Where, again, the hirer or lessee has either not taken due care to prevent or remedy an accidental injury, or has adopted means extraordinary or hazardous, he must run the risk. Thus, if a horse become ill in the hirer's possession, and he take no means to relieve the malady, and the horse die or become useless when it might have been saved, he will be responsible.[1] Or if he proceed himself to administer medicines when he might have had medical advice, and the horse die, he will be answerable where there is any unskilfulness in the means employed.[2] Neglect.

This implied obligation to diligence makes the master liable for his servants. The diligence is that of a bonus pater-familias.

§ 3. HIRING OF LABOUR.

Locatio Operis, or Hiring of Labour, includes the simple case of the hiring of Common or of Skilled Labour, which is 'Locatio operis faciendi;' and the hiring of that particular kind of labour to which special rules have been applied, namely, the Carriage of Goods, called 'Locatio operis mercium vehundarum.'

Referring to what has already been said respecting the property of the thing on which the labour is to be employed, the personal obligation, and the claims thence arising, are here to be considered.

Without being too curious about distinctions, there is some little difference observable between the hiring of the labour of an undertaker in any branch of art, and the hiring of the labour of workmen or servants. The former is a contract for performing some piece of work or operation of art, and has reference to its accomplishment; the latter is an engagement to labour under a master, and has reference to an appointed term.

A contract of locatio operis, to accomplish some particular piece of work or operation of art, implies that the materials shall be furnished by the employer, otherwise it is properly a sale.[3]

Two questions may arise on this contract:—

1. Where more has been done than the parties have stipulated and expressed in their contract, and there is, on the one hand, no acquiescence in the change, while, on the other, the work is inseparably connected with the property of the employer; it would seem that the employer is not bound to pay more than he has agreed to pay. But a departure from the contract, assented to by the employer, will, to the extent of that alteration, substitute for the contracted price the fair remuneration for work and materials, a Increase of Work.

[1] Bray against Mayne, 1818; 1. Gow, 1. Mayne took a horse on trial, to pay L.10 for the hire, if not purchased, or L.55 for the horse. He drove him from London to Worthing, where the horse appeared not to be affected otherwise than by a cold. Having afterwards driven him 20 miles in the morning, the ostler at the inn observed a swelling under his throat, and that he refused his food. Mayne, however, drove him from Ewell to London that day. During the journey, the horse was much distressed, and came to the stables in a much worse condition. This was held a want of due care, and verdict went for the price of the horse.

[2] Dean against Keate, 1811; 3. Camp. 4. Keate having jobbed a pair of coach-horses, and one of them being slightly indisposed, he wrote a prescription for him. The medicine was not calculated to do injury to the horse; but after administering it, Keate had put the horse into harness, given him strong exercise, and kept him exposed to the inclemency of the weather: the animal was seized with an inflammation of the intestines, when the defender gave him a doze of opium and ginger, and the horse soon after died. Medical advice was called in when too late. Dean, who had let the horse to hire, brought his action for the value of the horse. Lord Ellenborough held, that Keate had not exercised 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 had entered into, when he hired the horse from the plaintiff. The plaintiff had a verdict for 60 guineas.

[3] See p. 451.

claim for the quantum meruit; and the workman will be entitled to payment by measure and value. The contract is binding so far as can be traced, and the quantum meruit applies to the remainder.

Faulty performances.

2. Where the contract has not been performed in terms of a specific agreement, or has not been duly performed, the employer is, generally speaking, not liable. It is otherwise where the employer acquiesces in the work as performed.

United with Employer's Property.

These are the rules where the work performed is separate, and not united with the property of the employer. Unless he have acquiesced in the change, he certainly is not bound to take or pay for it, if not according to the contract; and will further be entitled to damages for non-performance. But where it is united with the employer's property inseparably, a point of greater difficulty arises, Whether, being thus compelled to take what he has not bargained for, he must pay for it? In England, it seems that he is not compellable to pay even on the quantum meruit.[1] But this appears to proceed on the peculiarity of English pleading at law. The rule in Scotland seems to be, that balancing the inconvenience and damage arising from the imperfect or faulty performance against the benefit actually derived, the workman is entitled to demand, or bound to make up, the difference.

Work rendered Useless.

Another question has been moved, whether any action or claim will lie where the employer derives no benefit from the work and labour? as where the whole is accidentally destroyed before the workman's labour has been completed, or the thing delivered? There are high authorities in support of such claim, whether the work is finished or not; the reward, in the latter case, being restrained to the fair value of the work actually performed.[2] This rests on the principle, that the workman is entitled to the price of what he has done, although by accident, or force, he has been prevented from completing it; and an additional consideration strengthens the rule where the work is an accessary to the property of the employer, and by accretion becomes his; in which case, as an accessary, it perishes with the work to the owner of both.[3] Another opinion has been maintained, that, in such cases, the subject, and the undelivered work bestowed on it, will perish to the employer and workmen respectively.[4] The rules seem to be,—1. That 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. That 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; and, 3. That if the work has

Rules.

[1] Ellis against Hamlen, 1810, 3. Taunt. 52. A builder undertook to build according to a plan, with certain materials and dimensions specified. He had omitted to put in certain joists, and other materials of the specified dimension. He had received the greater part of the price, and brought his action for the remainder; and on the objection being stated, his counsel went into an inquiry to ascertain what would be requisite to make the house equal in value to that specified in the contract, contending that he was entitled to the whole balance under that deduction. Sir J. Mansfield directed a nonsuit, and would not even sustain action on a plea of quantum valebant. He said, Is the defendant to have his ground covered with buildings of no use, which he would be glad to see removed? and is he to be forced to pay for them besides? To be sure it is hard that the plaintiff should build houses, and not be paid for them. But the difficulty is, to draw the line; for if the defendant is obliged to pay in a case where there is one deviation from his contract, he may equally be obliged to pay for any thing, how far soever distant from what the contract stipulated for.

[2] Dig. Lib. 19. tit. 2. Local. Cond. l. 59. Pothier, Tr. du. Cont. de Louage, No. 433.

