allegationibus composita, ipsi scientes prudenteque mala conscientia liti patrocinabuntur, sed et si certamine procedente aliquid tale sibi cognitum fuerit, a causa recedent ab hujusmodi communione sese penitus separantes.* See also D. 19, 2, 38, § 1: *Advocati quoque si per vos non steterit quominus causam agant, honoraria reddere non debent.* With this compare *Turner* v. *Phillips*, Peake (N. P.), 122, 123. A well-known passage on the relations between counsel and client is found in Cicero's oration, Pro Roscio Amerino, c. 11. See also De Oratore, 1, 45. The English theory was eloquently expressed by Cockburn, C.J., at the bar dinner in the Middle Temple Hall to M. Berryer, reported in the Times newspaper, 9th November 1864: "The arms which an advocate wields he ought to use as a warrior and not as an assassin. He ought to uphold the interests of his clients *per fas* but not *per nefas*. He ought to know how to reconcile the interests of his clients with the eternal interests of truth and justice." There is "A Preface Dedicatorie" to Sir John Davys's Reports well worth referring to on the same subject. See also an article in Edin. Rev. vol. lxiv. 155, Rights and Duties of Advocates; one in Lond. and Westm. Rev. vol. xxxv. Licence of Counsel; and No. 303, Law Magazine (Feb. 1897), The Right of Counsel to be Instructed by Lay Clients, which refers at length to *Doe d. Bennett* v. *Hale*, 15 Q. B. 171, deciding that there is no rule of law requiring that counsel appearing in Court for a party who pleads in person, should be instructed by an attorney.

[5] Negligence, §§ 486, 719.

[6] *Kennedy* v. *Broun*, 13 C. B. N. S. 735. It is noteworthy that in Mr. Kennedy's argument in this case, D. 50, 13, 1, is not cited: *Divus Antoninus Pius rescripsit, juris studiosos, qui salaria petant, hæc exigere posse.* See the explanation of this text in Moyle, Introduction to Justinian, Institutes (2nd ed.), 60.

[7] D. 50, 13, 1, §§ 10, 12.

[8] Colquhoun, Roman Civil Law, § 501.

Erle, C.J.'s statement not accurate.

In English law, according to Erle, C.J., there does not seem any trace of the limit imposed by the decree of the Emperor Claudius; and he adds that in all the records of our law from the earliest time till now there is no trace that an advocate has ever maintained a suit against his client for his fees in litigation, or a client against an advocate for breach of a contract to advocate.[1]

But this is considerably overstating the facts. For instance, in Y. B. 14 H. VI. 18, pl. 58, Paston, J., says, addressing counsel before him, and with the concurrence of Juyn, C.J., "if you, who are sergeant at law, undertake my cause and do nothing, or conduct it in such a manner that I have cause to charge you with losing it, I have an action on the case against you." Again, Reeves cites Prisot, C.J., in Y. B. 37 H. VI. 8, pl. 18: "if a person were retained to be counsel for a certain sum, he might have an action for the money though the other might have had no advice from him";[2] and this statement is repeated in Comyns's Digest as if it were law.[3] In 5 Car. I., however, there is the following: "The plaintiff being a counsellor at law, brought his bill for fees due to him from the defendant, being a solicitor, and was to account with him at the end of every term. The defendant demurs. This Court allowed demurrer *nisi causâ*. Demurrer affirmed, and the bill dismissed."[4]

Theory of the English law.

The theory of the English law seems rather to be that it is of advantage for counsel to be paid "those emoluments, which produce integrity and independence";[5] but that "counsel should be rendered independent of the event of the cause, in order that no temptation may induce them to endeavour to get a verdict, which in their consciences they think they are not entitled to. Counsel should be rendered as independent as the judge or jury who try the cause, when called upon to do their duty."[6] That this admirable provision of the law was not

[1] *Kennedy* v. *Brown*, 13 C. B. N. S. 727; 3 Bl. Comm. 28, and the note in Christian's edition.

[2] Reeves, Hist. of the Eng. Law (2nd ed.), vol. iii. 372; see also 404, where Y. B. 21 H. IV. pl. 6, is referred to. But *quære* does the passage cited, quite bear out the meaning put on it?

[3] Det). (A 8). See also a note to Fitzherbert, *De Natura Brevium*, *Trespass sur le Case*, 94 E., note, citing Y. B. 11 H. VI. 24, 55. There is an Irish case, *Hobart* v. *Butler* (1859), 9 Ir. C. L. R. 157, holding that fees are recoverable by express contract. It was seriously doubted in *The Queen* v. *Doutre*, 9 App. Cas. 745, 751, whether *Kennedy* v. *Brown* was an authority in English colonies, where a lawyer is "not a mere advocate or pleader," but "who combines in his own person the various functions which are exercised by legal practitioners of every class in England." In that case the Judicial Committee was "not prepared to accept all the reasons which were assigned for that decision in the judgment of Erle, C.J." See also Vin. Abr. Counseller.

[4] *Moor contra Row*, 1 Rep. in Chancery, 21. In America the different position of an "attorney at law" from that of a barrister in England has occasioned the adoption of a rule admitting the legal enforceability of agreements to prosecute a claim, either at a fixed compensation or for a reasonable percentage upon the amount recovered: *Wright* v. *Tibbitts*, 91 U. S. (1 Otto) 252. See the account of the practice as to counsel's fees by Bradley, J., *In re Paschal*, 10 Wall. (U. S.) 494. Cp. *Trist* v. *Child*, 21 Wall. (U. S.) 441; *Stanton* v. *Embrey*, 93 U. S. (3 Otto), 548; *Mooney* v. *Lloyd*, 5 Ser. & Rawle (Pa.), 412.

[5] *Morris* v. *Hunt*, 1 Chit. (K. B.) 544, per Bayley, J., 551. The learned judge adds: "It is their duty to take care, if they have fees, that they have them beforehand."

[6] Per Best, J., *l.c.* 554. Cp. some declamation by Erle, C.J., *Kennedy* v. *Brown*, 13 C. P. N. S. 738, beginning, "Such is the system." The considerations arising from the employment being one into which tact and judgment so largely enter, that it could not be submitted to the test of an action at law without destroying its character, seems so obvious and commonplace as not to require or merit treatment in a style of stilted rhetoric that only obscures their import. See an anecdote in Lord Campbell's Life of Lord Eldon, Lives of the Chancellors, vol. vii. 52: "I was counsel for a highwayman," &c.

altogether at all times effectual for its object, may be concluded from the necessity of the Statute of Westminster the First, c. 29, and from Sir Edward Coke's comments upon it.[1]

Distinction between undertakings concerning advocacy in litigation and contracts in cases unconnected with advocacy.

A distinction has, however, been drawn between undertakings concerning advocacy in litigation [2] and contracts in cases unconnected with advocacy. These latter are not regarded as within the rule disentitling counsel to sue in respect of contracts made regarding them; consequently the ordinary rules as to liability for negligence apply. As to the former, there is an absolute incapacity to make a contract of hiring as an advocate;[4] for it is of the essence of the employment of an advocate at the English bar, accepting a brief in the usual way, that he undertakes a duty, but does not enter into any contract or promise express or implied.[5] If, however, he intentionally does a wrong, and acts with malice, fraud, or treachery, his action may be treated as unauthorised and ineffectual. "For instance," says Pollock, C.B.,[6] "we think, in an action for a nuisance between the owners of adjoining land—however desirable it may be that litigation should cease by one of the parties purchasing the property of the other—we think the counsel have no authority to agree to such a sale and bind the parties to the suit without their consent, and certainly not contrary to their instructions, and we think such an agreement would be void."

Counsel have general control of action.

May enter into binding agreements for their clients in the conduct of the suit.

The conduct and control of causes are necessarily left to counsel; and the apparent authority with which they are clothed is to do everything which in the exercise of their discretion they may think best for the interests of their clients; and if within the limits of this apparent authority they enter into agreements with opposite counsel as to the causes in which they are engaged, such agreements are held binding.[7] If a party desires to keep the power of directing counsel in the conduct of the suit, he must agree with some counsel willing so to bind himself, else it will be presumed that counsel has power to act in everything within the scope of the action.

Counsel has no authority to settle a case against the wish of his client; nor yet on terms different from those which his client has authorised. Thus where counsel for the parties had agreed to refer a case to a special referee but one of them had had his authority limited

[1] 2 Co. Inst. 213. A whole mine of learning on the position, and various degrees of English legal practitioners is contained in Sergeant Manning's book, Serviens ad legem, As to Sergeants. See further the preface to 10 Co. Rep. xxxv.; Pulling, Order of the Coif; and Crabb, Hist. of Eng. Law, 182. In 2 Atk. 173, is an *Anonymous case*, No. 150, where counsel was prohibited practising at the bar by the Lord Chancellor for malpractices.

[2] That is, not merely business in court, but business relating to business that may come into court—*e.g.*, for negligently and unskilfully sealing and signing a bill in equity: *Fell* v. *Brown*, Peake (N. P.), 96.

[3] *Mingay* v. *Hammond*, Cro. Jac. 482; *Egan* v. *Guardians of the Kensington Union*, 3 Q. B. 935, *n.*; *Virany* v. *Warne*, 4 Esp. (N. P.) 46; *Huggins* v. *Gordon*, 3 Q. B. 466; *Marsack* v. *Webber*, 6 H. & N. 1.

[4] See an article in 50 Law Times, 197, Retainers and Retaining Fees, reprinted from the Canada Law Journal. As to the practice in accepting a retainer against a former client, *Earl of Cholmondeley* v. *Lord Clinton*, 19 Ves. 261.

[5] *Swinfen* v. *Lord Chelmsford*, 5 H. & N. 890, 920: "Cases may indeed occur where, on an express promise (if he made one), he would be liable in assumpsit." The honorary nature of counsel's fees is insisted on by Lindley, L.J., in *In re Le Brasseur and Oakley*, [1896] 2 Ch. 493, whose conclusion is that "it is of the utmost importance that the Court should not assist barristers to recover their fees." In *In re Hall*, 2 Jur. (N. S.) 1076, counsel was admitted to prove in the bankruptcy of some solicitors who admitted that they had received a specific sum from their clients previously to the bankruptcy for the payment of the fees.

[6] *L.c.* 922.

[7] *Strauss* v. *Francis*, L. R. 1 Q. B. 379.

hy his client, though this was not made known to the other side, the House of Lords set the agreement aside and restored the cause to the list for trial.[1] "I have rarely heard," said Lord Brampton,[2] "anything more preposterous to my mind than the notion that a suitor can impose no effective veto upon a course proposed to be taken hy his or her own counsel which rightly or wrongly in his or her judgment will operate most prejudicially to his or her interests." And Lord Macnaghten did not think[3] "that the Court is entirely in the hands of counsel, and hound to give the seal of its authority to any arrangement that counsel may make"; or, "that any counsel has authority to compel his client to refer an action which the client desires to try in open Court."

Counsel not responsible for his ignorance or lack of judgment.

A counsel is not liahle to an action for any proceedings in the course of an action, as for calling or not calling a particular witness,[4] or for putting or not putting a particular question, or for honestly taking a view of the case which may turn out to he quite erroneous.[5] He is not responsihle for ignorance of law, or any mistake in fact, or for heing less eloquent or less astute than he was expected to he. He may even withdraw a juror contrary to his client's wishes,[6] unless the client's dissent is hrought to the knowledge of the opposite party at the time;[7] and the client is hound hy the representation he makes hy counsel acting for him so long as the representation continues. Thus even a secret withdrawal of authority unknown to the other side does not affect his apparent authority. If, however, counsel conduct a cause in such a manner that an unjust advantage would he given to the other side, or if he act under a mistake in such a way as to work injustice, the Court could review his action.[8]

Opinion of Pollock, C.B., in *Swinfen* v. *Lord Chelmsford*.

This view of the authority of counsel is substantially that of Pollock, C.B., in *Swinfen* v. *Lord Chelmsford*,[9] in which, however, some members of his Court did not concur. "If," says the learned Chief Baron, "in spite of instructions to the contrary, he [counsel] enters into a compromise, helieving that it is the hest course to take, and that the interest of his client requires it, this is hut an indiscretion or an error in judgment if done honestly; and it appears to me that, neither for the one nor the other, can any action he maintained against him." (As we have just seen the client's remedy is to get the proceedings set aside and the cause restored.[10]) "I am sure," says Lord Camphell in *Purves* v. *Landell*,[11] "I should have heen sorry when I had the honour of practising at the har of England, if harristers had been liahle to such a responsibility" [of guaranteeing the soundness of their advice]. "Though I was tolerably cautious in giving opinions, I have no douht that I have repeatedly given erroneous opinions; and I think it was Mr. Justice Heath who said that it was a very difficult thing for a gentleman at the har to he called upon to give his opinion, because it was calling upon him to conjecture what twelve other

[1] *Neale* v. *Gordon Lennox*, [1902] A. C. 465.
[2] *L.c.* 472.
[3] *L.c.* 472.
[4] See *Hatch* v. *Lewis*, 2 F. & F. 477.
[5] *Swinfen* v. *Lord Chelmsford*, 5 H. & N. 890.
[6] *Strauss* v. *Francis*, L. R. 1 Q. B. 379.
[7] Cp. *Lowry* v. *Guilford*, 5 C. & P. 234.
[8] *Matthews* v. *Munster*, 20 Q. B. D. 141.
[9] 5 H. & N. 924.
[10] *Neale* v. *Gordon Lennox*, [1902] A. C. 465.
[11] 12 Cl. & F. 102.

persons would say upon some point that had never before been determined." [1]

As counsel is not directly liable for negligence, so also he cannot be made indirectly liable by being sued for the recovery of his fee, even though he has not attended the hearing of the case, and apparently has done nothing for his money.[2] Counsel not liable indirectly.

This last feature of counsel's relation to his client is attributed by Dr. Clark Hare [3] to the principle of the Roman law, in which system the doctrine of consideration did not prevail, and under which either party to a contract was entitled to insist on the performance by the other of his part irrespective of default on his own part. But this view does not seem accurate, since neither by the Roman law nor by our own is the relation of counsel and solicitor a contractual one. In legal theory, the fee of counsel is a present, not a payment; his services also, in theory, are not paid for, but gratuitous.

[1] I have heard the late Huddleston, B., express this somewhat differently, saying: "There is no such thing as being right in law. The House of Lords are only right, because there is no Court above them to overrule them."

[2] *Turner* v. *Phillips*, Peake (N. P.), 122. As to misconduct of counsel, see note to *McDonald* v. *People*, 9 Am. St. R. 547, at 559-570; *In re Pollard*, L. R. 2 P. C. 106. As to the limits of professional confidence, *Annesley* v. *Anglesea* (*Earl of*), 17 How. St. Tr. 1228-1244; *Bullivant* v. *A.-G. for Victoria*, [1901] A. C. 196.

[3] Contracts, 87.

BOOK VII.

UNCLASSIFIED RELATIONS.

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CHAPTER I.

PARTNERSHIP.

THE definition of Partnership in English law is now fixed by the Partnership Act, 1890,[1] as "the relation which subsists between persons carrying on a business [2] in common with a view of profit."

Definition.

"Partnership," says Jessel, M.R.,[3] in commenting upon the collection of definitions in Lindley on Partnership,[4] "is undoubtedly a contract for the purpose of carrying on a commercial business—that is, a business bringing profit—and dividing the profit in some shape or other between the partners." Further, if there is an association of two or more persons formed to carry on a business who share between them the profits of the business, they are to be treated as partners unless there are surrounding circumstances to show that they are not such.[5]

The principles governing the determination of the amount of negligence importing liability between partners are not very copiously

[1] 53 & 54 Vict. c. 39, s. 1, sub-s. 1. Jessel, M.R., criticises this definition of partnership, by anticipation, in *Pooley* v. *Driver*, 5 Ch. D. 473. See Pothier's definition, Traité du Contrat de Société, n. 1.

[2] By sec. 45, "business" includes every trade, occupation, or profession.

[3] *Pooley* v. *Driver*, 5 Ch. D. 472. "There was in this agreement," says Field, J. (*Beauregard* v. *Case*, 91 U. S. (1 Otto) 140), "all the essential conditions for the creation of a partnership—provisions for a union of services and money, and a division of profits and losses." See for the general principles governing commercial partnerships, *Winship* v. *Bank of the United States*, 5 Peters (U. S.), 529. A partnership exists between two or more persons whenever there is such a relation between them "that each is as to all the others, in respect to some business, both principal and agent": *Morgan* v. *Farrel*, 58 Conn. 413, 422.

[4] Vol. i. (3rd ed.) 2 and 3, (7th ed.) 11. In the 7th edition the definition adopted is: "an agreement that something shall be attempted with a view to gain, and that the gain shall be shared by the parties to the agreement." See *Badely* v. *Consolidated Bank*, 34 Ch. D. 552, citing *Mollwo March & Co.* v. *Court of Wards*, L. R. 4 P. C. 435: "It appears to be now established that although a right to participate in the profits of a trade is a strong test of partnership, and that there may be cases where, from such perception alone, it may, as a presumption, not of law but of fact, be inferred; yet that whether that relation does or does not exist must depend on the real intention and contract of the parties." Statutory rules to determine the existence of partnership are given 53 & 54 Vict. c. 39, s. 2.

[5] *Pooley* v. *Driver*, 5 Ch. D. 474. As to right of action *inter se*, Parsons, Partnership (2nd ed.), 288

illustrated by decided cases in English law. Hence the rules of the civil law must be our guide.[1]

Principle of liability in the Civil law.

The general principle of liability is thus treated: *Socius socio etiam culpæ nomine tenetur, id est desidiæ, atque negligentiæ. Culpa autem non ad exactissimam diligentiam dirigenda est; sufficit etenim talem diligentiam communibus rebus adhibere, qualem suis rebus adhibere solet; quia qui parum diligentem sibi socium adquirit, de se queri debet.*[2] Or, as it is otherwise stated, the partner must show "*diligentia quam suis rebus adhibere solet*, or *diligentia quam suis*";[3] but *In societatis contractibus fides exuberet.*[4]

Case of partners an exception to the ordinary rule.

Partners, accordingly, are "not always obliged to use that middle kind of diligence which prudent men employ in their own affairs";[5] they are secure if they act in the partnership affairs as they would do in their own; so that if a partner fall into error in management from want of a larger share of prudence and skill than he was truly master of, he is not liable for the consequences; for the partners are themselves to blame in not making choice of an associate of greater abilities, and can recover only for the consequences of gross faults.[6]

Not responsible for *damna fatalia*.

It follows that partners are not responsible for *damna fatalia*[7]—accidents, as, for example, robbery or fire; but they are liable for thefts, as any other bailees would be.[8] Where a partner is engaged in partnership business, and is thereby exposed to loss, he is entitled to recoupment from the partnership funds; and the opinion of Julian was generally accepted, that, if a partner sustained injury in defending the partnership goods, the partnership should pay the doctor's bill.[9]

These principles, having their basis in universal jurisprudence, are, with certain modifications to be noticed in order, operative also in the law of England.[10]

The rights and obligations of partners *inter se* are very usually indicated by the agreement of partnership or are deducible from it.[11] They may be varied by the consent of all the partners, or a variation may be inferred from a course of dealing.[12]

Inattention to business through illness is no breach of an agreement to attend to it.[13]

A failure to deal honestly is a flagrant breach of the duty of a partner; so that where a man was convicted by a magistrate of travelling

[1] D. 17, 2, Pro Socio; Moyle, Just. Inst. 3, 25; Hunter, Roman Law (3rd ed.), 516–524.

[2] Dig. 17, 2, 72.

[3] Wharton, Negligence, § 54.

[4] Code 4, 37, 3.

[5] Erskine, Inst. 3, 3, 21.

[6] *Utrum ergo tantum dolum, an etiam culpam præstare socium oporteat, quæritur? Et Celsus libro septimo digestorum ita scripsit: Socios inter se dolum et culpam præstare oportet. Si in coëunda societate, inquit, artem operamve pollicitus est alter, veluti cum pecus in commune pascendum, aut agrum politori damus in commune quærendis fructibus; nimirum ibi etiam culpa præstanda est; pretium enim operæ artis est vectigal. Quod si rei communi socius nocuit, magis admittit, culpam quoque venire:* Dig. 17, 2, 52, § 2. The extract from Ulpian in D. 13, 6, 5, places the husband and partner in the same category with the vendor, vendee hirer, letter, &c. This identity is adopted by Sir William Jones, but Mr. Poste in his edition of Gaius (1st ed.), 397, regards it as a mistake. Mr. Poste omits the criticism in his third edition. Cp. *Ambler* v. *Whipple*, 20 Wall. (U. S.) 546, where defendant entered into partnership with (552) "a man of genius" but "of intemperate habits." See the Partnership Act, 1890 (53 & 54 Vict. c. 39), ss. 19, 24.

[7] *Ante*, 871.

[8] Dig. 17, 2, 52, § 3: *Damna quæ imprudentibus accidunt, hoc est, damna fatalia, socii non cogentur præstare;* that is, *si nihil dolo aut culpa acciderit.*

[9] *Quod medicis pro se datum est, recipere potest*: Dig. 17, 2, 61.

[10] Wharton, Negligence, § 740; Erskine, 3, 3, 21.

[11] *Smith* v. *Jeyes*, 4 Beav. 595; *Crawshay* v. *Collins*, 15 Ves.' 218, 226.

[12] 53 & 54 Vict. c. 39, s. 9. *In re Frank Mills Mining Co.*, 23 Ch. D., per Jessel, M.R., 56.

[13] *Boast* v. *Firth*, L. R. 4 C. P. 1.

on a railway without a ticket with intent to avoid payment of the fare his expulsion from his firm was held justified.[1]

The mutual confidence between partners determines the amount of care that is to be applied to the partnership affairs.

The rule of diligence to which the partners must conform where personal confidence is the foundation of the contract and there is no specific agreement in point, is determined by the circumstances of that confidence. If this rule is inapplicable the test is what Erskine terms "that middle kind of diligence which prudent men employ in their own affairs"; but where the diligence required is not personal, the test is the *diligentia diligentis*. The case of partnership where the personality of the partner is the basis of the relationship, differs from other cases in this: that the accused partner may discharge himself by showing that his partnership actions are governed by identical principles with those prevailing in his private business; that he acted in accordance with what a reasonable anticipation of his methods of action would have forecast: *Quia qui parum diligentem sibi socium adquirit de se queri debet.* A joint owner, on the other hand, cannot discharge himself of his responsibility in case of the loss of the subject of the joint ownership by showing that he has bestowed on it the same care which he bestows on his separate property; he is bound to show that he took the care which men ordinarily take of their property.[2] It may, however, be shown that the partner charged with negligence is a person of extraordinary skill and care and selected on this account; then the lack of the application of these qualities will warrant holding him liable for his default.[3]

This is the distinction marked in the Roman law by the phrases *culpa in concreto*, that is, negligence in the individual, opposed to *culpa in abstracto*, negligence generally, apart from the idiosyncrasies of the individual.

Good faith required in a partner.

Good faith is required in a partner as well as diligence. A partner may not divert the partnership funds to any purpose foreign to the scope of business. If a partner is guilty of gross negligence, unskilfulness, fraud, or wanton misconduct in the course of the partnership business, he is ordinarily responsible to the other partners for all losses and damages sustained thereby; and in the event of a sale of a share by one partner to another, disclosure of all material facts known by one must be communicated to the other.[4]

Rule of liability with regard to third persons.

As regards the outside world, the partners, apart from express notice, are liable for the acts of each other, or of the agents of the partnership, on the ordinary principles of the law—that is, when they are acting within the scope of the partnership affairs or in the interest of the partnership.[5]

[1] *Carmichael* v. *Evans*, [1904] 1 Ch. 486.

[2] *Guillot* v. *Dossat* (1816), 4 Martin (La.), 203, where the principles of the Civil Law are examined.

[3] *Ante*, 1157 *et seqq.*

[4] *Law* v. *Law*, [1905] 1 Ch. 140; *Maddeford* v. *Austwick*, 1 Sim. 89; Story, Partnership, §§ 169, 173; Pothier, Traité du Contrat de Société, n. 133, where the case of partners having a carriage in common is put, which each is to have equal opportunity of using in turn.

[5] *Bank of Australasia* v. *Breillat*, 6 Moo. P. C. C. 193; *Bayley* v. *Manchester, Sheffield, and Lincolnshire Ry. Co.*, L. R. 8 C. P. 148; *Morcton* v. *Hardern*, 4 B. & C. 223, a case of partners of a coach liable for the negligence of one of their number—the wrongdoer in trespass, the co-partners in case; 3 Kent, Comm. 46; *Stead* v. *Lester*, 3 C. P. D. 121, joint interest in a ship. The contracts of partners are at law joint contracts, *Kendall* v. *Hamilton*, 4 App. Cas. 504. With what Lord Cairns, C., says at 517, compare per Marshall, C.J., in *Barry* v. *Foyles*, 1 Peters (U. S.), 311, 317: "The principle is that a contract made by co-partners is several, as well as joint, and the *assumpsit* is made by all, and by each. It is obligatory on all, and on each of

James, V.C.'s, summary of the law.

The principle was pithily expressed by James, V.C., in *Dundonald (Earl of)* v. *Masterman*:[1] "All the profits arising from the transaction by him [a partner] of the plaintiff's business resulted to the firm; and the firm must bear the expense of any miscarriage by him, whether by negligence or dishonesty, in the conduct of the business."

But in this connection Lord Lindley's principle[2] must be kept in view: "a fraud committed by a partner while acting on his own separate account is not imputable to the firm, although he had not been connected with the firm he might not have been in a position to commit the fraud."[3]

Documents in possession of co-partner.

It is not negligence to leave documents in the possession of a co-partner;[4] while on the dissolution of a partnership by death, the fact of continuing money in the hands of the survivors is evidence of a transfer of credit from the old to the new partnership, which, other things being the same, increases in probative weight in proportion to the time allowed to elapse without a change being suggested.[5] Partners should keep proper accounts and every presumption is made against those to whose negligence or misconduct the failure to produce them is due.[6]

By sec. 28 of the Partnership Act, 1890,[7] partners are bound to render true accounts and to give full information of all things affecting the partnership to any partner or his legal representatives.

Directors of Companies.

Limited liability companies.

The Companies Acts,[8] with their various amending and regulating

the partners." But see *Mason* v. *Ehlred*, 6 Wall. (U. S.) 231. See the Partnership Act, 1890 (53 & 54 Vict. c. 39), s. 9; for the liability of a firm for wrongs, see secs. 10–12; for the procedure against partnership property for a partner's separate judgment debt, see sec. 23. If a bill of exchange be drawn by one partner in the name of the firm, and within the scope of the partnership, or if a bill drawn on the firm by their usual name and style be accepted by one of the partners, all the partners are bound: *Le Roy, Bayard & Co.* v. *Johnson*, 2 Peters (U. S.), 186, 197. As to the scope of a partnership which admits of the drawing of bills of exchange, *Kinsler* v. *Bullitt*, 22 How. (U. S.) 256. For the case of a partner drawing notes in the name of the firm payable to himself and indorsing them to a third party for a personal and not a partnership consideration, *Smyth* v. *Strader*, 4 How (U. S.) 404. See the Partnership Act, 1890 (53 & 54 Vict. c. 39), ss. 5, 6, and 7. In equity the creditor of a firm has a concurrent remedy against the estate of a deceased partner, *Beckett* v. *Ramsdale*, 31 Ch. D. 177, where *Kendall* v. *Hamilton* is discussed and explained by Bowen, L.J., at 188; *Seager* v. *Goodwin*, 36 L. J. Ch. 578. *Ante*, 173. Time under the Statute of Limitations only begins to run against a partner from an act of exclusion, *Burton* v. *North Staffordshire Ry. Co.*, 38 Ch. D. 458. *In re Severn and Wye and Severn Bridge Ry. Co.*, [1896] 1 Ch. 559.

[1] L. R. 7 Eq. 517.

[2] Lindley, Partnership (7th ed.), 189.

[3] *Tredway Hundred Waterworks Co.* v. *Jones*, [1903] 2 Ch. 615; 53 & 54 Vict. c. 39 s. 11. *Thomas* v. *Atherton*, 10 Ch. D. 185, is the case of a loss arising from gross negligence of one partner, for damages in respect of which he was held disentitled to obtain contributions from the other partners.

[4] *Cotton* v. *Eastern Counties Ry. Co.*, 1 J. & H. 243; *Johnston* v. *Renton*, L. R. 9 Eq. 181; *Carnegie* v. *Bulred*, L. R. 9 Ch. 79, where the rule holding that if a person is in possession of property, notice of the title under which he is in possession must be attributed to every one who deals with that property, in *Daniels* v. *Davison*, 16 Ves. 249, is extended and applied.

[5] *Arguendo*, *Dynyates* v. *Noble*, 1 Meriv. 551; *Knox* v. *Gye*, L. R. 5 H. L. 656; *Friend* v. *Young*, [1897] 2 Ch. 421.

[6] Lindley, Partnership (7th ed.), 439.

[7] 53 & 54 Vict. c. 39; while s. 24 (9) gives a right to copy books. *Trego* v. *Hunt*, [1896] A. C. 7, 26.

[8] 25 & 26 Vict. c. 89; 30 & 31 Vict. c. 131. Sec. 38 of this latter Act was applicable only for the protection of shareholders, and did not create a statutory duty towards bondholders of the company or others: *Cornell* v. *Hay*, L. R. 8 C. P. 328. *Sullivan* v. *Metcalfe*, 5 C. P. D. 455, is also on the construction of this section, which is repealed by sec. 33 of 63 & 64 Vict. c. 48, and the much more detailed provisions of sec. 10

Acts,[1] have constituted another species of partnership than that existing at common law, with different relations and responsibilities.

Managed by directors.

The business of a company incorporated under the Companies Acts, whether with limited or unlimited liability, is managed by the directors, subject to certain control by a general meeting of the shareholders;[2] with the proviso that no regulation made by a general meeting shall invalidate any prior act of the directors which would have been valid if such regulation had not been made.[3]

Definition of directors.

Directors, said Jessel, M.R.,[4] "are really commercial men managing a trading company for the benefit of themselves and of all the other shareholders in it"; nevertheless since their powers are the creation of statutes, the sole tests of the limitations of their action are the statutes by which they are empowered. Thus it is not accurate to describe them by any one term connoting recognised and limited incidents at common law; for they are affected by other principles importing other relations; and it is essential to bear in mind, when using terms indicating the powers of directors under the Companies Acts, "that such expressions are used, not as exhaustive of the powers or responsibilities of those persons, but only as indicating useful points of view from which they may for the moment and for the particular purpose be considered."[5]

Directors' liability considered;

Directors' liability may be looked at in two aspects:

I. As the directors act for their company in the prosecution of the purposes of its incorporation as a trading concern; and

II. As the directors act on behalf of the shareholders, and have possession of assets for distribution amongst the shareholders.

I. As directors act for their company.

I. As the directors act for their company in the prosecution of the purpose of its incorporation as a trading concern.

Position of directors of a company considered by Cairns, L.J.

Their position is that of agents at common law, and the company is their principal.[6] "What," says Cairns, L.J., in *Ferguson* v. *Wilson*,[7] "is the position of directors of a public company? They are mere agents of a company. The company itself cannot act in its own person, for it has no person; it can only act through directors, and the case is, as regards those directors, merely the ordinary case of principal and agent. Wherever an agent is liable these directors

as to particulars of prospectus are enacted in its place (*post*, 1226), but omitting the provision that a director issuing a prospectus wanting the particulars specified should be "deemed to be fraudulent": *Shepheard* v. *Broome*, [1904] A. C. 342; *Macleay* v. *Tait*, [1906] A. C. 24.

[1] 33 & 34 Vict. c. 104; 40 & 41 Vict. c. 26; 42 & 43 Vict. c. 76; 43 Vict. c. 19; 46 & 47 Vict. c. 30; 47 & 48 Vict. c. 56; 49 & 50 Vict. c. 23; 51 & 52 Vict. c. 48; 52 & 53 Vict. c. 37; 53 & 54 Vict. cc. 62, 63, 64; 54 & 55 Vict. c. 43; 55 & 56 Vict. c. 36; 56 & 57 Vict. c. 58; 61 & 62 Vict. c. 26; 63 & 64 Vict. c. 48.

[2] 25 & 26 Vict. c. 89, First Sched. art. 55. "A joint-stock company is not an agreement between a number of persons that they will be co-partners, but is an agreement between the owners of shares or the owners of "stock" to "continue an association together, sharing profits and bearing losses": *Baird's case*, L. R. 5 Ch., per James, L.J., 734.

[3] *Isle of Wight Ry. Co.* v. *Tahourdin*, 25 Ch. D. 330.

[4] *In re Forest of Dean Coal Mining Co.*, 10 Ch. D. 452.

[5] Per Bowen, L.J., *Imperial Hydropathic Hotel Co., Blackpool* v. *Hampson*, 23 Ch. D. 12. Brett, L.J., discusses this in *Wilson* v. *Lord Bury*, 5 Q. B. D. 528; cp. *In re Barney, Barney* v. *Barney*, [1892] 2 Ch. 265.

[6] *Briggs* v. *Spaulding*, 141 U. S. (34 Davis) 132, 147: "the relation is that of contract and not of trust."

[7] L. R. 2 Ch. 89. *The National Exchange Co. of Glasgow* v. *Drew*, 2 Macq. (H. L. Sc.) 103, contains a full discussion by the House of Lords of the position of the directors of a company, holding that when a report presented by directors is adopted by the general meeting of a company, though the original statements contained may be *ultra vires*, yet as against outsiders the representations contained in it may become binding on the company.

would be liable; where the liability would attach to the principal, and the principal only, the liability is the liability of the company."

Rule fixing the liability for negligence.

The negligence which imposes liability in the case of directors acting as agents in matters reasonably necessary for the management of the company [1] is to be ascertained by applying the general rule: a man who acts as director in any matter thereby *primâ facie* impliedly undertakes that he has reasonable skill and ordinary diligence fit for the business in which he engages; if he fails of this amount of skill and diligence he is liable;[2] yet he has a discretion to take measures to preserve or increase the customers.[3]

Judgment in *Percy* v. *Millaudon*.

"It is not contemplated," says the Supreme Court of Louisiana,[4] "that they (directors) should devote their whole time and attention to the institution to which they are appointed, and guard it from injury by constant superintendence. Other officers, on whom compensation is bestowed for the employment of their time in the affairs of the bank" (company) "have the immediate management. In relation to these officers, the duties of directors are those of control, and the neglect which would render them responsible for not exercising that control properly must depend on circumstances, and in a great measure be tested by the facts of the case. If nothing has come to their knowledge to awaken suspicion of the fidelity of the president and cashier, ordinary attention to the affairs of the institution is sufficient. If they become acquainted with any fact calculated to put prudent men on their guard, a degree of care commensurate with the evil to be avoided is required, and a want of that care certainly makes them responsible."[5]

The case of a director of a company is distinguishable from that of a partner by the absence *primâ facie* of the element of personal skill or knowledge; there is no personal knowledge or confidence involved in it unless in exceptional cases.

Standard of duty.

The standard of duty is that which a business man capable of acting in the particular directorship would be expected to show. The absence of this Wharton[6] terms *culpa levis*—that is, not showing the diligence a good director should; but Brett, L.J., in *Wilson* v. *Lord Bury*,[7] speaking of "the neglect of taking the same care which a person of ordinary prudence and skill would take of his own similar affairs," regards the term "gross negligence" as not inapplicable to describe it.

Brett, L.J., in *Wilson* v. *Lord Bury*.

1 *A.-G.* v. *G. E. Ry. Co.*, 11 Ch. D., per James, L.J., 480.

2 Story, Agency (9th ed.), §§ 183, 184.

3 *Taunton* v. *Royal Insurance Co.*, 2 H. & M. 135.

4 *Percy* v. *Millaudon* (1829), 8 Mart. N. S. (La.) 68, 75. The passage cited in the text is set out in Story, Bailments, § 173. See also §§ 186, 186 *a*. As to the case cited, Story observes, Bailments, § 186 *b*: "How far similar doctrines will be adopted in Courts sitting under the jurisprudence of the common law remains for future discussion in those Courts, as I am not aware that the question has as yet been litigated therein. But there can be little doubt that these doctrines are just conclusions from the general law of mandates." The conclusion of the passage extracted in the text from the judgment in *Percy* v. *Millaudon*, at 78, is: "The test of responsibility therefore should be, not the certainty of wisdom in others, but the possession of ordinary knowledge; and by showing that the error of the agent is of so gross a kind that a man of common sense and ordinary attention would not have fallen into it. The rule which fixes responsibility, because men of unerring sagacity are supposed to exist, and would have been found by the principal, appears to us essentially erroneous." See per Fuller, C.J., *Briggs* v. *Spaulding*, 141 U. S. (34 Davis) 132.

5 Cp. *United Society of Shakers* v. *Underwood*, 9 Bush (Ky.) 609. United States Digest, 1875, Banking, 25, where, says Dr. Bigelow, L. C. on Torts, 618, "the English rule has been virtually rejected."

6 Negligence, § 510.

7 5 Q. B. D. 528.

Here again there recurs the almost inextricable confusion wrought in the endeavour to discriminate degrees of negligence. Taking the division of the civil law of negligence into *culpa lata* and *culpa levis*, and adopting the view that this division corresponds with the distinction between the lack of diligence of an ordinary person and the lack of diligence of an expert, another ground of confusion suggests itself. Lack of diligence by an expert is not measured by the same standard in all cases. The test of accountability varies with the particular pretensions advanced. This we have already seen in the case of medical men and solicitors.[1] To discriminate the larger from the lesser degree of accountability, the term *crassa negligentia* (disregarding its possible ambiguity) may be applied to signify the neglect of a person of ordinary prudence and skill as distinguished from that other degree of negligence which affixes liability where the exercise of a special skill is undertaken.[2] Common.

Admitting this distinction, a director is liable if he do that which a man of ordinary prudence in his own affairs would not do; he is not liable if he acts in good faith, and with proper care, and with a reasonable, even if not a high, degree of skill.[3] As Lord Hatherley, C., states the law in *Land Company of Ireland* v. *Lord Fermoy*:[4] "What-ever may be the case with a trustee, a director cannot be held liable for being defrauded; to do so would make his position intolerable." Distinction between the liability of a director and the liability of a trustee.

In *In re Railway and General Light Improvement Co., Marzetti's case*,[5] both before the Master of the Rolls and in the Court of Appeal, these principles are accepted. "It is said," said Jessel, M.R.,[6] "he [a director who authorised a payment without inquiry, which proved to be one incurred in fraudulently raising the price of the company's shares in the market] is not liable, because he is an honest man. I have heard nothing against him to show that there was more than negligence or carelessness on his part, but still he is liable. He is not to pay away other people's money without knowing what he pays it for. If he does, he must take the consequences."[7] In the Court of Appeal, James, L.J., said:[8] "A director should not be held liable upon any very strict rules, such as those, in my opinion, too strict rules which were laid down by the Court of Chancery to make unfortunate trustees liable; directors are not to be made liable on those strict rules which have been applied to trustees. But they must show something like reasonable diligence. It would be impossible that any man managing his own affairs would make such a payment as this without any real or effective inquiry." The purpose of this is plainly confined to those cases where directors are acting as agents for the company and in their relation to the company in their capacity of agents." *Marzetti's case*. Judgment of Jessel, M.R., and of James, L.J., in the Court of Appeal.

[1] *Ante*, 1156 and 1182.

[2] *Ante*, 36.

[3] *Hodges* v. *New England Screw Co.*, 1 R. I. 312, cited Bigelow, L. C. on Torts, 619; 3 R. I. 9. See *Dodge* v. *Woolsey*, 18 How. (U. S.) 331, 343. For powers of directors, Thompson, Corporations, § 3987 *et seqq.*; for liabilities, *id.* § 4039 *et seqq.*

[4] L. R. 5 Ch. 772.

[5] 42 L. T. 206, 28 W. R. 541. See *Sheffield and South Yorkshire Permanent Building Society* v. *Aizlewood*, 44 Ch. D. 412, 453. Under the Companies (Winding-up) Act, 1890 (53 & 54 Vict. c. 63), s. 10, in *In re New Mashonaland Exploration Co.*, [1892] 3 Ch. 585, Wilkins, J., says: "In order to make the directors liable, you must be able to deny that they did really exercise their judgment and discretion" as agents of the company.

[6] 42 L. T. 208.

[7] Cp. *Joint Stock Discount Co.* v. *Brown*, L. R. 8 Eq. 381; *In re Liverpool Household Stores Association*, 59 L. J. Ch. 616.

[8] 28 W. R. 512.

[9] *Meux's Executors' case*, 2 De G. M. & G. 522, distinguished *In re Denby Provident Gold Mining Co.*, 22 Ch. D. 593.

Laguna Nitrate Co. v. Laguna Syndicate.

In *Laguna Nitrate Co.* v. *Laguna Syndicate*, Lindley, M.R.,[1] says: "If directors act within their powers, if they act with such care as is reasonably to be expected from them, having regard to their knowledge and experience, and if they act honestly for the benefit of the company they represent, they discharge both their equitable as well as their legal duty to the company." "The amount of care to be taken is difficult to define; but it is plain that directors are not liable for all the mistakes they make, although if they had taken more care they might have avoided them." "Their negligence must be, not the omission to take all possible care; it must be more blamable than that: it must be in a business sense culpable or gross."

Dovey v. Cory.

The immunity of directors was expressed in even more liberal terms in the House of Lords in *Dovey* v *Cory*,[2] where a director was held not liable to replace money which had been made away with through his assenting to payments advised by the chairman and general manager of the company: but which statements were misleading and fraudulent. Lord Halsbury says:[3] "I cannot think that it can be expected of a director that he should be watching either the inferior officers of the bank or verifying the calculations of the auditors himself. The business of life could not go on if people could not trust those who are put into a position of trust for the express purpose of attending to details of management. If Mr. Cory was deceived by his own officers—and the theory of his being free from moral fraud assumes under the circumstances that he was—there appears to me to be no case against him at all."

Knowledge required from a director.

Jessel, M.R., in *Hallmark's case*[4] had previously laid down the law to the same effect. "Is knowledge to be imputed to him (a director) under any rule of law? As a matter of fact, no one can suppose that a director of a company knows everything which is entered in the books, and I see no reason why knowledge should be imputed to him which he does not possess in fact. Why should it be his duty to look into the list of shareholders? I know no case except *Ex parte Brown*[5] which shows that it is the duty of a director to look at the entries in any of the books; and it would be extending the doctrine of constructive notice far beyond that or any other case to impute to this director the knowledge which it is sought to impute to him in this case"—*i.e.*, knowledge of the books of the company.

In re Forest of Dean Coal Mining Co.

The same judge in *In re Forest of Dean Coal Mining Co.*[6] had given the caution: "One must be very careful in administering the law of joint-stock companies not to press so hardly on honest directors as to make them liable for these constructive defaults, the only effect of which would be to deter all men of any property, and perhaps all men who have any character to lose, from becoming directors of companies at all." He formulates the principle thus: Directors "are bound no doubt to use reasonable diligence having regard to their position, though probably an ordinary director who only attends at the board occasionally, cannot be expected to devote as much time and attention to the business as the sole managing partner of an ordinary partnership, but they are bound to use fair and reasonable diligence in the management

[1] [1899] 2 Ch. 435.
[2] [1901] A. C. 477.
[3] *Ib.* 486.
[4] 9 Ch. D. 332.
[5] 19 Beav. 97. *See In re Denham*, 25 Ch. D. 752, where Chitty, J., discusses the effect of the issue of documents by directors to shareholders and to the public respectively.
[6] 10 Ch. D. 451. *In re Lands Allotment Co.*, [1894] 1 Ch. 616, 638.

of their company's affairs and to act honestly." [1] "Directors are called trustees. They are no doubt trustees of assets which have come into their hands or which are under their control, but they are not trustees of a debt due to the company;" [2] nor for individual shareholders.[3]

Rule of duty as stated by Harlan, J., in *Martin* v. *Webb*.

Harlan, J., in a banking case in the Supreme Court of the United States, expresses the rule of duty as follows:[4] "Directors cannot, in justice to those who deal with the bank, shut their eyes to what is going on around them. It is their duty to use ordinary diligence in ascertaining the condition of its business, and to exercise reasonable control and supervision of its officers. They have something more to do than, from time to time, to elect the officers of the bank and make declarations of dividends. That which they ought, by proper diligence, to have known as to the general course of business in the bank, they may be presumed to have known in any contest between the corporation and those who are justified by the circumstances in dealing with its officers upon the basis of that course of business." This statement is not perspicuous. Such terms as "ordinary diligence," "reasonable control," and "proper diligence" point to fruitful sources of ambignity. They may perhaps be reduced to the requirement of the diligence of a good average business man, not in the exercise of specialty knowledge.[5]

Briggs v. *Spaulding*.

In the subsequent case of *Briggs* v. *Spaulding*[6] the Supreme Court of the United States was divided five against four, as to the elements required to constitute negligence in a director. The judgment of the majority, which is in accord with the English rule, is thus stated:[7] "The degree of care to which these defendants were bound is that which ordinarily prudent and diligent men would exercise under similar circumstances, and in determining that the restrictions of the statute and the usages of business should be taken into account. What may be negligence in one case may not be want of ordinary care in another, and the question of negligence is, therefore, ultimately a question of fact, to be determined under all the circumstances." Therefore, if a director is ill, it is in the power of the others to give him leave of absence instead of requiring him to resign, and if frauds are committed during his absence he is not responsible. There was, however, a dissentient opinion by four of the judges, the contention of which was that directors may not "abdicate their functions and leave its (their company's) management and the administration of its affairs entirely to executive officers." [8]

Sweatzel v. *Penn Bank*.

In the subsequent case of *Sweatzel* v. *Penn Bank*[9] a bank director was said to be "a gratuitous mandatory" and "only liable for fraud or such gross negligence as amounts to fraud." These expressions are incorrect if they be regarded as postulating actual fraud or asserting a merely gratuitous undertaking. The duty the bank director undertakes is for the mutual benefit of himself and the shareholders; the standard of his duty is that of "ordinary diligence": the care which a business man of the average skill, care and honesty of his class ("fair and reasonable diligence"), and in the circumstances, is wont to give

[1] *L.c.* 452. [2] *L.c.* 453.

[3] *In re Kennard, Kennard* v. *Collins*, 11 Times L. R. 283; *Percival* v. *Wright*, [1902] 2 Ch. 421.

[4] *Martin* v. *Webb*, 110 U. S. (3 Davis), 1, 15.

[5] In *Savings Bank of Louisville* v. *Caperton*, 12 Am. St. R. 188, the liability of bank directors for the defalcations of a cashier was considered.

[6] 141 U. S. (34 Davis) 132; see also *North Hudson Mutual Building and Loan Association* v. *Childs*, 33 Am. St. R. 57.

[7] 141 U. S. (34 Davis) 152.

[8] See per Harlan, J., 169.

[9] 30 Am. St. R. 718.

to the same kind of business, but where only a portion of his attention or skill is contemplated as due.[1]

Overend, Gurney & Co. v. Gurney. Imprudent exercise of directors' powers.

In *Overend, Gurney & Co.* v. *Gurney* [2] an effort was made to charge directors where they had full power to do all they had done, but where acting as agents of the company they had misconducted themselves in purchasing that which it was unwise and imprudent of them to purchase. The business in which they were concerned was "a hazardous business—a business entirely dependent on the prudence and dexterity of those who manage it." [3] "I think," said Lord Hatherley, C.,[4] "that the shareholders must take the consequences of the manner in which their business was conducted by those whom they have trusted to act as their agents. If the question were simply whether they had or had not made a bad or imprudent bargain, that is not a question that could be dealt with in this Court as involving a breach of trust; or, if it were, whether they had failed to secure a good bargain for persons who intrusted the moneys to them for that purpose, that is not the case we have here. The company must take the consequences of having intrusted their moneys to persons of sanguine temperament, who have made a purchase which turns out to be a bad one: but I do not find enough in this case to show me that it is so ridiculous or absurd, or that there has been such *crassa negligentia*, amounting to fraud, as to induce me to hold that the gentleman whose executors are now sought to be impeached had made himself responsible for a breach of trust for which I can hold them liable." The Lord Chancellor's judgment was affirmed by the House of Lords,[5] where Lord Chelmsford, speaking of the acquisition of the business by the directors, which was the ground of the suit against them, said: [6] "They did it, it is admitted, honestly and fairly, and believing that they were doing it in the discharge of their duty, and it seems to me a very strong and unusual thing for a suit to be now instituted to make the directors liable for the loss which has occurred under these circumstances. In fact it amounts to this: an agent (because these directors are really more in the character of agents than of trustees, they are mandatories), an agent being authorised to do an act, which act is in itself an imprudent one, and which the principal ought never to have authorised to be done, is, when the loss is occasioned by his having done the act, to be made liable for it. That certainly is rather a startling proposition."

Judgment of Lord Hatherley, C.

Lord Chelmsford's opinion in the House of Lords.

Turquand v. *Marshall.*

In *Turquand* v. *Marshall* [7] directors made a loan to one of their brother directors, an act which was within the powers of the company's deed. The money was lost; and it was held that the Court could not interfere and make the directors liable. Lord Hatherley, C., states the principle applicable as follows: [8] "They [the directors] were

[1] *Dovey* v. *Cory*, [1901] A. C. 477, 485; *Marzetti's case*, 28 W. R. 541, 543; *In re Forest of Dean Coal Mining Co.*, 10 Ch. D., per Jessel, M.R., 452. *Ante*, 40, 1216.

[2] L. R. 4 Ch. 701. As to acts *ultra vires* see *Cullerne* v. *London and Suburban General Permanent Building Society*, 25 Q. B. D. 485; *Young* v. *Naval Military and Civil Service Co-operative Society of South Africa*, [1905] 1 K. B. 687—directors not entitled to travelling expenses from the company. By the Building Societies Act, 1874 (37 & 38 Vict. c. 42), s. 43: "If any society under this Act receives loans or deposits in excess of the limits prescribed by this Act, the directors or committee of management of such society receiving such loans or deposits on its behalf shall be personally liable for the amount so received in excess." For the scope of this section see *Cross* v. *Fisher*, [1892] 1 Q. B. 467. A similar provision is made in sec. 13, sub-sec. 3 of the Building Societies Act, 1894 (57 & 58 Vict. c. 47). A criminal remedy is given by sec. 15 (2).

[3] L. R. 4 Ch. 715. [4] *L.c.* 720.

[5] L. R. 5 H. L. 480. [6] *L.c.* 501. [7] L. R. 4 Ch. 376. [8] *L.c.* 386.

intrusted with full powers of lending the money, and it was part of the business of the concern to trust people with money, and their trusting to an undue extent was not a matter with which they could be fixed, unless there was something more alleged, as, for instance, that it was done fraudulently and improperly, and not merely by a default of judgment. Whatever may have been the amount lent to anybody, however ridiculous and absurd their conduct may seem, it was the misfortune of the company that they chose such unwise directors; but as long as they kept within the powers of their deed, the Court could not interfere with the discretion exercised by them. If a Bill had been filed to stop their lending money in this way, the Court, on the principle of the case of *Foss* v *Harbottle*,[1] could not have interfered on that ground."

London Financial Association v. Kelk.

In *London Financial Association* v. *Kelk*,[2] Bacon, V.C., says: "Among the multitudinous cases which have been cited in support of the plaintiffs' contention" "there is not one, so far as I know, in which directors of a joint-stock company have been held to be answerable for losses sustained by their mere innocent mistake, nor unless that mistake has been accompanied by some fraudulent or at least suspicious conduct or motive." Honest mistake imposes no liability if it falls short of that want of care which in a business man is gross or culpable.

Distinction between duties of directors and of trustees.

The distinction between the duties of directors as managers of a trading company and those of trustees as managers of a settled estate arises from the different object in view in each case respectively. The funds which form the subject of a settlement are intended to be preserved for the benefit of those who may become entitled to them. The funds embarked in a trading company are, on the other hand, to be employed for the acquisition of gain; and risk is of the essence of the employment. Accordingly, Stirling, J.,[3] regards the law as "settled by such cases as *Overend and Gurney Co.* v. *Gibb*[4] and *Turquand* v. *Marshall*[5] that directors are not to be made liable for loss occasioned by mere imprudence or error of judgment in the exercise of the powers conferred on them."

Opinion of Stirling, J.

Sheffield and South Yorkshire Permanent Building Society v. Aizlewood.

The same learned judge points out the same distinction in *Sheffield and South Yorkshire Permanent Building Society* v. *Aizlewood*.[6] He cites the rule stated by Lord Watson in *Learoyd* v. *Whiteley*:[7] "Business men of ordinary prudence may, and frequently do, select investments which are more or less of a speculative character; but it is the duty of a trustee to confine himself to the class of investments which are permitted by the trust, and likewise to avoid all investments of that class which are attended with hazard." From this he concludes that "Directors are not under an obligation to avoid investments attended with hazard, but may, in the absence of anything to the contrary in the rules or articles of association, act in the same manner as business men of ordinary prudence." The remedy is in the hands of any company that should deem such powers too wide; for "it is competent for the members to frame rules or articles of association so as to impose such restrictions as they may deem advisable." As a concrete instance of the greater liberty accorded to directors than trustees the learned

Directors not bound to avoid hazardous investments.

[1] 2 Hare, 461. Cp. *Macdougall* v. *Gardiner*, L. R. 10 Ch. 606; *Isle of Wight Ry. Co.* v. *Tahourdin*, 25 Ch. D. 320; *Alexander* v. *Automatic Telephone Co.*, [1900] 2 Ch. 56.

[2] 26 Ch. D. 107, 144.

[3] *Leeds Estate Building and Investment Co.* v. *Shepherd*, 36 Ch. D. 798. *Dovey* v. *Cory*, [1901] A. C. 477.

[4] L. R. 5 H. L. 480.

[5] L. R. 4 Ch. 376.

[6] 44 Ch. D. 454.

[7] 12 App. Cas. 733.

judge, later on in his judgment,[1] holds that directors may take second mortgages; since "the risk" (arising from the probable want of means on the part of the mortgagor to pay off the first mortgagee, in the event of the first mortgagee attempting to enforce his right by foreclosure, to the disadvantage of the second mortgagee) "is one which, as it seems to me, a business man of ordinary prudence might be willing to incur."

Chairman of Directors.

The responsibility of a chairman of directors, although he is paid, does not involve the obligation of checking or independently investigating all the company accounts which pass before him. Where the officers of the company are experienced, and, so far as the directors know, trustworthy, the directors are warranted in treating them as such, and are not obliged to a prying suspicion in their dealings with them. If, then, accounts are compiled by such officers or any of them on a system so ingeniously contrived to mislead that they have passed the scrutiny of independent auditors, no case of negligence can be made out against a paid chairman who has failed to detect them. In the case in which this was held[2] the Privy Council considered that the fact of the defendant being remunerated for his services did not strengthen the case against him. "Indeed, the modest scale of his remuneration is scarcely consistent with the idea that he, a man of considerable position, and with a business of his own, was ever expected to give his time and labour to the detailed control of the work of the bank. It is much more consistent with the idea that he was expected to do what he did—that is to say, to devote some two hours a day to the business of the bank, two hours largely taken up by official interviews."[3]

Liability of directors signing cheques.

Judgment of James, V.C., in *Joint Stock Discount Co.* v. *Brown*.

The duty attaching to directors who sign cheques on behalf of their company has been the subject of some extremely forcible remarks by James, V.C.[4] After observing on the contention that signing cheques for a company is to be treated as a mere ministerial act, the Vice-Chancellor continues: "A company for its own protection against the misapplication of its funds requires that cheques should be signed by certain persons. Of course it is quite clear that no company of this kind could be carried on if every director were obliged to sign every cheque, and it is therefore required that the cheques should be signed by a certain number of persons for the safety of the company. That implies, of course, that every one of those persons takes care to inform himself, or, if he does not take care to inform himself, is willing to take the risk of not doing so, of the purpose for which and the authority under which the cheque is signed; and I cannot allow it to be said for a moment that a man signing a cheque can say 'I signed that cheque as a mere matter of form; the secretary brought it to me; a director signed it before me; two clerks have countersigned it; I merely put my name to it.' Most of us have been obliged to trust in the course of our lives to a great number of persons when we have had to sign deeds and things of that kind; but if we trust, of course we must take the consequences of our so trusting." Yet in view of what has gone before, the duty here prescribed is a little too exacting.[5]

II. As the directors act for their shareholders.

If. As the directors act on behalf of the *shareholders* as distinguished from the *company*, and have possession of assets for distribution amongst the shareholders.

[1] 44 Ch. D. 459.
[2] *Prefontaine* v. *Grenier*, [1907] A. C. 101.
[3] *L.c.* 110. Cp. *Dixon* v. *Kennaway*, [1900] 1 Ch. 833.
[4] *Joint Stock Discount Co.* v. *Brown*, L. R. 8 Eq. 404.
[5] *Ante*, 1216.

This aspect of a director's duties is noticed by Lord Selborne, C., in *G. E. Ry. Co.* v. *Turner*,[1] where he says: "Directors are the mere trustees or agents of the company—trustees of the company's money and property—agents in the transactions which they enter into on behalf of the company." Yet there is a wide distinction between the liability of directors to their shareholders for acts respectively *intra* and *ultra vires*. Description by Lord Selborne, C.

If the act charged against the directors is so outside the powers of the company that the company could not sanction the outlay, the directors may be made personally liable as trustees;[2] for they cannot be justly said to be forwarding the purposes of the common venture, but rather to be misapplying funds with which they are entrusted. Acts *ultra vires*.

If the act charged against the directors is one within the powers of the company, they are not liable; unless it is of "a character so plain, so manifest, and so simple of appreciation that no men with any ordinary degree of prudence, acting on their own behalf, would have entered into such a transaction as they entered into."[3] Acts *intra vires*.

In *Flitcroft's case*[4] the principal ground of decision was indeed that payment of dividends had been made out of capital, and that as such payments were *ultra vires*, they affected the directors with a liability which shareholders as a body could not assume to themselves; the principle was also involved of the act of the directors being a breach of trust against which the protection of the Statute of Limitations was unavailing; but it also shows that a different rule is to be applied to the acts of the directors as agents for carrying out the purposes of the incorporation with the outside world and the acts of the directors as between them and the shareholders as depositaries of the realised property of the concern.[5] *Flitcroft's case*.

But sec. 8 of the Trustee Act, 1888,[6] enables directors where they are trustees to plead the Statute of Limitations, if nothing of the nature of fraud is involved in the transaction. Yet directors are not strictly trustees, except in certain only of the relations that they occupy.[7]

Kay, J., in *In re Oxford Benefit Building and Investment Society*[8] held it settled law: Summary of the law by Kay, J.

(1) That directors are *quasi*-trustees of the capital of the company;

[1] L. R. 8 Ch. 152. *Percival* v. *Wright*, [1902] 2 Ch. 421.

[2] *Sheffield and South Yorkshire Permanent Building Society* v. *Aizlewood*, 44 Ch. D. 452; *In re Faure Electric Accumulator Co.*, 40 Ch. D. 141; *Land Credit Co. of Ireland* v. *Lord Fermoy*, L. R. 8 Eq. 7; L. R. 5 Ch. 763; *Grimes* v. *Harrison*, 26 Beav. 435. Cp. *In re Lands Allotment Co.*, [1894] 1 Ch. 616; *Young* v. *Naval, &c. Society of South Africa*, [1905] 1 K. B. 687.

[3] *Overend and Gurney Co.* v. *Gibb*, L. R. 5 H. L. 487.

[4] 21 Ch. D. 519. Cp. *Verner* v. *General and Commercial Investment Trust*, [1894] 2 Ch. 239; *In re Kingston Cotton Mill Co.* (No. 2), [1896] 1 Ch. 331.

[5] *In re Sharpe, Masonic and General Life Assurance Co.* v. *Sharpe*, [1892] 1 Ch. 167: per Lindley, L.J.: "The liability of a director . . . being treated as a breach of trust, I apprehend that the Statute of Limitations would not apply even after a director had ceased to be a director."

[6] 51 & 52 Vict. c. 59.

[7] *In re the Lands Allotment Co.*, [1894] 1 Ch. 616, where it was held, per Lindley, L.J., 631, that, "although directors are not, properly speaking, trustees, yet they have always been considered and treated as trustees of money which comes to their hands or which is actually under their control; and ever since joint-stock companies were invented, directors have been held liable to make good moneys which they have misapplied, upon the same footing as if they were trustees, and it has always been held that they are not entitled to the benefit of the old Statute of Limitations because they have committed breaches of trust, and are in respect of such moneys to be treated as trustees." See Lord Westbury in *Knox* v. *Gye*, L. R. 5 H. L. 675, on ambiguities in the use of the word "trustee" and the looseness with which it is frequently used; and Swinfen Eady, J., *Percival* v. *Wright*, [1902] 2 Ch. 425.

[8] 35 Ch. D. 509. *Leeds Estate Building and Investment Co.* v. *Shepherd*, 36 Ch. D. 787, 799

(2) That directors who improperly pay dividends out of capital are liable to repay such dividends personally, upon the company being wound up.[1]

To this head of acting on behalf of the *shareholders* as distinguished from the *company* must also be referred the case, described by Cairns, L.J.,[2] "where a shareholder files a bill against the company and against the directors, treating the directors as his trustees, which in point of law they are, and seeking redress against them for a breach of trust." The shareholder who files the bill in fact alleges "that the company has done no wrong whatever, that it is the executive which has committed the wrong, and they—the shareholders—file the bill to protect, as it were, the company from the unlawful acts of the directors. There the directors, being in the position of trustees, are of course liable."

Directors holding a fiduciary capacity.

Where directors stand in a fiduciary relation to other parties they become disentitled to occupy any position which will conflict with the interest of those they represent, and whom they are bound to protect. Consequently they cannot, as agents or trustees, enter into or authorise contracts on behalf of those for whom they are appointed to act, so as to receive any benefit special to themselves and not partaken in by their shareholders.[3]

Cullerne v. *London and Suburban General Permanent Building Society.*

In *Cullerne* v. *London and Suburban General Permanent Building Society*,[4] the plaintiff, a director of the defendant company, concurred with the other directors in passing a resolution authorising advances to members on the security of their shares. In accordance with the resolution an advance was made to a member, which resulted in a loss, but the plaintiff was not present and did not concur in the advance. In an action brought by the plaintiff the other directors counterclaimed in respect of the loss they had incurred, on the ground that the advance was *ultra vires*, and was attributable to the illegal resolution which authorised such advances. The Court of Appeal disallowed the counterclaim, pointing out that if the resolution alone had been passed nothing would have happened; since the loss arose from a new wrongful act by independent persons. The plaintiff ought not to have passed the resolutions, and his co-directors ought not to have acted on them. "I am not aware of any authority," said Lindley, L.J.,[5] "which goes the length of deciding that under these circumstances the plaintiff is liable for what they have done.

[1] *Evans* v. *Coventry*, 8 De G. M. & G. 835; *Joint Stock Discount Co.* v. *Brown*, L. R. 8 Eq. 381; *Salisbury* v. *Metropolitan Ry. Co.*, 22 L. T. (N. S.) 839; *Leeds Estate Building and Investment Co.* v. *Shepherd*, 36 Ch. D. 787; distinguished *In re Cawley & Co.*, 42 Ch. D. 209; *In re National Funds Assurance Co.*, 10 Ch. D. 118; *Studdert* v. *Grosvenor*, 33 Ch. D. 528, overruled on one point, *Peel* v. *L. & N. W. Ry. Co.*, [1907] 1 Ch. 5.

[2] *Ferguson* v. *Wilson*, L. R. 2 Ch. 90.

[3] *In re Faure Electric Accumulator Co.*, 40 Ch. D. 141, as limited by *Metropolitan Coal Consumers' Association* v. *Scrimgeour*, [1895] 2 Q. B. 604, 608; *York and North Midland Ry. Co.* v. *Hudson*, 16 Beav. 485; *Benson* v. *Heathorn*, 1 Y. & C. (Ch.) 326; *Wardell* v. *Rd. Co.*, 103 U. S. (13 Otto), 651. See also *In re Lands Allotment Co.*, [1894] 1 Ch. 616.

[4] 25 Q. B. D. 485. Reliance was placed by the plaintiff in *Cullerne's case* on the judgment of Wickens, V.C., in *Pickering* v. *Stephenson*, L. R. 14 Eq. 322; followed by Kay, J., in *Studdert* v. *Grosvenor*, 33 Ch. D. 528, and as to which Lindley, L.J., says, at 490: "I never could understand that part of the V.C.'s judgment, nor can I understand it now. I think he was wrong." The part alluded to was that which held that approval by a majority of a company of acts *ultra vires* can avail as a defence to an action to charge them for so acting. See *In re Sharpe, Masonic and General Life Assurance Co.* v. *Sharpe*, [1892] 1 Ch. 154, 165.

[5] 25 Q. B. D. 489.

They were not his servants or agents; their authority was as great as his; their knowledge the same as his; and, even assuming that he misled them upon a point of law, this does not make him liable to the society for the loss of money which they advanced, and not he."

Liability of directors under the analogy of trustees.

The liability of directors under the analogy of trustees has been summarised [1] under, amongst others, the following heads:

(1) Those directors are liable who –

(*a*) are directly implicated in the wrongful act;

(*b*) have notice of it, and do not interfere to prevent it; [2] and

(*c*) having notice, and objecting, do not take active steps to prevent it.[3]

(2) Those directors who join the board after the commission of a breach of trust (if at all liable),[4] are liable for the extra loss occasioned by their inaction.[5]

(3) Those directors who have no notice of breach of trust are not liable for the acts of their co-directors.[6]

Distinction between the acts of directors acting on behalf of the company with regard to third persons and when acting for the shareholders in a fiduciary capacity.

"A prospectus," says Chitty, J.,[7] "purports to be issued by all the directors whose names appear on the face of it; and it may well be that an ignorant director who has not really been personally engaged in issuing the prospectus is bound on the ground of his ratification; and such ratification may, when circumstances justify it, be inferred from his abstaining from taking any steps to inform the public that he was not a party to issuing the prospectus. But the report of directors at a general meeting is issued under the powers of the articles, and is generally, as it certainly was here, made by the Board acting as such. The shareholders in this company knew, or must be deemed to have known, the provisions of the articles that two directors were to be a quorum, and therefore they were not justified, in my opinion, in accepting the report as the act of all the directors." Thus the directors' liability as trustees is in that particular not only narrower than that of a private trustee, but narrower than the liability of the directors as agents; for they are only liable according to the articles of association; which circumscribe what would otherwise be the general liability of trustees; while their liability as agents is fixed by the incidents which the common law attaches in the case of dealings with third persons. On the other hand, a director who permits the use of his name and neglects to attend to his duties may be bound by acts which he neither investigates nor repudiates.

[1] Healey, Law and Practice of Joint Stock Companies (3rd ed.), 150.

[2] *In re Grant*, 7 Moo. P. C. C. 141.

[3] *Joint Stock Discount Co.* v. *Brown*, L. R. 8 Eq. 381; per Fry, L.J., *Cargill* v. *Bower*, 10 Ch. D. 514; *Cross* v. *Fisher*, [1892] 1 Q. B., per Lord Halsbury, C., 476; *Jackson* v. *Munster Bank*, 15 L. R. Ir. 356, 362: "It was his [a director's] bounden duty to have gone at once into an investigation of these transactions, and to have put a stop to them."

[4] "I am not aware of any authority which goes the length of saying that a director who is not a party to any misapplication of a company's funds is liable for not taking legal proceedings to upset the transaction *after the thing is done*, and I do not think it would be in accordance with the principles applicable to these cases if we were now first to make a precedent of that kind": per Lindley, L.J., *In re Lands Allotment Co.*, [1894] 1 Ch. 635.

[5] *Turquand* v. *Marshall*, L. R. 4 Ch. 376, where the Scottish cases to the contrary are cited; *In re Forest of Dean Coal Mining Co.*, 10 Ch. D. 450. Cp. *Boardman* v. *Mosman*, 1 Bro. C. C. 68; *Walker* v. *Symonds*, 3 Swanst. 1, 41.

[6] *Dovey* v. *Cory*, [1901] A. C. 477; *In re Denham & Co.*, 25 Ch. D. 752; *In re Montrose Asphalte Co., Perry's case*, 54 L. T. (N. S.) 716; *Townley* v. *Sherborne*, 2 White & Tudor, L. C. Equity (6th ed.), 1018 *note*, How far persons are liable for the Acts or Defaults of Co-trustees and Co-executors.

[7] *In re Denham & Co.*, 25 Ch. D. 765.

Joint and several liability of directors.

(4) Those directors who are jointly implicated in a breach of trust are, as a rule, jointly and severally liable to the company in respect of it; but if the results are separable, then each is liable for his own acts and defaults alone.[1] Furthermore, it has been held that directors, who herein differ from trustees, are not liable for mere nonfeasance, "without fraud and without dishonesty," in omitting to take proceedings to enforce a claim belonging to the company;[2] though to render them liable it is not necessary that they should derive benefit, or even contemplate benefit, from the transaction complained of.[3]

(5) Contribution may be ordered between co-directors who are jointly implicated in a breach of trust, at least where the breach consists only in the doing of some act not in itself illegal but unauthorised.[4]

Neglect to comply with the requirement of the Companies Act as to registration of securities.

Directors or officers of a joint-stock company who neglect to comply with the requirement of the Companies Act, 1870, which requires mortgages and charges on the property of the company to be registered, do not make void the security by their neglect to comply with the Act;[5] the effect of which is no more than to impose a pecuniary penalty for the non-performance of the statutory duty when that statutory duty is knowingly and wilfully omitted.[6]

Directors are not guilty of negligence in trusting a manager of general high character and taking his reports or advice without further inquiry.[7] With regard to his powers, "the persons dealing with him must look to the articles, and see that the managing director might have power to do what he purports to do, and that is enough for a person dealing with him *bonâ fide*."[8]

Duty of those dealing with companies.

There are duties also incumbent on those dealing with companies which must be regarded.

The external position of a company must be mastered by every one dealing with it; since its articles of association and the deed under which it acts are open to all, and those who have dealings with it are affected with notice of all they contain. But the internal arrangements are necessarily known to the directors alone, and their right action may be presumed so long as such action does not transcend what is permitted by the articles of association or the deed.[9] Therefore

[1] *Parker* v. *McKenna*, L. R. 10 Ch. 96; *In re Englefield Colliery*, 8 Ch. D. 388; *In re Carriage Co-operative Supply Association*, 27 Ch. D. 322; *In re London and Provincial Starch Co.*, 20 L. T. (N. S.) 390, as to joint and several liability; as to which see further *ante*, 173, n. 4.

[2] *In re Forest of Dean Coal Mining Co.*, 10 Ch. D. 450; *In re Weldywood Coal and Iron Co.*, 47 L. T. 612. *In re Cardiff Savings Bank, Davies's case*, 45 Ch. D. 537, is an instance of liability arising from an omission to act.

[3] *In re British Guardian Life Assurance Co.*, 14 Ch. D. 335.

[4] *Ashhurst* v. *Mason*, L. R. 20 Eq. 225, explained and applied *Jackson* v. *Dickinson*, [1903] 1 Ch. 947; *Ramskill* v. *Edwards*, 31 Ch. D. 100; *Shepheard* v. *Bray*, [1906] 2 Ch. 235; 53 & 54 Vict. c. 64, s. 3, sub-s. 1.

[5] *Wright* v. *Horton*, 12 App. Cas. 371, overruling *In re Native Iron Ore Co.*, 2 Ch. D. 345, for the reasons given in *In re Globe New Patent Iron and Steel Co.*, 48 L. J. Ch. 295.

[6] As to the personal liability of directors, *Beattie* v. *Lord Ebury*, L. R. 7 H. L. 102; *West London Commercial Bank* v. *Kitson*, 13 Q. B. D. 360; *Atkins* v. *Wardle*, 58 L. J. Q. B. 377, 379.

[7] *In re Kingston Cotton Mill Co.* (No. 2), [1896] 2 Ch. 279, 286.

[8] *Biggerstaff* v. *Rowatt's Wharf*, [1896] 2 Ch., per Lindley, L.J., 102; *Rainford* v. *James Keith, &c. Co.*, [1905] 2 Ch. 147, 162.

[9] *Mahony* v. *East Holyford Mining Co.*, L. R. 7 H. L. 869, followed in *County of Gloucester Bank* v. *Rudry Merthyr Steam and House Coal Colliery Co.*, [1895] 1 Ch. 629. *In re Denham Payne & Co.*, [1904] 2 Ch. 608. If directors act in a matter in which they have no authority, their act is void, but if they neglect the acts which are within their authority they cannot take advantage of their own neglect: *Bargate* v. *Shortridge*, 5 H. L. C. 297.

a company cannot repudiate what is done in the usual course of business with a third party, where that third party deals *bonâ fide* with persons who may be termed *de facto* directors, and who might, so far as he could tell, have been directors *de jure*; since if the law were otherwise the ordinary business of companies could not be transacted.[1]

Liability of liquidator.

A liquidator is not liable to an action for damages for delay in performing his duty, unless the delay is wilful or fraudulent or arises from *malâ fides*; for a liquidator is not properly described as a trustee, but is rather the agent of the company on whom are cast by statute and otherwise the duty of applying the company's assets in paying creditors and distributing the surplus amongst the shareholders. In this view he cannot be sued by a third party for negligence apart from misfeasance or personal misconduct.[2] In the case of delay in distributing assets application can be made to the Court under sec. 138 of the Companies Act, 1862.

Delay in distributing assets.

If there has been any miscarriage on the part of the liquidator after the completion of the winding up and the dissolution of the company, as if he had knowingly and wilfully left unpaid a debt of which he had notice, he is personally liable to the creditor; "because the liquidator has violated a plain statutory duty to pay the debts *pari passu* out of the assets of the company as they came to his hands." "Certainly, if the liquidator were guilty of anything like *mala fides*, or dishonesty, or fraud," "or if any persons were his accomplices in that *mala fides*, dishonesty, or fraud, he and they could, no doubt, be made liable to the person defrauded by their conduct."[3]

Derry v. *Peek*.

A word must be added about the controversy terminated by the decision of *Derry* v. *Peek* in the House of Lords.[4] Previously to that decision one school of lawyers considered that a legal duty lay on persons promoting companies not only to believe what they recommended, but to take reasonable care in forming their beliefs—not merely to believe, but to believe intelligently. *Derry* v. *Peek* in the House of Lords settled the law adversely to this contention, and decided that where persons have formed a genuine belief no action will lie for negligence in forming it;[5] but Bowen, L.J., in *Angus* v. *Clifford*,[6] points out that what a man may represent as the state of his mind is by no means conclusive of what in fact is the state: "So far from saying that you cannot look into a man's mind, you must look into it if you are going to find fraud against him; and unless you think you see what must have been in his mind, you cannot find him guilty of fraud." "Once arrive at the inference of fact that the state of his mind was to his own knowledge not that which he describes it as being, then he has told a lie, just as if he made an intentional misstatement of something outside his own mind, and visible to the eyes of all men." The distinction therefore is between a statement not true made carelessly and a statement not true made fraudulently, of which the latter only is actionable, as negligence is not deceit.

With the comment by Bowen, L.J., in *Angus* v. *Clifford*.

[1] *In re County Life Assurance Co.*, L. R. 5 Ch. 288.

[2] *Knowles* v. *Scott*, [1891] 1 Ch. 717, explained by Farwell, J., *Pulsford* v. *Devenish*, [1903] 2 Ch. 625, 636.

[3] Per James, L.J., *In re London and Caledonian Marine Insurance Co.*, 11 Ch. D. 144; *Pulsford* v. *Devenish*, [1903] 2 Ch. 625, 634.

[4] 14 App. Cas. 337.

[5] "To prevent a false statement being fraudulent, there must, I think, always be an honest belief in its truth": per Lord Herschell, *Peek* v. *Derry*, 14 App. Cas. 374.

[6] [1891] 2 Ch. 471; see also *Low* v. *Bouverie*, [1891] 3 Ch. 82; *Le Lievre* v. *Gould*, [1893] 1 Q. B., per Bowen, L.J., 499; *Glasier* v. *Rolls*, 42 Ch., per Cotton, L.J., 458.

Doctrine of *Derry* v. *Peek* distinguished from doctrine of estoppel by representation.

Care must be taken not to confound the decision of *Derry* v. *Peek* with the doctrine of estoppel by representation. In *Derry* v. *Peek* the plaintiff's contention was that the defendant's representation was inaccurate. The defence was that if it was inaccurate, it was still not fraudulent. In a case of estoppel, on the other hand, the plaintiff's claim is that the statement made by the defendant be taken as accurate against him. But in a case of deceit the plaintiff's case is based, not on the want of accuracy of the defendant's statement, but upon its falsity. "Preventing the defendants from denying the truth of their representation would not enable the plaintiff to succeed in such an action; so that the plaintiff could not rely on estoppel." [1]

Distinction between false information innocently given, where there is a duty, and where there is not a duty.

Another distinction must be drawn between mere false information innocently given, where there is no duty to give information at all, and false information innocently given, where the informer is under a duty to give correct information. In the former case an action for damages resulting from acting on the information will not lie; in the latter it will. Bowen, L.J., clearly expresses this in *Low* v. *Bouverie*: [2] "Negligent misrepresentation does not certainly amount to deceit, and negligent misrepresentation can only amount to a cause of action if there exist a duty to be careful—not to give information except after careful inquiry." For example, a stranger standing at the entrance of a dock is asked by one navigating a vessel whether the entrance is wide enough to admit it safely to the dock. He answers the width is fifty feet The vessel is steered into the opening relying on fifty feet being the width, and is injured. There is no action. If, instead of a stranger being asked, the inquiry had been made of the harbour-master,[3] there would be an action.

Bowen, L.J., in *Low* v. *Bouverie*.

Directors' Liability Act, 1890.

The liability of directors for statements made in prospectuses and similar documents is extended by the Directors' Liability Act, 1890,[4] passed in consequence of the decision of the House of Lords in *Derry* v. *Peek*,[5] and by which negligent statements made in a company's prospectus are excluded from the operation of the principle there affirmed. In the cases to which the Act applies, an action in the nature of an action for damages for misrepresentation will lie against a person responsible for an untrue statement, although he is not guilty of fraud; and where there are joint wrongdoers, notwithstanding the general law, one is entitled to contribution from the other.[6] The test of an untrue statement is not the meaning of those making the statement, but that conveyed to those reading it.[7] If the statement is a repetition of an expert's report or an extract from it, or of a valuation, no liability attaches. The plaintiff may, however, prove that the defendant had no reasonable ground that the alleged expert was competent to report or value.[8]

The Companies Act, 1900,[9] by sec. 10 provides that every prospectus issued by or on behalf of a company shall contain detailed and minute particulars which are specified in the section and that any condition

[1] Per Kay, L.J., *Low* v. *Bouverie*, [1891] 3 Ch. 112; see also *Barley* v. *Walford*, 9 Q. B., per Lord Denman, 208.

[2] [1891] 3 Ch. 105.

[3] *The* "*Apollo*," [1891] A. C. 499.

[4] 53 & 54 Vict. c. 64. An action under sec. 3 is not within the limitation of the Civil Procedure Act, 1833 (3 & 4 Will. 4 c. 42), s. 3. The action may be brought within six years from the time of subscribing for the shares: *Thompson* v. *Lord Clanmorris*, [1900] 1 Ch. 718.

[5] 14 App. Cas. 337.

[6] *Gerson* v. *Simpson*, [1903] 2 K. B. 197.

[7] *Greenwood* v. *Leather Shod Wheel Co.*, [1900] 1 Ch. 421.

[8] 53 & 54 Vict. c. 64, s. 3.

[9] 63 & 64 Vict. c. 48.

requiring any applicant for shares to waive compliance shall be void. No penalty for non-compliance is imposed by the Act; so that any person who wilfully disobeys the Act is liable to an indictment, and to an action at the instance of any one who has suffered damage through his noncompliance.[1]

Duties of the secretary of a company.

"The duties of a company's secretary are well understood. They are of a limited and of a somewhat humble character. 'A secretary,' said Lord Esher, 'is a mere servant. His position is that he is to do what he is told, and no person can assume that he has any authority to represent anything at all.'[2]"[3] The duty of examining and checking share certificates may, as a rule, be properly left to the secretary. Where this is done a director is not estopped from denying the accuracy of a certificate passed at a board meeting at which he was present.[4]

[1] *Ante*, 295, 305.

[2] *Barnett* v. *South London Tramways Co.*, 18 Q. B. D. 817.

[3] Per Lord Macnaghten, *Whitchurch* v. *Cavanagh*, [1902] A. C. 124; *Leeds Estate Building and Investment Co.* v. *Shepherd*, 36 Ch. D. 787, 808; *Pembrey Hundred Waterworks Co.* v. *Jones*, [1903] 2 Ch., per Farwell, J., 621; *Ruben* v. *Great Fingall Consolidated*, [1906] A. C. 439; *Cairney* v. *Back*, [1906] 2 K. B. 746.

[4] *Dixon* v. *Kennaway*, [1900] 1 Ch. 833.

CHAPTER II.

TRUSTEES AND EXECUTORS.

The liability for negligence of trustees and of executors may conveniently be treated together.

Definition of trustee.

A trustee has been defined as "a person in whom some estate, interest, or power in or affecting property is vested for the benefit of another." [1]

Definition of executor.

An executor, as defined by Blackstone,[2] is one "to whom another man commits, by will, the execution of that his last will and testament." [3] A trustee is the *genus* of which executor is a *species*.

Distinction between the position of trustees and the position of executors.

Certain differences there are between executors and trustees, such, for instance, as the executor's power of retainer; [3] which is an implied power, and not inserted in the instrument from which he derives his authority; and the legal presumption that all trustees are liable to account for moneys paid to the trust, while only those executors are presumed liable who are shown to have acted in any matter; [4] and that, apart from statute, one trustee cannot, and one executor can, *primâ facie*, give a discharge; [5] and that worked by the different

[1] Per Woods, J., in *Taylor* v. *Davis*, 110 U. S. (3 Davis) 330, 335. The same definition is found in Bouvier, Law Dictionary, *sub voce*, adding the words after "property" "of any description." The Statutory Law is consolidated by the Trustee Act, 1893 (56 & 57 Vict. c. 53). As to constructive trustees, or in the language of Lord Selborne, trustees *de son tort*, *Barnes* v. *Addy*, L. R. 9 Ch. 251; *In re Barney*, *Barney* v. *Barney*, [1892] 2 Ch. 265. By the Judicial Trustee Act, 1896 (59 & 60 Vict. c. 35), s. 1, sub-s. 2, the administration of the property of a deceased person shall be a trust, and the executor or administrator a trustee. *In re Ratcliff*, [1898] 2 Ch. 352. The Land Transfer Act, 1897 (60 & 61 Vict. c. 65), vests the real estate of a testator in all the executors irrespective of whether they have proved the will: *In re Parchy and London and Provincial Bank*, [1900] 1 Ch. 58.

[2] 2 Bl. Comm. 503. Pollock and Maitland, Hist. of Eng. Law (2nd ed.), vol. ii. 342–348.

[3] *In re Rhoades*, [1899] 2 Q. B. 347; *In re Benett*, [1906] 1 Ch. 216; *Davies* v. *Parry*, [1899] 1 Ch. 602; see note of Probate Practice, [1899] W. N. 262. This right does not extend to a debt not enforceable by reason of the Statute of Frauds, *In re Rownson*, 29 Ch. D. 358.

[4] *Chambers* v. *Minchin*, 7 Ves. 186, where Lord Eldon states the reason for the rule: *Langford* v. *Gascoyne*, 11 Ves. 333; "At law a joint receipt is conclusive evidence that the money came to the hands of both, and is not to be contradicted. But this Court, which rejects estoppels and pursues truth, will decree according to the justice and verity of the fact, *Churchill* v. *Hobson*, 1 P. Wms. 241"; *Hardin* v. *Parsons*, 1 Eden, per Lord Keeper Henley, 147. See Story, J.'s, summary of the authorities in a note to 2 Spence, Eq. Jur. 952, collected from the judgments of Chancellor Kent in *Monell* v. *Monell*, 5 Johns. (Ch. N. Y.) 283, and *Clark* v. *Clark*, 8 Paige (N. Y.), 152. The note abridges Story, Eq. Jur. §§ 1283, 1284. *Brice* v. *Stoker*, 11 Ves. 319; *Hovey* v. *Blakeman*, 4 Ves. 596, 608.

[5] *Walker* v. *Symonds*, 3 Swanst. 1, 64; *Charlton* v. *Lord Durham*, L. R. 4 Ch. 433; which is distinguished in *Lee* v. *Sankey*, L. R. 15 Eq. 204, on the ground that though

operation of the Statute of Limitations;[1] and that, flowing from the historic circumstances of their origin, of the comparatively limited scope within which the executor's powers are to be exercised. The points of difference are, however, minute, while those of identity between the position of trustees and executors are constantly to be insisted on.

General principle of trustee's liability.

The most general principle to which questions of a trustee's liability are to be referred is stated by Jessel, M.R., in the Court of Appeal, in *Speight* v. *Gaunt*,[2] to be that "a trustee ought to conduct the business of the trust in the same manner that an ordinary prudent man of business would conduct his own, and that beyond that there is no liability or obligation on the trustee. In other words, a trustee is not bound, because he is a trustee, to conduct business in other than the ordinary and usual way in which similar business is conducted by mankind in transactions of their own. It never could be reasonable to make a trustee adopt further and better precautions than an ordinary prudent man of business would adopt, or to conduct the business in any other way. If it were otherwise, no one would be a trustee at all. He is not paid for it. He says, 'I take all reasonable precautions, and all the precautions that are deemed reasonable by prudent men of business, and beyond that I am not required to go.'"[3]

Stated by Lord Brougham, C.

The same principle is forcibly stated by Lord Brougham, C., in a case where a dealing with property had in the result turned out burdensome.[4] "No trustee is bound to be a prophet; he is bound to act with

defendants were executors, they acted as trustees; *Magnus* v. *Queensland National Bank*, 37 Ch. D. 466; *Lord Shipbrook* v. *Hinchinbrook*, 11 Ves. 252; 16 Ves. 477; *Doe d. Stace* v. *Whetter*, 15 M. & W. 823; now the Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 20, makes the receipt in writing of one trustee sufficient discharge. *Lathory* v. *Anthony*, [1895] 2 Ch. 141, as to the acknowledgment by one of two executors. As to actions for neglect to take out probate: *In re Stevens*, [1898] 1 Ch. 162, 177. There is a curious case on the power of executors in Y. B. 4 H. VII. 4, pl. 8, where one of two executors in collusion with a debtor released him so that the assets of the estate were insufficient to meet its liabilities. The co-executor filed his bill against the debtor and the other executor. Archbishop Morton, the Chancellor, thought the case one proper for relief: "*Nullus recedat a curia cancellariæ sine remedio.*" Fineux, counsel for the defendants, urged there was no remedy, since one executor had complete power over the estate. The Chancellor answers: "Sir, I know the law is, or ought to be, according to the law of God, and the law of God is, that an executor who is evilly disposed shall not expend all the goods, *et jeo scay bien si issint soit et ne fait amends . . . si il fait de pouvoir, il serrait damne in Hell.*"

Under the Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16), s. 18, there is no power of entering executors on the share register *as executors*; when entered they become *shareholders*, *Burton* v. *L. & N. W. Ry. Co.*, 24 Q. B. D. 77; so that where one executor executed a transfer, forging the name of the other, and the transfer was registered by the company, such other was not estopped from alleging that the transfer was invalid and the company had no right to accept a transfer executed by one only as valid. See to the same effect *Burton* v. *North Staffordshire Ry. Co.*, 38 Ch. D. 438, and *In re Ingham*, [1893] 1 Ch. 352. See *Muir* v. *City of Glasgow Bank*, 4 App. Cas., per Lord Penzance, 368; *Lumsden* v. *Buchanan*, 4 Macq. (H. L. Sc.), per Lord Westbury, C., 955; *Buchan's case*, 4 App. Cas., per Earl Cairns, C., 588, and per Lord Selborne, 594. Position of executors entered on company's register in respect of the estate of their testator.

[1] Trustee Act, 1888 (51 & 52 Vict. c. 59), s. 8; 2 Spence, Eq. Jur. 937–8.

[2] 22 Ch. D. 739; approved, per Lord Blackburn, 9 App. Cas. 19.

[3] "There is one clear, homely, intelligible, but inflexible rule, which has never been departed from in times ancient or modern—viz., that a trustee is bound to act in the execution of his trust as a prudent man would in dealing with his own property": per Bacon, V.C., *Smethurst* v. *Hastings*, 30 Ch. D. 498; and there is no difference in degree of care, in regard to the conduct of the business of a trust, according to "whether there are persons to take in the future, or whether the trust fund is to be created for one beneficiary absolutely": per Lord Halsbury, C., *Learoyd* v. *Whiteley*, 12 App. Cas. 732; nor whether the trust is voluntary or for valuable consideration: *Dunser* v. *Tirerton*, 15 Beav. 221; nor whether those assuming to act as trustees are such in reality or not: *Rackham* v. *Siddall*, 16 Sim. 297; 1 Mac. & G. 607; nor whether the *cestui que trust* is known or unknown: *Ex parte Norris*, L. R. 4 Ch. 280.

[4] *A.-G.* v. *Haugerford*, 2 Cl. & F. 357, 376.

providence and foresight to a reasonable extent, but he is not bound to an absolute foreknowledge, which no man can have, of events that afterwards do occur. The event has proved that it would have been more provident not to have granted such a lease, because the lease has a great deal more time to run, and it would be better if it had expired; but we are not to judge of it by the state of things now, but as they were at the time."

Contention that the liability of a gratuitous trustee must be tested by the degree of care and prudence he uses in the management of his own private affairs.

The opinion has been advanced that the liability of a gratuitous trustee must ordinarily be tested by reference, not to an average standard, but to the degree of care and prudence which the particular trustee uses in the management of his own private affairs, "and the mandant ought to impute it to himself, that he made not choice of a more diligent person, which our custom follows, but still there must be *bonâ fides*."[1] Wharton[2] regards this as emanating from "the scholastic jurists" and "those who follow them." When the point came to be argued in the House of Lords,[3] Lord Watson[4] said that such a "rule, which is quite new to me, would be highly inconvenient in practice. In every case where neglect of duty is imputed to a body of trustees it would necessitate an exhaustive inquiry into the private transactions of each individual member—the interest of the trustee being to show that he was a stupid fellow, careless in money matters, and that of his opponents to prove that he was a man of superior intelligence and exceptional shrewdness." And in the subsequent case of *Rae* v. *Meek*,[5] Lord Herschell, speaking of *Learoyd* v. *Whiteley*[6] and *Knox* v. *Mackinnon*,[7] said: "I think these cases establish that the law in both countries" (*i.e.*, England and Scotland) "requires of a trustee the same degree of diligence that a man of ordinary prudence would exercise in the management of his own affairs"; and this test may now be regarded as established.

Duty undertaken by accepting a trust.

"By accepting a trust," said Lord Hardwicke, "a person is obliged to execute it with fidelity and reasonable diligence; and it is no excuse to say that they (*sic*) had no benefit from it, but that it was merely honorary";[8] and as authority he cited the words of Holt, C.J., in *Coggs* v. *Bernard*:[9] "For though he (the trustee) was not bound to enter upon the trust, yet, if he does enter upon it, he must take care not to miscarry, at least by mismanagement of his own."

Trustee not bound to special diligence.

A distinction[10] must be noted between ordinary business men and experts. A trustee in general is only expected to be a good business man with judgment to select those who must act for him in matters requiring special faculties. Yet though a trustee is not required to show the knowledge of an expert in the business of the trust, his

[1] Stair, Inst. I. 12, 10, adopted by Lord President Inglis, Lord Justice-Clerk Moncreiff, and Lord Adam in *Rae* v. *Meek*, 15 Rettie, 1033, 1046, reversed 14 App. Cas. 558.

[2] Wharton, Negligence, § 510.

[3] *Knox* v. *Mackinnon*, 13 App. Cas. 753.

[4] *L.c.* 766.

[5] 14 App. Cas. 569. *In re Salmon*, *Priest* v. *Appleby*, 42 Ch. D. 351; *Carruthers* v. *Cairns*, 17 Rettie, 769; *Crabbe* v. *Whyte*, 18 Rettie, 1065.

[6] 12 App. Cas. 727.

[7] 13 App. Cas. 753.

[8] *Charitable Corporation* v. *Sutton*, 2 Atk. 406. Lord Hardwicke referred to *Ayliffe* v. *Murray*, 2 Atk. 60, where a deed obtained from a *cestui que trust* by executors and trustees securing them remuneration as a condition of their acting under the will was set aside on the ground that trusts are honorary, "and there is a strong reason, too, against allowing anything beyond the terms of the trust, because it gives an undue advantage to a trustee to distress a *cestui que trust*." See in *Briggs* v. *Spaulding*, 141 U. S. (31 Davis) 132, the dissentient opinion of Harlan, J., at 171.

[9] 1 Salk. 26.

[10] Wharton, Negligence, § 515.

acceptance of it obliges him to the discharge of its duties with adequate care and prudence; and if he is selected as an expert and undertakes the trusteeship in that character he will come under a severer test in the discharge of the duties of his office. The acceptance of this proposition does not warrant the assumption that because a trustee happens to have specialist knowledge the test of the discharge of his duties will be the skill of a specialist. In many cases where trustees are specialists, the discharge of specialist duties are entrusted to paid agents, and then the duty of the trustees will be those of general supervision merely.

Brett, L.J.'s comment on Story, in *Wilson* v. *Lord Bury*

In *Wilson* v. *Lord Bury*,[1] Brett, L.J., quotes Story on Contracts:[2] "A trustee is bound to perform all acts which are necessary for the proper execution of his trust. But by the English rule, as he is not allowed compensation for his services, he would stand in the position of a gratuitous bailee, and be responsible only for losses or improper execution of his trust in cases of gross negligence"; and comments thus: "It may be, perhaps, noticed that in this passage, if the analogy be correct, gross negligence is the neglect of taking the same care which a person of ordinary prudence and skill would take of his own similar affairs." This, then, is the test—not a consideration of skill but of prudence.

Prudence, not skill, the test of diligence.

A trustee must act in the way pointed out by his testator and must not do acts other than those which the terms of his trust permit, though they may be such as would be done by an ordinary prudent man of business or advised by a specialist.[3] On the other hand, when there is a usual course of business within the scope of the trustee's powers, he is justified in adopting it, though there may be some risk of losing the property by the dishonesty or insolvency of an agent employed in ordinary course.[4] It results from the nature of a trustee's liability from the fact that his diligence is to be that of a good business man and not that of a specialist—that he may employ agents of competent skill to conduct any business of the trust requiring the exercise of special knowledge or faculties whenever such employment is according to the usual course of business; though, since the duty he has undertaken involves discretion, he must not shift the responsibility of acting upon any other person.[5]

Trustee not permitted to act beyond the terms of his trust. May follow usual course of business.

The standard of conduct that of the ordinary business man.

In *Shepherd* v. *Harris*,[6] one trustee, a stockbroker, persuaded his co-trustee to change the investments of the trust fund from Tasmanian stock into West Australian, an inscribed stock. The stockbroker undertook the business, sold the stock and purported to make the purchase. This in fact he did not do, but applied the proceeds to his own use. Ultimately it was sought to make the other trustee liable on the ground that he was negligent in not attending at the bank personally to accept the transfer. The evidence showed that this was not a usual course, though suggested on the usual form of the stock receipt, one of which was shown to the defendant. Farwell, J., quoting Lord Blackburn:[7] "It would be both unreasonable and inexpedient to make a trustee responsible for not being more prudent than ordinary

[1] 5 Q. B. D. 527.
[2] § 207.
[3] *Carruthers* v. *Carruthers*, [1896] A. C. 659; *Billing* v. *Brogden*, 38 Ch. D. 546; *Pride* v. *Fooks*, 2 Beav. 430, 440.
[4] *Ex parte Belchier*, per Lord Hardwicke, Amb. 218; *Speight* v. *Gaunt*, 9 App. Cas. 1; *Magnus* v. *Queensland National Bank*, 37 Ch. D. 466, 5 *Turner* v. *Corney*, 5 Beav. 515; *Ex parte Belchier*, Amb. 218; *Speight* v. *Gaunt*, 9 App. Cas. 20
[6] [1905] 2 Ch. 310, 317.

men of business are," asked "whether he is liable for not having done so. That depends on this: whether in the ordinary course of business it is usual for the ordinary prudent business man to do it; and on the evidence it is quite plain it is not."

A trustee is not justified, without necessity, in permitting trust-monoys to pass into the hands of solicitors even for the purpose of completing an investment agreed upon hy the trustees.[1]

Responsibility of agent employed by trustee.

An agent employed in any business of the trust is responsible to the trustee and not to the *cestuis que trust*; unless such agent was employed also by the *cestuis que trust* or on their behalf; for the agent's duty arises out of tho contract alone and is limited hy its terms. Lord Herschell, however, notes [2] that "there may be cases where, if trustees failed to call to account those who were under liability in respect of acts injurious to the trust estate, tho heneficiaries might compel them to do so, or even enforce the right themselves." Such cases must bo very rare, yet their possible occurrence must not be overlooked.[3]

Where agent may be made responsible to *cestui que trust*. Rule stated by Lindley, L.J.

"*Primâ facie*," says Lindley, L.J.,[4] "the only persons to sue an agent are his principals; although, no doubt, it might be shown that an agent was so involved in a breach of trust committed by his principal as to stand in the position of a *quasi*-trustee, and in that case an action might be supported against him." That is, where the agent by his conduct has ceased to be agent and acted as a trustee he becomes liahle as such.

Illustration.

For instance, "If the agent of a trustee, whether a corporato body or not, knowing that a breach of trust is being committed, interferes and assists in that hreach of trust, he is personally answerahle, although he may he employed as the agent of the person who directs him to commit that breach of trust" [5]—he is a joint tort feasor and liahle as such.[6]

But the cases alluded to hy Lord Herschell are not of this class, as liahility attaches hy virtue of the person charged ceasing to be a mere agent, and being clothed with a more onerous capacity. They seem rather to he in the nature of special exceptions to the rule, and to be referable to that principle of equity which requires its decisions to he regulated *secundum æquum et bonum*,[7] and are not strictly recognised deflections from any rule.

Opinion of Turner, V.C.

Turner, V.C., shows this when he says: [8] "The cases, I think, may fairly he considered to go to this extent that such a hill" (*i.e.*, hy *cestuis que trust* against the executors of a deceased partner which joined the surviving partners) "may be supported in all cases where the relation hetween the executors and tbe surviving partners is such as to present a suhstantial impediment to the prosecution hy the executors of the rights of the parties interested in the estate against tho surviving partners."

Adopted by Lord Selborne in *Beningfield* v. *Baxter*.

This is recognised as law in Lord Selhorne's judgment in the Privy Council case of *Beningfield* v. *Baxter*,[9] and may he considered settled on the footing that as a rule the *cestui que trust* is not entitled to sue an agent of the trust whose sole relation is with the trustee; hut the Court has power to enable him to sue

1 *Campbell* v. *Sclanders*, 13 N. Z. L. R. 757, 769.

2 *Rae* v. *Meek*, 14 App. Cas. 569.

3 As to what Lord Herschell says about beneficiaries compelling trustees to take action, see Lewin, Trusts (11th ed.), 255; R. S. C. (1883), Order xvi. r. 11.

4 *In re Spencer*, 51 L. J. Ch. 273.

5 *A.-G.* v. *Leicester* (*Corporation of*), 7 Beav., per Lord Langdale, M.R., 179. Cp. *Fyler* v. *Fyler*, 3 Beav. 550.

6 *Ante*, 173 n. 4.

7 Story, Eq. Jur. § 34. 3 Bla. Com. 430.

8 *Travis* v. *Milne*, 9 Hare, 141, 150.

9 12 App. Cas. 178. *The Heirs Hiddingh* v. *De Villiers Dennyssen*, *l.c.* 641.

where otherwise injustice would be worked; while in granting the dispensation in favour of the *cestui que trust* the Court is very strict and requires to be shown circumstances of disability for suing and not a mere refusal to sue by the trustee.[1]

Trustee bound to use his own skill and judgment.

In any event, the trustee is personally bound to use his own judgment, and may not rest upon the untested advice of those whose assistance he has invoked, whatever their skill may be. If he chooses to place reliance upon such advice without testing its soundness, he cannot escape personal liability if things go wrong, unless he can show that the circumstances are such as would justify a trustee of ordinary prudence, and fully informed on the character of the proposed transaction, in entering upon it. The trustee may rely on his expert's skill, but cannot shirk the exercise of his own judgment; not the judgment of a specialist even though he may be such, but the judgment of the business man of ordinary prudence confining his attention to the class of investments which are permitted by his trust.[2]

If the trustee uses the means he has to test the skilled advice given him, he is protected.

If the trustee uses such means of judgment as he has to test the advice of the skilled person to whom he has referred any business, he will be protected in the event of an unfavourable issue;[3] but he must not abdicate the exercise of his own judgment by an implicit reliance on the reports of his agents, however qualified they may be.[4] Neither must he employ an unskilful agent, or even a skilful agent in circumstances that are not within the ordinary line of his business. "Suppose," says Kay, J.,[5] "that, in selling trust property or changing an investment, trustees were to allow the trust fund to pass into the hands of their solicitors, and that it was lost in consequence, they would be liable. . . . It would be no excuse to say, as one of the witnesses said in this case, 'Solicitors often do so.' The question is not what they often do, but what is properly within the scope of their employment as solicitors."[6] No stronger case could be given of this limitation of the rule—that trustees acting according to the ordinary course of business, and employing agents as a prudent man of business would do on his own behalf, are not liable for the default of an agent so employed—than the case cited in the course of this judgment by Kay, J., where trustees were held liable for taking a competent London surveyor to value property at Broadstairs,[7] on the ground that, though competent, he was unacquainted with the place. This case is, however, now no longer law.[8]

Court to lean to the side of the honest trustee.

The duty of the Court where there is a question of nicety as to construction or otherwise is to lean to the side of the honest trustee,

[1] *Yeatman* v. *Yeatman*, 7 Ch. D. 210; see per Kay, J., *Meldrum* v. *Scorer*, 56 L. T. 471. In *Sharpe* v. *San Paulo Ry. Co.*, L. R. 8 Ch. 609, James, L.J., says: "I came to the conclusion very clearly that a person interested in an estate or a trust fund could not sue a debtor to that trust fund, or sue for that trust fund, merely on the allegation that the trustee would not sue; but that if there was any difficulty of that kind, if the trustee would not take the proper steps to enforce the claim, the remedy of the *cestui que trust* was to file his bill against the trustee for the execution of the trust."

[2] *Learoyd* v. *Whiteley*, 12 App. Cas. 727; *Sutton* v. *Wilders*, L. R. 12 Eq. 373; *In re Weall, Andrews* v. *Weall*, 42 Ch. D. 674; *In re Somerset, Somerset* v. *Earl Poulett*, [1894] 1 Ch. 231; *Speight* v. *Gaunt*, 9 App. Cas. 1, distinguished in *Bullock* v. *Bullock*, 56 L. J. Ch. 221; *Maclean* v. *Soady's Trustee*, 15 Rettie, 966; *Rae* v. *Meek*, 15 Rettie, 1033, reversed 14 App. Cas. 558; *Austin* v. *Austin*, 3 C. L. R. (Australia), 510.

[3] *Speight* v. *Gaunt*, 9 App. Cas. 1.

[4] *Learoyd* v. *Whiteley*, 12 App. Cas. 727.

[5] *Fry* v. *Tapson*, 28 Ch. D. 280; *In re Partington, Partington* v. *Allen*, 57 L. T. 654.

[6] Cp. *Knox* v. *Mackinnon*, 13 App. Cas., per Lord Watson, 767.

[7] *Budge* v. *Gummow*, L. R. 7 Ch. 719.

[8] 56 & 57 Vict. c. 53, s. 8 (1).

and not to be anxious to find fine and extraordinary reasons for fixing him with any liability upon the contract. "You are," said Jessel, M.R.,[1] "to endeavour as far as possible, having regard to the whole transaction, to avoid making an honest man who is not paid for the performance of an unthankful office liable for the failure of other people from whom he receives no benefit."

Trustee not entitled to remuneration.

Further, it is a rule in equity, that in all matters of trust or in the nature of a trust, the trustee is not entitled to any remuneration for any extraordinary *trouble* he may have had in the business entrusted to him; for if the trustee were allowed to charge for his services his interest would be opposed to his duty, and the Court will not allow a trustee to place himself in a false position.[2] But when extraordinary *expense* is incurred by the trustee for the benefit of the estate, the estate must defray it.[3] "It is in the nature of the office of a trustee, whether expressed in the instrument or not, that the trust property shall reimburse him all the charges and expenses incurred in the execution of the trust."[4]

Where trustee may employ an agent.

Neither is it in every case that the propriety of employing an agent[5] can be established; yet this is the first step for the exoneration of the trustee. "Generally speaking," said Sir John Leach, M.R., in *Weiss* v. *Dill*,[6] "executors are not allowed to employ an agent to perform those duties which, by accepting the office of executors, they have taken upon themselves; but there may be very special circumstances in which it may be thought fit to allow them such expenses as they may have incurred by the employment of agents"; yet where an agent was employed in special circumstances, Courts of Equity stepped in and held that the propriety of employing an agent being established, the trustee should be exonerated from loss unless guilty of wilful default.

22 & 23 Vict. c. 35, s. 31.

The Law of Property and Trustees' Relief Amendment Act, 1859,[7] exonerated trustees from the duty to make good the default of "any banker, broker, or other person with whom trust-moneys have been deposited." This enactment, says Lord Selborne, C.,[8] "does not substantially alter the law as it was administered by Courts of Equity, but gives it the authority and force of statute law, and appears to me

Effect stated by Lord Selborne, C.

[1] *Speight* v. *Gaunt*, 22 Ch. D. 746. [2] *Robinson* v. *Pett*, 3 P. Wms. 249.
[3] *In the matter of Ormsby, a minor*, 1 Ball. & B. (Ir. Ch.) 189.
[4] Per Lord Eldon, C., *Worrall* v. *Harford*, 8 Ves. 8.
[5] *In re Partington, Partington* v. *Allen*, 57 L. T. 654. So long as the agent acts merely as agent, generally speaking he cannot be held liable as constructive trustee, unless he assist with knowledge in a dishonest and fraudulent design on the part of the trustees: *Barnes* v. *Addy*, L. R. 9 Ch., per Lord Selborne, C., 251; but where the agent obtains possession of the trust funds and acts otherwise than in strict conformity with his duty as agent, he thereby charges himself as trustee: *Lee* v. *Sankey*, L. R. 15 Eq., per Bacon, V.C., 211; *In re Barney, Barney* v. *Barney*, [1892] 2 Ch. 265; there was a difference of opinion of the Court in *Soar* v. *Ashwell*, [1893] 2 Q. B. 390, as to the ground of the decision, but none as to the decision itself: see per Bowen, L.J., 396, and per Kay, L.J., 405. Bowen, L.J., says, *l.c.* 397: "A person occupying a fiduciary relation, who has property deposited with him on the strength of such relation, is to be dealt with as an express, and not merely a constructive, trustee of such property." *In re Dixon*, [1900] 2 Ch. 561.
[6] 3 My. & K. 26, the case of executors employing an agent for collecting debts in the testator's business of a tailor. The collector charged 5 per cent. The master allowed only 2½ per cent. in the executors' account. See, however, *Brier* v. *Erison*, 26 Ch. D. 238. As to the trustee's responsibility for the intelligence and honesty of his agents, *In re Weall*, 42 Ch. D. 674. In *Henderson* v. *M'Iver*, 3 Madd. 275, an executor was held justified in employing an accountant. See also *Macnamara* v. *Jones*, 2 Dick. (Ch.) 587.
[7] 22 & 23 Vict. c. 35, s. 31. [8] *Brier* v. *Erison*, 26 Ch. D. 243.

to throw the *onus probandi* on those who seek to charge an executor or trustee with a loss arising from the default of an agent when the propriety of employing an agent has been established."

The wider provisions of the Trustee Act, 1893,[1] is now substituted for this; by sec. 17 of which a trustee may appoint a solicitor as his agent to grant a discharge for property receivable by the trustee and to have the custody of any such deed as is referred to in sec. 56 of the Conveyancing and Law of Property Act, 1881;[2] or a banker or solicitor may give a discharge for insurance moneys. Trustee Act, 1893.

Trustees are entitled to choose the solicitor, the broker and the banker they employ;[3] and it has been held by Chitty, J., that a trustee is not even bound to regard the direction of his testator what solicitor he is to employ;[4] but the trustee must not allow any money or property to remain in the hands or under the control of the banker or solicitor for a longer period than is reasonably necessary to pay over the same to the trustee.[5]

We have seen[6] that a trustee is not accountable for property rightly in the hands of an agent when the Court has come to the conclusion that there was reason for the employment of an agent.[7] This ground of exoneration is dependent on the reasonableness of the action of the trustee. A comparison of the cases of *Clough* v. *Bond*[8] and *Johnson* v. *Newton*[9] will mark both the limits and the reason of the rule. Trustee's accountability for property rightly in the hands of agent.

In the former case, on the death of an intestate, administration was granted to her son and married daughter. The assets were paid into a banking account in the joint names of the son and of the daughter's husband. Seven months after, the daughter's husband died; ten months after that, the son drew out the balance, applied it to his own use, and absconded. The Lord Chancellor, affirming the Vice-Chancellor, held that the personal representatives of the husband were liable, because he had deposited the money in the two names, and thus excluded his wife from ever having control—a mode of deposit by which, without necessity, exclusive possession was likely to vest in a person not entitled to it. When the money was thereby lost the impropriety of so placing it imposed a liability upon the estate of those to whom the loss was imputable.[10] The Lord Chancellor said the *Clough* v. *Bond*. Judgment of

[1] 56 & 57 Vict. c. 53, s. 17; *In re Hetling and Merton*, [1893] 3 Ch. 269; *Bennett* v. *Stone*, [1903] 1 Ch. 509. *In re Bellamy* v. *Metropolitan Board of Works*, 24 Ch. D. 387, was overruled by sec. 2 of 51 & 52 Vict. c. 59, for which the present section is substituted; *In re Flower*, 27 Ch. D. 592; *Day* v. *Woolwich Equitable Building Society*, 40 Ch. D. 491, which is questioned in *King* v. *Smith*, [1900] 2 Ch. 425; *Wyman* v. *Paterson*, [1900] A. C. 271.

[2] 44 & 45 Vict. c. 41.

[3] *In re Cleveland's (Duke of) Settled Estates*, [1902] 2 Ch. 350; *In re Hunt's Settled Estates*, [1905] 2 Ch. 418.

[4] *Foster* v. *Elsley*, 19 Ch. D. 518.

[5] *In re Fryer*, 3 K. & J. 317; *Cann* v. *Cann*, 51 L. T. 770.

[6] *Ante*, 1234.

[7] *Edmonds* v. *Peake*, 7 Beav. 239, the case of an auctioneer; *Williams* v. *Higgins*, 17 L. T. (N. S.) 525; *In re Bird*, L. R. 16 Eq. 203, the case of money sent to a solicitor to make a payment with, and which was misappropriated.

[8] 3 My. & Cr. 490; *Newton* v. *Hallett*, 19 L. T. (N. S.) 471; *Gasquoine* v. *Gasquoine*, [1894] 1 Ch. 470.

[9] 11 Hare, 160.

[10] *Salway* v. *Salway*, 2 Russ. & My. 215, in the House of Lords, *sub nom. White* v. *Baugh*, 9 Bli. (N. S.) 181, is the converse case, where the House of Lords, affirming Lord Brougham and overruling Sir John Leach, M.R., held that in the event of loss a trustee will be liable who parts with his *exclusive* control of trust funds by associating with himself some other person not a member of the trust, or leaves funds in the exclusive control of a co-trustee; *Mendes* v. *Guedalla*, 2 J. & H. 259; *Lewis* v. *Nobbs*, 8 Ch. D. 591. *In re Nisson's Settlement*, [1903] 1 Ch. 262, distinguished the two last-cited cases

Lord Cottenham.

principle[1] was "that, although a personal representative, acting strictly within the line of his duty, and exercising reasonable care and diligence, will not be responsible for the failure or depreciation of the fund in which any part of the estate may be invested, or for the insolvency or misconduct of any person who may have possessed it, yet, if that line of duty be not strictly pursued, and any part of the property be invested by such personal representative in funds or upon securities not authorised, or be put within the control of persons who ought not to be entrusted with it, and a loss be thereby eventually sustained, such personal representative will be liable to make it good, however unexpected the result, however little likely to arise from the course adopted, and however free such conduct may have been from any improper motive."[2] "So when the loss arises from the dishonesty or failure of any one to whom the possession of part of the estate has been entrusted, necessity, which includes the regular course of business in administering the property, will in equity exonerate the personal representative.[3] But if, without such necessity, he be instrumental in giving to the person failing possession of any part of the property, he will be liable, although the person possessing it be a co-executor or co-administrator."[4]

Johnson v. *Newton*.

Johnson v. *Newton*[5] was the case of executors maintaining a balance of more than £2000 at a bank nine months after their testator's death; of which sum more than £1000 was lost to the estate by the bankruptcy of the bankers. The Master held that it was not necessary to retain the balance or any part of it at the banker's; but Page Wood, V.C., held the executors not liable for the loss, since there was a rule of law that allowed them a year to wind up their testator's estate;[6] while there were no directions to invest the balance of the estate; failing which, had they done so, they would have been liable to the residuary legatee for any loss on a re-sale. "The executors are no doubt bound to exercise their judgment on the safety of the place of deposit, whether it be that which the testator had in his lifetime chosen, or whether it be

in that they were cases of bearer securities. In the case before the Court the trust property could not be dealt with by the holder of the deeds without forgery; and the custody of title-deeds or non-negotiable securities will not be taken by the Court from the possession of one trustee to be placed under joint control. This accords with *Lord Buckhurst's case*, 1 Co. Rep. 2 b, note O, which is followed, *Foster* v. *Crabb* (1852), 21 L. J. C. P. 189. *In re Pothonier*, [1900] 2 Ch. 529. Cp. *Kilbee* v. *Sneyd*, 2 Moll. (Ir. Ch.) 186. As to a possible difference in the case of an executor from a trustee, see *Pemberton* v. *Chapman*, 7 E. B. & E. 1056; *quære*, would not the providing for drawing cheques *singly* by either executor be an act of negligence? *Consterdine* v. *Consterdine*, 31 Beav. 330.

1 3 My. & Cr. 496.

2 Cp. *Phillips* v. *Phillips*, Freem. (Ch.) 11, Rep. temp. Finch, 410, 1 Ch. Cas. 292. *In re Brogden*, *Billing* v. *Brogden*, 38 Ch. D., per Cotton, L.J., 567. *Carruthers* v. *Carruthers*, [1896] A. C. 659. Where an executor is negligent and does not exercise ordinary care, he is personally liable for the loss of money belonging to the estate, by the theft of the same from his person by pickpockets whilst travelling upon a street car: *Tarver* v. *Torrance*, 12 Am. St. R. 311, where there is a note on the skill and diligence required of an administrator.

3 This sentence is slightly altered from the report, where a full stop is inserted after "entrusted."

4 The reporter in 3 My. & Cr. 497, adds: "See *Hanbury* v. *Kirkland*, 3 Sim. 265," where a trustee absconded with the trust funds, and the co-trustees were held guilty of "most culpable negligence." See Story, Eq. Jur. § 1269 and notes. A trustee is not liable upon a proper investment in English Government securities for loss through fluctuations of the fund: *Peat* v. *Crane*, 2 Dick. (Ch.) 499 n. If the investment is unauthorised he is liable: *Hancom* v. *Allen*, 2 Dick. (Ch.) 498; *Howe* v. *Earl of Dartmouth*, 7 Ves. 137, 150.

5 11 Hare, 160.

6 *Brooke* v. *Lewis*, 6 Madd. 358.

selected by themselves; and when a loss unfortunately happens, the question must always be, how far the executors must be held to be answerable under the circumstances of the case." [1]

Matthews v. *Brise*. *Matthews v. Brise,*[2] before Lord Langdale, M.R., illustrates the rule in both its aspects. A trustee was there held to have properly invested trust-money in Exchequer bills pending necessary delay in the completion of a mortgage; but was held personally liable for having left the bills bought in the hands of a broker who misapplied them.[3]

Money lost by being paid to trustee's own account. If a trustee pays money to his own account with a banker, and it is lost, he is personally liable, even in cases where it would have been equally lost had it been placed to a separate account; for by so doing, in the event of his bankruptcy, it would go to the credit of his estate, and if the bankers had any account with him for set-off they could claim the *cestui que trust's* funds;[4] and if a trustee or agent mixes and confuses the property which he holds in a fiduciary character with his own property, he is, *primâ facie*, liable for the whole, and the *onus* will consequently be on him to discriminate.[5]

Trust funds left at the bank too long and lost. Though trust funds may be kept in a separate account, yet, if left standing at the bank too long, and thereby lost, the trustee becomes personally liable. Where to draw the line between proper and improper detention is, as is observed by Kay, J.,[6] "extremely difficult" to determine. Where £500 was left in a bank for fourteen months while trustees looked for a mortgage, at the end of which time the bank failed, it was held by that learned judge "that leaving that money in the bank for fourteen months was leaving it there too long," so that the trustees were personally responsible; on the other hand, in the circumstances of *Johnson* v. *Newton* [7] nine months was held not too long.

But in *Challen* v. *Shippam* [8] a trustee has been held liable to replace a trust fund deposited with his bankers accompanied by an order in writing to invest in consols; this the bankers omitted to do, and the money remained with them for five months without any inquiries being made by the trustee and then the bankers became bankrupt.

Trustee not liable for non-performance of a trust of which he is ignorant. "There has been no case referred to," says Bacon, V.C., in *Youde* v. *Cloud*,[9] "and, according to my experience, my belief is that no case can be found, in which a trustee, however formally he may have been appointed, however extensive may have been the powers that were conferred upon him, has been held liable for the non-performance of a trust of which he was ignorant; and I should be very much surprised to find that any such case had ever occurred, or that any such decision had ever been pronounced against a trustee in such circumstances."

Trustee paying trust funds into partnership. Where there are partners, one of whom is a trustee who brings trust-moneys into the firm's assets with the knowledge of the others, which is misapplied, the Court holds them all liable as trustees.[10]

[1] 11 Hare, 167.

[2] 6 Beav. 239.

[3] *Lanham* v. *Blundell*, 4 Jur. N. S. 3; *Wilkinson* v. *Bewick*, 4 Jur. N. S. 1010.

[4] *Wren* v. *Kirton*, 11 Ves. 377; *Billing* v. *Brogden*, 38 Ch. D. 546.

[5] *Lupton* v. *White*, 15 Ves. 432; *Cook* v. *Addison*, L. R. 7 Eq. 466. As to the distinction between debtor and creditor and trustee and *cestui que trust*, see *Lister* v. *Stubbs*, 45 Ch. D. 1. *Selway* v. *Salway*, 2 Russ. & M. 215, affd. *sub nom. White* v. *Baugh*, 3 Cl. & F. 44, 9 Bli. (N. S.) 181; *In re Oatway*, [1903] 2 Ch. 356.

[6] *Cann* v. *Cann*, 51 L. T. 770.

[7] 11 Hare, 160. In *Wyman* v. *Paterson*, [1900] A. C. 271, where money was left in an agent's hands, six months was held too long to leave it there.

[8] 4 Hare, 555.

[9] L. R. 18 Eq. 642.

[10] *Ex parte Watson*, 2 Ves. & B. 414: "The clear principle of equity is that, if a trustee has made use of the trust property, the *cestui que trust* has an option to have the profit actually made or interest": per Lord Eldon, C., 415. *In re Davis, Eager*

Trustee not an agent.

It must be borne in mind that a trustee is not an agent. An agent represents and acts for his principal, and when he contracts as agent the principal is bound, but the agent is not. When a trustee contracts, unless he is bound, there is no one bound, since he has no principal; the contract is therefore his personal contract, but with power to the trustee to resort to the trust funds for his exoneration. If, then, he wishes to protect himself from personal liability he must do so by distinctly contracting that the other party to the contract is to look exclusively to the trust estate;[1] and we have already seen[2] that it is an established rule that a trustee, executor, or administrator of a trust estate shall have no allowance for his care and trouble.[3]

Effect of clause exonerating from liability for errors, omissions, or neglect, &c.

The effect of a special clause in a trust deed, exonerating trustees from liability "for omissions, errors, or neglect of management," or for the inefficiency of securities, insolvency of debtors, or depreciations of securities, and other like casualties, has yet to be considered. "Such a clause," says Lord Watson,[4] and his expression is adopted by Lord Herschell,[5] "is ineffectual to protect a trustee against the consequences of *culpa lata*, or gross negligence, on his part, or of conduct which is inconsistent with *bonâ fides*. I think it is equally clear that the clause will afford no protection to trustees who, from motives however laudable in themselves, act in plain violation of the duty which they owe to the individuals beneficially interested in the funds which they administer." "Clauses of this kind do not protect against positive breach of duty."[6]

Costs.

The general rule as to costs is, that where one interested in an estate resorts to the Court of Chancery for an account of that estate, the costs fall on the estate; "for executors usually are to be exempted from paying costs; and this rule holds even in cases where great delays and difficulties have been occasioned by the executor; for the Court will overlook these circumstances if it can."[7]

Having thus considered the general principles of law applicable to the acts and default of trustees, we are now to treat of the more special applications of it, and—

I. Custody of trust property.

I. As to the position of a trustee with regard to the custody of trust property.

Although Lord Ellenborough laid down in *Crosse* v. *Smith*[8] that an executor is liable at law for the loss of his testator's assets, when they have once come into his hands, either by fire, robbery, or by any of the various means which afford excuse to ordinary bailees and agents

v. *Barnes*, 31 Beav. 579; *Alliance Bank* v. *Tucker*, 17 L. T. (N. S.) 13; *Blyth* v. *Fladgate*, [1891] 1 Ch. 337.

[1] *Taylor* v. *Davis*, 110 U. S. (3 Davis) 330, 335.

[2] *Ante*, 1234.

[3] *Robinson* v. *Pett*, 3 P. Wms. 249; *In re Barber*, (1886), 34 Ch. D. 77; where the lessor has refused to grant a renewal of a lease to the *cestui que trust*, he will yet be entitled to the benefit of any renewal the trustee may have obtained: *Keech* v. *Sandford*, Sel. Cas. in Ch. (King) 61, 2 Wh. & T. Lead. Cas. in Eq. (7th ed.) 693; *Tanner* v. *Elworthy*, 4 Beav. 487. *In re Biss*, [1903] 2 Ch. 40; *Bevan* v. *Webb*, [1905] 1 Ch. 620.

[4] *Knox* v. *Mackinnon*, 13 App. Cas. 765; *Wyman* v. *Paterson*, [1900] A. C. 271. For a curious case of "sheer unreasonableness" of a trustee, who was in consequence ordered to pay the costs of legal proceedings taken by *cestui que trust*, see *In re Chapman*, *Freeman* v. *Parker*, 11 Times L. R. 177 (C. A.).

[5] *Rae* v. *Meek*, 14 App. Cas. 572.

[6] *Seton* v. *Dawson*, 4 Dunlop, per Lord Ivory, 318. Cp. *Kennedy* v. *Kennedy*, 12 Rettie, 275.

[7] Per Lord Thurlow, C., *Hall* v. *Hallett*, 1 Cox (Ch.) 141; but trustees were made to pay costs in *In re Skinner*, [1904] 1 Ch. 289. See Judicature Act, 1890 (53 & 54 Vict. c. 44), s. 5.

[8] 7 East, 246.

in cases of loss without negligence, the rule of equity was always otherwise, and was thus stated by Lord Hardwicke:[1] "If a trustee is robbed, that robbery, properly proved, shall be a discharge, provided he keeps them [the trust funds] so as he would keep his own. So it is as to an executor or administrator, who is not to be chargeable further than goods come to his hands; and for these not to be charged unless guilty of a *devastavit*; and if robbed, and he could not avoid it, he is not to be charged, at least in this Court."

Variance between the common law and chancery doctrines.

If Lord Ellenborough's decision ever correctly expressed the rule of law,[2] it now no longer does so, by virtue of the Judicature Act, 1873,[3] providing that, in case of a conflict between the rules of equity and the rules of law, the rules of equity are to prevail—and the law is settled in the sense of Lord Hardwicke; and an executor, or administrator, or trustee has no more extensive liability than a bailee (whether gratuitous or not makes no difference[4]), who cannot be charged with the loss of his testator's assets without negligence or default.[5] And if any goods are stolen from the possession of any of the class of persons whose liability we are now considering, or from the possession of a third person to whose custody they have been delivered by any person affected with a trust of them, or are lost by casualty, as by accidental fire, the person so affected with a trust of them shall, in the absence of negligence or default, not be charged with their loss.

Effect of the Judicature Act, 1873.

Remunerated or unremunerated trustee under the same rule.

An executor is liable on a *devastavit*, not only for loss arising by a direct abuse of the assets by spending or consuming them, but also for waste by such acts of negligence and wrong administration as will disappoint the claimants on the assets.[6] This liability may include a loss arising to the estate by reason of the estate having to bear charges which it would not have had to bear but for the culpable negligence of the executor.[7]

Executor liable on a *devastavit* for frittering the assets away.

In *Hooper* v. *Summersett*,[8] where the defendant was shown to be living in the house and carrying on the trade of the deceased in the same manner as in the lifetime of the deceased, the Court of Exchequer held that there was evidence of "a sufficient intermeddling to charge him as an executor *de son tort*" and that the authorities to this effect "were too strong to be got over."

What constitutes "intermeddling."

If an executor pay a debt due to a creditor who cannot enforce it by reason of the Statute of Frauds,[9] he commits a *devastavit*; it is other-

Claims not enforceable by reason of the Statute of Frauds,

[1] *Jones* v. *Lewis*, 2 Ves. Sen. 240; *Morley* v. *Morley*, 2 Cas. in Ch. 2; *Knight* v. *Lord Plymouth*, 3 Atk. 480, decides the same point as to a receiver appointed by the Court; *Rowth* v. *Howell*, 3 Ves. 565. "Nor will the Court ever charge a trustee with imaginary values, but he shall be charged as a bailiff only. And although very supine negligence might indeed in some cases charge a trustee with more than he had received, yet the proof must be then very strong": 2 Fonbl. Eq. (5th ed.), 178; Story, Eq. Jur. § 1269.

[2] *Coggs* v. *Bernard*, 2 Lord Raym., per Holt, C.J., 913: "He is not answerable if they are stole without any fault in him." "If he keeps the goods in such a case with an ordinary care, he has performed the trust reposed in him."

[3] 36 & 37 Vict. c. 66, s. 25, sub-s. 11.

[4] *Charitable Corporation* v. *Sutton*, 2 Atk. 406; *Jobson* v. *Palmer*, [1893] 1 Ch. 71; *Shepherd* v. *Harris*, [1905] 2 Ch. 310, 318.

[5] *Job* v. *Job*, 6 Ch. D. 562; *Mayer* v. *Murray*, 8 Ch. D. 424, explained and followed *In re Symons*, *Luke* v. *Tonkin*, 21 Ch. D. 757. In all these cases a claim was made in respect of "wilful default." *Rowley* v. *Adams*, 2 H. L. C. 725; *Bennett* v. *Stone*, [1903] 1 Ch. 509. Sec. 3 of the Judicial Trustees Act, 1896 (59 & 60 Vict. c. 35), applies to the case of an executor who has committed a *devastavit*; but in considering the question of relief the Court must see that there has been no undue delay in advertising for claims under 22 & 23 Vict. c. 35, s. 29: *In re Lord de Clifford's Estate*, [1900] 2 Ch. 707, following *Bacon* v. *Bacon*, 5 Ves. 331.

[6] *In re Stevens*, [1898] 1 Ch., per Williams, L.J., 177.

[7] *Hall* v. *Hallet*, 1 Cox, 134. [8] Wight. 16, 21. [9] *In re Rownson*, 29 Ch. D. 358.

and claims barred by Statute of Limitations.

wise if the debt is merely barred by the Statute of Limitations;[1] yet this is an exception which is not to be extended; and therefore if a claim be judicially declared, by a court of competent jurisdiction, to be statute barred it is not within the exception; for in those circumstances the correct plea to a claim is *res judicata*, which an executor is bound to plead. If executors sever in their defences and plead different pleas, that which is most advantageous to the estate is the one to be received.[2] A promise to pay by one executor does not take a case out of the Act—to do so, the promise must be the act of all.[3]

Neglect of trustee to insure.

Alderson, B.,[4] held that an executor is not liable for neglect to insure when a fire happens and destroys his testator's property. This is usually cited as settling the law on this point.[5] On examination it will be seen that, in the particular case, a business was in the possession of two persons as partners, and on the death of the one the insurance was not renewed, the other being interested in the matter of the insurance, and not renewing it. Alderson, B., treats this as "a material circumstance." He says: "It would be a strong thing to say (he as a reasonable man, and taking reasonable care of his own property, not doing it)—it would be a strong thing to say that these parties were guilty of wilful default in omitting to do what Barlow himself [the surviving partner] might have done." This is the ground on which the case is decided.

Suggested distinction.

Other authorities, it is true, dealing with life, and not with fire policies, hold an executor or trustee who drops a policy liable to the beneficiaries.[6] The question seems really to turn on what, in the existing state of opinion, and with reference to contemporary modes of life, is the reasonable thing to do; and whatever may have been the case in the year 1840, it would be a hard saying at the present day, and with the immensely diminished rate of insurance, to affirm that a prudent business man would not insure his property.[7]

The executor has to act as a good business man in the circumstances; and, at the best, Alderson, B.'s, decision was complicated with facts which would have made it unsafe to follow as embodying a principle that an executor is excused from insuring his testator's property at any time.

[1] *Stahlschmidt* v. *Lett*, 1 Sm. & G. 415; *Coombs* v. *Coombs*, L. R. 1 P. & D. 288; *Hunt* v. *Wenham*, [1892] 3 Ch. 59.

[2] *Midgley* v. *Midgley*, [1893] 3 Ch. 282.

[3] *In re Ingham*, [1893] 1 Ch. 352.

[4] *Bailey* v. *Gould*, 4 Y. & C. (Ex.) 221. See *Fry* v. *Fry*, 27 Beav. 146. *Ex parte Andrews*, 2 Rose, 410, and *Dobson* v. *Land*, 8 Hare, 216, are cited for the general proposition, but they are very special in their facts.

[5] *E.g.*, 2 Wms. Exors. (10th ed.), 1444, note (*r*).

[6] *Garner* v. *Moore*, 24 L. J. Ch. 687; *Marriott* v. *Kinnersley*, 1 Tamlyn, 470; but only if he has or can procure funds, *Hobday* v. *Peters* (No. 3), 28 Beav. 603.

[7] In *Fry* v. *Fry*, 27 Beav. 146, Lord Romilly, M.R., refused to charge executors personally with the consequence of not keeping up a policy of insurance of a house. The premium on the policy became due on the 25th of March; the testator died on the 27th of March; and the house was destroyed by fire on the 26th May in the same year. Executors have been held personally liable on a covenant to repair where an uninsured leasehold house the property of their testators was destroyed by fire. *Tremeer* v. *Morison*, 1 Bing. N. C. 89; *Sleap* v. *Newman*, 12 C. B. (N. S.) 116; and the judgment of Smith, J., in which all the cases are collected, in *Rendall* v. *Andreæ*, 61 L. J. Q. B. 630. By the Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 18, a trustee may insure up to three-fourths of the value of the property and pay the premiums out of the income of the trust funds without the consent of the beneficiary. *Lady Croft* v. *Lyndsay*, Freem. (Ch.) 1, is the case of houses destroyed in the fire of London, where the administrator was relieved in Equity. There is a note to the report referring to Lord Ellenborough's dictum in *Crosse* v. *Smith*, 7 East, 255, which is not now law; *Job* v. *Job*, 6 Ch. D., per Jessel, M.R., 564. *Ante*, 498.

Where trustees are guilty of breach of trust, each trustee is responsible for the whole loss sustained in consequence of their collective negligence, and execution may be issued against any one of them singly;[1] and there is no difference in liability whether the loss arises from a mere default of the trustee, or is occasioned by an act, whether it is attributable to nonfeasance or misfeasance.[2]

Trustees guilty of breach of trust, each liable for the whole loss.

In one case the trustee has a remedy over against his *cestui que trust*, namely, where he is compelled to replace trust funds which have been lost through his breach of trust in making an improper investment, to which he has been induced by the *cestui que trust*. The law is expressed by Turner, L.J.:[3] "It seems to me to be the necessary consequence of the *cestuis que trust* for life having received the income of the trust fund unduly invested, that the trustees have a right to be indemnified as against the *cestuis que trust* for life, or their estates to the extent to which those estates have been benefited by the improper investment." This right has been limited to the case where the interest of the *cestui que trust* was in possession, and where a personal benefit had been received from the investment;[4] but statutory recognition is given to the principle asserted in *Raby* v. *Ridehalgh* by sec. 6 of the Trustee Act, 1888,[5] which is re-enacted by sec. 45 of the Trustee Act, 1893.[6] The scope of this is indicated by Lindley, L.J.:[7] "In order to bring a case within this section the *cestui que trust* must instigate, or request, or consent in writing to some act or omission which is itself a breach of trust, and not to some act or omission which only becomes a breach of trust by reason of want of care on the part of the trustees. If a *cestui que trust* instigates, requests, or consents in writing to an investment not in terms authorised by the power of investment, he clearly falls within the section; and in such a case his ignorance or forgetfulness of the terms of the power would not, I think, protect him—at all events, not unless he could give some good reason why it should, *e.g.*, that it was caused by the trustee. But if all that a *cestui que trust* does is to instigate, request, or consent in writing to an investment which is authorised by the terms of the power, the case is, I think, very different. He has a right to expect that the trustees will act with proper care in making the investment, and if they do not, they cannot throw the consequences on him, unless they can show that he instigated, requested, or consented in writing to their non-performance of their duty in this respect."

Cestui que trust receiving benefit from unauthorised investment must indemnify trustee.

Trustee Act, 1893, s. 45.

Lindley, L.J.'s, explanation of the scope of the section.

There has been some dispute in working out this principle. The cases run back to *Trafford* v. *Boehm*,[8] where Lord Hardwicke, C., enunciated the principle "that if a trustee errs in the management of the trust and is guilty of a breach, yet if he goes out of the trust with

Extent of the principle compelling *cestui que trust* to recoup.

[1] *Ex parte Shakeshaft*, 3 Bro. C. C. 197; *Ex parte Norris*, L. R. 4 Ch. 280.

[2] *Dennynes* v. *Robinson*, 24 Beav. 86; *Grayburn* v. *Clarkson*, L. R. 3 Ch. 605.

[3] *Raby* v. *Ridehalgh*, 7 De G. M. & G. 110. See *Sawyer* v. *Sawyer*, 28 Ch. D., per Chitty, J., 598, affirmed 602; *Blyth* v. *Fladgate*, [1891] 1 Ch., per Stirling, J., 363.

[4] *Morgan* v. *Blyth*, [1891] 1 Ch. 344, 363.

[5] 51 & 52 Vict. c. 59.

[6] 56 & 57 Vict. c. 53.

[7] *In re Somerset*, [1894] 1 Ch. 231, 265. The words "in writing" in sec. 45 apply only to "consent," and not to "instigation" or "request": *Griffith* v. *Hughes*, [1892] 3 Ch. 105, approved *In re Somerset*, *l.c.* 265. A married woman (to whose income subject to a restraint on anticipation the section extends) must be shown to have acted for herself with knowledge of the facts: *Sawyer* v. *Sawyer*, 28 Ch. D. 595; see *Ricketts* v. *Ricketts*, 64 L. T. 263, explained in *Bolton* v. *Curre*, [1895] 1 Ch. 544. The sections in the Trustees Acts, ss. 6, 8 of 51 & 52 Vict. c. 59, and s. 45 of 56 & 57 Vict. c. 53, extended the powers of the Court for the benefit of trustees; *Mara* v. *Browne*, [1895] 2 Ch. 69; reversed [1896] 1 Ch. 199.

[8] (1746), 3 Atk. 440, 444.

the approbation of the *cestui que trust*, it must be made good first out of the estate of the person who consented to it." Lord Eldon, C., in *Walker* v. *Symonds*[1] carries the principle further: "Either concurrence in the act, or acquiescence[2] without original concurrence will release the trustees: but that is only a general rule, and the Court must inquire into the circumstances which induced concurrence or acquiescence; recollecting in the conduct of that inquiry how important it is, on the one hand, to secure the property of the *cestui que trust*; and on the other, not to deter men from undertaking trusts from the performance of which they seldom obtain either satisfaction or gratitude."

Position of *cestui qu trust* with regard to acquiescence in an improper investment.

It is true that if a *cestui que trust*, who is *sui juris*, acquiesces in an improper investment, he cannot afterwards call it in question;[3] provided that it be made with his full knowledge[4] and without any misrepresentation or concealment on the part of the trustees;[5] but this statement must be taken with the further qualification that the *cestui que trust* is entitled to place reliance on his trustee; and a duty to inquire does not arise unless something has happened which suggests suspicion. There is no duty on a *cestui que trust* to inquire into his trustee's discharge of the functions of his trust, in the absence of matter for suspicion;[6] and approbation is more than knowledge with acquiescence.[7]

In re Salmon.

In *In re Salmon*,[8] after making an investment within the scope of the powers under the trust, the trustee retired and new trustees were appointed. Six years elapsed and then the new trustees, with the concurrence of the plaintiff, a beneficiary, but without notice to the retired trustee, sold the mortgaged property for £500 less than the amount of the trust fund invested in it. The beneficiary having brought his action against the retired trustee for the deficiency, the investment was held an improper one. The case of *Knott* v. *Cottee*[9] was cited in argument, where the Master of the Rolls, speaking of improper investments, said:[10] "The case must either be treated as if these investments had not been made, or had been made for his (the trustee's) own benefit out of his own moneys, and that he had at the same time retained moneys of the testator in his own hands." If so, the trustee would be entitled to the property in which the investment had been made on replacing the trust fund; because the property purchased was never trust property, but only property purchased with trust funds and liable to be retained by the trust till redeemed by the making good the funds used in the purchase; and the trustee had his option to replace the funds or submit to a sale. It was then argued that since the trustee was deprived of his option of taking the property by the sale, he could not be held to payment of the deficiency in the value of the security when sold without his concurrence. This argument succeeded before Kekewich, J. On appeal the case of *Thornton*

Knott v. *Cottee.*

Thornton v. *Stokill.*

[1] 3 Swans. 1, 64. [2] *Post*, 1263. [3] *Harden* v. *Parsons*, 1 Eden, 145.

[4] *Lord Montford* v. *Lord Cadogan*, 17 Ves. 485; 19 Ves. 635. *Hughes* v. *Wells*, 9 Hare, 749, 773. [5] *Burrows* v. *Walls*, 5 De G. M. & G. 233.

[6] *Shropshire Union Railways and Canal Co.* v. *The Queen*, L. R. 7 H. L. 496; *In re Vernon Ewens & Co.*, 33 Ch. D. 402; *Hartopp* v. *Huskisson*, 55 L. T. 773. Where a trustee commits a breach of trust at the instigation or request or with the consent in writing of a beneficiary, the Court may in its discretion impound the interest of the beneficiary by way of indemnity, 56 & 57 Vict. c. 53, s. 45; *In re Bowden*, 45 Ch. D. 444.

[7] *Phillipson* v. *Gatty*, 7 Hare, 516, 524; *Fletcher* v. *Collis*, [1905] 2 Ch. 24, 32.

[8] 42 Ch. D. 351; *Head* v. *Gould*, [1898] 2 Ch. 250, 266. [9] 16 Beav. 77. [10] *L.c.* 79.

Thornton v. *Stokill.*

v. *Stokill* [1] was cited for the defendant to establish that the option of the *cestui que trust* is to take the property, or to have the deficiency made up. But Cotton, L.J.,[2] pointed out that there the investment was outside the limits of the trust, while in the case before the Court the investment was warranted by the terms of it. The Court of Appeal, overruling Kekewich, J., drew a distinction between investments in their nature improper because outside the trustees' powers, and investments proper in themselves, that is, authorised by the powers of the trust, but on sale proved to be an improvident exercise of those powers. As to these latter the *cestui que trust* could not dissent till he had ascertained that the trustee had not acted with reasonable prudence; and that would not be, in the case before the Court, till the deficiency was manifested by a sale; so that the retired trustee was liable even though the beneficiary had had notice of the investment. Where an investment is made outside the terms of the trust, the *cestuis que trust* must accept or reject; and this duty being on the *cestui que trust*, in the event of failure to perform it, the trustee would be discharged.[3]

Rule formulated by Kekewich, J., adopted by Wright, J.

In *In re Lake*,[4] Wright, J., followed the rule indicated by Kekewich, J., that where trust funds have been invested on a security which is not merely insufficient, but of a description not authorised by the trust, the trustee should have the opportunity or option of taking to the improper security on replacing the trust fund; and held a trustee in bankruptcy entitled to the same right.

Inaction does not avoid liability.

Sir William Grant, M.R. in *Lingard* v. *Bromley* [5] held that nothing could be more mischievous than to hold a trustee acquitted from contribution to make good a deficiency in trust funds as between himself and his co-trustee, because he had done nothing, but had abdicated all judgment of his own and had done whatever his co-trustee had desired.[6]

Trustee receiving payment of a private debt out of trust funds used to pay a trust debt not accountable.

In *Butler* v. *Butler* [7] one trustee sought to recover from his co-trustee money that had been advanced on mortgage to a builder who had paid it over to the co-trustee as the price of the land on which the mortgage was secured and which was insufficient security. The attempt failed; James, L.J., pointed out that "if two trustees will sell out stock and hand the money over to one, no doubt that one can be made to repay, but the indirect benefit which a creditor gets from trust-money being lent to his debtor upon insufficient security is too remote, unless the thing was a fraudulent scheme." "All that is said is that in the result some of the moneys lent upon insufficient security were paid in discharge of a debt due from the mortgagor to one of the trustees." [8]

Lockhart v. *Reilly.* *Thompson* v. *Finch.*

In two cases, *Lockhart* v. *Reilly* [9] and *Thompson* v. *Finch*,[10] this claim for indemnity has been allowed; but in both the trustee against whom relief was sought was a solicitor, and the action through which loss to the trust resulted arose from misuse of the position of solicitor. In *Bahin* v. *Hughes*,[11] however, Cotton, L.J., thought it "wrong to lay

[1] 1 Jur. N. S. 751.
[2] *In re Salmon*, 42 Ch. D. 369.
[3] *In re Massingberd's Settlement*, 59 L. J. Ch. 107.
[4] [1903] 1 K. B. 439.
[5] (1812), 1 Ves. & B. 114.
[6] The authorities are collected in *Baynard* v. *Woolley*, 20 Beav. 583.
[7] 7 Ch. D. 116.
[8] *Jackson* v. *Dickinson*, [1903] 1 Ch. 947. Cp. *Mutton* v. *Peat*, [1900] 2 Ch. 79, on the third point decided.
[9] 25 L. J. Ch. 697. *In re Turner*, [1897] 1 Ch. 536. *In re Lindley*, [1904] 2 Ch. 785, applied the distinction of the trustee being a solicitor. *The Milwall*, [1905] P., per Cozens Hardy, L.J., 176.
[10] 22 Beav. 316; 8 De G. M. & G. 560.
[11] 31 Ch. D. 395; *In re Partington*, *Partington* v. *Allen*, 57 L. T. 654, 662; *Campbell* v. *Selanders*, 13 N. Z. L. R. 757, 760.

down any limitation of the circumstances under which one trustee would be held liable to the other for indemnity, both having been held liable to the *cestui que trust*; but so far as cases have gone at present, relief has only been granted against a trustee who has himself got the benefit of the breach of trust, or between whom and his co-trustees there has existed a relation which will justify the Court in treating him as solely liable for the breach of trust." "In my opinion, it would be laying down a wrong rule to hold that where one trustee acts honestly, though erroneously, the other trustee is to be held entitled to indemnity who by doing nothing neglects his duty more than the acting trustee." The rest of the Court concurred. The principle is well established that "as between two trustees who are *in pari delicto*, the one who has made good a loss occasioned by a breach of trust for which the two are jointly and severally liable may obtain contribution to that loss from the other."[1]

Contribution between trustees *in pari delicto*.

Returning now to the consideration of the liability of the *cestui que trust* to indemnify a trustee, we find the facts in *Chillingworth* v. *Chambers*[2] complicated by reason of the trustee who sought contribution being also a *cestui que trust*, who had concurred in a breach which was for his benefit. The rule laid down was that the trustee's position as a *cestui que trust* stood in the way of his claim to contribution from his co-trustee. On the breach of trust being brought to light the first duty of the trustees is to replace the trust fund; and the share of the *cestui que trust* is primarily applicable to this. The claim for contribution, however, fails; since to establish this the pre-requisites are that the trustees should be equally to blame for the breach, and that the one claiming contribution should not have profited by it. "If I request a person to deal with my property in a particular way and loss ensues I cannot justly throw that loss on him. Whatever our liabilities may be to other people, still, as between him and me, the loss clearly ought to fall on me. Whether I am solely entitled to the property or have only a share or a limited interest, still the loss which I sustain in respect of my share or interest must clearly be borne by me, not by him."[3] Nor does it affect the principle that some of the breaches occurred before the interest as *cestui que trust* accrued.

Indemnity where trustee is also *cestui que trust*. *Chillingworth* v. *Chambers*.

The position of the trustee in relation to his *cestui que trust* was further defined in *Fletcher* v. *Collis*.[4] A breach of trust resulting in the loss of trust funds was committed for the benefit of a *cestui que trust* who was tenant for life. At the instance of the remainder-man an arrangement was come to by which payments were made by the trustee to replace the fund and to pay interest from the date of the arrangement. Twenty years afterwards, during which time the trustee's payments were accumulating, the tenant for life died. By means of the policies which fell in on his death and the payments made in his lifetime, the fund had been restored with all interest due from the first. The accumulated interest was claimed both by the trustee's representative and by the trustee in bankruptcy of the tenant for life. The Court of Appeal held, apart from any statute, that a *cestui que trust* of full age[5] and *sui juris*, who consents to his trustee committing a

Where *cestui que trust* is tenant for life. *Fletcher* v. *Collis*.

[1] *Robinson* v. *Harkin*, [1896] 2 Ch. 415, 425.
[2] [1896] 1 Ch. 685.
[3] *L.c.*, per Lindley, L.J., 699.
[4] [1905] 2 Ch. 24.
[5] As to an infant *cestui que trust*: *Head* v. *Gould*, [1898] 2 Ch. 250. In D. 27, 3, 1, we find, *In omnibus quæ fecit tutor cum facere non deberet, item in his quæ non fecit rationem reddet hoc judicio: præstando dolum, culpam, et quantum in rebus suis dili-*

breach of trust and paying the proceeds to some third person, so that the *cestui que trust* does not himself benefit at all, could have no right as against his trustee to recover the income of the fund that has been spent. The remainder-man is entitled to have the capital replaced, but the income arising therefrom should not be paid over to the *cestui que trust*, but could be impounded by the trustee to indemnify him. The trustee in bankruptcy would be in no better position. The principle is that a beneficiary who consents to a breach of trust is not to be heard as against his trustee to claim compensation for that to which he has given consent. Romer, L.J.,[1] intimates that if the trustee had parted with the funds he had replaced to a new trustee without reservation of rights "he might be held to have lost his right to claim the income after he had parted with the fund." The Lord Justice also affirms the proposition that "if a beneficiary claiming under a trust does not instigate or request a breach of trust, is not the active moving party towards it, but merely consents to it, *and he obtains no personal benefit from it*, then his interest in the trust estate would not be impoundable in order to indemnify the trustee liable to make good loss occasioned by the breach."[2]

Romer, L.J.'s, view.

The existence of a duty for an executor to inform his *cestuis que trust* "when they attained twenty-one, of the position of the fund and of their rights" was asserted by Giffard, V.C.[3] In *In re Lewis*[4] the Court of Appeal proceeded on the basis of an admission by counsel, that there was apparently no such duty in the case before them; and this is very manifest; but Cozens Hardy, L.J., lays down as a general proposition it to be "plain there is no *primâ facie* duty resting on an executor to give notice." With the qualification "*primâ facie*" this may well be so (an adult and *sui juris* is presumably cognisant of his rights[5]); but at law, at any rate, the duty "to pay" raises an obligation to seek out the creditor. Kekewich, J., discusses the same point *In re Mackay*,[6] and makes no distinction between the case where there is the duty "to pay" and that where the will directed in case the legatee "should not return and claim the said house the same shall accrue" to another. Yet the distinction seems both obvious and material.

Duty to inform *cestui que trust* of his rights.

If property is held in trust for tenants for life or for infants or upon special trusts limiting the right to indemnity, no beneficiary can be required personally to indemnify the trustee against the whole of the burdens incident to his legal ownership, and the trustee is held to take the trust with his right to indemnity limited to the trust estate. But where the *cestui que trust* is *sui juris* and beneficial owner of the whole property the right of the trustee to indemnity is not limited to the trust property, but is a personal obligation of the *cestui que trust* enforceable in equity.[7] There is an exception to this principle in the case of trustees of a club. The fundamental condition in the foundation of

Right to indemnity limited to the trust estate except where *cestui que trust* is *sui juris* and beneficial owner of the whole estate.

gentium. See also D. 27, 3, 1, § 3; D. 26, 7, 5, § 7; D. 26, 7, 15; Code 5, 37, 22; Inst. 3, 27, 2.

[1] *L.c.* 35. [2] *L.c.* 32. *Sawyer* v. *Sawyer*, 28 Ch. D. 595, 598.

[3] *Brittlebank* v. *Goodwin*, L. R. 5 Eq. 545, 550. [4] [1904] 2 Ch. 656, 664.

[5] "Presumptions are founded upon the ordinary course of things, *ex re quod plerumque fit*"; Evans, Pothier, Obligations, vol. i. 451, citing Cujas.

[6] [1906] 1 Ch. 25, 33.

[7] *Hardoon* v. *Belilios*, [1901] A. C. 118. Trustees are entitled to their indemnity in priority to the solicitors of a beneficiary who have obtained a charging order under s. 28 of the Solicitors Act, 1860; *In re Turner*, [1907] 2 Ch. 326. A trustee who has been made to pay personally may have indemnity from the trust estate, where the liability has been incurred in the reasonable management of the trust; *Bennett* v. *Wyndham*, 4 De G. F. & J. 259; *In re Raybould*, [1900] 1 Ch. 199.

a club is that no member as such becomes liable to pay in respect of his membership any sum beyond his subscription.[1]

No distinction between *cestuis que trust* under disability and those *sui juris*.

An attempt to distinguish the liabilities of trustees, as they relate to the property of married women or children, or others under disability, from their liability where the *cestui que trust* is *sui juris*, was defeated by the decision of the House of Lords in *Shropshire Union Railways and Canal Co.* v. *The Queen*;[2] a decision not inconsistent with what has been just said, since here the *cestui que trust* remains only a limited owner; in the other he is, except formally, absolute owner; the distinction does not turn on his capacity but on the nature of his estate.

Trustees are liable who pay over funds on a forged authority.

Lord Romilly, M.R., held[3] trustees liable to replace funds they had paid over on the faith of a marriage certificate which proved to be forged; on the ground that the trustees were bound to pay over the fund to the persons entitled to it, and ought to have seen to the genuineness of the authority to receive money.[4] The liability of the trustees was thus for personal default.

Non-disclosure of trust in conveyance.

The contention in *Carritt* v. *Real and Personal Advance Co.*,[5] was that the suppression of notice of a trust in a conveyance to a trustee was a "misstatement" "on the face of any document stating something which was not the truth," within the remarks of Lord Cairns[6] in the case just noticed, that invalidated the title of the *cestui que trust* as against a purchaser from the trustee; but Chitty, J., held that:[7] "the practice of conveyancers and the convenience of dealing with real property is the justification for keeping the trusts off the face of the deed"; and he did not consider himself at liberty to say at this day "that where purchasers are dealing with real estate or leasehold estate, they are not entited to frame their deed (so long as they do not make any direct misrepresentation on the face of it) according to the ordinary forms used by conveyancers, and according to those forms which disclose part only of the transaction."

II. Dealing with trust funds.

II. As to the position of a trustee dealing with trust funds.

First, as to acts having special reference to executors.

(1) Acts with a special reference to executors.

The rule of executors' liability in regard to tortions or negligent acts is founded on two principles:

(1) That, in order not to deter persons from undertaking these offices, the Court is extremely liberal in making every possible allowance, and is cautious not to hold executors or administrators liable upon slight grounds;

[1] *Wise* v. *Perpetual Trustee Co.*, [1903] A. C. 139.

[2] L. R. 7 H. L. 496.

[3] *Eaves* v. *Hickson*, 30 Beav. 136. "This view of mine has, I believe, been affirmed by the House of Lords in the case of a forgery upon one of the railway companies—*Midland Ry. Co.* v. *Taylor*, 8 H. L. C. 751": per Lord Romilly, M.R., *Sutton* v. *Wilders*, L. R. 12 Eq. 378. In *Hopgood* v. *Parkin*, L. R. 11 Eq. 74, Lord Romilly, M.R., founding himself on *Eaves* v. *Hickson*, held a trustee liable for the loss of a trust fund occasioned by his solicitor's default. But in *In re Speight, Speight* v. *Gaunt*, 22 Ch. D. 727, the Court of Appeal overruled the decision (at 761, 768), emphasising the rule that trustees employing properly qualified agents and having no reason to distrust their fitness in all respects for the work on which they employ them, do not guarantee the solvency or honesty of the agents employed, even though the agent may be a co-trustee; in H. L. 9 App. Cas. 1, per Lord Blackburn, 20; *Shepherd* v. *Harrison*, [1905] 2 Ch. 310. See also per Stirling, J., *In re Partington*, 57 L. T. 654.

[4] *Doyle* v. *Blake*, 2 Sch. & Lef. (Ir. Ch.) 231, a case before Lord Redesdale; *National Trustees Co. of Australasia* v. *General Finance Co. of Australasia*, [1905] A. C. 373, 379. It is in this case (at 375), that Lord Lindley says, "the great use of a trustee is to commit *judicious* breaches of trust."

[5] 42 Ch. D. 263. *Rimmer* v. *Webster*, [1902] 2 Ch. 163, 174.

[6] L. R. 7 H. L. 509.

[7] 42 Ch. D. 272.

(2) That care must be taken to guard against any abuse of their trust.[1]

The duty of an executor is to collect assets "with all convenient speed,"[2] to pay all funeral expenses and debts, and to distribute the residue in the way indicated by the will of the testator; if he fails in any of these respects, subject to the rule just stated, he renders himself personally liable.[3] But an executor who does not prove, yet acts, is answerable only for what he actually receives.[4] No action for negligence lies for neglect to prove; the remedy is to cite the executor who fails to prove into the Probate Court.[5] Duty of executor.

If the executor retains balances, which he ought to have laid out either in compliance with the express directions of the will or from his general duty, he will be liable;[6] and if he has funds in hand, and permits debts carrying interest to remain unpaid, he will be liable for the interest.[7] From the nature of an executor's office it is often necessary for him to keep sums in hand for the making of payments; and where this is so he will not be liable, "unless it be shown that all the purposes for which the executor kept the money were answered";[8] but when the Court is of opinion that the executor is needlessly and improperly retaining funds, it will hold him guilty of negligence and breach of trust, and charge him with interest on the sums he thus keeps in his hands.[9] Yet to warrant the Court doing this there must be not a mere mistake,[10] but "a clear case of improper retention of balances to a considerable or substantial amount."[11] Where he retains funds in hand.

[1] Wms. Exors. (10th ed.) 1435.

[2] A special direction to this effect in a will obliges to no more than the ordinary duty implied in the office of an executor, and there must necessarily be some discretion: *Buxton* v. *Buxton*, 1 My. & Cr. 80, 93.

[3] *Lowson* v. *Copeland*, 2 Bro. C. C. 156; *Brown* v. *Burdett*, 40 Ch. D. 244, per Kay, J., 254; *Powell* v. *Evans*, 5 Ves. 839. Romilly, M.R., was of opinion that the executor is exonerated if it appears that his failure to obtain payment of a sum is not in fact injurious, *Clack* v. *Holland*, 19 Beav. 271. In *In re Brogden*, *Billing* v. *Brogden*, 38 Ch. D. 558, North, J., says of this case: "The law was stated in terms more favourable to the defendant" "than in any other case which I know." Cp. *East* v. *East*, 5 Hare, 343, 348. The *onus* is on the executor, where it is shown that the debt existed and that the executor took no step to call it in. "It might be a justification for the executor to prove that, at the death of the testator, the debtor was utterly insolvent; but till that is proved, the law assumes the fact to be the other way": *Stiles* v. *Guy*, 16 Sim. 230, affirmed *sub nom. Styles* v. *Guy*, 1 Mac. & G. 422. *Ex parte Ogle*, *Ex parte Smith*, *In re Pilling*, L. R. 8 Ch. 711.

[4] *Lowry* v. *Fulton*, 9 Sim. 104.

[5] *In re Stevens*, [1898] 1 Ch., per Williams, L.J., 177.

[6] *Tebbs* v. *Carpenter*, 1 Madd. 290.

[7] *Hall* v. *Hallet*, 1 Cox (Ch.), 134, commented on by Bacon, V.C., *Naut-y-Glo and Blaina Ironworks Co.* v. *Grave*, 12 Ch. D. 747. *In re Stevens*, [1898] 1 Ch. 162. See *In re Baker*, 20 Ch. D. 239: not to sue for a specialty debt for any period short of the period of limitation is not negligence which will deprive the creditor of his right to payment. Where, in an administration suit, there is a fund in Court a creditor may come in, though the time appointed has long elapsed: *Harrison* v. *Kirk*, [1904] A. C. 1. *Re Postlewaite*, 59 L. T. 58, 60.

[8] *Dawson* v. *Massey*, 1 Ball. & B. (Ir. Ch.) 231 and note; *Forbes* v. *Ross*, 2 Cox (Ch.), 113; *Flanagan* v. *Nolan*, 1 Moll. (Ir. Ch.) 84.