[3] It would be a necessary consequence of this doctrine, that, if the work had been defectively or unskilfully performed, a defence would lie against the claim, as if the subject were extant, with all its imperfections. Thus, if cloth were sent to the bleachfield, and burnt by lightning, the employer would not be bound to pay as for good work, if it should appear that the cloth was injured in the manufacture.

[4] 1. Bank. 20. § 21. Code Civile du Cont. de Louage, c. 3. § 3. No. 1790. Cours de Droit Commercial, par J. M. Pardessus, Professeur du Code de Commerce a la Faculté de Droit de Paris, 1814, vol. i. p. 549.

been performed in such a way as to afford a defence to the employer against a demand for the price, had the accident not happened, it will be equally available after its loss.

These are questions which arise chiefly from the occurrence of accidental fires: as in dockyards, manufactories, printing-houses, &c; and not unfrequently the rule of law is controlled by general or local usage.[1]

CLAIMS UNDER THIS CONTRACT.

Claims on Employer's Bankruptcy.

I. CLAIMS ON THE BANKRUPTCY OF THE EMPLOYER.[2]—In consequence of the bankruptcy of the employer, the workman may be left unpaid, while the work is entirely completed; or partly finished; or not yet begun. In these circumstances, the following claims arise:—

1. If the work be completed, the workman has a claim as a personal creditor (secured by lien if the work is not yet delivered) for the stipulated hire.

2. If the work be partly completed, the workman may be called upon by the creditors to proceed with the contract, they engaging to fulfil the counterpart; or he will have his claim for the price of what has been finished, and for damages on account of the disappointment of the contract; which, however, it may be difficult to ascertain.

3. If the work has not been commenced, still the workman may have suffered loss by the failure of the contract. He may have declined another engagement: but it does not appear that this can form a ground for claiming damages to the amount of the loss thence arising. He may have incurred penalties to workmen and labourers hired to perform the contract; and that, as more direct, appears to afford a better ground for damages. It would also seem that he may claim, as damage, the profit which he might expect to gain by the performance of the contract according to its terms.

Claims on Workman's Bankruptcy.

II. CLAIMS ON THE BANKRUPTCY OF THE WORKMAN.—1. The creditors of the workman may, with the bankrupt's assistance, or with the aid of others, where the work is of a kind which may be so performed, insist on completing it, and earning for the estate the benefit of the hire. But if the contract be personal, and to be performed by the bankrupt himself as an artist, the creditors cannot compel the employer to proceed with the agreement, unless the bankrupt himself will fulfil it.

2. On the other hand, the employer may suffer direct damage in having to arrange

[1] MENETONE against ATHAWES, 1764; 3. Burrow, 1592. Here a ship was to be repaired in dock by a ship-wright. The dock was his own, and L. 5 was to be paid for the use of it. The day before the ship was to leave the dock, and when only three hours' work were required to complete the repair, a neighbouring brewery took fire, and the fire was communicated to the dock, and the ship burnt. The action was for work and labour in repairing the ship. The examples of a carrier, when the goods perish before delivery; a jeweller setting a jewel; a taylor making a coat. On the other side, a farrier having a horse under cure; a pawn-broker having a pledge burnt. Lord Mansfield held the defence to be desperate; and said, 'Besides, it is stated he was to pay L. 5 for the use of 'the dock.' The rest of the Court concurred; and the Attorney-general, after taking time, would not argue it.

GILLET against MAWMAN, 1808; 1. Taunt. 137. This may be taken as a confirmation of the former. It was a demand for work and labour in printing a translation of the Travels of Anacharsis; the paper being furnished by the translator; the work not having been finished, and the whole having in that condition been consumed by fire. A custom of the trade was proved, that the printer is not entitled to be paid for any part of his work till the whole is completed and delivered. The Court held the general rule in favour of the workman to be controlled by the custom. They said, 'This 'custom is the law of the realm, and so far as it ex- 'tends, it controls the general law.'

[2] By a nicety in the application of the verbs Locare and Conducere, as Heineccius, and after him Sir W. Jones, observes, there is a sort of ambiguity in the terms used in the Roman law for the employer and workman in this contract. The employer is called 'locator operis,' but he is 'conductor operarum.' The workman is 'locator operarum,' but conductor vel redemptor operis. Heinec. in Pand. P. 3. § 920. in Note. Jones, Bailments, 90.

Indemnification.

a new contract on terms less favourable; or in having thrown on his hands, in an unfinished state, goods which were to be returned completely manufactured at a particular time, and ready for the market. He will, in such cases, be entitled to claim damages from the estate of the workman, and to set off the amount against the value of what has been done. Thus, if a builder has undertaken to build a house; or a machinist to erect an engine; or a ship-carpenter to build a vessel; and has become bankrupt after the wages of labour have increased, the employer will have a claim on his insolvent estate for the difference between the sum at which he had contracted to finish the work, and that at which it can now be accomplished, this being direct damage. So if goods are left unfinished, whereby the market is lost, and the price falls, the difference will form matter of direct damage, for which a claim may be entered. And on the principles already explained,[1] other consequences may, by the nature and terms of the contract, become legitimate ground of damage; as where goods are stipulated to be bleached or dyed for a particular voyage, but are still unfinished when the voyage must necessarily be performed; or to be ready for sailing with convoy, but are detained till the opportunity is lost. The damage arising in such cases by loss of the voyage, raises a legitimate claim of damage. So, under such a contract, an additional insurance made necessary by the delay, or a claim of demurrage incurred by the failure, will ground a claim of damage against the undertaker.

Inevitable Accident.

3. If the subject of the contract perish by inevitable accident, the loss is to the employer, and no claim will lie against the estate of the workman in whose hands the property perished. The rule is, Res perit domino. But the negligence, fault, or unskilfulness of the workman will cast the responsibility the other way. The rule by which such responsibility is judged of is that already explained,[2] namely, that the workman is bound to ordinary care; a criterion not less just because it is versatile, accommodating itself to circumstances, and according with the common sense of mankind. The care required in building a common door-way, and in raising a marble pillar, are quite different, but both come under the description of ordinary care. The responsibilities under these rules are those of safe custody and of adequate skill.

Care implied in Custody.