[9] *Littlehales* v. *Gascoyne*, 3 Bro. C. C. 73; also see 107, 433; *Forbes* v. *Ross*, 2 Cox (Ch.), 113; *Seers* v. *Hind*, 1 Ves. 294. The payment of interest by executors and trustees when compelled to refund is treated by Chitty, J., in *In re Hulkes*, 33 Ch. D. 552, dissenting from *Saltmarsh* v. *Barrett* (No. 2), 31 Beav. 349, and following *A.-G.* v. *Kohler*, 9 H. L. C. 654, and *A.-G.* v. *Alford*, 4 De G. M. & G. 843. See *Masonic General Life Assurance Co.* v. *Sharpe*, [1892] 1 Ch., per Lindley, L.J., 170: "The trustee is treated as if he had the funds still in his hands."

[10] *Brucre* v. *Pemberton*, 12 Ves. 386.

[11] *Jones* v. *Morrall*, 2 Sim. N. S. 241, 252; *Davenport* v. *Stafford*, 14 Beav. 319; 2 De G. M. & G. 901. For the law as to legacies and the executor's duty with regard to them, see *Ashburner* v. *Maguire*, and the notes to it, in 1 White & Tudor, L. C. in Equity (7th ed.), 780.

Executor *de son tort.*

The sole title of an executor is the production of probate; but one who, without being executor, intermeddles with the deceased's estate as if he were executor makes himself executor *de son tort*, that is, executor generally.[1] Thus where executors of a foreigner meddle with his property in the jurisdiction of the English crown they become executors *de son tort*[2] to the extent of the assets received by them.

Trust to accumulate. Lord Eldon's view,

"Where there is an express trust to make improvement of the money [a trust to accumulate], if he [the trustee] will not honestly endeavour to improve it, there is nothing wrong in considering him, as the principal, to have lent the money to himself upon the same terms upon which he could have lent it to others, and as often as he ought to have lent it, if it he principal; and as often as he ought to have received it and lent it to others, if the demand be interest, and interest upon interest." "This is a species of case, in which the Court would shamefully desert its duty to infants by adopting a rule, that an executor might keep money in his hands without being answerable, as if he had accumulated; and, if the Court cannot find out from the actual circumstances proved that he has attempted accumulation, and the charge falls more heavily upon him on that account, *the fault is his own*[3] in not showing what endeavours to improve it he had made."[4]

and Sir William Grant, M.R.'s

And this was fully accepted by Sir William Grant, M.R.: "The Court says [to the trustee], 'if you neglect your duty and keep the money yourself, your obligation is to put the infant in the same situation as if you had not done so.' The Court does not inquire into the particular benefit that has been made; but fastens upon the party an obligation to make good the situation of the *cestuis que trust*."[5]

Distinction noted by Sir Thomas Plumer.

Yet there is a qualification to be kept in mind. "If the executor has balances which he ought to have laid out, either in compliance with the express directions of the will or from his general duty, even when the will is silent on the subject, yet if there be nothing more proved in either case, the omission to lay out amounts only to a case of negligence and not of misfeasance."[6] In the case before him the Vice-Chancellor held the facts to show "a case of negligence," and the executors were charged the usual interest at £4 per cent.

Comment.

One expression used by the Vice-Chancellor seems to require explanation. The correct antithesis plainly is not between misfeasance and negligence, but between that gross negligence which, in the words of the civil law, *plane dolo comparabitur*,[7] and failure to attain that standard of care, *quo plerique ejusdem conditionis homines*

[1] *Paull* v. *Simpson*, 9 Q. B. 365, 370; but the mere handing goods on to another is not sufficient.

[2] *A.-G.* v. *New York Breweries Co.*, [1898] 1 Q. B. 205, [1899] A. C. 62.

[3] In the report in 11 Ves. at 108, this is printed "the fault is not his own," an obvious misprint.

[4] *Raphael* v. *Boehm*, 11 Ves., per Lord Eldon, C., 107, 108; 13 Ves. 591, considered *Tebbs* v. *Carpenter*, 1 Madd. 290, 300; *Heighington* v. *Grant*, 5 My. & Cr. 258; 1 Ph. 600, 604; *Feltham* v. *Turner* (1870), 23 L. T. (N. S.) 347. The question of the liability of trustees to pay compound interest is considered in a note (c), 2 Kent, Comm. 231, the conclusion of which is that authority and the reason of the thing preponderate alike in favour of the allowance under the limitations stated in the note, and that the total abandonment of the rule would operate in many cases most unjustly as respects the right of the *cestui que trust*, and would introduce a lax discipline that would be dangerous to the vigilant and faithful administration of trust estates. Trustees have now to accumulate the residue of the income of infants after payments for maintenance and education under the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 43, sub-s. 2. *In re Holford*, [1894] 3 Ch. 30; *In re Bowlby*, [1904] 2 Ch. 685.

[5] *Dornford* v. *Dornford*, 12 Ves. 129; *Brown* v. *Sansome*, McClel. & Younge (Ex.), 427 —a banker trustee unnecessarily retaining trust funds.

[6] *Tebbs* v. *Carpenter*, 1 Madd. 307.

[7] D. 11, 6. 1 § 1.

solent pervenire; or, perhaps, between a recklessness which connotes culpability, and heedlessness which only marks a falling short of the amount of diligence due in the circumstances.[1]

Trustee chargeable to extent of loss arising from neglect to invest.

A loss sustained by the *cestui que trust*, through the trustee neglecting his duty to invest, renders the trustee chargeable to the extent of the loss, and irrespective of whether he derives benefit from the breach of trust or not.[2]

Executor not to carry on trade of his testator unless expressly authorised.

An executor must not carry on the trade of his testator unless expressly authorised to do so;[3] where he is directed to do so, the trade and the debts are, so far as personal liability goes, looked at as his own;[4] he is nevertheless entitled to go for indemnity to the fund applied to carry on the business, but not to the general funds of the testator,[5] while the creditors of the business have only the same right.[6] But if executors carry on a business under an authority given by the will of their testator, they are entitled to a general indemnity out of the estate as against all people claiming under the will.

Where business carried on under express authority in testator's will.

Where the rights of creditors of the testator intervene other considerations arise. The fact that creditors stand by while executors are carrying on a business so as to be able to sell it as a going concern, will, indeed, entitle the executors, even against the creditors, to an indemnity from the liabilities properly incurred in doing so; but there is a difference where executors carry on a business for purposes beyond what is necessary for effecting a sale. In this latter case the mere fact that a creditor stands by and does not immediately enforce his debt will not entitle the executors, as against him, to be indemnified out of the estate; still, if there be circumstances which infer that the business was carried on with the assent of the creditors and for their benefit, then the executors are entitled to an indemnity out of the whole estate, and not merely out of the assets which come into existence subsequently to the testator's death.[7]

Creditors' right intervening.

Rule of law stated by Lord Maenaghten in *Dowse* v. *Gorton*.

The law is summed up by Lord Maenaghten[8] as follows: "If the business has been properly continued as between the executors and the creditors, or if the creditors choose to treat it so, which comes to the same thing, the executors are entitled to be indemnified against all liabilities properly incurred in carrying it on. If it has been improperly continued and the creditors choose to treat the continuance as improper (which, of course, they are not bound to do), they may

[1] 2 Spence. Eq. Jur. 192; *Byrchall* v. *Bradford*, Madd. & Geld. 13. In *Holmes* v. *Dring*, 2 Cox (Ch.), 1, Sir Lloyd Kenyon said: "It was never heard of that a trustee could lend an infant's money on private security. This is a rule which should be rung in the ears of every person who acts in the character of trustee, for such an act may very probably be done with the best and honestest intention, yet no rule in a Court of Equity is so well established as this." The principal amount decreed was made payable with interest at £4 per cent. For the general characteristics of the rule of liability of trustees, see Wharton, Negligence, §§ 515, 535.

[2] *Lord Montford* v. *Lord Cadogan*, 17 Ves. 485; 19 Ves. 633; *In re Parker*, 19 Q. B. D. 84.

[3] *Kirkman* v. *Booth*, 11 Beav. 273; *In re Chancellor, Chancellor* v. *Brown*, 26 Ch. D. 42. See Law Quarterly Review, vol. ix. 331–340, Indemnity of executor continuing testator's business.

[4] *Farhall* v. *Farhall*, L. R. 7 Ch. 123. A judgment *de bonis propriis* against an executor is erroneous where the action is upon a contract of his testator's and a *devastavit* is not proved. *Smith* v. *Chapman*, 93 U. S. (3 Otto) 41.

[5] *Fraser* v. *Murdoch*, 6 App. Cas., per Lord Selborne, C., 866.

[6] *Strickland* v. *Symons*, 26 Ch. D. 245. *Shearman* v. *Robinson*, 15 Ch. D. 548, holds that the creditors' right is merely to be put in the place of the executor. See *In re Blundell, Blundell* v. *Blundell*, 44 Ch. D., per Lindley, L.J., 11.

[7] *Dowse* v. *Gorton*, [1891] A. C. 190. As to the liability of an executor generally for carrying on his testator's trade 2 Wms. Executors (10th ed.), 1430.

[8] *Dowse* v. *Gorton*, [1891] A. C. 203.

proceed in the proper way to make the executors accountable for the value of the assets used in carrying on the business, and they may also follow the assets and obtain a charge on the business in the hands of the executors for the value of the assets misapplied, with interest thereon; and they may enforce the charge, if necessary, by means of a receiver and a sale. Then there can be no room for any claim to indemnity on the part of the executors. The charge in favour of the trust estate must be satisfied first. The executors can only take what is left. But the creditors must do one thing or the other. Though they are not bound by what they do in ignorance, and may, by leave of the Court, sue in respect of wilful default after having taken the usual order, they cannot approbate and reprobate in one breath. They cannot claim the assets of the business as a going concern in the state and condition in which those assets happen to be at the moment when they choose to intervene, and at the same time refuse the executors' indemnity in respect of liabilities incurred in carrying on the business."

Where executors carry on business at the instance of creditors.

If, again, a business is carried on by executors at the instance of creditors, but without authorisation by the will, the relation between the executors and the creditors would appear to reduce itself to a case of the law of principal and agent.

Executor bound to account for all profits.

Various doctrines were at one time current as to the circumstances in which an executor might employ the assets of his testator's estate in trade,[1] and distinctions were drawn between solvent and insolvent executors,[2] and assets specifically bequeathed and general assets.[3] An uniform rule is now established: that the executor is bound to account for all profits, however derived, to the estate of his testator.[4] The beneficiary has his option either to take the profit or to charge the executor with interest.[5] The executor will be held to employ money

[1] *Ratcliff* v. *Graves*, 2 Cas. in Ch. 152. [2] *Adams* v. *Gale*, 2 Atk. 100.

[3] *Child* v. *Gibson*, 2 Atk. 603.

[4] *Vyse* v. *Foster*, L. R. 7 H. L. 318, 329. In the Court of Appeal, L. R. 8 Ch. 333, James, L.J., said: "It was pointed out by Lord Cranworth, in *A.-G.* v. *Alford* (4 De G. M. & G. 851): that this Court has no jurisdiction in this class of cases to punish an executor for misconduct by making him account for more than that which he actually received, or which it presumes he did receive or ought to have received. This Court is not a Court of penal jurisdiction. It compels restitution of property unconscientiously withheld; it gives full compensation for any loss or damage through failure of some equitable duty; but it has no power of punishing any one. In fact, it is not by way of punishment that the Court ever charges a trustee with more than he actually received, or ought to have received, and the appropriate interest thereon. It is simply on the ground that the Court finds that he actually made more, constituting moneys in his hands 'had and received to the use' of the *cestui que trust*. A trustee, for instance, directly lending money to his firm is answerable for such money, with full interest, to the uttermost farthing; but to make him answerable for all the profits made of such money by all the firm would be simply a punishment—a punishment arbitrary and most unreasonable in this, that its severity would be in the inverse ratio of the gravity of the offence. A man squandering trust-money with deliberate dishonesty in profligate extravagance would be answerable for it with 4 per cent. interest; a man lending it (at good interest) to a large, solvent, and prudent well-established firm of which he was a partner, would be punished by a fine equal to all the profits made thereby by all the partners." See *Stroud* v. *Guyer*, 28 Beav. 130, and *Jones* v. *Foxall*, 15 Beav. 388, with Lord Selborne's comment in *Vyse* v. *Foster*, L. R. 7 H. L. 346. *In re Montagu*, [1897] 2 Ch. 8.

[5] Usually at the rate of 4 per cent., unless some higher rate of profit has been obtained: *Emmet* v. *Emmet*, 17 Ch. D. 142; or where the executor is guilty, not merely of negligence, but of actual corruption or deliberate breach of trust, when £5 per cent. will be allowed: *Ex parte Oyle*, L. R. 8 Ch. 711. In *In re Davis*, [1902] 2 Ch. 317, Farwell, J., followed the rule laid down by James, L.J., in *Vyse* v. *Foster*, L. R. 8 Ch. 329: "If an executor or trustee makes profit by an improper dealing with the assets or the trust fund, that profit he must give up to the trust. If that improper dealing consists in embarking or investing the trust-money in business, he must account for the profits made by him by such employment in such business; or at the option

in trade if, being a trader, he places it to his own banking account; since thereby he procures himself a credit not his due.[1]

An executor is not liable for bad judgment; nor is one executor bound to surrender his own judgment because one of his co-executors has a different opinion from himself; so that he will not be liable in the event of his view proving wrong while that of his co-executor turns out right, and the testator's estate suffers injury from not acting on it.[2] Executor not liable for bad judgment.

There is no absolute rule fixing the time from which executors who have neglected to realise assets outstanding upon improper investments are to be liable; generally the conversion should take place within a year from the testator's death.. Accordingly, in the event of an action being brought, executors who have not realised by that time have the *onus* thrown on them to justify their inaction,[3] unless they have an absolute discretion to postpone the conversion; in which case they will not be liable where loss occurs, even though some of the property consists in shares in unlimited companies.[4] In deciding whether a reasonable discretion was exercised or not the Court will look into all the circumstances of the case, such as the nature of the investment, the confidence the testator had in the investment, the efforts made by the executor to realise, the state of the market, and the length of time that had elapsed since the testator's death.[5] When assets to be realised.

In the case of legacies payable under a general disposition in a testator's will, the same rule of a distribution within a year is applicable. The test is, when might a distribution be made if the trustees act with reasonable diligence? The presumption is that "a year after the death of the testator is the period within which his property might with reasonable diligence be administered."[6] Rule as to distribution.

An executor is liable to refund, who, having received the assets[7] of the *cestui que trust*, or if it does not appear, or cannot be made to appear, what profits are attributable to such employment, he must account for trade interest, that is to say, interest at 5 per cent." See *Hall* v. *Hallet*, 1 Cox (Ch.), 134. In *De Cordova* v. *De Cordova*, 4 App. Cas. 692, interest was allowed against executors of a testator domiciled in Jamaica at the rate of 6 per cent. Where executor is liable to refund.

[1] *Treves* v. *Townshend*, 1 Bro. C. C. 384.

[2] *Buxton* v. *Buxton*, 1 My. & Cr. 80, followed in *Marsden* v. *Kent*, 5 Ch. D. 598. See *The Heirs Hiddingh* v. *Denyssen*, 12 App. Cas. 624. As to failure to exercise a discretion, *Gainsborough (Earl of)* v. *Watcombe Terra Cotta Co.* (1885), 54 L. J. Ch. 991; *In re Owens*, 47 L. T. 61, where Jessel, M.R., says at 64: "Sec. 37 of the Conveyancing and Law of Property Act, 1881, will have to be considered. It may have a revolutionary effect on this branch of the law. It looks as if the only question left would be, whether the executors have acted in good faith or not"; see *In re Agg-Gardner*, 25 Ch. D. 600. *Scaltherpe* v. *Tipper*, L. R. 13 Eq. 232.

[3] *Grayburn* v. *Clarkson*, L. R. 3 Ch. 605; *Hughes* v. *Empson*, 22 Beav. 181.

[4] *In re Norrington*, 13 Ch. D. 654.

[5] *The Heirs Hiddingh* v. *Denyssen*, 12 App. Cas. 624. See *Churchill* v. *Lady Hobson*, 1 P. Wms. 241, where testator had made one of his executors his banker during his life. This decision has been questioned. But see also *Chambers* v. *Minchin*, 7 Ves. 186, 198; Vin. Abr. Trust (N. a). Co-trustee, Chargeable how far for the Acts and Receipts of the other, pls. 8, 9. In *Home* v. *Pringle*, 8 Cl. & F. 264, the mere fact of trustees allowing balances to remain against their agent, at the annual settlement of his accounts, where it is impossible to include his whole receipts and payments for the year, was held not a breach of trust or such culpable negligence as would make them liable for the ultimate balances due from him to the trust. In *Wyman* v. *Paterson*, [1900] A. C. 271, trustees were held liable.

[6] *Brooke* v. *Lewis*, Madd. & Geld., per Leach, V.C., 359.

[7] *Candler* v. *Tillett*, 22 Beav. 257, 263. In *Gasquoine* v. *Gasquoine*, [1894] 1 Ch. 470, it is said by Kay, L.J., at 477, that the proposition in *Candler* v. *Tillett*, that an executor who does an act by which his co-executor obtains sole possession of a part of the testator's estate, is liable for the co-executor's misapplication of it, must be read "who unnecessarily does an act." An act is not "unnecessary" if it is done in the regular course of business in administering the property.

of his testator, voluntarily,[1] and without sufficient excuse,[2] parts with any portion of them to his co-executor, who but for that act could not have obtained possession of them, so that they are embezzled or lost.[3] If funds are handed over to facilitate the performance of some duty of the executorship, for instance, the payment of debts in the ordinary course, the law is otherwise;[4] for "he is considered to do this of necessity; he could not transact business without trusting some persons, and it would be impossible for him to discharge his duty if he is made responsible where he remitted to a person to whom he would have given credit, and would in his own business have remitted money in the same way."[5]

Effect of giving receipts.

So, too, it is said by Lord Redesdale in the case just cited:[6] "If a receipt be given for the mere purposes of form, then the signing will not charge the person not receiving [the fund in respect of which the receipt is given]; but if it be given under circumstances purporting that the money, though not actually received by both executors, was under the control of both, such a receipt shall charge, and the true question in all those cases seems to have been, whether the money was under the control of both executors; if it was so considered by the person paying the money, then the joining in the receipt by the executor who did not actually receive it, amounted to a direction to pay his co-executor; for it could have no other meaning; he became responsible for the application of the money just as if he had received it."

Transmission of money amongst executors. Sir William Grant's rule.

The rule affecting transmission of money from one executor to another as laid down by Sir William Grant, M.R.,[7] is, that "if an executor does any act, by which money gets into the possession of another executor, the former is equally answerable with the other; not, where an executor is merely passive, by not obstructing the other in receiving it. But if the one contributes in any way to enable the other to obtain possession, he is answerable; unless he can assign a sufficient excuse."

An executor, or trustee, may not sell his testator's property to himself; and any such attempted sale will be declared void at the suit of one person among many interested, and even if such person's actual interest may probably be reduced to nothing by prior claims.[8]

Lord Eldon's reason for the rule.

The reason for the universality of this rule is stated by Lord Eldon, C.,[9] to rest on the consideration that "as no Court is equal to the examination and ascertainment of the truth in much the greater number of cases," the general interests of justice require such transactions to be set aside in every instance. Yet as a purchase by a trustee of trust property, or a sale to the trust of a trustee's own property is not void, but voidable, it may be confirmed either directly or by long acquiescence and absence of election.

1 This, of course, is not so where the executor has no legal right to retain: *Davis* v. *Spurling*, 1 Russ. & My. 64.

2 *Langford* v. *Gascoyne*, 11 Ves. 333.

3 *Townsend* v. *Barber*, 1 Dick. (Ch.) 356.

4 *Bacon* v. *Bacon*, 5 Ves. 331. Cp. *Speight* v. *Gaunt*, 9 App. Cas. 1.

5 Per Lord Redesdale, *Joy* v. *Campbell*, 1 Sch. & Lef. (Ir. Ch.) 328, 341.

6 *L.c.* 341. As to these cases, *Bacon* v. *Bacon*, and *Joy* v. *Campbell*, see per Jessel, M.R., *Speight* v. *Gaunt*, 22 Ch. D. 743, 744. As to the greater rights creditors may have than legatees, see *Doyle* v. *Blake*, 2 Sch. & Lef. (Ir. Ch.) 231, 239.

7 *Langford* v. *Gascoyne*, 11 Ves. 333, 335; *Underwood* v. *Stevens*, 1 Meriv. 712; *Williams* v. *Nixon*, 2 Beav. 472.

8 *Beningfield* v. *Baxter*, 12 App. Cas. 167; *Re Postlethwaite*, *Postlethwaite* v. *Rickman*, 59 L. T. 58. As to transfer of assets by executor to his bankers to secure executor's debt, *Hill* v. *Simpson*, 7 Ves. 152.

9 *Ex parte James*, 8 Ves. 337, 345; *Carter* v. *Palmer*, (1842) 8 Cl. & F., per Lord Cottenham, 706; *Luddy's Trustees* v. *Peard*, (1886) 33 Ch. D. 500.

Those buying from an executor cannot safely trust to his title to sell. "Common prudence required that they should look at the will and not take the debtor's word as to his right under it. If they neglect that, and take the chance of his speaking the truth, they must incur the hazard of his falsehood. The rights of third persons must not be affected by their negligence. I do not impute to them direct fraud; but they acted rashly, incautiously, and without the common attention used in the ordinary course of business." "It was gross negligence not to look at the will under which alone a title could be given to them. It was not necessary to use any exertion to obtain information, but merely not to shut their eyes against the information which, without extraordinary neglect, they could not avoid receiving. No transaction with executors can be rendered unsafe by holding that assets transferred in such circumstances can be followed." [1] Purchase from an executor.

Second, as to acts which have no special reference to executors. (2) Acts with no special reference to executors.

It is the duty of trustees to see that all those acts are done which are necessary or expedient to put the trust property in security and out of the power of strangers to the trust to deal with it. A trustee must, in Sir John Romilly, M.R.'s, emphatic words,[2] "*make it impossible* for his co-trustee to receive and misapply the trust fund." He is bound to invest trust-moneys not wanted for the immediate purpose of their trust, and cannot excuse himself on the ground that he did not himself use the money, but placed it to a separate account at the bankers.[3] The general rule is, that if a trustee is guilty of unreasonable delay in investing a fund, or, if it is his duty to pay, in paying it over to the beneficiary, he will be liable for interest for the period of his unnecessary delay in doing so.[4] They must put the trust property in security. Bound to invest.

The rule is similar with regard to money outstanding upon personal security. Though trustees are not to rush into litigation, they will not be justified in merely applying by lawyer's letter for payment of a debt, even if (the trustee being an executor) the debt was a loan by the testator himself;[5] but unless there is a well-founded belief on the part of the trustees that an action would be useless they must follow up their letter by legal proceedings.[6] The burden of proving the futility of coercion lies on the trustees.[7] Money outstanding on personal security.

Where the trustees were to get in settlement money whenever they "shall think fit and expedient so to do," they are not entitled to stay their hands from enforcing payment on account of the interest of the tenant for life without regard to that of *all* the *cestuis que trust*.[8] Must regard the interests of *all* their beneficiaries.

[1] *Hill* v. *Simpson*, 7 Ves., per Sir Wm. Grant, M.R., 170; *Wilson* v. *Moore*, 1 My. & K. 126. *Foxton* v. *Manchester, &c. District Banking Co.*, 44 L. T. 406.

[2] *Dix* v. *Burford*, 19 Beav. 409, 413; *Macnamara* v. *Carey*, Ir. R. 1 Eq. 9; *Jacob* v. *Lucas*, 1 Beav. 436; *Kingdon* v. *Castleman*, 46 L. J. Ch. 448; *Woodhouse* v. *Woodhouse*, L. R. 8 Eq. 514; *Walker* v. *Linom*, [1907] 2 Ch. 104. *Post*, 1259.

[3] *Ashburnham* v. *Thompson*, 13 Ves. 402; *Younge* v. *Combe*, 4 Ves. 101.

[4] *Tickner* v. *Smith*, 3 Sm. & G. 42, and cases cited in *Blogg* v. *Johnson*, L. R. 2 Ch. 225.

[5] *Powell* v. *Evans*, 5 Ves. 839; for "personal security changes from day to day by reason of the personal responsibility of the party giving the security": *Bailey* v. *Gould*, 4 Y. & C. (Ex.) 226.

[6] *Lowson* v. *Copeland*, 2 Bro. C. C. 156. This is the case though the outstanding debt is in the hands of a co-executor, who was treated as a private banker by the testator: *Styles* v. *Guy*, 1 Mac. & G. 422. In *Yeatman* v. *Yeatman*, 7 Ch. D. 210, mere refusal to sue was held not sufficient to justify a legatee in suing an executor and an alleged debtor for loss of assets. The test suggested was whether a party should be allowed to institute such a suit after refusal by the legal representative to sue; *Meldrum* v. *Scorer*, 56 L. T. 471; *Barker* v. *Birch*, 1 De G. & Sm. 376.

[7] *In re Brogden*, 38 Ch. D. 546; *In re Stevens*, [1898] 1 Ch. 162, 171.

[8] *Luther* v. *Bianconi*, 10 Ir. Ch. R. 194.

May compound a debt.

In the *bonâ fide* exercise of a discretion trustees may always compromise a debt or otherwise deal with it without incurring a personal liability;[1] and it is no ground for liability that they refuse a compromise.[2]

Trustee Act, 1893, s. 21.

Now, by the Trustee Act, 1893,[3]

(1) An executor or administrator may pay or allow any debt or any claim on any evidence he may think sufficient;[4]

(2) An executor or administrator or two or more trustees acting together, or a sole trustee where the instrument creating his authority so authorises,[5] may accept any composition or may allow any time for payment of any debt, or settle it in any way that seems to him or them expedient, without being responsible for any loss occasioned by any act or thing so done by him or them in good faith;

(3) The enactment applies to trusts where the trust deed does not express a contrary intention; and is retrospective.

Other powers conferred on trustees.

The Trustee Act, 1893, also confers powers on trustees of renewable leaseholds to renew their leases and to raise money for the purpose.[6] Trustees are besides exonerated by the same Act for acting or paying money in good faith under powers of attorney which are in fact avoided by death or act of the party; and they are indemnified against any other than their own acts and defaults in respect of money, and securities actually received by them,[7] notwithstanding the signature of any receipt for the sake of conformity.[8]

The Court of Chancery has always exercised the power of dealing with the property of *cestuis que trust* under disability in a way not provided for by the trust deed. The principle on which the Court acts is a comprehensive one. It disclaims any general power to disregard a trust, but "in cases of emergency, cases not foreseen or provided for by the author of the trust, where the circumstances require that something should be done" the Court will authorise action beyond the express provisions of the trust instrument. Mere benefit to accrue to the estate does not justify interference; and each case must be brought before the Court and dealt with in its individual aspect.[9]

Judicial Trustee Act, 1896.

By the Judicial Trustees Act, 1896,[10] in any case where a trustee has been guilty of a breach of trust "but has acted honestly and reasonably and ought fairly to be excused for the breach of trust and for omitting to obtain the directions of the Court in the matter in which he committed such breach" jurisdiction is given to relieve the trustee from personal liability.

1 *Pennington* v. *Healey*, 1 Cr. & M. 402; *Forshaw* v. *Higginson*, 8 De G. M. & G. 827, citing, 834, *Blue* v. *Marshall*, 3 P. Wms. 381.

2 *Ex parte Ogle*, L. R. 8 Ch. 711.

3 56 & 57 Vict. c. 53, s. 21, re-enacting 44 & 45 Vict. c. 41, s. 37.

4 See *Re Owens*, 47 L. T. 61. The extension to an administrator is new: *In re Clay and Tetley*, 16 Ch. D. 3; *West of England and South Wales Bank* v. *Murch*, 23 Ch. D. 138. *In re Houghton*, [1904] 1 Ch. 622.

5 By sec. 22 (1) the survivor may exercise a joint power, unless the contrary is expressed in the instrument; see *Crawford* v. *Forshaw*, [1891] 2 Ch. 261.

6 Sec. 19. 7 Sec. 23.

8 Sec. 24. For the definition of "securities" see sec. 50. As to a trustee's liability for the insolvency of his agent, see *Brier* v. *Evison*, 26 Ch. D. 238; for his agent's negligence, *Benett* v. *Wyndham*, 4 De G. F. & J. 259; for his felonious act, *Jobson* v. *Palmer*, [1893] 1 Ch. 71. 9 *In re New*, [1901] 2 Ch. 534; *In re Tollemache*, [1903] 1 Ch. 955.

10 59 & 60 Vict. c. 35, s. 3. In *Chapman* v. *Browne*, [1902] 1 Ch. 785, relief under the section was refused because though the trustee had acted "honestly," he had not acted "reasonably"; and in *National Trustees Co. of Australasia* v. *General Finance Co. of Australasia*, [1905] A. C. 373 (under the identical Victorian Act), because though the trustees had acted "honestly and reasonably," they made no attempt to replace the fund or to excuse their inaction. *In re Stuart*, [1897] 2 Ch. 583.

When the money which is the subject of a trust is not forthcoming, it is not for the *cestuis que trust* to show that if the trustee had done his duty the loss would have been avoided; it is for the trustee to explain and excuse the loss. "The rule is well laid down by Lord Cottenham in the case of *Clough* v. *Bond*,[1] that where a trustee does not do that which it is his duty to do, *primâ facie* he is answerable for any loss occasioned thereby." [2] "Once show that he has neglected his duty and *primâ facie* he is answerable for all the consequences of that neglect." [3]

Onus on the trustee to excuse himself when trust fund lost.

A trustee must not place himself in a situation where his interests and his duty conflict. "No person in whom fiduciary duties are vested shall make a profit of them by employing himself, because in doing this he cannot perform one part of his trust—namely, that of seeing that no improper charges are made." [4]

Trustee must not take a position where his interest and his duty are in conflict.

But so wholesome a principle as this may be carried beyond reason; as happened in the Victoria case of *Clark* v. *Clark*,[5] where a purchaser of a business was named executor in the will of the deceased owner, but never acted, and subsequently renounced by deed. The Victoria Court held that "until a person appointed executor unmistakably divests himself of that character or by his solemn act puts it out of his own power ever to clothe himself with it, he is as much incapacitated from purchasing from his co-executor as if he had obtained probate." The Privy Council reversed this, holding that "a man so placed might possibly use his power in such a way as to raise a case for setting aside the transaction," but that this was a question of evidence, of which in the case before the Court there was none to invalidate the purchase. The case where a man had been a trustee, but had for twelve years previously to the impugned purchase retired, was treated by Buckley, J., as within the same principle.[6]

The custody of title-deeds and convertible securities suggests a point of special importance. If in the execution of a trust there is no need to deal with title-deeds, which may perhaps be locked up for years without any call to refer to them, a deposit of them in a bank or a safe deposit, in a box of which the trustees keep the key, is a proper mode of bestowing them. If they are required from time to time the deposit with a solicitor is justified so long at any rate as there is occasion to refer to them from time to time, and probably longer. If the trust property consists of bonds and certificates payable to bearer, they cannot without negligence be left under the control of a solicitor,[7] but they may be left with a banker, since it is the ordinary course of business to leave bonds with bankers who discharge the duty of cutting off the interest coupons as they become due and collecting the interest; never-

Custody of title-deeds and convertible securities.

[1] 3 My. & C. 490, 496.

[2] *In re Brogden*, 38 Ch. D., per Cotton, L.J., 567. [3] *I.c.* 568.

[4] *Broughton* v. *Broughton*, 5 De G. M. & G., per Lord Cranworth, 164. *In re Doody*, [1893] 1 Ch. 129, where *Crodock* v. *Piper*, 1 Mac. & G. 664, is commented on; *In re Smith's Estate*, [1894] 1 Ir. R. 60; *In re Fish*, [1893] 2 Ch. 413; *In re Webb*, [1894] 1 Ch. 73. Formerly the equitable estate of a *cestui que trust* in land or in the proceeds of the sale of land devised on trust for conversion, dying intestate vested in the trustee: *Burgess* v. *Wheate*, 1 Eden, 177; *Gallard* v. *Hawkins*, 27 Ch. D. 208; but by the Intestates Estate Act, 1884 (47 & 48 Vict. c. 71), s. 4, "the law of escheat shall apply in the same manner as if the estate or interest above-mentioned were a legal estate in corporeal hereditaments." See per Lord Eldon, *Walker* v. *Symonds*, 3 Swanst. 62, commenting on Lord Northington's views in *Harden* v. *Parsons*, 1 Eden 145.

[5] 9 App. Cas. 731.

[6] *In re Bodes and British Land Company's Contract*, [1902] 1 Ch. 244.

[7] *Field* v. *Field*, [1894] 1 Ch. 425.

theless the bankers would not be justified in parting with the bonds without the authority of all the trustees.[1]

Trust investments.

The determination of the question in what funds trust property may be invested without negligence depends largely on the terms of the trust.[2] Yet there are some general principles which must be glanced at.

Trustees not justified in lending on personal security.

Trustees will not be justified in lending on personal security, such as a promissory note,[3] unless specially authorised to do so by the instrument creating the trust, even to a person to whom there is the clearest evidence that their trustor would have lent on the same security; for personal security fluctuates from day to day, and the trustees are to exercise their own, not their trustor's, discretion.[4] Even where specially authorised to lend on personal security they will not be allowed to lend to one of their own number.[5] Moreover, a power to lend on personal security must be strictly construed as against the trustee.[6]

Trustees must deal impartially.

Trustees must deal impartially between the various interests they have in charge, not preferring the tenant for life to the remainder-man, nor yet sacrificing him.[7]

Trustees may in certain cases make an advance upon a personal undertaking.

Where trustees have a power to advance money on "real or personal security," they may make an advance upon a person's personal undertaking as distinguished from the security of personal property.[8] This is subject to the requirement of reasonable care and caution in making an investment of that class. Words so wide as a direction that trust-

[1] *In re De Pothonier*, [1900] 2 Ch. 529; *In re Sisson's Settlement*, [1903] 1 Ch. 252.

[2] In *Ritchies* v. *Ritchie's Trustees*, 15 Rettie, 1086, the purchase of fully paid-up stock in a limited company was held not an "investment." "I think," said Lord Creighill, at 1093, "it was a partnership in a company, and the trustees became partners. The shares that were bought formed their contribution of the capital. But there can be no investment of money properly so called where the trustees become partners"; *sed quære*. See *Re Norwich and Norfolk Provident Building Society*, 45 L. J. Ch. 785, for an "investing" member of a building society. As to "investments," see *Arnould* v. *Grinstead*, 21 W. R. 155. *In re Hurst, Addison* v. *Topp*, 67 L. T. 96; 8 Times L. R. 528 (C. A.).

[3] Per Lord Hardwicke in *Ryder* v. *Bickerton*, 3 Swanst. 80 *n.*; per Lord Loughborough in *Adye* v. *Feuilletau*, 3 Swanst. 84 *n.*; *Holmes* v. *Dring*, 2 Cox (Ch.), 1; *Terry* v. *Terry*, (1708) Prec. Ch. 273, where an executor and trustee with "power by the will to act in everything for the advantage of an infant," was held justified in laying out personal estate in the purchase of lands for the infant, with the saving that "if he lends the money on bad security, he must answer it out of his own pocket." The Lord Chancellor (Cowper) having decreed that a sum lent by the trustees on a personal bond and lost should be refunded by them, said "he did this for example to discourage men from taking single personal bonds; and that, considering the contingencies and hazards of trade, a man's bond for £100 that is to lie any time, is not security for above £50, and so he would take this." *Darke* v. *Martyn*, 1 Beav. 525, where executors deposited part of the assets with a banker and took two bankers' notes carrying interest for the amount; *Moyle* v. *Moyle*, 2 Russ. & M. 710, money lying upwards of a year with bankers. In *Walker* v. *Symonds*, 3 Swanst. 63, it is pointed out that the old doctrine that "if a man be trusted with money as executor or otherwise for children's portions" "and if he let it out to such men as are trusted and esteemed by others to be men of worth and ability, if any loss happen, he shall not bear the loss thereof" is clearly overruled, and that to invest trust money on personal security is a breach of trust. The purchase of an equity of redemption is not an investment which trustees would be justified in making under the common form of a power of investment: *Worman* v. *Worman*, 43 Ch. D. 296.

[4] *Styles* v. *Guy*, 1 Mac. & G. 422; *Boss* v. *Godsall*, 1 Y. & C. (Ch.) 617. This overrules *Lord Dorchester* v. *Effingham*, Temlyn, 279, where Sir John Leach, M.R., "thought no blame could be imputed to executors, who employed the same persons as the testator had placed confidence in."

[5] *Forbes* v. *Ross*, 2 Bro. C. C. 430; *Francis* v. *Francis*, 5 De G. M. & G. 108.

[6] *Cocker* v. *Quayle*, 1 Russ. & My. 535; *Greenham* v. *Gibbeson*, 10 Bing. 363.

[7] *Cockburn* v. *Peel*, 3 De G. F. & J. 170; *Stuart* v. *Stuart*, 3 Beav. 430; *Stewart* v. *Sanderson*, L. R. 10 Eq. 26; *In re Boyces, Minors*, Ir. R. 1 Eq. 45; *Costello* v. *O'Rorke*, Ir. R. 3 Eq. 172.

[8] *Pickard* v. *Anderson*, L. R. 13 Eq. 608; *Forbes* v. *Ross*, 2 Bro. C. C. 430.

money should be placed out "to interest or other way of improvement" will not be construed as an authority for using the trust fund in trade.[1]

The powers of trustees with respect to investments are now regulated by the Trustee Act, 1893,[2] to which reference must be made.

What is money under the control of the Court?

There has been some conflict of judicial opinion whether money paid into Court under the Lands Clauses Consolidation Act, 1845,[3] is under the control of the Court within the meaning of the Law of Property Act, 1860.[4] The rule is now established to be in accordance with the view of Cotton, L.J.,[5] that "cash under the control of the Court must mean cash standing in the name of the Accountant-General in any cause or matter."[6]

Where trustees are authorised to advance money on mortgage.

In the case of trustees authorised to advance money upon mortgage, the rule used to be that an advance of two-thirds of the value upon property of permanent value, as freehold land, was within the rule of ordinary prudence; as to property in houses, "which fluctuates in value, and is always deteriorating," an advance of not more than one-half was justifiable.[7] The tendency latterly was, however, "to lean to the side of the honest trustee, and not to be anxious to find fine and extraordinary reasons for fixing him with any liability," but "to endeavour as far as possible, having regard to the whole transaction, to avoid making an honest man, who is not paid for the performance of an unthankful office, liable for the failure of other people from whom he receives no benefit."[8]

Lord Watson's opinion in *Learoyd* v. *Whiteley*.

Lord Watson thus expressed his view:[9] "I do not think these have been laid down as hard and fast limits up to which trustees will be invariably safe, and beyond which they can never be in safety to lend, but as indicating the lowest margins which in ordinary circumstances a careful investor of trust funds ought to accept. It is manifest that, in cases where the subjects of the security are exclusively or mainly used for the purposes of trade, no prudent investor can be in a position to judge of the amount of margin necessary to make a loan for a term of years reasonably secure until he has ascertained, not only their present market price, but their intrinsic value apart from those trading considerations which give them a speculative and it may be a temporary value." The rule must be observed in normal circumstances, yet is liable to be displaced by proof of exceptional matters, either augmenting or detracting from its force.[10] Evidence of value, in order to entitle it to sufficient weight to discharge from liability,[11] should

Effect of the decision in that case.

[1] *Cook* v. *Goodfellow*, 10 Mod., per Lord Chancellor Parker, 495.

[2] 56 & 57 Vict. c. 53, ss. 1–9. See *Hume* v. *Lopes*, [1892] A. C. 112; *In re Owthwaite*, [1891] 3 Ch. 494; *In re National Permanent Building Society*, 43 Ch. D. 431; *In re Druitt*, [1903] 1 Ch. 446.

[3] 8 Vict. c. 18.

[4] 23 & 24 Vict. c. 38.

[5] *Ex parte St. John Baptist College, Oxford, In re Metropolitan and District Railways Act*, 22 Ch. D. 93; *Jackson* v. *Tyas*, 52 L. J. Ch. 830; *In re Brown*, 59 L. J. Ch. 530.

[6] As to investments under the control of the Court, see S. C. Funds Rules, 1894, Part VII., pars. 69–75, Annual Practice.

[7] *Stickney* v. *Sewell*, 1 My. & Cr. 8, 15; *Stretton* v. *Ashmall*, 3 Drew. 9.

[8] Per Jessel, M.R., *Speight* v. *Gaunt*, 22 Ch. D. 746; *Jones* v. *Lewis*, 3 De G. & Sm. 471. "Reversed on appeal, it is believed by Lord Truro, on Feb. 26, 1852, but on what ground not known": Lewin, Trusts (11th ed.), 371, n. d; *Kennedy* v. *Kennedy*, 12 Rettie, 275.

[9] *Learoyd* v. *Whiteley*, 12 App. Cas., per Lord Watson, 733.

[10] The rule is discussed by Kay, J., *In re Olive*, 34 Ch. D. 70; see also *In re Salmon*, 42 Ch. D. 351. In *In re Partington*, *Partington* v. *Allen*, 57 L. T. 654, the rule is said not to be one of law, but the general result of experience.

[11] *Norris* v. *Wright*, 14 Beav. 291; *Ingle* v. *Partridge*, 34 Beav. 411.

come from disinterested persons, and not from those connected in any way with the property valued; and, apart from legislation to be presently noticed, was required to be that of persons cognisant of local circumstances, and not that of persons, however generally qualified, who possessed no particular experience.[1] Trustees advancing money on mortgage must themselves inquire into the correctness of the statements made by the mortgagors as to the value and nature of the property and the amount of outgoings, and are not protected by a valuation if the valuer is not instructed to make such inquiries; it was also added, they "should tell their valuers that they are lending trust-moneys, and that they do not desire to lend more than one-half the actual value of the property."[2]

And of the Trustee Act, 1893.

All this law must now be taken subject to the Trustee Act, 1893,[3] which provides that:

(1) A trustee is not to be chargeable with breach of trust by "reason *only* of the proportion borne by the amount of the loan to the value of the property at the time when the loan was made"; if he shows the Court that he acted on the report of one whom he believed to be an able practical surveyor,[4] and the loan does not exceed two-thirds of the value stated in the report on which he acts.

(2) A trustee lending money on the security of any leasehold property is not to be chargeable with breach of trust only upon the ground that in making such loan he dispensed with investigation of the lessor's title.

(3) A trustee is not to be chargeable with breach of trust, only because in the case of either a purchase or a loan he has accepted a shorter title than by law he is entitled to require; if in the opinion of the Court the title accepted be such as a person acting with prudence would have accepted.

Requisites of a valuer under the section.

It therefore becomes essential that the valuer be "instructed and employed independently of any owner of the property," and a form of valuation be adopted so as to show compliance with this section. This act will not authorise the trustee to lend upon leaseholds, though, if he have the power otherwise, the provisions of the Act apply.

Limitation of liability where a trustee has advanced too much money on a security.

By sec. 9 of the same Act the liability of the trustee is limited in the case where he has advanced too much money on a security, to the excess beyond what he could properly have advanced on it.[5]

Where apparently the widest powers are given, the exercise of a sound discretion is not superseded.

Even where the terms of their trust deed seem to give trustees the widest powers—as, for instance, a power "to invest on such securities as they should approve"—they are still bound to the use of care and the exercise of a sound discretion; so that if they invest in stocks of an unusual character, the burden will be cast on them to justify their action.[6]

Loss incurred by trustees.

Trustees, unless in the case of wilful default or very gross negligence, are to be charged only with that which they have actually received,[7] and not with mere imaginary values;[8] and trustees joining in a receipt for trust-money merely for conformity were not at any time liable, in

1 *Budge* v. *Gummow*, L. R. 7 Ch. 719; *Fry* v. *Tapson*, 28 Ch. D. 268.

2 *In re Partington*, *Partington* v. *Allen*, 57 L. T. 654, 658.

3 56 & 57 Vict. c. 53, s. 8 (1); *In re Godfrey*, 23 Ch. D. 483.

4 *Le Lievre* v. *Gould*, [1893] 1 Q. B. 491; *In re Walker*, 59 L. J. Ch. 386; *Bullock* v. *Bullock*, 55 L. J. Ch. 221.

5 For the old law see *Fry* v. *Tapson*, 28 Ch. D. 268; *In re Somerset*, *Somerset* v. *Earl Poulett*, [1894] 1 Ch. 231.

6 *Stretton* v. *Ashmall*, 3 Drew. 9; *Consterdine* v. *Consterdine*, 31 Beav. 329; *Zambaco* v. *Cassavetti*, L. R. 11 Eq. 439.

7 1 Seton, Decrees (5th ed.), 985.

8 *Palmer* v. *Jones*, 1 Vern. 144.

the absence of other circumstances, for the misapplication of money coming into the hands of co-trustees.[1] The *onus*, nevertheless, lay on the trustee who joined in a receipt to show that he did not in fact receive it, and only joined for conformity;[2] in the absence of evidence he was liable *in solido*.[3]

Trustees liable only for funds actually received.

The Trustee Act, 1893,[4] modifies the law and provides that a trustee shall, without prejudice to the provisions of the instrument, if any, creating the trust, be chargeable only for money and securities actually received by him, notwithstanding his signing any receipt for the sake of conformity; and shall be answerable and accountable only for his own acts, receipts, neglects, or defaults, and not for those of any other trustee, nor for any banker, broker, or other person with whom any trust-moneys or securities may be deposited, nor for the insufficiency or deficiency of any securities, nor for any loss, unless the same happens through his own wilful default; and may reimburse himself, or pay or discharge out of the trust property all expenses incurred in or about the execution of his trusts or powers.

Money must not be left in a trustee's hands longer than necessary.

When money is actually received (though it is safe to permit a co-trustee to receive it[5]) a trustee is not justified in leaving the money in his co-trustee's hands for a longer time than is reasonably necessary.[6] Assurances that the trust fund is intact are not sufficient; he must ascertain for himself that it is so in fact.[7]

Trustee bound in certain cases to proceed against his co-trustee.

If one trustee finds that his colleague has committed a breach of trust, he is bound, if not for the restoration of the trust yet for his own exoneration, to bring an action,[8] or at least to take such steps as may, with regard to the circumstances of the case, be most prudent;[9] if he conceals the breach or abstains from action, he thereby becomes answerable for his co-trustee's default.[10]

Following trust funds.

There is no distinction between a rightful and a wrongful disposition of property, so far as the right of the beneficial owner to follow the proceeds is involved; and this right is not confined to the case of express trusts. When a purchase is made with trust-money, the beneficial owner has a right to elect either to take the property purchased or to hold it as security for the trust funds laid out in its purchase. When a purchase is made with a mixed fund, the beneficial owner can no longer elect to take the property, but he is entitled to a charge upon it up to the amount of trust funds expended in its purchase, and the doctrine of the old cases, that money has no ear-mark and cannot be followed, even in the case of a trust fund, is no longer law.[11]

[1] *In re Fryer*, 3 K. & J. 317. *Ante*, 1252.
[2] *Brice* v. *Stokes*, 11 Ves. 319.
[3] *Westley* v. *Clarke*, 1 Eden 357.
[4] 56 & 57 Vict. c. 53, s. 24.
[5] *Townley* v. *Sherborne*, Bridg. (C. P.) 35, Cro. Car 312 *sub nom.*, *Townley* v. *Chadenor*.
[6] *Brice* v. *Stokes*, *supra*; cp. The Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 24.
[7] *In re Brogden*, 38 Ch. D. 546; *Walker* v. *Symonds*, 3 Swanst. 1; *Mendes* v. *Guedalla*, 2 J. & H. 259.
[8] Lewin, Trusts (11th ed.), 301, citing *Franco* v. *Franco*, 3 Ves. Sen. 75, and *Earl Powlett* v. *Herbert*, 1 Ves. 297.
[9] *Walker* v. *Symonds*, 3 Swanst. 1, 71.
[10] *Boardman* v. *Mosman*, 1 Bro. C. C. 68.
[11] *In re Hallett's Estate*, 13 Ch. D. 696. *Ante*, 731. As to the application of the rule in *Clayton's case*, 1 Meriv. 572, 585, between *cestuis que trust*, see *Hancock* v. *Smith*, 41 Ch. D. 456, distinguished *In re Stenning*, [1895] 2 Ch. 433, which was followed in *Mutton* v. *Peat*, [1899] 2 Ch. 556, reversed on the facts, [1900] 2 Ch. 79. Cp. *King* v. *Hutton*, [1900] 2 Q. B. 504. Appropriation under the rule in *Clayton's case* may be made "up to the very last moment": per Lord Macnaghten in *The Mecca*, [1897] A. C. 293; *Seymour* v. *Pickett*, [1905] 1 K. B. 715, 723.

Provision of the Judicature Act, 1873, as to limitation of action.

By the Supreme Court of Judicature Act, 1873,[1] no claim of a *cestui que trust* against his trustee for any property held on express trust,[2] or in respect of any breach of such trust, could be held barred by any Statute of Limitations.[3]

Alteration effected by Trustee Act, 1888.

An alteration of the law is effected by the Trustee Act, 1888,[4] the 8th section of which is not touched by the Trustee Act, 1893, and enables trustees to plead the Statute of Limitations, "except where the claim is founded upon any fraud or fraudulent breach of trust to which the trustee was party or privy, or is to recover trust property or the proceeds thereof still retained by the trustee." This section was

Considered by Fry, L.J., in *In re Bowden*,

considered by Fry, L.J., in *In re Bowden*,[5] an action brought by a recently appointed trustee against an old trustee and the representatives of two deceased trustees for breaches of trust. The last of the breaches of trust complained of took place considerably more than six years before the action was begun. The question then arose whether a plea of the Statute of Limitations was within the new Act. The Lord Justice points out[6] that sub-sec. 1 (*a*), which was relied on, and which reserves "all rights and privileges conferred by any Statute of Limitations," was inapplicable, as "it is obvious that if a person had not been a trustee he could not be sued for a breach of trust; and, further, there is no right or privilege, that I am aware of, conferred by any Statute of Limitations in respect of a breach of trust." The Lord Justice then shows that sub-sec. 1 (*b*) is material. This provides for the case of an action to "recover money or other property, and is one to which no existing Statute of Limitations applies," in which case the trustee shall be entitled to the same defence "as if the claim had been against him in an action of debt for money had and received, but" the statute "shall not begin to run against any beneficiary unless and until the interest of such beneficiary shall be an interest in possession." That limitation, says Fry, L.J.,[7] "does not apply to the present case, because in the present case the action is brought by one trustee against another." The same sub-section also provides that the Statute of Limitations shall run against a married woman entitled in possession for her separate use.

whose view is criticised by Lindley, L.J., in *How* v. *Earl Winterton*.

Fry, L.J.'s, view, as stated above,[8] was criticised by Lindley, L.J., in *How* v. *Earl Winterton*:[9] "Although I share with Fry, L.J., the difficulty presented by clause (*a*), I cannot avoid the conclusion that to exclude the operation of clause (*a*) in all cases on the short ground stated by him would be really to deprive clause (*a*) of all meaning whatever. I cannot think that Fry, L.J., intended to go so far as that. The Legislature appears to have assumed that there might be cases in which, if there were no trust, some action or proceeding might be

[1] 36 & 37 Vict. c. 66, s. 25, sub-s. 2; *Banner* v. *Berridge*, 18 Ch. D. 254.

[2] The distinction between an express trust and a constructive trust is explained, *Soar* v. *Ashwell*, [1893] 2 Q. B. 390; *In re Dixon*, [1900] 2 Ch. 561. Cp. *Thorn* v. *Heard*, [1894] 1 Ch. 599; [1895] A. C. 495; *Rochefoucauld* v. *Boustead*, [1897] 1 Ch. 196.

[3] *Burdick* v. *Garrick*, L. R. 5 Ch. 233; *Stone* v. *Stone*, L. R. 5 Ch. 74; see *Masonic and General Life Assurance Co.* v. *Sharpe*, [1892] 1 Ch., per Lindley, L.J., 166.

[4] 51 & 52 Vict. c. 59, s. 8. *In re Sharp*, [1906] 1 Ch. 793; *Lacons* v. *Warmoll*, [1907] 2 K. B. 350.

[5] 45 Ch. D. 444; see *In re Swain*, [1891] 3 Ch. 233; *In re Page*, [1893] 1 Ch. 304; *In re Gurney*, [1893] 1 Ch. 590; *In re Somerset*, [1894] 1 Ch. 231; *In re Timmis*, [1902] 1 Ch. 176; *Flitcroft's case*, 21 Ch. D. 519, decided that as a director is a trustee in certain of his capacities, sec. 8 would therefore protect him. *In re Bowden* is followed *Gardner* v. *Perry*, (1903) 6 Ont. L. R. 269.

[6] 45 Ch. D. 450.

[7] *L.c.* 451.

[8] *In re Bowden*, 45 Ch. D. 450.

[9] [1896] 2 Ch. 638.

taken by the plaintiff against the defendant, and to which some Statute of Limitations would be a defence." Lindley, L.J., concludes:[1] "The short effect of sec. 8 appears to me to be that, except in three specified cases (namely, fraud, retention by a trustee of trust-money when an action is commenced against him, and conversion of money to his own use), a trustee who has committed a breach of trust is entitled to the protection of the several Statutes of Limitation as if actions and suits for breaches of trust were enumerated in them."

Moore v. *Knight*.

The 8th section of this Act was also invoked, but unsuccessfully, by the defendants in *Moore* v. *Knight*,[2] where money of the plaintiff's came for investment without fraud into the hands of the defendants, a firm of solicitors. No investment was made, but the money was misappropriated and applied to the purposes of the firm, though members of the firm were ignorant of such misappropriation. The period fixed by the Statute of Limitations having expired, it was contended that by force of sec. 8 of the Trustee Act, 1888, the innocent partners were exonerated from liability, and that the case of *Blair* v. *Bromley*,[3] which otherwise concluded the case, did not apply. *Blair* v. *Bromley*[3] was the case of money coming into the defendants' hands without fraud, which subsequently was used for firm purposes by the fraud of one of them; and this fraud was concealed till after the period fixed by the Statute of Limitations had expired, by misrepresentations attributable to the firm. These misrepresentations, it was held, deprived an innocent partner of the benefit of the statute. Stirling, J., in *Moore* v. *Knight*,[4] points out that this "decision rests on principles of the law relating to representation and to partnership, not on those which relate to trusts," and therefore is unaffected by the provisions of the Trustee Act, 1888.[5]

Blair v. *Bromley*.

Distinguished by Stirling, J.

Laches.

In the absence of a Statute of Limitations, negligence or delay in the enforcement of a right—*laches*, as it is called—may extinguish the best-founded claim. The doctrine of the Court of Chancery as to this was: "Nothing can call forth this Court into activity but conscience, good faith, and reasonable diligence; where these are wanting the Court is passive and does nothing."[6] But the Statute of Limitations should be taken as a guide, and the lapse of the statutory period "becomes a very material element for consideration"; though in the case quoted[7] no conclusion was arrived at as to whether delay alone will constitute a sufficient defence.[8] Judging from the expressions in the older cases it may be concluded that where the period has been exceeded which, under the statutes, would constitute a bar, equity will, as a rule, refuse relief; but in equity special circumstances may always be averred in answer to the defence of delay; and, where these are present, any particular case may be excluded from the operation of a general rule that might work injustice if rigidly enforced.[9]

[1] *L.c.* 640. [2] [1891] 1 Ch. 547. [3] 2 Ph. 354; 5 Hare, 542.

[4] [1891] 1 Ch. 555.

[5] As to the relation of concealed fraud to the Statute of Limitations, see *Gibbs* v. *Guild*, 9 Q. B. D. 59. To exclude the operation of the Real Property Limitation Act (37 & 38 Vict. c. 57), s. 8, the trust must be express; an implied or constructive trust is not sufficient: *In re Davis*, [1891] 3 Ch. 119; *In re Barker*, [1892] 2 Ch. 491.

[6] Per Lord Camden, C., *Smith* v. *Clay*, note to *Delorraine* v. *Brown*, 3 Bro. C. C. 640.

[7] *Allcard* v. *Skinner* (1887), 36 Ch. D., per Lindley, L.J., 186. See *London, Chatham, and Dover Ry. Co.* v. *Bull* (1882), 47 L. T. 413; 2 Spence Eq. Jur. 60–62; Story, Eq. Jur. § 105.

[8] Cp. *Colsell* v. *Budd*, 1 Camp. 27.

[9] Story, Eq. Jur. § 64, where the maxim *Æquitas sequitur legem* is expounded. *Laches* is not imputable to the Sovereign. *Cooke* v. *United States*, 91 U. S. (1 Otto) 398.

Stale demands discouraged.

The rule of equity, apart from statute, is stated by Lord Westbury, C.:[1] "Though it is perfectly true that no time runs as between the *cestui que trust* or beneficiary and the trustee upon an express trust, so as to bar the remedy of the beneficiary, yet with respect to claims made by him against a trustee, the general rule of equity that encouragement is not to be given to stale demands is equally applicable. And in taking an account for the purpose of charging the trustee with personal liability" "every fair allowance ought to be made in favour of the trustee if it can be shown that the claim which is now sought to be enforced is one which arose many years ago, and one of the nature and particulars of which the beneficiary was at the time when it arose perfectly cognisant."

Delay not permitted to prejudice the other party's position.

In the Privy Council[2] it is also pointed out that: "The doctrine of *laches* in Courts of Equity is not an arbitrary or a technical doctrine. Where it would be practically unjust to give a remedy, either because the party has, by his conduct, done that which might fairly be regarded as equivalent to a waiver of it, or where by his conduct and neglect he has, though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted, in either of these cases, lapse of time and delay are most material. But in every case, if an argument against relief, which otherwise would be just, is founded upon mere delay, that delay of course not amounting to a bar by any Statute of Limitations, the validity of that defence must be tried upon principles substantially equitable. Two circumstances, always important in such cases, are, the length of the delay and the nature of the acts done during the interval which might affect either party and cause a balance of justice or injustice in taking the one course or the other, so far as relates to their remedy." Lord Blackburn says of this statement:[3] "I have looked in vain for any authority which gives a more distinct and definite rule than this; and I think, from the nature of the inquiry, it must always be a question of more or less, depending on the degree of diligence which might reasonably be required, and the degree of change which has occurred, whether the balance of justice or injustice is in favour of granting the remedy or withholding it. The determination of such a question must largely depend on the turn of mind of those who have to decide, and must therefore be subject to uncertainty; but that, I think, is inherent in the nature of the inquiry."

Distinction between *executed* and *executory interests*.

The distinction between "*executed*" and "*executory interests*" is important. "Where," says Lord Chelmsford, C.,[4] "a person is obliged to apply for the peculiar relief afforded by a Court of Equity to enforce the performance of an agreement, or to declare a trust, or to obtain any other right of which he is not in possession, and which may be described as an executory interest, it is an invariable principle of the Court that the party must come promptly, that there must be no unreasonable delay. And if there is anything that amounts to *laches* on his part, Courts of Equity have always said, We will refuse you relief. With regard to interests which are executed, the consideration is entirely different. There, mere *laches* will not of itself disentitle the

[1] *M'Donnel* v. *White*, 11 H. L. C. 570.

[2] *Lindsay Petroleum Co.* v. *Hurd*, L. R. 5 P. C. 221, 239, the judgment is by Lord Selborne, C.

[3] *Erlanger* v. *New Sombrero Phosphate Co.*, 3 App. Cas. 1279.

[4] *Clarke* v. *Hart*, 6 H. L. C. 655.

party to relief by a Court of Equity; but a party may, by "sleeping by, as it has been metaphorically called, waive or abandon any right which he may possess and which, under the circumstances, therefore, a Court of Equity may say he is not entitled to enforce."

Negligent inaction of a guarantee does not discharge surety.

Laches of the person on behalf of whom an obligation has been entered into will not avail to discharge the obligee of his duty. The most common illustration of this principle is that of suretyship. The surety cannot allege that by the negligent inaction of him he has guaranteed he is discharged of his obligation. "It is no argument against my being answerable for a man's not doing a certain thing that the party to whom I gave this obligation did not see that he did the thing. I had myself undertaken for his doing it, and it is no discharge of my voluntary obligation that the other party, the obligee, did not see to his proceedings." "That the obligee may by his conduct release a surety in certain cases no one can doubt. The holder of a bill of exchange giving time to the acceptor, discharges the indorser from his suretyship liability, even at law, and so in any other guarantee by simple contract; and in equity, the obligee in a specialty may do so, by giving indulgence or otherwise injuring the resort of the surety or co-obligor; and all this upon the ground that the surety has a right to stand in the place of the creditor, holder, obligee, or other party indemnified, and must not have his rights or equities voluntarily cut down by the acts of that party. But while at law the surety in a bond is not at all discharged, even by a long neglect of the obligee to demand payment or account from the principal—nay, when the latter has become insolvent during the time thus suffered to elapse, as was decided in the *Trent Navigation Co.* v. *Harley*[1]—the Courts of Equity have never to my knowledge given a discharge to the surety merely on the ground of the creditor, the obligee, not having called on the debtor so early as he ought, or not having given early notice of his failure or non-payment to the surety."[2] "It is, however, undeniable that the Courts of Equity will look narrowly to everything in the conduct of the obligee which has a direct tendency to wrong the surety and injure his rights and equities, and will, as Lord Loughborough said in *Rees* v. *Berrington*,[3] lay hold of such errors to release him. The error, however, in the present case arises in supposing that any want of care on the commissioners' side in making the trustee do that which the surety had covenanted that he should do, was like a postponement of the surety's equities or diminution of his rights at law."[4]

Acquiescence.

A word should be said here about acquiescence, which is sometimes used in a sense short of expressing the meaning of adoption or ratification.[5] Its proper meaning, as stated by Lord Cottenham in the case

[1] 10 East, 34. [2] Per Lord Brougham, C., *Mactaggart* v. *Watson*, 3 Cl. & F. 540.
[3] 2 Ves. 540.
[4] 3 Cl. & F. 542; *Mayor of Kingston-upon-Hull* v. *Harding*, [1892] 2 Q. B., per Bowen, L.J., 508; *Mayor, &c. of Durham* v. *Fowler*, 22 Q. B. D. 394.
[5] *Duke of Leeds* v. *Earl of Amherst*, 2 Ph. 117, 123. As to acquiescence, see further, *La Banque Jacques-Cartier and La Banque D'Epargne* v. *La cité et du district de Montréal*, 13 App. Cas. 118, where it is said: "Acquiescence and ratification must be founded on a full knowledge of the facts, and further it must be in relation to a transaction which may be valid in itself and not illegal, and to which effect may be given as against the party by his acquiescence in and adoption of the transaction." See *Lewis* v. *Smallcombe*, L. R. 3 H. L., per Lord Cairns, C., 256, and *Willcott* v. *Barker*, 15 Ch. D. 105, where Fry, J., says, "It has been said that the acquiescence which will deprive a man of his legal rights must amount to fraud, and in my view that is an abbreviated statement of a very true position. A man is not to be deprived of his legal rights unless he has acted in such a way as would make it fraudulent for him to set up those rights."

last cited, is, where "a party having a right stands by and sees another dealing with the property in a manner inconsistent with that right, and makes no objection while the act is in progress, then the person so acquiescing cannot afterwards complain." When, however, the act is completed without intimation to him whose right is infringed, he has thereupon a right of action, which, as a general rule, cannot be divested without accord and satisfaction, or release under seal.

Laches and acquiescence distinguished.

The distinction between *laches* and acquiescence is drawn out by Lord Wensleydale:[1] "So far as *laches* is a defence, I take it that where there is a Statute of Limitations, the objection of simple *laches* does not apply until the expiration of the time allowed by the statute. But acquiescence is a different thing; it means more than *laches*. If a party, who could object, lies by and knowingly permits another to incur an expense in doing an act under the belief that it would not be objected to, and so a kind of permission may be said to be given to another to alter his condition, he may be said to acquiesce; but the fact of simply neglecting to enforce a claim for the period during which the law permits him to delay, without losing his right, I conceive cannot be any equitable bar."

Considered by Thesiger, L.J.

"Mere submission to the injury," says Thesiger, L.J.,[2] "for any time short of the period limited by statute for the enforcement of the right of action cannot take away such right, although under the name of *laches* it may afford a ground for refusing relief under some particular circumstances;[3] and it is clear that even an express promise by the person injured that he would not take any legal proceedings to redress the injury done to him could not by itself constitute a bar to such proceedings, for the promise would be without consideration and therefore not binding."

Lord Cranworth in *Ramsden* v. *Dyson*.

On the other hand, as is pointed out by Lord Cranworth in *Ramsden* v. *Dyson*,[4] "If a stranger begins to build on my land, supposing it to be his own, and I, perceiving his mistake, abstain from setting him right, and leave him to persevere in his error, a Court of Equity will not allow me afterwards to assert my title to the land on which he had expended money on the supposition that the land was his own. It considers that when I saw the mistake into which he had fallen, it was my duty to be active, and to state my adverse title; and that it would be dishonest in me to remain wilfully passive on such an occasion, in order afterwards to profit by the mistake which I might have prevented."

Principle that vendor of property can transmit no greater title than he has covers different ground.

Acquiescence to be binding must be direct and positive, not merely constructive.[5] Mere abstinence from complaint is not in itself and necessarily a bar,[6] though neglect to sue for twenty years with a knowledge of the right has been so held.[7]

It is a well-recognised rule that to property, other than negotiable securities, a vendor or pledgor can transmit no greater title than he has.[8] This, however, is a principle independent of that now asserted,

[1] *Archbold* v. *Scully*, 9 H. L. C. 383. [2] *De Bussche* v. *Alt*, 8 Ch. D. 314.

[3] For what such circumstances are see *Allcard* v. *Skinner*, 36 Ch. D. 145; *Blake* v. *Gale*, 32 Ch. D. 571; *Beningfield* v. *Baxter*, 12 App. Cas. 167.

[4] L. R. 1 H. L. 140.

[5] *Farrant* v. *Blanchford*, 1 De G. J. & Sm. 107; *Thompson* v. *Finch*, 22 Beav. 316, 8 De G. M. & G. 560. [6] *Phillipson* v. *Gatty*, 7 Hare, 516; 2 Ha. & Tw., 459.

[7] *Bright* v. *Legerton* (No. 1), 29 Beav. 60; 2 De G. F. & J. 606; *In re Cross*, 20 Ch. D. 109, 124.

[8] *Nemo plus juris ad alium transferre potest quam ipse haberet*: D. 50, 17, 54 *West* v. *Williams*, [1899] 1 Ch., per Lindley, L.J., 143.

that where the true owner holds out another, or for the purpose of inducing the belief allows another to appear, as owning, or with dispositive power over, his property which innocent third parties are led into dealing with by his action or conduct, on the basis of the apparent being the true owner, their rights in such a case will not depend upon the actual title or authority of the person with whom they directly deal, but will be referred back to that conduct of the real owner by which their dealings are induced; and the real owner will be precluded thereby as against the innocent third parties from disputing the existence of the title or power which, through negligence or mistaken confidence, he caused or allowed to appear to be vested in that person with whom they immediately deal.[1]

The settlor may extend the exemptions of the usual indemnity clause.

In *Wilkins* v. *Hogg*[2] it was argued that trustees were not protected notwithstanding a special clause in their deed of trust providing that any trustee should not be obliged to see to the application of moneys paid by him to his co-trustee, or be responsible by express or implied notice of the misapplication. The Court refused assent to this proposition, and laid down the rule that, though certain cases are provided for by the usual indemnity clause, there exist others to which protection may be afforded by special provision of the creator of the trust. This is on the principle that it is perfectly competent for him to define the liability incident to the duty of a trustee in a trust of his own creation, so long as he keeps within the bounds of law; and this rule excludes cases of "gross negligence or personal misconduct."[3] In this connection "gross negligence" is obviously used to mean flagrant negligence in the sense of the maxim, *Magna negligentia, culpa est; magna culpa dolus est.*

Lord Westbury, in *Wilkins* v. *Hogg*,[4] specifies three classes of cases in which a trustee is liable under the ordinary indemnity clause, as follows:

Three classes of cases specified by Lord Westbury in which a trustee would be liable under the ordinary indemnity clause.

(1) Where a trustee having received money, hands it over without securing its due application;

(2) Where a trustee allows his co-trustee to receive money, and does not make due inquiry as to his dealing with it; and

(3) Where a trustee, becoming aware of a breach of trust, committed or meditated, after having acquired such knowledge abstains from taking steps to obtain redress.

As none of these involves any absolute misconduct in respect of which liability would attach, they may be excepted in a trust deed.

A fourth class.

There is a fourth class, where personal misconduct is involved; for example, the trustee colludes with his co-trustee, and hands over trust-money with a reasonable ground for believing or suspecting that the trustee to whom he hands it will commit a breach of trust; for

Where personal misconduct is involved.

[1] *Pickering* v. *Busk*, 15 East, 38; *Gregg* v. *Wells*, 10 A. & E. 90; *Wilson* v. *West Hartlepool Ry. Co.*, 2 De G. J. & S. 475, followed in *Melbourne Banking Corporation* v. *Brougham*, 4 App. Cas. 156, 169; *Lawford* v. *Billericay Rural Council*, [1903] 1 K. B. 772; *Cowdrey* v. *Vandenburgh*, 101 U. S. (10 Otto) 572. As regards the sale of goods, this is established by the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), ss. 23, 25. *Cahn* v. *Pockett's Bristol Channel Steam Packet Co.*, [1899] 1 Q. B. 643.

[2] 3 Giff. 116; affirmed, 8 Jur. N. S. 25.

[3] *Pass* v. *Dundas*, 43 L. T. 665.

[4] 8 Jur. N. S. 25. In *Wilson* v. *Moore*, 1 My. & K. 126, 146, Sir John Leach, M.R., says: "All parties to a breach of trust are equally liable; there is between them no primary liability"; affirmed on appeal, 1 My. & K. 337. *Hill* v. *Simpson*, 7 Ves. per Sir William Grant, M.R., 166; *Gray* v. *Lewis*, L. R. 8 Eq. 526, 543; L. R. 8 Ch. 1035.

which, despite any clause in a trust deed, the trustee handing over the fund is liable. This class comprises the species of negligence which Bacon, V.C., describes as "gross,"[1] and within the rule of the Roman law, *magna culpa dolus est*.[2]

Receivers.

There are some cases where persons occupy the position of *quasi*-trustees under the appointment of a Court, for instance, receivers.

Personal liability of receiver. *Owen* v. *Cronk*.

In the case of a receiver being required to carry on a business, the question arises as to the personal liability thereby incurred by him. In *Owen* v. *Cronk*[3] the receiver was appointed by trustees of a trading company's business under a trust deed, and carried on the business in the name of the company, his own name being added as receiver. The Court of Appeal held the receiver not personally liable, on the ground that "he would have to account, not to the Court, but to the persons who appointed him."[4]

Burt, Boulton, and Hayward v. *Bull*. Rule stated by Rigby, L.J.

In *Burt, Boulton, and Hayward* v. *Bull*,[5] the position of receivers and managers appointed by the Court was considered. Rigby, L.J., thus expressed his view of the *primâ facie* effect of contracts made by receivers and managers *eo nomine*:[6] "According to my understanding of the matter, it cannot be intended by the Court in such cases to put forward an officer of the Court to carry on business—which might involve the making of contracts almost daily in the ordinary course of business—in such a manner as would be likely to delude members of the public into the idea that somebody would be responsible on those contracts, whereas nobody would be so responsible. I do not say that there might not be very special cases in which the intention might be that receivers and managers should not pledge their personal credit, though I am not aware that any such have arisen." "The rule has always been that such persons are *primâ facie* themselves personally liable, and they cannot get rid of liability on the contracts made by them merely by describing themselves in the contract as executors or trustees."

Rights of receiver.

Receivers have, however, a right against the funds; and also the protection of the Court restraining persons from bringing suits against them in respect of their receiverships, except where leave is given by the Court which appoints them;[7] though this does not, as appears from the cases just noted, extend to actions brought against them personally in respect to contracts made by them in the course of the business of the receivership.[8]

[1] *Pace* v. *Dumbar*, 43 L. T. 665.

[2] D. 50, 16, 226. *Ante*, 40. As to the remedies of *cestui que trust* for breach of trust, see *Dowgate* v. *Robinson*, 24 Beav. 39 n.

[3] [1895] 1 Q. B. 265. *Gosling* v. *Gaskell*, [1897] A. C. 575; *Robinson Printing Co.* v. *Chic*, [1905] 2 Ch. 123.

[4] Per Lord Esher, M.R., *l.c.* 272.

[5] [1895] 1 Q. B. 276.

[6] *L.c.* 283.

[7] *Knight* v. *Lord Plimouth*, 3 Atk. 480, more fully reported 1 Dick. 120, distinguished by Lord Eldon, C., in *Wren* v. *Kirton*, 11 Ves. 377; *Shaw* v. *Rhodes*, 2 Russ. 539; *Seagram* v. *Tuck*, 18 Ch. D. 296; *Sargant* v. *Read*, 1 Ch. D. 600; *Taylor* v. *Neale*, 39 Ch. D. 538. For the extent of the liability of sureties under a receiver's recognisances, see *In re Graham*, [1895] 1 Ch. 66. A receiver may not enter into any agreement with his sureties which in effect indemnifies them against loss; *White* v. *Baugh*, 3 Cl. & F. 44, where the position of a receiver's surety is considered.

[8] "I do not say that it would never be right to allow an action to be brought against a receiver, but no such action can be brought without leave of the Court": per Lindley, L.J., *Searle* v. *Choat*, 25 Ch. D. 723, 727; *Helmore* v. *Smith* (No. 2), 35 Ch. D. 449, per Bowen, L.J., 456. Ever since the decision of *Morrice* v. *Bank of England*, Cas. temp. Talbot, 217, 2 Bro. Parl. C. 465, a decree for the administration of an estate has been treated as a judgment for all the creditors, and the Court will not permit any particular creditor to disturb the administration of the assets. The subject is

Rule in the United States.

In the United States the rule of liability is differently stated: "Actions against the receiver are, in law, actions against the receivership, or the funds in the hands of the receiver, and his contracts, misfeasances, negligences, and liabilities are official and not personal, and judgments against him as receiver are payable only from the funds in his hands." [1] In *Barton* v. *Barbour* [2] it is also said by Woods, J., delivering the opinion of the Court: "If claims arise against the receiver as such, whilst acting under the powers conferred on him, whether for labour performed, for supplies and materials furnished, or for injury to persons or property, then a question of some difficulty arises as to the proper mode of obtaining satisfaction and redress." "If the receiver is to be suable as a private proprietor of the railroad would be, or as the company itself while carrying on the business of the railroad was, it would become impossible for the Court to discharge its duty to preserve the property and distribute its proceeds among those entitled to it according to their equities and priorities. It has therefore been found necessary, and has become a common practice for a Court of Equity, in its decree appointing a receiver of a railroad property, to provide that he shall not be liable to suit unless leave is first obtained of the Court by which he was appointed." [3]

Barton v. *Barbour.*

Liability for torts committed in the management of a business in the hands of a receiver.

The rule of the liability of a receiver for torts committed in the management of the business of which he is receiver appears from *McNulta* v. *Lockridge*,[4] in the State Court. "A receiver of a railroad company, who is exercising the franchises of such company and operating its road, is, in his official capacity, amenable to the same rules of liability that are applicable to the company when it is operating the road by virtue of the same franchises. For torts committed by his servants while operating the railroad under his management, he is responsible upon the principle of *respondeat superior*. The liability, however, is not a personal liability, but a liability in his official capacity only; and the damages for such torts are not to be recovered in suits against him personally, and collected on executions against his individual property, but recovered in suits or proceedings in which he is named or designated as receiver, and to be paid only out of the fund or property which the Court appointing him has placed in his possession and under his control. The corporation itself, having no control over either the receiver or his servants, is not, in the absence of an absolute liability imposed upon the company by statute, responsible for the negligence or torts of the employees of the receiver, and no suit against it for damages occasioned thereby can be maintained. These rules of law are well settled, and have been held in many adjudicated cases."

In case of misconduct or neglect, a receiver is liable to be ordered to pay costs personally,[5] and one defending an action without the sanction of the Court will not be allowed his costs.[6]

discussed very fully in *Thompson* v. *Brown*, 4 Johns. (N. Y. Ch.) 619. See Story, Eq. Jur. § 330 *et seqq.*; *Ames* v. *Trustees of Birkenhead Docks*, 20 Beav. 332.

[1] *McNulta* v. *Lockridge*, 141 U. S. (34 Davis) 332, cited and approved by Fuller, C.J., *Texas and Pacific Ry. Co.* v. *Cox*, 145 U. S. (38 Davis) 601; *Texas and Pacific Ry. Co.* v. *Johnson*, 151 U. S. (44 Davis), 81—all cases of tort.

[2] 104 U. S. (14 Otto) 124.

[3] *L.c.* 130.

[4] 31 Am. St. R. 366.

[5] *Ex parte Brown*, 36 W. R. 303.

[6] *Saxby* v. *Dickon*, 5 Sim. 629; *Bristowe* v. *Needham*, 2 Ph. 190. The rule of responsibility of a receiver and manager is dealt with in *Plisson* v. *Duncan*, 36 Can. S. C. R. 647.

Vendor in possession after a contract for sale of land.

The vendor in possession after a contract for sale of land is, for some purposes, in the position of a trustee for the purchaser.[1] He has the right to insist upon retaining possession until payment of the purchase-money is made and the conveyance is accepted. "He has that right; but the question is, upon what terms that right is to be exercised? It appears to me that it must be upon the terms of his undertaking the duties of possession while he insists upon retaining possession."[2] For example, he has to take reasonable care that the property is not deteriorated in the interval before completion while it still remains in the hands of the vendor, as by removing of fixtures, breaking windows, or anything of that kind.[3] Thus, too, it was decided that where a trespasser, without either the authority or knowledge of the vendor of certain property, entered on the same and removed large quantities of surface soil, the purchaser could maintain an action against the vendor for a breach of trust in not using due care to prevent the removal.[4] And where there is a wilful refusal by the vendor to carry out a contract, in addition to specific performance, such damages may be given as may reasonably be said to have naturally arisen from the delay, or which may reasonably be supposed to have been in the contemplation of the parties as likely to arise from the breach.[5]

Browne v. *Savage.* Trustees to give correct information of prior assignments affecting trust property if they answer at all.

It has been said[6] that trustees must, "for their own security, give correct information when inquiry is made of them, whether they have had notice of any prior assignments affecting their trust property." Hence it has been inferred that trustees are bound to answer such inquiries;[7] but Lindley, L.J.,[8] points out that: "The duty of a trustee is properly to preserve the trust fund, to pay the income and the *corpus* to those who are entitled to them respectively, and to give all his *cestuis que trust*, on demand, information with respect to the mode in which the trust fund has been dealt with, and where it is. But it is no part of the duty of a trustee to tell his *cestui que trust* what incumbrances the latter has created, nor which of his incumbrancers have given notice of their respective charges. It is no part of the duty of a trustee to assist his *cestui que trust* in selling or mortgaging his beneficial interest and in squandering or anticipating his fortune; and it is clear that a person who proposes to buy or lend money on it has no greater rights than the *cestui que trust* himself. There is no trust or other relation between a trustee and a stranger about to deal with a *cestui que trust*, and although probably such a person in making inquiries may be regarded as authorised by the *cestui que trust* to make them, this view of the stranger's position will not give him a right to informa-

[1] *Phillips* v. *Silvester*, L. R. 8 Ch. 173: see *Earl of Egmont* v. *Smith*, 6 Ch. D., per Jessel, M.R., 475, referring to *Shaw* v. *Foster*, L. R. 5 H. L. 321, "which only restated what had been the well-known law of the Court of Chancery for centuries." *Plews* v. *Samuel*, [1904] 1 Ch. 464.

[2] Per Lord Selborne, C., *Phillips* v. *Silvester*, L. R. 8 Ch. 177. As to "wilful default" on the part of a vendor exonerating the purchaser from the payment of interest on the purchase-money, *In re Wilson's and Stevens' Contract*, [1894] 3 Ch. 546. *Bennett* v. *Stone*, [1903] 1 Ch. 509.

[3] *Royal Bristol Permanent Building Society* v. *Bomash*, 35 Ch. D. 390, where *Bain* v. *Fothergill*, L. R. 7 H. L. 158, is distinguished.

[4] *Clarke* v. *Ramuz*, [1891] 2 Q. B. 456.

[5] *Jacques* v. *Miller*, 6 Ch. D. 153; *Jones* v. *Gardiner*, [1902] 1 Ch. 191.

[6] *Browne* v. *Savage*, 4 Drew., per Kindersley, V.C., 639. This case is considered, so far as it is concerned with notice, in *Newman* v. *Newman*, 28 Ch. D. 674.

[7] Lewin, Trusts (6th ed.), 704; but see 11th ed. 866.

[8] *Low* v. *Bouverie*, [1891] 3 Ch. 99. But see *In re Tillott*, [1892] 1 Ch. 86; *Sawyer* v. *Goddard*, (C. A.) Law Times newspaper, 9th March, 1895, 450.

tion which the *cestui que trust* himself is not entitled to demand. The trustee, therefore, is, in my opinion, under no obligation to answer such an inquiry." The Lord Justice then examines the position of a trustee who does answer such an inquiry, and concludes that the duty of a trustee who thus undertakes to answer is merely to answer honestly —that is, to "answer to the best of his actual knowledge and belief," unless he either binds himself by a warranty, or so expresses himself as to estop himself from afterwards denying the truth of what he said.[1]

Convict's property. Forfeiture Act, 1870.

Under the Forfeiture Act, 1870,[2] the administrator of a convict's property has absolute power to sell that property, provided that the sale is *bonâ fide*. The administrator must not sell blindly or carelessly or without exercising any judgment or discretion upon it, but if he has sold *bonâ fide*, then the sale is binding and the exercise of the administrator's power cannot be impugned by the convict. The administrator is not limited to selling for the purpose of paying debts; he has an absolute power to sell the whole.[3]

Neglect under the Trustee Savings Banks Act, 1863.

Any trustee or manager of a savings bank who neglects or omits to comply with the rules and regulations of the savings bank within the meaning of sec. 11 of the Trustee Savings Banks Act, 1863,[4] was compellable under sec. 165 of the Companies Act, 1862,[5] to pay an adequate sum towards the assets of the bank by way of compensation for any loss occasioned to the bank by his neglect or omission.[6] Omission to attend meetings was held under the section not the same as neglect or omission of the duties which ought to have been performed at them.[7]

The above-mentioned section of the Companies Act, 1862, is repealed by the Companies Winding Up Act 1890,[8] and sec. 10 of the latter Act was substituted for it. This gives power to the Court on the application of the Official Receiver or the liquidator of any company under the Companies Acts to examine into the conduct of any promoter, director, manager, or other officer, and to compel restitution of property misapplied or retained or for which he is liable, with interest. The section applies notwithstanding that there is also a criminal liability.

[1] As to the authority of *Burrowes* v. *Lock*, 10 Ves. 470, and *Slim* v. *Croucher*, 1 De G. F. & J. 518, see *Low* v. *Bouverie*, [1891] 3 Ch., per Lindley, L.J., 101, 102, and *Brownlie* v. *Miller*, 7 Rettie (H. L.), per Lord Selborne, C., 70.

[2] 33 & 34 Vict. c. 23, s. 12.

[3] *Carr* v. *Anderson*, [1903] 1 Ch. 90; but he has no power to bar the estate tail of a convict: *In re Gaskell and Walters' Contract*, [1906] 2 Ch. 1.

[4] 26 & 27 Vict. c. 87. See 4 Edw. VII. c. 8, s. 16 (2).

[5] 25 & 26 Vict. c. 89.

[6] *In re Cardiff Savings Bank, Davies's case*, 45 Ch. D. 537.

[7] *Marquess of Bute's case*, [1892] 2 Ch. 100. There are Savings Bank Investment Regulations dated 21 May, 1894, and Trustee Savings Bank Regulations dated 14th June, 1895.

[8] 53 & 54 Vict. c. 63, s. 33.

CHAPTER III.

BANKERS.

Definition.

A BANK is defined as an establishment for the custody of money received from, or on behalf of, its customers. Its essential duty is the payment of the orders given on it by its customers; its profits arise mainly from the investment of the money left noused by them.[1]

I. Banker his customer's debtor for the balance standing to the customer's account. *Marzetti* v. *Williams.*

I. The relation between banker and customer is that of debtor and creditor,[2] with a superadded obligation on the part of the banker to honour the customer's cheques so long as there are any assets of his in the banker's hands.[3] If the banker dishonours his customer's cheque, when he has funds in hand to meet it, he is liable to an action for damages, though the customer may not have suffered actual loss or damage by the act, and the amount of damages given should be greater than merely nominal.[4] In the case which decides this the cheque, of which payment was refused, was for £87 7*s.* 6*d.* This circumstance Lord Tenterden, C.J., considered an aggravation of the wrong; and the jury having found for the plaintiff with nominal damages, he remarked that it was a discredit to any person, and particularly to one in trade,[5] to have a "draft refused payment for so small a sum."

[1] Dr. Murray's Dictionary, *sub voce*. "Banker" includes a body of persons whether incorporated or not, who carry on the business of banking; 45 & 46 Vict. c. 61, s. 2. See the Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 29.

[2] So that the Statute of Limitations runs as against any other simple contract debt. *Smith* v. *Lorenax*, 2 De G. J. & S. 1, 5; *Phœnix Bank* v. *Ridley*, 111 U. S. (1 Davis), 125, following *Marine Bank* v. *The Fulton Bank*, 2 Wall. (U. S.) 252. As to the test of whether the Statute of Limitations runs or not, see *Burdick* v. *Garrick*, L. R. 5 Ch. 233, 240; *Banner* v. *Berridge*, 18 Ch. D. 254, 263.

[3] *Foley* v. *Hill*, 2 H. L. C. 28. Cp. *Pott* v. *Clegg*, 16 M. & W. 321, 328 (distinguished *Lee* v. *Tidd*, *Tidd* v. *Overell*, [1893] 3 Ch., per North, J., 157), with remarks of Cockburn, C.J., *Goodwin* v. *Roberts*, L. R. 10 Ex. 351; *Garnett* v. *M'Kewan*, L. R. 8 Ex. 10. In the argument in *Roberts* v. *Tucker*, 16 Q. B. 575, Alderson, B., addressing Sir Frederick Thesiger, said: "Your reason as if the customer lodged money to the banker to be kept with reasonable diligence and returned in specie. But the customer lends money to the banker and the banker promises to repay that money, and, whilst indebted, to pay the whole or any part of the debt to any person to whom his creditor the customer in the ordinary way requires him to pay it." Parke, B., added: "That is undoubtedly so." In the United States the law is settled in the same sense by *Marine Bank* v. *Fulton Bank*, 2 Wall. (U. S.) 252; *Thompson* v. *Riggs*, 5 Wall. (U. S.) 663.

[4] *Marzetti* v. *Williams*, 1 B. & Ad. 415; *Whitaker* v. *Bank of England*, 6 C. & P. 700; *Robin* v. *Steward*, 14 C. B. 595; *Lorius* v. *Bunny & Gerety*, L. R. 5 P. C. 346, 357.

[5] In Victoria it has been held that a plaintiff who is not a trader, "and has therefore no mercantile character," cannot recover more than nominal damages unless he proves special damage; since there is no presumption legitimately deducible that a

On the case being remitted to the jury under the instruction to find substantial damages, they returned a verdict for £500, which was afterwards reduced by consent, on an intimation from the Court, to £200.

Banker's obligation is to honour his customer's cheque only.

The banker's obligation is to honour his customer's cheque. To that end he is bound to know his customer's handwriting. If in any way he is deceived without the instrumentality of his customer, he must himself abide the loss. Thus, notwithstanding that the alteration in a cheque is such that "no person in the ordinary course of business could observe it," the banker is liable for the amount wrongly paid on it.[1] The principle of the decision was expressed in *Young* v. *Grote*[2] to be: "A banker who pays a forged cheque, is in general bound to pay the amount again to his customer, because, in the first instance, he pays without authority." The limitations on this proposition will be discussed subsequently.[3]

The bankers' obligation is sometimes extremely onerous; as when they received a sum of money from a married woman and gave an accountable receipt bearing interest in the name of her son by a former marriage, yet were held liable to her husband for money had and received.[4]

Credits in books of bank.

The credits in the books of the bank are *primâ facie* evidence of the customer's right. Yet money deposited in a bank to the credit of A may be shown to be the property of B. It may be reached by attachment on the part of the judgment creditors of B, or payment of it by the banker to A may be stopped by a proper notice on the part of B that the money belongs to him. The credits in the banker's books are thus only *primâ facie* evidence of ownership. But in the absence of any claim by the real owner the banker cannot dispute the right of his depositor, and, as already has been pointed out, is bound to honour his cheque.

Where banker is justified in refusing to cash customer's cheque.

In one case only may a banker be justified in refusing to pay a demand of his customer when the customer is in funds. This justification exists where the customer is a trustee and draws a cheque as trustee and some misapplication of the proceeds is intended by the trustee, and of which the bankers have knowledge.[5] This knowledge is

person who is not a trader suffers substantial damage by the dishonour of his cheque: *Bank of New South Wales* v. *Milvain*, 10 Vict. L. R. (Law) 3. In *Doria* v. *Bank of Victoria* the Court treated a schoolmaster as having a "mercantile character," 5 Vict. L. R. (Law) 393. *Forman* v. *Bank of England*, 18 Times L. R. 339, turns on the difference between a London and country cheque, and the custom of bankers in crediting them when paid in.

[1] *Hall* v. *Fuller*, 5 B. & C. 750. *Smith* v. *Mercer*, 6 Taunt. 76; *Roberts* v. *Tucker*, (Ex. Ch.) 16 Q. B. 560; see, however, now 45 & 46 Vict. c. 61, s. 64 (1), and *post*, 1312, n. In *East Holyford Mining Co.* v. *National Bank*, Ir. R. 5 C. L. 508, the Irish Court of Common Pleas held that the banker of a public registered company is not bound to inquire whether the persons drawing cheques as directors against the company's banking account were legally appointed directors, or authorised to draw cheques, if there was nothing on the face of the transactions calculated to excite suspicion or inconsistent with the company's articles of association. This was reversed in the Exchequer Chamber, Ir. R. 7. C. L. 169, but was restored by the House of Lords, *Mahony* v. *East Holyford Mining Co.*, L. R. 7 H. L. 869; *County of Gloucester Bank* v. *Rudry Merthyr Steam and House Coal Colliery Co.*, [1895] 1 Ch. 629.

[2] 4 Bing., per Best, C.J., 258.

[3] *Post*, 1317.

[4] *Calland* v. *Loyd*, 6 M. & W. 26.

[5] Per Sir John Leach, V.C., *Keane* v. *Roberts*, 4 Madd. 332, 357. Cp. *Hill* v. *Simpson*, 7 Ves. 152, 166, as to the power of executors in dealing with assets; which in that case was held not to be an absolute power, when "the assignee knows the executor is applying the assets to a purpose wholly foreign to his trust." See Lord Eldon's remarks on *Hill* v. *Simpson*, *M'Leod* v. *Drummond*, 17 Ves. 152, 169,

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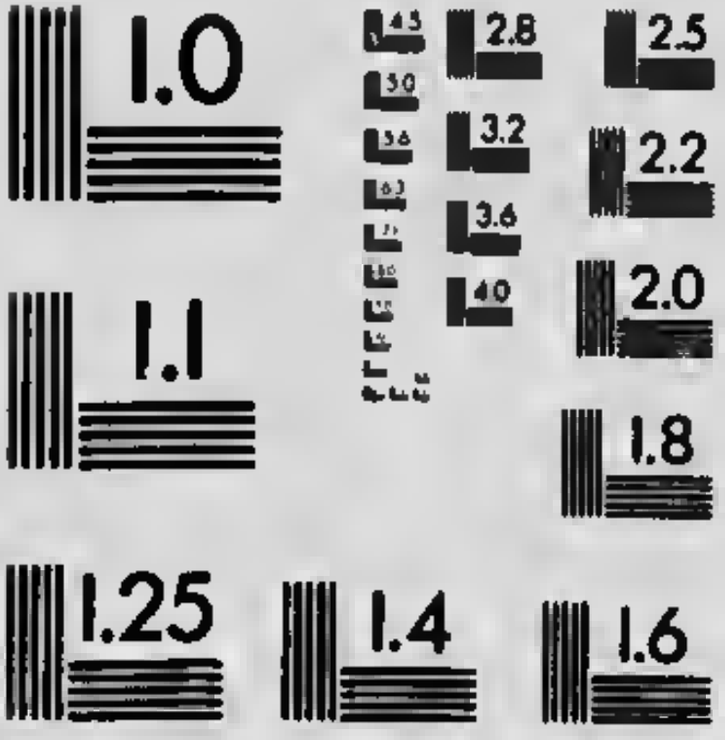

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presumed if the dealing in question is "*primâ facie* inconsistent with the duty of an executor or trustee." "I think," says Lord Cairns,[1] "I may safely add, that if it be shown that any personal benefit to the bankers themselves is designed or stipulated for, that circumstance, above all others, will most readily establish the fact that the bankers are in privity with the breach of trust which is about to be committed."

Lord Westbury in *Gray* v. *Johnson.*

"Supposing," says Lord Westbury,[2] "that the banker becomes incidentally aware that the customer, being in a fiduciary or representative capacity, meditates a breach of trust, and draws a cheque for that purpose, the banker, not being interested in the transaction, has no right to refuse the payment of the cheque, for if he did so he would be making himself a party to an inquiry as between his customer and third persons." "But then it has been very well settled that if an executor or a trustee who is indebted to a banker, or to another person, having the legal custody of the assets of a trust estate, applies a portion of them in the payment of his own debt to the individual having that custody, the individual receiving the debt has at once not only abundant proof of the breach of trust but participates in it for his own personal benefit." The question then becomes one of fact whether the payment was designed for the benefit of the bankers.[3]

Lord Davey in *Bank of New South Wales* v. *Goulburn Valley Butter Co.*

The law, says Lord Davey,[4] "is well settled that in the absence of notice of fraud or irregularity a banker is bound to honour his customer's cheque, and is entitled to set off what is due to a customer on one account against what is due from him on another account, although the moneys due to him may in fact belong to other persons. On the other hand, a banker is not justified of his own motion in transferring a balance from what he knows to be a trust account of his customer to the same customer's private account." Yet the *onus* is on him who seeks to charge the banker; and where the banker is not shown to have received the money as trust funds (though they may have been kept separate and paid to an account opened with them by the depositor), or to have been affected with notice of their trust character during the currency of the account, he is entitled to set them off against the customer's own debit balance.[5]

Where banker may pay without direct authorisation.

On the other hand, in one case the banker may be justified in paying the money of his customer without direct authorisation from him, that is, where an acceptance of his customer's, payable at his bank, is presented to him.[6]

Some banks are incorporated under private acts in which are wide clauses exonerating the bank from the duty of looking to the execution of any trusts, express, implied or constructive, to which the shares may be subject. Where this is the case a registration of shares by the trustees which involves a breach of trust does not affect the bank with liability; even though the bank has notice that the shares are subject to the trust, and possession of a copy of the will of the creator of the trust.[7]

170. The cases are considered by Chancellor Kent in *Field* v. *Schieffelin*, 7 Johns. (Ch. N. Y.) 150.

[1] *Gray* v. *Johnson*, L. R. 3 H. L. 11. Cp. *In re Blundell, Blundell* v. *Blundell*, 40 Ch. D. 370, 382.

[2] *L.c.* 14.

[3] *Coleman* v. *Bucks and Oxon Union Bank*, [1897] 2 Ch. 243.

[4] *Bank of New South Wales* v. *Goulburn Valley Butter Co.*, [1902] A. C. 550, omitting the authorities cited.

[5] *Union Bank of Australia* v. *Murray-Aynsley*, [1898] A. C. 693.

[6] *Kymer* v. *Laurie*, 18 L. J. Q. B. 218.

[7] *Simpson* v. *Molson's Bank*, [1895] A. C. 270.

In the Massachusetts case of *Union Bank* v. *Knapp* [1] it is laid down that a depositor has a right to inspect the books of the bank into which he has paid his money; that "the bank is bound to produce them on all proper occasions"; and that "the officers of the bank having the charge of the books are to be so far considered as agents for both parties." [2] It is very difficult to see on what ground this right is based, since it is now well-established law that the depositor's relation to the bank is that of creditor only. A suggestion has been made limiting this supposed right to that portion of the books of the bank in which the customer's own concerns are dealt with; yet this limited proposition is almost as difficult to comprehend as the wider one. If the *dictum* is only applicable to "proper occasions," any difficulty may be avoided by a just definition of that vague term. Thus an undoubtedly "proper occasion" is in the course of an action when the banker is summoned as a witness; and it has been decided that, as against his customer, the banker is not protected from giving evidence as to the balance of his customer at any given date,[3] when summoned in a case between his customer and a third person.

American case laying down that the customer has a right to inspect the books of the banker.

Considered.

In *Foster* v. *Bank of London*,[4] Erle, C.J., left to the jury to say whether there was a duty on a banker not to disclose the account of one customer to another, the latter being a creditor of the former. The action of Erle, C.J., in that case was regarded by Kelly, C.B., in *Hardy* v. *Veasy*,[5] as countenancing a legal obligation on the banker to keep reasonably secret the state of the customer's account; while in the same case, *Tassell* v. *Cooper* [6] was instanced as inclining against the existence of such a duty. The Court avoided a decision of the point by assuming in the plaintiff's favour a legal duty not to disclose the customer's account except upon a reasonable and proper occasion. This was the duty laid in the declaration as amended. As the jury had found the occasion was a reasonable and proper one, the Court confined its decision to holding that the jury were the right tribunal for the decision of the reasonableness of the occasion. The inclination of the learned judge's opinion seems to be against the existence of any such duty not to disclose the account of one customer to another as of other than moral obligation.

Foster v. *Bank of London.*

Hardy v. *Veasy.*

The practice of bankers is to bind their clerks to secrecy, and the rumour getting abroad, that a banker was divulging his customers' accounts to inquirers, would effectually limit his confidences. On the other hand, the banker is plainly compelled to answer what he knows that is relevant when called in a suit as a witness.

The liability of the banker to his customer must be kept distinct from his liability to his customer's payee. If the banker refuses payment of a cheque, the payee has his remedy against the drawer. Even when the banker has funds of the customer in his hands, he is guilty of no breach of duty to the payee in not honouring the cheque

Banker's duty to the payee.

[1] 20 Mass. 96. In the third edition of these reports the position in the text is supported by reference to 2 Stark. Ev. 734; *Francis* v. *Ocean Insurance Co.*, 6 Cowen (N.Y.), 404; *Bank of Utica* v. *Hillard*, 5 Cowen (N.Y.), 419.

[2] *L.c.* 108.

[3] *Loyd* v. *Freshfield*, 2 C. & P. 325, 9 D. & R. 19. The privilege of the banker is not greater than that of the customer. As to the Law of Evidence with respect to Bankers' Books, see 42 & 43 Vict. c. 11, referred to 45 & 46 Vict. c. 72, s. 11 (2); *In re Marshfield*, 32 Ch. D. 499; *Arnott* v. *Hayes*, 36 Ch. D. 731; *Howard* v. *Beall*, 23 Q. B. D. 1; *Parnell* v. *Wood*, [1892] P. 137, affd. *S. Staffordshire Tramways Co.* v. *Ebbsmith*, [1895] 2 Q. B. 669, 676; *Kissam* v. *Link*, [1896] 1 Q. B. 574; *Pollock* v. *Garle*, [1898] 1 Ch. 1.

[4] 3 F. & F. 214.

[5] L. R. 3 Ex. 107.

[6] 9 C. B. 509.

he presents; for "the right of the depositor is a *chose in action*. It is immaterial whether the implied engagement upon the part of the banker is to pay the sum in gross, or in parcels, as it shall be required by the depositor. In either case the draft or cheque of the latter would not of itself transfer the debt or a lien upon it to a third person without the assent of the depositary."[1] But where the banker by mistake has paid the cheque when the account of his customer is overdrawn, he cannot recover the money from the payee.[2]

Customer's clerk's negligence in paying-in does not affect banker with liability.

In a New Zealand case,[3] the customer's clerk negligently filled in the "pay-in slip" with another name than that of the customer, which was nevertheless correctly inserted by him on the tag or receipt, and this was then stamped and initialled by the bank clerk, while the money was credited to the name on the paying-in slip. A cheque of the customer's was subsequently dishonoured, which, had the money paid in been put to the customer's account, there would have been funds to meet. An action was brought against the bank for damages for dishonouring the cheque. The Court of Appeal held that initialling the tag did not estop the bank from denying that the money paid in was paid to the customer's credit; because there was no duty on the bank's part to see that the "tag" and the "pay-in" slip corresponded; and the negligence which occasioned the damage was that of the customer's clerk.

Accounts of customer at various branch banks only one account.

Whatever number of accounts are kept by a customer in the books of a bank, the whole is really but one account, and it is not open to a customer, in the absence of some special contract, to deny the right of the bank to say that securities deposited as security for a loan are not applicable for a deficit on the general balance.[4] In the same way, if a customer has accounts with separate branches of a bank, being in funds at the one and overdrawn at the other, the banker may refuse a cheque on the branch in funds and apply the balance there to the liquidation of the deficit at the other.[5] Of course this does not apply to two accounts kept in different rights, as a personal account and a trust account. The principle of the last-noticed decision is that branch banks are but agencies of the firm or corporation.[6] Their independence of the central organisation is so far recognised that in giving notice of dishonour the bill must be sent to the branch banks successively through which it has come;[7] and also that a customer banking at a branch can only require his cheque to be honoured at that branch at which he banks.[8] "To hold," says Lord Campbell, C.J.,[9] "that the customer of one branch keeping his cash and account there has a right to have his cheques paid at all or any of the branches, is to suppose a state of circumstances so inconsistent with any safe dealing on the part of the banker, that it cannot be presumed without direct evidence

[1] *Chapman* v. *White*, 6 N. Y. 412, 417; see also *Bank of the Republic* v. *Millard*, 10 Wall. (U. S.) 152, where it is said, at 156: "On principle, there can be no foundation for an action on the part of the holder, unless there be a privity of contract between him and the bank. How can there be such a privity when the bank owes no duty and is under no obligation to the holder?" The law is the same with regard to public agents as to private persons: *United States* v. *Bank of the Metropolis*, 15 Peters (U. S.), 377.

[2] *First National Bank* v. *Devenish*, 22 Am. St. R. 394.

[3] *Banks* v. *Bank of New Zealand*, 22 N. Z. L. R. 572.

[4] *In re European Bank*, L. R. 8 Ch. 41; *Mutton* v. *Peat*, [1900] 2 Ch. 79.

[5] *Garnett* v. *M'Kewan*, L. R. 8 Ex. 10.

[6] *Prince* v. *Oriental Bank Corporation*, 3 App. Cas. 325; *Bank of Africa* v. *Colonial Government*, 13 App. Cas. 215.

[7] *Clode* v. *Bayley*, 12 M. & W. 51.

[8] *Woodland* v. *Fear*, 7 E. & B. 519.

[9] *L.c.* 521.

of such an agreement; and the giving, on the one hand, and accepting, on the other, of a limited cheque-book, seems intended to guard against such an inference."

Contention that payment of cheque on overdrawn account is to be treated as mistake in fact, between the banker and his customer.

Bankers have sometimes claimed to recover money paid to payees of cheques drawn by customers whose accounts are overdrawn and of which fact at the moment of payment they were not actively cognisant, on the ground that the payment made was to be treated as made under a mistake of fact.[1] But this view has not been approved. It has been pointed out that as between the banker and the payee there is no mistake, the mistake, if any, being between the banker and his customer; and a mistake in proceedings between banker and payee is irrelevant.[2] The banker is bound to know the state of his depositor's account, and if he makes a mistake in this respect, he must abide the consequences.

Effect of entries in a pass-book.

The effect of entries in a pass-book as against the banker and the customer respectively has been somewhat controverted, and the authorities are not in all respects full and satisfactory. The chief value of the pass-book is as a check on the banker, which the depositor may use as evidence *against* the banker.[3] There can be no doubt that entries in a pass-book are admissions by the banker, and the balancing of a pass-book is in the nature of an account stated, though not conclusive against the banker, but open to be impugned whether for mistake or fraud. The entry of a credit is in the nature of a receipt, and so open to explanation by other evidence.[4]

Rule laid down by the Privy Council.

The Privy Council has laid down what, as against the banker, is the correct rule:[5] entries in a pass-book "are not conclusive; they are admissions only, and, as in the case of receipts for the payment of money, they do not debar the party sought to be bound b[illegible]m from showing the real nature of the transactions which they are [illegible]aded to record."

An account stated as against the customer binds only by way of estoppel through the depositor having acted upon the statement and having been misled, to his injury.[6] The ordinary writing-up of a bank-book with a return of vouchers or a statement of account, is said in an

[1] *Merchants' National Bank* v. *National Eagle Bank*, 101 Mass. 281. As to payment by mistake, see Story, Eq. Jur., § 110 *et seqq.*; *Kelly* v. *Solari*, 9 M. & W. 54, deciding that money honestly paid, under a mistake of fact, could be recovered back, although the person paying it had means of knowing, which he neglected to avail himself of; approved *Imperial Bank of Canada* v. *Bank of Hamilton*, [1903] A. C. 49, 56. *Townsend* v. *Crowdy*, 8 C. B. (N. S.) 477. *Kleinwort* v. *Dunlop Rubber Co.* (H. L.) 23 Times L. R. 696.

[2] Per Erle, C.J., *Chambers* v. *Miller*, 32 L. J. C. P. 30, 32.

[3] The effect of a banker issuing a pass-book is discussed in *McCaskill* v. *Connecticut Savings Bank*, 60 Conn. 300, 25 Am. St. R. 323; see, too, *Gifford* v. *Rutland Savings Bank*, 25 Am. St. R. 744, where a savings bank having paid on presentation of a deposit-book which had been stolen, and of which theft no notice was given to the banker, the banker was held not chargeable with negligence. *Irwin* v. *London and San Francisco Bank*, 27 Am. St. R. 82, turns on possession by the customer of his pass-book balance[illegible] with forged cheque debited. "I never heard before that an entry in a pass-b[illegible], payment": per Lord Eldon, C., *Noel* v. *Rochfort*, 4 Cl. & F. 176 n. Entries [illegible] pass-book communicated *to* the opposite parties are binding (it is presumed that the opposite party had acted on them or been prejudiced), but "entries made by a man in books which he keeps for his own private purposes, are not conclusive on him until he has made a communication on the subject of those entries to the opposite party. Until that time he continues to have the option of applying the several payments as he thinks fit": *Simson* v. *Ingham*, 2 B. & C., per Bayley, J., 73, followed by Fry, L.J., *Brown, Janson & Co.* v. *Cann*, 6 Times L. R. 250.

[4] Morse, Banks and Banking, §§ 290, 291. See *Manhattan Co.* v. *Lydig*, 4 Johns. (Sup. Ct. N. Y.) 377, where, on the facts, a bank clerk was held the agent of the customer. [illegible] *Gaden* v. *Newfoundland Savings Bank*, [1899] A. C. 281, 286.

[6] *Hardy* v. *Chesapeake Bank*, 31 Md. 562, 589.

American case [1] to preclude "no one from ascertaining the truth and claiming its benefit," and this a subsequent case [2] affirms to be "undoubtedly a correct statement of a general rule." But "without impugning the general rule, that an account rendered which has become an account stated is open to correction for mistake or fraud,[3] other principles come into operation, where a party to a stated account, who is under a duty, from the usages of business or otherwise, to examine it within a reasonable time after having an opportunity to do so, and give timely notice of his objections thereto, neglects altogether to make such examination himself or to have it made, in good faith, by another for him; by reason of which negligence, the other party, relying upon the account as having been acquiesced in or approved, has failed to take steps for his protection which he could and would have taken had such notice been given. In other words, parties to a stated account may be estopped by their conduct from questioning its correctness." [4]

American law.

In America, then, the law is settled [5] that a depositor in a bank, who sends his pass-book to be written up, and receives it back, with entries of credits and debits, and his paid cheques as vouchers for the latter, is bound personally or by an authorised agent, and with due diligence, to examine the pass-book and vouchers, and to report to the banker, without unreasonable delay, any errors which may be discovered in them; so that if he fails to do so, and the banker is thereby misled to his prejudice, he cannot afterwards dispute the correctness of the balance shown by the pass-book; and this view appears to be well founded.[6]

English cases.

The English cases point to the same conclusion, with one exception. In *Devaynes* v. *Noble*,[7] the master reported in detail on the custom of bankers, finding that the customer on receipt of the pass-book, or "passage-book" as it is termed in the report, has a duty to examine it "and, if there appears to be an error or omission, brings or sends it back to be rectified, or, if not, his silence is regarded as an admission that the entries are correct"; and this, though the report was much excepted to, seems to have passed unchallenged.

May be evidence against the depositor.

A "pass-book," says Lord Campbell, C.,[8] "(as its name indicates), is a book which passes between the bankers and their customer, being alternately in the custody of each party, on proof of its having been in the custody of the customer and returned by him to the bankers without objection being made to any of the entries by which the bankers are credited, I think such entries may be *primâ facie* evidence for the bankers, as those on the other side are *primâ facie* evidence

[1] *First National Bank* v. *Whitman*, 94 U. S. (4 Otto) 343. As to the effect of a stated account and how it may be falsified, Story, Eq. Jur. §§ 523–529.

[2] *Leather Manufacturers' Bank* v. *Morgan*, 117 U. S. (10 Davis) 96, 107. *Critten* v. *Chemical National Bank of New York*, 171 N. Y. 219, 228, is to the same effect: "If the depositor has by his negligence in failing to detect forgeries in his cheques and give notice thereof, caused loss to his bank, either by enabling the forger to repeat his fraud, or by depriving the bank of an opportunity to obtain restitution, he should be responsible for the damage caused by his default."

[3] *Perkins* v. *Hart*, 11 Wheat. (U. S.) 237, 256; *Wiggins* v. *Burkham*, 10 Wall. (U. S.) 129, 132.

[4] See *post*, 1336.

[5] *Leather Manufacturers' Bank* v. *Morgan*, 117 U. S. (10 Davis) 96.

[6] A gift with delivery of a pass-book was held not to make a good *donatio mortis causa*, *In re Beak's Estate*, L. R. 13 Eq. 489; *In re Beaumont*, [1902] 1 Ch. 889; it is otherwise with a deposit note, *In re Dillon*, 44 Ch. D. 76; *In re Weston*, [1902] 1 Ch. 680; *In re Andrews*, [1902] 2 Ch. 394. The law as to *donatio mortis causa* may be found in Story, Eq. Jur. 606–607 *d*; *Duffield* v. *Elwes*, 1 Bligh (N. S.), 497.

[7] 1 Meriv. 529, 535.

[8] *Commercial Bank of Scotland* v. *Rhind*, 3 Macq. (H. L. Sc.) 651.

against them." Lord Selborne[1] speaks of "the doctrine that a pass-book passing to and fro is evidence of a stated and settled account"; and Bigham, J.,[2] says that the pass-book "belongs to the customer and the entries made in it by the bank are statements on which the customer is entitled to act."

Chatterton v. London and County Bank.

Chatterton v. *London and County Bank*,[3] is the exception just noticed. The case in the Court of Appeal seems to have been dealt with in the boisterous manner of Lord Esher's latter days. No judgment was delivered, and in answer to counsel's suggestion that a jury must find whether the customer has looked through his pass-book after receiving it, Lord Esher observes: "You must not put a burden on people the law never placed on them." The customer "is not bound to look at it." The jury in the case seem to have given a very unsatisfactory verdict, and the only point before the Court of Appeal was whether a new trial should be granted; moreover, it has to be borne in mind that in his interlocutory remarks, which were many and apparently unpremeditated, Lord Esher was prone to be most inexact in his use of language, especially when dealing with points not really relevant to the necessary decision. On the new trial, in summing up Mathew, J., directed the jury that "there was no contract between the bank and the customer with regard to the pass-book." Taken in connection with Lord Campbell's, Lord Selborne's and Lord Halsbury's expressions noted above, this was plainly a misdirection; and the suggestion that if the plaintiff had told the clerk, who was alleged to have forged the cheques (upon the liability to pay which the action depended), "to examine the pass-book and compare the returned cheques with it and the counterfoils" the bank would have no right to complain, is a somewhat unblushing begging of the point at issue: whether the customer had a duty or not. If there was no duty, then the conduct of the plaintiff is irrelevant; if there was a duty, his delegation of it was at his own risk.[4]

Conclusion.

Notwithstanding, then, the aberration in *Chatterton* v. *London and County Bank*, no lawyer will have much difficulty in concluding that the English law as to entries in a pass-book is identical with the American decisions: that there is a duty on the customer to inspect his pass-book, and that entries in a pass-book communicated to a customer are in the nature of an account stated, which may be impugned by the customer on the ground either of mistake or fraud, but which raise a *primâ facie* case against the customer and put on him the *onus* of displacing them.

Power of cashier to bind banker.

Another point on which there has been some dispute is the power of a cashier[5] to bind the banker by acts which he has been suffered to do, yet which are outside the authority of one in his position. This

[1] *Blackburn Building Society* v. *Cunliffe, Brooks & Co.*, 22 Ch. D. 71, 72. In *Bank of England* v. *Vagliano*, [1891] A. C. 116, Lord Halsbury, C., asks, as if only one answer could be given: "Was not the customer bound to know the contents of his own pass-book?" In *Tarbuck* v. *Bispham*, 2 M. & W. 2, entries in a pass-book were assumed to be an account stated, but not against a lunatic.

[2] *Akrokerri (Atlantic) Mines* v. *Economic Bank*, [1904] 2 K. B. 470.

[3] Paget, Law of Banking, 120–124.

[4] Save for the notice given to the case in Sir John Paget's book, *Chatterton* v. *London and County Bank* might very safely have been ignored.

[5] There is apparently some difference in the use of the term "cashier" in England and in the United States. In the United States the word appears to have a more restricted meaning than in England, and the case cited must be read subject to this consideration; see *United States* v. *City Bank of Columbus*, 21 How. U. S.) 356, 364. The Court defines the "cashier" of the bank to be "an executive officer by whom its debts are received and paid and its securities taken and transferred."

Martin v. *Webb.*

was considered in *Martin* v. *Webb*,[1] where the facts, which were somewhat complicated, were minutely examined in arriving at the conclusion that the bankers were estopped in the particular case from denying the authority of their cashier to do acts outside the scope of his authority. The following principles were enunciated in the course of the judgment of Harlan, J.:[2] "It is clear that a banking corporation may be represented by its cashier—at least, where its charter does not otherwise provide—in transactions outside of his ordinary duties, without his authority to do so being in writing, or appearing upon the record of the proceedings of the directors. His authority may be by parol and collected from circumstances. It may be inferred from the general manner in which, for a period sufficiently long to establish a settled course of business, he has been allowed without interference to conduct the affairs of the bank. It may be implied from the conduct or acquiescence of the corporation, as represented by the board of directors. When during a series of years or in numerous business transactions, he has been permitted, without objection and in his official capacity, to pursue a particular course of conduct, it may be presumed, as between the bank and those who in good faith deal with it upon the basis of his authority, to represent the corporation, that he has acted in conformity with instructions received from those who have the right to control its operations." "Directors cannot in justice to those who deal with the bank, shut their eyes to what is going on around them. It is their duty to use ordinary diligence in ascertaining the condition of its business, and to exercise reasonable control and supervision of its officers. They have something more to do than, from time to time, to elect the officers of the bank, and to make declarations of dividends. That which they ought, by proper diligence, to have known as to the general course of business in the bank, they may be presumed to have known in any contest between the corporation and those who are justified by the circumstances in dealing with its officers upon the basis of that course of business."

Judgment of Harlan, J.

Security for overdraft. No duty to volunteer information to proposed guarantor.

Bankers often require security for their customers' overdrafts. Any duty on the part of the officers of a bank to volunteer information to a proposed guarantor (or cautioner as he is termed in Scotch law) as to the state of accounts with the principal has been emphatically negatived in a Scotch case:[3] "If the cautioner desires to know the state of accounts with the principal, it is his duty to ask and to inform himself, but no duty lies upon a party seeking security to give any information of that kind."

When a banker has given an overdraft he cannot refuse to honour cheques or drafts, within the limit of the overdraft, which have been drawn and put in circulation before any notice that the limit is withdrawn. Probably the grant of an overdraft does not prevent the bank from giving notice to discontinue it, with the limitation just noticed; and the question whether a banker having granted an overdraft could immediately and without notice sue for the money, is solved by ascertaining whether the terms granting the overdraft exclude the common law right of the banker to sue for what is in essence a debt.[4]

[1] 110 U. S. (3 Davis) 7. [2] *L.c.* 14.

[3] *Young* v. *Clydesdale Bank*, 17 Rettie, 231, 240. As to the moral duty, while affirming the absence of legal obligation, see per Lord Shand at 247, in which opinion the Lord President (Inglis), at 248, does not seem to have concurred.

[4] *Rouse* v. *Bradford Banking Co.*, [1894] A. C. 586, 596.

II. Banker may be agent of his customer.

II. In addition to his more common duty just discussed, a banker may be the agent of his customer. For example, he may receive money directed to be appropriated to some specific purpose, or stocks and shares with instructions to take and apply the dividends to his customer's account, or bills of exchange or cheques to collect, or Exchequer bills to receive the interest upon and to renew. Lord Brougham, in *Foley* v. *Hill*,[1] appears to consider the banker in this relation as a trustee; yet it is hard to see how his position is other than that of an agent, or how the duty to collect dividends can impose other liability than that attaching to an ordinary agent.[2]

Bills delivered for collection.

The effect of delivering bills and notes to a banker for collection[3] must be considered not as an act imposing a burden, but rather as producing an advantage, from which profit might probably arise. "The custom of receiving notes for collection is not founded on mere courtesy, but with a view to the interests of the institution, and is the source from whence profit may and does arise."[4] "It is not necessary to show that profits would inevitably accrue to the bank; it is enough that a reasonable expectation exists that such will be the result."[5]

Indorsers of negotiable paper.

Walton v. *Shelley*[6] decided that one who had placed his name on negotiable paper as a party to it, is not to be heard to prove any fact tending to impeach or invalidate the instrument. Lord Mansfield's reason for his decision is expressed in the maxim of the Civil Law: *Nemo allegans suam turpitudinem est audiendus.*[7] In Lord Kenyon's time, in *Jordaine* v. *Lashbrooke*[8] the contrary was held. The United States Courts have consistently followed the earlier English case; but where the indorsement is "for collection" the negotiability of the paper is restrained, and one who has thus indorsed it is competent to prove that he was not the owner of it, and did not mean to give title to it or its proceeds when collected.[9]

Negotiable Instruments.

Definition.

This brings us to consider what makes a document negotiable.[10] "A negotiable instrument payable to bearer," says Bowen, L.J.,[11] "is one which, by the custom of trade, passes from hand to hand by delivery, and the holder of which, for the time being, if he is a *bonâ fide* holder for value without notice, has a good title notwithstanding any defect of title in the person from whom he took it. A contractual document, in other words, may be such that, by virtue of its delivery, all the rights of the transferor are transferred to and can be enforced by the transferee against the original contracting party, but it may

[1] 2 H. L. C. 44.

[2] See Paley, Agency, 45; Morse, Banks and Banking (3rd ed.), §§ 214 *et seqq.*

[3] *Smedes* v. *Utica Bank*, 20 Johns. (Sup. Ct. N. Y.) 372, affirmed 3 Cowen (N. Y.), 662. [4] *L.c.* 381. [5] *L.c.* 382. [6] 1 T. R. 296. [7] *L.c.* 300.

[8] 7 T. R. 601. The controversy as to these cases is fully gone into in *Haines* v. *Dennett*, 11 N. H. 180. See also *Hawkins* v. *Cree*, 37 Pa. St. 494.

[9] *Sweeny* v. *Easter*, 1 Wall. (U. S.) 166. See *Goupy* v. *Harden*, 7 Taunt. 159, explained in *Castrique* v. *Buttigieg*, 10 Moo. P. C. C. 115. This case should be referred to for the law of the liability of an agent indorsing a bill of exchange for his principal. *Woodbridge* v. *Spooner*, 3 B. & Ald. 233; *Abrey* v. *Crux*, L. R. 5 C. P. 37; *Stott* v. *Fairlamb*, 52 L. J. Q. B. 420; *New London Credit Syndicate* v. *Neale*, [1898] 2 Q. B. 487, as to the inadmissibility of evidence to contradict the effect of a negotiable instrument.

[10] *Miller* v. *Race*, 1 Bur. 452; *Peacock* v. *Rhodes*, 2 Doug. 633, 636.

[11] *Simmons* v. *London Joint Stock Bank*, [1891] 1 Ch. 294.

yet fall short of being a completely negotiable instrument because the transferee acquires by mere delivery no better title than his transferor." Negotiability, says Strong, J.,[1] "is a technical term derived from the usage of merchants and bankers in transferring, primarily, bills of exchange and afterwards promissory notes. At common law, no contract was assignable, so as to give an assignee a right to enforce it by suit in his own name. To this rule bills of exchange and promissory notes, payable to order or bearer, have been admitted exceptions, made such by the adoption of the law merchant. They may be transferred by indorsement and delivery, and such a transfer is called negotiation. It is a mercantile business transaction, and the capability of being thus transferred so as to give to the indorsee a right to sue on the contract in his own name is what constitutes negotiability."

Foreign and Colonial Government Bonds.

Bonds of foreign and colonial Governments payable to bearer are precisely analogous to a bank-note payable to bearer or to a bill of exchange indorsed in blank, and so are negotiable;[2] and the same is the case with foreign Government scrip issued in England.[3] In *Crouch* v. *Crédit Foncier of England*,[4] Blackburn, J., had said with the concurrence of the judges sitting with him, that it was incompetent to those issuing an instrument to give to it the character of negotiability which the law had not attached to it; while "by making it payable to bearer, the custom could not have that effect, because being recent it formed no part of the ancient law merchant."[5] Cockburn, C.J., giving the judgment of the Exchequer Chamber in *Goodwin* v. *Robarts*, dissents from this. Usage, he says,[6] being the origin of the law merchant as to negotiable securities, "what is there to prevent our acting upon the principle acted upon by our predecessors?" On the authority of this last-cited case in *Bechuanaland Exploration Co.* v. *London Trading Bank*, Kennedy, J., held that instruments in their form negotiable and treated as such by mercantile usage would, on proof of those facts, be regarded as negotiable instruments by the Courts, even though they were not so by "the ancient law merchant." The judgment in *Bechuanaland Exploration Co.* v. *London Trading Bank* was much discussed in the profession and very generally approved, and was followed in *Edelstein* v. *Schuler*,[8] where Bigham, J., was of opinion that "the time has passed when the negotiability of bearer bonds, whether Government bonds or trading bonds, foreign or English, can be called in question in our Courts. The existence of the usage has been so often proved, and its convenience is so obvious, that it must be taken now to be part of the law; the very expression 'bearer bond' connotes the idea of negotiability, so that the moment such bonds are issued to the public they rank themselves among the class of negotiable securities."[9]

Bechuanaland Exploration Co. v. *London Trading Bank*, Judgment of Kennedy, J.

[1] *Shaw* v. *Railroad Co.*, 101 U. S. (11 Otto) 562.
[2] *Gorgier* v. *Mieville*, 3 B. & C. 45; *A.-G.* v. *Bouwens*, 4 M. & W. 171.
[3] *Goodwin* v. *Robarts*, L. R. 10 Ex. 76, 337; 1 App. Cas. 476.
[4] L. R. 8 Q. B. 374. [5] L. R. 10 Ex. 355.
[6] L. R. 10 Ex. 356. Lord Cairns, C., 1 App. Cas. 490, had "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." [7] [1898] 2 Q. B. 658. [8] [1902] 2 K. B. 144, 155.
[9] There is an article on the Early History of Negotiable Instruments, L. Q. R. vol. ix. 70. A commercial guaranty is not a negotiable security: 2 Kent, Comm. 549 n. (*a*). *Tatam* v. *Haslar*, 23 Q. B. D. 345; *Goodall* v. *Australian Freehold Banking Corporation*, 16 Vict. L. R. 29. A share warrant to bearer issued by a company registered under the Companies Act, 1867 (30 & 31 Vict. c. 131), ss. 27, 28, is a negotiable instrument: *Rumball* v. *Metropolitan Bank*, 2 Q. B. D. 194; *Webb, Hale & Co.* v. *Alexandria Water Co.*, 21 Times L. R. 572. As to *onus* of proof of title to a negotiable instrument, *Solomons* v. *Bank of England*, 13 East, 135 n. In America a distinction

Blanks in negotiable instruments when delivered.

"Negotiable instruments are frequently delivered for use with blanks not filled; and in respect to such instruments it is held, that where a party to such an instrument entrusts it to the custody of another for use, with blanks not filled up, whether it be to accommodate the person to whom it was entrusted, or to be used for the benefit of the signer of the same, such negotiable instrument carries on its face an implied authority to fill up the blanks necessary to perfect the same; and the rule is, that, as between such party and innocent third parties, the person to whom the instrument was so entrusted must be deemed the agent of the party who committed the instrument to his custody in filling the blanks necessary to perfect the instrument." "Where blanks exist in negotiable securities delivered to another for use, the custody of the paper, under such circumstances, gives the custodian the right to fill the blanks; but it does not confer authority to make any addition to the terms of the note; and if any such of a material character are made by such a party, without the consent of the party from whom the paper was received, it will avoid the note, even in the hands of an innocent holder."[1] To give validity to an instrument so completed it is essential that the delivery is *for use*.

Distinction between negotiable and not negotiable instruments.

The different effects of instruments that are negotiable, or are treated in such a way as to hold out to third persons that they are negotiable, and instruments that are in their nature not negotiable, may now be noted more in detail.

(1) Where an instrument is not negotiable.

(1) If an instrument is not negotiable, no right of action on it can be transferred by delivery; unless there is a representation on the face of the instrument made by the person in whom the title would be apart from such representation—that it would pass with a good title to any one taking it in good faith and for value—which representation has induced others to alter their position on the faith thereof.[2] This is so even where the conduct of the owner has enabled a fraud to be perpetrated and has caused loss; provided that his conduct is in the ordinary course of business, and there is no neglect of duty either to individuals or to the public; as was the case in *Fine Art Society* v. *Union Bank of London*.[3]

Fine Art Society v *Union Bank of London.*

In that case plaintiffs brought an action for wrongful conversion of certain post-office orders which they had handed to a clerk to pay in to their account at the defendants' bank, where also, unknown to them, the clerk had an account. The clerk paid the orders to his own account, and the bank presented the orders to the post-office, received the money for them, and placed it to his credit. If the post-office orders were not negotiable, the defendants were liable, as the property of the plaintiffs would then not have been divested. The ordinary practice with post-office orders was proved to be for the payee to sign a receipt in the form appearing on the order. In the case of orders

between bank-notes and other negotiable instruments is recognised which is not allowed in England (*De la Chaumette* v. *Bank of England*, 9 B. & C. 208, whereby the holder of a bank-note can rest secure in its possession as sufficient evidence of his right to recover upon it, until the defendant shows he was tainted with the fraud or at any rate cognisant of it: Daniel, Negotiable Instruments (4th ed.), § 1680. For the law where share certificates with a blank form of transfer are handed over, see *Colonial Bank* v. *Hepworth*, 36 Ch. D. 36; *Colonial Bank* v. *Cady and Williams*, 15 App. Cas. 267; *London Joint Stock Bank* v. *Simmons*, [1892] A. C. 201, 221; *Venables* v. *Baring Brothers*, [1892] 3 Ch. 527. *Frey* v. *Ives*, 8 Times L. R. 582, is a decision on the particular facts.

[1] *Angle* v. *North-Western Mutual Life Insurance Co.*, 92 U. S. (2 Otto), per Clifford, J., 338, 340.

[2] *Goodwin* v. *Roberts*, 1 App. Cas., per Lord Cairns, C., 489.

[3] 17 Q. B. D. 705. *Gordon* v. *London City and Midland Bank*, [1902] 1 K. B. 242, 264, as to the conversion.

presented for payment by a banker a regulation permitted payment without the payee's signature, if the name of the banker presenting the order was written or stamped on it. The contention was that the effect of this was to make a post-office order an instrument which passed by delivery amongst all persons having banking accounts. The Court of Appeal held otherwise, considering that the effect was merely "to make the signature of the banker a substitute for the signature to the receipt of the original payee."[1] To the suggestion that the plaintiffs' conduct in trusting the orders to a clerk to pay in, estopped them from setting up their legal title, it was answered[2] that there was "no neglect of any duty which the plaintiffs owed to the defendants or to the general public, and in fact there was no negligence at all; for the plaintiffs could not, and if they could, they were not bound themselves to carry the post-office orders to the bank, and they were therefore acting reasonably and prudently in entrusting the orders to the care and custody of" "their servant; and by this reasonable conduct they cannot be estopped from asserting their legal claim to the proceeds of the orders."

(2) Where an instrument is negotiable.

(2) Where an instrument is negotiable, it passes from hand to hand as if part of the currency. If it comes into the hands of a *bonâ fide* holder as a complete instrument, the person who has signed it is estopped from disputing any alterations made in it after it left his hands, by filling up blanks or otherwise in a way not *ex facie* fraudulent. But this estoppel is only in favour of a *bonâ fide* holder. A man who takes a negotiable instrument in blank and then himself fills it up without the consent or knowledge of the person to be bound, is not entitled to the benefit of the doctrine; for he necessarily has knowledge that in order to pass any larger right than he had from the person from whom he received it, an addition must be made to the document that he received; and if he makes one without inquiry, he can only take the right possessed by the person from whom he received it, and nothing more. "He cannot by his own subsequent act alter the legal character or enlarge in his own favour the legal or equitable operation of the instrument."[3] "The defence of purchaser for valuable consideration without notice, by any one who takes from another without inquiry an instrument signed in blank by a third party, and then himself fills up the blanks, appears to us to be altogether untenable."[4]

***Colonial Bank* v. *Cady and Williams*, not inconsistent with *France* v. *Clark*.**

It has been contended[5] that this is inconsistent with *Colonial Bank* v. *Cady and Williams*,[6] where executors indorsed certificates in blank and handed them to their stockbroker, who pledged them with his banker. The House of Lords held that the executors were not estopped from shewing their title against the bank; for their indorsement in blank and delivery to their stockbroker was consistent with either of two intentions; either to enable the stockbroker to have the stock registered in their names, or to sell or to pledge them; and so the bankers were put upon inquiry. Lord Herschell there says:[7] "If in the present case the transfer had been signed by the registered owner and delivered by him to the brokers, I should have come to the conclusion that the banks had obtained a good title as against him, and that he was estopped by his act from asserting any right to them."

[1] Per Fry, L.J., delivering the judgment of himself and Bowen, L.J., *l.c.* at 713.

[2] *Ibid.*

[3] Per Lord Selborne, C., *France* v. *Clark*, 26 Ch. D. 263. *Powell* v. *London and Provincial Bank*, [1893] 2 Ch. 555. *Lloyds Bank* v. *Cooke*, [1907] 1 K. B., per Moulton, L.J., 806. [4] *L.c.* 263. [5] 26 Ch. D. 262. *Fox* v. *Martin*, W. N. (1895) 36.

[6] 15 App. Cas. 267. [7] *L.c.* 285.

This does not conflict with Lord Selborne's principle when taken in connection with what Lord Watson says.[1] "When the registered shareholder executes the transfer indorsed on his certificate he can have only one intelligible purpose in view, that of passing on his right to a transferee"; a statement which assumes that in the case before them, that had in fact happened what Lord Halsbury, C.,[2] indicates as possible: "A document may by usage become so well understood in a particular sense that a person may be well estopped from denying that when he issues it to the world it must bear the sense which usage has attached to it." A deposit of a certificate of shares with a transfer executed in blank, in the opinion of Lord Blackburn, at least, has not this operation. This, he points out in *Colonial Bank* v. *Whinney*,[3] "was inoperative as a transfer. It was, however, I think, evidence that the deposit of the certificates was intended to be as a security"; a possibility not present apparently to Lord Herschell's mind at the time he made the statement quoted above.[4]

Negotiable paper presumed to be issued clear of all blemishes.

The maker of negotiable paper is presumed to have issued it free from all blemishes or alterations. The burden of showing that it was defective when issued is on the holder; for "he who takes a blemished bill or note takes it with all its imperfections on its head. He becomes sponsor for them, and though he may act honestly, he acts negligently. But the law presumes against negligence as a degree of culpability; and it presumes that he [the holder] had not only satisfied himself of the innocency of the transaction, but that he had provided himself with the proofs of it, to meet a "scrutiny he had reason to suspect."[5]

Negotiable instrument when issued becomes a portion of the currency.

This is on the principle that by the law merchant a negotiable instrument becomes a portion of the currency, and the person who issues it is bound to make good the representation he thus authorizes. It may be urged, that this principle does not extend to authorize dealings that take effect only through the perpetration of crime. But even admitting the existence of the principle, a difference is apparent between such a case as *Young* v. *Grote* and the case of an instrument issued in an imperfect state and made the occasion of a forgery, defeating the issuer's intention. There the cheque, though negligently filled up, was yet a perfect instrument, which there was no authority to alter. In the case of an instrument issued in an imperfect condition, where the maker signs his name and delivers the paper for the purpose of being filled up within limits indicated by the stamp, when it is filled up, and in a manner that is apparently warranted by the maker's dealings with it, whether he was defrauded or not became in law immaterial; else private instructions would determine matter of so much public concern as the authenticity of the currency.[6]

The acceptor of a bill is in no better position if he signs before the drawer's name is inserted than if he signs after; and if he signs after he is bound, by virtue of the third proposition in *Carr* v. *L. & N. W. Ry. Co.*[7] The case has been put in another way; whether there is crime or not in the filling up of the instrument, is immaterial, and therefore inadmissible, since the acceptor has given authority to fill up

[1] *L.c.* 280. [2] *L.c.* 274. [3] 11 App. Cas. 433.

[4] *S. Montagu & Co.* v. *Western Clevedon and Portishead Light Ry. Co.*, 19 Times L. R. 272.

[5] *Estate of Nagle*, 134 Pa. St. 31, 44, 19 Am. St. R. 669, adopting the language of Gibson, C.J., in *Simpson* v. *Stackhouse*, 9 Pa. St. 187.

[6] *Lloyds Bank* v. *Cooke*, [1907] 1 K. B. 794. [7] L. R. 10 C. P. 307.

the instrument by issuing it. Any such proposition is nevertheless logically inadmissible; for the acceptor has never given any such authority; and the law does not say that he has given authority. It merely refuses to take cognisance of anything else than is apparent on the paper the acceptor has issued, where the acceptor is sued upon it.

American decision.

In an old American case the point was discussed.[1] A merchant entrusted his clerk with blank indorsements, and these were obtained from the clerk by false pretences, and negotiated. In an action to obtain payment from the indorser the merchant was held liable. "If," says Parsons, C.J.,[2] "the clerk had fraudulently and for his own benefit made use of all the indorsements for making promissory notes to charge the indorsers, we are of opinion that this use, though a gross fraud, would not be in law a forgery, but a breach of trust. And, for the same reason, when one of these indorsements was delivered by the clerk, who had the custody of them, to the promiser, who by false pretences had obtained it, the fraudulent use of it would not be a forgery; because it was delivered with the intention that a note should be written on the face of the paper by the promiser, for the purpose of negotiating it, as indorsed in blank by the house. And we must consider a delivery by the clerk who was entrusted with a power of using these indorsements (although his discretion was confined) as a delivery by one of the house; whether he was deceived, as in the present case, or had voluntarily exceeded his direction. For the limitation imposed on his discretion was not known to any but to himself and to his principals."

Judgment of Parsons, C.J.

Conclusion.

The conclusion was, that since one of two innocent persons must suffer, it was expedient in the interests of the mercantile community at large that an additional burden should be placed on those issuing blank paper, rather than that the confidence in all mercantile instruments should be shaken.

Distinction between consequences dependent on the commission of a crime and those dependent on a breach of trust.

A distinction drawn between consequences of the commission of a crime and the consequences of a breach of trust would explain many of the cases, and would apply to such a principle as that indicated by Pollock, C.B., in *Barker* v. *Sterne*;[3] though it would not apply in the case of *London and South-Western Bank* v. *Wentworth*,[4] where a broader ground is stated, namely, that forgery was immaterial, since it did not affect the rights on the bill. "Where," it was there said,[5] "the bill is drawn by a real person, not only have those who claim under a forged indorsement no title to the bill, but the title is in some one else, who is entitled to have the bill restored to him and to sue upon it; and to his action a plea of payment to the man who claims under the forgery would be no defence. In the present case there is no real drawer, and the defendant could have paid the plaintiff without the risk of having to pay it a second time to another."

Limitation imposed by the House of Lords in *Earl of Sheffield* v. *London Joint Stock Bank*.

A limitation was for some time considered to have been imposed by the decision of the House of Lords in *Earl of Sheffield* v. *London Joint Stock Bank*.[6] Certificates of railway stock, with transfers executed in blank, were handed over to a money-lender to secure an advance. The money-lender deposited these securities with his bankers as security for large loan accounts, filling in the blanks in the transfers of stock with

1 *Putnam* v. *Sullivan*, 4 Mass. 45. 2 *L.c.* 54.

3 9 Ex. 687: "When a person issues a document of that kind [*i.e.*, a bill of exchange] the rest of the world must judge of the authority to fill it up by the paper itself, and not by any private instructions." 4 5 Ex. D. 96. 5 *L.c.* 101.

6 13 App. Cas. 333; *Duggan* v. *London and Canadian Loan, &c. Co.*, 20 Can. S. C. R. 481.

tbe name of the nominees of the hankers. The interpretation pnt on the evidence was that the hankers must he taken to have known that the securities on pledge with tbem were securitios taken hy the money-lender in the ordinary courso of his husiness. The money-lender having hecome hankrupt, tbe bankers claimed to retain tbe securities to satisfy the debt due to them. The Court of Appeal [1] held that the bonds must he treated as negotiable securities, and that the hank werc entitled to hold them as security for all the dcht due to them. The House of Lords reversed this docision as "founded on the Court's forgetting that at the same time that the hankers lent their money they had notice" of the infirmity of the pledgor's title, or of such facts and matters as made it reasonable that inquiry should be made into such title.[2] This fact of notice (Lord Halsbury, C., went furtber, and was of opinion the hankers had "actual knowledge" [3]), that should have put the bankers on inquiry as to the title of tbe securities they were taking, was held sufficient to disentitle them, assuming tbe securities were negotiable, and *à fortiori* if they were not negotiable.[4]

Simmons v. *London Joint Stock Bank* was held hy the Court of Appeal to be indistinguishable from *Earl of Sheffield* v. *London Joint Stock Bank*. In *Simmons* v. *London Joint Stock Bank* the facts proved were as follows: A stockbroker, entrusted witb honds of a foreign company payable to bearer, pledged them with his hanker, together with honds belonging to othcrs of his clients, to cover an advance to himself. Tbe hankers did not know to whom the honds belonged and did not inquire, and their loan not being paid, sold the bonds. The Court were of opinion that the bankers based their action on a mistaken assumption that a deposit *en bloc* of securities, without authority from the client, was recognised by law. The conclusion of the Court of Appeal is summed up in these words: [5] "The hank never became *bonâ fide* holders for value without notice, since they never helieved that Delmar [the stockbroker] was the true owner, and never, indeed, believed that any autbority bad heen given by the true owner, which alone in law could justify what was heing done. On the contrary, they chose to shut their eyes to this necessary part of the inquiry under a misconception of the law." *Simmons* v. *London Joint Stock Bank.*

The bankers appealed to the House of Lords against the judgment of the Court of Appeal on the ground tbat the decision in *Earl of Sheffield* v. *London Joint Stock Bank* turned entirely on the special nature of the business of tbe money-lender. The House sustained this view, and reversed the judgment of the Court of Appeal, affirming tbe broad proposition laid down by Abhott, C.J., in *Gorgier* v. *Mieville* [6] "that wboever is tbe holder of a negotiable instrument 'has power to give title to any person honestly acquiring it.'" [7] Distinguished from *Earl of Sheffield* v. *London Joint Stock Bank* in the House of Lords.

In arriving at tbeir decision the learned Law Lords elahorately distinguished *Earl of Sheffield* v. *London Joint Stock Bank*, which they explained to lay down no wider proposition than "that a purchaser even for value, cannot insist on his purchase if he knows tbat the person from whom he purchases has no right to sell." [8] Tbat decision, it was *Earl of Sheffield* v. *London Joint Stock Bank.*

[1] Under the name of *Easton* v. *London Joint Stock Bank*, 34 Ch. D. 95.
[2] Per Lord Bramwell, 13 App. Cas. 346.
[3] 13 App. Cas. 341.
[4] [1892] A. C. 201.
[5] Per Bowen, L.J., [1891] 1 Ch. 295.
[6] 3 B. & C. 47; *Foster* v. *Pearson*, 1 Cr. M. & R. 849.
[7] See per Lord Halsbury, C., [1892] A. C. 212
[8] Per Lord Halsbury, C., *l.c.* 208.

said,[1] proceeded on the lines of *Cooke* v. *Eshelby*,[2] that "it would be inconsistent with fair dealing that a latent principal should by his own act or omission lead a purchaser to rely upon" his right "against the agent as the real seller, and should nevertheless be permitted to intervene and deprive the purchaser of that right," after his position had been made worse by reliance on the latent principal's authority. "In any other case," says Lord Herschell,[3] referring to *Earl of Sheffield* v. *London Joint Stock Bank*, "the tribunal must investigate the facts for itself, and determine whether those who claim to hold a negotiable instrument have made out that they took it in good faith and for value." To avoid misconception of Lord Herschell's meaning in this passage we must bear in mind that in the ordinary case of taking a negotiable instrument the *onus* is on the person impugning the title of the holder; so that Lord Herschell's dictum must be confined to those cases where, by showing circumstances of suspicion, the *primâ facie* presumption in favour of the holder is displaced, and he is called on to show that his possession of the instrument is consistent with good faith and that he is a holder for value.[4]

Caution.

The two cases considered.

The effect of the decision in *London Joint Stock Bank* v. *Simmons*, when coupled with the explanatory remarks on *Earl of Sheffield* v. *London Joint Stock Bank*, is to discredit any doctrine of constructive notice in the law of negotiable instruments,[5] and to reassert the old accepted doctrine that the only conditions necessary to give a good title to a person taking a negotiable instrument from one who has, as against the true owners, no authority to transfer it, are that he should take it *bonâ fide* and for value. "Regard to the facts of which the taker of such instruments had notice is most material in considering whether he took in good faith";[6] so that in this view shutting the eyes to suspicion is a consideration of vital moment.

Thomson v. *Clydesdale Bank.*

Earl of Sheffield v. *London Joint Stock Bank* probably suggested the attempt made in *Thomson* v. *Clydesdale Bank*[7] by trustees to recover from a banker money paid in by a stockbroker to his overdrawn account; which money was the proceeds of the sale of trust stocks, and was applied by the bank in reduction of their customer's (the

[1] [1892] A. C. 229.

[2] 12 A. C. 271, 278.

[3] [1892] A. C. 221.

[4] Cp. *Angle* v. *North-Western Mutual Life Insurance Co.*, 92 U. S. (2 Otto) 330, 341, 342.

[5] *E.g.*, per Lord Halsbury, 13 App. Cas. 341: "If they (*i.e.*, the bankers) had reason to think that the securities might be Mozley's own, or might belong to somebody else, I think they were bound to inquire"; per Lord Watson, 343: "In my opinion, the character of the transactions between the respondente and Mozley was of itself sufficient to notify to them that his interest was limited"; per Lord Bramwell, 346: "The expression should be something like this: 'Notice of the infirmity of the pledgor's title or of such facts and matters as made it reasonable that inquiry should be made into such title'"; per Lord Macnaghten, 348: "They (the bankers) did not choose to inquire what that authority was." In *Colonial Bank* v. *Cady and Williams*, 15 App. Cas. 267, 283, Lord Herschell had previously negatived any doctrine of constructive notice in the acquiring title to negotiable instruments. See also per Lord Herschell, *London Joint Stock Bank* v. *Simmons*, [1892] A. C. 223, where the obligation of making inquiry is limited to the case where "there is anything to arouse suspicion, to lead to a doubt whether the person purporting to transfer" "is justified in entering into the contemplated transaction," when the neglect to inquire would be "inconsistent with good faith." *London and Canadian Loan and Agency Co.* v. *Duggan*, [1893] A. C. 506.

[6] Per Lord Herschell, [1892] A. C. 221; *Venables* v. *Baring Bros.*, [1892] 3 Ch. 527; *Baker* v. *Nottingham and Nottinghamshire Banking Co.*, 60 L. J. Q. B. 542; *Bentinck* v. *London Joint Stock Bank*, [1893] 2 Ch. 120.

[7] [1893] A. C. 282.

stockbroker's) debt to them. The argument for the trustees was that so soon as the bankers had notice that an account is a trust account, they were disentitled to retain the money against the real owners. To this the answer was made that in *London Joint Stock Bank* v. *Simmons* it was held not to be enough to have reason to believe that the fund that was being dealt with was another's property; there must be also a belief that the person dealing with it was acting fraudulently. *Ex parte Cooke* [1] was cited to prove that the relation between stockbroker and client is that of trustee and *cestui que trust*. In *Ex parte Cooke*, however, the question was only between the broker and his client. In the present case the question was between the broker's banker and his client—two innocent persons. The principle applicable in these circumstances differs, and is, that when a broker or other agent entrusted with the possession and apparent ownership of money pays it away in the ordinary course of business, though such payment is fraudulent as between agent and employer, yet the employer is bound as against third persons, unless he can show that the person appearing to receive the money in the ordinary course of business did not in fact so receive it, but was wanting in good faith in the transaction; and the *onus* of proving bad faith (mere negligence being insufficient to raise an implication of it) rests on him impeaching the payment. This suffices for the decision of the case.

Viewing the banker as an agent, the question arises, What are his duties with respect to the collection and dealing with bills and notes placed in his hands to be collected?

Duty of banker in respect of the collection (1) of bills of exchange and promissory notes, (2) of cheques.

The duty of the banker differs in respect of the character of the collection he is to make. We shall accordingly proceed to consider, first, his duty in regard to the collection of bills of exchange and promissory notes, and secondly, his duty with regard to cheques.

Bills of Exchange and Promissory Notes.[2]

The theory of a bill of exchange is that the bill is an assignment to the payee of a debt due from the acceptor to the drawer, and the

[1] 4 Ch. D. 123.

[2] Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), as to bills of exchange, sec. 3, *et seqq.*; as to promissory notes, sec. 83 *et seqq.*, where the respective instruments are defined. For the early history of bills of exchange and promissory notes, see *Goodwin* v. *Robarts*, L. R. 10 Ex., per Cockburn, C.J., 346 *et seqq.* There is an interesting article on bills of exchange in Beckmann, History of Inventions, vol. iii. (2nd ed.), 430. Much curious information is also to be found in Macleod, Theory and Practice of Banking (4th ed.), vol. i. 168, 265 *et seqq.* Promissory notes do not appear to be mentioned in Marius's Advice Concerning Bills of Exchange, published in 1651. According to Holt, C.J., in *Buller* v. *Crips*, 6 Mod. 29, they were not introduced into general use till near the close of the reign of Charles II. By 3 & 4 Anne, c. 9, a remedy was given upon promissory notes as upon bills of exchange. See Savary, Dictionnaire Universel de Commerce (1723), translated and extended in two immense folio volumes by Postlethwayt (1757), from which Beawes largely compiled his Lex Mercatoria, published in 1758; Story, Promissory Notes. The negotiability of promissory notes is treated by Blackburn, J., *Crouch* v. *Crédit Foncier of England*, L. R. 8 Q. B. 382, and in its historical and antiquarian aspect by Kent in his lecture on Negotiable Paper, 3 Comm. 72 *et seqq.*; while the literature of the subject is discussed, 3 Comm. 124 *et seqq.* Mention of Marius's work on Bills suggests Kent's reflections, in 3 Kent, Comm. 126, upon it: "It is quite amusing to perceive that many of the points which have been litigated, or stated in our Courts, within the last thirty years, are to be found in Marius; so true is it that case after case, and point after point on all branches of the law are constantly arising in the courts of justice, and discussed as doubtful or new points, merely because those who raise them are not thorough

acceptance imports that the acceptor is a debtor to the drawer, or at least has effects of the drawer's in his hands. The acceptor, therefore, has or ought to have in his hands, or under his control, the fund by which payment ought to be made; and it is his duty so to apply it.[1] "For the purpose of rendering bills of exchange negotiable, the right of property in them passes with the bills. Every holder with the bills takes the property, and his title is stamped upon the bills themselves. The property and the possession are inseparable. This was necessary to make them negotiable, and in this respect they differ essentially from goods of which the property and possession may be in different persons."[2]

(1) Duties of a banker in the collection of bills of exchange or promissory notes.

A banker must present bills of exchange or drafts or promissory notes for acceptance if the paper ought to be accepted; he must also present for payment at maturity; if this is refused and the instrument requires protest he must send it to a notary for protest.[3]

The undertaking to collect bills binds the banker to exercise the necessary skill and diligence for the accomplishment of that object; therefore he is bound to know the commercial character of the paper he undertakes to collect; for example, if he is dealing with a bill of exchange, he is bound to know that it is entitled to three days of grace, that on the last day of grace it should be protested, and that notice must be given to the indorser, to hold him liable for the payment of the bill. If the banker does not know these and like incidents of the business he professes, he is liable for the consequences of his want of knowledge. Thus, where a banker conducted himself in such an unskilful way in collecting commercial paper committed to him for collection that the indorser became discharged in consequence, the banker was held liable to his principal for the loss occasioned.[4]

View of Marshall, C.J., as to the mode in which the liability of the banker arises.

Marshall, C.J., considers the liability of the banker for the bill placed in his hands for collection to depend on the question whether reasonable and due diligence has been used in the performance of his duty; and to arise through the failure to demand payment in time being looked at as equivalent to the banker making the bill his own, and thereby entitling the original owner to sue for the price.[5]

Duty in collecting bills and notes. *Mackersy* v. *Ramsays*.

Lord Cottenham, C., in *Mackersy* v. *Ramsays*,[6] thus states the banker's obligation in the collection of bills and notes: "If I send to my bankers a bill or draft upon another banker in London, I do not expect that they will themselves go and receive the amount and pay me the proceeds; but that they will send a clerk in the course of the day to the Clearing House, and settle the balances, in which my bill or draft will form one item. If such clerk, instead of returning to the bankers with the balance, should abscond with it, can my bankers refuse to credit me with the amount? Certainly not. If the bill had been drawn upon a person at York, the case would have been the same; although, instead of the bankers employing a clerk to receive the amount, they would probably employ their correspondent at York to do so; and if such correspondent received the amount, am I to be refused credit because he afterwards became bankrupt whilst in debt to my bankers?

masters of their profession." *Multa ignoramus quæ nobis non laterent si veterum lectio nobis esset familiaris*: 2 Co. Inst. 166.

1 *Rowe* v. *Young*, 2 Bli. (H. L.) 391, 467.
2 Per Eyre, C.J., *Collins* v. *Martin*, 1 B. & P. 651.
3 *Ante*, 251.
4 *Georgia National Bank* v. *Henderson*, 12 Am. R. 590.
5 *Bank of Washington* v. *Triplett*, 1 Peters (U. S.), 25, 31.
6 9 Cl. & F. 848

If the balance were not in favour of my bankers, the question would not arise; so that my title to the credit would depend upon the state of the account between my bankers and their correspondent."

It has been sought [1] to deduce a different rule from *Van Wart* v. *Woolley*.[2] The agent of an American firm sued bankers for neglecting to give him notice of the non-acceptance of a bill forwarded from the American firm, and which they also had forwarded to their agent for collection. The very first words of the considered judgment of Abbott, C.J., are plain: "It is evident that the defendants (who cannot be distinguished from, but are answerable for, their London correspondents, Sir John Lubbock & Co.) have been guilty of a neglect of the duty which they owed the plaintiff, their employer," &c. For the contrary view certain expressions farther on in the same judgment are vouched: [3] "The bill is drawn upon persons residing in London; the plaintiff, therefore, could not have been expected to present the bill himself; it must have been understood that he was to do this through the medium of some other person. He employed for that purpose persons in the habit of transacting such business for him and others, and upon whose punctuality he might reasonably rely. In doing this, we think that he did all that was incumbent upon him; . . . that he is personally in no default as to them, and is not answerable to them for the default of the person whom he employed under such circumstances." *Van Wart v. Woolley.* Considered.

It is manifest that the plaintiff was only a general agent, while the defendants were carrying on a business that implied the having facilities which the general agent did not possess. Therefore, as regards his principal he came within the rule that where the employment of a sub-agent is authorised either expressly or impliedly, by usage of trade,[4] or by reason of the course of business between an agent and his principal admitting the appointment of a sub-agent, and the agent has used reasonable diligence in the choice of a sub-agent of skill and care, the agent will not ordinarily be responsible for the negligence or misconduct of the sub-agent.[5] The bankers, whose business it is, make themselves responsible for the performance of what they have undertaken —that is the ordinary and usual conduct of their business.

A limitation of the banker's liability arises where the banker has to employ a notary public; since the official position of a notary authorises the presumption that any one invested with it is a suitable person to discharge the duties to which he is assigned; [6] on disproof of this presumption the banker is liable for the notary's negligence. Employment of a notary.

The duty owed by the banker to his customer is that of a business man of reasonable skill and ordinary diligence; and as "by reasonable skill is understood such as is ordinarily possessed and exercised by persons of common capacity, engaged in the same business or employment; and by ordinary diligence is to be understood that degree of diligence which persons of common prudence are accustomed to use about their own affairs"; [7] it follows that if any point of law concerning any act in the business of collecting is without authority and doubtful, the banker will be absolved, if he goes wrong, on proof that his conduct attained the standard of diligence and skill of the ordinary business Banker to bestow the diligence and skill of the ordinary business man.

[1] Morse, Banks and Banking (3rd ed.), 277. [2] 3 B. & C. 439.
[3] *L.c.* 446. [4] *Robinson* v. *Mollett*, L. R. 7 H. L. 802.
[5] *Goswill* v. *Dunkley*, 2 Str. 680; *Cockran* v. *Irlam*, 2 M. & S. 301. Cp. *Speight* v. *Gaunt*, 9 App. Cas. 1. Cp. *Heywood* v. *Pickering*, L. R. 9 Q. B. 428.
[6] *Stacy* v. *Dane County Bank*, 12 Wis. 629; United States Digest, 1862, Banks, 12.
[7] Per Shaw, C.J., *Mechanics' Bank* v. *Merchants' Bank*, 47 Mass. 26.

man in that particular. He is not discharged if he goes wrong through want of care, as through misreading the hill.[1]

Distinction between notes left on deposit and notes left as collateral security for a loan.

A distinction exists between notes left with a banker on deposit and notes left as collateral security for a loan. In the former case it is not part of a banker's duty to sue out legal process for their enforcement.[2] In the latter, he is bound to take every step to fix the liability of the parties; he must resort to the ordinary means amongst merchants; and further, if necessary, bring an action with reasonable diligence and prosecute it with skill and promptitude; for if he fails in his duty the debtor may be discharged.[3]

(a) Presentment of bill of exchange.

(a) A bill of exchange[4] must be presented to the drawee for acceptance when it is drawn payable at a certain period after sight;[5] or where the bill expressly stipulates for acceptance; or where it is drawn payable elsewhere than at the residence or place of business of the drawee.[6] In no other case is the presentment for acceptance necessary to charge any party to the bill;[7] yet if not presented it must be negotiated within a reasonable time.

"The person," says Lord Watson,[8] "who draws a bill of exchange, and his addressee who accepts it, can never, according to the principles of the law merchant, be liable otherwise than in their respective characters of drawer and acceptor. In other cases the character and liability of parties to a bill cannot be ascertained without the aid of proof, as, for instance, when a dispute arises in regard to the order of time in which indorsements were made upon a bill." "On the other hand, it is undoubtedly competent for parties to a bill, by contract *inter se*, express or implied, to alter and even invert the positions and liabilities assigned to them by the law merchant. The drawer and acceptor of a bill may agree that, as between themselves the acceptor shall have the rights of a drawer, and that the drawer shall be subject to the liabilities of an acceptor, and that agreement when proved will be binding upon them both, although it can have no effect upon the obligations to third parties interested in the bill imposed upon them by the law merchant."

Comment.

By the common law any alteration made subsequently to acceptance

1 *Bank of Delaware County* v. *Broomhall*, 38 Pa. St. 135.

2 *Crow* v. *Mechanics' and Traders' Bank*, 12 La. Ann. 692.

3 *Wakeman* v. *Gowdy*, 10 Bosw. (Sup. Ct. N. Y.) 208; Story, Promissory Notes, § 284.

4 As to the form and definition of a bill of exchange, *Chamberlain* v. *Young*, [1893] 2 Q. B. 206, where an instrument made payable to "—— order" was held to mean payable to "my order," *i.e.*, of the drawer.

5 45 & 46 Vict. c. 61, s. 39, sub-s. 1; *Campbell* v. *French*, 6 T. R. 200; *Holmes* v. *Kerrison*, 2 Taunt. 323. As to when a bill payable after sight is negotiated, see s. 40.

6 45 & 46 Vict. c. 61, s. 39, sub-s. 2.

7 45 & 46 Vict. c. 61, s. 39, sub-s. 3. *Ramchurn Mullick* v. *Radakissen*, 9 Moo. P. C. C. 46, 65, 66, adopting *Mellish* v. *Rawdon*, 9 Bing. 416; 45 & 46 Vict. c. 62, s. 40.