1. CUSTODY.—The care required of a custodier is such as a diligent and prudent man takes of his own property. The simple case of custody for hire is where one places his goods in a warehouse for which he pays rent: This is properly LOCATIO CUSTODIÆ. It is the contract by which goods are placed in the king's cellar under bond for the duties; or in a private warehouse till put on board ship; or in a wharfinger's warehouse when unloaded. The case differs a little where a horse is sent to a livery stable; since, in this case, there is not mere custody, but also the labour of dressing and feeding.

Place of Custody.

In such cases, the place of custody must be secure against the ordinary accidents incident to the property to be preserved. The warehouse must be water-tight, secure from attacks without and from damage of fire within, and from all things else hurtful to the property. The grazing field must be properly secured against the escape of the cattle, and free from pitfalls and dangers which may lame or injure them. The livery-stable must be wind and water-tight, so as not to expose a horse to cold or wetness, (besides the food being wholesome and the hostler fit for his undertaking). A failure in these respects will expose the owner of the cellar, of the field, of the stable, or other place of custody, to a claim for the damage thus occasioned by his fault.[3]

[1] See, of Sale, above, p. 448. et seq.

[2] See above, p. 458.; 1. Stair, 15. § 5.

[3] See Sir W. Jones, Bailment, 91, 92. LECK v. MAESTAER, 1807; 1. Camp. 138. A ship was taken into a private dry dock on the Thames. The waters rose, and, when the workmen were absent during the day, burst the doors. Lord Ellenborough held it incumbent on the ship-carpenter to have had a sufficient

But if the party be made aware of any peculiarity in the condition of the place of custody, it may by acquiescence or tacit agreement become a part of the contract, or a limitation of the responsibility.[1] Limitation by Acquiescence.

The responsibility that belongs to carriers, innkeepers, &c. under the edict, Nautæ, Caupones, Stabularii, will be considered hereafter. See below, p. 465.

2. SKILL.—The general rule as to all workmen is, 'Spondet peritiam artis,' and 'Imperitia culpæ annumeratur.' The engagement, in short, is for a due application of the necessary attention, art, and skill. Under this rule all professional men are comprehended. Their contract is Locatio operarum, not Mandate: and they, as well as smiths, farriers, bleachers, and ordinary artists of all kinds, wherever they engage their services for hire, are responsible for the skill and art necessary to accomplish safely what they undertake, in so far as ordinary skill and art can accomplish it. The public who employ them may exercise a judgment of selection; but having selected the person, they are entitled to presume that he has the ordinary skill in his art, which he holds himself out to the world as possessed of.[2]

The rules are:—1. That if one applies to an apprentice in an art; or to a man skilled in another, but not professing that in question; such person will be responsible only for the fair exertion of his capacity: as in Sir W. Jones's case, from the Mahomedan law, of a farrier employed to cure the eyes of a man.

2. That although it may be difficult to find a criterion of professional skill, some points at least are clear: Thus, 1. Where a specific act is ordered to be done, it must be done according to rule; neither neglected nor unskilfully performed. So a notary employed to

number of men in the dock to take measures of precaution; and on the ground of this deficiency he was found liable.

See CAILIFF *v.* DANVERS, Peak's Cases, 114.

CLARKE *v.* EARNSHAW, 1818; Gow's Cases at Nisi Prius, p. 30. Clarke gave a chronometer to Earnshaw, a watchmaker, to be repaired. He had a shopman well recommended, and deemed trust-worthy, who slept as guard in the shop; but who stole the chronometer. The chronometer was in a locked drawer, while Earnshaw's own watches and chronometers were deposited in an iron chest. Earnshaw was held liable.

BROADWATER *v.* BLOT, 1817; Holt's Cases, 547.

[1] WHITEHEAD against STRAITON, 14th and 16th November 1667, Dirl. 43.; 1. Stair, 48. 6. (10074). A gentleman sent his horse to the park of Holyroodhouse to be pastured, and the horse, after a search, could not be found. He brought his action against the tenant of the park, who defended himself on the ground of a placard affixed on the gate, intimating, 'that he would be answerable for no horses put into 'the park, although they should be stolen, or break 'their neck.' The Court ordered an inquiry into the fact, and parties to be heard 'on the terms of the 'agreement when the horse was put in; whether it was 'told or known to the pursuer that the keeper would 'not be answerable.' And it was held relevant, that no condition being expressed, 'it behoved to be understood on such terms as were usual with others, which 'were the terms expressed in the placard.'

BIRNIE, 21st December 1680, (10079). MAXWELL against TODRIDGE, 20th February 1684; 1. Fount. 272. (10079). In two other cases afterwards tried relative to the same party, and the effect of the placard, the Court sustained the defence, unless it should be proved that the tenant was accessary to the loss by fraud or negligence.

In a subsequent case, DAVIDSON, 2d June 1749, Kilk. 379. (10081), the defence for the loss of a horse was, that the pasture-ground was an extensive wood, fenced on one side only by the river Findhorn, which in some places was fordable. It was proved that this was, in most cases, pointed out to those who placed their cattle there; but it was not so proved as to the owner of the horse in question. The decision of the case does not appear; but it may, in some degree, be collected from the Court having recommended to the Lord Ordinary to order an inquiry as to the care usually taken of cattle in that wood, and what care was taken in this case,—that, in their opinion, if the defender should justify himself, by showing that there was no undue negligence in looking after the horses in so ill enclosed a field, and giving immediate notice, or making due search on the loss, the action should be dismissed.

[2] 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 mean time, 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.

protest a bill, if he neglect or mistake any of the established rules which regulate that duty, makes himself responsible for the loss arising to his client by the fault in the diligence. So a messenger is liable who errs in executing a caption put into his hand;[1] or an agent employed to expede a confirmation, who neglects it till his client dies;[2] or to frame obligatory missives, who fails to have them tested in terms of the statute;[3] or an agent employed to lodge an aliment for a debtor applying for the act of grace, who fails to do it, and the debtor is liberated;[4] or an agent who is to procure a security by bond and assignation, and neglects to have the assignation intimated;[5] or a security by heritable bond, and executes it only with a holding a me, and takes sasine, but does not complete it by confirmation.[6] 2. Where, although the act to be done is not settled by so unquestionable and fixed a rule, if yet the object to be accomplished may be safely attained by following a known method, the professional man is responsible if he neglects to follow such method. Thus, a law-agent employed to 'do such diligence as will place his employer on an 'equal footing with the other creditors, and who contents himself with using inhibition, al- 'though the other creditors have adjudged, neglects a plain and common rule of the pro- 'fession, and must be responsible.'[7] 3. Where the operation to be performed is complicated and difficult, a professional man, exerting fairly the best of his judgment, may err and be unsuccessful, and yet not be responsible;[8] and without some such limitation of responsibility,

[1] AITKINSON against MACBEAN, 3d December 1756, (13965). CHATTO against MARSHALL, 17th January 1811. KENNEDY against M'KINNON, 13th December 1821.