8 *Steele* v. *M'Kinlay*, 5 App. Cas. 778; *Jenkins* v. *Coomber*, [1898] 2 Q. B. 168, a decision on ss. 55, 56 of the Bills of Exchange Act, 1882, holding that the principles laid down in *Steele* v. *M'Kinlay* are not superseded by the Act; *Harburg India Rubber Comb Co.* v. *Martin*, [1902] 1 K. B. 778; *Macdonald* v. *Whitfield*, 8 App. Cas. 733. As to a promise to accept and the estoppels worked by acceptance or payment, see Mr. Holmes's note, 3 Kent, Comm. (12th ed.) 85. When a party to a bill is discharged from his liability thereon by reason of the holder's omission to perform his duties as to presentment for acceptance or payment, protest or notice of dishonour, such party is also discharged from liability on the debt or other consideration for which the bill was given: *Bridges* v. *Berry*, 3 Taunt. 130; *Soward* v. *Palmer*, 8 Taunt. 277; *Peacock* v. *Pursell*, 14 C. B. N. S. 728; *Cambefort* v. *Chapman*, 19 Q. B. D. 229, 233; but see *Wegg-Prosser* v. *Evans*, [1894] 2 Q. B., per Wills, J., 101, and on app., [1895] 1 Q. B. 108. As to qualified acceptance, see *Meyer* v. *Decroix*, [1891] A. C. 520. The qualification must be by plain and intelligible language, and so made part of the acceptance itself that it is intelligible in the ordinary course of business.

will not, even in the case of an innocent holder for value, avail to charge the acceptor;[1] but now, "where a bill has been materially altered, but the alteration is not apparent, and the bill is in the hands of a holder in due course, such holder may avail himself of the bill as if it had not been altered, and may enforce payment of it according to its original tenor; except against such as are privy to the alteration and subsequent indorsers; and they are liable."[2]

Dictum of Byles, J., in Swan v. North British Australasian Co.

In *Swan* v. *North British Australasian Co.*,[3] Byles, J., says: "The object of the law merchant, as to bills and notes made or become payable to bearer, is to secure their 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 whatever. 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 comment on this passage by Byles, J., himself, when it was cited in *Foster* v. *Mackinnon*,[4] is: "If that be right, it can only be with reference to the case of a complete instrument; it can hardly be applicable to a case where a man's signature has been obtained by a fraudulent representation to a document which he never intended to sign." The judgment of the Court in *Foster* v. *Mackinnon* was delivered by Byles, J. After referring to the judgment in *Swan* v. *North British Australasian Land Co.*,[5] as establishing the proposition that "if a deed he delivered and a blank left therein be afterwards improperly filled up (at least if that he done without the grantor's negligence), it is not the deed of the grantor," the learned judge adds:[6] "Nevertheless, this principle, when applied to negotiable instruments, must be and is limited in its application. These instruments are not only assignable, but they form part of the currency of the country. A qualification of the general rule is necessary to protect innocent transferees for value. If, therefore, a man write his name across the back of a blank bill stamp, and part with it, and the paper is afterwards improperly filled up, he is liable as indorser. If he write it across the face of the bill, he is liable as acceptor, when the instrument has once passed into the hands of an innocent indorsee for value before maturity, and liable to the extent

Commented on by the same judge in Foster v. Mackinnon.

Judgment of Byles, J., in Foster v. Mackinnon.

[1] *Master* v. *Miller*, 2 H. Bl. 140.

[2] 45 & 46 Vict. c. 61, s. 64 (1). *Greenfield Savings Bank* v. *Stowell*, 123 Mass. 196; *Holmes* v. *Trumper*, 7 Am. R., per Christiancy, J., 665, as to subsequent alteration of a note issued as "a complete legal instrument." What is a "material alteration" was the subject of decision in *Suffell* v. *The Bank of England*, 9 Q. B. D. 555; *Leeds Bank* v. *Walker*, 11 Q. B. D. 84; *Imperial Bank of Canada* v. *Bank of Hamilton*, [1903] A. C. 49. Cp. *London and Provincial Bank of England* v. *Roberts*, 22 W. R. 402. *Gordon* v. *Third National Bank*, 144 U. S. (37 Davis) 97, considers what is a material alteration in a promissory note. Phillimore, J., decided that the insertion of the word "limited" after the name of a company, payee, was, if material, not apparent: *Bank of Montreal* v. *Exhibit and Trading Co.*, 22 Times L. R. 722. A note to *Draper* v. *Wood*, 17 Am. R. 92, 97, collects the cases on the alteration of negotiable instruments. As to alterations in deeds at Common Law, *Pigot's case*, 11 Co. Rep. 26 *b*, is modified by *Aldous* v. *Cornwell*, L. R. 3 Q. B. 573, and now applies only in the case of material alterations; *Crediton (Bishop of)* v. *Exeter (Bishop of)*, [1905] 2 Ch. 455; *Blair* v. *Assets Co.*, [1896] A. C. 409. The rules of law applicable to deeds were held applicable also to documents not under seal in *Master* v. *Miller (supra)*; *Henfree* v. *Bromley*, 6 East, 309. See *Cowie* v. *Halsall*, 2 B. & Ald. 197.

[3] 2 H. & C. 175, 184; *Burchfield* v. *Moore*, 3 E. & B. 683; *Gardner* v. *Walsh*, 5 E. & B. 83. [4] L. R. 4 C. P. 709. [5] 2 H. & C. 175. [6] L. R. 4 C. P. 712.

of any sum which the stamp will cover. In these cases, however, the party signing knows what he is doing; the indorser intended to indorse, and the acceptor intended to accept, a bill of exchange to be thereafter filled up, leaving the amount, the date, the maturity, and the other parties to the bill undetermined."

Comment.

So that if the bill is issued as a perfected instrument, which there is no intention on the acceptor's part to have altered in any respect, no liability will attach to the acceptor by reason of an alteration.

Lord Herschell in *Bank of England* v. *Vagliano*.

The *dictum* of Lord Herschell in *Bank of England* v. *Vagliano* must also be noted:[1] "It is immaterial to the acceptor to whom the drawer directs him to make payment; that is a matter for the choice of the drawer alone. The acceptor is only concerned to see that he makes the payment as directed, so as to be able to charge the drawer. It is in truth only with the drawer that the acceptor deals; it is at his instance that he accepts; it is on his behalf that he pays; and it is to him that he looks either for the funds to pay with, or for reimbursement if he holds no funds of the drawer at the time of payment."

United States cases.

Wood v. *Steele*.

Judgment of Swayne, J.

In a case depending on the interpretation of the law merchant the opinion of the Supreme Court of the United States is of the highest value, and in *Wood* v. *Steele*,[2] where an alteration was made in a promissory note after execution, Swayne, J., says:[3] "The rules, that where one of two innocent persons must suffer, he who has put it in the power of another to do the wrong must bear the loss, and that the holder of commercial paper taken in good faith, and in the ordinary course of business, is unaffected by any latent infirmities of the security, have no application to this class of cases. The defendant could no more have prevented the alteration than he could have prevented a complete fabrication; and he had as little reason to anticipate one as the other. The law regards the security, after it is altered, as an entire forgery with respect to the parties who have not consented, and so far as they are concerned, deals with it accordingly."

Rules relating to presentment.

Presentment must be within a reasonable time.

Presentment is dispensed with "where, after the exercise of reasonable diligence, such presentment cannot be effected."[4] Where presentment is necessary and the bill payable after sight "is negotiated, the holder must either present it for acceptance or negotiate it within a reasonable time"; if he do not do so, the drawer and all prior indorsers are discharged.[5] In *Shute* v. *Robins*[6] a bill drawn by bankers

[1] [1891] A. C. 147. [2] 6 Wall. (U. S.) 80. [3] *L.c.* 82.

[4] The rules as to presentment for acceptance are set out in the Act 45 & 46 Vict. c. 61, s. 41; "holder" is defined, sec. 2; "holder in due course": *Herdman* v. *Wheeler*, [1902] 1 K. B. 361, 371; but see *Lloyd's Bank* v. *Cooke*, [1907] 1 K. B., per Moulton, L.J., 805. Cp. *Morrison* v. *Buchanan*, 6 C. & P. 18. The presentment must be either to the drawee or his *authorised* agent: *Cheek* v. *Roper*, 5 Esp. (N. P.) 175. A bill should be presented for acceptance before maturity: *O'Keefe* v. *Dunn*, 6 Taunt. 305, 307; *Nicholson* v. *Gouthit*, 2 H. Bl. 610. The bill must be presented, though the holder may know that the drawee will not accept: *Hill* v. *Heap*, D. & R. (N. P.) 57; *Prideaux* v. *Collier*, 2 Stark. (N. P.) 57; and during the usual banking hours: *Parker* v. *Gordon*, 7 East, 385; *Jameson* v. *Swinton*, 2 Taunt. 224; but presentment after the usual hours is sufficient if there is somebody at the place who sees the bill and gives an answer, but not otherwise: *Henry* v. *Lee*, 2 Chit. (K. B.) 124; *Bynner* v. *Russell*, 7 Moore (C. P.), 266; *Smith* v. *New South Wales Bank* (1872), 8 Moo. P. C. C. N. S. 443, 461-463; 3 Kent, Comm. 96.

[5] 45 & 46 Vict. c. 61, s. 40; 3 Kent, Comm. 83. Any *bonâ fide* holder of a negotiable instrument, or any one lawfully in possession of it for the purpose of payment, may present it for payment at maturity: *Leftley* v. *Mills*, 4 T. R. 170. Possession is sufficient *primâ facie* evidence of right to present: *Bachelor* v. *Priest*, 29 Mass. 398, 406, citing Bayley, Bills of Exchange (6th ed.), 139. As to payment at a particular place, *Rowe* v. *Young*, 2 Brod. & B. (H. L.) 165, caused the passing of 1 & 2 Geo. IV. c. 78, re-enacted by 45 & 46 Vict. c. 61, s. 191 (2) (c.)

[6] Moo. & M. 133, 3 C. & P. 80. See *Fry* v. *Hill*, 7 Taunt. 396.

in the country on their correspondents in London, payable after sight, was indorsed to the traveller of the plaintiffs. He kept it a week, then forwarded it to the plaintiffs; they kept it two days, then transmitted it for acceptance. In the meantime the drawers had become bankrupt and the drawees refused to accept. An action was brought, and in summing up to the jury, after observing that the question was one of mixed law and fact, Lord Tenterden, C.J., said:[1] "Whatever strictness may be required with respect to common bills of exchange, payable after sight, it does not seem unreasonable to treat bills of this nature, drawn by bankers on their correspondents, as not requiring immediate presentment, but as being retainable by the holders for the purpose of using them within a moderate time (for indefinite delay, of course, cannot be allowed), as part of the circulating medium of the country." The jury found that the delay in this case was not unreasonable. Opinion of Lord Tenterden, C.J.

To the same effect is the judgment of Tindal, C.J., in *Mellish* v. *Rawdon*.[2] The bill must be forwarded within a reasonable time under all the circumstances of the case, and with no unreasonable or improper delay. "Whether there has been in any particular case reasonable diligence used, or whether unreasonable delay has occurred, is a mixed question of law and fact to be decided by the jury acting under the direction of the judge, upon the particular circumstances of each case."[3] Opinion of Tindal, C.J.

"The law," says Lord Cairns,[4] discussing what is to be regarded as "unreasonable time," where an agent has to present, as between him and his principal, "does not lay down as an absolute rule any time which is reasonable or unreasonable, as between persons standing in this relation, for the execution by the agent of the duty which is imposed upon him. But inasmuch as the object of the transmission of a bill of this kind from principal to agent is to obtain the acceptance and payment of the bill, or, if it is not accepted, to guard the rights of the principal against the drawer in case recourse is to be had to the drawer, their Lordships are of opinion that the duty of the agent must be measured by these considerations, and that the duty of the agent is to obtain acceptance of the bill, if possible, but not to press unduly for acceptance in such a way as to lead to a refusal, provided that the steps for obtaining acceptance or refusal are taken within that limit of time which will preserve the right of his principal against the drawer." What is an unreasonable time.

There is, however, a difference between a bill circulating and a bill locked up. "If," says Buller, J., "a bill drawn at three days' sight were kept out in that way [in circulation] for a year, I cannot say that Distinction between a bill circulating and a bill locked up.

[1] Moo. & M. 136. [2] 9 Bing. 416.

[3] *L.c.* 423. In *Straker* v. *Graham*, 4 M. & W. 721, delay in presentment was held unreasonable; in *Goupy* v. *Harden*, 7 Taunt. 159, reasonable, as to which see 10 Moo. P. C. C. 115.

[4] *Bank of Van Dieman's Land* v. *Bank of Victoria*, L. R. 3 P. C. 542. *Cox* v. *National Bank*, 100 U. S. (10 Otto) 704. The French Code de Commerce, Liv. 1, 8, § 11, requires a European bill, *i.e.*, one drawn from the continent or islands of Europe and payable within the European possessions of France, to be presented within three months from the date it bears, and in default the holder loses all recourse over. The rule as to reasonable time is well stated by Bigelow, J., in *Prescott Bank* v. *Caverly*, 73 Mass. 221: "Ordinarily, the question whether a presentment was within a reasonable time is a mixed question of law and fact, to be decided by the jury under proper instructions from the Court. And it may vary very much according to the particular circumstances of each case. If the facts are doubtful, or in dispute, it is the clear duty of the Court to submit them to the jury. But when they are clear and uncontradicted, then it is competent for the Court to determine whether the reasonable time required by law for the presentment has been exceeded or not." See Bayley, Bills of Exchange (6th ed.), 230, and note. Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 40, sub-s. (3).

there would be *laches*. But if, instead of putting it in circulation, the holder were to lock it up for any length of time, I should say that he would be guilty of *laches*." [1] The distinction has also been stated between bills payable at a certain number of days after date and bills payable at a certain number of days after sight. In the case of the former the holder is bound to use due diligence to present the bill at maturity; in the latter, if he chooses he may put the bill into circulation instead of immediately presenting it. It is then uncertain when it may be presented, and the circumstances must determine the reasonableness or unreasonableness of the delay.[2]

Distinction drawn by Parke, B., between promissory notes and cheques.

Again, there is a difference in the law as to promissory notes. "If," says Parke, B.,[3] "a promissory note payable on demand is, after a certain time, to be treated as overdue, although payment has not been demanded, it is no longer a negotiable instrument. But a promissory note payable on demand is intended to be a continuing security. It is quite unlike the case of a cheque which is intended to be presented speedily." From what fell from Lord Cairns in the *Chartered Mercantile Bank of India, &c.* v. *Dickson* [4] the law still seems not to be finally settled. There it was contended that the law with regard to the time for the presentation of a promissory note payable upon demand or indorsed over, requires a presentation to the maker within a reasonable time. Lord Cairns said: "The cases of bills of exchange and of cheques stand upon a footing obviously different, and the law as to them does not by any means of necessity decide the present question. We have been referred to some American authorities in support of the proposition that the question to be determined is always whether the presentation for payment was made within a reasonable time. Their Lordships think it better to assume, as was contended by the respondent, that this is a proper definition of the question to be considered. They would be unwilling to preclude any argument upon that in any other case when there might be an opportunity of considering it more fully." Meanwhile the decision of the Exchequer stands.

Chartered Mercantile Bank of India, &c. v. *Dickson.*

Lord Cairns treats the question as an open one.

American authorities.

The effect of the American authorities may be summed up in the words used in *Losee* v. *Dunkin*: [5] "There is no precise time at which such a note [a note payable on demand] is to be deemed dishonoured." "The demand must be made in reasonable time, and that will depend upon the circumstances of the case and the situation of the parties."

Holder of bill presenting for acceptance before

Blesard v. *Hirst* [6] decides that though it is not necessary that the holder should present a bill for acceptance before it becomes due [7] yet

[1] *Muilman* v. *D'Eguino*, 2 H. Bl. 570. See the explanation of this by Tindal, C.J., in *Mellish* v. *Rawdon*, 9 Bing. 416, 423.

[2] *Goupy* v. *Harden*, 7 Taunt. 159.

[3] *Brooks* v. *Mitchell*, 9 M. & W. 18, and in the argument the same learned judge said: "A promissory note payable on demand is current for any length of time," nevertheless the Statute of Limitations runs from the date thereof: *In re George*, 44 Ch. D. 627. *Edwards* v. *Walters*, [1896] 2 Ch. 157; The law merchant is adopted with modifications in sec. 62 of the Bills of Exchange Act. In *Tinson* v. *Francis*, 1 Camp. 19, Lord Ellenborough, C.J., says: "After a bill or note is due it comes disgraced to the indorsee"; and Bulloy, J., in *Brown* v. *Davies*, 3 T. R. 80, says that to take an overdue note or bill "is out of the common course of dealing." But these cases must be treated as overruled, *Charles* v. *Marsden*, 1 Taunt. 224, 225; *Sturtevant* v. *Ford*, 4 M. & G. 191. The authorities are considered in *In re Overend, Gurney & Co., Ex parte Swan*, L. R. 6 Eq. 344, 358. See Daniel, Negotiable Instruments, (4th ed.), § 610.

[4] L. R. 3 P. C. 579. See *In re Rutherford*, 14 Ch. Div. 687.

[5] 7 Johns. (Sup. Ct. N. Y.) 70.

[6] 5 Burr. 2670.

[7] Notice of dishonour is not necessary where the drawee is, and at the time of the

if he do so he must give immediate notice of the refusal to accept to all parties to the bill to whom he desires to resort for payment in case it is dishonoured; and this was accepted as correct in *Goodall* v. *Dolley*;[1] if the holder fails to do this the indorser is discharged. In the last-mentioned case it was also said that a subsequent proposal by the indorser to pay the bill by instalments, made without knowledge of the indorsee's *laches*, is not a waiver of the want of notice. The Statute of Limitations runs from the time of presentation.[2]

Maturity must give notice to all parties in case of dishonour.

Proposal to settle made without knowledge of holder's *laches* no waiver of indorser's rights.

There is a distinction to be observed in relation to the presenting a bill for acceptance between the case of the owner of a draft and his agent for collection. In the case of the owner he is not bound to present a draft payable at a date certain, for acceptance before that day. But the agent (this is as between him and his principal) must act with due diligence to get the draft accepted as well as paid; and he has not the discretion and latitude of time given him that the owner has, but is responsible for all damage sustained by the owner for any unreasonable delay of which he is guilty.[3]

Distinction between duty of owner and of agent in presenting bill.

The drawee need not say straightway whether he will accept or refuse. In *Bank of Van Diemen's Land* v. *Bank of Victoria*,[4] their Lordships were prepared to hold that it was "the ordinary custom of merchants to leave a bill for acceptance twenty-four hours with the person upon whom it is drawn"; so that, where the twenty-four hours would expire after business hours on a Saturday, "it was a natural and justifiable act to postpone the demand for an answer"[5] till Monday.[6]

Immediate answer not required from the drawee.

The holder of a bill may refuse to take a qualified acceptance, and may treat a bill accepted in a qualified manner as non-accepted.[7]

Qualified acceptance.

(β) A bill must be also presented for payment[8] on penalty of discharging the drawer and indorsers.[9]

(β) Presentment for payment.

If the bill is not payable on demand, presentment must be made on the day it falls due.[10] If the bill is payable on demand, then presentment must be made within a reasonable time after its issue in order to render the drawer liable, and within a reasonable time after its indorse-

drawing of the bill was without effects of the drawer in his hands: *Bickerdike* v. *Bollman*, 1 T. R. 405. See The Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 50; *Carew* v. *Duckworth*, L. R. 4 Ex. 313, and per Bramwell, B., 316; *Turner* v. *Samson*, 2 Q. B. D. 23.

1 1 T. R. 712.

2 *Whitehead* v. *Walker*, 9 M. & W. 506.

3 *Exchange National Bank* v. *Third National Bank*, 112 U. S. (5 Davis), 276, 291, citing 3 Kent, Comm. 82, and Chitty, Bills of Exchange (13th Am. ed.), 272, 273.

4 L. R. 3 P. C. 543.

5 *L.c.* 547. Lord Cairns (546), says of the term "excusable neglect": "it must mean this—that an excuse valid in law existed from that which, *primâ facie*, and if the excuse did not exist, would in law be a neglect."

6 In *Ingram* v. *Foster*, 2 Sm. (K. B.) 243, 245, it was said by Lord Ellenborough, C.J., that the law of merchants at Hamburg, and which prevails all over the continent of Europe, is that when a bill is kept more than twenty-four hours after presentation for acceptance it amounts to an acceptance; The Bills of Exchange Act, 1882, s. 42, recognises "the customary time." Lord Ellenborough intimated a desire to have the point, amongst others, argued whether, if the holder allows further time, he should not inform his indorser, and put him in as good a situation as himself.

7 45 & 46 Vict. c. 61, s. 44, sub-s. (1); as to rights where there is a qualified acceptance, see ss. 19 and 52.

8 See Mr. Holmes's note on Place of Presentment to 3 Kent, Comm. (12th ed.) 96.

9 45 & 46 Vict. c. 61, s. 45. "It is too late now," says Lord Ellenborough, (*Esdaile* v. *Sowerby* (1809), 11 East, 114), "to contend that the insolvency of the drawer or acceptor dispenses with the necessity of a demand of payment, or of notice of the dishonour." See 45 & 46 Vict. c. 61, s. 48. Excuses for delay or non-presentation for payment are regulated now by 45 & 46 Vict. c. 61, s. 46.

10 45 & 46 Vict. c. 61, s. 45, sub-s. 1.

ment to render the indorser liable.[1] Reasonable time is, we have seen when discussing presentment for acceptance, most often a mixed question of law and fact.[2] *Quam longum esse debet non definitur in jure, sed pendet ex discretione justiciariorum.*[3] Delay in making presentment for payment is excused when caused by circumstances beyond the control of the holder and not imputable to his servants' misconduct or negligence.[4]

American cases.

In some American cases[5] reasonableness of notice or demand, or due diligence when the facts are not in dispute, has been held a question of law. The difficulty is to dissociate it from the facts, and the case will not often arise where it is possible to dispense with the assistance of the jury.[6]

How to be made.

Presentment for payment[7] must be made by the holder, or by some person authorised to receive payment on his behalf, at a reasonable hour on a business day at the proper place,[8] either to the person designated by the bill as payer, or to some person authorised to pay or refuse payment on his behalf, if with the exercise of reasonable diligence such person can there be found.

Rule as to presentment for payment.

The rule at common law has been thus expressed:[9] A man taking a bill or note payable on demand, or a cheque, is not bound, laying aside all other business, to present or transmit it for payment [on] the very first opportunity. It has long since been decided, in numerous cases, that, though the party by whom the bill or note is to be paid live in the same place, it is not necessary to present the instrument for payment till the morning next after the day on which it was received.[10] And later cases have established that the holder of a cheque has the whole of the banking hours of the next day within which to present it for payment.[11]

Where parties to bill live in the same place.

Where the parties live in the same place a bill of exchange ought to be presented the next day after the payee has received it. If it has to be sent by post to be presented, it ought to be posted on the day next after the day on which it was received, and it is then the duty of the

[1] 45 & 46 Vict. c. 61, s. 45, sub-s. (2). A note payable on demand is not so strictly construed overdue as other instruments: *Cornidge* v. *Allenby*, 6 B. & C. 373; as to bankers' cash-notes, *Rogers* v. *Langford*, 1 Cr. & M. 637; *Robson* v. *Oliver*, 10 Q. B. 704; 45 & 46 Vict. c. 61, s. 36. In *Bowes* v. *Howe*, 5 Taunt. 30, an allegation in the declaration that the makers became insolvent and "ceased and wholly declined and refused to pay" any of their notes, was held insufficient, as not being equivalent to an allegation of presentment. Not even the bankruptcy or insolvency of the drawee or maker will avail as an excuse for not presenting; for many means may remain of obtaining payment by the assistance of friends or otherwise: *Sands* v. *Clarke*, 8 C. B. 751; *In re East of England Banking Co.*, L. R. 4 Ch. 14.

[2] *Ante*, 1292; *Manwaring* v. *Harrison*, 1 Stra. 508.

[3] Co. Litt. 56 b.

[4] 45 & 46 Vict. c. 61, s. 46, sub-s. (1). Cp. *Patience* v. *Townley*, 2 Sm. (K. B.) 223.

[5] *Aymar* v. *Beers*, 7 Cowen (N. Y.), 705; *Bank of Columbia* v. *Lawrence*, 1 Peters (U. S.), 578, where the rule applicable when the party, to whom notice is to be given, has no regular place of business in the city or town where the holder resides, yet receives his letters there, is considered. *Remer* v. *Downer*, 23 Wend. (N. Y.) 620.

[6] 3 Kent, Comm. (13th ed.), 105, n. (x^1). Where sudden illness or death of or accident to the holder or his agent prevents the presentment of the bill or note in due season, or the communication of notice, the delay is excused, provided that presentment is made and notice given as promptly afterwards as the circumstances permit: Daniel, Negotiable Instruments (4th ed.), § 1125.

[7] 45 & 46 Vict. c. 61, s. 45, sub-s. (3). *Post*, 1301.

[8] As to what is the proper place at which to present a bill, see 45 & 46 Vict. c. 61, s. 45, sub-s. (4).

[9] Byles, Bills of Exchange (16th ed.), 284.

[10] *Ward* v. *Evans*, 2 Ld. Raym. 928; *Moore* v. *Warren*, 1 Str. 415.

[11] *Robson* v. *Bennett*, 2 Taunt. 388; *Moule* v. *Brown*, 4 Bing. N. C. 266.

person who receives it by post to present it on the day next following the day on which it is received.[1]

This is not so with promissory notes. In the case of these it is a question for the jury whether the delay in presentment is in all the circumstances reasonable or unreasonable.[2] Bills of exchange and cheques, we have already noted, stand upon a footing obviously different. Bank-notes and bankers' cash-notes[3] differ again, since they are intended to circulate as money, and are not intended as a continuing security in the hands of any single owner. Exceptions.

The leading case dealing with this class of securities is *Camidge* v. *Allenby*.[4] There Bayley, J., lays down the general rule applicable to negotiable instruments to be "that the holder of such an instrument is to present promptly, or to communicate without delay notice of non-payment, or of the insolvency of the acceptor of a bill or the maker of a note, for a party is not only entitled to knowledge of insolvency, but to notice that in consequence of such insolvency he will be called upon to pay the amount of the bill or note."[5] *Camidge* v. *Allenby*. Rule applicable to negotiable instruments formulated by Bayley, J.

The rule as to bank-notes is declared to be that, since they are intended for circulation, the holder is not bound *immediately*[6] to circulate them or send them into the bank for payment, but he is bound to do one or the other "within a reasonable time after he had received them";[7] so that where notes of a Huddersfield bank, which had stopped payment the same morning at eleven o'clock (though the fact was not known to either payer or payee), were handed over to a creditor at York on Saturday afternoon at three o'clock in payment of an account, and were neither circulated nor presented for payment, and a week after the payee required the payer to take them back and to pay the amount of them, the Court of King's Bench held that, "in consequence of the negotiable nature of the instruments, it became his [the payee's] duty to give notice to the party who paid him the notes, that the bankers had become insolvent, and that he, the plaintiff, would resort to the defendant for payment of the notes; and it would then have been for the defendant to consider whether he could transfer the loss to any other person, for unless he had been guilty of negligence, he might perhaps have resorted to the person who paid him the notes."[8] Rule as to bank-notes.

[1] Byles, Bills of Exchange (16th ed.), 285.

[2] *Chartered Mercantile Bank of India, &c.* v. *Dickson*, L. R. 3 P. C. 574, 579; 45 & 46 Vict. c. 61, s. 86. As to cancellation without authority by an agent employed to collect a bill, *Bank of Scotland* v. *Dominion Bank (Toronto)*, [1891] A. C. 592.

[3] *Shute* v. *Robins*, 3 C. & P. 80.

[4] 6 B. & C. 373, 383; *Robinson* v. *Hawksford*, 9 Q. B. 52. "I have before said, the milder of a bill of exchange is not, *omissis omnibus aliis negotiis*, to devote himself to giving notice of its dishonour. It is enough if this be done with reasonable expedition. . . . Here a day has been lost. . . . If a party has an entire day he must send off his letter conveying the notice within post time of that day": per Lord Ellenborough, C.J., *Smith* v. *Mullett*, 2 Camp. 209. Now 45 & 46 Vict. c. 61, s. 49, sub-s. (12), regulates the time within which notice of dishonour must be given: *The Elmville*, [1904] P. 31.

[5] See *Robson* v. *Oliver*, 10 Q. B. 704; *James* v. *Holditch*, 8 D. & R. 40. In an action by an indorsee on a bill of exchange, if it appear that a prior party was defrauded out of it, the plaintiff is bound to prove the consideration he gave for it: *Rees* v. *Marquis of Headfort*, 2 Camp. 574; 45 & 46 Vict. c. 61, s. 30, sub-s. (2). *Tatam* v. *Haslar*, 23 Q. B. D. 345, 348.

[6] *Shute* v. *Robins*, 3 C. & P. 80. If the notes have to be transmitted, they may be cut in halves, and sent in different parcels and on different days: *Williams* v. *Smith*, 2 B. & Ald. 496.

[7] 6 B. & C. 382.

[8] See *The Feronia*, L. R. 2 A. & E. 65, 79, for the law as to the consequences of neglect to give notice, which "presumes that if the drawer has not had due notice he

Right of resort dependent on indorsement.

This right of resort, in the case of bills of exchange and of cheques, is dependent upon indorsemsnt. By the Bills of Excbange Act, 1882,[1] a transferor by delivery is not liable on the instrument. He is liable to his immediate transferee, being a holder for value, on an implied warranty connected with, but collateral to, the instrument, to the effect that the instrument is what it purports to be, that he has a right to transfer it, and that at the time of transfer hs was not aware of any fact that rendered it worthless.[2]

Holder of hill of exchange for value not disentitled to recover by reason of negligence.

Where value is given for a bill of exchange, carelessness, nsgligence, or foolishness is not enough to dissntitle the holder to recovsr if there is anything wrong with it; nor yet in itself is taking it at a considerable undervalue. They ars matters tsnding to show the existence of dishonesty, but do not in themselves constitute matter of dsfence. To do this it must be shown that the person who gave value for the bill was affected with notice that there was something wrong about it when he took it. In that case hs takes it at his psril. The real point is, did he know there was something wrong about it. If "he refrained from asking questions not becanse he was an honest blunderer or a stupid man, but becau[illegible]e thought in his own secret min[illegible]–I suspect there is somsthing wr[illegible]g, and if I ask qusstions and make farther inquiry, it will no longer be my suspecting it, but my knowing it, and then I shall not be able to recovsr. I think that is dishonesty."[3] Where that is found no right can avail. As Pollock, C.B., says:[4] "By the law of England fraud cuts down everything. I believe that is the common mode of expressing a legal proposition known to every lawyer in Westminster Hall. The law ssts itself against fraud to the extent of breaking through almost every rule, sacrificing every maxim, getting rid of every ground of opposition which may be presented, so as to prevent it from succeeding. So much does the law of England abhor frsud that even the maxim that you can never aver against the record is not allowed to prevail if frand can be shown; and probably there is no maxim more stringsnt than that you cannot aver against the record. The law wili not allow technical difficulties of any kind to interfere to prevent the success of right and justice and truth."

Pollock, C.B., in *Rogers* v. *Hadley*, on the effects of fraud.

Fraud in the acquisition of a bill.

The consequences of fraud, however, affect a bill no furthsr than its acquisition. To trace back its courss until fraud is found in some earlier transaction during its currency will not avail; for to do this would, in the words of Lord Kenyon,[5] "be at once to paralyse the circulation of all ths paper in ths country, and with it all its commerce." Abbott, C.J., strove for a different rule in *Gill* v. *Cubitt*,[6] but the earlier

is injured, because otherwise he might have immediately withdrawn his effects from the hands of the drawee." *The Feronia* is overruled on the question of the maritime lien of the master in *The "Sara,"* 14 App. Cas. 209.

[1] Sec. 58, suh-s. (2). Cp. *ex parte Roberts*, 2 Cox (Ch.), 171; *Fenn* v. *Harrison*, 3 T. R. 757; *Ex parte Bird*, 4 De G. & S. 273. See ss. 23, 91; *Lindus* v. *Bradwell*, 5 C. B. 583, 591; *Trueman* v. *Loder*, 11 A. & E. 589, 594; *Pooley* v. *Driver*, 5 Ch. D. 458.

[2] Sec. 58, suh-s. (3). The Statute of Limitations beigns to run immediately on payment being made, though the instrument is forged: *Bree* v. *Holbech*, 2 Doug. 654; *Leather Manufacturers' Bank* v. *Merchants' Bank*, 128 U. S. (22 Davis) 26.

[3] Per Lord Blackburn, *Jones* v. *Gordon*, 2 App. Cas. 829. Cp. *Tatam* v. *Haslar*, 23 Q. B. D. 345. *Foster* v. *Pearson*, 1 Cr. M. & R. 849, approved in *London Joint Stock Bank* v. *Simmons*, [1892] A. C. 201. In America there is great mass of authority the other way; this is collected in a note to *People's Bank* v. *Franklin Bank*, 17 Am. St. R. 884. See *post*, 1340.

[4] *Rogers* v. *Hadley*, 32 L. J. Ex. 248.

[5] *Lawson* v. *Weston*, 4 Esp. (N. P.) 56.

[6] 3 B. & C. 466. The history of the decisions is given in *Phelan* v. *Moss*, 67 Pa. St. 59. *Snow* v. *Peacock*, 11 Moo. (C. P.) 288, 3 Bing. 406, is the case where the *dicta* in *Gill* v. *Cubitt* first take shape as a rule.

rule was adopted in *Goodman* v. *Harvey*,[1] and may he considered estahlished hy the decision in *Raphael* v. *Bank of England*.[2] The law, then, is now settled[3] that negligence does not invalidate the title of one who takes a negotiahle instrument in good faith and for value.[4]

What circumstances are sufficient to raise a case of fraud.

The question may then arise of what circumstances are sufficient to amount to proof of *mala fides*. "I agree," said Parke, B.,[5] "that 'notice and knowledge' means not merely express notice, but knowledge or the means of knowledge to which the party wilfully shuts his eyes"; and Lord Herschell, in *London Joint Stock Bank* v. *Simmons*,[6] says: "If there is anything to arouse suspicion, to lead to a doubt whether the person purporting to transfer them [negotiable instruments] is justified in entering into the contemplated transaction," "the existence of such suspicion or doubt would be inconsistent with good faith. And if no inquiry were made, or if on inquiry the doubt were not removed and the suspicion dissipated, I should have no hesitation in holding that good faith was wanting in a person thus acting." If, then, the circumstances are of such a character as to create either a presumption of fraud or to suggest a right in any prior party, they operate as notice to the transferee.

But it is not a good ground of defence against a *bonâ fide* holder for value that he was informed that the note was made or the bill accepted in consideration of an executory contract unless he was also informed of its hreach.[7]

American decision.

In an American case[8] it was further held that the mere fact that the consideration for which a note is given is recited in it, although it may appear therehy that it was given for or in consideration of an executory contract or promise on the part of the payec, will not destroy its negotiahility, unless it appears, through the recital, that it qualifies the promise to pay, and renders it conditional or uncertain either as to the time of payment or the sum to he paid; hut "if, at the time of the indorsement, the consideration has in fact failed, the recital might he sufficient to put him (the holder) on inquiry, and in connection with other facts amount to notice."[9]

Transferee of bill after dishonour.

The general proposition, that a person who takes an accommodation hill after it has been dishonoured cannot he in a hetter situation than the drawer as against the acceptor, is no longer law;[10] for negotiahle

[1] 4 A. & E. 870.

[2] 17 C. B. 161. See per Field, J., in *London and County Banking Co.* v. *Groome*, 6 Q. B. D. 294. Tbe preponderating rule in America is the same as the rule in England; nevertheless *Gill* v. *Cubitt* is followedin some Courts, Daniel, Negotiable Instruments (4th ed.), § 775.

[3] Per Lord Herschell, *London Joint Stock Bank* v. *Simmons*, [1892] A. C. 219. 45 & 46 Vict. c. 61, s. 90: "A thing is deemed done in good faith witbin the meaning of this Act wben it is in fact done honestly, wbetber it is done negligently or not."

[4] *Bank of Bengal* v. *Macleod*, 5 Moo. Ind. App. 1; *Bank of Bengal* v. *Fagan*, 7 Moo. P. C. C. 61.

[5] *May* v. *Chapman*, 16 M. & W. 361. Daniel, Negotiable Instruments (4th ed. § 796.

[6] [1892] A. C. 223.

[7] Daniel, Negotiable Instruments, § 790. *Patten* v. *Gleason*, 106 Mass. 439.

[8] *Siegel, Cooper & Co.* v. *Chicago, &c. Bank*, 19 Am. St. R. 51.

[9] *L.c.* 53. In con.. ..ion witb the subject of bills may be noted what Parke, B., says in *Foster* v. *Pearson*, 1 Cr. M. & R. 858, as to a bill-broker. He "is not a character known to the law witb certain prescribed duties; but bis employment is one which depends entirely upon tbe course of dealing. It may differ in different parts of the country, it may have powers more or less extensive in one place than in another; wbat is the nature of its powers and duties in any instance is a question of fact, and is to be determined by the usage and course of dealing in the particular place."

[10] *Tinson* v. *Francis*, 1 Camp. 19, and *Ex parte Lambert*, 13 Ves. 179, which maintain

paper does not lose its negotiability by being dishonoured either for non-payment or non-acceptance;[1] but the indorsee or transferee for value of a bill of exchange after dishonour has "a right to recover against the acceptor whether the bill was given for value or not, unless there be an equity attached to the bill itself amounting to a discharge of it."[2] And further: "the person who takes up a bill *supra protest* for the honour of a particular party to the bill, succeeds to the title of the person *from whom*, not *for whom*, he receives it, and has all the title of such person to sue upon it, except that he discharges all the parties to the bill subsequent to the one for whose honour he takes it up, and that he cannot himself indorse it over."[3] The absence of indorsement, however, does not preclude the transferee from suing; and if a transferee has given value for a bill, he is still entitled to recover, even though the bill is an accommodation bill, and has not been indorsed to the transferee.[3] In the United States it has further been decided that when a bill of exchange or promissory note is proved to have been parted with for value, the amount of the consideration is immaterial except as it bears on the question of actual or constructive notice.[4]

Rights of holder of overdue bill of exchange.

The holder of an overdue bill of exchange or promissory note takes it at his peril, and as to any equities attaching between those from whom he takes it and the acceptor, stands in no better position than they do;[5] for these instruments are usually current only during the period before they become payable, so that negotiation of them afterwards is out of the ordinary and usual course of dealing.[6] Delay in giving notice of dishonour is excused where the delay is caused by circumstances beyond the control of a party giving notice and not imputable to his default, misconduct or negligence. When the cause of delay ceases to operate the notice must be given with reasonable diligence.[7]

Case of a cheque differs.

The case of cheques is different.[8] There the jury has to decide whether the transfer was in such circumstances as should have raised suspicion in the transferee. *London and County Banking Co.* v.

the proposition, must be taken to be overruled by a string of cases, beginning with *Charles* v. *Marsden*, 1 Taunt. 224, down to *In re European Bank, Ex parte Oriental Commercial Bank*, L. R. 5 Ch. 358, 362, where *Ex parte Swan*, L. R. 6 Eq. 359, 360, is referred to. See, however, note to *Tinson* v. *Francis*, 10 R. R. 617, and 45 & 46 Vict. c. 61, s. 36. The American rule may be found, Daniel, Negotiable Instruments (4th ed.), § 786.

[1] *Thompson* v. *Perrine*, 106 U. S. (16 Otto) 589, 593: "It passes by mere delivery; and the holder never makes any title by or through any assignment, but claims merely as bearer."

[2] Per Malins, V.C., *In re Overend, Gurney & Co., Ex parte Swan*, L. R. 6 Eq. 367, where assent is also given to the proposition, that "a person who does take up a bill for the honour of a particular person *supra protest*, cannot himself indorse it over." See Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 68.

[3] Cp. *Hood* v. *Stewart*, 17 Rettie, 749. See 45 & 46 Vict. c. 61, s. 31: subs. (1). "A bill is negotiated when it is transferred from one person to another in such a manner as to constitute the transferee the holder of the bill." Cp. *Lewis* v. *Clay*, 67 L. J. Q. B. 224, as to "holder in due course"; as to "holder in his own right" under sec. 61: *Nash* v. *De Freville*, [1900] 2 Q. B. 72. *In Herdman* v. *Wheeler*, [1902] 1 K. B. 361, the delivery of a note to the payee is said not to be negotiable within sec. 20: but *contra* per Moulton, L.J., *Lloyd's Bank* v. *Cooke*, [1907] 1 K. B. 794, 808.

[4] *King* v. *Doane*, 139 U. S. (32 Davis) 166.

[5] *Barough* v. *White*, 2 C. & P. 8, and note citing *Taylor* v. *Mather*, 3 T. R. 83 n.; *Brown* v. *Davies*, 3 T. R. 80; Bayley, Bills of Exchange, 118; see *Alcock* v. *Smith*, [1892] 1 Ch. 238; *Embiricos* v. *Anglo-Austrian Bank*, [1905] 1 K. B. 677; Daniel, Negotiable Instruments (4th ed.), § 782.

[6] *Down* v. *Halling*, 4 B. & C. 330, 2 C. & P. 11, and see per Lord Brougham, *Bank of Bengal* v. *Fagan*, 7 Moo. P. C. C. 72, and *London and County Bank* v. *Groome*, 8 Q. B. D. 288, 294. See also *Symonds* v. *Atkinson*, 1 H. & N. 146.

[7] 45 & 46 Vict. c. 61, s. 50. *The Elmville*, [1904] P. 319.

[8] *Rothschild* v. *Corney*, 9 B. & C. 388.

Groome [1] illustrates this point. A lapse of eight days occurred between the drawing and presentment of a cheque; and this Field, J., considered "although not conclusive, a circumstance to be taken into consideration by them (the jury) in coming to a conclusion on that question," *i.e.*, whether the transfer should have raised suspicions.

Bills lost or stolen.

Bills of exchange are specially favoured by the law merchant when in the hands of *bonâ fide* holders for value without notice; [2] so that in the case of a bill or note lost or stolen and purchased from either finder or thief by a *bonâ fide* purchaser, he may hold it against the true owner, even though he took it negligently and in circumstances of suspicion. This is in derogation of what Bowen, L.J., terms "the broad principle of law," "that except in the case of a sale in market overt [3] no person can acquire a title to a personal chattel from a person who is not the owner." [4] There must be actual or constructive notice of the defective title—in other words, *mala fides*—to defeat the purchaser's title. The purchaser is not bound to look beyond the instrument.[5] This rule was first formulated in the case of a lost bank-note,[6] on the ground that the exigencies of business and the consideration that bank-notes pass from hand to hand as coin so require. Later, the same principle was applied to merchants' drafts,[7] and lastly bills and notes were held to be comprehended by it. [8]

Statutory provision.

At common law, if the holder of a bill lost it, no action by him would lie, for by the custom of merchants the acceptor was entitled to the possession of the bill as his voucher for the payment.[9] In equity, however, relief would be given and payment ordered where an offer was made to give an indemnity under the direction of the Court.[10] Now, by the Bills of Exchange Act, 1882,[11] provision is made for forbidding the loss of such an instrument to be set up, "provided an indemnity be given to the satisfaction of a court or judge against the claims of any other person upon the instrument in question."

When presentment for payment must be made.

Presentment for payment of a bill or note can be made by the holder or his agent, at a reasonable hour, on a business day, at the proper place, to the person designated by the bill or note as the payer or his agent,[12]

[1] 8 Q. B. D. 288; *Hayes* v. *Robertson*, 15 Vict. L. R. 480. *Bull* v. *Bank of Kasson*, 123 U. S. (16 Davis) 105. See also 3 Kent, Comm. (12th ed.), 82, *cum notis*; *London Joint Stock Bank* v. *Simmons*, [1892] A. C. 201, 221.

[2] In *Goodman* v. *Harvey*, 4 A. & E. 870, where the bill bore on its face the marks of its dishonour, Denman, C.J., was of opinion the plaintiff could not recover, for he (872) "had received the bill with a death-wound apparent on it."

[3] *The Case of Market Overt*, Tudor, L. C. on Mercantile Law (3rd ed.), 274, in the notes to which, 275–307, the law as to sales in market overt is considered.

[4] See The Larceny Act, 1861 (24 & 25 Vict. c. 96), ss. 75 and 100.

[5] *Goodman* v. *Harvey*, 4 A. & E. 870; *King* v. *Milsom*, 2 Camp. 5.

[6] *Miller* v. *Race*, 1 Burr. 452.

[7] *Grant* v. *Vaughan*, 3 Burr. 1516.

[8] *Peacock* v. *Rhodes*, 2 Doug. 633. In *Glyn* v. *Baker*, 11 East, 509, the securities were not then negotiable. See now 51 Geo. III. c. 64, s. 4.

[9] *Hansard* v. *Robinson*, 7 B. & C. 90. Bayley, Bills of Exchange (6th ed.), 139.

[10] *Walmsley* v. *Child*, 1 Ves. Sen. 341; Story, Eq. Jur. § 85.

[11] 45 & 46 Vict. c. 61, ss. 69, 70. See *Gillett* v. *The Bank of England*, 6 Times L. R. 9; *Conflans Stone Quarry Co.* v. *Parker*, L. R. 3 C. P. 1; *Bevan* v. *Hill*, 2 Camp. 381. At common law the holder of a bill of exchange might release the liability of the acceptor by parol: *Whatley* v. *Tricker*, 1 Camp. 35; but by 45 & 46 Vict. c. 61, s. 62, the bill must now be delivered up to the acceptor where the renunciation is not in writing. With respect to bank-notes, absolutely destroyed by *accident*, the banker, on due proof thereof, must pay the owner. If only *lost* by theft, &c., he must pay the *bonâ fide* holder "and of course would not be bound to pay the loser of them": Shaw, C.J., in *Whiton* v. *Old Colony Insurance Co.*, 43 Mass. 1, 6; 3 Kent, Comm. (12th ed.), 115, *cum notis*.

[12] A collecting agent is liable if he does not use due diligence. *Lubbock* v. *Tribe*, 3 M. & W. 607, 612; *Lysaght* v. *Bryant*, 19 L. J. C. P. 160.

if such a person can he found by the use of reasonable diligence. It may also he made through the Post Office.[1] Presentment, if at a hanker's, should he within hanking hours; if not at a hanker's, it may he made at any time of the day when the person chargeable may reasonably he expected to be found at his place of residence or husiness, though it he six, seven, or eight in the evening.[2] When a bill or note is presented hy the holder or his agent at a reasonahle hour on a husiness day at the proper place, and when after the exercise of reasonahle diligence no person authorised to pay or refuse payment can he found there, no further presentment to the drawee or acceptor or maker is necessary.[3]

Personal demand not in general necessary.

A personal demand is not in general necessary.[4] If, however, a bill is drawn upon, or accepted, or a note made by two or more persons who are not partners, and no place of payment is specified, presentment must be made to all of them.[5] In the event of the death of the person chargeable, where no place of payment is specified on the bill, presentment must he made to his personal representative.[6] If a bill or note is not duly presented, all the antecedent parties are discharged,[7] though the acceptor or maker continues liahle.[8] Neglect to present has been held not to discharge a man who guarantees the due payment of a bill or note.[9] And a payment before a bill or note hecomes due does not extinguish it any more than if it were merely discounted.[10]

Roberts v. *Tucker.*

In *Roberts* v. *Tucker*,[11] the Exchequer Chamber held the acceptance of a bill of exchange payahle at a hanker's to be equivalent to an order to the banker to pay the bill to any person who, according to the law merchant, could give a valid discharge for it. Therefore a banker is warranted in paying to any one who becomes the holder by a genuine indorsement, and only to such; and the responsibility for deciding on the genuineness of indorsements is on the banker. This liahility is

1 45 & 46 Vict. c. 61, s. 45, sub-ss. (3)-(8). As between drawer and holder tbe presentment for payment must be witbin a reasonable time, and the drawer is not discharged unless some loss is occasioned to him by the delay: *Heywood* v. *Pickering*, L. R. 9 Q. B. 428. In *Prideaux* v. *Criddle*, L. R. 4 Q. B. 455, 461, presentment through a post office was said to be a reasonable mode of presentment. See per Erle, C.J., *Bailey* v. *Bodenham*, 16 C. B. N. S. 285, 296. Presentment was held to be excused in *In re Bethell*, 34 Ch. D. 561. Cp. *Smith* v. *Bank of New South Wales*, L. R. 4 P. C., per Mellish, L.J., 207.

2 Byles, Bills of Exchange (16tb ed.), 287. *Parker* v. *Gordon*, 7 East 385; *Barclay* v. *Bailey*, 2 Camp. 527.

3 45 & 46 Vict. c. 61, s. 45, sub-s. (5).

4 *Matthews* v. *Haydon*, 2 Esp. (N. P.) 509; *Brown* v. *M'Dermot*, 5 Esp. (N. P.) 265.

5 45 & 46 Vict. c. 61, s. 45, sub-s. (6). 6 Sec. 45, sub-s. (7). 7 Sec. 45.

8 Sec. 52, sub-s. (1). General and qualified acceptances are distinguished, sec. 19 (c). *Rowe* v. *Young*, 2 Bligh (H. L.), 391, 407, 468. *Maltby* v. *Murrells*, 5 H. & N. 813, as to acceptor.

9 *Carter* v. *White*, 25 Ch. D. 666; *Hitchcock* v. *Humfrey*, 5 M. & G. 559; *Walton* v. *Mascall* 13 M. & W. 452. *Ex parte Bishop*, 15 Ch. D. 400, guarantee given according to course of business by London bill-brokers to tbeir bankers is equivalent to indorsement.

10 *Burbridge* v. *Manners*, 3 Camp. 193, 195; *Scholey* v. *Ramsbottom*, 2 Camp. 485.

11 16 Q. B. 560. *Woods* v. *Thiedemann*, 1 H. & C. 478, 495. The distinction between *Robarts* v. *Tucker* and *Bank of England* v. *Vagliano*, [1891] A. C. 107, is that in *Robarts* v. *Tucker* tbe acceptor did not contribute to mislead the bankers, and when there is a *bonâ fide* payee, tbe acceptor remains liable to him. But where there is a real payee, as in *Vagliano's case*, and the drawer indorses the name of a pretended payee, there is no outstanding liability from which a discharge is needed for the acceptor's protection. *Robarts* v. *Tucker*, in tbe main, has now statutory sanction by virtue of tbe Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 24; though, as is pointed out presently, the application of the decision to cheques is disallowed by the same authority. *Post*, 1314.

oxtremely onerous. Lord Herschell, indeed, goes so far as to say the decision "rested upon the assumption that it was possiblo for a banker to do that which would he, commercially speaking, absolutely impracticahle—viz., to investigate the validity of all the indorsements before ho complied with the direction of his customers and paid the bill";[1] but, as is suggested in the judgment of Parke, B.,[2] the banker may, if he pleases, avoid it hy requiring his customers "to domicile their bills at their own offices and to honour them by giving a cheque upon the banker." Failing this, they are liable if they pay on other than a genuine indorsement.[3] Lord Halsbury, C., in *Bank of England* v. *Vagliano*,[4] was not "prepared to assent to the proposition that it (*i.e.*, the decision in *Robarts* v. *Tucker*) is 'a harsh decision.' A customer tells his hanker to pay a particular person; the hanker payssome one elsc, and it would seem to follow as a perfectly just result that the hanker should he called upon to make good the amount he has so erroneously paid."

Criticism of Lord Herschell.

Anticipated by Parke, B.

The law as laid down in *Robarts* v. *Tucker* was shortly afterwards modified by statute,[5] and the alteration thus effected was continued in the Bills of Exchange Act, 1882;[6] so that, when a bill payable to order on demand is drawn on a hanker, and the banker on whom it is drawn pays the bill in good faith and in the ordinary course of business, it is not incumbent on the banker to show that the indorsements are genuine; and he is protected if the indorsements are forged;[7] and also, as in *Charles* v. *Blackwell*,[8] where an agent who has authority to receive bills but not to indorse them, does indorse and so obtains payment and appropriates the proceeds; for "the form of this indorsement, purporting to he that of an agent, would have made it incumbent on him [the banker] to ascertain, before he paid the cheque, that the agent had authority to indorse." *Robarts* v. *Tucker* remains law in cases not within the terms of this enactment.

Law declared in *Robarts* v. *Tucker* modified by statute.

Notice of disbonour must be given hy the holder of a bill to the drawers and indorsers, or to their authorised agent, to ontitle the holder to a suit against them. This must be done with reasonable diligence; and it seems now settled that each person successively into whose hands a dishonoured bill passes is allowed one entire day to give

Notice of dishonour.

[1] *Bank of England* v. *Vagliano*, [1891] A. C. 155. [2] 16 Q. B. 579.

[3] From this statement Lord Macnaghten draws the conclusion that the relation of banker and customer does not of itself, and apart from otber circumstances, imposo upon a banker the duty of paying bis customer's acceptances, *Bank of England* v. *Vagliono*, [1891] A. C. 157. *Vagliano's case* is considered and distinguished in *Shipman* v. *Bank of State of New York*, 126 N. Y. 318, 22 Am. St. R. 821. There it is said (126 N. Y. 335), per O'Brien, J., delivering the opinion of tbe Court: "Our statuto is a codification of the Common Law, while tbe English statute is, and was intended to be, a departure from it. In so far aa tbe opinions deal with the facts of the case upon tbe question of negligenee, it is difficult to deduce from them any abstract rule or principle." Tbis last assertion is in close accord with what is said by Lord Bramwell in delivering his opinion in *Vagliano's case*, [1891] A. C. 143. The Code alluded to and tbe decisiona upon it are inserted as an appendix to vol. ii., Street, Foundations of Legal Liability, wbere detailed comparison with the English Act is made.

[4] [1891] A. C. 117. See per Lord Esher, then giving judgment in tho same case in the Court of Appeal, 23 Q. B. D. 254, and, as supporting the view of the Lord Chancellor, Lord Bramwell and Lord Macnaghten, [1891] A. C. 141 and 158 respectively.

[5] 16 & 17 Vict. c. 59, s. 19, extended 35 & 36 Vict. c. 44, s. 11; *Gordon* v. *Capital and Counties Bank*, [1903] A. C. 240, 250.

[6] 45 & 46 Vict. c. 61, s. 60. By sec. 73 a cbeque is a bill. See *Guardians of Halifax Union* v. *Wheelwright*, L. R. 10 Ex. 183; and per Lord Selborne, *Bank of England* v. *Vagliano*, *l.c.* 130.

[7] "I am inclined to think that sec. 8 [of 45 & 46 Vict. c. 61] divides bills into three classes—bills not negotiable, bills payable to order, and bills payable to bearer; so tbat a bill payable to order must always be negotiablo": per Fry, L.J., *National Bank* v. *Silke*, [1891] 1 Q. B. 439. [8] 2 C. P. D. 151, 159.

notice. The rules applicable are set out with some particularity in the Bille of Exchange Act, 1882.[1]

Acceptance admits drawer's signature but not indorser's.

It may here be noted that though an acceptance of a bill admits the drawer's signature, it does not as a rule admit the genuineness of an indorsement, even though the indorsement were on the bill before acceptance. This was held the law,[2] though with some reluctance.[3] Since the Bills of Exchange Act, 1882, the point is concluded by statute.[4]

Primâ facie duty of banker to pay only to the order of payee may be rebutted.

Though the duty of the banker is, *primâ facie*, only to pay to the order of the person named as payee on the bill or under the limitations marked out by the Bills of Exchange Act, 1882,[5] yet as between banker and customer there may be circumstances that rebut this *primâ facie* case. This is pointed out by Lord Selborne in *Bank of England* v. *Vagliano*.[6] "Negligence on the customer's part," says he, "might be one of those circumstances; the fact that there was no real payee might be another; and I think that a representation made directly to the banker upon a material point, untrue in fact (though believed by the person who made it to be true), and on which the banker acted by paying money which he would not otherwise have paid, ought also to be an answer to that *primâ facie* case. If the bank acted upon such a representation in good faith, and according to the ordinary course of business, and a loss has in consequence occurred which would not have happened if the representation had been true, I think that is a loss which the customer, and not the bank, ought to bear."

Banker not negligent in receiving cheque for bills of exchange.

When a banker receives bills to present for payment it is not negligent of him to deliver the bills to the acceptor on receipt of a cheque for the amount of the bills. In a case in which the contention was raised, that the acceptance of a cheque in such circumstances was negligence, the Court of King's Bench said emphatically:[7] "We dare not even grant a rule to show cause, as it would be putting the whole trade of London in suspense, pending it." There is no ground to impute negligence to the defendants.

Innocent holders of forged instruments.

The law as to the liabilities of innocent holders of forged instruments is treated in *Price* v. *Neal*.[8]

Price v. *Neal*.

A bill was indorsed to the defendant for valuable consideration, and notice was left at plaintiff's house on the day the bill became due. Plaintiff sent his servant to take it up. Another bill was then drawn which the plaintiff accepted, and which was also indorsed to the defendant for valuable consideration, left at his bankers, paid by order of the plaintiff, and taken up. Both these bills were forged by one Lee, who was, subsequently to payment, and before action brought, hanged for forgery. Defendant was found to have acted innocently, and *bonâ fide* without the least privity or suspicion of the forgeries,

1 45 & 46 Vict. c. 61, s. 49. The subject is treated with considerable minuteness and with reference to the cases, 3 Kent. Comm. (13th ed.), 104–111, *cum notis*.

2 *Smith* v. *Chester*, 1 T. R. 654; *Carvick* v. *Vickery*, 2 Doug. 653 n.; *Cooper* v. *Meyer*, 10 B. & C. 468. Daniel, Negotiable Instruments (4th ed.), §§ 532–540, lays down that (*a*) an acceptance admits: (1) the signature of the drawer; (2) funds of the drawer in drawee's hands; (3) drawer's capacity to draw; (4) payee's capacity to indorse; (5) agent's handwriting and authority, where there is an agent. (*b*) An acceptance does not admit: (1) signature of payee; (2) agency to indorse; (3) genuineness of terms in the body of the bill.

3 Per Lord Selborne, *Bank of England* v. *Vagliano*, [1891] A. C. 126.

4 45 & 46 Vict. c. 61, s. 54.

5 45 & 46 Vict. c. 61; and see *Edinburgh Ballarat Gold Quartz Mine Co.* v. *Sydney*, 7 Times L. R. 656.

6 [1891] A. C. 123.

7 *Russell* v. *Hankey*, 6 T. R. 12.

8 (1762), 3 Burr. 1354.

and to have paid the whole value of the bills. On motion after verdict for the plaintiff, Lord Mansfield [1] said: In an action for money had and received, "the plaintiff cannot recover the money unless it is against conscience in the defendant to retain it; and great liberality is always allowed in this sort of action.[2] But it can never be thought unconscientious in the defendant to retain this money when he has once received it upon a bill of exchange indorsed to him for a fair and valuable consideration, which he has *bonâ fide* paid without the least privity or suspicion of any forgery." "It is a misfortune which has happened without the defendant's fault or neglect. If there was no neglect in the plaintiff, yet there is no reason to throw off the loss from one innocent man upon another innocent man; but in this case, if there was any fault or negligence in any one, it certainly was in the plaintiff and not in the defendant." Opinion of Lord Mansfield.

Lord Kenyon, C.J.'s, ruling in *Barber* v. *Gingell*,[3] may illustrate this. The defendant proved a plea of forgery to a declaration on a bill of exchange; and the Chief Justice ruled that it was a good answer for the plaintiff to show that the defendant had paid other bills of the same party under similar circumstances; "for though the defendant might not have accepted the bill, he had adopted the acceptance and made himself thereby liable to the payment of it." [4] Explained by Lord Kenyon in *Barber* v. *Gingell*.

This is probably not correct in its whole breadth of expression. "One who pays one bill which purports to bear his signature as acceptor thereby makes evidence against himself that the person who wrote the acceptance did so with his authority; and, if the bill is given in a course of business implying a continuance of such authority, it may be conclusive authority"; [5] but the doctrine cannot be carried further than this. The jury may find, if there be evidence to leave to them, that the defendant is precluded from setting up the forgery or want of authority, yet apart from this a forged signature is "wholly inoperative." [6] Where money has been paid on the faith of a forged signature a prejudice may exist on the part of a jury against finding that it should be repaid; but where the answer of a ratified forgery is made to a lawful demand of payment the difficulty in the defendant's way, notwithstanding Lord Kenyon's opinion, would be practically insuperable, since a forgery *cannot* be ratified.

Price v. *Neal* was considered "very distinguishable" in *Jones* v. *Ryde*,[7] where it was held that a person who discounts a forged Navy *Price* v. *Neal* distinguished in *Jones* v. *Ryde*.

[1] *L.c.* 1357.

[2] See *Moses* v. *Macferlan*, 2 Burr., per Lord Mansfield, 1010. When plaintiff's money has been wrongfully obtained by the defendant, the plaintiff may waive the wrong, and claim as money received to his use: *Hambly* v. *Trott*, 1 Cowp. 371, 376; *Lindon* v. *Hooper*, 1 Cowp. 414, 419. Money feloniously stolen constitutes a debt from the felon: *Chowne* v. *Baylis*, 8 Jur. N. S. 1028; so also money obtained under a fraudulent contract, *Street* v. *Blay*, 2 B. & Ad. 456; *Bannatyne* v. *D. & C. Maclver*, [1906] 1 K. B. 103.

[3] (1800), 3 Esp. (N. P.) 60.

[4] See *Leach* v. *Buchanan*, 4 Esp. (N. P.) 226, where defendant accredited a forged bill, and thereby induced plaintiff to take it; also *Mather* v. *Lord Maidstone*, 18 C. B. 273; 1 C. B. N. S. 273; *De Feriet* v. *Bank of America*, 23 La. Ann. 310.

[5] Per Willes, J., *Morris* v. *Bethell*, L. R. 5 C. P. 51.

[6] 45 & 46 Vict. c. 61, s. 24. The proviso to which is "nothing in this section shall affect the ratification of an unauthorised signature not amounting to a forgery." *Post*, 1309.

[7] 5 Taunt. 488, 492. Cp. *Gompertz* v. *Bartlett*, 2 E. & B. 849; *Gurney* v. *Womersley*, 4 E. & B. 133; see also *Wilkinson* v. *Johnstone*, 3 B. & C. 428, money paid in discharge of a forged bill; *Burchfield* v. *Moore*, 3 E. & B. 683: money given for a bill of exchange avoided by a material alteration; *Young* v. *Cole*, 3 Bing. N. C. 724: money given for bonds sold as valid, but proved worthless; *Turner* v. *Stones*, 1 Dow. & L. 122; and *Woodland* v. *Fear*, 7 E. & B. 519: money given for a worthless note or cheque.

bill for another who passed it to him without knowledge of the forgery, may recover back what he has paid as money had and received to his use upon failure of the consideration. "If a person gives a forged bank-note there is nothing for the money; it is no payment."[1] A clear distinction between *Jones* v. *Ryde* and *Price* v. *Neal* is, that in the former case the parties did not pay money upon contracts supposed to be their own and which they were bound to know, but they received in discharge of another's contract something which purported to be of value yet was worth nothing.[2]

Bruce v. *Bruce.*

Bruce v. *Bruce*[3] is the case of the forgery of a victualling bill, which the victualling office on whom it was drawn had paid before the forgery was discovered; the decision is on the lines of *Jones* v. *Ryde*; the victualling office was a public body, and not so likely to know the signature of their officers as a merchant is to know his own signature or the signatures of those authorised by him, and the payment was without consideration.[4]

Price v. *Neal* followed in *Smith* v. *Mercer.*

The majority of the Common Pleas (Chambre, J., dissenting) in *Smith* v. *Mercer*,[5] held that an intelligible rule was furnished by *Price* v. *Neal*, where *Jenys* v. *Fawler*[6] had been cited for the proposition that "proof of forgery shall not be admitted on behalf of the acceptor of a bill because it would hurt the negotiation of paper credit."[7] In *Smith* v. *Mercer*[5] bankers paid a bill presented to them, which proved a forgery, and which was repudiated by their customer on whose account it purported to be paid. They then sued the defendants in assumpsit for money had and received; in which action they failed on the ground that by the acts of the plaintiffs, the defendants were put in a worse position, and that a banker's duty to know the handwriting of his customer is even a more stringent duty than that of an acceptor to know the drawer's handwriting. These cases are canvassed in *Wilkinson* v. *Johnston*,[8] and in *Cocks* v. *Masterman*.[9]

In *Wilkinson* v. *Johnston*[8] the general rule that money paid under a mistake of fact may be recovered back as being paid without consideration was held to be clear. To this rule *Price* v. *Neal* and *Smith* v. *Mercer* were exceptions. In the present case the plaintiffs discovered the mistake on the morning of the day on which they made the payment, and forthwith gave notice of it to the defendants in time for them to give notice of dishonour to the prior parties, and this was done. Thus the remedies of all the parties were left entire and no one was discharged by *laches*.

Rule stated in *Cocks* v. *Masterman.*

In *Cocks* v. *Masterman* the rule is stated, "that the holder of a bill is entitled to know, on the day when it becomes due, whether it is an honoured or dishonoured bill, and that, if he receive the money and is suffered to retain it during the whole of that day, the parties who paid it cannot recover it back."[10]

Followed in *London and River Plate Bank* v. *Bank of Liverpool,*

This rule was followed in *London and River Plate Bank* v. *Bank*

1 Per Heath, J., 5 Taunt. 494.

2 Cp. *Lamert* v. *Heath*, 15 M. & W. 486; *Lawes* v. *Purser*, 6 E. & B. 930.

3 5 Taunt. 495 n.

4 Failure of consideration must be complete in order to entitle plaintiff to recover the money paid: *Hunt* v. *Silk*, 5 East. 449; *Blackburn* v. *Smith*, 2 Ex. 783. Where the consideration is severable a proportionate part may be recovered: *Hirst* v. *Tolson*, 19 L. J. Ch. 441; *Devaux* v. *Conolly*, 8 C. B. 640.

5 (1815), 6 Taunt. 76. See 3 Kent, Comm. 86.

6 2 Str. 946.

7 1 Wm. Bl. 390, 391.

8 3 B. & C. 428.

9 9 B. & C. 902. *Leeds Bank* v. *Walker*, 11 Q. B. D. 84, 89.

10 Per Bayley, J., *l.c.* 908.

of Liverpool.[1] But in *Imperial Bank of Canada* v. *Bank of Hamilton*[2] the Privy Council restricted it "to negotiable instruments on the dishonour of which notice has to be given to some one, namely, some drawer or indorser, who would be discharged from liability unless such notice were given in proper time." The rule does not extend to cases "where notice of the mistake is given in reasonable time, and no loss has been occasioned by their delay in giving it." In this case the drawer and forger of the cheque, the subject of the action, was not entitled to notice of its dishonour by non-payment.[3]

but restricted in *Imperial Bank of Canada* v. *Bank of Hamilton*.

The American rule is stated in *Cooke* v. *United States*,[4] where a bank was paid in notes purporting to be their own. The Court, adopting[5] the language of Parker, J., in *Gloucester Bank* v. *Salem Bank*,[6] held that "the party receiving such notes must examine them as soon as he has opportunity, and return them immediately; if he does not, he is negligent; and negligence will defeat his right of action." "It is undoubtedly also true, as a general rule of commercial law, that where one accepts forged paper purporting to be his own, and pays it to a holder for value, he cannot recall the payment. The operative fact in this rule is the acceptance, or more properly perhaps the adoption, of the paper as genuine by its apparent maker. Often the bare receipt of the paper accompanied by payment is equivalent to an adoption within the meaning of the rule; because as every man is presumed to know his own signature and ought to detect its forgery by simple inspection, the examination which he can give when the demand upon him is made is all that the law considers necessary for his protection. He must repudiate as soon as he ought to have discovered the forgery, otherwise he will be regarded as accepting the paper. Unnecessary delay under such circumstances is unreasonable; and unreasonable delay is negligence, which throws the burden of the loss upon him who is guilty of it, rather than upon one who is not."

Cooke v. *United States*.

Judgment of Fuller, C.J.

The point has been elaborately discussed, whether the acceptor, who is estopped from denying the signature of the drawer, is not also estopped from denying the drawer's signature as indorser. On the one hand, *dicta* have been cited of Lord Tenterden in *Cooper* v *Meyer*;[7] of Wightman, J., in *Ashpitel* v. *Bryan*;[8] and of Patteson, J., in *Tucker* v. *Robarts*.[9] On the other hand, it has been well pointed out that the meaning of the acceptor's vouching for the drawer is not "for the name being written by the drawer's own hand, but for the drawing being, so far as he is concerned, valid and indisputable."[10] The acceptor would therefore be at liberty to rebut a presumption that the indorsing was in the same handwriting.[11]

Acceptor is not estopped from denying the drawer's signature as indorser.

[1] [1896] 1 Q. B. 7.
[2] [1903] A. C. 49, 58.
[3] 45 & 46 Vict. c. 61, s. 50, sub-s. (2) (c).
[4] 91 U. S. (1 Otto) 389. While noticing this case it may be worth while to notice another point treated by Fuller, J. "Laches," he says at 398, "is not imputable to the government in its character as sovereign by those subject to its dominion. Still a government may suffer loss through the negligence of its officers. If it comes down from its position of sovereignty, and enters the domain of commerce, it submits itself to the same laws that govern individuals there. Thus if it becomes the holder of a bill of exchange, it must use the same diligence to charge the drawers and indorsers that is required of individuals; and if it fails in this, its claim upon the parties is lost."
[5] 91 U. S. (1 Otto) 396, 397.
[6] 17 Mass. 33, 45.
[7] 10 B. & C. 468, 471.
[8] 3 B. & S. 474, 489.
[9] 18 L. J. Q. B. 169, 173.
[10] Per Patterson, J.A., *Ryan* v. *Bank of Montreal*, 14 Ont. App. 556.
[11] *Merchants' Bank* v. *Lucas*, 15 Ont. App. 573, affd. 18 Can. S. C. R. 704. Patterson, J.A.'s, judgment in *Ryan* v. *Bank of Montreal*, 14 Ont. App. 533, at 546–561, is a compendium of the law on this question.

English law settled by Bills of Exchange Act, 1882.

In England the law is now settled in harmony with the view of the Canadian Courts, as stated above, by the Bills of Exchange Act, 1882, sec. 24.[1]

Taney, C.J., in *Hortsman* v. *Henshaw*.

In America[2] "the general rule undoubtedly is, that the drawee by accepting admits the handwriting of the drawer; but not of the indorsers. And the holder is bound to know that the previous indorsements, including that of the payee, are in the handwriting of the parties whose names appear upon the bill, or were duly authorised by them. And if it should appear that one of them is forged, he cannot recover against the acceptor, although the forged name was on the bill at the time of the acceptance. And if he has received the money from the acceptor, and the forgery is afterwards discovered, he will be compelled to repay it. The reason of the rule is obvious. A forged indorsement cannot transfer any interest in the bill, and the holder therefore has no right to demand the money. If the bill is dishonoured by the drawee, the drawer is not responsible. And if the drawee pays it to a person not authorised to receive the money, he cannot claim credit for it in his account with the drawer." . . . "We take the rule[3] to be this. Whenever the drawer is liable to the holder, the acceptor is entitled to a credit if he pay the money; and he is bound to pay upon his acceptance, when the payment will entitle him to a credit in his account with the drawer."

Bills of exchange drawn in conjunction with bills of lading.

There is another class of cases where bills of exchange have been drawn in conjunction with bills of lading, and the bills of lading having proved to be forged, the acceptor of the bills of exchange has disputed his liability on them against an indorsee.

Opinion of Tindal, C.J., in *Robinson* v. *Reynolds*.

In a case of this kind which went to the Exchequer Chamber, Tindal, C.J., said:[4] "If the bill had been accepted without any value at all being given by the bank to the defendants," "the defendants would still be liable as acceptors to the bank, who are indorsees for value, unless, not only such want of consideration existed between the drawer and acceptors, but unless the indorsees had notice or knowledge thereof. For the acceptance binds the defendants conclusively, as between them and every *bonâ fide* indorsee for value."

Hoffman v. *Bank of Milwaukee*.

The American cases follow in the same course. In *Hoffman* v. *Bank of Milwaukee*,[5] a consignor who had been in the habit of drawing bills of exchange on his consignee with bills of lading attached, drew in ordinary course; but the bills of lading were forged. The bills were discounted in the ordinary way by a bank ignorant of the fraud; the consignee also ignorant of it paid the draft, and was held to have no recourse against the bank. "Money," said Clifford, J.,[6] "paid under a mistake of facts, it is said, may be recovered back as having been paid without consideration, but the decisive answer to that suggestion, as applied to the case before the Court, is, that money paid, as in this case, by the acceptor of a bill of exchange to the payee of the same, or to a subsequent indorsee, in discharge of his legal obligation as such, is not a payment by mistake nor without consideration, unless it be shown that the instrument was fraudulent in its inception, or that the consideration was illegal, or that the facts and circumstances which

Judgment of Clifford, J.

1 45 & 46 Vict. c. 61. See *Garland* v. *Jacomb*, L. R. 8 Ex. 216.

2 Per Taney, C.J., *Hortsman* v. *Henshaw*, 11 How. (U. S.) 177, 183.

3 *L.c.* 184.

4 *Robinson* v. *Reynolds*, 2 Q. B. 211; *Thiedemann* v. *Goldschmidt*, 1 De G. F. & J. 4; *Leather* v. *Simpson*, L. R. 11 Eq. 398.

5 12 Wall. (U. S.) 181.

6 *L.c.* 189.

impeach the transaction, as between the acceptor and the drawer, were known to the payee or subsequent indorsee at the time he became the holder of the instrument." "It is not pretended that the defendants had any knowledge or intimation that the bills of lading were not genuine, nor is it pretended that they made any representation upon the subject to induce the plaintiffs to contract any such liability. They received the bills of exchange in the usual course of their business as a bank of discount, and paid the full amount of the net proceeds of the same to the drawers, and it is not even suggested that any act of the defendants, except the indorsement of the bills of exchange in the usual course of their business, operated to the prejudice of the plaintiffs, or prevented them from making an earlier discovery of the true character of the transaction." "Beyond doubt the bills of lading gave some credit to the bills of exchange beyond what was created by the pecuniary standing of the parties to the same, but it is clear that they are not a part of those instruments, nor are they referred to either in the body of the bills or in the acceptance, and they cannot be regarded in any more favourable light for the plaintiffs than as collateral security accompanying the bills of exchange. Sent forward, as the bills of lading were, with the bills of exchange, it is beyond question that the property in the same passed to the acceptors when they paid the several amounts therein specified." "Proof, therefore, that the bills of lading were forgeries could not operate to discharge the liability of the plaintiffs, as acceptors, to pay the amounts to the payees or their indorsees, as the payees were innocent holders, having paid value for the same in the usual course of business. Different rules apply between the immediate parties to a bill of exchange—as between the drawer and the acceptor, or between the payee and the drawer—as the only consideration as between those parties is that which moves from the plaintiff to the defendant; and the rule is, if that consideration fails, proof of that fact is a good defence to the action. But the rule is otherwise between the remote parties to the bill, as, for example, between the payee and the acceptor, or between the indorsee and the acceptor, as two distinct considerations come in question in every such case where the payee or indorsee became the holder of the bill before it was overdue, and without any knowledge of the facts and circumstances which impeach the title as between the immediate parties to the instrument. Those two considerations are as follows: First, that which the defendant received for his liability; and secondly, that which the plaintiff gave for his title. And the rule is well settled that the action between the remote parties to the bill will not be defeated unless there be an absence or failure of both these considerations." [1]

Bills of lading only collateral security for bills of exchange.

Proof of the actual consideration may be given between the immediate parties to bills of exchange.

Rule otherwise between remote parties.

It is clear, both on principle and authority, that there can be no ratification of a forged instrument, for an essential element of ratification is wanting, viz., that the act ratified is one assumed or pretended to have been done for or under the authority of the party sought to be charged. *Williams* v. *Bayley*,[2] implies this. The actual point is decided in *Brook* v. *Brook*.[3]

No ratification of a forged instrument.

[1] See also *Goetz* v. *Bank of Kansas City*, 119 U. S. (12 Davis) 551. As to how negotiable instruments may be affected by fraud, see note to *Bedell* v. *Herring*, 11 Am. St. R. 307, 309–326. What is carelessness in signing. As to concealed fraud and the Statute of Limitations, *Gibbs* v. *Guild*, 8 Q. B. D. 296; 9 Q. B. D. 59; *Betjemann* v. *Betjemann*, [1895] 2 Ch. 474. See *United States* v. *Spalding*, 2 Mason (U. S.), 478, a case where mutilation of an instrument was occasioned by fraud.

[2] L. R. 1 H. L. 200.

[3] L. R. 6 Ex, 89; Martin, B., dissented.

Blackburn, J., in *McKenzie* v. *British Linen Co.*

In *McKenzie* v. *British Linen Co.*,[1] Blackburn, J., speaks of a forgery as possibly an act done by a person as professing to be agent, and in such case the subject of ratification. Such a profession, if not absolutely impossible to be made, can very rarely be made in the case of forgery, where the profession is not that the signature is an authorised signature, but that it is the very signature of him whose name is used.

The law of England is fixed in the sense of the majority of the Court in *Brook* v. *Hook*, by the Bills of Exchange Act, 1882.[2] Yet though a forgery may not be ratified, a person who has paid on a forged signature may, as we have seen, be estopped by his conduct from recovering the money he has paid.[3]

Cheques.[4]

Definition.

A cheque is defined in the Bills of Exchange Act, 1882,[5] as "a bill of exchange drawn on a banker, payable on demand."[6] A cheque has been described as the instrument by which, customarily, a depositor seeks to withdraw his funds or any part thereof from the bank. It is a draft or order on the banker requiring him to pay a sum named either to bearer, or to a named person, or to the order of the payee.[7] It is clearly not an assignment of money in the hands of a banker; it is a bill of exchange payable at a banker's.[8]

[1] 6 App. Cas. 106.

[2] 45 & 46 Vict. c. 61, s. 24. In America "the weight of authority is the other way." See Mr. Holmes's note, Ratification, 2 Kent, Comm. (12th ed.), 616. *Union Bank* v. *Middlebrook*, 33 Conn. 93.

[3] 45 & 46 Vict. c. 61, s. 24.

[4] 45 & 46 Vict. c. 61, ss. 73–82; *M'Lean* v. *Clydesdale Banking Co.*, 9 App. Cas. 95; *National Bank* v. *Silke*, [1891] 1 Q. B. 433. Sec. 38 of the Stamp Act, 1891 (54 & 55 Vict. c. 39), enables the person to whom "any bill of exchange payable on demand" is presented for payment unstamped to "affix thereto an adhesive stamp of one penny, and to cancel the same." *Hobbs* v. *Cathie*, 6 Times L. R. 292, decides that an intermediate holder is not authorised to do this. Sec. 17 of 46 & 47 Vict. c. 55, extends secs. 76–82 of the Bills of Exchange Act, 1882, "to any document issued by a customer of any banker, and intended to enable any person or body corporate to obtain payment from such banker of the sum mentioned in such document, and shall so extend in like manner as if the said document were a cheque." Sec. 17 only applies to drafts issued by a customer of a bank, not to drafts issued by a bank to customer: *Capital and Counties Bank* v. *Gordon*, [1903] A. C., per Lord Lindley, 250. *Curtice* v. *London City and Midland Bank*, 23 Times, L. R. 594, holds that payment of a cheque may be countermanded by telegram. The soundness of A. T. Lawrence, J.'s, opinion that if the bank omit to look at the telegram they escape liability can only be plausible to a lawyer, and probably to but very few of them. Darling, J., held that the countermand was communicated to the bank when the means afforded by the bank to notify it were used; and that the want of knowledge by the bank was attributable to the management failing to use the means provided.

[5] 45 & 46 Vict. c. 61, s. 73. The relations of banker and customer in respect of cheques are summarised, Chalmers, Bills of Exchange, note to s. 75.

[6] An order on bankers to pay money was held not a cheque because the payment was made conditional on signature of a receipt appended, in *Bavins* v. *London and South-Western Bank*, [1900] 1 Q. B. 270. See note at 272.

[7] Morse, Banks and Banking (3rd ed.), § 363. See the exhaustive notes by Mr. Holmes on Cheques, 3 Kent, Comm. (12th ed.), 88, and on Notice, 3 Kent, Comm. (12th ed.), 105.

[8] *Hopkinson* v. *Forster*, L. R. 19 Eq. 74. *In re Beaumont*, [1902] 1 Ch. 880. In *First National Bank* v. *Whitman*, 94 U. S. (4 Otto) 343, it was argued that the payee of a cheque, whose indorsement had been forged or made without authority, and which cheque had been paid by the bank upon which it was drawn, could maintain a suit against the bank to recover the amount of the cheque. The opinion of the Court was adverse to this contention. "We think it clear," said Hunt, J., at 344, "both upon principle and authority, that the payee of a cheque unaccepted cannot maintain an action upon it against the bank on which it is drawn. The careful and well-reasoned opinion of Mr. Justice Davis in delivering the judgment of the Court in *Bank of the*

By Parke, B.

"A banker's cheque," says Parke, B.,[1] "is a peculiar sort of instrument, in many respects resembling a bill of exchange, but in some entirely different. A cheque does not require acceptance; in the ordinary course it is never accepted; it is not intended for circulation, it is given for immediate payment; it is not entitled to days of grace; and though it is strictly speaking an order upon a debtor by a creditor to pay to a third person the whole or part of a debt, yet in the ordinary understanding of persons it is not so considered. It is more like an appropriation of what is treated as ready money in the hands of the banker, and in giving the order to appropriate to a creditor, the person giving the cheque must be considered as the person primarily liable to pay, who orders his debt to be paid at a particular place, and as being much in the same position as the maker of a promissory note, or the acceptor of a bill of exchange, payable at a particular place, and not elsewhere, who has no right to insist on immediate presentment at that place. There is a very good note on this subject to the case of *Serle* v. *Norton*[2] as to the difference between cheques and bills of exchange."

Distinction in the consequences of presentation for payment of bills of exchange and cheques respectively.

Cheques and bills are distinguishable in the consequences attaching to delay or neglect in presenting them for payment. In the case of a bill of exchange, negligence in presenting or in giving notice absolutely discharges the drawer. In the case of a cheque the drawer is the principal debtor, and the cheque purports to be drawn upon a fund deposited to meet it. In the absence, then, of any loss or injury sustained by any negligence in not making due presentment or not giving notice of dishonour, the drawer of a cheque is not discharged; and, if he has sustained loss or injury, he is then only discharged to the extent of such loss or injury.[3]

Cheque certified.

A cheque may be marked, that is, certified by the banker that there are funds sufficient and available to meet it.[4] The effect of this is that a collateral representation is made by the bankers that the cheque if presented without delay and in due course will be honoured by them to the amount certified or marked. But *primâ facie* no contract is constituted with the payee to hold the money at his disposal.[5]

Cheque when presented is presented for payment.

When a cheque is presented at the banker's upon whom it is drawn, it is *primâ facie* presented for payment;[6] but if the holder accepts something from the banker in lieu of payment, he may discharge the drawer; as where the payee took a cheque to the bank on which it was drawn on the afternoon of the day on which he received it from the drawer, and having got it marked "good," did not demand payment but took

Republic v. *Millard* (10 Wall. (U. S.) 152), leaves little to add upon the subject by way of illustration or authority." "It is not to be doubted, however, that it is within the power of the bank to render itself liable to the holder and payee of the cheque. This it may do by a formal acceptance written upon the cheque, in which case it stands to the holder in the position of a drawer and acceptor of a bill of exchange." "It may accomplish the same result by writing upon it the word 'good,' or any similar words which indicate a statement by it that the drawer has funds in a bank applicable to the payment of the cheque, and that it will so apply them."

[1] *Ramchurn Mullick* v. *Radakissen*, 9 Moo. P. C. C. 69. [2] 2 Moo. & Rob. 404

[3] *Robinson* v. *Hawksford*, 9 Q. B. 52; *In re Bethell*, 34 Ch. D. 561.

[4] *Gaden* v. *Newfoundland Savings Bank*, [1899] A. C. 281; *Imperial Bank of Canada* v. *Bank of Hamilton*, [1903] A. C. 49.

[5] *Warwick* v. *Rogers*, 5 M. & G., per Tindal, C.J., 373; *Goodwin* v. *Roberts*, L. R. 10 Ex. 337, 351. *Ante*, 1310 n. 8. There is a representation, though no consideration to make a contract, unless one is constituted by surrendering the cheque and leaving the money in the hands of the banker; then the payee becomes a customer.

[6] A cheque should be presented for payment not later than the day following that on which the holder receives it, whether the presentment is made by himself or through his bankers, expressly or by implication. This time, however, may be extended: *Alexander* v. *Burchfield*, 7 M. & G. 1061; *O'Brien* v. *Smith*, 1 Black (U. S.), 99.

it away with him. On the evening of the same day the banker suspended payment, and the following day on presentation the cheque was refused.[1] The ground of this is well put in a New York case:[2] "The theory of the law is that where a cheque is certified to be good by a bank, the amount thereof is then charged to the account of the drawer in the bank certificate account." "The money is due, and payable when the cheque is certified. The bank virtually says: 'That cheque is good; we have the money of the drawer here ready to pay it. We will pay it now, if you will receive it.' The holder says: 'No, I will not take the money; you may certify the cheque and retain the money for me till this cheque is presented.'"[3]

Distinction as to time of presentment: (i) as against the original drawer; (ii) as against the ultimate holder.

Where a cheque is circulated, a distinction is drawn between the time of presentment necessary as against the original drawer in the event of the banker's insolvency, and the time necessary to charge the person from whom the cheque is ultimately received. The circulation should not increase the liability of the drawer; so that to charge him in the event of the banker's failure, the cheque should be presented within the period within which the payee or first holder must have presented it. As against the party transferring the cheque to the holder, it must be forwarded for presentation on the day next after the transfer.[4]

Demand of payment of cheque by holder against drawer good at any time before action.

Though, as between holder and indorser, a cheque must be presented with reasonable diligence, or else the holder will lose his right of resort against the indorser as between the holder and drawer, a demand at any time before action brought will be sufficient;[5] but if it appear that the default of the holder has caused injury to the drawer, as through the failure of the drawee or otherwise, the drawer is discharged to the extent of such damage; that is to say, to the extent to which such drawer or person is a creditor of such banker to a larger amount than he would have been had such cheque been paid.[6]

Banker cashing cheque does not necessarily assume the risk of there being funds to meet it.

A banker cashing a cheque for a customer does not by doing so necessarily assume the risk of there being funds to meet it;[7] the banker may only look to his own customer; or, to state the proposition more broadly, if a person obtains in good faith change for a cheque which turns out worthless, the loss must fall on him on the ground of mistake of fact; he warrants his transferor that there are funds against the cheque.[8]

The position of a banker receiving cheques to collect considered.

The holder of a cheque may happen to hand it for collection to the banker on whom it is drawn.

1 *Boyd* v. *Nasmith*, 17 Ont. R. 40.

2 *First National Bank of Jersey City* v. *Leach*, 52 N. Y. 350, 351, 353. As to the liability of a banker who certifies a cheque, and the signification and effect of certifying, *Espy* v. *Bank of Cincinnati*, 18 Wall. (U. S.) 604. See further, Daniel, Negotiable Instruments (4th ed.), § 1601; by certifying a cheque (1) the banker becomes the only debtor; (2) the holder by taking the certificate discharges the drawer; (3) the cheque circulates as the representative of so much cash in the banker's hands. See also *Merchants' Bank* v. *State Bank*, 10 Wall. (U. S.) 604, 647; *Metropolitan National Bank* v. *Jones*, 31 Am. St. R. 403.

3 As to the practice of marking cheques received after four o'clock, *Robson* v. *Bennett*, 2 Taunt. 388.

4 Byles, Bills of Exchange (16th ed.), 23.

5 *Rickford* v. *Ridge*, 2 Camp. 537; 3 Kent, Comm. 88.

6 45 & 46 Vict. c. 61, s. 74, by the operation of which cheques are incidentally excepted from sec. 45. *London and County Banking Co.* v. *Groome*, 8 Q. B. D. 288, 293; 3 Kent, Comm. 104 n. (c).

7 *Woodland* v. *Fear*, 7 E. & B. 519; *Prince* v. *Oriental Bank Corporation*, 3 App. Cas. 325; *Capital and Counties Bank* v. *Gordon*, [1903] A. C., per Lord Macnaghten, 245. As between bankers, see *Parr's Bank* v. *Ashby*, 14 Times L. R. 563.

8 45 & 46 Vict. c. 61, s. 58, sub-s. (3). *Timmins* v. *Gibbins*, 18 Q. B. 722. Where a banker paid a customer's cheque to bearer in ignorance of the fact that at the time he had no assets of the customer, he was held not entitled to recover the money back: *Chambers* v. *Miller*, 13 C. B. N. S. 125.

Boyd v. *Emmerson.*

The banker thereupon stands in the same position as any other agent, and is only bound to use due diligence in getting the cheque paid. If, however, he receive it as the drawer's agent, then the person presenting it, on asking whether it were to be paid or not, would have a right to an immediate answer.[1] If the holder merely asks for the cheque to be put to his account, the inference is that the cheque is paid in to the holder's agent subject to its being honoured or not in the course of the day.[2]

When bankers of the holder and drawer are different.

When the bankers of the holder and the drawer are different, the deposit of a cheque for which credit is given on the depositor's account is held *primâ facie* to be merely for collection, and the memorandum of credit may be cancelled if the collection is not accomplished in due course.[3] The time allotted for collection is till the close of banking hours on the business day next following that on which the banker comes into possession of the cheque; and unless the banker acts in other than the usual way (save on having special instructions), and loss occurs, he will not be liable.[4] The duty of the banker to his customer bears no necessary relation to the duty of the customer to others interested in the bill.[5] If the collecting banker and the drawee banker carry on business in the same place, and the collecting banker has recourse to the agency of third parties, he will be liable for the consequences if he has not a distinct permission to employ an agent.[6]

Duty of holder of a cheque.

The holder of a cheque is not bound to give notice of its dishonour to the drawer for the purpose of charging the person from whom he received it. He does enough if he presents it with due diligence to the banker on whom it is drawn, and gives due notice of dishonour to those only against whom he seeks his remedy.[7]

Duty of banker in paying cheque.

Besides the liability of the banker who collects cheques paid in to his bank, there is the liability of the banker who pays cheques.

If before the cheque reaches the banker it is lost or stolen, the loss is the drawer's. If it is abstracted from a letter, or lost by a clerk entrusted with it and a forged indorsement is put on it by some one into whose hands it has fallen, and the cheque is paid, the loss must fall on the drawer, just as if cash had been sent by a messenger who had been robbed by the way. A cheque delivered to the payee operates as payment and extinguishes the debt, subject only to the condition that if unpaid the debt revives. If it is stolen and on presentment to the banker is paid before the payee gives notice to the banker, the loss falls on the payee. He has taken the cheque in payment and cannot call upon his debtor to pay twice because he is careless or unfortunate.[8]

[1] *Boyd* v. *Emmerson*, 2 A. & E. 184, which is distinguished in *Oddie* v. *National City Bank*, 45 N. Y. 735, 740, on the ground that there nothing was done indicating an intention or assent to receive the cheque on deposit. *Peterson* v. *Union National Bank*, 52 Pa. St. 206. When a customer pays a cheque in to his bankers with the intention that his bankers shall at once credit him with the amount in his account, and the bankers accept the cheque upon those terms and place the amount to his credit, the bankers thereupon become holders of the cheque for value: *In re Palmer, Ex parte Richdale*, 19 Ch. D. 409: *Royal Bank of Scotland* v. *Tottenham*, [1894] 2 Q. B. 715, where *Gaily* v. *Fry*, 2 Ex. D. 265, is followed, which upholds the validity of a post-dated cheque. But where through payment of a post-dated cheque before its date the funds to meet another cheque of due date are exhausted, the customer is entitled to recover damages for its dishonour: *Pollock* v. *Bank of New Zealand*, 20 N. Z. L. R. 174, where *McGill* v. *Bank of North Queensland*, [1895] Queensland L. R. 262, is not followed.

[2] *Kilsby* v. *Williams*, 5 B. & Ald. 815; *Bolton* v. *Richard*, 6 T. R. 139.

[3] *Moule* v. *Brown*, 4 Bing. N. C. 266.

[4] *Boddington* v. *Schlencker*, 4 B. & Ad. 752.

[5] *Rickford* v. *Ridge*, 2 Camp. 537.

[6] *Moule* v. *Brown*, 4 Bing. N. C. 266: Morse, Banks and Banking (3rd ed.), § 243.

[7] Per Lord Ellenborough, *Rickford* v. *Ridge*, 2 Camp. 539. The rules for the presentation of a cheque within a reasonable time are summarised, Chalmers, Bills of Exchange, note to s. 74.

[8] *Charles* v. *Blackwell*, 2 C. P. D. 151, 158.

Statutory enactments.

Before 1853 cheques were practically all payable to bearer;[1] and thus a banker who paid one was not liable if the cheque was regularly drawn, however the bearer might have come by it.

16 & 17 Vict. c. 59, s. 19.

By sect. 19 of 16 & 17 Vict. c. 59, the banker obtained further protection, and was exonerated from proving the authenticity of an indorsement on an order cheque where it "purports to be indorsed by the person to whom the same shall be drawn payable." The section does not extend to protect any other person who takes the cheque upon the faith of such forged indorsement than the banker.[2]

45 & 46 Vict. c. 61, s. 73.

And by the Bills of Exchange Act, 1882,[3] when the banker pays a cheque[4] "in good faith" and "in the ordinary course of business," the payment is to be deemed made in due course although the indorsement is in fact forged. Payment is deemed to be made "in good faith" where it is in fact made honestly, whether negligently or not.[5] Bearer cheques and order cheques, therefore, *quâ* banker and customer are, when the latter are brought within these conditions, on the same footing. Without the protection of the section, the position of a banker paying a cheque to order on a forged indorsement is that of one who, having undertaken to pay to the order of a certain person, pays to what is not that person's order; and what he does thus improvidently he must stand the loss of.

Crossed cheques.

A cheque may be crossed by the drawer, and after issue may be crossed generally or specially by the holder, who may also add the words "not negotiable."[6]

By 19 & 20 Vict. c. 25, the crossing of a cheque was to "have the force of a direction to the bankers upon whom such draft is made that the same is to be paid only to or through some banker, and the same shall be payable only to or through some banker." This was interpreted not to restrain the negotiability of the cheque, and that fraudulent alteration was not a forgery.[7] The law was accordingly amended by 21 & 22 Vict. c. 79; so that the crossing was to be deemed a material part of the cheque; the obliteration of the crossing with intent to defraud, a felony; and the banker was not responsible for paying a cheque which did not "plainly appear" to have been crossed or altered, unless the banker acted *malâ fide* or was guilty of negligence in so paying the cheque. Lord Cairns, C., interpreted this enactment in the Exchequer Chamber.[8] It did not restrain the negotiability of the cheque. "It imposes caution, at least, on the bankers." "By its express words it alters the mandate, and the customer, the drawer, is entitled to object to being charged with it, if paid contrary to his altered direction." The result of this decision was the passing of 39 & 40 Vict. c. 81. Sect. 12 provided (1) that any person taking

[1] *Charles* v. *Blackwell*, 2 C. P. D. 151, 158.

[2] *Ogden* v. *Benas*, L. R. 9 C. P. 513; *Arnold* v. *Cheque Bank*, 1 C. P. D. 578, 585. The history of this section is given by Lord Lindley, *Capital and Counties Bank* v. *Gordon*, [1903] A. C. 251.

[3] 45 & 46 Vict. c. 61, s. 60.

[4] 45 & 46 Vict. c. 61, s. 73. If the cheque is drawn to "a fictitious or non-existing person," it may be treated as payable to bearer: sec. 7, sub-s. (3). *Clutton* v. *Attenborough*, [1897] A. C. 90, distinguished *Vinden* v. *Hughes*, [1905] 1 K. B. 795, which was followed in *Macbeth* v. *North and South Wales Bank*, [1906] 2 K. B. 718. *Bank of England* v. *Vagliano*, [1891] A. C. 107.

[5] 45 & 46 Vict. c. 61, s. 90. Payment on a forged cheque or order is not of itself any payment at all as between the party paying and the person whose name is forged: per Lord Cranworth, C., *Orr* v. *Union Bank of Scotland*, 1 Macq. H. L. Sc. 522.

[6] 45 & 46 Vict. c. 61, s. 76. The origin and history of crossing cheques is expounded by Parke, B., *Bellamy* v. *Marjoribanks*, 7 Ex. 402.

[7] *Simmons* v. *Taylor*, 2 C. B. (N. S.) 528; 4 C. B. N. S. 463.

[8] *Smith* v. *Union Bank*, 1 Q. B. D. 31, 35.

a cheque marked "not negotiable" should not be able to give a better title to the cheque than he received from his transferor; (2) that a banker who "in good faith and without any negligence received payment for a customer" of a crossed cheque should not incur "any liability to the true owner of the cheque by reason only of having received such payment."[1] This is also repealed, and now by the Bills of Exchange Act, 1882,[2] the duty of a banker on whom a crossed cheque is drawn is—if it is crossed generally, not to pay it otherwise than to a banker; if specially, not to pay it otherwise than to the banker to whom it is crossed. If the banker pays the cheque otherwise than as above, he will be liable to the true owner for any loss he may sustain by reason of the cheque having been so paid. If he pays it according to its tenor, in good faith and without negligence, he (and the drawer, if the cheque has come into the hands of the payee) will be entitled to the same rights and placed in the same position as if payment of the cheque had been made to the true owner thereof.[3]

Duty of banker on whom a crossed cheque is drawn.

Where a cheque is presented for payment which does not at the time of presentment appear to be crossed; or appears to have had a crossing which has been obliterated; or to have been added to or altered otherwise than as authorised by the Bills of Exchange Act, 1882; the banker paying the cheque, and without negligence, shall not be responsible nor incur any liability; nor shall the payment be questioned by reason of the cheque having been crossed, or of the crossing having been obliterated; or having been added to or altered otherwise than as authorised by the Act; and of payment having been made otherwise than to a banker, or to the banker to whom the cheque is or was crossed, or to his agent for collection being a banker, as the case may be.[4]

Cheque tampered with.

A person taking a crossed cheque which bears on it the words "not negotiable" will not have, and will not be capable of giving, a better title to the cheque than that which the person from whom he took it had.[5]

Crossed cheque marked "not negotiable."

Apart from statute, as we have noted, the payment of a crossed cheque by a banker otherwise than through another banker is evidence of negligence which will suffice to render the banker responsible to his customer.[6]

Crossed cheque paid otherwise than through banker.

Where a collecting banker in good faith and without negligence receives payment for "a customer"[7] of a cheque crossed generally or specially to himself to which the customer has no title or a defective one, the banker does not by receipt of payment incur any liability to the true owner.[8]

But if a crossed cheque is stolen, a special indorsement obliterated, a new indorsement made, and it is then handed to a banker for collection, unless the banker can bring himself within the provision just recited, he is liable for a conversion to the original indorsees.[9]

[1] *Matthiessen* v. *London and County Bank*, 5 C. P. D. 7.

[2] 45 & 46 Vict. c. 61, s. 79, sub-s. (2). See *Stringfield* v. *Lanezzari*, 16 L. T. (N. S.) 361, as to reasonable time of payment in to a banker of a crossed cheque.

[3] Sec. 80.

[4] Sec. 79, sub-s. (2).

[5] Sec. 81. This is a re-enactment of 39 & 40 Vict. c. 81, s. 12.

[6] *Bellamy* v. *Majoribanks*, 7 Ex. 389; *Carlon* v. *Ireland*, 5 E. & B. 765; *Bobbett* v. *Pinkett*, 1 Ex. D. 368.

[7] *G. W. Ry. Co.* v. *London and County Banking Co.*, [1901] A. C. 414; *La Cave* v. *Crédit Lyonnais*, [1897] 1 Q. B. 148; *Mathews* v. *Brown*, 63 L. J. (Q. B.) 494.

[8] 45 & 46 Vict. c. 61, s. 82.

[9] *Kleinwort* v. *Comptoir National d'Escompte de Paris*, [1894] 2 Q. B. 157. What is negligence in this regard is considered at length in *Hannan's Lake View Central* v. *Armstrong*, 16 Times L. R. 236.

Cheque marked "account of payee."

We have already seen that "good faith" has been interpreted by the Act itself;[1] and the phrase "without negligence" has been the subject of decision, and held to be equivalent to "without want of reasonable care in reference to the interests of the true owner."[2] A practice has also grown up of marking a crossed cheque "account of payee." This is not a marking authorised by the Bills of Exchange Act; but the effect of it has been considered by Channell, J.,[3] who held that the practice had grown up "in order further to protect the drawer of a cheque against the consequences of its being lost or stolen. It was a direction to the receiving banker that the drawer desired to pay the particular cheque into the bank which kept the account of the payee. To disregard a direction of that kind, if the banker had information which might lead him to think that the account into which he was paying the amount was not the payee's account would, in his opinion, be negligence."

The custom of bankers was to credit their customers with the value of cheques handed to them for collection before they received the proceeds. The House of Lords decided[4] that the protection of sec. 82 was only effectual while the banker was acting as agent, and that the giving credit in the books of the bank and allowing the customer to draw against the amounts so credited before collecting the cheques, indicated that the banker received payment on his own account. This decision occasioned the passing of the Bills of Exchange (Crossed Cheques) Act, 1906,[5] which enacts that "a banker receives payment of a crossed cheque for a customer within the meaning of sec. 82 of the Bills of Exchange Act, 1882, notwithstanding that he credits his customer's account with the amount of the cheque before receiving payment thereof."

Banker's lien.

A banker has a general lien upon all the securities in his hands belonging to any particular person for his general balance, unless special circumstances exist which oust the ordinary rule. "No person," says Lord Kenyon, C.J.,[6] "can take any paper securities out of the hands of his banker without paying him his general balance, unless such securities were delivered under a particular agreement which enables him so to do"; or, as the same principle was stated by James, L.J.,[7] "between banker and customer whatever number of accounts are kept in the books, the whole is really but one account, and it is not open to the customer, in the absence of some special contract, to say that the securities he deposits are only applicable to one account." In *Teale* v. *Williams, Brown & Co.*,[8] Wright, J., stated the rule to be that: "A banker with whom a customer opened several accounts had a lien upon all the accounts except (1) where there was a special agreement; (2) where specific property of a third person had been paid to the bank; (3) where the bankers had notice that when a customer drew upon a particular account it would be a fraud or breach of trust."

Principle stated by James, L.J.

And by Wright, J., in *Teale* v. *Williams, Brown & Co.*

[1] *Ante*, 1314.

[2] Per Kennedy, J., *Hannan's Lake View Central* v. *Armstrong*, 16 Times L. R. 237, citing Denman, J., *Bissell* v. *Fox*, 51 L. T. 666, approved by C. A. 53 L. T. 193.

[3] *Bevan* v. *National Bank*, 23 Times L. R. 65, 68.

[4] *Capital and Counties Bank* v. *Gordon*, [1903] A. C. 240; *Akrokerri Atlantic Mines* v. *Economic Bank*, [1904] 2 K. B. 465, distinguishes *Gordon's case*; *Bevan* v. *National Bank*, 23 Times L. R. 65.

[5] 6 Edw. VII. c. 17.

[6] *Davis* v. *Bowsher*, 5 T. R. 492. Banker's lien is treated in the note to *Masonic Savings Bank* v. *Bangs's Administrator*, 4 Am. St. R. 202, where the cases are collected.

[7] *In re European Bank, Agra Bank Claim*, L. R. 8 Ch 44. *Robertson's Trustee* v. *Royal Bank of Scotland* (1890), 18 Rettie, 12. 11 Times L. R. 56.

YOUNG *v.* GROTE.

Young v. Grote.

We have reserved for the last the consideration of the famous case of *Young* v. *Grote*.[1] A customer of a banker delivered certain printed cheques to his wife signed by himself, but with blanks which he instructed his wife to fill up according as his business demanded. She directed a clerk to fill up one with the words *fifty pounds two shillings*; this he did, and having done so showed it filled up to the wife; the *fifty* commenced with a small letter and was placed in the middle of a line. The figures 50 : 2 were also placed at a considerable distance from the printed £. She then told the clerk to get it cashed; he inserted at the beginning of the line in which the word fifty was written the words *Three hundred and*, and the figure 3 between the £ and the 50. This was paid by the bankers. The Court of Common Pleas held that the customer must bear the loss.

A controversy has ever since raged about this decision, which shows no sign of being soon ended. The result of the judges' decision in the particular case has till recently been very generally approved or perhaps acquiesced in; their reasons have been very keenly canvassed. In the first instance the decision was assumed to apply to all negotiable instruments; gradually it has been narrowed down to hold good only between banker and customer; and latterly an endeavour has been made to get rid of it altogether by the bold fiction that the relation between a customer and his banker and the acceptor and the subsequent holder of a bill "is substantially the same."[2]

The case considered.

The grounds on which this decision can be sustained have been very variously stated; although the actual reason for it is most unequivocally stated by Best, C.J.:[3] "We decide here on the ground that the banker has been misled by want of proper caution on the part of his customer." Yet this has been either overlooked or disregarded, and conjecture and suggestion have run wild in assigning and demolishing explanations vainly tendered as satisfactory. The decision has been claimed to rest on estoppel—possibly giving to the word a more elastic meaning than strictly belongs to it; since Lord Cranworth, C., in *Orr* v. *Union Bank of Scotland*,[4] while saying that the ground of the decision was estoppel, yet regards the result as satisfactory, because "the customer's neglect of due caution has caused his bankers to make a payment on a forged order," that is, the customer was guilty of negligence which disentitled him to recover. This is also the view of Cockburn, C.J.:[5] the case, "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 conclusion was, the learned judge considered, arrived at to avoid circuity of action; since, looked at technically, "the customer would be entitled to recover from the banker the amount paid on such a

Cockburn, C.J.'s view in *Swan* v. *North British Australasian Co.*

[1] (1827) 4 Bing. 253. Cp. *Marcussen* v. *Birkbeck Bank*, 5 Times L. R. 4[illegible]; *Garrard* v. *Haddan*, 67 Pa. St. 82; *Zimmerman* v. *Rote*, 75 Pa. St. 188; *Brown* v. *Reed*, 79 Pa. St. 370; *Johnson Harvester Co.* v. *McLean*, 46 Am. R. 39; Daniel, Negotiable Instruments (4th ed.), § 1405; Morse, Banks and Banking (3rd ed.), § 480.

[2] *Colonial Bank of Australasia* v. *Marshall*, [1906] A. C. 567; 4 C. L. R. (Australia) 196.

[3] 4 Bing. 259.

[4] 1 Macq. (H. L. Sc.) 523. Lord Cranworth explains his meaning in *British Linen Co.* v. *Caledonian Insurance Co.*, 4 Macq. (H. L. Sc.) 114.

[5] *Swan* v. *North British Australasian Co.*, 2 H. & C. 189.

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." [1] This view has also been adopted by the Court of Exchequer in *Halifax Union* v. *Wheelwright*,[2] and by the Supreme Court of Massachusetts in *Greenfield Savings Bank* v. *Stowell*.[3]

Lord Cranworth's view in *Bank of Ireland* v. *Trustees of Evans's Charities*.

Again, in *Bank of Ireland* v. *Trustees of Evans's Charities*,[4] although Lord Cranworth mentions estoppel as the basis of the decision, he yet hints a doubt whether the facts in law amounted to estoppel, and treats negligence as the foundation of the liability. Whether the correct formula is that on proof of negligence in the transaction the customer is estopped from saying that the cheque was not for £350; or, whether, as seems simpler, and more accurate, on proof that through the customer's negligence in the performance of his duty his banker has lost £300 which he thereby becomes entitled to recover from his customer, would ordinarily be immaterial; since the substantial outcome is the same—the banker's claim is based on the negligence of the customer; yet the difference in these modes of expression was made use of later, when it was sought to discredit *Young* v. *Grote*, and to explain the decision on the ground that the plaintiff had there signed a blank cheque (which, by the way, Lord Esher, M.R.,[5] somewhat surprisingly denies to be "a case of estoppel at all"). The train of reasoning during this phase ran thus. *Young* v. *Grote* was decided on estoppel: the plaintiff signed a blank cheque, and so authorised the filling up of the cheque by the holder. He is, therefore, estopped from denying any particular filling up to be by his authority. No negligence is needed to make him liable for the amount filled in; therefore, no duty; so that *Young* v. *Grote* is no authority for a duty existing as between customer and banker.

Ground of decision in *Young* v. *Grote*.

But while there has been this dispute as to what were the grounds of the Court's decision, the evidence of the case itself, which is absolutely clear, and which shows that it was not estoppel, has been passed over. "We decide here," says Best, C.J.,[6] "on the ground that the banker has been misled by want of proper caution on the part of his customer." The ground of the decision is negligence of the plaintiff,[7] and to make negligence there must be duty unperformed.

Of all the explanations attempted of the case there is none more plainly wrong than that which commended itself to the High Court of Australia,[8] based on the assertion: "It is impossible to regard the judgment as anything more than a decision upon the facts of the

[1] *L.c.* 190.

[2] (1873), L. R. 10 Ex. 183.

[3] 123 Mass. 196, 25 Am. R. 67; *Fordyce* v. *Kosminski*, 4 Am. St. R. 18; *Burrows* v. *Klunk*, 14 Am. St. R. 371.

[4] 5 H. L. C. 389, 413. See, too, per Erle, C.J., *Ex parte Swan*, 7 C. B. N. S. 431. As to the summary power to rectify the register, which was the main point considered in *Ex parte Swan*, see *Ex parte Shaw*, 2 Q. B. D. 463. As to registration, see per Lord Blackburn, *Société Générale de Paris* v. *Walker*, 11 App. Cas. 34.

[5] *Scholfield* v. *Earl of Londesborough*, [1895] 1 Q. B. 543; 45 & 46 Vict. c. 61, s. 20.

[6] 4 Bing. 259.

[7] This appears beyond cavil in the report in 12 Moore, C. P. 484, where Best, C.J. (490), says, "gross negligence may fairly be imputed to Young or his agent, and that the bankers, who have been misled by his want of caution, and thus induced to pay the money, are not liable to be called on to make good the loss." Park, J. (491), thinks "he was guilty of gross negligence"; Burrough, J., says "the drawer of the cheque being the sole cause of the fraud must bear the loss"; and Gaselee, J., says "the drawer was guilty of gross negligence."

[8] 1 Commonwealth L. R. 632, per Griffith, C.J., 651.

particular case," implying that that being so, no rule of law was involved. This might have been a possible solution had the decision been for the plaintiff, on the ground that he was under no duty to his banker: but is impossible in the circumstances since the judgment on the facts implies a rule of law to which the facts are subordinated. The decision is that the plaintiff has violated a rule of law binding on him.[1]

A review of the cases in which *Young* v. *Grote* has been considered, will prepare the way for an estimate of its present position. The chief of these is *Bank of Ireland* v. *Trustees of Evans's Charities*, where Parke, B.,[2] delivering the opinion of the judges, says that in *Young* v. *Grote* "it was held to have been the fault of the drawer of the cheque that he misled the banker on whom it was drawn by want of proper caution in the mode of drawing the cheque, which admitted of easy interpolation, and consequently, that the drawer, having thus caused the banker to pay the forged cheque by his own neglect in the mode of drawing the cheque itself, could not complain of that payment";[3] that is, there was negligence.

Parke, B.'s, view in the case of *Trustees of Evans's Charities*.

Previously to this, Parke, B., delivering his oral judgment in the Exchequer Chamber in *Robarts* v. *Tucker*,[4] is accredited with the statement[5] that in *Young* v. *Grote* "the customer had by signing a blank cheque given authority to any person in whose hands it was to fill up the cheque in whatever way the blank permitted."[6] Yet that he ever used the words is doubtful, and if he did they are nullified by his more deliberate statement.

In *Robarts* v. *Tucker*.

Variations in the reports of Parke, B.'s, judgment.

In *Barker* v. *Sterne*,[7] Pollock, C.B., thus comments: "There is a case where a customer of a banker on leaving home, gave to his wife several blank forms of cheques signed by himself, and desired her to fill them up according to the exigency of his business. She filled up one of them so carelessly that a clerk to whom she delivered it was enabled to alter the amount to a larger sum, in such a way that the

Barker v. *Sterne*.

Comment on *Young* v. *Grote* by Pollock, C.B.

[1] The C.J. has entangled himself in a snare usually avoided by all but the most unwary. He fails to appreciate the different signification of an affirmative proposition and a negative: to discriminate what is involved in A is B from No A is B. The former concludes that notwithstanding any peculiarity of the facts of A, B also must exist, and A is a case in which it exists. The latter merely says that no A is within B, and passes no kind of judgment whether B does or does not exist; A is not a case under it. *Young* v. *Grote* involves affirmative propositions; there is a legal duty; this is a case under the rule; Griffith, C.J., confounds them with negative ones.

[2] 5 H. L. C. 410.

[3] It will be observed that this expression is with reference to the question of whether the negligence was *proximate* or *remote*, the point then under discussion, and not with regard to the general merits of the case; and that the point subsequently taken, that the negligence to be effectual had to work through the operation of a crime and so was not a legal consequence, was not referred to.

[4] 16 Q. B. 560.

[5] *L.c.* 580. Cited by Williams, J., *Ex parte Swan*, 7 C. B. N. S. 445; by Lord Coleridge, C.J., *Arnold* v. *Cheque Bank*, 1 C. P. D. 587; and by Lord Esher, M.R., *Scholfield* v. *Earl of Londesborough*, [1895] 1 Q. B. 543. Even if Parke, B., used the words attributed to him, which is doubtful, with the meaning attributed to him, which is also doubtful, his subsequent words embodying the opinion of himself and the other common law judges must operate as a retractation. Cp. *Schultz* v. *Astley*, 2 Bing. N. C. 544, a case which Crompton, J., in *Stocssiger* v. *S. E. Ry. Co.*, 3 E. & B. 556, regards as going "to the utmost extent of the law."

[6] In the report in 15 Jur. 988 the words attributed to him are: "In that case [*Young* v. *Grote*] there was negligence in the drawing of the cheque itself, which was the authority given by the drawers to the bank"; while in the report in 20 L. J. Q. B. 273 the words are: "There [in *Young* v. *Grote*] the Court held that the cheque was drawn in so negligent a way as to facilitate the forgery and to exonerate the banker from liability to his customer for paying the amount. They, in truth, consider that he, as it were, gave authority to the party to fill up the cheque in the way it was filled up."

[7] 9 Ex. 684, 686.

bankers could not discover the alteration and they paid it; it was held that the loss must fall on the drawer as it was caused by his negligence. Now, whether the better ground for supporting that decision is that the drawer is responsible for his negligence, which has enabled a fraud to be practised, or whether it be considered that, when a person issues a document of that kind, the rest of the world must judge of the authority to fill it up by the paper itself, and not by any private instructions, it is unnecessary to inquire. I should prefer putting it on the latter ground." [1]

Patent Safety Gun Cotton Co. v. Wilson.

In *Patent Safety Gun Cotton Co.* v. *Wilson* [2] the statement of claim alleged that a cheque payable to the order of the plaintiffs was stolen from them, and the indorsement of their name forged upon it, and that it came into the possession of the defendant, who converted it to his own use. The defendants pleaded that the plaintiffs knowingly employed as clerk a man who had been convicted of embezzlement and was a notorious thief; that the clerk was allowed access to the rooms where the plaintiff's letters and cheques were kept, and was empowered and permitted to receive and open the said letters and cheques, and to witness the mode in which the plaintiffs indorsed their cheques; that the clerk was frequently paid his wages by the duly indorsed cheques of the plaintiffs, and was sometimes employed by the plaintiffs to indorse cheques payable to their order; that the cheque in question was taken or stolen by the clerk, who thereupon forged the indorsement, and then procured one E., who had no notice of the forgery and theft, to cash the cheque; that the defendant received the same, with other cheques from E., without notice of the forgery and theft, and in the ordinary course of business gave full value therefor; that by their carelessness and wilful neglect in dealing with their letters and cheques the plaintiffs did not discover the forgery and theft for a considerable time; and after such discovery did not take any steps to prevent the negotiation of the cheque, and by such carelessness and neglect caused the defendant to become a *bonâ fide* holder for value of the cheque without notice of the forgery and theft. The plaintiff demurred. Grove, J., overruled the demurrer, which was allowed on appeal. Bramwell, L.J., had "a difficulty in dealing with the proposition that those facts afford any answer to the claim, because I am at a loss to find any reason in support of the proposition. The only answer to it is, it is not the law." Baggallay, L.J., was of the same opinion. Brett, L.J., thought that "in point of law no negligence can justify a thief or forger; it may be taken into consideration in punishing him, but it is impossible to say that any negligence can be a justification or excuse. If so, there can be no reason why the plaintiffs should not take advantage of the fact that the cheque was stolen and forged, and recover. There is another ground upon which the plea is bad; there can be no negligence without neglect of some duty; there was no duty here—no relation between the plaintiffs and defendant which could cause any duty to exist from the plaintiffs to the defendant." If A has a duty to B to prevent a bill of exchange (or it may be *mutatis mutandis* a tiger, getting abroad and doing a damage to him), and by A's negligence B is injured, in what course the damage flows, whether by forgery or any other mode, may possibly be relevant as to the *quantum* of damage, but the cause of action is the breach of duty, not the subsequent developments of it.

Opinion of Bramwell, L.J.

Opinion of Brett, L.J.

[1] See per Blackburn, J., *Gamm* v. *Tyrie*, 4 B. & S. 713.
[2] 49 L. J. Q. B. 713.

Baxendale v. *Bennett*.

In *Baxendale* v. *Bennett*,[1] defendant drew a bill, without a drawer's name, addressed to himself, and wrote an acceptance across it. In this condition it was stolen, filled up with a drawer's name, and transferred to the plaintiff, a *bonâ fide* holder for value. Though it was possible that the bill might have been made a complete instrument without a crime,[2] in fact a crime was committed by stealing the document; and without that the bill could not have been completed. At the trial the learned judge ruled, on the authority of *Young* v. *Grote* and *Ingham* v. *Primrose*[3], that the defendants were liable. His judgment was reversed in the Court of Appeal, and entered for the defendant. In the Court of Appeal, Brett, L.J., relied mainly on the fact that the acceptance was not issued by the defendant, and that the defendant never authorised the bill to be filled in with a drawer's name, so that he could not be sued thereon; and declined to inquire whether the defendant was negligent, because the defendant did not owe a duty to any one, and, by putting the bill into a drawer in his own room, he did not act otherwise than an ordinary careful man would act; and this seems the sufficient unassailable ground for the decision. Bramwell, L.J., assumed that the defendant had been negligent, but considered his negligence not the proximate or effective cause of the fraud; he lays considerable stress on a distinction between the cases cited and that before the Court; in them the instruments had been parted with voluntarily, but in the case before the Court the bill had been obtained by the commission of a crime.

Ground of Brett, L.J.'s, decision.

Ground of Bramwell, L.J.'s, decision.

Bovill, C.J., in *Société Générale* v. *Metropolitan Bank*.

This is the view of Bovill, C.J., in *Société Générale* v. *Metropolitan Bank*,[4] a case where "eight days" was altered to "eighty days" in a bill of exchange. Bovill, C.J., says: "Here the printed form was filled up with 'eight days,' and it is said there was negligence in allowing sufficient space for the addition of the letter 'y,' but I cannot, sitting as a jury, say there was negligence enabling the forgery to be committed. It would be ridiculous to expect all persons to exclude such a possibility as that. This was the usual course of filling up blanks in a form, and a man is not to assume that a forgery will be committed."[5]

[1] 3 Q. B. D. 525. Cp. *In re Cooper, Cooper* v. *Vesey*, 20 Ch. D. 611. "It cannot make any difference whether" a "stranger bear the same name with the real payee or not; for no person can give a title to a bill but he to whom it is made payable": *Mead* v. *Young*, 4 T. R. 28, per Buller, J., 31. In *District of Columbia* v. *Cornell*, 130 U. S. (23 Davis) 655, negotiable certificates, which had been cancelled, had the marks of cancellation fraudulently effaced by a clerk and were reissued by him. Held that a purchaser in good faith and for value before maturity could not recover, *Cooke* v. *United States*, 91 U. S. (1 Otto) 389, being much pressed upon the Court, who were "not prepared to extend the scope of that decision."

[2] See per Bramwell, L.J., 3 Q. B. D. 530.

[3] 7 C. B. N. S. 82.

[4] 21 W. R. 335. See *Marcussen* v. *Birkbeck Bank*, 5 Times L. R. 463.

[5] Of course this is otherwise where a cheque has been indorsed in blank, and subsequently filled up without fraud. See per Buller, J., in *Lickbarrow* v. *Mason*, 1 Sm. L. Cas. (11th ed.), 722, citing *Russel* v. *Langstaffe*, 2 Doug. 4th Edn. 514; *Aude* v. *Dixon*, per Parke, B., 6 Ex. 869. In *Schultz* v. *Astley*, 2 Bing. N. C. 553, Tindal, C.J., says: "The acceptor was a stranger to the party to whom he handed over his blank acceptance, and as all that he desired was to raise the money, it could make no difference to him, either as to the extent of his liability, or in any other respect, whether the bill was drawn in the name of one person or another. And if the defendant is estopped from denying the right of the drawer to draw the bill, whoever he may be, he is bound by the indorsement made by such drawer, after such indorsement is proved to have been made by such drawer." 45 & 46 Vict. c. 61, s. 29. *London and South-Western Bank* v. *Wentworth*, 5 Ex. D. 96. Bigelow, Estoppel (5th ed.), 654; Bowen, L.J., in *Garrard* v. *Lewis*, 10 Q. B. D. 30, holds that he who gives an acceptance in blank (which he held was in effect done in that case) holds out the person he entrusts therewith as having authority to fill in the bill as he uses within the limits of the stamp. See *France* v. *Clark*, 26 Ch. D. 257; *Fox* v. *Martin*, W. N. (1895) 36.

This is one of the cases which have been most effectual in defining the limits of *Young* v. *Grote* to the relation of customer and banker.

Brett, L.J.'s views as to *Young* v. *Grote.*

Brett, L.J.,[1] in *Baxendale* v. *Bennett*, also confines the principle in *Young* v. *Grote* to the relation of banker and customer. The bare proposition that the intervention of a crime between the act or default alleged and the loss, absolves from the consequences of it is sufficiently refuted by *Bank of England* v. *Vagliano*.[2] The criterion is whether there is a duty and a falling short in its performance or not.

Bank of England v. *Vagliano.*

In *Bank of England* v. *Vagliano*[3] the question was as to the relation of banker and customer, when "false documents were by what I have called the act of the customer permitted to reach the bank for payment," Lord Halsbury, C.,[4] thought it "impossible to dispute that this was, in fact, a misleading of the bankers," and he discriminates the case from others on the ground of the existence of a duty. The distinction between this case and *Young* v. *Grote* is that in this a letter of advice apparently validating the payments accompanied the bills, thus there was what was equivalent to a representation that the paper tendered was good, and this representation was acted on by the bank to their detriment. If there is a duty from the customer to the banker, the added fact of a written representation, not fraudulent, does not increase the right; it is only evidence of it.

Young v. *Grote* accepted by Lord Selborne.

In *Vagliano's case*[5] Lord Selborne recognises *Young* v. *Grote* as rightly decided, though he does not agree with the theory that it was decided on estoppel. He says: "I am not convinced that estoppel is a sufficient explanation of the cases in which the drawer of a cheque has been held bound by fraudulent alterations for which the state of the paper afforded space"; and "It is not (as I understand) disputed that there might, as between banker and customer, be circumstances which would be an answer to the *primâ facie* case that the authority was only to pay to the order of the person named as payee upon the bill, and that the banker can only charge the customer with payments made pursuant to that authority. Negligence on the customer's part might be one of those circumstances."[6]

Lord Field and Lord Coleridge.

Lord Field[7] also approves the case and adopts the expressions of Lord Coleridge, C.J., delivering the judgment of the Court of Common Pleas in *Arnold* v. *Cheque Bank*:[8] "that case no doubt must be considered as well decided" and "is entirely consistent with the rule laid down and explained on fuller consideration in subsequent cases, viz., negligence in order to estop must be negligence in the transaction itself."[9]

Greenfield Savings Bank v. *Stowell.*

Greenfield Savings Bank v. *Stowell*[10] is the most important of the American cases in which *Young* v. *Grote* is criticised. The question discussed was whether the maker of a promissory note was under a liability to subsequent indorsees in respect of an alteration made in the note after it had left the hands of the maker. *Young* v. *Grote* was cited as an authority in favour of the existence of the duty, but after

1 3 Q. B. D. 533. Day, J., in *Merchants of the Staple of England* v. *Bank of England*, 21 Q. B. D. 163, vouched the authority of *Young* v. *Grote*, which he "ventured respectfully to think was most properly decided on the ground of negligence."

2 [1891] A. C. 107. *Giblin* v. *McMullen*, L. R. 2 P. C. 317, *In re United Service, Johnston's Claim*, L. R. 6 Ch., per James, L.J., 217.

3 [1891] A. C. 107. 4 *I.c.* 115. 5 [1891] A. C. 120.

6 *I.c.* 123. Cp. *Ireland* v. *Livingston*, L. R. 5 H. L. 395.

7 [1891] A. C. 170. 8 1 C. P. D. 568.

9 *Magnus* v. *Queensland National Bank*, 37 Ch. D. 466, is "an example of negligence in the transaction itself." 10 123 Mass. 196, 25 Am. R. 67.

an elaborate examination was distinguished as applying only where the relation of banker and customer exists. "The maker of a promissory note holds no such relation to the indorsees thereof as a customer does to his banker. The relation between banker and customer is created by their own contract, by which the banker is bound to honour the customer's drafts; and if the negligence of the customer affords opportunity to a clerk or other person in his employ to add to the terms of a draft and thereby mislead the banker, the customer may well be held liable to the banker. But even as between customer and banker the former has not been held liable for an unauthorised addition or alteration by a stranger. And that the signer of a note, complete upon its face, and not entrusted by him to any person for the purpose of being filled up or added to, but afterwards altered, without his authority or assent by the insertion of additional words in blank spaces therein, should be held to have contracted with every subsequent innocent holder who may be thereby defrauded, and to be liable to him in an action on the note in its altered form is unsupported by any English decision of which we are aware, and appears to us to be inconsistent with the weight of American authority and unfounded in principle." [1]

Canadian Courts disposed to uphold the case.

The Canadian Courts have considered [2] *Young* v. *Grote*, and uphold it on the ground that the bankers were misled by the negligence of the drawer, and in accordance with the judges' view in *Bank of Ireland* v. *Trustees of Evans's Charities*. This ground, too, we have seen, has been taken by English supporters of the case.

It is pointed out that in *Young* v. *Grote* the negligence was in "the transaction itself," and *therefore* proximate; and, if proximate, it is assumed to be actionable.[3]

Brown v. *Bennett*.

Young v. *Grote* was considered in the New Zealand case, *Brown* v. *Bennett*,[4] and is explained by Prendergast, C.J., to be "a case between

[1] Per Gray, C.J., 123 Mass. 201, 202. The law in Scotland seems to have been decided otherwise. The Scottish decisions are (1) *Graham* v. *Gillespie* (1795), Mor. Dict. of Dec. 14351, where blanks having been left in a bill at the time of accepting by means of which the drawer afterwards increased the amount of the bill without giving the bill a suspicious appearance, the acceptor was held liable to no persons indorsee for the increased value; (2) *Fagan* v. *Wylie* (1793), Mor. Dict. of Dec. 1660, where a bill having been fraudulently altered in consequence of a blank being left in it, all the persons whose names were upon it were held to be liable for the amount upon it. As to the authority of these decisions, see per Denniston, J., *Brown* v. *Bennett*, 9 N. Z. L. R. 513 (C. A.). See also, Thomson, Bills of Exchange (Wilson's ed.) 10. *Young* v. *Grote* is approved in its widest interpretation in *Wallace's Trustees* v. *Port Glasgow Harbour Trustees*, 7 Retlie, 618, where the Court says, per Lord Moncreiff: "Where a document is forged and uttered, or otherwise made use of as a genuine document, and so as to enable a party to obtain payment of money owing to the negligence of the person whose signature is forged, the ordinary rule that a payment made upon a forged signature cannot be held to be a good payment does not, I conceive, apply, and cannot be pleaded to the prejudice of the party who has been induced to pay by means of that forged document. The law to this effect is, I think, pretty clearly laid down in the case of *Young* v. *Grote*." The note on Negotiable Instruments to *Bedell* v. *Herring*, 11 Am. St. R. 309-326, is an exhaustive collection of cases on this subject.

[2] *Agricultural Investment Co.* v. *Federal Bank*, 43 Upp. Can. Q. B. 214, on appeal *sub nom.* *Agricultural Savings and Loan Association* v. *Federal Bank*, 6 Upp. Can. App. (Tupper) 192.

[3] A case in Victoria, *Bank of Australasia* v. *Erwin*, 1 W. W. & A'B. 70, as reported in Kerferd and Box's Victorian Digest, col. 87, is substantially the same case as *Young* v. *Grote*, with the difference that the document was a bill, and that the negligence was apparently due to the acceptor having weak sight, and not taking precautions to obviate its effects, whereby he was held to have made the drawer, who fraudulently altered the bill after acceptance, his agent to do so; such a ground is obviously untenable. See per Denniston, J., *Brown* v. *Bennett*, 9 N. Z. L. R. 514 (C. A.); also *Lea* v. *Graham*, 1 W. & O. (N. S. W.) S. C. 288. The weight of the American cases is on the same side. *Knoxville National Bank* v. *Clarke*, 33 Am. R. 129.

[4] 9 N. Z. L. R. (C. A.) 487.

Opinion of Prendergast, C.J.

banker and customer, and was decided upon the ground of that relationship." [1] The Chief Justice doubts whether there is "a single reported case where *Young* v. *Grote* has been followed, where the question arose . . . between people not holding those relative positions." "Except in the case of banker and customer, the maker of a negotiable instrument does not owe any duty to be careful in the mode of making the complete instrument, and the maker is not, as to all who may become holders, under any obligation to anticipate, and therefore to preclude the fraudulent interpolation of words or figures." "Even *Young* v. *Grote*," adds Williams, J.,[2] "has been doubted, and to decide that the maker of a promissory note was under such an obligation would be going a great way beyond *Young* v. *Grote*." "If a person is careless of his property, and it is stolen in consequence, and the thief sells it to an innocent purchaser, the true owner can recover it from the innocent purchaser, notwithstanding his negligence. . . . The transferee of a note runs the risk of forgery, just as the transferee of a chattel runs the risk of larceny. The transferee of the stolen chattel cannot set up the mere negligence of the true owner as an answer to an action by him to the chattel, because there is no legal duty to the public on the part of the owner to keep his own property safe from theft. So in the case of an altered promissory note, if the maker is to be charged on the ground of his negligence, the duty to take precautions against forgery must first be established." [3]

Opinion of Williams, J.

Scholfield v. *Earl of Londesborough*.

This brings us to *Scholfield* v. *Earl of Londesborough*,[4] where *Young* v. *Grote* was keenly canvassed. The document in that case was a bill of exchange which was accepted as a complete bill, but which as completed had spaces left, and these admitted of interpolations largely increasing the value of the bill. The case was argued on the basis of its identity with *Young* v. *Grote*. The decision was that the acceptor of a bill of exchange owes no duty to a subsequent holder for value to take any precautions to see that the bill is filled up in the usual way. As the case is claimed to overrule *Young* v. *Grote*, which has been recognised by the House of Lords as a good decision, it is necessary to note the opinions of the Lords in detail. But before doing so the decisions subsequent to it, in which the claim has been made, will be noticed.

Imperial Bank of Canada v. *Bank of Hamilton*.

The first of these is *Imperial Bank of Canada* v. *Bank of Hamilton*.[5] A cheque was certified by the Bank of Hamilton, and as certified afforded opportunity for fraudulent alteration; it was altered, paid by the Bank of Hamilton as altered, and the money was subsequently recovered by them as paid under a mistake. The question was whether the Bank of Hamilton, having chosen to mark a cheque, were liable for the amount obtained from the appellants by the fraudulent alteration. The customer of the Bank of Hamilton procured the certification, and he took it away with him, made the alteration and afterwards negotiated it. Therefore, on any interpretation of *Scholfield* v. *Earl of Londesborough* there was no duty to the world at large; and the relation of banker and customer was not involved. But Lord Lindley, who

[1] *L.c.* 501. [2] *L.c.* 506. [3] *L.c.* 507. [4] [1896] A. C. 514.

[5] [1903] A. C. 49, 54. In *Union Credit Bank* v. *Mersey Docks and Harbour Board*, [1899] 2 Q. B. 205, at 211, Bigham, J., with Lord Halsbury's opinion in *Scholfield* v. *Earl of Londesborough*, before him, did not consider *Young* v. *Grote* to be overruled thereby; but the proposition he vouches it for is certainly not a proposition involved in *Young* v. *Grote*. Bigham, J., assumes that the cheque was filled up before issue. A glance at the facts will show that the cheque was filled up, then entrusted to the clerk to change, and subsequently altered without authority: 4 Bing. 255.

delivered the judgment of the Privy Council, says: "If the principle laid down in *Young* v. *Grote* could still be acted upon, the Bank of Hamilton would, as between themselves and an innocent holder for value, be estopped." This, assuming that the principle of *Young* v. *Grote* is confined to the relation of banker and customer,[1] is plainly a mistake. He continues: "After the decision of the House of Lords in *Scholfield* v. *Earl of Londesborough*, it was hopeless to contend that by the law of England the Bank of Hamilton was not at liberty to prove that the cheque had been fraudulently altered after it had been certified by the bank." Most clearly so, because the relation is not that of banker and customer.

Colonial Bank of Australasia v. Marshall.

Then came *Colonial Bank of Australasia* v. *Marshall*,[2] where the question whether there is a duty of care from the customer to the banker was directly raised. The High Court of Australia,[3] reversing the Supreme Court of Victoria, hold there is no such duty. Griffith, C.J., bases the judgment of the Court on three grounds: (1) "In *Scholfield* v. *Earl of Londesborough*, Lord Halsbury, C., invited the House of Lords formally to overrule it" (*Young* v. *Grote*). The proposition that they responded is inferred. (2) "It is impossible to regard the judgment as anything more than a decision upon the facts of the particular case." The import of this proposition has already been examined;[4] and (3) "If the doctrine [of *Young* v. *Grote*] applies to the case of a cheque it must also apply to the acceptor of a bill as between him and the drawer."[5] The validity of this apophthegm is dependent on the identity of the two propositions and so far as they are identical.

Affirmed on the authority of *Scholfield* v. *Earl of Londesborough*.

The Privy Council affirmed this judgment on the authority of *Scholfield* v. *Earl of Londesborough*. They say:[6] "The principles there laid down appear to their Lordships to warrant the proposition that, whatever the duty of a customer towards his banker may be with reference to the drawing of cheques, the mere fact that the cheque is drawn with spaces such that a forger can utilise them for the purposes of forgery, is not by itself any violation of that obligation."

It therefore becomes necessary to ascertain what the "principles there laid down" were.

Young v. *Grote*, accepted by Lord Watson.

In *Scholfield* v. *Earl of Londesborough*,[7] Lord Watson says: "In my opinion, *Young* v. *Grote* can have no bearing upon the present case if it was decided upon the ground that the customer, by signing a blank cheque, had given implied authority to fill it up to any subsequent holder." "If, on the other hand, the decision in *Young* v. *Grote* was based upon the ratio that the customer, in filling up the cheque through his wife, whom he had constituted his agent for that purpose, had failed in the duty which he owed to his banker by giving facilities for the fraudulent alteration, I am not prepared to affirm that it cannot be supported by authority. But it does not, in my opinion, necessarily follow that the same rule must be applied between the acceptor of a

1 See per Lord Esher, M.R., *Scholfield* v. *Earl of Londesborough*, [1895] 1 Q. B. 543.

2 [1906] A. C. 559.

3 1 C. L. R. (Australia) 632, explained *Austin* v. *Austin*, 3 C. L. R. (Australia) 516.

4 *Ante*, 1318. In *Ex parte Swan*, 7 C. B. N. S. Williams, J., 445, says: "Its authority cannot be disputed."

5 If the bill is payable on demand by a banker it is a cheque: 45 & 46 Vict. c. 61, s. 73; the reasoning is *idem per id*[illegible]. If the bill is not payable on demand, there is a difference which the C.J.'s affirm[illegible] does not remove: the difference between paying away money and undertak[illegible] so at a time more or less remote; at least a place of repentance is si[illegible]

6 [1906] A.C. 568.

7 [1896] A.C. 536.

hill of exchange and a holder acquiring right to it after acceptance." The rest of the opinion is devoted to these other circumstances. Lord Macnaghten [1] treats *Young* v. *Grote* at greater length. He first refers to *Orr* v. *Union Bank of Scotland* [2] in the House of Lords, and quotes Lord Cranworth, C.: "The principle is a sound one, that where the customer's neglect of due caution has caused his bankers to make a payment on a forged order, he shall not set up against them the invalidity of a document which he has induced them to act on as genuine," and adds: "If that be the principle of *Young* v. *Grote*, I do not think it helps the appellant much. Lord Cranworth treats the relation of banker and customer as the governing feature in the case. That relation is, I think, a long way off from the connection between the acceptor of a hill and a subsequent holder." He then notes that Parke, B.'s, expressions, giving the opinion of the judges to the House of Lords in *Bank of Ireland* v. *Trustees of Evans's Charities*, are to the same effect. "Nor do I think that there is any difference in substance in the views expressed by Lord Cranworth himself in the two cases." It may be mentioned that Lord Brougham, the only other Lord who addressed the House on that occasion, concurred in approving *Young* v. *Grote*. "The doctrine" [of *Young* v. *Grote*], Lord Macnaughten adds, "has no application to the present case." [3] Lord Morris also failed "to see how it governs this case, where the defendant accepted a regularly filled-up hill;" and Lord Shand says: [4] "The case of *Young* v. *Grote*, between a banker and his customer, was one in which there was the relation of parties contracting with each other. It appears to me that the ground of decision, as reported, was in conformity with the limited doctrine of Pothier, that this relation inferred, if not expressly, at least by implication, the duty and obligation on the customer's part, in issuing cheques on his banker to third parties, to take care that these were not in such a form as to give the means of enlarging their amount without this being readily detected. In that view of the case the decision does not apply here." Last Lord Davey, concurring with Lord Watson, said: "I only desire to say that, in my opinion, our judgment in this case is outside the case of *Young* v. *Grote*." [5] Thus five out of six Law Lords held that *Young* v. *Grote* was untouched by the decision in *Scholfield* v. *Earl of Londesborough*.

Lord Macnaghten vouching Lord Cranworth, C.

and Parke, B. (delivering the opinion of the judges)

Young v. *Grote* also accepted by Lord Morris,

Lord Shand,

Lord Davey,

but disputed by Lord Halshury, C.

Turning now to the opinion of Lord Halshury, C. "I am not aware," he says, [6] "of any principle known to the law which should attach such consequences [a duty to safeguard from fraud] to a written instrument when no such principle is applicable in any other region of jurisprudence, where a man's own carelessness has given opportunity for the commission of a crime."

His opinion examined.

Testimony of "jurisprudence."

If Lord Halshury by "jurisprudence" meant the science of law, this assertion is inaccurate, as his lengthy excerpt from Pothier sufficiently demonstrates, even apart from the American [7] and Scottish cases. [8]

[1] *L.c.* 544, 545. [2] 1 Macq. (H. L. Sc.) 513, 523.
[3] *L.c.* 546. [4] *L.c.* 548. [5] *L.c.* 550. [6] *L.c.* 521.

[7] Morse, Banks and Banking (3rd ed.), § 480. *Critten* v. *Chemical National Bank*, [1902] 171 N. Y. 219, may suffice as a sample of many cases. The opinion of the Court in *Crawford* v. *West Side Bank*, 100 N. Y. 50, 55, is there reiterated: "The question of negligence cannot arise unless the depositor has, in drawing his check, left blanks unfilled, or by some affirmative act of negligence has facilitated the commission of a fraud by those into whose hands the check may come."

[8] 1 Bell, Comm. (7th ed.) 416, asserts that the Scottish decisions "have proceeded on the principles so well laid down by Pothier," and he cites the passage Lord Halshury has extracted.

If he meant in the English system, then it assumes, as he proceeds to do in the next passage, an identity between the law as to chattels and the law as to mercantile paper. But Lord Halsbury has himself provided the answer to his argument: "Such a mode of reasoning assumes that the law is necessarily a logical code, whereas every lawyer must acknowledge that the law is not always logical at all";[1] as Lord Selborne has also done:[2] "A banker undertakes to do what is in the proper course of a banker's business." Therefore, where a practice, an anomaly perhaps, has been held to exist in the law merchant for seventy years, the argument that it is not logical is of no greater weight than that drawn by Lord Halsbury from the defective analogy between a man's pocket handkerchief and a banker's cheque.

Lord Selborne's remark as to the custom of bankers.

Lord Halsbury's illustration is superficial, not sound. His words are: "A man, for instance, does not lose his right to his property if he has unnecessarily exposed his goods, or allowed his pocket handkerchief to hang out of his pocket, but could recover against a *bonâ fide* purchaser."[3] True, because there is no duty;[4] but import a duty and the result is different, and duty or no duty is the point at issue here. A man who had made a binding contract with a conjurer to produce a certain handkerchief at a certain place for a company to see the conjurer turn it into bank-notes, and then so negligently let it hang out of his pocket that the handkerchief was stolen, would be liable to an action for damages either "in English jurisprudence" or "in any other region of jurisprudence"; neither would any principle of jurisprudence be violated by attaching a customary or conventional form or safeguard to the execution of a duty. But further, a duty not to "facilitate fraud" had been asserted in the House of Lords by Lord Herschell, C., three years previously to the time at which Lord Halsbury was speaking, and expresses the outcome of a long line of cases then affirmed by the House,[5] and a principle established in an extensive field of law: so that a prior incumbrancer who has not given notice is postponed to a later one who has given notice on this very ground—of a duty not to facilitate fraud.

Lord Halsbury's reasoning considered.

Lord Halsbury continues: "The truth is that the whole doctrine, that facilitating forgery, or giving opportunity for forgery, or so acting that a forgery is a possible result, affects the validity of the instrument forged, may be traced, in English law at all events, to the case of *Young* v. *Grote*, and probably beyond, to certain doctrines of the civil law, which, to my mind, form [a] part of the law merchant, so far as it exists in English jurisprude ...."[6]

Lord Halsbury's criticism of the judgments in *Young* v. *Grote* noted.

It must be admitted that if Lord Halsbury was competent to overrule *Young* v. *Grote*, which had twice been approved by the House of Lords, and twice upheld by the collective opinion of the judges, this would do so. The negligence is issuing the cheque in an unusual state.[7] The forgery is, in the train of consequences, not the breach of

[1] *Quinn* v. *Leatham*, [1901] A. C. 506.
[2] *Vagliano's case*, [1891] A. C. 127.
[3] Lord Macnaghten, in *Farquharson* v. *King*, [1902] A. C. 337, quotes these words in another connection.
[4] Per Cockburn, C.J., *Johnson* v. *Crédit Lyonnais Co.*, 3 C. P. D. 42.
[5] *Ward* v. *Duncombe*, [1893], A. C. 369.
[6] Lord Halsbury's legal history is hardly accurate, in the light of Sir Thomas Plumer's judgment in *Dearle* v. *Hall*, 3 Russ. 1. The date of this is 1823: *Young* v. *Grote* is 1827.
[7] *British Linen Co.* v. *Caledonian Insurance Co.*, 4 Macq. H. L. Sc. 107, 114, carrying the assent of Lords Campbell, Cranworth, Wensleydale and Chelmsford.

duty itself, but a consequence of the breach of duty.[1] He continues: "That case has been pushed so far in argument that I think the time has come when it would be desirable for your Lordships to deal with it authoritatively, and to examine how far it ought to be quoted as an authority for anything." We have already seen that Lord Halsbury's five colleagues responded to his invitation and refused to overrule *Young* v. *Grote*, but limited its operation to the case of banker and customer.

Conclusion *Young* v. *Grote* not overruled.

Lord Halsbury next examines the judgments in *Young* v. *Grote*, and detects "inextricable confusion, not only among the different judges, but in the judgment of each judge in turn."[2] He fails to note that the judgments were oral ones, delivered at the conclusion of the case, and thus, as later instances also testify, likely to be very inexactly expressed; and also, which is of more importance, that the result of the conference of the judges preliminary to giving judgment is very distinctly summed up by the Chief Justice: "We decide here on the ground that the banker has been misled by want of proper caution on the part of his customer." The passage, in Lord Halsbury's opinion, which follows this, is barely tenable as a debating point; and there is no better authority to cite than Lord Halsbury to prove that a judgment may be sustainable, though passages of it, or illustrations in it, may be very inexact.[3] The facts in *Young* v. *Grote* are fatally inconsistent with Lord Halsbury's suggestion of the blank cheque theory, and inconsistent with the more widely mooted explanation on the ground that the plaintiff had issued a blank cheque. They set forth[4] that the wife "delivered one of the cheques so signed by P. Young to William Worcester, a clerk of P. Young, and desired W. Worcester to fill it up with the sum of fifty pounds two shillings and threepence. Worcester *accordingly filled it up with that sum*, and *showed it so filled up to Mrs. Young*, and she desired him to get it cashed."[5] Thus Mrs. Young entrusted a special agency to her agent, saw to the completion of it, and then gave him another commission. The explanation that the negligence was entrusting the cheque to the wife, or that it was the issuing of a blank cheque, falls to the ground. The negligence, then, can only be what the House of Lords, in *Bank of Ireland* v. *Evans's Trustees*, accepted it to have been on the advice of the judges: that the customer, by his neglect to use due caution, had caused his bankers to make a payment on a forged order.

Lord Halsbury expresses his opinion that the "modified doctrine" laid down by Pothier,[6] "considering the principles on which that learned author himself relies for its acceptance, is not and never has been the law of England." It is submissively pointed out that that may

[1] *Smith* v. *L. & S. W. Ry. Co.*, L. R. 6 C. P. 14. *Ante*, 87. [2] [1896] A. C. 522.

[3] *E.g.*, his Lordship's own judgment on "resulting trusts." "If no one is intended to have a resulting trust the ordinary and familiar mode of doing that is by saying so on the face of the instrument": *Smith* v. *Cooke*, [1891] A. C. 299. See Underhill, Trusts (5th ed.), 106 n. Possibly his opinion in *Scholfield's case* may also be in point.

[4] 4 Bing. 254.

[5] The head-note in 12 Moore, 484, is even plainer: "The wife requiring £50 2*s*. 3*d*., desired one of her husband's clerks to fill up one of the checks for that sum. The clerk did so, and was sent to get cash for it; but before he presented the check he altered it."

[6] This may be extracted from some six pages of the law reports occupied with an excerpt from Pothier printed in the middle of Lord Halsbury's opinion. The relevant passage occupies as many lines in 4 Bing. 258. The "modified doctrine" is—if it be the fault of the customer that the banker pays more than he ought, the customer must make the difference good; and this is accepted by Parke, B., delivering the opinion of the judges, *Bank of Ireland* v. *Trustees of Evans's Charities*, 5 H. L. C. 410.

very well he so; and yet the principle of *Young* v. *Grote*, expounded in 1827, recognised in his Lordship's own House and acted on ever since, may, notwithstanding its concurrence with a passage from Pothier, be part of the law merchant: the custom of merchants generally accepted in England; even though the judges gave inconclusive or conflicting or incorrect reasons for its currency. The conclusion is inevitable that *Young* v. *Grote* is not overruled.[1]

Inaccurate statements and reasoning in *Colonial Bank of Australasia* v. *Marshall*.

Returning, then, to the judgment in *Colonial Bank of Australasia* v. *Marshall*,[2] we are driven to conclude that the statement there made, that "the duty which, according to the ruling of the learned Chief Justice, subsists between customer and banker is substantially the same as that contended for in *Scholfield* v. *Earl of Londesborough*,"[3] is as inaccurate in law as it is in fact. In law it is inaccurate; for *Young* v. *Grote* is not overruled, since our examination demonstrates that no adequate authority has yet even affected to overrule it; nor is an unanalysed assumption that it is "substantially the same" with something else that is overruled sufficient to do so in face of the weight of testimony that it is something different. It is inaccurate in fact; because, irrespectively of its legal effect, between customer and banker there is a definite contractual and customary relation; while as between holder and acceptor of a bill, the acceptor may be, and often is, ignorant of the holder's existence till the moment when he is called on to pay the bill by virtue of his acceptance of the paper of a third person.[4] The subsequent assumption that *Scholfield's case*[5] "included everything existing in the present case" is manifestly a *petitio principii*, and contradictory of the very authority to which it appeals: for Lord Esher, M.R., who justly characterises *Young* v. *Grote* as "the fount of bad argument," yet adds "it does not apply to this case": *Scholfield* v. *Earl of Londesborough*.

In *Colonial Bank of Australasia* v. *Marshall*, accordingly, the question being between banker and customer and evidence being given that the cheque had been drawn in other than the usual way, the case should have been left to the jury.

Rogers v. *Hadley*.

It is not apparent why the doctrine so forcibly propounded by Pollock, C.B., in *Rogers* v. *Hadley*[6] was not invoked. The cheque in its inception was absolutely inoperative without the fraud. Whether the drawer is one person or three, if before the issue of the cheque there is a fraud by the drawer himself, it vitiates the cheque on the most elementary principles;[7] and *Marshall's case*, where the fraudulent drawer is to profit by his or their own fraud, seems to be an *à fortiori* case; for the drawing cannot be divided up. The signature of two out of three whose signature is necessary is a mere nullity, and the signature of the third—a fraud. In any view the decision is most unsatisfactory.

[1] "I think the relation of bankers and customers does involve a duty on the part of the customer": per Kennedy, J., *Lewes Sanitary Steam Laundry Co.* v. *Barclays*, 22 Times L. R. 739.

[2] [1906] A. C. 559.

[3] *L.c.* 567.

[4] It may serve to illustrate the want of authority or of accuracy in this judgment to note that Lord Macnaghten who was sitting in the Privy Council at the hearing, had, in his elaborate opinion in *Scholfield* v. *Earl of Londesborough*, [1896] A. C. 545, held the relation of banker and customer "a long way off from the connection between the acceptor of a bill and a subsequent holder;" yet the identity of the relations is assumed as incontrovertible by the writer of the judgment in the Privy Council.

[5] [1895] 1 Q. B. 543.

[6] 32 L. J. Ex. 241, 248; 2 H. & C. 227, 247.

[7] 45 & 46 Vict. c. 61, s. 29, sub-s. (2); s. 30, sub-s. (2). Cp. *Sawyer* v. *Wiswell*, 91 Mass. 39, 42; *Hogg* v. *Skeen*, 18 C. B. (N. S.) 426.

Scholfield v. *Earl of Londesborough.*

Young v. *Grote* was also much discussed in the Court of Appeal in *Scholfield* v. *Earl of Londesborough* [1] in considering the liability of an acceptor of a bill of exchange in respect of fraudulent alterations subsequent to his acceptance.

III. Banker as pawnee.

III. Another relation frequently constituted between a banker and his customer is that which makes the banker a pawnee of his customers' securities.

Banker's lien as pawnee.

In this relation, again, bankers have most undoubtedly "a general lien on all securities deposited with them as bankers, by a customer, unless there be an express contract or circumstances that show an implied contract inconsistent with lien." [2] This lien exists not only when the banker makes a loan on the pledge of these securities, but also where the customer overdraws his ordinary account. The banker's liability in respect of the securities appears to be that of a bailee for reward.[3] The liability is thus stated in the Roman law: *Ea igitur, quæ diligens paterfamilias in suis rebus præstare solet, a creditore exiguntur*; [4] and *Quia pignus utriusque gratia datur . . . placuit sufficere, si ad eam rem custodiendam exactam diligentiam adhibeat; quam si præstiterit et aliquo fortuito casu eam rem amiserit, securum esse nec impediri creditum petere.*[5] The amount of care exacted is that which an ordinary prudent man of business habits would use in the custody of his own securities.

IV. Bankers may be warehousemen.

IV. The last relation which it is necessary to notice here in which bankers stand to their customers is that of warehousemen of their plate, jewels, deeds, and securities.

The general aspects of this relationship have been already considered under the head "Deposit," and reference must be made to the cases there cited.[6] The leading case is *Giblin* v. *McMullen* [7] before the Judicial Committee of the Privy Council, affirming the decision of the Supreme Court of Victoria, which adopted as a correct expression the law as stated in Addison on Contracts [8] as follows: "It is the custom of bankers to receive and keep, for the accommodation of their customers, boxes of plate and jewels, wills, deeds, and securities; and, as no charge is made for the keeping of these things, they are gratuitous deposits. The bankers, therefore, are only bound to take ordinary care of them; and if they are stolen by a clerk or servant employed about the bank, the bankers are not responsible, unless they have knowingly hired or kept in their service a dishonest servant."

Giblin v. *McMullen.*

Addison, Contracts.

Bankers as gratuitous bailees.

In the argument of the appeal it was admitted that the appellants were gratuitous bailees; [9] but it does not seem by any means clear that that is necessarily the position of a banker receiving securities for safe custody and without any special agreement. There has grown up a practice of customers sending their jewels and securities to banker to be taken care of. But the banker discriminates between customers

[1] [1895] 1 Q. B. 536.

[2] *Brandão* v. *Barnett*, 12 Cl. & F., per Lord Campbell, 806; *London Chartered Bank of Australia* v. *White*, 4 App. Cas. 413.

[3] *In re United Service Co., Johnston's Claim*, L. R. 6 Ch. 212, distinguished *Leese* v. *Martin*, L. R. 17 Eq. 224.

[4] D. 13, 7, 14.

[5] Inst. 3, 14, § 4. In the Elzevir edition of 1663 this is 3, 15, § 4.

[6] *Ante*, 755.

[7] L. R. 2 P. C. 317, 327; *Leese* v. *Martin*, L. R. 17 Eq. 224. All the chief cases are cited in *De Haven* v. *Kensington National Bank*, 81 Pa. St. 95.

[8] 6th ed. (Cave's), 406.

[9] See per Lord Chelmsford, 334. There were two counts to the declaration, the first alleging a bailment for reward, which the jury negatived. See *Dearborn* v. *Union National Bank*, 61 Me. 369; *Briggs* v. *Spaulding*, 141 U. S. (34 Davis) 132.

and those who have no relation with his bank. If the latter were to wish to place securities with him, he would either refuse or make a charge.[1] The relations of his customer with him makes a difference in this respect, that he acts differently in the customer's case from what he would if the relation of customer did not exist. Then can it fairly be said that the position of a banker taking charge of securities for a customer is identical with that of a man entrusting his gold watch to a friend or locking up his deed-box in a neighbour's house while he goes out of town? If the position is not identical, the banker is described as a gratuitous bailee in a sense peculiar to this relation.

American authorities.

This, however, is not the opinion of some of the chief American authorities. "The bank cannot use the deposit in its business, and no such profit or credit from the holding of the money can arise as will convert the bank into a bailee for hire or reward of any kind. The bailment in such cases is purely gratuitous, and for the benefit of the bailor, and no loss can be cast upon the bank for a larceny unless there has been gross negligence in taking care of the deposit."[2]

There is one consideration quite left out of sight here. The depositor may have been induced to open the account in order to deposit his securities. In these times of keen competition for banking business, facilities for keeping securities safely and readiness of access to them may be a determining element in selecting between competing banks. The point is of hardly more than speculative interest, as the care taken in any well-managed bank is so ample as to preclude a finding of negligence whatever the abstract standard may be.

[1] *Pattison* v. *Syracuse National Bank*, 1 Hun (N. Y.) 606.

[2] Per Agnew, C.J., in *Scott* v. *National Bank*, 72 Pa. St. 478, embodying the opinion of Parker, C.J., in *Foster* v. *Essex Bank*, 17 Mass. 501; and of Thompson, C.J., in *Lancaster Bank* v. *Smith*, 62 Pa. St. 54. This latter case does not raise the point, as the depositor was not a customer of the bank, while the bailment was absolutely gratuitous.

CHAPTER IV.

ESTOPPEL.[1]

Definitions, Sir Edward Coke's.

"ESTOPPE," says Sir Edward Coke,[2] "cometh of the French word *estoupe*, from whence the English word stopped; and it is called an estoppel or conclusion because a man's owne act or acceptance stoppeth or closeth up his mouth to alledge or plead the truth."

Bowen, L.J.'s.

"Estoppel," says Bowen, L.J.,[3] "is only a rule of evidence; you cannot found an action upon estoppel. Estoppel is only important as being one step in the progress towards relief, on the hypothesis that the defendant is estopped from denying the truth of something which he has said. An illustration of a case of that kind of estoppel filling up the gap in the evidence which, when so filled up, would produce this right to relief, is found in the case of *In re Bahia* v. *San Francisco Ry. Co.*[4] *Burrowes* v. *Lock*[5] was a case of estoppel. As soon as we looked at the record it so appeared. It was a case where there was a right to relief on the hypothesis that the defendant was precluded from denying the truth of a particular fact."

Lindley, L.J.'s.

"Estoppel," says Lindley, L.J.,[6] "is a rule of evidence which prevents a man from saying what is true"; or as Bramwell, L.J., puts it, "an estoppel may be said to exist where a person is compelled to admit that to be true which is not true, and to act on a theory contrary to the truth."[7]

The law relating to estoppel is extensive, but only a small portion concerns us here—viz., that relating to estoppel by negligence, an

[1] Vin. Abr. Estoppel; *Doe* v. *Oliver*, 2 Sm. L. C. (11th ed.), 724, *cum notis*; Bigelow, Estoppel. *Ashpitel* v. *Bryan*, 3 B. & S. per Wightman, J., 489.

[2] Co. Litt. 352 a. There is a sufficiently remarkable statement by Griffith, C.J., in *Marshall* v. *Colonial Bank of Australasia*, 1 Commonwealth (Australia) L. R. 655: "The doctrine of *estoppel in pais* was not, however, formulated in England in 1827, when *Young* v. *Grote* was decided, nor until the case of *Pickard* v. *Sears*, 6 A. & E. 469, which was decided in 1837. There is room for definition in the word "formulated": but *estoppel in pais* was discussed by Coke, Co. Litt. *supra*, *Rawlyns's case*, 4 Co. Rep. 52, 53; *Syms's case*, 3 Co. Rep. 51a, 53b, Bro. Abr. Estoppel, and Lord Denman in *Pickard* v. *Sears*, *l.c.* 474, so far from indicating that he is formulating new law, treats the rule as "clear." Griffith, C.J., possibly had in his mind Bigelow, Estoppel (5th ed.) 455. He should have considered *Welland Canal Co.* v. *Hathaway* (1832), 8 Wend. 480, 483. Cp. *Burrowes* v. *Lock*, 10 Ves. 470, decided in 1805.