[2] GOLDIE against M'DONALD, 4th July 1757; 2. Fac. Coll. 3. (3527).

[3] CURRIE against COLQUHOUN, 17th June 1823; 2. Shaw and Dunlop, 407.

[4] DOUGAN against SMITH, 3d July 1817; 19. Fac. Coll. 369.

[5] LILLIE against M'DONALD, 13th December 1816; 19. Fac. Coll. 234.

[6] STRUTHERS against LANG, 2d February 1826; Fac. Coll. and 4. Shaw and Dunlop, 418.

[7] MASON against THOM, 4th February 1787; 9. Fac. Coll. 474. (5535).

[8] LENNOX against GRANT, 26th November 1784; 9. Fac. Coll. 283. (14381). In making up titles to property and succession, some extremely nice cases occur. And in one case, though of no extraordinary difficulty, it happened that the true method was neglected, and an erroneous one adopted, by which the client lost his debt.

GRANT against M'LEAY, 1st January 1791; Bell's Cases, 319. The consequence was an action of damages against the law-agent. He defended himself on the difficulty of the professional question, which he proved by the fact, that in the original question the judgments of the Court had varied. The Court held this to be a justification.

M'LEAN against GRANT, 15th November 1805. A lady was entitled to a provision of L. 300 out of her father's estate. This estate had come into the person of the son, who having failed, adjudications proceeded at the instance of the creditors, and she employed Grant to make her claim effectual. He led an adjudication, but committed two errors in doing so:—1. A great part of the estate was still in hæreditate jacente of the father, but Grant used no special charge in adjudging from the son. 2. His adjudication was conjoined with one *posterior* to the first effectual. Other agents had committed the same mistakes, but, on being informed of it, led new adjudications, which Grant neglected. Upon those objections the adjudication was annulled; and the lady, having thus lost her debt, brought an action for reparation against her agent. The Court considered the matter in this light, that the error of conjoining with a posterior adjudication, though against the direction in the statute, was so far sanctioned by the practice of men of business, and by a difference on the Bench in pronouncing the decision which found it to be erroneous, that it could form no ground for an action of damages against an agent. But then they held, that the error of not having used a special charge, was so clearly contrary to common rules, that the writer was liable; and, accordingly, the judgment was, 'Repelled his defences, so far as regards 'the omission to lead a second adjudication on a spe- 'cial charge, for attaching Lots 3 and 4; and find him 'liable in the damage which has arisen to the pursuer 'from that neglect.'

Thus, the claim of the pursuer for reparation, though on the whole successful under the above judgment, failed as to one of the grounds, viz. that Grant had improperly conjoined his adjudication with a posterior one. As to this it may be observed,—1. That the Act of Parliament having laid down a precise rule, it was a strong thing to hold a writer excusable for neglecting that rule, whatever looseness of practice had arisen under the Act; and, 2. That the Court held it to be a sufficient answer to this, that the words were not so absolutely clear that a question of construction might not

respectable persons would shun the profession. 4. It is no defence to an agent employed in a joint transaction, as a loan, that he was employed by the granter of the bond, and not by him who suffers from any defect in the security. 'The liability does not depend on who gives the order, but for whose behoof it is given.'[1] 5. The responsibility can extend only to the amount of the injury specifically caused by the act of carelessness or unskilfulness, for which reparation is due. Thus, if a farrier, by want of skill, kill a horse which is already lame, reparation can only be sought for the value of a lame horse. So if a writer has committed an error which annuls the diligence, but it turns out that this diligence would, on another ground, have been ineffectual, he will be freed from responsibility.[2]

§ 4. HIRING OF CARRIAGE BY LAND.

This is the application of the contract of locatio operis to one of the most frequent occasions of temporary employment which occur in practice. It is called in civil law, 'Locatio operis mercium vehundarum;' but it may here be taken both as it relates to goods and to persons. The rules which regulate the contract of location in ordinary cases are also applicable to this example of the contract, but with this difference, that a more strict responsibility has been imposed from views of public expediency, and in order to avoid the dangers to which the goods of merchants and travellers are exposed while intrusted to the care of the carrier.

CLAIMS UNDER THIS CONTRACT.

I. CLAIM BY THE CARRIER.—On the bankruptcy of the owner of the goods, a claim arises to the carrier for the carriage.

1. If the goods have been delivered by the carrier before the estate has come into the hands of the creditors by sequestration or private trust, this claim will be only as a personal creditor of the bankrupt for a dividend along with the other personal creditors.

2. If the goods are still to be delivered, the carrier is secured by his lien, of which hereafter.

3. In the middle case, where the carrier has completed the carriage of the goods, and delivered them to the administrators of the bankrupt estate, the *estate* is his debtor, and he will have preference on his demand for the whole price.[3]

be raised on them; and that the Court had been so doubtful on that question of construction, that they decided first one way and then the other.

There was a secondary question on the case, which will require very particular attention before it is relied on as a precedent. See below, Note [2].

[1] STRUTHERS against LANG, (p. 460. Note [6]), 2d February 1826; Fac. Coll.; 4. Shaw and Dunlop, 418. See WILSON against RIDDELL, 20th June 1826.

[2] In the above case of M'LEAN against GRANT, (p. 460. Note [3]), this principle produced a very singular effect. The agent had been guilty of *two* errors; one of them undoubtedly blamable, and for which the Court held him liable in damages; the other admitting of some question whether it was justifiable or not. If he had committed only the first error, he would have been held by the final judgment, as well as by the first one, liable in damages. But as he had the good fortune to combine this blamable error with another, which some of the Court thought equally blamable, others not, he escaped from the action of damages; the *justifiable* error having been found fatal to the diligence.