[3] *Low* v. *Bouverie*, [1891] 3 Ch. 105.

[4] L. R. 3 Q. B. 584. *Sheffield Corporation* v. *Barclay*, [1905] A. C. 392, 401.

[5] 10 Ves. 470.

[6] *Onward Building Society* v. *Smithson*, [1893] 1 Ch. 14. To create an estoppel there must be a precise and specific averment of a particular fact; *Right* v. *Bucknell*, 2 B. & Ad. 278. "It is a rule that estoppels must be certain to every intent"; per Williams, J., *Kepp* v. *Wiggett*, 10 C. B. 53; *Whitechurch* v. *Cavanagh*, [1902] A. C. 117, 145.

[7] *Simm* v. *Anglo American Telegraph Co.*, 5 Q. B. D. 202.

expression usual but not accurate; since negligence prevents a right of action accruing, estoppel a right that has accrued from being set up.

General Principles.

Distinction between fraud, breach of duty, warranty and estoppel.

The distinction should be observed between the operation of fraud, breach of duty, warranty and estoppel.[1] Fraud vitiates everything at the option of its victim. Breach of duty is the violation of an obligation and the ground of action where damage is suffered. Warranty is the undertaking an obligation that whatever the actual condition of a thing, the warrantor shall be bound to act on the basis of it being as it is warranted. Estoppel is a legal disability to aver contrary to a representation, and the representation must be of such a nature that it would have misled any reasonable man, and the person setting up the estoppel must in fact have been misled by it.[2] Unless a liability arises in one of the above ways, there is no greater obligation on one than to answer honestly to any inquiry made of him: to answer, that is, to the best of his actual knowledge and belief.

Parke, B., in *Freeman* v. *Cooke*, adopting the definition of Lord Denman, C.J., in *Pickard* v. *Sears*.

The general rule of estoppel is stated in *Freeman* v. *Cooke*[3] by Parke, B.,[4] adopting a previous definition of Lord Denman, C.J., in *Pickard* v. *Sears*,[5] "that where one by his words or conduct, *wilfully* causes another to believe in the existence of a certain state of things, and induces him to act on that belief, so as [6] to alter his own previous

[1] *Low* v. *Bouverie*, [1891] 3 Ch. 82. [2] *Low* v. *Bouverie*, [1891] 3 Ch. 82, 113.

[3] 2 Ex. 654. There were earlier cases, as *Heane* v. *Rogers*, 9 B. & C. 577, *Graves* v. *Key*, 3 B. & Ad. 313, holding that a receipt may be contradicted or explained; see *Lee* v. *Lancs. & Y. Ry. Co.*, L. R. 6 Ch. 527, 535, and *Mildmay* v. *Smith*, 2 Wms. Saund. 343, explained *Stimson* v. *Farnham*, L. R. 7 Q. B. 175. It was an ancient rule as to estoppel by statements in a deed that they must be clear and unambiguous in order to bind, Roll. Abr. Estoppel (P.), pl. 1 and 7, acted upon by Lord Cairns, C., in *Heath* v. *Crealock*, L. R. 10 Ch. 22, 30, which case was followed by Jessel, M.R., in *General Finance Mortgage Discount Co.* v. *Liberator Permanent Benefit Building Society*, 10 Ch. D. 15. "That certainty of statement," says Kay, L.J., "is also required to maintain an estoppel upon a statement not by deed appears from *Freeman* v. *Cooke*, where relief was refused upon the ground that no reasonable man would have acted on the faith of the statements made if they were taken together": *Low* v. *Bouverie*, [1891] 3 Ch. 113.

[4] "Who after great consideration amongst all the judges of the Court of Exchequer (to which I can speak from personal knowledge) delivered judgment": per Lord Cranworth, C., *Jorden* v. *Money*, 5 H. L. C. 213.

[5] 5 A. & E. 469; see also *Gregg* v. *Wells*, 10 A. & E. 97, where Lord Denman, C.J., said: "*Pickard* v. *Sears* was in my mind at the time of the trial, and the principle of that case may be stated even more broadly than it is there laid down. A party who negligently or culpably stands by and allows another to contract on the faith and understanding of a fact which he can contradict, cannot afterwards dispute that fact in an action against the person whom he has himself assisted in deceiving." This Lord Cranworth, C., in *Jorden* v. *Money*, 5 H. L. C. 214, says "is stated a little too broadly." See *Knights* v. *Wiffen*, L. R. 5 Q. B. 660, considered in *Simm* v. *Anglo-American Telegraph Co.*, 5 Q. B. D. 188, doubted in 1 Langdell, Cases on Sales, 1028, in the index, also in Am. Law Rev. vol. vi. 470, and observed upon per Bowen, L.J., *Mayor, &c. of Kingston-upon-Hull* v. *Harding*, [1892] 2 Q. B. 506, and per Farwell, J., *Dixon* v. *Kennaway*, [1900] 1 Ch. 837; *Stephens* v. *Baird*, 9 Cowen (N. Y.), 274; *Welland Canal Co.* v. *Hathaway*, 8 Wend. (N. Y.) 480. The representation which induces the plaintiff's act must be "a misrepresentation in point of fact, and not merely in point of law": per Mellish, L.J., *Beattie* v. *Lord Ebury*, L. R. 7 Ch. 802, but see L. R. 7 H. L. 107, *arguendo*. "If it is a misrepresentation of a legal right pretended to be possessed by the person who asserts it, and a man is injured thereby, he may claim compensation. The misrepresentation in itself may be nothing, it may be that of a mere opinion on doctrine, but if it is a misrepresentation as to title, and the rights and character of the parties who make it, and if it is made with the intention of inducing another to act upon it, and it does so induce him to act, and he thereby suffers, he may obtain compensation." Honyman, J., in *Weeks* v. *Propert*, L. R. 8 C. P. 437, explains Mellish, L.J.'s, *dictum*; so does Lush, J., in *McCollin* v. *Gilpin*, 5 Q. B. D. 394.

[6] In 2 Ex. "so as" is in error printed "or," as may be seen by reference to 6 A. & E. 474.

Term "wilfully" explained.

position, the former is concluded from averring against the latter a different state of things as existing at the same time." The term *wilfully*, as used by Lord Denman, is explained to mean: "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 men 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 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 authorised to act as his agents, is bound by all the contracts made by them with third persons on the faith of their being so authorised."[1] Further on in the same judgment, Parke, B., says that the representation that is necessary to work an estoppel must be "such as to amount to the contract or licence of the person making it";[2] and Lord Chelmsford, C.,[3] subsequently in the House of Lords, after approving Parke, B.'s, doctrine,[4] adds, "so that I apprehend, where there is a vested right or interest in any party, the principle of law as now firmly established is, that he cannot waive or abandon that right except by acts which are equivalent to an agreement or to a licence."[5]

Parke, B.'s, comment amplified in *Cornish* v. *Abington* by Pollock, C.B.

Pollock, C.B., in *Cornish* v. *Abington*,[6] comments on Parke, B.'s, judgment in *Freeman* v. *Cooke* as follows: "Lord Wensleydale, perceiving that the word 'wilfully' might be read as opposed not merely to 'involuntarily,' but to 'unintentionally,' showed that if the representation was made voluntarily, though the effect on the mind of the hearer was produced unintentionally, the same result would follow. If a party uses language which, in the ordinary course of business and the general sense in which words are understood, conveys a certain meaning, he cannot afterwards say he is not bound if another, so understanding it, has acted upon it. If any person, by a course of conduct or by actual expressions, so conducts himself that another may reasonably infer the existence of an agreement or licence,[7] whether the party intends that he should do so or not, it has the effect that the party using that language, or who has so conducted himself, cannot afterwards gainsay the reasonable inference to be drawn from his words or conduct."

[1] 2 Exch. 663. Cp. *Scarf* v. *Jardine*, 7 App. Cas. 345. *British Homes Assurance Corporation* v. *Paterson*, [1902] 2 Ch. 404, is the converse case.

[2] Parke, B.'s, statement has been adopted by Lord Blackburn, delivering judgment in the following cases: *Betts* v. *Menzies*, 10 H. L. C. 144; *Polak* v. *Everett*, 1 Q. B. D. 673; *Miles* v. *M'Ilwraith*, 8 App. Cas. 133; *M'Kenzie* v. *British Linen Co.*, 6 App. Cas. 101. [3] *Clarke* v. *Hall*, 6 H. L. C. 656. [4] *Supra*.

[5] See *Chadwick* v. *Manning*, [1896] A. C. 231, decided on the authority of *Jorden* v. *Money*, *supra*. [6] 4 H. & N. 555.

[7] This test of an agreement or licence is also adopted by Lord Campbell, C., in *Cairncross* v. *Lorimer*, 3 Macq. (H. L. Sc.) 830. The American law seems to be the same: *Sessions* v. *Rice*, 70 Iowa, 306, 310; "The test question is as to whether the party setting up the estoppel was justified in relying upon the conduct of the other party." "Every person will be conclusively presumed to intend to be understood according to the reasonable import of his words; and where a person's words are thus reasonably understood, and justly acted upon by another, such person cannot be heard to aver to the contrary as against the other"; *Morgan* v. *Railroad Co.*, 96 U. S. (6 Otto) 716.

Crompton, J.,[1] points out that the meaning of "wilfully" must be taken to be "*malo animo*, or with the intent to defraud or deceive, but so far wilfully that the party making the representation on which the other acts means it to be acted upon in that way." *Howard* v. *Hudson.*

Lord Campbell[2] describes the doctrine of estoppel as "found, I believe, in the laws of all civilised nations," and he states it as follows:[3] "If a party having an interest to prevent an act being done, has full notice of its having been done, and acquiesces in it, so as to induce a reasonable belief that he consents to it, and the position of others is altered by their giving credit to his sincerity, he has no more right to challenge the act to their prejudice than he would have had if it had been done by his previous licence." And Lord Blackburn's[4] statement is not less forcible: "When a person makes to another the representation, 'I take upon myself to say such and such things do exist and you may act upon the basis that they do exist,' and the other man does really act upon that basis, it seems to me it is of the very essence of justice that, between those two parties, their rights should be regulated, not by the real state of the facts, but by that conventional state of facts which the two parties agree to make the basis of their action." Lord Campbell's statement of the principle in *Cairncross* v. *Lorimer.* Lord Blackburn's in *Burkinshaw* v. *Nicolls.*

The principle was viewed in *Jorden* v. *Money*[5] from the standpoint of a Court of Equity. In the opinion of the majority of the Lords, no more was proved there than imported the declaration of a present intention not to enforce a bond; and the proposition of law affirmed was that where a person possesses a legal right, a Court of Equity will not interfere to restrain him from enforcing it, though between the time of its creation and that of his attempt to enforce it he has made representations of his intention to abandon it: "A mere expression of intention, although acted upon, is no ground for equitable interference."[6] *Jorden* v. *Money.* Mere intention for the future confers no right.

Lord Campbell, C., reiterated the doctrine a few months later;[7] and Lord Selborne, C., in *Maddison* v. *Alderson*[8] "always understood it to have been decided in *Jorden* v. *Money*[9] that the doctrine of estoppel by representation is applicable only to representations alleged to be at the time actually in existence, and not to promises *de futuro* which, if binding at all, must be binding as contracts."[10]

A representation cannot be relied on as ground of estoppel if it has been induced by the concealment of any material fact; and least of all can a statement induced by the misrepresentation of one claiming the statement to operate as an estoppel be so treated.[11]

This doctrine of estoppel *in pais* is aimed at the preventing injustice where one party has been led into error by the fault or fraud of the other. But it can have no application unless the party invoking it can show that he has been induced to act or refrain from acting by the acts or conduct of the adverse party in circumstances that would naturally Ground of the doctrine.

[1] *Howard* v. *Hudson*, 2 E. & B. 1.
[2] *Cairncross* v. *Lorimer*, 3 Macq. (H. L. Sc.) 829.
[3] 3 Macq. (H. L. Sc.) 830.
[4] *Burkinshaw* v. *Nicolls*, 3 App. Cas. 1026. [5] 5 H. L. C. 185.
[6] Per Lord Campbell, C., *Piggott* v. *Stratton*, 1 De G. F. & J. 51. Cp. *Spicer* v. *Martin*, 14 App. Cas. 12, 23.
[7] *Slim* v. *Croucher*, 1 De G. F. & J. 518. See *Low* v. *Bouverie*, [1891] 3 Ch., per Lindley, L.J., 102, also per Kay, L.J., 110.
[8] 8 App. Cas. 473. [9] 5 H. L. C. 185.
[10] See *Whitechurch* v. *Cavanagh*, [1902] A. C., per Lord Macnaghten, 130.
[11] *Porter* v. *Moore*, [1904] 2 Ch. 367.

and rationally influence ordinary men. Thus it can only be set up by one who has been actually misled to his injury; for if not misled he can have no ground for the protection of the principles he invokes.[1]

Rule laid down by Wilde, B.;

In *Swan* v. *North British Australasian Co.*,[2] in the Court of Exchequer, Wilde, B., formulated the propositions: "That if 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. That if he 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. In short, and in popular language, a man is not permitted to charge the consequences of his own *fault* on others, and complain of that which he has himself brought about."

qualified in the Exchequer Chamber by Blackburn, J.

In the Exchequer Chamber, Blackburn, J.,[3] characterised this as "very nearly right, but, in my opinion, not quite," and he proceeds to qualify it by two provisos: the neglect "must be in the transaction itself, and be the proximate cause of the leading the party into that mistake"; and "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."

Carr v. *L. & N. W. Ry. Co*

Brett, J., expands this into four propositions.[4]

Summed up by James, L.J., in *Ex parte Adamson, In re Collie*,

These are all condensed in the expression of James, L.J., in *Ex parte Adamson, In re Collie*:[5] "Nobody ought to be estopped from averring the truth or asserting a just demand, unless, by his acts or words or neglect, his now averring the truth or asserting the demand would work some wrong to some other person who has been induced to do something, or to abstain from doing something, by reason of what he had said or done or omitted to say or do."

and by Mellish, L.J., in *Hunter* v. *Walters*.

"It is still," says Mellish, L.J.,[6] "a doubtful question at law . . . whether, if there be a false representation respecting the contents of a deed, a person who is an educated person, and who might, by very simple means, have satisfied himself as to what the contents of the deed really were, may not, by executing it negligently, be estopped as between himself and a person who innocently acts upon the faith of the deed being valid, and who accepts an estate under it. I do not

1 *Hardy* v. *Chesapeake Bank*, 51 Md. 582, 589, summarised. In *Morgan* v. *Railroad Co.*, 96 U. S. (6 Otto) 716, 720, it is said always to presuppose "error on one side and fault or fraud upon the other, and some defect of which it would be inequitable for the party against whom the doctrine is asserted to take advantage." The leading cases on estoppel by conduct are reviewed in *Leather Manufacturers' Bank* v. *Morgan*, 117 U. S. (10 Davis) 98, 103–112.

2 7 H. & N. 603, 633.

3 2 H. & C. 175, 182. In *Union Credit Bank* v. *Mersey Docks and Harbour Board*, [1899] 2 Q. B. 210, Bigham, J., calls attention to "the misleading wording of the head-note."

4 *Carr* v. *L. & N. W. Ry. Co.*, L. R. 10 C. P. 307; *Farmeloe* v. *Bain*, 1 C. P. D. 445; *Coventry* v. *G. E. Ry. Co.*, 11 Q. B. D. 778; *Seton* v. *Lafone*, 19 Q. B. D. 68; *Longman* v. *Bath Electric Tramways*, [1905] 1 Ch. 646.

5 8 Ch. D. 817. Kay, L.J., in *Low* v. *Bouverie*, [1891] 3 Ch. 111, 112, indulges in six propositions.

6 *Hunter* v. *Walters*, L. R. 7 Ch. 87.

think that the case of *Swan* v. *North British Australasian Co.*, a decision of which the learned Vice-Chancellor disapproves, is really a direct authority upon that question. . . . That decision does not go to the extent of saying that if the broker had filled them up with the same shares which he was authorised to insert and therefore had done what he was authorised to do, that then, because it was void at law from being executed in blank, nevertheless, the principal might not have been estopped."

M'Kenzie v. *British Linen Co.*,[1] may here be referred to. From July 17 till July 29 the appellant did not inform the respondents that his signature to a certain bill in their hands was a forgery; at which latter date he gave the information. At that time the bank was in no worse position than it was when he first was able to give the information to them. The Court of Session held the appellant estopped by his negligence from setting up the forgery; the House of Lords reversed this decision as being "contrary to justice"[2] to hold a man responsible for not giving information where, had he given any, the position of the other party would in no degree have been bettered. While thus deciding, the House of Lords carefully provided for the case where delay alters the rights of a party. "It would be a most unreasonable thing to permit a man, who knew the bank were relying upon his forged signature to a bill, to lie by, and not to divulge the fact until he saw that the position of the bank was altered for the worse."[3] In *Cornish* v. *Abington*,[4] where the jury drew the inference that the plaintiff was prejudiced, he succeeded. *M'Kenzie v. British Linen Co.*

Ogilvie v. *West Australian Mortgage and Agency Corporation*[5] presents the facts in a different aspect. In *M'Kenzie's case* the liability of the customer rested upon the fact of his having withheld from the bank knowledge of a forgery till the bank's position was materially prejudiced. In the present case, an agent of the bank had earlier and better information of the forgeries than the customer himself, and "it is hardly conceivable that the appellant would have been under any duty to reconvey to the bank the information which he had received from their own agent," [6] unless he had good cause to suspect that the agent was suppressing the knowledge from his principals; and this possibility was negatived by the jury. *Ogilvie v. West Australian Mortgage and Agency Corporation.*

In *Ewing* v. *Dominion Bank*[7] knowledge of a forgery of a promissory note purporting to charge them was brought home to merchants two days before the day of payment. They did nothing; and the Supreme Court of Canada held them estopped to deny the forgery to be their signature; for there was a duty on them to communicate with the bank "by telegraph or telephone," and by their default the bank was placed in a worse position. *Ewing v. Dominion Bank.*

The Court of Session has held [8] that a person whose name is forged to bills is not legally bound to answer letters addressed to him by persons to whom he stands in no special relation, asking whether he has put his name to bills purporting to be his that they hold. If there is Where no legal duty no obligation to answer letters of inquiry.

[1] 6 App. Cas. 82. The American cases are cited in *Allen* v. *Shaw*, 61 N. H. 95. Two valuable Canadian cases, *Ryan* v. *Bank of Montreal*, 14 Ont. App. 533, and *Merchants' Bank* v. *Lucas*, 15 Ont. App. 573, affirmed 18 Can. S. C. R. 704, should be referred to for the admirable and exhaustive judgments they contain dealing with the whole of this matter.

[2] Per Lord Watson, 6 App. Cas. 109.

[3] *Ibid.*

[4] 4 H. & N. 549.

[5] [1896] A. C. 257.

[6] *L.c.* 268.

[7] 35 Can. S. C. R. 133.

[8] *British Linen Co.* v. *Cowan*, 8 Fraser, 704.

no reason for adopting such a course, to do so is churlish; if there is, it is fraught with considerable danger where a jury is concerned. In the case in question, though the defendant said that probably he should have acted as he did in any case, yet he denied knowledge of the receipt of the letters.

Morris v. *Bethell*

Morris v. *Bethell*[1] marks the other side of the principle. There it was held[2] that "one who pays one bill which purports to bear his signature as acceptor, thereby makes evidence against himself that the person who wrote the acceptance did so with his authority; and, if the bill be given in the course of business implying a continuance of such authority, it may be conclusive evidence."[3]

Limits marked for the operation of the principle.

Between these limits where the abstaining from volunteering information causes no injury, and where a similar abstinence is a means of misleading, the inference to be drawn is for the jury. The two aspects both appear in *Bell* v. *Marsh*.[4]

Case of signing deed or document under a mistake as to its contents discriminated from the case of signing a document under a mistake as to its identity.

The case of a man signing a deed or document under a mistake as to its contents, or as to their operation, and the case of a signature to a document given under the belief that it was a different document from what it proves to be, must be discriminated. Thus Lord Hatherley, C., in *Hunter* v. *Walters*,[5] says: "In the early books we find Lord Coke saying that if a man is blind or illiterate, and an instrument is read over to him falsely, then the instrument is void. . . . I apprehend that if a man executes a solemn instrument by which he conveys an interest, and if he signs on the back a receipt for money—a document which, as the Vice-Chancellor observes, could not be mistaken—he cannot affect not to know what he was doing, and it is not enough for him afterwards to say that he thought it was only a form. That merely amounts to saying that a misrepresentation was made to him, under which he executed a deed; still the deed may have been exactly what he intended to execute, though he intended it to be used for a totally different purpose. But this does not affect the deed. The fraud of the person who used the deed for a different purpose does not make it less the deed of the person who executed it." And James, L.J., says:[6] "To my mind it is almost ludicrous to contend, and it would be most injurious to hold, that a man executing a deed and signing a receipt as a matter of form should be able to say that it is a nullity. Many young men put their names to pieces of paper upon the representation that it is a mere matter of form, and that they will never hear any more of it. They learn by experience that the form is a painful substance. Many a trustee has endeavoured in vain in this Court to escape from the consequence of his acts by saying, 'I signed a deed, and I signed a receipt for money as a matter of conformity'; which is another mode of saying 'I executed it as a matter of form.' But those trustees have been made most painfully to learn that the instrument they have so signed will, with the consequences, follow them, and cause them to suffer for their negligence."[7]

1 L. R. 5 C. P. 47.

2 Per Willes, J., *l.c.* 51.

3 Cp. *Trickett* v. *Tomlinson*, 13 C. B. N. S. 663; *Bank of England* v. *Vagliano*, [1891] A. C. 107.

4 [1903] 1 Ch. 528.

5 L. R. 7 Ch. 81; referring to *Thoroughgood's case*, 2 Co. Rep. 9 a; *Manser's case*, 2 Co. Rep. 3 a; see Vin. Abr. Fait (S); *Bedell* v. *Herring*, 11 Am. St. R. 307, note 318. Cp. Fry, L.J., *Imperial Loan Co.* v. *Stone*, [1892] 1 Q. B. 601.

6 L. R. 7 Ch. 84.

7 But see now as to this last illustration, The Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 24. *Ante*, 1259. Cp. *Young* v. *Clydesdale Bank*, 17 Rettie, 231.

In *Hunter* v. *Walters*, accordingly, the plaintiff was held bound, on the ground that he in fact intended to execute a deed, and the circumstances in which he carried out his intention did not make that intention void. But in *Foster* v. *Mackinnon*,[1] the defendant was induced to put his name upon the back of a bill by the fraudulent representation that he was signing a guarantee; and was held not bound by his signature, because he never intended to indorse a bill, but his signature was intended to be attached to a document of another sort. Byles, J., thus states the distinction:[2] "It was not his (defendant's) design, and if he were guilty of no negligence, it was not even his fault, that the instrument he signed turned out to be a bill of exchange. It was as if he had written his name on a sheet of paper for the purpose of franking a letter, or in a lady's album, or on an order for admission to the Temple Church, or on the flyleaf of a book, and there had already been, without his knowledge, a bill of exchange or a promissory note, payable to order, inscribed on the other side of the paper. To make the case clearer, suppose the bill or note on the other side of the paper in each of these cases to be written at a time subsequent to the signature, then the fraudulent misapplication of that genuine signature to a different purpose would have been a counterfeit alteration of a writing, with intent to defraud, and would therefore have amounted to a forgery. In that case the signer would not have been bound by his signature for two reasons—first, that he never in fact signed the writing declared on; and, secondly, that he never intended to sign any such contract."[3]

Hunter v. *Walters* and *Foster* v. *Mackinnon* distinguished.

By Byles, J.

The Court of Appeal subsequently state the rule:[4] "If a person who seals and delivers a deed is misled by the misstatements or misrepresentations of the persons procuring the execution of the deeds, so that he does not know what is the instrument to which he puts his hand, the deed is not his deed at all, because he was neither minded nor intended to sign a document of that character or class, as, for instance, a release while intending to execute a lease. Such a deed is void." If otherwise, it cannot be considered void, but it is voidable, except against a purchaser for value without notice.

A duty may arise to amend representations which when made were absolutely correct. The principle applicable is stated by Turner, L.J.:[5] "I take it to be quite clear, that if a person makes a representation by which he induces another to take a particular course, and the circumstances are afterwards altered to the knowledge of the party making the representation, but not to the knowledge of the party to whom the representation is made, and are so altered that the alteration of the circumstances may affect the course of conduct which may be pursued by the party to whom the representation is made, it is the imperative duty of the party who has made the representation to communicate to the party to whom the representation has been made the alteration of those circumstances; and that this Court will not

Duty to amend representation originally correctly made.

[1] L. R. 4 C. P. 704; *Onward Building Society* v. *Smithson*, [1893] 1 Ch. 1. *Herdman* v. *Wheeler*, [1902] 1 K. B. 361. *Lloyd's Bank* v. *Cooke*, [1907] 1 K. B. 794.

[2] *L.c.* 712. In *Lloyds Bank* v. *Bullock*, [1896] 2 Ch. 192, the fraudulent deed was held not a mere nullity, as it was also in *King* v. *Smith*, [1900] 2 Ch. 425.

[3] Cp. *London and South-Western Bank* v. *Wentworth*, 5 Ex. D. 96. The distinction pointed out in the text is very fully and ably discussed in a New Zealand case, *Bank of Australasia* v. *Reynell*, 10 N. Z. L. R. 257 (C. A.).

[4] *National Provincial Bank of England* v. *Jackson*, 33 Ch. D. 1, 10.

[5] *Traill* v. *Baring*, 4 De G. J. & S. 329.

hold the party to whom the representation has been made, bound unless such a communication has been made." [1]

Misrepresentation must be of existing facts.

One other limitation ought to be noticed. Where the ground of action is a misrepresentation, it must be "of existing facts, and not of a mere intention," since "in the former case it is a contract, in the latter it is not." [2]

FACILITATING FRAUD.

Young v. *Grote*,[3] which has been alleged to be a decision involving estoppel, has been examined elsewhere,[4] with the result that it was found to have been decided upon breach of duty and not upon estoppel (although the term is often and loosely applied in the discussions on the validity of the decision); and so needs here no further notice.

Ingham v. *Primrose*.

Ingham v. *Primrose*[5] was decided by judges of the greatest reputation, and in a considered judgment. The acceptor of a bill of exchange, with the intention of cancelling it, tore it into two pieces and threw them into the street. They were picked up by the indorser, joined together, and the bill was put into circulation. The acceptor was held liable, because "such negotiable instruments have, by the law merchant, become part of the mercantile currency of the country; and, in order that this may not be impeded, it is requisite that innocent holders for value should have a right to enforce payment of them against those who, by making them, have caused them to be a part of such currency." Brett, L.J.'s, comment on this case, in *Baxendale* v. *Bennett*, is: [6] "The correct mode of dealing with it is to say we do not agree with it."

Brett, L.J.'s comment.

Brett, L.J.'s, off-hand dismissal of the case has not been accepted. In *Nash* v. *De Freville* [7] Collins, L.J., with reference to Brett, L.J.'s, expression, says that the case was "decided in a considered judgment by a very strong Court, not questioned, so far as I know, elsewhere, and at all events sound in principle if wrong on the facts." The remark of Collins, L.J., joined with the fact that *Ingham* v. *Primrose* [8] is commented on by Lord Watson in *Scholfield* v. *Earl of Londesborough* [9] as still a binding decision, though at the time Brett, L.J.'s, expression of disapprobation was before him, more than countervail Brett, L.J.'s, opinion. Lord Watson's explanation of the decision is adequate for its vindication; the acceptor "had negligently put into circulation a negotiable document which had not been properly cancelled." The element of negligence is non-essential. Whether negligent or not, the acceptor had allowed his acceptance to flow into the currency and was bound to make it good in the hands of a holder in good faith for value. Apart from what was accepted as the practice of tearing bills in half to send through the post, the condition of a bill that had been torn in half and then pasted together would have been such a blemish on the face of the instrument as to require an intending

See per Fry, L.J., *In re Scottish Petroleum Co.*, 23 Ch. D. 438. The distinction between a representation made independently of duty and a representation made in the course of duty has been already touched on, *ante*, 1337.

[2] *Jorden* v. *Money*, 5 H. L. C. 185. See per Lord Selborne, C., *Maddison* v. *Alderson*, 8 App. Cas. 473, where *Loftus* v. *Maw*, 3 Giff. 592, is overruled. As to the law applicable where misrepresentations have induced one to enter into a contract which he wishes to rescind, and the distinction between a fraudulent representation and an innocent misrepresentation, see per Blackburn, J., *Kennedy* v. *Panama, &c. Mail Co.*, L. R. 2 Q. B. 586.

[3] (1827) 4 Bing. 253.

[4] *Ante*, 1317.

[5] (1859) 7 C. B. N. S. 82.

[6] 8 Q. B. D. 532.

[7] [1900] 2 Q. B. 89.

[8] 7 C. B. N. S. 82.

[9] [1896] A.C. 538.

transferee to take the risk of its being "complete and regular";[1] or of the "cancellation" being "apparent thereon."[2]

The different conclusions arrived at on this matter of fact explains the different views on the authority of the case.

Proposition in *Ingham* v. *Primrose.*

The proposition of law for which *Ingham* v. *Primrose* may be cited, and which the Court there described as "settled," is: "If the defendant had drawn a cheque, and before he had issued it he had lost it or it had been stolen from him, and it had afterwards found its way into the hands of a holder for value without notice, who had sued the defendant upon it, he would have had no answer to the action. So if he had indorsed in blank a bill payable to his order, and it had been lost or stolen before he delivered it to any one to indorse." The reason is that in the event of the cheque or bill getting into circulation, the maker had made it part of the currency of the country. This proposition, it should be noticed, in no way conflicts with what Parke, B., says in *Bank of Ireland* v. *Trustees of Evans's Charities*,[3] which is indeed its complement: "If a man should lose his cheque-book or neglect to lock the desk in which it is kept, and a servant or stranger should take it up, it is impossible, in our opinion, to contend that a banker paying his forged cheque would be entitled to charge his customer with the payment." This is because, however lax the conduct may have been, his act had no relation to the issue of any negotiable instrument by him; and there was no legal duty on him in the matter.

Where no duty of negligence does not disentitle.

As Cockburn, C.J., says:[4] "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 except in market overt."

But actual payment of notes or bills does not divest the drawer or acceptor of responsibility, where he allows them to continue outside his own control without cancelling their potentialities as negotiable instruments.[5]

Coles v. *Bank of England.*

Another case, of which Brett, L.J., expresses disapproval in *Baxendale* v. *Bennett*, is *Coles* v. *Bank of England*,[6] an action by the executors of a stockholder. The deceased, a very aged woman, was in the habit of being accompanied by her nephew, a clerk in the bank, when she went for her dividends, for which she signed receipts both on the dividend warrant and in the bank-books. The nephew must have handed over to her the full amount of dividends due, though he had in fact taken another woman to the bank, who personated the testatrix from time to time, and by forged signatures had transferred the greater part of the stock. The jury found that the deceased had been guilty of gross negligence, and that the bank had not been guilty of negligence. On motion to enter the verdict for the plaintiff the rule was discharged, on the ground that the facts found by the jury entitled the defendant to the verdict; or, as stated by the Lord Chancellor in *Bank of Ireland* v. *Trustees of Evans's Charities*,[7] "that the conduct of the owner of the stock, in subsequently signing from time to time receipts for reduced sums when the sums had been reduced by previous forgery,

[1] 45 & 46 Vict. c. 61, § 29. Cp. *Scholey* v. *Ramsbottom*, 2 Camp. 485.
[2] 45 & 46 Vict. c. 61, s. 63, sub-s. (1).
[3] 5 H. L. C. 410
[4] *Johnson* v. *Crédit Lyonnais*, 3 C. P. D. 42.
[5] *Nash* v. *De Freville*, [1900] 2 Q. B. 72.
[6] 10 A. & E. 437.
[7] 5 H. L. C. 389, 414.

was in truth a ratification of what had previously taken place." "That," said the Lord Chancellor, "certainly seems to me to be rather a strong result." [1]

Negligence must be proximate.

The main value of the decision in *Bank of Ireland* v. *Trustees of Evans's Charities* [2] is that it establishes the proposition that negligence to prevent a recovery must be "in, or immediately connected with," the transaction itself which is complained of. We have, therefore, to ascertain the precise import of this proposition.

Bank of Ireland v. *Trustees of Evans's Charities.*

Plaintiffs, the trustees of the charities, alleged that they were possessed of stock; that they had not transferred it; that it was the duty of the defendants—the bank—to transfer on request; that they requested the defendants to transfer it, and that the defendants refused to make the transfer. The defendants set up a transfer under forged powers of attorney, for which they said the plaintiffs were responsible, since they allowed their secretary to have their corporate seal in his possession. The Act incorporating the trustees of the charities gave to any meeting of trustees or the majority present thereat (provided such majority should consist of three trustees at the least) power "to order and dispose of the common seal of the said corporation, and the use and application thereof." There was no evidence how far this had been acted on beyond the fact that the secretary, the confidential officer of the trustees, had the custody of the seal, though not power to use or apply it. Further, the bank were only empowered to register transfers or assignments if signed by the person or persons making such assignment or transfer. "Or if such person or persons be absent, by his, her, or their attorney or attorneys thereunto lawfully authorised in writing, under his, her, or their hand and seal, or hands and seals to be attested by two or more credible witnesses." [3] The transfer could not, therefore, be made by merely impressing the seal; besides this, the signature of the witnesses was necessary.[4]

Parke, B.'s, distinction between direct and remote negligence.

In delivering the opinion of the judges to the House of Lords, affirming the judgment of the Irish Exchequer Chamber, Parke, B., drew a distinction between direct and remote negligence. Direct negligence is that which itself by natural operation is productive of injury. Remote or indirect negligence must operate by the intervention of some new cause. Where the course that events follow is a result that is seen to have flowed in ordinary course from the particular negligence in the case, then the negligent person is liable to answer for the neglect; where the result is not "the necessary, or ordinary, or likely result of that negligence," [5] then, according to the general principle of law, the loss must lie where it falls.[6] In the case before the

[1] See, too, per Lord Brougham, 5 H. L. C. 415, noticing *Young* v. *Grote* and *Coles* v. *Bank of England*: "I agree in what the learned judges have said upon them, and also in the doubt insinuated rather than expressed by the learned judges, and more plainly intimated by my noble and learned friend, as to how the latter case might have been determined if it had not been disposed of in the way in which it was."

[2] 5 H. L. C. 389.

[3] 37 Geo. III. c. 54, s. 6 (Irish Statutes).

[4] For valuable information as to seals and sealing, see 4 Kent, Comm. (12th ed.) 451, n. (c), and 452–455; also Shep. Touch. (Preston's ed.) 57; Com. Dig. Fait (A 2), Sealing. Vin. Abr. Prerog. of the King (A *b*), Seals; Pollock and Maitland, Hist. of English Law (2nd ed.), vol. i. 508; vol. ii. 223. There is a curious passage in Fleta with regard to negligence in the custody of a seal. After suggesting various defences to actions on a deed, it concludes: "*Dum tamen nihil sit quod imperitiæ vel negligentiæ suæ possit imputari ut sigillum suum senescallo tradiderit vel uxori quod cautius debuit custodivisse in quibus casibus oportebit vocantem vocare contrarium, et tunc fiant inquisitiones per talia brevia*": Lib. 6, c. 33, sec. 2. Cp. *Hibblewhite* v. *M'Morine*, 6 M. & W. 200. *Powell* v. *London and Provincial Bank*, [1893] 1 Ch. 610, 617.

[5] 5 H. L. C. 410.

[6] *Ante*, 657.

House, tho "negligence in the custody of the seal" "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, hut for tho 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.*" [1]

Bank of Ireland v. *Trustees of Evans's Charities* considered.

In considering this case it is apparent that tho difficulties to he got over hy the bank were numerous. To establish any defence they had to show, first, negligence of the trustee; secondly, damage flowing therefrom in natural and ordinary course. But negligenco, as wo have frequently insisted, is dependent on duty.[2] The negligence alleged was in not taking more care in tho custody of their seal. If the trustees were in the position of a private person, as Parke, B., points out,[3] a similar duty must exist to safeguard a cheque-hook, to lock up the desk in which it is kept, or to he so answerable for his goods that if "a servant took them and sold them he must he considered as having concurred in the sale." The trustees were a corporation with statutory duties, among which it does not appear to have been alleged there was any in this respect that the hank could call on them to perform. Moreover, they had done nothing beyond leaving their seal in the custody of their confidential officer. This they were empowered to do, observing certain formalities.[4] Had they done so with the formalities the same results would have followed. Yet the trustees would have been justified. At worst their act would have been an exercise of a discretionary power attended with unhappy results. If the formalities were not observed, the neglect of them (assuming the bank's right to complain) could have no connection with the forgery. The case thus involves the same principle as that illustrated by *Sharp* v. *Powell*.[5]

Subsequent negligence for which the trustees were not liable neutralises their own antecedent negligence.

Secondly, on the assumption that there was a duty on the part of the trustees to keep the seal out of the possession of the secretary,[6] an equal difficulty existed. The custody of the seal alone would not enable a fraud to be committed, even granted there was also a duty on the trustees to anticipate a fraud. The plaintiffs were entitled to anticipate that tho "two or more credihle witnesses," who were required to attest the transfer, would perform their duty faithfully, and that even if they did not, the bank would "look to and see a true and genuine authority for a transfer." [7] The wrongful act of the trustees, if there were a wrongful act of which the bank could avail themselves, could thus only hecome effectual through a default in duty of some person over whose actions the trustees had no control and on whose right action they were therefore entitled to count. Such default accordingly rendered the previous negligence of the plaintiffs remote and not actionahle.

[1] Per Parke, B., 5 H. L. C. 410. No adequate study of this case can be had without reading the judgments delivered in the Irish Exchequer Chamber, 3 Ir. C. L. R. 280. In *Leeds Sanitary Steam Laundry Co.* v. *Barclays*, 22 Times L. R. 737, the secretary of a company had the custody of the company's cheque-book and bank pass-book, production of which latter was not required at their meetings. Kennedy, J., held that the company were not estopped from denying the signature of a director forged to cheques by the secretary.

[2] See per Lord Esher, M.R., *Le Lievre* v. *Gould*, [1893] 1 Q. B. 497.

[3] 5 H. L. C. 410.

[4] See per Crampton, J., in the Irish Queen's Bench, 3 Ir. C. L. R. 335.

[5] L. R. 7 C. P. 253.

[6] See 3 Ir. C. L. R., per Ball, J., 315, per Crampton, J., 335, and per Monahan, C.J., 374.

[7] Per Perrin, J., *l.c.* 323.

Merchants of the Staple of England v. *Bank of England*

Merchants of the Staple of England v. *Bank of England* [1] was decided on the authority of *Bank of Ireland* v. *Trustees of Evans's Charities*. An attempt was made to discriminate the case by drawing attention to Parks, B.'s, reference to the fact that the attestation of the transfer in *Bank of Ireland* v. *Trustees of Evans's Charities* asserted that the sealing and delivery was had in the presence of the witnesses by the successive chairmen of the company. Fry, L.J., considered this to be immaterial: [2] "It appears to me that the attestation, so far as it referred to the presence of the chairman, was immaterial. The terms of the statute which required the attestation did not require that it shall be executed in the presence of the chairman at all, and therefore I cannot help concluding that it is really an immaterial matter, though, no doubt, the fact that certain persons so certified is evidence of their carelessness."

Fry, L.J.'s, reasoning considered.

Yet surely this very fact of the carelessness of certain persons is vital. Assuming actionable negligence and an uninterrupted course of events subsequent to the negligence, if the view presented here is correct, it would be difficult to avoid the conclusion that the person guilty of the negligence is responsible for the consequences. Where the sequence of consequences fails is where a duty of care has to be exercised by third persons. The presumption is that they will do their duties. Thus everything subsequent to the time when they are bound to intervene can only indirectly and remotely be referred to previous agents, whose action in law then becomes legally ineffective action. The true ground of the likeness of this case to *Bank of Ireland* v. *Trustees of Evans's Charities* is that in neither case was there any legal duty on the plaintiffs to do some further act which they had not done. Any duty that existed was a duty not to mislead.[3] The plaintiffs did nothing, represented nothing; and mere laxity in the custody of the seal alone would not enable a transfer of stock to be effected.

Arnold v. *Cheque Bank*

Arnold v. *Cheque Bank* [4] illustrates the same principle. An action was brought to recover the proceeds of a draft of £1000, upon the ground that it was received by the defendants in circumstances which made it money received to the use of the plaintiffs, who were merchants in New York, and desired to transmit the draft in question to Bradford. To this end the draft was specially indorsed, and enclosed in a letter for England. It was stolen during transit, an indorsement forged, and was ultimately paid by the defendants. The plaintiffs sought to recover the money thus paid. Payment was resisted by the defendants on the ground that the plaintiffs had been negligent in the transmission of the draft; and to prove this they tendered evidence to

[1] 21 Q. B. D. 160. See also *In re Cooper, Cooper* v. *Vesey*, 20 Ch. D. 611, 634; *Patent Safety Gun Cotton Co.* v. *Wilson*, 49 L. J. C. P., per Brett, L.J., 715: "In point of law no negligence can justify a thief or forger"; also the remarks of Lord Field in *Vagliano's case*, [1891] A. C. 169. In Canada the same principle is recognised in *Agricultural Savings, &c. Association* v. *Federal Bank*, 6 Upp. Can. App. (Tupper) 192; and in *Saderquist* v. *Ontario Bank*, 15 Ont. App. 609, where an ignorant man, a foreigner, deposited money with the defendants, and received a non-negotiable deposit receipt for the amount. The depositor's signature was left with defendants for identification. Defendants, however, paid to a person, who presented the note, without identification. From the time of payment, in April, to December, nothing was done. In December the plaintiff employed a solicitor, who did nothing. In April he consulted another; a demand on the bank was then made, and this was the first intimation of the fraud practised on them. The Court held there was no legal duty cast on the plaintiff to notify the fraud to defendants, and thus an essential element to estoppel by conduct was absent from their case. *Shipman* v. *Bank of State of New York*, 120 N. Y. 318, 22 Am. St. R. 821.

[2] 21 Q. B. D. 177. [3] Per Parke, B., 5 H. L. C. 416. [4] 1 C. P. D. 578.

show "an usual or almost invariable practice of sending, besides the letter containing the draft, a letter of advice by the same or another ship."[1] This was rejected, and in the result a verdict was directed for the plaintiffs. An order *nisi* for a new trial, on the ground of the rejection of evidence of the plaintiff's neglect of the ordinary usage of merchants, and that the plaintiffs were precluded from recovering by neglect of proper precautions in the custody and dispatch of the draft, was discharged: the plaintiffs could not be guilty of negligence in relying on the honesty of their servants in the discharge of their ordinary duty of conveying letters to the post; neither was there a duty to the general public to exercise the same care in transmission of the draft as if any or every servant employed was a notorious thief.[2] As to the duty of sending a separate letter of advice with it, "which would entail upon the senders of cheques new and unheard-of responsibilities," the Court held that "this duty would be collateral to the indorsing and forwarding of the draft, and the omission of it could in no sense be considered as the proximate cause of the larceny and forgery which have occurred."[3] The draft was a genuine draft and the bankers were estopped from denying it when presented by a genuine indorsee and true owner of the bill.[4]

Stock handed over on forged order.

Which of two innocent persons is to be loser.

Hildyard v. *South Sea Co. and Keate*

Akin to the cases we have considered is the case of stock or funds handed over under a forged order to an innocent purchaser from the forger. The question then arises: Who is to suffer loss—the rightful owner, the holder of the stock, or the innocent assignee?

The earliest decision on the point dates so far back as 1722. In *Hildyard* v. *South Sea Co. and Keate*,[5] South Sea stock of the plaintiff was transferred on the authority of a forged letter of attorney to the defendant Keate. On the plaintiff claiming restitution, it was held by Sir Joseph Jekyll that "a forged letter of attorney was, as to him, the same as no letter of attorney; consequently his stock, which has been transferred from him without any authority at all, ought to be restored to him." The decision further was that Keate, the innocent purchaser, and not the company, was to restore the stock, and also to pay back the dividend which he had received, as well as pay to the plaintiff and the company their costs; "and it would be of public use that those who accept of a transfer of stock under a letter of attorney should be obliged to take strict care of the validity and reality of such letter of attorney, for no other person can be so properly concerned to do it."

not followed by Lord Chancellor Northington in *Ashby* v. *Blackwell*.

In *Ashby* v. *Blackwell*,[6] Lord Chancellor Northington declined to follow this decision, and decided that "a trustee, whether a private person or body corporate, must see to the reality of the authority empowering them to dispose of the trust-money; for if the transfer is made without the authority of the owner the act is a nullity, and in consideration of law and equity the rights remain as before." As to *Hildyard* v. *South Sea Co. and Keate*, the Lord Chancellor differed

[1] 1 C. P. D. 584.

[2] See per Fry, L.J., *Fine Art Society* v. *Union Bank of London*, 17 Q. B. D. 713; also *McEntire* v. *Potter*, 22 Q. B. D. 438; *Bilknap* v. *National Bank of North America*, 100 Mass. 376.

[3] 1 C. P. D. 590. Cp *Vagliano's case*, [1891] A. C. 107.

[4] Per Lord Watson, *Scholfield* v. *Earl of Londesborough*, [1896] A. C. 538.

[5] 2 P. Wms. 76; cp. *Harrison and Pryse's case* (1740), Barnard. (Ch.) 324, which Best, C.J., in *Davis* v. *Bank of England*, 2 Bing. 406, considers "not correctly reported by Barnardiston," and refers to 2 Atk. 120, where it appears *sub nom. Harrison* v. *Harrison*.

[6] (1765) 2 Eden, 299, Ambler, 503.

"both from the decision and the reasoning" of that case.[1] "I think, he said, "it was not incumbent upon Blackwell to inquire into the letter of attorney, because I think the letter of attorney in this and similar cases is no part of the purchaser's title. The title is the admission into the company as a partner *pro tanto*, he accepting the stock on the conditions of the partnership. The letter of attorney is only the authority of the company to transfer. In fact, they have so considered it, for they have made regulations to prevent frauds in letters of attorney, which, they now insist, concerned not them, but the purchaser, which is repugnant. . . . On the other hand, they (the company) must and ought to answer for their and their servants' negligence."

Cotton, L.J.,[2] considered that "the case was really decided upon the ground that the company, by their secretary, had been guilty of negligence; at the time when the forged letter of attorney was delivered to them, it did not purport to have been executed according to the requirements of the constitution of the company."

Davis v. *Bank of England.* Judgment of Best, C.J.

A similar point came before the Common Pleas in *Davis* v. *Bank of England*.[3] The judgment of Best, C.J., is a leading authority. In the course of it he said:[4] "It is the duty of the bank to prevent the entry of a transfer until they are satisfied that the person who claims to be allowed to make it is duly authorised to do so. They may take reasonable time to make inquiries, and require proof that the signature to a power of attorney is the writing of the person whose signature it purports to be. It is the bank, therefore, and not the stockholder, who is to suffer, if *for want of inquiring*—and it does not appear that any inquiry was made in this case—they are imposed upon, and allow a transfer to be entered in their books, made without a proper authority." "But,[5] to prevent as far as we can the alarm which an argument urged on behalf of the bank is likely to excite, we will say that the bank cannot refuse to pay the dividends to subsequent purchasers of these stocks. If the bank should say to such subsequent purchasers, 'The persons of whom you bought were not legally possessed of the stocks they sold you,' the answer would be: 'The bank, in the books which the law requires them to keep, and for the keeping which they receive a remuneration from the public, have registered these persons as the owners of these stocks, and the bank cannot be permitted to say that such persons were not the owners.'" "We agree[6] with the counsel for the bank, that if it had appeared that the bank had paid these dividends to persons to whom (if the plaintiff had informed them of the forgeries as he ought to have done on March 5, 1820) they could have refused to pay them, he cannot recover such dividends in this action. We say, in the language of Lord Mansfield in *Bird* v. *Randal*,[7] 'That whatever will in equity and conscience, according to the circumstances of the case, bar the plaintiff's recovery, may be given in evidence by the defendant, because the plaintiff must recover upon the justice and conscience of his own case, and on that only.'" "It is not enough for the defendants to say that they might have paid these dividends to

[1] *l.c.* 302.

[2] *Simm* v. *Anglo-American Telegraph Co.*, 5 Q. B. D. 200.

[3] (1824), 2 Bing. 393. This case was much considered by the Irish judges in the Ex. Ch. in *Bank of Ireland* v. *Trustees of Evans's Charities*, 3 Ir. C. L. R. 303, 319, 336, 340, 342, 352, 373, 379. *Coles* v. *Bank of England*, 10 A. & E. 437. has been noticed already.

[4] 2 Bing. 405.

[5] *l.c.* 407.

[6] *l.c.* 409.

[7] 3 Burr. 1353

other persons; to defend the action on the principle laid down by Lord Mansfield they must prove that they have paid them to persons to whom they could have refused to pay them had they been informed of the forgeries." "This case [1] was put to us in argument. A knowing that B had forged A's name to a draft on his banker, sees B come out of the banker's shop with the money obtained by the forgery, and neither arrests B nor gives any information to the banker. Could A recover this money again from the banker? A jury in such a case must find that A was privy to the forgery at the time it was committed, and would, I think, infer that A assented to it, and such finding would prevent his recovering in an action against the banker." [2]

Citing Lord Mansfield, C.J.

The judgment of the Common Pleas was reversed upon writ of error by the King's Bench,[3] on what Shadwell, V.C., in *Sloman* v. *Bank of England*,[4] describes as the "singular ground that it could not be the duty of the bank to pay the dividends until they had received them from Government," and on the ground that "there is no allegation in the declaration that the bank ever had received the dividends from Government, nor is there any fact found by the jury to cure the want of that allegation." [5] As to this the remark of Shadwell, V.C., appears eminently just: "It seems to me that every Court of Law ought to take it for granted that that which the Legislature says shall be done has been done." [6] The principles laid down by Best, C.J., were not impugned, and have since been referred to in subsequent cases as rightly setting forth the law.[7]

Judgment of Common Pleas reversed by the King's Bench.

The Fauntleroy forgeries resulted in a crop of cases where the rights of stockholders in relation to forgery was discussed in all their aspects. In the most important of these, *Marsh* v. *Keating*,[8] the right of the stockholder to have stock replaced which had been sold by virtue of forgery was practically admitted. The Bank of England made an agreement with the stockholder that they would continue to pay her the amount of dividends on the stock fraudulently transferred from her name, pending proceedings against Messrs. Marsh, the firm in which Fauntleroy was a partner, to recover from them the proceeds of the stock which had been paid in to their firm. The plaintiff's contention was that where the fruits of stock obtained by means of a forged power are traced into the possession of a defendant, he is liable to account to the true owner of the same for them. The bankers, Messrs. Marsh, as against this, contended that the power of transferring Bank of England stock is statutory; and that inasmuch as no transfer complying with the statutory requirements had been made, the stock still stood to the plaintiff's name in the bank-books, and that *Davis* v. *Bank of England*[9] was authority for this. In their opinion to the House of Lords, the judges declined to consider this point, which they treated as irrelevant; and concluded that the stockholder was "at liberty to abandon and give up all claims to her former stock so standing in

Marsh v. *Keating*

1 2 Bing. 411.

2 Cp. *M'Kenzie* v. *British Linen Co.*, 6 App. Cas., per Lord Blackburn, 100.

3 5 B. & C. 185. Shortly after the decision in the K. B., Best, C.J., in *Hume* v. *Bolland*, Ry. & Moo. 371, 376, said that he and the judges of the Common Pleas adhered to their opinion. Sir E. Sugden, *arguendo*, *Marsh* v. *Keating*, 2 Cl. & F. 267, says: "There was nothing in their decision to affect the judgment of Best, C.J., on the merits," and the judges, in giving their opinion, *l.c.* 283, while holding it unnecessary to discuss the point, in no way intimated disapprobation.

4 (1845), 14 Sim. 475, 486.

5 5 B. & C. 187.

6 14 Sim. 486.

7 *Barton* v. *North Staffordshire Ry. Co.*, 38 Ch. D. 458, 464.

8 2 Cl. & F. 250.

9 2 Bing. 393.

her name, and to sue for the money produced by the sale of such stock as for her own money, which, we think, has been sufficiently traced into the hands of the defendants below." This affirms[1] that "actual receipt of the money produced by the sale and transfer of their [plaintiff's] annuities" was sufficient to charge the defendants with the duty of restitution.[2] In *Jacobs* v. *Morris*,[3] *Marsh* v. *Keating* was discussed. Farwell, J.,[4] was of opinion that two questions had to be decided. "First, did the money actually come into the possession of the defendants? Secondly, if it ever was in their possession, had the defendants the means of knowledge while it remained in their hands that it was the money of the plaintiff and not the money of Fauntleroy?" This view was approved by the majority of the Court of Appeal; but Williams, L.J., was not sure[5] that "either the House of Lords or the judges whose opinion was taken meant to decide either that ignorance and want of means of knowledge will exonerate a person, through whose account a sum of money has passed, from responsibility, or that knowledge of the fact is essential to liability. Nothing more seems to have been decided than that the defendants could not rely upon ignorance if they had the means of knowledge." "The ignorance in such a case seems evidence of negligence." "I have no doubt myself, that the *onus* in such a case is on the person through whose account the money passed; but, whatever may have been the intention of the decision in *Marsh* v. *Keating*, I am not prepared to say that a man who places his account at a bank under the absolute control of an agent, giving him the power to indorse cheques payable to his order, including cheques crossed with the name of his bankers, and to sign cheques drawn on his account, had not the means of knowledge, at all events after a lapse of time, of what was being paid into and paid out of his account by his agent."

Sloman v. *Bank of England.*

In *Sloman* v. *Bank of England*[6] a curious complication arose, and caused the suit to be prosecuted in Chancery. One of two trustees of a sum of stock sold it out under a power of attorney to which he had forged the signature of his co-trustee, and subsequently absconded. The bank refused to replace the stock; and the plaintiffs were advised that as the stock was standing in the joint names of the trustees, one alone could not bring an action at law against the bank. The Vice-Chancellor held that a Court of Equity would compel the bank to reinvest the stock in the name of the other trustee, adding:[7] "Upon the mere restitution of the stock a right would accrue to" the holder "to receive the dividends from the time when the stock was abstracted."

Midland Ry. Co. v. *Taylor.*

Midland Ry. Co. v. *Taylor*[8] was argued by Sir Hugh Cairns on a subtle distinction between its facts and those which existed in *Sloman* v. *Bank of England*. It was contended that in that case the defrauded trustee was alive, and his legal rights complete and enforceable, while in the present case the defrauded trustee had died, so that his right of action was altogether gone, and the other trustee, who had transferred the stock by deed, forging his co-trustee's name, had himself duly executed the deed of transfer. The argument was thus summed up: "All that the appellants did was to act on a deed which, as to them, was a lawful authority for the transfer, but if not so at that time, was

[1] *Stone* v. *Marsh*, 6 B. & C. 551.

[2] *Marsh* v. *Keating*, 2 Cl. & F. 250, was followed *Reid* v. *Rigby*. [1894] 2 Q. B. 40. Cp. *Bannatyne* v. *MacIver*, [1906] 1 K. B. 103.

[3] [1902] 1 Ch. 816.

[4] [1901] 1 Ch. 270.

[5] [1902] 1 Ch. 830.

[6] 14 Sim. 475.

[7] *L.c.* 492.

[8] (1860), 28 Beav. 287; 3 H. L. C. 751.

ao afterwards, for Bright, becoming the aurvivor of the two partners, became the *dominus* of the stock." [1] This argument did not prevail either with the Master of the Rolls or in the House of Lords, whither the case was carried (after enrolment). Lord Westbury, C., was particularly emphatic: "There can be no possible doubt that there is a title in that personal representative (of the defrauded trustee) to call on the company to replace the stock. . . . It is impossible to say that the right, which existed at the time when the forged transfer was made, is taken away and lost by the accidentel circumstance of Taylor subsequently dying in the lifetime of Bright." [2]

Conclusion.

The law appears clearly esteblished in the course marked out by these decisions. No one is to be deprived of his property without his assent; and property wrongfully transferred or stolen must be restored to the rightful owner. On the presentation to a banker or a trustee of funds of a certificate for transfer, the parties required to transfer must act upon their own responsibility, and if misled, though wholly without fault, they must suffer for their mistake; and their loss can only be shifted where the act of the true owner has brought about the state of things which has induced them to part with possession.[3]

Certificates and Certification.

We are here to have a deal to do with the effect of the issue by a company of a certificate of stock, which may prove invalid as against the registered owner, but is binding by estoppel on the company which issues it.

Certificate.

By the Companies Act, 1862, sec. 31,[4] a certificate, which is under the seal of the company, is made *primâ facie* evidence of title. If faith were not given to the solemn assertions of a company under their common seal, "it would," says Lord Cairns,[5] "paralyse the whole of the dealings with shares in public companies." A "certification," the effect of which is considered presently when discussing *Bishop* v. *Balkes Consolidated Co.*,[6] stands on a wholly different footing, and is a representation made by the secretary of a company that a transferor of shares is registered as owner of a block of shares, some of which he proposes to dispose of, or which he proposes to dispose of to more than one transferee, and is to obviate the difficulty of the transfer not being accompanied with the certificate of the whole block.

Certification.

Not compulsory on company.

The representation is made for Stock Exchange purposes only. Certifications are never certified under the company's seal and there is no obligation on the company to give them.[7]

Delivery of the certificate with a transfer executed in blank accompanying it does not pass the full rights of property in the shares "notwithstanding his having parted with the certificate and transfer, the originel trensferor, who is entered as owner in the certificate and register, continues to be the only shareholder recognised by the

1 8 H. L. C. 754.

2 *L.c.* 756. *Barton* v. *L. & N. W. Ry. Co.*, 24 Q. B. D. 77; *Barton* v. *North Staffordshire Ry. Co.*, 38 Ch. D. 458.

3 *Swan* v. *North British Australasian Co.*, 7 H. & N. 603, 2 H. & C. 175. The American authorities accord with the English: *Telegraph Co.* v. *Davenport*, 97 U. S. (7 Otto) 369.

4 25 & 26 Vict. c. 89.

5 *Burkinshaw* v. *Nicolls*, 3 App. Cas. 1017.

6 25 Q. B. D. 512.

7 *Whitechurch* v. *Cavanagh*, [1902] A. C., per Lord Macnaghten, 126.

company as entitled to vote and draw dividends in respect of the shares until the transferee or holder for the time being obtains registration in his own name." [1]

In re Bahia and San Francisco Ry. Co.

In re Bahia and San Francisco Ry. Co.[2] deals with the liability of a company by virtue of secs. 25, 35, of the Companies Act, 1862, who register a fraudulent transfer to the purchaser of the shares registered under the forged deed. The principle of *Pickard* v. *Sears* [3] as explained by *Freeman* v. *Cooke* [4] then applies. By granting a certificate the company make a statement that they have transferred the shares to the person to whom the certificate is issued and that he is the holder of them. A purchaser from the person to whom the certificate is issued can maintain against the company that they are estopped from saying that the plaintiffs are not the owners; for they had purchased on a statement of title issued by the company and which the company intended to be acted on. As Martin, B.,[5] states the point: "It would not require much, or indeed any, authority to induce me to hold that if persons conduct themselves so as to show that another is owner of property, they cannot afterwards turn round and say that the property was not his, if the representation had been acted on." The test Bramwell, B., applies is whether the purchaser "has been injured by their act"—the company's.

Company may have time for inquiry.

But a company is not bound, even though a transfer tendered to them is in order and accompanied by a certificate, to register it at once. They are entitled to delay for a reasonable time and to make reasonable inquiries before registering; and the general practice is to delay registration till there has been an opportunity given to the registered holder to answer a letter of advice of the presentation of the transfer,[6] and a deposit of a certificate of shares accompanied by a blank transfer is not sufficient to warrant the inference of a transfer of property, for it is consistent with a deposit for security against advances; [7] since "a certificate of shares or stock" "is merely a solemn affirmation under the seal of the company that a certain amount of shares or stock stands in the name of the person mentioned in the certificate." [8] And it has been said to be the duty of one receiving the certificate of shares as an equitable mortgage to inquire what is the real position of the person who assumes to mortgage it.[9]

Colonial Bank v. *Hepworth*

Colonial Bank v. *Hepworth* [10] cleared the nature of the character of stock certificates somewhat further. A certificate imports an engagement that the shares thereby represented are transferable only on the surrender and cancellation of the certificate, and the printed form on the back shows that a complete transfer must be by registration. Where a transfer is duly signed by the registered holder each prior holder confers on his *bonâ fide* successor for value an authority to fill in the name of the transferee and is estopped from denying it. But till registration has been effected no legal estate passes; and the possessor in good faith for value of a complete legal title is not to be defeated by one with an inchoate title; nor, as between the transferee and the

1 *Colonial Bank* v. *Cady*, 15 App. Cas., per Lord Watson, 277.

2 L. R. 3 Q. B. 584, explained *In re Ottos Kopje Diamond Mines*, [1893] 1 Ch., per Bowen, L.J., 628. 3 6 A. & E. 469. 4 2 Ex. 654.

5 *Hart* v. *Frontino, &c. Gold Mining Co.*, L. R. 5 Ex. 115. Cp. *Simm* v. *Anglo-American Telegraph Co.*, 5 Q. B. D., per Bramwell, L.J., 205.

6 *Société Générale de Paris* v. *Walker*, 11 App. Cas. 20.

7 *Colonial Bank* v. *Whinney*, 11 App. Cas. 426.

8 Lord Cairns, C., *Shropshire Union Railways and Canal Co.* v. *The Queen*, L. R. 7 H. L. 509. 9 *France* v. *Clark*, 26 Ch. D. 257. *Ante*, 1282. 10 36 Ch. D. 36.

company, will less than an absolute and unconditional right to be registered as shareholders avail.[1] An incompleted title of any kind will not defeat a pre-existing equitable one.[2]

Simm v. Anglo-American Telegraph Co.

In *Simm* v. *Anglo-American Telegraph Co.*,[3] the system of inquiry by companies before the registration of a transfer is said to be modern, and "clearly a practice to which they have recourse for their own benefit and not for the benefit of any one else; because, although there may be no estoppel between them and a person who brings transfers to them, there would be between them and his transferees, and therefore, in order to keep themselves out of trouble, they ought to endeavour to ascertain whether the transfer brought to them is a valid instrument." A company is not precluded from saying to a transferee who has brought them a forged transfer to register: "You brought us a forged transfer; we believed it to be genuine, and we have registered you as stockholders; but we are not precluded from saying that the transfer was forged and that you had not a real title."[4] This was what was done in *Simm* v. *Anglo-American Telegraph Co.* What purported to be a transfer of shares was brought to the defendants; but since, as between the transferee and the company, no duty existed on the company to inquire of the registered holder of the shares whether his signature to the transfer was genuine (although it was the practice of the company to inquire for their own protection), no liability could arise if the transfer proved to be a forgery.

Transferees borrow from bankers on the credit of the company's certificate.

The transferees of the stock however went on to borrow from bankers the credit of the company's certificate; and at their request their nominees in whose name the stock stood transferred it into the names of trustees for the lenders. So long as the loan was outstanding, the lenders having been induced to part with their money on the faith of the company's certificate of registration, the company became liable for any loss that might be sustained. The loan was subsequently paid off and the stock remained in the name of the registered holders, only now no longer as bare trustees for the lenders, but as bare trustees for the original transferees who had brought the forged transfer for registration. Here a difference of opinion showed itself. Lindley, J., held that "a duty is thrown on the company to look to their own register, which involves, of course, the looking after the transfer of stocks or shares standing in the names of persons on the register; and that duty the company owe to those who come with transfers."[5] The Court of Appeal held that there was no such duty. The inquiry preliminary to registration is, as has been just indicated, "a practice to which they have recourse for their own benefit, and not for the benefit of any one else."[6] A company is not estopped from denying the sufficiency of a filed contract against a person who knows that the certificate is untrue;[7] unless perchance he takes a title for value from a purchaser without notice of the untruth.[8] So soon as the loan was repaid, the registered owners, who were the trustees for the bank during the currency of the loan, became trustees for the original

[1] *Société Générale de Paris* v. *Walker*, 11 App. Cas., per Lord Selborne, 28. *Powell* v. *London and Provincial Bank*, [1893] 1 Ch. 610. *In re Ottos Kopje Diamond Mines*, [1893] 1 Ch. 618.

[2] *Roots* v. *Williamson*, 38 Ch. D. 485; *Moore* v. *North-Western Bank*, [1891] 2 Ch. 599; *Ireland* v. *Hart*, [1902] 1 Ch. 522; *Peat* v. *Clayton*, [1906] 1 Ch. 659.

[3] 5 Q. B. D., per Bramwell, L.J., 203.

[4] *Ibid.*

[5] *L.c.* 195.

[6] *L.c.*, per Bramwell, L.J., 203.

[7] *Markham and Darter's case*, [1899] 1 Ch. 414.

[8] *In re Bank of Syria, Owen and Ashworth's Claim*, [1901] 1 Ch. 115.

transferees, and as against them no representation had been made on which they had acted and sustained damage.

Bishop v. Balkis Consolidated Co.

The contention in *Bishop* v. *Balkis Consolidated Co.*[1] was that the effect of a "certification" of shares as against the company making it is no less than the giving a "certificate." "The practice of giving 'certifications' has arisen from the difficulty felt by members of the Stock Exchange in settling their accounts as buyers and sellers of shares, where the seller's certificate of title does not accompany his transfer. If the seller's certificate includes more shares than he sells, he does not deliver it to the buyer with the transfer, but the seller produces his certificate and the transfer to an officer of the company, and he 'certificates' the transfer; and buyers and their brokers act on the faith of this 'certification' just as they would if the certificate produced to the company had been produced to and lodged with themselves." "The object of the 'certification' is to enable the transferor to satisfy his transferee that he, the transferor, can make a good title to the shares mentioned in the transfer." "The certification is made by the secretary or some other officer who has no time to do more than look at the documents produced to him. If, in business language, they are 'in order,' i.e., if they are right on the face of them, he certifies; if they are not, he refuses to certify. But he has no means of ascertaining and no time to inquire whether the documents produced to him are genuine or not, nor whether the various transfers are valid or invalid in point of law." "He does not warrant the title of the transferor, nor the validity in point of law of the various documents which together establish his title."[2]

The giving "certifications" was held to be incidental to the ordinary business of companies having capitals divided into shares; and the company is estopped from denying the truth of the facts certified; but those facts are only that a certificate was produced to the certifying officer purporting to show a right to transfer in some registered owner. In *Bishop's case* no such certificate was produced; but since the misrepresentation thence arising was only careless and not fraudulent no action lay. Then as to an estoppel, "the doctrine of estoppel cannot put the company in a worse position than if a certificate of Lupton's transferor, Powter, had been produced. If it had, still the transfer from Powter to Lupton would have been invalid, and Lupton, without any default on the part of the company, would not have been able to transfer the shares to Cuthbert."[3] The invalidity of the transfer is thus the infirmative point of the transaction.

Here may be noticed the duty of the certifying company with regard to the certificate intrusted to them for certification. It has been contended that immediately upon the lodging and retention of certificates, and on the certification being completed, a duty arises from the company towards persons who may desire to become shareholders; but this has been negatived; so that where the secretary of a company, who had had certificates left with him for certification, by mistake sent them back to the registered owner and so enabled a fraud to be perpetrated through the wrongful possession of them, a claim based on breach of duty was held not sustainable; because no duty existed to persons desirous of becoming members of the company; nor yet,

1 25 Q. B. D. 512. *In re Concession's Trust, McKay's case*, [1896] 2 Ch. 757.
2 *L.c.*, per Lindley, L.J., 519.
3 *L.c.* 521. See *Whitechurch* v. *Cavanagh*, [1902] A. C., per Lord Brampton, 138.

assuming such a duty, was the mere returning of the certificate to the registered owner the proximate, direct or real cause of loss sustained through the plaintiffs having advanced money to him upon the security of certificates which he was not entitled to deal with.[1]

Longman v. Bath Electric Tramways.

Farwell, J., held [2] that the note usually inserted on certificates — "Without the production of this certificate no transfer of the shares mentioned therein can be registered"—does not raise a duty from the company to one possessed of a certificate so noted, and served as no more than a warning to the owner to take care of the certificate which he could not make the company register without producing the certificate. *Farwell, J.'s*, decision was reversed on the facts and without reference to this point; but Williams, L.J., referred to an argument which did not rely "only on the foot-note," contended that a duty rose independently of the foot-note by reason of the operation of the certificate as a document of title issued by the company for the purpose of enabling persons to whom share certificates might be offered for sale or pledge to act upon the certificate as a document of title, and thus giving to shares a negotiability highly advantageous to the company issuing the certificate, which negotiability would be defeated if the company had no duty to call in one certificate of many before it issued a second certificate in respect of the same shares, or at least to obtain information reasonably accounting for the non-return of the certificate of the transferor." This somewhat ponderous phraseology seems to argue a duty from the consideration that certificates are or may be used as negotiable instruments, and to be closely akin to the argument the inadequacy of which was exposed by Lord Macnaghten in *Whitechurch* v. *Cavanagh*.[4] Till this negotiability is established and a duty concurrent therewith, the safer plan will be to adopt the view of Lord Cairns [5] that companies "were not bound to permit a transfer without the production of the certificates, but, though not bound to permit a transfer, I apprehend they would not be in any way answerable if the transfer should be in any case made without the production of the certificates of the shares," corroborated as it is by that of Lord Davey, which will presently be set out.

Williams, L.J.'s, suggestion.

Criticised by anticipation by Lord Macnaghten in Whitechurch v. Cavanagh.

Lord Cairns's opinion.

In *In re Bahia and San Francisco Ry. Co.*,[6] the giving of a certificate by a company had been held to amount to a statement by the company which was intended by them to be acted upon by the purchasers of shares in the market, that the persons certified as the holders were entitled to the shares; and the company were held estopped from denying its truth as against purchasers who had acted on the statement and were liable to pay as damages the value of the shares. In *Balkis Consolidated Co.* v. *Tomkinson* [7] a distinction was drawn based on the fact that in *In re Bahia and San Francisco Ry. Co.* the person seeking to render the company liable was the purchaser of the shares, in whose favour the certificate of the company might work an estoppel; while in *Balkis Consolidated Co.*, Tomkinson, the vendor of the shares, was suing, who himself received the certificate from the company; and the case was accordingly brought within the decision

Balkis Consolidated Co. v. Tomkinson.

[1] *Longman* v. *Bath Electric Tramways*, [1905] 1 Ch. 646.
[2] *Rainford* v. *James Keith and Blackman Co.*, [1905] 1 Ch. 296.
[3] [1905] 2 Ch. 147.
[4] [1902] A. C. 125.
[5] *Shropshire Union Railways and Canal Co.* v. *The Queen*, L. R. 7 H. L. 509. See per Lord Selborne in *Societe Generale de Paris* v. *Walker*, 11 App. Cas. 20, and per Lord Davey, *Sheffield Corporation* v. *Barclay*, [1905] A. C. 403.
[6] L. R. 3 Q. B. 584.
[7] [1893] A. C. 396

in *Simm* v. *Anglo-American Telegraph Co.*, that one, who having handed a transfer in for registration receives from a company a certificate that he is the proprietor of shares therein, is not in the same position as regards his rights by estoppel as a transferee from him would be. Lord Herschell, C., however, points out that the ground for the decision in *Simm* v. *Anglo-American Telegraph Co.* is twofold:[1] "In the first place, that Burge [the original purchaser] had not altered his position by reason of the statement in the certificate; in the next place, that he had himself, by producing to them a forged transfer, induced the company to insert the name of his nominee as the proprietor of the stock." In *Balkis Consolidated Co.* v. *Tomkinson*, moreover, there was negligence on the part of the company. "The company had certified the transfer to the plaintiffs—that is, they had stated in effect that there was in their possession a certificate showing the title of Powter [the fraudulent assignor] to make the transfer to them; they knew, and the plaintiffs did not, that they had already certified a transfer of these very shares from Powter to Maitland and Balfour, and that the certificate referred to in their indorsement, 'Certificate lodged,' bore on the face of it a statement showing this was not the case." They were accordingly held liable.[2]

Lord Herschell's opinion.

But though the company issuing certificates is bound by them to indemnify one acting on their representation, by reason of the estoppel to deny it, they have in their turn a right against the transferee who comes to them for registration if his transfer is fraudulent or invalid. The House of Lords, in *Sheffield Corporation* v. *Barclay*,[3] affirmed the principle that "when an act is done by one person at the request of another, which act is not in itself manifestly tortious to the knowledge of the person doing it, and such act turns out to be injurious to the rights of a third party, the person doing it is entitled to an indemnity from him who requested that it should be done;" and further reiterated the result of the decision in *Starkey* v. *Bank of England*[4] that a person who brings a transfer to the registering authority and requests him to register it represents that it is a genuine instrument. Lord Davey was "disposed to think (though it is not necessary to decide it in the present case) that he not only affirms it is genuine, but warrants that it is so." Lord Davey also expressed an opinion, which is probably final, on a question we have before noted of the duty of a company to keep their register correct.[5] "Their only duty (if that be the proper expression) is one which they owe to the stockholders who are on the register. This point was decided by all the learned judges who took part in the decision of the first case of *Simm* v. *Anglo-American Telegraph Co.*[6] I will content myself with quoting the language of Cotton, L.J.:[7] 'The duty of the company is not to accept a forged transfer, and no duty to make inquiries exists towards the person bringing the transfer. It is merely an obligation upon the company to take care that they do not get into difficulties in consequence of their accepting a forged transfer, and it may be said to be an obligation towards the stockholder not to take the stock out of his name unless he has executed a transfer, but it is only a duty in this sense, that unless the company act, upon a genuine transfer they may be liable to the real stockholder.'"

Sheffield Corporation v. *Barclay.*

Lord Davey's opinion.

Duty to keep register only one to shareholders.

[1] *L.c.* 406. [2] *Dixon* v. *Kennaway*, [1900] 1 Ch. 833.

[3] [1905] A. C. 392, 397, followed in *Bank of England* v. *Cutler*, [1907] 1 K. B. 889; *A.-G.* v. *O'Dell*, [1906] 2 Ch. 47; *Moel Tryvan Ship Co.* v. *Kruger*, [1906] 2 K. B. 792, affirmed [1907] A. C. 272. [4] [1903] A. C. 114. [5] [1905] A. C. 403.

[6] 5 Q. B. D. 188. [7] *L.c.* 214, also per Bramwell, L. J., 203, and Brett, L.J., 209.

Shaw v. *Port Philip and Colonial Gold Mining Co.*,[1] though decided by a Court of little weight when dealing with a question of common law principle,[2] made for some time a difficulty in cases dealing with certificates issued by a fraudulent officer of a company. The case presents many features of similarity with *Bank of Ireland* v. *Trustees of Evans's Charities*,[3] which was not, however, noticed in the discussion. A forged certificate was issued by the secretary of a company. Stephen and Mathew, JJ.'s, held "that the secretary is held out by the company as their agent to warrant the genuineness of the certificate." In 1893, in *Balkis Consolidated Co.* v. *Tomkinson*,[4] arguing in the House of Lords, Finlay, Q.C., treated this assertion as overruled by *British Mutual Banking Co.* v. *Charnwood Forest Ry. Co.*,[5] which reiterated what had long been established law, that a principal cannot be liable for the unauthorised and fraudulent act of a servant or agent committed for the latter's own private ends. *Whitechurch* v. *Cavanagh*[6] decided that a limited company is not estopped, by the fraudulent "certification" of their secretary that certificates for shares were in the company's office, from showing that the proposed transferor had no shares to transfer; and the case was thus left to linger on the distinction in liability founded on a fraudulent certificate and that on a fraudulent certification. But its vicious and costly existence as an authority was put an end to by *Ruben* v. *Great Fingall Consolidated*,[7] in the House of Lords, where it was held that a "forged certificate is a pure nullity. It is quite true that persons dealing with limited liability companies are not bound to inquire into their indoor management, and will not be affected by irregularities of which they had no notice. But this doctrine, which is well established, applies only to irregularities that otherwise might affect a genuine transaction. It cannot apply to a forgery."[8] As to the contention that delivery of a certificate by a secretary imported a representation or warranty that the certificate was genuine, Lord Lorebirn, C., continues: "Certainly no such authority arises from the simple fact that [the forger] held the office of secretary and was a proper person to deliver certificates, nor am I able to see how the defendant company is estopped from disputing the genuineness of this certificate." "From beginning to end the company itself and its officers, with the exception of the secretary, had nothing to do either with the preparation or issue of the document." Lord Macnaghten, noticing *Shaw* v. *Port Philip and Colonial Gold Mining Co.*, observed that it "cannot be supported unless a forced and unreasonable construction be placed on the admissions which were made by the parties in that action." This referred to a courteous assumption by Stirling, L.J., in the Court of Appeal[9] (where Mathew, L.J., was sitting as one of the Court), that "the secretary had in the circumstances been held out by the company as their agent to warrant the genuineness of the certificate."

Shaw v. Port Philip and Colonial Gold Mining Co.,

formally overruled in *Ruben* v. *Great Fingall Consolidated.*

Opinion of Lord Lorebirn, C.

Of Lord Macnaghten.

Ashbury Railway Carriage and Iron Co. v. *Riche*,[10] with its doctrine of *ultra vires*, has been invoked for the protection of companies where they have certified transfers that ultimately prove forged. It has been argued on their behalf that there can be no remedy for the non-issue

Ashbury Railway Carriage and Iron Co. v. Riche.

[1] 13 Q. B. D. 103.
[2] Cp. the dissentient judgment in *Cavalier* v. *Pope*, [1905] 2 K. B. 766.
[3] 5 H. L. C. 389. [4] [1893] A. C. 399. [5] 18 Q. B. D. 714.
[6] [1902] A. C. 117. [7] [1906] A. C. 439. [8] *L.c.* 443. [9] [1904] 2 K. B. 730.
[10] L. R. 7 H. L. 653. 54 & 55 Vict. c. 43, and 55 & 56 Vict. c. 36. are Acts for preserving purchasers of stock from losses by forged transfer, and provides for payment of compensation for losses sustained from a transfer of securities brought about by forgery.

of stock, which a company has no power to issue; for the effect of allowing damages where there is no power to contract would be to extend the powers of a company, and do away with the limitation on their issue of shares. The answer to this contention was given in *Balkis Consolidated Co.* v. *Tomkinson*,[1] where Lord Herschell, C., says: "A person to whom the company is liable by estoppel to pay damages for refusing to register his transfer, does not by reason thereof become a shareholder. Indeed the very title by estoppel implies that he is not one. It has never been laid down, and is manifestly not the law, that a company is not authorised to employ its funds in paying damages for a wrong done, and if his right by estoppel is established the company have as much committed a wrong by refusing to register as shareholder the person whose title they deny as if his title to be registered had in fact been a good one."

Balkis Consolidated Co. v. *Tomkinson.*

MORTGAGEES.

Negligent mortgagee's liability for the deterioration of the mortgaged estate through negligence.

This opportunity may be taken for noting the amount of negligence which will render a mortgagee liable in respect of deterioration in the value of the mortgaged premises while in his possession. This was treated of by Alderson, B., as follows:[2] "It is clear that a mortgagee ought not to be charged with deterioration arising in the ordinary way, by reason of houses and buildings of a perishable nature decaying by time."[3] "I think also that a mortgagee ought not to be charged exactly with the same degree of care as a man is supposed to take who keeps possession of his own property. But if there be gross negligence, by which the property is deteriorated in value, the mortgagee who is in possession is trustee for the mortgagor to that extent that he ought to be made responsible for that deterioration during the time of his possession. It is not necessary to go the length of showing fraud in the mortgagee; gross negligence is sufficient." See further a note to 4 Y. & C. (Ex.) 570, where Lord Hardwicke is reported as holding that "a mortgagee in possession ought to do such repairs as he can repay by the rents of the estate after his interest paid, but he need not rebuild or lay out large sums beyond the rent, for that would be to lend more principal money upon, perhaps, a deficient security."[4]

Hopkinson v. *Roll.*

In *Hopkinson* v. *Roll*[5] the question before the House of Lords was thus stated: "A prior mortgage for present and future advances; a subsequent mortgage of the same description; each mortgagee has notice of the other's deeds. Advances are made by the prior mortgagee after the date of the subsequent mortgage and with full knowledge of it; is the prior mortgagee entitled to priority for these advances over the antecedent advance made by the subsequent mortgagee?" Lord Cranworth thought he was; the House decided he was not. Lord Blackburn[6] understood the principle laid down there to be: "The owner of property does not, by making a pledge or mortgage of it,

Interpreted by Lord Blackburn

[1] [1893] A. C. 407.

[2] *Wragg* v. *Denham*, 2 Y. & C. (Ex.) 121.

[3] *Russell* v. *Smithies*, 1 Anstr. 96.

[4] As to loss or destruction of deeds by the mortgagee, *Stokoe* v. *Robson*, 3 Ves. & B. 51; *Lord Midleton* v. *Eliot*, 15 Sim. 531; 2 Spence, Eq. Jur. 690.

[5] 9 H. L. C. 514, 523. *Hughes* v. *Britannia Permanent Benefit Building Society*, [1906] 2 Ch. 607.

[6] *Bradford Banking Co.* v. *Briggs*, 12 App. Cas. 30; *Union Bank of Scotland* v. *National Bank of Scotland*, 12 App. Cas. 53.

cease to be owner of it any further than is necessary to give effect to the security which he has thus created, and if the security is, as that in *Hopkinson* v. *Rolt* was, a security for present and also for future advances, the pledgee or mortgagee, though not bound to make fresh advances, may, if he pleases, do so, and will, if the property at the time of the further advance remains that of the pledgor, have the security of that property." Meanwhile, the owner may go elsewhere than to his first mortgagee to get the advances he may require. But "a mortgagee who is entitled, but not bound, to give credit on the security of property belonging to the debtor, cannot give that credit after he has notice that the property has so far been parted with by the debtor"; [1] or as Lindley, M.R., expresses the principle: [2] "An owner of property, dealing honestly with it, cannot confer upon another a greater interest in that property than he himself has." "When a man mortgages his property he is still free to deal with his equity of redemption in it, or, in other words, with the property itself subject to the mortgage." *in Bradford Banking Co. v. Briggs.*

Many questions arise on the duty of mortgagees dealing with title-deeds, and the circumstances in which they are estopped from setting up title against those who possess them. Mortgagees dealing with title deeds.

The general principle is well settled, and is stated by Lord Cranworth, C.: [3] "A first mortgagee having the legal title is not to be postponed to a subsequent purchaser or mortgagee merely because he has not possessed himself of the title-deeds. In order to deprive the first mortgagee of his legal priority, the party claiming by title subsequent must satisfy the Court that the first mortgagee has been guilty either of fraud or gross negligence,[4] but for which he would have had the deeds in his possession. What are the circumstances which will amount to or be evidence of gross negligence it is difficult to define beforehand; but I think that *primâ facie* a mortgagee who, knowing that his mortgagor has title-deeds, omits to call for them, or who omits to make any inquiry on the subject, must be considered to be guilty of such negligence as to make him responsible for the frauds which he has thus enabled his mortgagor to commit." General principle

The obligation of a purchaser or a mortgagee to inquire after title-deeds has been defined by Lord Selborne in *Agra Bank* v. *Barry*: [5] "This, if it can properly be called a duty, is not a duty owing to the possible holder of a latent title or security. It is merely the course which a man dealing *bonâ fide* in the proper and usual manner for his own interest ought, by himself or his solicitor, to follow, with a view to his own title and his own security. If he does not follow that course, the omission of it may be a thing requiring to be accounted for or explained. It may be evidence, if it is not explained, of a design inconsistent with *bonâ fide* dealing to avoid knowledge of the true state of the title. What is a sufficient explanation must always be a question to be decided with reference to the nature and circumstances of each particular case." Mortgagee's duty to inquire after title deeds defined.

If the purchaser has notice of an incumbrance at the time of the purchase, the possession of the legal estate and the title-deeds does not avail against the incumbrancer's priority. [6] Competing rights of incumbrancer and possessor of the legal estate considered.

[1] *L.c.*, per Lord Blackburn, 37. [2] *West* v. *Williams*, [1899] 1 Ch. 132, 143.
[3] *Colyer* v. *Finch*, 5 H. L. C. 928. The principle is reiterated by the Lord Chancellor, *Perry Herrick* v. *Attwood*, 2 De G. & J. 21, 37. See also *Hewitt* v. *Loosemore*, 9 Hare, per Turner, V.C., 458. [4] *Ante*, 39, 42. [5] L. R. 7 H. L. 157.
[6] *Jared* v. *Clements*, [1903] 1 Ch. 428; *Perham* v. *Kempster*, [1907] 1 Ch. 373.

Division of the subject in Fry, L. J.'s, judgment in *Northern Counties of England Fire Insurance Co.* v. *Whipp.*

Fry, L.J.,[1] divides the discussion of the subject as follows:

I. Those cases which relate to the conduct of the legal mortgagee in not obtaining possession of the title-deeds; and

II. Those cases which relate to the conduct of the legal mortgagee in giving up or not retaining the possession of the title-deeds after he has obtained them.

I. The former of these classes is further subdivided:

(α) Where the legal mortgagee or purchaser has made no inquiry for the title-deeds; in which case he is postponed either to the holder of a prior equitable estate[2] or to a subsequent equitable owner who used diligence in inquiring for the title-deeds,[3] or registering his security.

(β) Where the legal mortgagee has made inquiry for the deeds and has received a reasonable excuse for their non-delivery; in which case he does not lose his priority;[5]

(γ) Where the legal mortgagee has received part of the deeds under a reasonable belief that he was receiving all; here also he does not lose his priority;[6]

(δ) Where the legal mortgagee has left the deeds in the hands of the mortgagor, with authority to deal with them for the purpose of raising money on the security of the estate, and the mortgagor exceeds the collateral instructions given to him; in which case the legal mortgagee is postponed.[7]

II. The second class of cases is divided into:

(α) Those where the title-deeds have been lent by the legal mortgagee to the mortgagor upon a reasonable representation made by him as to the object in borrowing them; in this case the legal mortgagee does not lose his priority.[8]

(β) Those where the legal mortgagee has returned the deeds to the mortgagor for the express purpose of raising money on them, though with the expectation that he would disclose the existence of the prior security to any second mortgagee; in which case the Court has, on the ground of authority, postponed the legal to the equitable estate.[9]

[1] *Northern Counties of England Fire Insurance Co.* v. *Whipp*, 26 Ch. D. 482, 487.

[2] *Worthington* v. *Morgan*, 16 Sim. 547; *Berwick* v. *Price*, [1905] 1 Ch. 632; *Wormald* v. *Maitland*, 35 L. J. Ch. 69; *Walker* v. *Linom*, [1907] 2 Ch. 104.

[3] *Clarke* v. *Palmer*, 21 Ch. D. 124. *In re Castell and Brown*, [1898] 1 Ch. 315, *In re Valletort Sanitary Steam Laundry Co.*, [1903] 2 Ch. 654; followed *In re Bourne*, [1906] 1 Ch. 113, affirmed [1906] 2 Ch. 427.

[4] *Fullerton* v. *Provincial Bank of Ireland*, [1903] A. C. 309.

[5] *Barnett* v. *Weston*, 12 Ves. 130; *Hewitt* v. *Loosemore*, 9 Hare, 449; *Agra Bank* v. *Barry*, L. R. 7 H. L. 135, 157; *Manners* v. *Mew*, 29 Ch. D. 725. See also *Sharpe* v. *Foy*, L. R. 4 Ch. 35.

[6] *Hunt* v. *Elmes*, 2 De G. F. & J. 578; *Ratcliffe* v. *Barnard*, L. R. 6 Ch. 652, observed on in *Oliver* v. *Hinton*, [1899] 2 Ch. 264; *Colyer* v. *Finch*, 5 H. L. C. 905.

[7] *Perry Herrick* v. *Attwood*, 2 De G. & J. 21, followed in *Brocklesbury* v. *Temperance Building Society*, [1895] A. C. 173, where deeds were entrusted to an agent with authority to borrow a limited amount, but who, disregarding the limit, borrowed to a greater amount, the principal was estopped from showing the limitation; which was followed in *Lloyd's Bank* v. *Cooke*, [1907] 1 K. B. 794, 803. *Lloyds Bank* v. *Bullock*, [1896] 2 Ch. 192; *Rimmer* v. *Webster*, [1902] 2 Ch. 163.

[8] *Peter* v. *Russel*, or *Thatched House case*, 1 Eq. Cas. Abr. 321; *Martimer* v. *Cooper*, 2 Ross. 198; *Layard* v. *Maud*, L. R. 4 Eq. 397.

[9] *Briggs* v. *Jones*, L. R. 10 Eq. 92; *In re Ingham*, [1893] 1 Ch. 352; *Brocklesby* v. *Temperance Permanent Building Society*, [1895] A. C. 173; *Farquharson Brothers* v. *King*, [1902] A. C. 325. As to priorities between equitable mortgagees and others, *Russel* v. *Russel*, 1 White & Tudor, L. C. in Equity (6th ed.), 794, note, Priorities as between Equitable Mortgagees and Others. Where there are equities which are otherwise equal, the possession of the deeds gives priority to the person who has got them: *Lloyd's Banking Co.* v. *Jones*, 29 Ch. D. 221, 239. This does not refer to the dates being the same: per North, J., *Farrand* v. *Yorkshire Banking Co.*, 40 Ch. D. 189. Jones's case was followed in *Walker* v. *Linom*, [1907] 2 Ch. 104. *Harpham* v. *Shacklock*, 19 Ch. D. 207,

A supplementary case may be added—where the relation between the equitable incumbrancer and the person in possession of the title-deeds is not merely that of mortgagee and mortgagor, but is of a fiduciary nature (as, for example, that of *cestui que trust* and trustee, or client and solicitor), there the equitable incumbrancer is not to be deprived of his priority by reason of the improper acts of the person entrusted with the deeds, so long as the incumbrancer has no ground to suppose that there has been any want of good faith on the part of the custodian of the deeds.[1]

Examination of the law where there is a conflict between two equities.

The question then arises whether, the law being as stated in the case of a contest between the legal estate and an equitable interest, there is any difference where the legal estate is not concerned and conflicting equities only are involved.

Kay, J., in *Taylor* v. *Russell*.

The opinion of Kay, J., in *Taylor* v. *Russell*[2] is expressed most uncompromisingly in the negative. He holds the two cases are identical so far as the application of a standard of care goes. Speaking of displacing the first of two equitable mortgagees, he says: "I have not found any case of authority in which this has been done on the ground of negligence that was not 'gross'—that is, so great as to make the prior mortgagee responsible for the fraud committed on the subsequent mortgagee. This seems to me to be the accurate statement of the rule as between two equitable mortgagees; and for this view of the law there is positive and very high authority." He then cites statements of the law by Turner, L.J.,[3] Lord Cairns,[4] Lord Cranworth[5] and Lord Selborne,[6] which "are not *obiter dicta*, but the carefully worded reasons on which some of the most eminent of modern judges based their decisions;"[7] and adds: "Nothing short of a decision of the House of Lords can overrule the law so laid down." "I conclude, therefore, that the negligence necessary to postpone the first equitable mortgagee in such a case as the present, must be so gross as to render him responsible for the fraud committed upon the second mortgagee."[8] The judgment of Kay, J., was appealed against, and reversed by the Court of Appeal,[9] but on another ground; and Fry, L.J., who delivered the considered judgment of the Court, merely referred to this point by saying:[10] "It becomes needless for us to enter upon a discussion as to any question of negligence, or as to the relative equities of the plaintiff and defendants."

The Court of Appeal's decision was affirmed by the House of Lords,[11] where Lord Macnaghten said: "I am not at present convinced of the correctness of the view expressed by the learned judge who tried the case in the first instance, that negligence necessary to postpone a prior equitable mortgagee in such a case as the present must be so gross as to render him responsible for the fraud committed on the second mortgagee, and that in fact it is immaterial in such cases

is commented on by Lord Herschell, *Taylor* v. *Russell*, [1892] A.C. 253. See also per Lord Macnaghten, 259. As to the doctrine of *tabula in naufragio*, the obtaining priority for an equity by getting in the legal estate, see *Marsh* v. *Lee*, 1 White & Tudor, L. C. in Equity (6th ed.), note 700, 701. For what is a "better equity," see 2 Spence, Eq. Jur. 728 *et seqq.*

[1] *Taylor* v. *London and County Banking Co.*, [1901] 2 Ch. 231, 261; *Oxley* v. *National Provincial Bank*, 20 Times L. R. 607; *Walker* v. *Linom*, [1907] 2 Ch. 104.

[2] [1891] 1 Ch. 8, 15; *Powell* v. *London and Provincial Bank*, [1893] 1 Ch. 610, 2 Ch. 555.

[3] *Cory* v. *Eyre*, 1 De G. J. & S. 167.

[4] *Shropshire Union Railways and Canal Co.* v. *The Queen*, L. R. 7 H. L. 507, commented on *Parrott* v. *Real and Personal Advance Co.*, 42 Ch. D. 263; *In re Richards*, 45 Ch. D. 589, 594; *Rimmer* v. *Webster*, [1902] 2 Ch. 163, 170.

[5] *Roberts* v. *Croft*, 2 De G. & J. 6.

[6] *Dixon* v. *Muckleston*, L. R. 8 Ch. 161.

[7] [1891] 1 Ch. 17. [8] *Ibid.* [9] *L.c.* 24. [10] *L.c.* 30. [11] [1892] A. C. 244, 262.

whether the prior mortgagee has or has not the legal estate." In *Taylor* v. *London and County Banking Co.*,[1] Stirling, L.J., referring to the above-cited passage says: "I am not aware that the precise point considered by that learned judge has since arisen for decision; and if it were necessary to decide it in the present case, I should think it my duty to examine with the utmost care his judgment in *Taylor* v. *Russell*, and the authorities relied on by him. I think, however, that on the present occasion such an examination may be dispensed with."

Farrand v. Yorkshire Banking Co.

In the argument in *Taylor* v. *Russell* before Kay, J., the case of *Farrand* v. *Yorkshire Banking Co.*[2] was cited, but is not alluded to in the judgment. In his judgment there, North, J.,[3] considering the case of the postponement of a legal mortgagee to an equitable mortgagee and the case of a conflict between the rights of two equitable mortgagees, held the distinction "between the two cases is clear, and cannot be better stated than in the judgment of Cotton, L.J., in *National Provincial Bank of England* v. *Jackson*,[4] where, after referring to Fry, L.J.'s, judgment in *Northern Counties of England Fire Insurance Co.* v. *Whipp* as recognising the difference between the case of a contest between equities and one between an equitable title and the legal estate, he quoted this passage: 'The question is not what circumstances may, as between two equities, give priority to the one over the other, but what circumstances justify the Court in depriving a legal mortgagee of the benefit of the legal estate'; and he added: 'And the judgment in *Kettlewell* v. *Watson*[5] is to the same effect. As between equitable claims, the question is, whether one party has acted in such a way as to justify him in insisting on his equity as against the other.'"

In the case he was deciding, the negligence he was deciding on was undoubtedly gross. A loan was made and with it an agreement to deposit title-deeds with the lender. No demand was made; the title-deeds were allowed to remain in the possession of the borrower, who raised money on them from his bankers, in whose possession they remained for twenty-two years without any inquiry after them from the person entitled to their possession. The case seems to fall under Fry, L.J.'s, Class I (*a*).

Comment.

The words used in *Northern Counties of England Fire Insurance Co.* v. *Whipp*,[6] and quoted by North, J., are at the best merely *obiter dicta*. The point decided in that case was that a legal mortgagee will not be postponed to an equitable mortgagee on the ground of mere carelessness. What Fry, L.J., did, possibly with reference to a point made during the argument,[7] was to assume a state of the law, in the case of a conflict between two equities, which he decided did not hold good where the conflict was between the legal estate and an equity.

National Provincial Bank of England v. *Jackson.*

In *National Provincial Bank of England* v. *Jackson*[8] the plaintiffs, as equitable mortgagees by memorandum and the deposit of title-deeds, claimed to enforce their security against the defendants, who had been the owners of the property in question previously to the execution of a conveyance (the validity of which the plaintiffs impugned as obtained by fraud), and who were still in possession. The defendants, therefore, had the prior equity as well as the possession of the property, while the *onus* of proving their claim was also on the plaintiffs. The defendants were held by the Court of Appeal not guilty of negligence

1 [1901] 2 Ch. 231, 260.
2 40 Ch. D. 182. *Carritt* v. *Real and Personal Advance Co.*, 42 Ch. D. 263.
3 *L.c.* 189. 4 33 Ch. D. 1, 13. 5 21 Ch. D. 685.
6 26 Ch. D. 482. 7 *L.c.* 485. 8 33 Ch. D. 1.

in the conduct by which the fraud was enabled to be prosecuted, while the plaintiffs were held guilty of "great negligence" in omitting precautions which would have rendered the discovery of the fraud certain. With these facts the decision might well have been that the plaintiffs had not discharged the *onus* upon them of showing ground for the interference of the Court in their behalf; or that they were estopped by their own want of prudence in making inquiries which enabled the fraud to be carried through.

In fact the case does seem to have been decided on some such ground. Cotton, L.J., says:[1] "It follows that the bank are not entitled to say that they relied on the recitals in making the advance, so as to establish an equitable claim against the sisters" the defendants; that is, the plaintiffs had not made out a case that showed the conduct of the defendants to have enabled a fraud to be perpetrated on the plaintiffs. Cotton, L.J., however, made use of the expression,[2] "As between equitable claims the question is, whether one party has acted in such a way as to justify him in insisting on his equity as against the other." North, J., has assumed that something less than gross negligence is sufficient for this. That it is so by no means follows from the words of Cotton, L.J., nor from the facts in *National Provincial Bank of England* v. *Jackson*. The contributory negligence of the plaintiffs in that case in fact disentitled them to recover. Had this been absent, had they inquired and been misled by the sisters, they would have recovered; but then the case would have been brought within the principle of *Perry Herrick* v. *Attwood*.[3] Judgment of Cotton, L.J.

These decisions do not establish any difference in principle in the two classes of cases. On the other hand, the statements of the law are clear and emphatic. The principle laid down was necessary for the decision in the earliest of these, that of Lord Cranworth, C., in *Robarts* v. *Croft*[4]—"She acquired a right which was good against all other merely equitable claimants whose titles had a later origin, unless she was guilty of gross negligence (for in this case fraud by her is out of the question) enabling Robarts to commit a fraud by holding himself out as unincumbered owner of the property"; and the subsequent authorities cited by Kay, J., amply support it. Cases considered.

Considered on principle, the conclusion of Kay, J., appears to be the correct one. Some confusion seems to have been imported by taking as an analogy the rule that a subsequent incumbrancer who gets in the legal estate is able to gain a priority over the prior *mesne* incumbrancer.[5] In that case a second mortgagee with the legal estate obtains priority over the first mortgagee. And it is not impossible the consideration that negligence producing the consequences of fraud is required to displace this priority has suggested the notion that where the legal estate is not involved, an equitable interest may displace another equitable interest on proof of a lesser degree of negligence than is required where the legal estate is concerned. If such a notion exists, it arises from a misconception of the grounds of preference of the legal estate, which is not treated by Courts of Equity with any especial respect when it comes in conflict with equitable doctrine, but is used as a means of determining equitable preference where other circumstances are wanting. Principle asserted by Kay, J.

The Courts of Equity seize upon the circumstance of the possession Grounds of the preference given in Equity to the legale.

[1] *L.c.* 12. [2] *L.c.* 13. [3] 2 De G. & J. 21.
[4] 2 De G. & J. 6 [5] *Bates* v. *Johnson*, Johns. (Ch.) 304.

of the legal estate, and refuse to disturb possession on that account, only where there is a conflict of equal equities: *In æquali jure melior est conditio defendentis.* Where grounds of equitable preference exist, the Court resorts to them irrespective of the fact of the legal estate being in one or the other of the equitable estate holders. The rule, then, of the preference given to the legal estate is no more than a method of determining the *onus* of proof in a conflict of equal equities,[1] and is rather an accidental than an intrinsic element in the granting equitable relief—a circumstance the Courts will seize on to work out the relief that should be afforded by reference to rule, and not a recognition of a superiority in a Court of Equity of a legal over an equitable interest. Indeed, the preference of the Court is the other way, and where the conflict is between the legal estate and an equitable estate it asserts the superior claims of the equitable.[2] If, then, equity regards an equitable estate as preferable to a legal, it would be a strange conclusion to come to that an equitable estate can be displaced by less onerous circumstances than can a legal estate.

How the equitable doctrine is worked out.

The action of a Court of Equity appears to work out as follows: By hypothesis, there are *primâ facie* equal equities. The problem is, which has the preference? If the Court finds one of these is tainted with fraud, on the most universal principle of jurisprudence it assists the other, even though the other has acquired the legal estate. Further than this, where there is no fraud, but only conduct which has enabled a fraud to be committed, the Court will do the same. The Court will in such a case postpone the legal estate, *plus* the equity, in favour of the unassisted equity. The person guilty of conduct that has misled will be estopped from averring the truth and held to his representations contrary to it. There is yet another case—where the equities are morally equal. There the Court relies on the possession of the legal estate. The law consequently takes its course, for there is no call for equity to interfere when each party has an equal equity. Lastly, this discriminating circumstance of possession of the legal estate may be absent, and the Court of Equity being invoked, determines by what has been said to be its last ground of preference—priority of time, by which it adjudicates priority of right.[3]

Contention that a lesser negligence than is required to displace a legal estate will displace an equity.

The contention, however, is that there is yet a further principle which determines priority, by reference to a standard of duty we have not yet ascertained—a lesser negligence than is required to affect the legal estate it is said will suffice to displace an equity. If this is an arbitrary principle, it must depend on authority not yet advanced for its support. If it depends on a general principle of law, it may be pointed out that the duty asserted is not to any particular person, but to the world at large; since, in the class of cases we are considering, till the moment of contest, each equitable holder is or may be wholly ignorant of the existence of the other, and is, moreover, bound to a greater amount of care in dealing with one species of property, viz., an equitable interest, than with any other.[4]

No duty on the part of the holder of one equitable interest to another.

Again, the duty, if any such exists, that the holder of one equitable interest has to another is plainly not that of a specialist; it is at best

[1] *Neslin* v. *Wells*, 104 U. S. (14 Otto) 428.

[2] Williams, Real Property (10th ed.), 152, chap. viii., On Uses and Trusts.

[3] *Bickerton* v. *Walker*, 31 Ch. D. 151; *Bateman* v. *Hunt*, [1904] 2 K. B. 530, 539. Where the equities are precisely equal, possession of the deeds determines the preference: *Rice* v. *Rice*, 2 Drew. 73, 81. *Spencer* v. *Clarke*, 9 Ch. D. 137.

[4] See the authorities collected in Story, Eq. Jur. (12th ed.), § 1020, and notes.

to refrain from *culpa lata* (*non intelligere quod omnes intelligunt*). If this is so, any difference between that involved with reference to a legal state and an equitable interest would be hard to find. But that any "duty," in the strict sense, exists has been negatived by Lord Selborne in the case of the *Agra Bank* v. *Barry*.[1]

Lord Selborne's opinion in *Agra Bank* v. *Barry*.

The obligation then is to avoid doing anything by which another person—not a professional person, but an unskilled one—may be misled. And the only inference open to the Court, from which liability may arise, is of that gross negligence whose consequences are indistinguishable from fraudulent intent. If so the view of Kay, J., is right, and there is no distinction between the negligence which postpones one equity to another and that which postpones the legal estate to an equity.

With whom the possession of the equitable estate establishes a relation.

The remarks of Fry, L.J., in *Union Bank of London* v. *Kent*[2] should be carefully attended to. In that case the contest was between two equities, neither of the parties having any legal estate. The question was in what circumstances a pre-existing admitted equitable title could be displaced by another equitable title. Fry, L.J., distinguishes two sets of circumstances.[3] "One class is where a mortgagee knows that the mortgagor has not fulfilled his obligations and yet does nothing. The other is where the mortgagee does not know that the mortgagor has failed to fulfil his obligations, but knows only that there are obligations which he may in the future fail to fulfil, and yet takes no precautions against the consequences of his doing so." To the former class is to be referred a case like *Layard* v. *Maud*.[4] Of the latter the Lord Justice says:[5] "I know of no decided case in which the mortgagee has been postponed on the ground that he did not take precautions against a future fraud by the mortgagor; and I do not know of any general rule which obliges you to assume that every person with whom you are dealing is likely to be a knave."

Fry, L.J., in *Union Bank of London* v. *Kent*.

The liability of a mortgagee by deposit of title-deeds for negligence in their custody has been considered in Ireland,[6] where it has been decided that there is no implied covenant on the part of the mortgagee to take reasonable care of them; they had been injured by a flood which invaded the improper place where they were kept. "Title-deeds," said the Court, "are regarded as part of the realty;" and repudiated "the misleading analogies of pledge or bailment of chattels." If a chattel be pledged the general property remains in the pledgor. But it is not so in the case of a mortgage, where the mortgagor's estate is gone at law, nor is it so in the case of an equitable mortgage.[7] Wood, V.C.'s, decision in *Brown* v. *Sewell*[8] is sought to be explained as referable to the jurisdiction of Courts of Equity to give relief in cases of accident. Wood, V.C., however, says:[9] "It is a case in which a loss of property has occurred, which, so far as appears, must, I think, be attributable to negligence on the part of the person losing it, for which he must be answerable, unless he can discharge himself by showing that it arose from some inevitable accident, from which in the ordinary course of events he could not guard himself." There appears no reason why the depreciation in the property caused by

Liability of mortgagee by deposit of title deeds for negligent custody.

[1] L. R. 7 H. L. 135, 157.
[2] 39 Ch. D. 238.
[3] *L.c.* 247.
[4] L. R. 4 Eq. 397.
[5] 39 Ch. D. 248.
[6] *Gilligan* v. *National Bank*, [1901] 2 I. R. 513, 532.
[7] Per Lord Macnaghten, *Bank of New South Wales* v. *O'Connor*, 14 App. Cas. 273, 282.
[8] (1853), 11 Hare 49.
[9] *L.c.* 53.

loss of the deeds should not be taken into account when the terms of redemption are settled.

Actual notice.

We are now brought to the consideration of the law as to notice. Notice may be actual or constructive. Actual notice is matter of fact and admits of no legal distinctions.

Constructive notice.

Constructive notice is defined to be "no more than evidence of notice, the presumptions of which are so violent that the Court will not allow even of its being controverted. Thus, if a mortgagee has a deed put into his hands which recites another deed which shows a title in some other person, the Court will presume him to have notice, and will not permit any evidence to disprove it." [1]

"The doctrine of constructive notice depends upon two considerations; first, that certain things existing in the relation or the conduct of parties, or in the case between them, beget a presumption so strong of actual knowledge, that the law holds the knowledge to exist, because it is highly improbable it should not; and next, that policy, and the safety of the public, forbids a person to deny knowledge while he is so dealing as to keep himself ignorant, or so that he may keep himself ignorant, and yet all the while let his agent know, and himself, perhaps, profit by that knowledge." [2]

General principle.

The general principle is that whatever is sufficient to put a person upon inquiry is good notice—that is, where a man has sufficient information to lead him to a fact he shall be deemed to have knowledge of it; [3] but it is "scarcely possible to declare *a priori* what shall be deemed constructive notice, because unquestionably that which would not affect one man may be abundantly sufficient to affect another." [4]

By the Conveyancing Act, 1882, sec. 3 sub-s. 1 (which only states the existing law but in a negative form, and thus shows that the legislative intention was rather to restrict the doctrine of notice than to extend it), "a purchaser shall not be prejudicially affected by notice of any instrument, fact or thing unless (i) It is within his own knowledge or would have come to his knowledge if such inquiries and inspections had been made as *ought* reasonably to have been made by him; or, (ii) In the same transaction with respect to which a question of notice to the purchaser arises, it has come to the knowledge of his counsel, as such, or of his solicitor, or other agent, as such, or would have come to the knowledge of his solicitor or agent as such, if such inquiries and inspections had been made as *ought* reasonably to have been made by the solicitor or other agent." [5] The use of the word "*ought*" in the

[1] Per Eyre, C.B., *Plumb* v. *Fluitt*, 2 Anstr. 438, discussed 2 Spence, Eq. Jur. 787.

[2] *Kennedy* v. *Green*, 3 My. & K., per Lord Brougham, C., 719; *Hunter* v. *Walters*, L. R. 7 Ch. 75; *English and Scottish Mercantile Investment Co.* v. *Brunton*, [1892] 2 Q. B. 700. See *Nesbit* v. *Riverside Independent District*, 144 U. S. (37 Davis) 610, as to the effect of recitals in municipal bonds operating as constructive notice, where it is said at 619: "The effect of recitals in municipal bonds is like that given to words of negotiability in a promissory note. They simply relieve the paper in the hands of a *bonâ fide* holder from the burden of defences other than the lack of power, growing out of the original issue of the paper, and available as against the immediate payee."

[3] *Anon.*, Freem. (Ch.) 137, Case 171; *Taylor* v. *Stibbert*, 2 Ves. 437, 440; *Smith* v. *Low*, 1 Atk. 489; *Foster* v. *Cockerell*, 3 Cl. & F. 456; *Lee* v. *Howlett*, 2 K. & J. 531; *In re Wyatt*, [1892] 1 Ch. 188, 195. *Selwyn* v. *Garfit*, 38 Ch. D., per Bowen, L.J., 284: "What is waiver? Delay is not waiver. Inaction is not waiver, though it may be evidence of waiver. Waiver is consent to dispense with the notice."

[4] *Jones* v. *Smith*, 1 Hare, 55.

[5] 45 & 46 Vict. c. 39. By the definition contained in sec. 1, sub-s. 4 (ii), "purchaser" includes a "mortgagee or an intending purchaser . . . or mortgagee, or other person who, for valuable consideration, takes or deals for property." *Bailey* v. *Barnes*, [1894] 1 Ch., per Lindley, L.J., 35.

above section has been held not to import a duty or obligation; for a purchaser need make no inquiry; and the expression "*ought reasonably*" means, ought as a matter of prudence, having regard to what is usually done by men of business in such circumstances.[1]

Cases of constructive notice classified.

The cases have been classified by Wigram, V.C.[2] First, into those in which the party charged has had actual notice that the property in dispute was in some way affected; whence the Court has imputed a knowledge of all facts, ascertainable by inquiry into the true relations of those circumstances affecting the property, brought home to the knowledge of the party charged. Secondly, into those where the Court draws the conclusion that the party charged has abstained from inquiry for the purpose of avoiding notice.

A third class.

It is plain that this division leaves open a third class—of those cases where any knowledge as to circumstances affecting the estate is in fact disproved and where there is no deliberate abstinence from inquiry, yet where the absence of knowledge can only be accounted for by gross negligence. This the policy of the law affects with the consequences of knowledge, and describes in the words of Alderson, B.,[3] as "such gross negligence as would be a cloak for fraud if permitted."

Wigram, V.C.'s, principle of division explained.

The adequacy of Wigram, V.C.'s, classification may, however, be vindicated by bearing in mind the principle of law that a purchaser *must* be presumed to investigate the title of the property he purchases, and may therefore be presumed to have examined every link in that title. This presumption stops short of inferring the examination of instruments not connected with the title merely because by possibility they may affect it.[4]

Constructive notice an equitable doctrine.

The doctrine of constructive notice, again, is wholly equitable. "In *Allen* v. *Seckham*[5] I pointed out," said Lord Esher, M.R.,[6] "that the doctrine is a dangerous one. It is contrary to the truth. It is wholly founded on the assumption that a man does not know the facts; and yet it is said that constructively he does know them." Later on in the same judgment[7] it is said: "I think the doctrine has been accurately deduced from the various cases, and is accurately stated in the notes to *Le Neve* v. *Le Neve*.[8] 'Although, as we have already seen, where a party has notice of a deed which, from the nature of it, must affect the property,[9] or is told at the time that it does affect it, he is considered to have notice of the contents of that deed and of all other deeds to which it refers; nevertheless, where a party has notice of a deed which does not necessarily affect the property,[9] and is told that in fact it does not affect it, but relates to some other property, and such party acts fairly in the transaction, believing the

[1] *Bailey* v. *Barnes*, [1894] 1 Ch. 25, 35; *Taylor* v. *London and County Banking Co.*, [1901] 2 Ch. 231, 257.

[2] *Jones* v. *Smith*, 1 Hare, 55; *Davis* v. *Hutchings*, [1907] 1 Ch. 350.

[3] *Whitbread* v. *Jordan*, 1 Y. & C. (Ex.) 330. See per Lord Lyndhurst, C., *Jones* v. *Smith*, 1 Ph. 253; *Kennedy* v. *Green*, 3 My. & K. 699, 713, 719.

[4] *West* v. *Reid*, 2 Hare, 249, 259. See 2 Spence, Eq. Jur. 755.

[5] 11 Ch. D. 795.

[6] *English and Scottish Mercantile Investment Co.* v. *Brunton*, [1892] 2 Q. B. 708.

[7] *I.c.* 709.

[8] 2 White & Tudor, L. C. in Equity (6th ed.), 26, 56. Which passage, says Kay, L.J., [1892] 2 Q. B. 718, is substantially taken from the judgment of Lord Lyndhurst, C., in *Jones* v. *Smith*, 1 Ph. 253, 254. To the same effect is the language of Jessel, M.R., in *Patman* v. *Harland*, 17 Ch. D. 353.

[9] These terms are defined by Lord Esher, M.R., in his judgment in *English and Scottish Mercantile Investment Co.* v. *Brunton*, [1892] 2 Q. B. 709. The case itself affords an excellent example of their application. *In re Castell and Brown*, [1898] 1 Ch. 315; *In re Valletort Sanitary Steam Laundry Co.*, [1903] 2 Ch. 654; *In re Bourne*, [1906] 1 Ch. 113; 2 Ch. 427.

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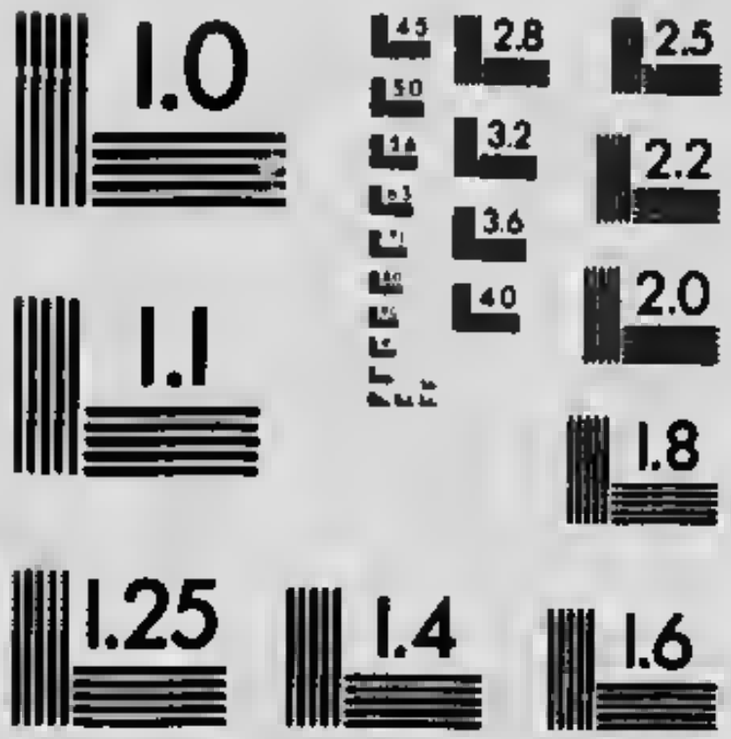

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representation to be true, he will not be fixed with notice of the contents of the instrument.' Now that is the doctrine formulated in equity; it is not to be carried farther; it is to be construed according to its true meaning, and not to be added to or diminished."

Lord Cottenham in *Wilde* v. *Gibson*.

Lord Cottenham, in the leading case of *Wilde* v. *Gibson*,[1] had previously spoken to the same intent: "The effect of constructive notice in cases where it is applicable, as in contests between equities of innocent parties, is sufficiently severe, and is only resorted to from the necessity of finding some ground for giving preference between equities otherwise equal; but this is the first time I ever knew it applied in support of an imputation of direct personal fraud and misrepresentation. The two things cannot exist together—there can be no direct personal fraud without intention, and there can be no intention without knowledge of the fact concealed or misrepresented; and if there be knowledge the case of constructive notice cannot arise; it would be absorbed in the proof of knowledge." The confusion pointed out by Bowen, L.J., in *Le Lievre* v. *Gould*[2] seems to have crept in here. Constructive notice cannot of itself work out into fraud, yet there may be such circumstances accompanying as would warrant the conclusion; constructive notice would be absorbed in the inference of knowledge. In the case in point there were not those circumstances, or the character of the negligence was rebutted, and therefore the conclusion in fact could not be drawn; gross negligence may sometimes have the consequences of fraud, but in no case is the presumption irrebuttable. The case in the abstract is only the old inquiry: *Can* circumstantial evidence be conclusive? The law will infer, as it often does infer, both knowledge and intention from overt acts; and the line between facts which conclude constructive notice and those which point to actual knowledge and intention may be imperceptible and dependent on an inference of fact.

Authorities considered.

Notice that the title-deeds of an estate are in the possession of one not the possessor of the estate may be held notice of a claim by him on the estate;[3] though the mere absence of the title-deeds has never been held enough by itself to affect one with notice if he has *bonâ fide* made inquiry for the deeds, and a good excuse has been given for the non-delivery of them.

Statement of the law by Lord Selborne in *Dixon* v. *Muckleston*.

In *Dixon* v. *Muckleston*[4] Lord Selborne, C., states the law to be[5] "that when the Court is satisfied of the good faith of the person who has got a prior equitable charge, and is satisfied that there has been a positive statement, honestly believed, that he has got the necessary deeds—then he is not bound to examine the deeds, and is not bound by constructive notice of their actual contents, or of any deficiencies which by examination he might have discovered in them. This I take to be the law even in cases where the depositor of the deeds is himself acting in the double character of borrower of

[1] 1 H. L. C. 605, 623. *Brownlie* v. *Campbell*, 5 App. Cas. 925, 937; *Joliffe* v. *Baker*, 11 Q. B. D. 255, 273. [2] [1893] 1 Q. B. 500. *Ante*, 42.

[3] *Hiern* v. *Mill*, 13 Ves. 114; *Dryden* v. *Frost*, 3 My. & Cr. 670. See *National Provincial Bank of England* v. *Games*, 31 Ch. D. 582; *Spencer* v. *Clarke*, 9 Ch. D. 137; *Maxfield* v. *Burton*, L. R. 17 Eq. 15. "It is, in my opinion, the giving of the notice which creates the priority (see *Foster* v. *Cockerell*, 3 Cl. & F. 456), and if the former assignee is prevented from giving the notice, either by contract with the assignor, as might often be the case, or by the nature of the charge which he holds, the same result should follow as in a case where a prior assignee has negligently omitted to give the notice that he might have given": *English and Scottish Mercantile Investment Trust* v. *Brunton*, [1892] 2 Q. B., per Charles, J., 8.

[4] L. R. 8 Ch 155. [5] *L.c.* 161.

the depositee's money and of solicitor for the depositee." It is otherwise if he omits all inquiries.

Both branches of the rule are stated by Turner, V.C., in *Hewitt* v. *Loosemore*: [1] "The law, therefore, as I collect it from the authorities, stands thus: That a legal mortgagee is not to be postponed to a prior equitable one upon the ground of his not having got in the title-deeds, unless there be fraud or gross and wilful negligence on his part. That the Court will not impute fraud, or gross and wilful negligence to the mortgagee, if he has *bonâ fide* inquired for the deeds and a reasonable excuse has been given for the non-delivery of them; but that the Court will impute fraud, or gross and wilful negligence, to the mortgagee if he omits all inquiry as to the deeds." [2] The same learned judge subsequently, when Lord Justice, more definitely indicates the limits of the law thus: [3] "A purchaser or mortgagee is bound to inquire into the title of his vendor or mortgagor, and will be affected with notice of what appears upon the title if he does not so inquire; [4] nor can it, I think, be disputed that this rule applies to a purchaser or mortgagee of leasehold estates, as much as it applies to the purchaser or mortgagee of freehold estates, or that it applies equally to a tenant for a term of years; and I cannot see my way to hold that a rule which applies in all these cases ought not to be held to apply in the case of a tenant from year to year." [5]

Statement by Turner, V.C., in *Hewitt* v. *Loosemore*.

Though it is true that where one with a charge on lands contracts with the owner to release his charge so that the owner may mortgage the lands and the mortgage is made on this basis, he who has contracted to release his charge will not be allowed to set it up against the mortgagee; yet where the mortgagor has fraudulently got the release without giving the holder of the charge the consideration he has contracted to give, as, for example, where forged securities have been handed over in place of genuine securities, the holder of the charge is not precluded from setting up his original and paramount right against the assignee of the mortgagor. The assignee may have a right to compel the performance of the contract between his mortgagor and the holder of the charge, that is, to compel him to release his original charge on having the new securities substituted; but this is all he has.[6] James, L.J., states the principle: [7] "If a purchaser, however honest, on the completion of his purchase acquires a defective title, that defective title this Court will not allow to be strengthened either by his own fraud or by the fraud of any other person."

Charge released by means of a false representation will work no prejudice to the holder.

[1] 9 Hare, 458. "Nothing but fraud or gross and voluntary negligence in leaving the title-deeds will oust the priority of the legal claimant": *Plumb* v. *Fluitt*, 2 Anstr. 432, 440; *Wormald* v. *Maitland*, 35 L. J. Ch. 69; *Sharpe* v. *Foy*, L. R. 4 Ch. 35; *Dixon* v. *Winch*, [1900] 1 Ch. 736; *Turner* v. *Smith*, [1901] 1 Ch. 213; *Berwick* v. *Price*, [1905] 1 Ch. 632; *Walker* v. *Linom*, [1907] 2 Ch. 104, 114.

[2] See *In re Lord Southampton's Estate, Allen* v. *Lord Southampton, Banfather's Claim*, 16 Ch. D. 178; *Roper's Claim*, 50 L. J. Ch. 155.

[3] *Wilson* v. *Hart*, L. R. 1 Ch. 463, 467.

[4] Notice to a purchaser that there is a lease is notice of its contents (*Hall* v. *Smith*, 14 Ves. 426), where there is a fair opportunity of ascertaining the contents: *Hyde* v. *Warden*, 3 Ex. D. 72; *Reeve* v. *Berridge*, 20 Q. B. D. 523. If the lease contains unusual and onerous covenants it is the duty of the vendor before the contract is made to disclose them to a purchaser ignorant of them: *Molyneux* v. *Hawtrey*, [1903] 2 K. B. 487. *In re White and Smith's Contract*, [1896] 1 Ch. 637; *In re Haedicke and Lipski's Contract*, [1901] 2 Ch. 666.

[5] See the Vendor and Purchaser Act, 1874 (37 & 38 Vict. c. 78), s. 2, Second Rule which is held not to have altered the rule that a lessee has constructive notice of his lessor's title: *Patman* v. *Harland*, 17 Ch. D. 353, followed in *English and Scottish Mercantile Co.* v. *Brunton*, [1892] 2 Q. B. 700.

[6] *Eyre* v. *Burmester*, 10 H. L. C. 90.

[7] *Heath* v. *Crealock*, L. R. 10 Ch. 33.

Client defrauded by solicitor. *Hunt* v. *Elmes.*

In a case[1] where a solicitor handed his client a packet of deeds, purporting to be the deeds of an estate, while in reality the deeds were not included in the packet but were retained by the solicitor and subsequently parted with to another mortgagee, Turner, L.J., held that the client had not been guilty of gross negligence in not examining them and ascertaining that they were correct so as to preclude him from setting up his title against the second mortgagee. "Clients in the ordinary course of business," said the Lord Justice,[2] "trust their solicitors, and negligence cannot be imputed where the ordinary course of business has been observed."

In re Richards.

In another case[3] a solicitor deposited the title-deeds of his client, a mortgagee, with his own banker as security for an advance. After the death of the solicitor the bankers gave notice to the mortgagor of the property in priority to the mortgagee, nevertheless, the bankers were still held postponed to the mortgagee.

Cestui que trust defrauded by trustee.

A *cestui que trust* is also entitled to place reliance upon his trustee, and is not bound to inquire whether he has committed a fraud against him unless there is something to arouse his suspicions.[4] On the other hand, the holder of a first equitable interest in property who puts the deeds, not into the hands of a person owing him a duty, but into the hands of his mortgagor, who uses them to obtain an advance, would be postponed to the maker of such advance.[5]

Various modes of affecting with notice.

A person may be affected with notice of a deed by anything outside the ordinary course of events calculated to suggest to a reasonably prudent man the advisability of making inquiry[6]—that is, if there is a natural connection between the abnormal circumstance and the point that it is the duty of the person to know;[7] as, for instance, where the purchaser is only able to make out a title by a deed which leads him to another fact which would work disclosure, the purchaser is presumed to have knowledge of it.[8] The rule has been put as high as that a man must show, not only that he had no information of the suggestive circumstance, but that with due diligence he could not have obtained it.[9] The preponderance of authority, however, is against this view. Thus in *Ware* v. *Lord Egmont*[10] Lord Cranworth said: "The question, when it is sought to affect a purchaser with constructive notice, is not whether he had the means of obtaining, and might by prudent caution have obtained, the knowledge in question, but whether the not obtaining it was an act of gross or culpable negligence." This was the rule adopted in the House

Lord Cranworth in *Ware* v. *Lord Egmont.*

[1] *Hunt* v. *Elmes*, 2 De G. F. & J. 578; *Taylor* v *London and County Banking Co.*, [1901] 2 Ch. 231, 261. [2] *L.c.* 588. [3] *In re Richards*, 45 Ch. D. 589, 595.

[4] *In re Vernon Ewens & Co.*, 33 Ch. D. 402. This also is a solicitor's case, though the principle of the confidential relation applies to trustees. *Ante*, 1198.

[5] *Waldron* v. *Sloper*, 1 Drew. 193.

[6] *Kennedy* v. *Green*, 3 My. & K. 699; *Robinson* v. *Briggs*, 1 Sm. & G. 188; *Earl of Gainsborough* v. *Watcombe Terra Cotta Co.*, 54 L. J. Ch. 991. The doctrine of *Kennedy* v. *Green* is exhaustively considered in connection with the English cases in *Green* v. *Fletcher*, 8 N. S. Wales R. (Eq.) 58. In *Rolland* v. *Hart*, L. R. 6 Ch. 678, Lord Hatherley, C., distinguishes *Kennedy* v. *Green*. See further, Sugden, Vendors and Purchasers (14th ed.), 756. Lord St. Leonards expressed disapproval of the decision in *Marjoribanks* v. *Hovenden*, Drury (Ir. Ch.), 11. James, L.J.'s, criticism in *Hunter* v. *Walters*, L. R. 7 Ch. 84, should also be referred to. *Kettlewell* v. *Watson*, 21 Ch. D. 685; 28 Ch. D. 501.

[7] *Greenslade* v. *Dare*, 20 Beav. 284. Cp. Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 55, sub-s. 1.

[8] *Risco* v. *Earl of Banbury*, 1 Cases in Ch. 287; *Moore* v. *Bennett*, 2 Cases in Ch. 246; *Davies* v. *Thomas*, 2 Y. & C. (Ex.) 234.

[9] *Wason* v. *Warcing*, 15 Beav. 151. [10] 4 De G. M. & G. 473.

of Lords in *Montefiore* v. *Browne*[1] and it has since repeatedly been followed.[2] So that, in the case of a purchaser omitting to call for title-deeds, he will not be affected with notice of a fraud by the person of whom he was bound to make the inquiry, in addition to being affected with the knowledge that they are in the possession of some holder for value;[3] nor yet if he is told, by the person who gives him notice of a deed, which does not necessarily affect the property, that it does not affect the particular property he is going to deal with.[4]

Notice in regard to personal estate and notice in regard to real estate.

There is a distinction also between notice in regard to personal estate and notice relating to real estate. Where an equitable charge is given on personal estate in the hands of a trustee, notice to the trustee is necessary as against subsequent incumbrancers, though this is not so in the case of land.[5] The principle is that where there are several assignments of interest in personal estate, the assignee who gives notice first to the trustee is entitled to priority.[6]

Requisites of notice.

Notice, said Lord Cairns, C., in a case of personal estate,[7] should be in writing to the trustees of the property on which the incumbrance is given. If there is no writing the holder of the security is exposed to two dangers: first, the danger of the trustee being left in entire ignorance of the security; and next, "if he attempts to prove knowledge of the trustee *aliunde*, the difficulty which this Court will always feel in attending to what are called casual conversations, or in attending to any kind of intimation which will put the trustee in a less favourable position as regards his mode of action than he would have been in if he had got distinct and clear notice from the incumbrancer." Yet in some circumstances, notwithstanding, a trustee may be fixed with knowledge of an incumbrance where there is no express notice from the incumbrancer. "It must depend upon the facts of the case; but I am quite prepared to say that I think the Court would expect to find that those who alleged that the trustee had knowledge of the incumbrance had made it out, not by any evidence of casual conversations, much less by any proof of what would only be constructive notice—but by proof that the mind of the trustee has in some way been brought to an intelligent apprehension of the nature of the incumbrance which has come upon the property, so that a reasonable man, or an ordinary man of business, would act upon the information and would regulate his conduct by it in the execution of the trust. If it can be shown that in any way the trustee has got knowledge of that kind—knowledge

[1] 7 H. L. C. 241.

[2] *Cavander* v. *Bulteel* (1871), L. R. 9 Ch., per Wickens, V.C., 81 n.; *Banco de Lima* v. *Anglo-Peruvian Bank* (1878), 8 Ch. D., per Malins, V.C., 175; *In re A. W. Hall & Co.* (1887), 37 Ch. D., per Stirling, J., 720, 721. See also *Macbryde* v. *Eykyn*, 24 L. T. (N. S.), per Malins, V.C., 464.

[3] *Hipkins* v. *Amery*, 2 Giff. 292, 301.

[4] *Jones* v. [illegible] 1 Hare, 43, affirmed, 1 Ph. 244, and referred to in *English and Scottish Mercantile Investment Trust* v. *Brunton*, [1892] 2 Q. B., by Charles, J., 10, as establishing [illegible] junction with *Patman* v. *Harland*, 17 Ch. D. 357, the distinction between documents which must necessarily, and those which may or may not affect title. Charles, J.'s, judgment was affirmed, [1892] 2 Q. B. 700. *Cox* v. *Coventon*, 31 Beav. 378; *Grosvenor* v. *Green*, 28 L. J. Ch. 173; *Borell* v. *Dann*, 2 Hare, 440; *Reeve* v. *Berridge*, 20 Q. B. D. 523; *Hill* v. *Simpson*, 7 Ves. 152.

[5] *Union Bank of London* v. *Kent*, 39 Ch. D. 238.

[6] *Stephens* v. *Green*, [1895] 2 Ch. 148, 158; *In re Lake, Ex parte Cavendish*, [1903] 1 K. B. 151.

[7] *Lloyd* v. *Banks*, L. R. 3 Ch. 488, 490. See *Saffron Walden Building Society* v. *Rayner*, 10 Ch. D. 696, 703, reversed 14 Ch. D. 406; *White* v. *Ellis*, [1892] 1 Ch. 188, 196.

which would operate upon the mind of any rational man, or man of business, and make him act with reference to the knowledge he has so acquired—then I think the end is attained, and that there has been fixed upon the conscience of the trustee, and through that upon the trust fund, a security against its being parted with in any way that would be inconsistent with the incumbrance which has been created."

Browne v. *Savage* commented on by Lindley, L.J., in *Low* v. *Bouverie*,

In *Brown* v. *Savage*[1] it was laid down that notice to one trustee is notice to all. But this is stigmatised by Lindley, L.J.,[2] as "one of those misleading generalities against which it is necessary to be on one's guard." The more accurate statement of the principle, as laid down by the same high authority, seems to be that, though notice to one trustee would give priority over a prior incumbrancer who has given notice to none of the trustees, yet notice to one does not affect the others so as to render them liable for their action taken in ignorance of the notice to their co-trustee.[3]

who quite inadequately appreciates Kindersley, V.C.'s, statement.

Lindley, L.J.'s, criticism is somewhat unjust, as a reference to the complete passage from Kindersley, V.C.'s, judgment shows:[4] "As a general rule, notice to one of several trustees is sufficient, so long as that trustee lives. It is sufficient for the reason that a person who is asked to advance his money on the trust property, whether by way of purchase or of mortgage, ought, for his own safety, to apply to every one of the trustees; and if he omits to take that precaution it is his own fault if he should suffer loss in consequence of the omission. If, then, notice to one trustee is sufficient, it is contended that in the case of the assignor being himself one of the trustees, inasmuch as he is necessarily cognisant of his own assignment, that, of itself, constitutes a sufficient notice to one of the trustees, and there is no necessity for notice being given to his co-trustees. Now, it is true that it is not necessary that the notice to a trustee should be a notice formally given in writing; a verbal and informal notice is sufficient, provided the fact of the assignment is distinctly and clearly brought to the mind and attention of the trustee. But in the case where the *assignor* is himself one of the trustees, he being the only one of the trustees who has any notice or knowledge of the assignment which he has made, if he should afterwards apply to another person to advance him a sum of money on an assignment of his interest, concealing the fact of such prior assignment, such proposed assignee could not, by any caution in making inquiry of all the trustees, discover the fact of the prior assignment; for it is the interest of the proposed assignor to conceal the prior assignment; and the other trustees know nothing about it. Such notice, therefore, would not effect the object for which notice to trustees is required; viz., the security of the party taking the assignment against prior assignments concealed from him by his assignor."

View of Cozens-Hardy, J., in *Lloyd's Bank* v. *Pearson*,

And Cozens-Hardy, J.,[5] says of this: "I am not aware that the authority of *Browne* v. *Savage*, so far as it relates to the effect of notice to or knowledge of a trustee assignor, has ever been questioned.[6] It was quoted with approval by Sir John Romilly in *Willes* v. *Greenhill*.[7] That case only decided that where a beneficiary, the wife of a trustee, mortgaged her separate estate by a deed to which the husband trustee

1 4 Drew. 635.
2 *Low* v. *Bouverie*, [1891] 3 Ch. 104; *White* v. *Ellis*, [1892] 1 Ch. 188.
3 *Phipps* v. *Lovegrove*, L. R. 16 Eq. 80. See *Ward* v. *Duncombe*, [1893] A. C. 369, 383.
4 4 Drew. 640. 5 *Lloyd's Bank* v. *Pearson*, [1901] 1 Ch. 865, 871.
6 This of course does not impugn what is said in *Low* v. *Bouverie*, [1891] 3 Ch., by Lindley, L.J., 99. 7 29 Beav. 373, 387.

was a party, the notice to or knowledge of the husband trustee was sufficient. It will be observed that the trustee was not and could not be the assignor of his wife's separate estate, though he may have been, and probably was, the person who got the benefit of the money advanced. On appeal,[1] Lord Westbury expressly stated that he did not intend to overrule or throw doubt upon any former decision, including of course *Browne* v. *Savage*." Further, in the Court of Appeal, in *In re Dallas*,[2] Williams, L.J., quotes with approval Cozens-Hardy, J.'s, statement in the last-cited case: "It would be whittling away the rule, and indeed would be making it a mere trap, if it were to be held that the knowledge which an assignor trustee has of his own incumbrance is sufficient to give the assignee priority against a subsequent incumbrancer who gives due notice to all the trustees. This, I take it, was the view of Kindersley, V.C." The notice to or knowledge of a sole assignor trustee is not, then, an effective notice to operate on priorities.

and of Williams, L.J., *In re Dallas*.

The law has been thus summed up:[3] "If one only of the trustees in existence at the date of the second assignment had notice of the prior assignment, the earlier assignee does not lose his priority. It has also been held that an assignee who has given notice to one only of several trustees is not entitled to priority over a subsequent assignee who takes his assignment after the death of the trustee to whom notice has been given; and it has also recently been determined by Stirling, J., in *In re Wasdale*,[4] where the authorities for the former propositions are referred to, that an assignee who has given notice to all the trustees in existence at the time of his assignment is entitled to priority over a subsequent assignee who has taken his assignment after the death or retirement of all those trustees, and who gives notice of such assignment to the new trustees."

Conclusion.

The mere omission of a person having an equitable interest in a fund, the legal property of which is in another, to give notice of that interest will of itself give a puisne incumbrancer the priority;[5] but this principle is not applicable to a mortgage of real estate;[6] because "by the assignment of the mortgage the debt necessarily passes as incident to it; and it is clear that to constitute a valid assignment notice to the mortgagor is not necessary."[7]

Effect of omission of person having an equitable interest in a fund to give notice to the tenant of the legal estate.

Where the property is equitable and the legal estate is in trustees, the act of giving the trustees notice is, to a certain degree, taking possession of the fund;[8] for after notice the trustee of the fund is

Giving notice analogous to taking possession of an equitable fund.

[1] 4 De G. F. & J. 147.

[2] [1904] 2 Ch. 385, 412.

[3] Per Byrne, J., *Freeman* v. *Laing*, [1899] 2 Ch. 358; *In re Phillips' Trusts*, [1903] 1 Ch. 183.

[4] [1899] 1 Ch. 163

[5] *Wright* v. *Lord Dorchester* (1809), 3 Russ. 49 n., has been cited as indicating that Lord Eldon favoured the doctrine. But Lord Macnaghten points out, in *Ward* v. *Duncombe*, [1893] A. C. 384, that "that case really throws no light upon the point"; and in *Meux* v. *Bell*, 1 Hare, Wigram, V.C., 83, thinks it "apparent upon the judgment in *Evans* v. *Bicknell* (6 Ves. 190), that Lord Eldon at that time did not consider the mere omission to give notice" would have the effect contended for. Sir Thomas Plumer, in *Cooper* v. *Fynmore* (1814), 3 Russ. 60, was of the same opinion. He says (64), "mere neglect of notice was not sufficient to postpone" a prior incumbrancer. "In order to deprive him of his priority, it was necessary that there should be such laches as, in a Court of Equity, amounted to fraud."

[6] *In re Richards*, 45 Ch. D., per Stirling, J., 595; *Hopkins* v. *Hemsworth*, [1898] 2 Ch. 347.

[7] Per Sir W. Grant, M.R., *Jones* v. *Gibbons*, 9 Ves. 410; *Taylor* v. *London and County Banking Co.*, [1901] 2 Ch. 231.

[8] Shadwell, V.C., in *Jones* v. *Jones*, 8 Sim. 633, explains that the rule in *Dearle* v. *Hall* has nothing to do with the assignment of equitable interests in real estate.

affected with a direct responsibility to the assignee who has given him notice. The reason for the assertion of this principle lies in the consideration of the power the *cestui que trust* of such an interest has of taking the same security repeatedly into the market, and inducing third persons to deal with him on the assumption of his absolute ownership of the property, and of the expediency of throwing difficulties in the way of the assignor coming into the market to dispose of that which he had previously sold, and being enabled to obtain "a false and delusive credit."[1] In such cases, therefore, priority of notice gives priority of title;[2] and to deprive a person who has done everything he can to complete his title to priority by giving notice to trustees, there must be negligence so gross as to affect the person guilty with the consequences of fraud.[3]

Lord Lyndhurst considers notice to one trustee sufficient to take property out of the order and disposition of a bankrupt.

Lord Lyndhurst, who as Chancellor affirmed *Dearle* v. *Hall*, as Chief Baron delivered the judgment in *Smith* v. *Smith*,[4] and held that notice to one of several trustees was sufficient to take the property out of the order and disposition of a person subsequently bankrupt. "A second assignee," said Lord Lyndhurst,[5] "in order to have obtained a priority over the plaintiff must have shown that he had exercised proper caution in taking the assignment; that he had applied to the trustees to know if any previous assignment had been made; and, unless he applied for this purpose to each of the trustees, he would not have exercised due caution, or done all that he ought to have done."

Comment on *Smith* v. *Smith* by Lord Herschell, C., in *Ward* v. *Duncombe*.

Commenting on this language in *Ward* v. *Duncombe*,[6] Lord Herschell, C., says it is "somewhat remarkable. It would seem, if correctly reported, to indicate the view that a second incumbrancer would only obtain priority over an earlier one if he had used due caution, and had, in fact, made such inquiry as a prudent man would of each of the trustees." Such a view is in direct conflict with the decision of the House of Lords two years later in *Foster* v. *Cockerell*,[7] where the rule[8] in *Dearle* v. *Hall* is affirmed to be independent of any considerations of the conduct of the competing assignee, if that assignee has no notice of the earlier assignment. Priority in such cases depends simply and solely on priority of notice.[9] Lord Herschell considered[10] that Lord Lyndhurst cannot have intended to say more than "that where one of several trustees has notice of an incumbrance, the *cestui que trust* is no longer left in apparent possession, for any person asked to take a subsequent assignment, and adopting the precaution which a prudent

[1] *Dearle* v. *Hall*, 3 Russ., per Sir Thomas Plumer, M.R., 13.

[2] *In re Fr. hfield's Trust*, 11 Ch. D. 198, followed in *English and Scottish Mercantile Investment Co.* v. *Brunton*, [1892] 2 Q. B. 1, and *Montefiore* v. *Guedalla*, [1903] 2 Ch. 26.

[3] *Ware* v. *Lord Egmont*, 4 De G. M. & G. 460, as to which see *Molyneux* v. *Hawtrey*, [1903] 2 K. B., per Collins, M.R., 493; *Montefiore* v. *Browne*, 7 H. L. 241; *Bailey* v. *Barnes*, [1894] 1 Ch. 25.

[4] 2 Cr. & M. 231, followed by Lord Westbury, C., *Willes* v. *Greenhill*, 4 De G. F. & J. 147.

[5] 2 Cr. & M. 233.

[6] [1893] A. C. 380.

[7] 3 Cl. & F. 456. See a criticism of this case, and the various explanations of it by Lord Macnaghten, who concludes that it has come to be treated "as applying only to assignments of *choses in action*, or of such interests in real estate as can only reach the hands of the beneficiary or assignor in the shape of money," [1893] A. C. 389, 390.

[8] Said to be derived from the doctrine of *Ryall* v. *Rowles*, 1 Ves. 348. "In the case of a *chose in action*, you must do everything towards taking possession that the subject admits": per Sir Thomas Plumer, M.R., *Dearle* v. *Hall*, 3 Russ. 23; *Wilmot* v. *Pike*, 5 Hare, per Wigram, V.C., 19: "The expressions of Sir Thomas Plumer are applied to personal property."

[9] *In re Dallas*, [1904] 2 Ch. 385, 414.

[10] [1893] A. C. 380.

man would of inquiring of all the trustees, would come to know of the prior incumbrance."

Rule in *Dearle* v. *Hall* examined in *Ward* v. *Duncombe*.

The rule in *Dearle* v. *Hall* was the subject of a very scrutinising inquiry in the House of Lords in *Ward* v. *Duncombe*.[1] There one of two trustees had notice of a settlement, and it was contended that so long as this trustee lived the settlement had priority of a subsequent charge of which both trustees had notice, but that on his death the subsequent charge obtained priority. Lord Herschell, C., was of opinion [2] that the leading consideration which induced the Court to lay down the rule in *Dearle* v. *Hall*, that he who gives notice has a better equitable right than a prior incumbrancer who has given no notice, was "that any other decision would facilitate fraud by the *cestui que trust*, and cause loss to those who might have used every precaution that was possible to ascertain, before parting with their money, that the title they were taking was a valid one." "Where," he says,[3] "at the time the second advance is made, one of the trustees has notice of a prior incumbrance, I see no reason why notice of the second incumbrance should give it priority over the earlier assignment. The fund was not at the time of the second advance left in the apparent possession of the *cestui que trust*. The person asked to make the second advance could have protected himself had he chosen to make that inquiry of all the trustees which prudence enjoined." The Lord Chancellor then discriminates the case where at the time of the second advance the trustee, knowing of the first advance, is no longer a trustee. The fund is again in the apparent possession of the *cestui que trust*. A case like this does not, however, "warrant the conclusion that where at the time of the second advance and notice the trustees, through one of their number, were in possession of notice of a prior assignment, the later assignment, although it is not, at the time when notice of it is received by the trustees, entitled to priority over the earlier assignment, becomes entitled to such priority when the trustee who had notice of that assignment dies or ceases to act." The test is what was the title at the time of the advance and when notice was given to the trustees.[4]

Reasoning of Lord Herschell, C.

Difficulty suggested by the decision in *Low* v. *Bouverie*.

Met by Lord Herschell.

A hardship was suggested as likely to arise by virtue of the decision of the Court of Appeal in *Low* v. *Bouverie*,[5] that trustees of a fund are not under any legal obligation to answer inquiries put to them as to existing incumbrances; but Lord Herschell meets it by saying: [6] "If the trustees, or any of them, were to decline to answer such inquiries, it seems to me that the intending incumbrancer would take the risk upon himself of whatever prior incumbrances there might chance to be. He would be dealing with property which he had no sufficient ground for concluding was at the disposal of the *cestui que trust*. He would not be deceived by any apparent possession."

Notice of deed, notice of its contents.

Notice of a deed is notice of its contents,[7] even where there is the most express representation that it contains nothing affecting the

[1] [1893] A. C. 399. [2] *L.c.* 378. [3] *L.c.* 381.

[4] Lord Macnaghten does not concede even so much. He says, *l.c.* 394, "I take leave, however, to doubt whether the proposition on which the argument is founded can be treated as settled law. There is no authority for it that I know in this country but the case of *Timson* v. *Ramsbottom*"; which he proceeds to show was decided on very special facts, besides that the appeal in the case was compromised.

[5] [1891] 3 Ch. 82. See as to the view of Knight Bruce, V.C., in *Etty* v. *Bridges*, 2 Y. & C. (Ch.) 493, Lord Macnaghten's comment, [1893] A. C. 393; and an article on The Doctrine of Notice to Trustees, Law Mag. and Review, (1893) vol. xix. (4th ser.) 81. *Porter* v. *Moore*, [1904] 2 Ch. 367.

[6] [1893] A. C. 383.

[7] *Malpas* v. *Ackland*, 3 Russ. 273.

title.[1] The mere deposit of a document or title is enough in equity to create a charge on the property therein referred to. If, however, the deposit is accompanied by an actual written charge, the terms of the written document must be referred to and govern the deposit.[2]

Notice in cases of specific performance.

In cases of specific performance, notice of a lease affects the purchaser only in the absence of misrepresentation and with the knowledge of ordinary covenants. What are ordinary covenants differ with regard to the situation of property or the circumstance of the sale.[3]

Notice must be of a deed actually executed.

Notice of a deed actually executed is necessary, and not notice merely of an intention to execute a deed. "There is no case or reasoning," said Lord Thurlow,[4] "which goes so far as to say that a purchaser shall be affected by notice of a deed in contemplation." Further, the mere execution of a deed by a witness will not fix him with notice of its contents; for, says Lord Thurlow, "a witness in practice is not privy to the contents of the deed."[5] Recitals in a deed operate as notice,[6] even though they are inaccurate;[7] but they are not representations of fact on the faith of which a stranger to the deed is entitled to act without inquiry.[8] A general notice that an estate is subject to a charge as a judgment is operative, though there is no information as to the exact nature or amount.[9]

It was held in a case[10] where plaintiff, believing a house to be his, had, though warned by the true owner of his title, pulled it down and rebuilt it, and had afterwards had ejectment brought against him by the owner, that the owner, having once and recently given notice of his claim to the property, was not bound again to assert his rights when the expenditure on it began, or while it was going on, in order to exclude any equity of the plaintiff's in respect of his expenditure.

Duty where property is purchased known to be in the occupation of a tenant.

Lord Romilly[11] also held that, where a vendor contracted to sell property which the purchaser knew was in the occupation of a tenant, there was a duty to inquire as to the interest of the tenant; failing which the purchaser was affected with notice of an agreement for a lease which the tenant had; his decision was followed by the Common Pleas in *Phillips* v. *Miller*.[12] In *Caballero* v. *Henty*[13] the Court of Appeal,

Conflicting decisions.

1 *Taylor* v. *Stibbert*, 2 Ves. 437; *Phillips* v. *Miller*, L. R. 10 C. P. 420.

2 *Shaw* v. *Foster*, L. R. 5 H. L. 321; *London and Canadian Loan and Agency Co.* v. *Duggan*, [1893] A. C. 506.

3 *Wilbraham* v. *Livesey*, 18 Beav. 206; *Molyneux* v. *Hawtrey*, [1903] 2 K. B. 487.

4 *Colhay* v. *Sydenham*, 2 Bro. C. C. 393; see *Shaw* v *Foster*, L. R. 5 H. L., per Lord O'Hagan, 352 *et seqq.*; *Williams* v. *Williams*, 17 Ch. D., per Kay, J., 442 *et seqq.*

5 *Beckett* v. *Cordley*, 1 Bro. C. C. 357, referring to *Mocatta* v. *Murgatroyd*, 1 P. Wms. 393, of which Lord Thurlow says: "I do not leave this as a case which I should determine in the same manner." See also *Stevens* v. *Mid-Hants Ry. Co.*, L. R. 8 Ch., per James, L.J., 1069.

6 *Farrow* v. *Rees*, 4 Beav. 18; *Taylor* v. *Baker*, 5 Price (Ex.), 306.

7 *Hope* v. *Liddell* (No. 1), 21 Beav. 183, Dart, Vendors and Purchasers (7th ed.), vol. ii. 895. As to statutory limitations on the old law, see the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 3, sub-s. 3. This clause will not affect the purchaser's right to object where the defect is accidentally disclosed by the vendor: *Smith* v. *Robinson*, 13 Ch. D. 148, followed *In re National Provincial Bank of England and Marsh*, [1895] 1 Ch. 190, 200.

8 *Trinidad Asphalte Co.* v. *Coryat*, [1896] A. C. 587.

9 *Taylor* v. *Baker*, 5 Price (Ex.), 306, Dan. (Ex.) 71 (where is a valuable reporter's note), which is recognised in *Penny* v. *Watts*, 1 Hall & Twells, 266, 282.

10 *Clare Hall* v. *Harding*, 6 Haro, 273.

11 *James* v. *Lichfield*, L. R. 9 Eq. 51.

12 L. R. 9 C. P. 196.

13 L. R. 9 Ch. 447.

affirming Jessel, M.R., held that the doctrine of notice would be unduly extended if applied as between the vendor and purchaser, and whilst the matter still rests in contract.[1] The true doctrine, said James, L.J.,[2] referred only "to equities between the purchaser and the tenant when the legal estate has passed," and had "nothing to do with the rights and liabilities of vendors and purchasers between themselves." "If there is anything in the nature of the tenancies which affects the property sold, the vendor is bound to tell the purchaser, and to let him know what it is which is being sold; and the vendor cannot afterwards say to the purchaser, 'If you had gone to the tenant and inquired, you would have found out all about it.' During the argument I referred to a passage in Sugden's Vendors and Purchasers,[3] which seems to show that a purchaser is not bound to go to the tenant to inquire." Subsequently the Exchequer Chamber overruled the decision of the Common Pleas in *Phillips* v. *Miller*.[4]

Doctrine of *Caballero* v. *Henty* affirmed.

Possession by a vendor of an estate which he has sold will not be constructive notice of any lien for unpaid purchase-money if the vendor has signed the usual receipt on the conveyance for the whole purchase-money; but otherwise it will.[5] Nor will the mere circumstance of the vendor having been out of possession many years affect a *bonâ fide* purchaser and without notice.[6]

Possession by vendor not necessarily notice of lien for unpaid purchase-money.

We have now to note the effect on the client of knowledge by his solicitor. Most generally the law imputes to the client the knowledge of the solicitor he employs. There is this qualification, however. "If the disclosure of that fact of which knowledge is sought to be fixed upon the client would have imputed fraud to the solicitor, it is not to be presumed that the solicitor did make disclosure of that fact."[7] "I take it to be very clearly established that if a person employed as a solicitor has done things, which if disclosed would prevent the perfection of the security on which he is engaged, which would show that a good title does not exist to that which he is the instrument of conveying to the purchaser, it is not to be expected or inferred that he would communicate what he has done to his client." And the tendency of the later decisions has been to hold that when a man employs a solicitor whose whole purpose and meaning in the transaction is to cheat and defraud his client, and who in furtherance of this intention keeps back purposely from his knowledge the true state of the case, the presumption that the client had imputed to him a constructive notice, through the solicitor, of the fact which had been concealed from him is repelled.[8]

Knowledge of solicitor's knowledge of client.

In *Fuller* v. *Benett*[9] three propositions seem to have been accepted as indispensable:

Fuller v. *Benett*.

First, that notice to the solicitor is notice to the client;

[1] *Daniels* v. *Davison*, 16 Ves. 249; *Carander* v. *Bulkeley*, L. R. 9 Ch. 79.
[2] L. R. 9 Ch. 450. [3] (14th ed.) 774. [4] L. R. 10 C. P. 420.
[5] *White* v. *Wakefield*, 7 Sim. 401; *Mackreth* v. *Symmons*, 1 White & Tudor, L. C. in Equity (6th ed.), 355, note at 387.
[6] *Barnhart* v. *Greenshields*, 9 Moo. P. C. C. 18, 34: "There is no authority ... for the proposition that notice of a tenancy is notice of the title of the lessor; ... a purchaser neglecting to inquire into the title of the occupier is affected by any ... equities than those which such occupier may insist on." This is followed by Farwell, J., *Hunt* v. *Luck*, [1901] 1 Ch. 45, who comments (53) on Sir George Jessel's statement in *Mumford* v. *Stohwasser*, L. R. 18 Eq. 562. *Hunt* v. *Luck* is affirmed, [1902] 1 Ch. 428, 433.
[7] Per Bacon, V.C., *Waldy* v. *Gray*, L. R. 20 Eq. 251, 252.
[8] Kerr, Fraud (3rd ed.), 330.
[9] 2 Hare, 394, 402. In the judgment the order of propositions 2 and 3 is transposed.

Secondly, that notice to the solicitor to bind the client must be notice in that transaction in which the client employs him;[1]

Thirdly, that where vendor and purchaser employ the same solicitor, each is affected with notice of whatever the solicitor had notice in his capacity of solicitor for either vendor or purchaser in the transaction in which he is so employed.[2]

Effect of notice of agent.

What is notice to an agent or trustee is notice[3] to the principal;[4] and the presumption that a solicitor has communicated to his client facts which he ought to have made known cannot be rebutted by proof that it was the solicitor's interest to conceal them.[5]

It is not necessary that the agent's knowledge should be acquired during the existence of the agency. It is sufficient that having acquired the knowledge he subsequently acts in the agency. The duty of the agent thereupon arises to communicate to his principal any knowledge which he had previously gained in the matter.[6]

No notice where title-deeds held by largest owner.

A purchaser will not be affected with notice of a prior equitable mortgage, by his knowledge that the title-deeds are in the possession of the equitable mortgagee, if the equitable mortgagee, by reason of his being the largest co-owner of the property, is the person who, independent of the mortgage, is entitled to their custody.[7]

Notice affecting the director of a company.

Chitty, J.,[8] following Jessel, M.R., refused to extend the doctrine of constructive notice so as to impute to a director of a company a knowledge of the books, where the accounts had been duly audited, and the auditors were apparently accountants of skill and integrity, since "it would be extending the doctrine of constructive notice far beyond that or any other case."[9] "It is sufficient," said Chitty, J., "if directors appoint a person of good repute and competent skill to audit the accounts, and have no ground for suspecting that anything is wrong. The directors are not bound to examine entries in the company's books."[10]

Negligence against negligence.

Negligence against negligence, like estoppel against estoppel, sets the matter at large.[11]

Res judicata.

The rule with regard to *res judicata* is laid down by Wigram, V.C., in *Henderson* v. *Henderson*,[12] "where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the Court requires the parties to that litigation to bring

1 *Bulpett* v. *Sturges*, 22 L. T. (N. S.) 739.

2 For the rule as to notice to agent, 2 Kent, Comm. 630 n. (h), and Mr. Holmes's note to 12th ed.

3 Actual not constructive notice to the principal, Dart, Vendors and Purchasers (6th ed.), vol. ii. 675; Sugden, Vendors and Purchasers (14th ed.), 756.

4 *Le Neve* v. *Le Neve*, Amh. 436, 2 White and Tudor, L. C. in Equity (6th ed.), 26, note at 67, "Constructive notice between principal and agent." *Maxfield* v. *Burton*, L. R. 7 Eq. 15; *Rolland* v. *Hart*, L. R. 6 Ch. 678; *Berwick* v. *Price*, [1905] 1 Ch. 632, 2 Ch. 153.

5 *Bradley* v. *Riches*, 9 Ch. D. 189. Actual notice amounting to fraud must be proved to affect the holder of a registered deed with notice of a prior unregistered deed: *Wyatt* v. *Barwell*, 19 Ves. 435. A man cannot be presumed to have disclosed his own fraud: *In re European Bank*, L. R. 5 Ch. 358, 362.

6 *Kettlewell* v. *Watson*, 21 Ch. D. 686, 705. *In re David Payne and Co.*, [1904] 2 Ch. 608, 616.

7 *Ex parte Hardy*, 2 Deac. & Ch. (Bank.) 393, 394. See *Agra Bank Ld.* v. *Barry*, L. R. 7 H. L. 135.

8 *In re Denham & Co.* (No. 1), 25 Ch. D. 766.

9 *Hallmark's case*, 9 Ch. D., per Jessel, M.R., 332.

10 25 Ch. D. 766. *Ante*, 1132.

11 Co. Litt. 352 b; per Stuart, V.C., *Were* v. *Lord Egmont*, 16 Jur. 371, 373, affirmed 4 De G. M. & G. 460; *Withington* v. *Tate*, L. R. 4 Ch. 288.

12 3 Hare, 115; *Worman* v. *Worman*, 43 Ch. D. 296.

forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of *res judicata* applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time."

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Printed by BALLANTYNE & Co. LIMITED
Tavistock Street, London

P.O. *Telephone:*
No. 221 CENTRAL.

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