[3] MALCOLM against BANNATYNE, 24th June 1813; 17. Fac. Coll. 404. This case related to a cargo of timber, of which part at least was delivered after it was known by the agent taking delivery that a sequestration was awarded; and, therefore, that he was thenceforward acting for the creditors under that proceeding. This ought to be marked as the point of the case. It is loosely stated in the report, and may be overlooked. The Judges went on this principle, that the sequestrated estate really was by adoption the employer; and by receiving the goods, was bound for the carriage.

II. Claim by Passengers and Owners of Goods.—The responsibility of carriers for persons and goods intrusted to them is, in Scotland, regulated partly by the law of the contract of hiring; partly by the rule of the Roman edict, 'Nautæ, Caupones, Stabu-'larii,' on the principles of expediency already alluded to. The former shall be considered here; the latter, under the next Section.

Indemnification to Passengers.

1. The remedy to Passengers for damage sustained by the carelessness or unskilfulness of stage-coachmen and others, is upon the contract of Locatio Operarum. It comprehends those who, for hire, undertake to carry the persons or property of others; common carriers, proprietors of waggons, stage-coaches, hackney-coaches, or post-chaises; as well as all masters and owners of ships, ferrymen, bargemen, and other carriers by water.[1]

This responsibility is, according to the rule of the contract, for the sufficiency of the carriage, and ordinary care (culpa levis) of those employed. As to the sufficiency of the carriage, it is enough if it be sufficient as far as the eye *can* discover.[2] The same is the case of one who lets to hire a private post-chaise or hackney-coach.[3]

But, in construing this responsibility, courts of law and juries have shown an inclination, in the case of Stage-coaches, to bind the rule much tighter than could be insisted for on the ordinary principles of locatio operarum. The consideration of the danger to the public which may proceed even from slight faults, unskilfulness, or negligence, in this particular case; and of the helpless state in which passengers are who trust themselves in such vehicles; have gradually led to a wholesome extension of the rule, so as to subject the principals for the most inconsiderable defect or insufficiency, and for the slightest fault. Neglect of the rules of the road; rashness in going too near to the edge of the road, or to any obstruction; want of skill in driving; racing against other coaches; taking up more passengers than the law allows, where the injury can be traced to overloading as a cause;—all of these will be held sufficient to charge the principals with the effect of any accident from which loss or injury arises.[4] In order to afford due protection

[1] For the doctrine as to this last description of carriers, see below, Of Maritime Law.

[2] 'If the axletree was sound as far as human eye 'could discover, the defendant was not liable.' Sir J. Mansfield in Christie *v.* Griggs, 2. Camp. 81. See below, p. 463. Note [1]. See below as to goods, Note [4], same page.

[3] Upshare *v.* Aidee, Comyn, Rep. 25.

[4] 1. *Rashness and injudicious driving.*—Wordsworth against Willin, 5. Espin. N. P. Cases, 273.; where it was held, that the rule of the road is founded in good sense, but not always conclusive. That if a carriage coming in any direction, leave sufficient room for any other carriage, horse, or passenger, on its proper side of the way, it is sufficient. But it is a question for the jury, whether the loss arose from want of sufficient room.

In Mayhew *v.* Boyce, 1816, 1. Starkie, 423. where one coach attempting to pass another, overturned it. There were two courses, one safe, the other hazardous. Taking the hazardous was held to make the coach-owner responsible.

In Jackson *v.* Tollet, 1817, 2. Starkie, 37. the coach was going up a hill slowly: it was met by a waggon nearly in the middle of a road 30 feet wide; and the Worcester coach was descending the hill at a quick rate. In this situation, the coachman deviated to the left, and the wheel was drawn on a hillock, which being frozen and unyielding, overturned the coach,—one of the passengers warning the coachman of his danger. Lord Ellenborough left it to the jury, whether the coachman could have adopted a better course. In order to subject the master to damages, it must appear that there has been something to blame on the part of his servant; and he is blamable if he has not exercised the best and soundest judgment upon the subject. If he could have exercised a better judgment than he did, the owner is liable. Verdict for the plaintiff, whose leg was broken. 2. Starkie, 37.

2. *Negligence.*—Dudley *v.* Smith, 1808; 1. Camp. N. P. 167. Shocking example of negligence, in not informing a woman, an outside passenger, that an archway was too low to suffer her to pass, and she was struck off from the top. Verdict for L.100 damage.

3. *Overloading.*—Israel *v.* Clark and Clinch, 4. Espinasse, 259. Mr Erskine stated it to have been laid down by Lord Kenyon, that if the owners of the coach take up more passengers than are allowed by Act of Parliament, that should be deemed such an overloading, that in case of an injury being laid in the declaration to have arisen from overloading, the excess above the number should be deemed conclusive evi-

and a ready remedy to the public, the presumption is against the owner of the coach where it has broken down or has been overturned.[1]

Where the injury arises from a rash or undue apprehension or alarm, the coach proprietor will not be liable; as when a passenger, thinking himself in danger, leaps from the coach to save himself, when truly there was no danger. Such conduct must be justified by a state of peril, sufficient to shew that the act done is a natural and prudent precaution to extricate one from a peril for which the coachmaster would have been liable. This delicate point must be left for a jury to determine on the evidence.[2]

Where the damage has arisen from unforeseen accident or misfortune, the owners are not responsible.[3] This is different from the rule of the edict, Nautæ, Caupones, &c. See below, p. 465. et seq.

Indemnification for Goods.

2. In the same way, the owner of Goods has his remedy, on the contract, against the carrier, for damage received by insufficiency, or by actual fault or negligence.

As to insufficiency, it has been said, that there is a distinction between the case of passengers and of goods; there being in the latter an absolute warranty, in the former a qualified engagement, to transport the person as safely as human foresight and care will permit. Under the contract there seems to be no sufficient authority to sanction this distinction. Under the *Edict*, indeed, there is a difference between goods and persons: But in so far as the *Contract* rules the case, the engagement and warranty seem to be the same; while any claim of damage for loss sustained must rest on negligence or fault.[4]

As to fault or negligence, the responsibility is not in the character of public carrier, but under the private contract; and, therefore, a private person undertaking to carry goods safely for hire, is liable to this as much as a public carrier. This responsibility will attach where a carrier is aware that a cask of brandy is leaking, and takes no pains to stop it;[5]

dence of the accident having arisen from that cause. Lord Ellenborough assented.

But it is no excuse that there has been no excess of number; still the coach must be 'landworthy.' Lord Ellenborough said, in the above case,—'At all events, 'he would expect a clear landworthiness in the car-'riage itself to be established.' Ib.

See Crofts v. Waterhouse, 1825; 3. Bingham, 319.

[1] So held by Sir J. Mansfield in Christie v. Griggs, 1809, 2. Camp. 79.; where a person, travelling to London by the Blackwell stage, was hurt by its breaking down, the axletree having snapped across at a place where there was a slight descent. Sir J. Mansfield said,—'Where the breaking down or overturning 'of a coach is proved, negligence on the part of the 'owner is implied. He has always the means to rebut 'this presumption, if it be unfounded; and it is now 'incumbent on the defender to make out, that the da-'mage in this case arose from what the law considers 'a *mere accident*.' Verdict went for the defendant.

[2] Such a case occurred in Jones v. Boyce, 1816, 1. Starkie, 493. where a coupling rein having broke, and one of the leaders becoming ungovernable while on a descent, the coachman drew the coach to one side of the road, where coming in contact with some piles, the wheel came upon a post, and Jones leapt off to save himself, and was hurt. Lord Ellenborough left it to the jury. Verdict for L. 300.

[3] Aston v. Heaven, 1797, 2. Esp. Cases, 533. where the coach was overset by the horses taking fright, from the reflection of the sun in a tub into which water was falling from a pump; and a passenger was hurt. The plaintiff relied on this, that the coach was at the time not on the left side of the road, but on the middle, where the horses chanced to be more exposed to the object which startled them. Lord Chief-Justice Eyre drew the distinction between cases of the loss of goods by carriers, and this; and held, that in such a case as arose out of the above circumstances, the owners are to be held responsible for the smallest negligence; but not, as in the carriage of goods, for every thing but the act of God and the king's enemies.

[4] Crofts v. Waterhouse, 3. Bing. 319.

Anderson against Pyper and Company, 1820; 2. Murray's Cases in Jury Court, 261. Here the question was, Whether, supposing the axle of a coach, which broke down and was overturned, was defective and faulty, but sound so far as human foresight could reach, the proprietors were liable for injury done to a passenger? Verdict was for the defenders, on a direction that the proprietors were not liable in such a case as they would have been in the case of goods: And a new trial, in which this direction was excepted to, was refused. It appears that too much was conceded in admitting, that, in an action for damage to goods, the proprietors would have been liable.

[5] Beck v. Evans, 16. East, 244.

or where a parcel is left in the coach at unloading;[1] or where the parcel cart is left unguarded in the street, and a parcel is stolen.[2]

There is a more extensive responsibility in the case of public carriers, (in which they have, though not quite accurately, been likened to insurers), to be considered hereafter:[3] But, under the contract itself, the owner of the goods is not aided by any legal presumption. The ground of his action for damage is insufficiency, fault, or negligence; and he must establish his case by the proper evidence.

3. It is a part of the responsibility on the contract, that the master is liable for the acts of his servant.[4] The servant himself is not, in England, liable to the public.[5]

4. The responsibility of the carrier begins from the moment the goods come to his hands, or to those of his servants.[6] But it is not delivery to a carrier if goods be left in the yard of an inn, or in a warehouse at which other carriers have their goods;[7] there must be special notice to him or his servants that they are so delivered. They must be either booked, or delivered to the carrier, or to some one who can be proved to be his servant or agent, for the purpose of receiving them, and at the place where he is authorized to take them.[8] This applies to the post-office, where delivery to a bellman is not sufficient; though it is enough if delivery is made to an officer for receiving letters; or if goods be delivered to a servant of a carrier, sent round with a parcel cart, or otherwise.[9]

Carrier.

5. The undertaking of a carrier, in respect to the delivery of the goods, may be discharged differently in different circumstances.

The general rule is, that the carrier is not discharged of the goods while any thing remains for him to do as carrier. This may be regulated by custom; as in London, by the usage of the Thames, the master is liable while the goods are delivering into a lighter until the loading is completed:[10] or by special agreement: or by implied agreement, as by force of the address; for if the parcel be addressed to a person in the place to which the carrier professes to transport goods, the natural and legal implication, from the address of the parcel, and the entry in the carrier's book, is, that he shall deliver it to the person at the place mentioned in the address. It is one contract from beginning to end; the perform-

[1] BODENHAM against BENNET, 4. Price, 41.

[2] SMITH against HORNE, 1817; Holt's Cases, 642.

[3] See below, p. 465. § 5. Digression on the Edict, Nautæ, &c.

[4] See the cases in p. 462. Note [4].

[5] In WILLIAMS against CRANSTON, 2. Starkie, 82. a watch delivered to the driver of a coach to be carried, was held to charge the master, not the servant; and the action being against the servant only, the plaintiff was nonsuited.

[6] STUART against CRAWLEY, 1818; 2. Starkie, 323. A greyhound was delivered to a carrier to be carried from London to Stanfield Lock, and a receipt given for him. He was afterwards tied by a cord which was round his neck in a watch-box; but he slipped his head from the noose, and was lost. The defence was, that being delivered without a collar, he was not in a state of security. Lord Ellenborough held, that the insecurity being visible, and the custody of the dog undertaken, the carrier was liable. Verdict for the plaintiff.

[7] SELWAY against HOLLOWAY, 1. Lord Raymond, 46. where hops being lodged in the inn-yard, which other carriers also used, and no proof of acknowledgment by any servant of the carrier, the Court 'were 'all of opinion, that the hops could not be said to be 'delivered to Holloway.'

[8] See BUCKMAN against LEVI, 3. Camp. 414. 23 June
HOWIE and Company against LOVEL, ~~22d January~~ 1826; Fac. Coll.; 4. Shaw and Dunlop, 752. A parcel delivered to a carrier's servant, on the road between Edinburgh and Glasgow, not held to be duly charged on the master.

[9] HAWKINS against RUTT, 1793, at Guildhall, before Lord Kenyon. A bill was enclosed in a letter, and delivered to the bellman of the post-office in the street. Lord Kenyon held it not good to charge the post-office, or discharge the draft of the money. It should have been at the post-office in Lombard-street, or to one of the houses authorized to receive letters.
See also CLAYTON against HUNT, 3. Camp. 27.

[10] CATHY against WINTRINGHAM, 1792; Peake's Cases, N. P. 150.

ance of which the carrier undertakes.[1] The porters or carters whom he employs are his servants, for whom he is responsible, whether porterage be paid or not; and whether it is payable for his behoof, the porter getting only a proportion; or he have only the election of the porter.[2] And, at all events, the carrier must give notice of the arrival of the goods.[3]

8. Where the carrier does not go all the length to which the goods are to be carried, then, if the journey is to be completed by another carrier unconnected, the delivery of the goods to that carrier, or to persons empowered to act as his agents or servants in taking delivery of goods, will discharge the original carrier.[4] It has also been held in England, that where the carrier's journey is at an end, and the goods have reached their destination quoad him, they are not, while lodged in a warehouse or cellar in order to wait for another carrier, held under the high responsibility which subjects the carrier for every loss but inevitable accident or the King's enemies.[5] If the journey is to be completed by subordinate persons employed by the original carrier, or of his selecting, the responsibility seems to continue with the original carrier till delivery to the consignee.

The question, how far responsibility may be limited, will be discussed below, p. 472.

§ 5. DIGRESSION CONCERNING THE EDICT, 'NAUTÆ, CAUPONES, STABULARII.'

Principle of the Edict.

The common rule of diligence and responsibility, which exposes the labourer for hire only to losses arising from ordinary neglect, or culpa levis, is, in particular cases, augmented by a more rigid responsibility. This is a regulation intended to operate as a check on collusion and carelessness; for the safe conduct of that personal intercourse in the way of travelling, and that transit and conveyance of goods, which the necessities of a rich and commercial country daily require. This stricter rule was first established by an edict of the Roman prætor; the spirit of which has been so universally adopted in modern Europe, that, without any special law, the doctrine has been recognized even in those countries where the Roman law has no avowed authority.

The words of the edict are these:—'NAUTÆ, CAUPONES, STABULARII, QUOD CUJUSQUE

[1] It is different in the case of ships under bill of loading. See below, Of Maritime Contracts.

[2] In HYDE against THE TRENT and MERSEY NAVIGATION COMPANY, 5. Term. Rep. 389., there was no occasion to determine the point. But the opinions of Ashurst, Buller, and Grose, Justices, (contra Lord Kenyon), were delivered in favour of the doctrine in the text.

ARMSTRONG against EDINBURGH and LEITH SHIPPING COMPANY, 22d January 1825; 3. Shaw and Dunlop, 464. A chest of tea was here delivered to a porter to be carried to the warehouse of a general agent, in order to be forwarded by another carrier. It appeared that the contents were abstracted and trash substituted, and that this was done between the delivery to the porter, and the placing of it in the warehouse of the agent. The question was, Whether the delivery to the porter discharged the original responsibility? It was held not.

[3] GOLDIN against MANNING, 2. Black. Rep. 916.

[4] DENNISTON against HARKNESS, 15th January 1791; Bell's Cases, 260. Goods were delivered, at Glasgow, by Denniston, to Harkness, carrier to Carlisle, addressed to Manchester, and so entered in Harkness's book. Harkness had no hire but to Carlisle. At Carlisle he delivered the goods to Wilson, the regular carrier between Carlisle and Manchester, and had them entered in his book, and received from Wilson the hire to Carlisle. The parcel was lost between Carlisle and Manchester; and Denniston brought an action against Harkness. He supported his action by evidence of an understanding among merchants, that, in such circumstances, the original carrier was liable; and the Lord Ordinary decided for him on that ground. The Court of Session were not only dissatisfied with the evidence, but held that such evidence could not be received, as tending to establish a practice contrary to law; and they held, that it was quite sufficient for the original carrier, in such a case, so to fix the goods upon the intermediate carrier, as to give the owner his remedy against him.

[5] HYDE against TRENT NAVIGATION COMPANY; 4. Term. Rep. 58.

'SALVUM FORE RECEPERINT, NISI RESTITUENT, IN EOS JUDICIUM DABO.'[1] The persons enumerated, having once received the goods under their charge, must, at all hazards, answer for their restitution.

In so far as this enlarged responsibility rests on a voluntary undertaking, it extends no farther than to reasonable and prudent care; and Sir William Jones has been at some pains to shew, that although in some of the cases falling under the edict, (as in the case of innkeepers, who receive nothing for the goods brought in by their guests), there is no direct hire given for the care of custody, so as strictly, under the contract of location, to ground this responsibility; there is not wanting another ground of responsibility in the application of the principle of the contract, 'facio ut facias.'[2] But there is a responsibility beyond that, proper to the contract of locatio operarum, resting on the principle of constructive negligence, and constructive fraud, or quasi ex delicto, as applied to the occasions of trade and safe intercourse. As the persons comprehended within this edict, shipmasters and carriers, innkeepers and stablers, have frequent opportunities of associating, themselves or their servants, with robbers, thieves, and pilferers of all descriptions, while the secret connexion often cannot be detected; and as even their negligence cannot always be proved so as to ground a claim;[3] the safety of the public is to be secured only by presuming every thing against those persons, and taking nothing as an excuse or justification for the loss or injury to goods received by them, but evidence of a natural and inevitable accident.[4]

This edict is not to be considered as positive law in Scotland; but as effectual only in so far as it has become a part of the maritime law of Europe, or as by its general policy it stands recommended to our adoption, and is now in its great principle recognized as a part of our jurisprudence.[5]

Persons liable to this responsibility.

I. PERSONS.—The persons to whom this rule applies are public servants, holding themselves out as such, professing their willingness to take the profits of that employment, with the full responsibility which the law enjoins, and being compellable to undertake the charge which that particular department comprehends.[6] Such are, according to the words of the edict, shipmasters, innkeepers, and stablers. But it requires a commentary

[1] Dig. Lib. 4. tit. 9. Nautæ, Caupones, Stabularii, ut recepta restituant.

[2] Sir W. Jones, Bailment, 93. et seq.

[3] 'Nisi hoc esset statutum,' says Ulpian, 'materia 'daretur cum furibus adversus eos quos recipiunt 'coeundi;' l. 1. h. t. Lord Holt has well expressed the 'principle in saying,—'This is a politic establishment, 'contrived by the policy of the law for the safety of 'all persons, the necessity of whose affairs oblige 'them to trust these sort 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 connexion with them, by combining 'with thieves, &c., and yet doing it in such a clandes-'tine manner as could not be possible to be discovered. 'And this is the reason the law is founded upon in 'that point.' 2. Lord Raymond, 918.

See Stypmanni Jus Maritimum, Ed. Hiennec. 1740, p. 573. No. 12.

[4] Lord Mansfield, in FORWARD against PITTARD, distinguishes the two principles thus:—'By the nature 'of his (the carrier's) contract, he is liable for all due 'care and diligence; and for any negligence, he is 'liable 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. It is laid down that he is liable for every 'accident, except by the act of God or the king's 'enemies.' 1. Term. Rep. 28.

[5] 1. Stair, 13. § 3.

[6] Ulpian gives as a reason why the edict should not be deemed harsh, that it is a spontaneous employment, 'nam est in ipsorum arbitrario ne quem recipiant:' but this is not an authority for holding it as in their election whether to receive goods or passengers. They may undertake or not the duty of a public servant; but having once undertaken it, they can reject no one. And the same excellent lawyer has said, 'Viatorem 'sibi eligere caupo vel stabularius non videtur, nec 'repellere potest iter agentes.' Dig. lib. 47. tit. 5. l. unic. § ult. See Van Leuwin Cens. Foren. lib. 5. c. 30. § 5, 6.

to set forth the several cases and questions which have, in practice, arisen under this brief description.

All Carriers comprehended. Land Carriers.

1. CARRIERS.—Under the word Nautæ, strictly speaking, are comprehended only carriers by water. But the reason and principle of the law has, in modern practice, extended it to land carriers, both in this country and in England.[1] In England, where the principle has been applied without any reference to the words of the Roman edict, but on the common custom of the realm, carriers by land furnish the chief examples, in the books, of this sort of responsibility. And that the rule applies to common carriers never was doubted, since first the principle of expediency was adopted in English jurisprudence; or rather, perhaps, this is the case in which the rule was first judicially applied. The sole difficulty has been, whether the same rule should be applied to those who were not *common* carriers.[2]

Carriage by Water.

The description of Nautæ fully comprehends the owners and masters of regular packets, carrying smacks, and ships on general freight. These are the proper cases. Barge-masters, hoymen, canal-boatmen, ferrymen, all come under the same rule.[3] It has been held that steam-boats, though for the conveyance of passengers, fall under the edict; even in respect of goods received on board, not as luggage of a passenger.[4] As to particular ships freighted specially; unless there be a specific agreement, the edict applies.[5] Under this class have also been comprehended wharfingers in the English law;[6] as, indeed, the principle of responsibility seems applicable to them as well as the others mentioned.

Mail-coaches and Stage-coaches.

The rule being once held applicable to land carriers, (supra), it follows, without much difficulty, that all sorts of land carriers, holding themselves out as public carriers, are under it, and that no distinction ought to be made on account of the vehicle, whether a waggon, a cart, or a mail-coach or stage-coach. A distinction, however, seems to have been contended for in the case of stage-coaches, on some such principle as this—that their undertaking is for the carriage of persons, not of goods; and that they are not to be subjected, except for goods entered and paid for. This must appear to be a very question-

[1] Bankton says,—'The edict is extended to common 'carriers;' 1. Bank. 16. § 5. Erskine, with more reserve, says,—'This edict would possibly, from the 'parity of reason, be also applied against carriers;' 3. Ersk. 1. § 29.

EWING against MILLER, July 1687; Harc. 261. (9235). Even in the case not of a common carrier, but a hired carter, the Court of Session applied the rule of the edict.

This doctrine is taken for granted, M'AUSLAND against DICK, 6th February 1787; 9. Fac. Coll. 476. (9246).

[2] See Sir W. Jones, Bailment, 106. See next Note.

[3] Without looking back into the older cases, Lord Holt's direction may be taken in his celebrated argument on bailments, where, speaking of the fifth sort of bailment of goods to be carried, he says,—'It is 'either a delivery to one that exercises a public em-'ployment, or a delivery to a private person. First, 'If it be to a person of the first sort, and he is to have 'a reward, he is bound to answer for the goods at all 'events; and this is the case of the common carrier, 'common hoyman, master of a ship, &c. The law 'charges the person thus intrusted to carry goods, 'against all events, but acts of God and of the enemies 'of the king.' COGGS against BERNARD, 2. Lord Raymond, 917.

[4] BAIN against SINCLAIR, 15th February 1825; 3. Shaw and Dunlop, 533.

[5] 3. Ersk. 1. § 29. Any particular observations relative to ships and sea-carriage, will be found in that part of the work where Charter-Party is discussed.

[6] In a case which turned on a technical objection to an action as of trover, when it ought to have been on the case, to subject a wharfinger for goods which had been received by him, Lord Mansfield said,—'It 'is impossible to make a distinction between a wharf-'inger and a common carrier; they both receive the 'goods upon a contract. Every case against a carrier 'is like the same against a wharfinger.' Ross against JOHNSTON, 5. Burr. 2825. I should have imagined this to imply merely an opinion that this *sort* of remedy was the same, not to go the length of holding the same responsibility; because it is not on the matter of *contract* that the degree of responsibility rests, though certainly the form of action will be affected by it. It seems, however, to be taken otherwise by English lawyers.

able ground of distinction, since it is not on the *contract* that the carrier is responsible, but on the principle of *public policy*, which is equally applicable to this as to any other sort of land carriage. In England, at one time, the distinction was actually entertained on the above ground,[1] though it now seems to be abandoned, and stage-coachmen held universally responsible.[2]

Hackney-coachmen.

Hackney-coachmen, however, seem to be in a different situation, as neither employed in the carriage of goods, nor in such journeys as make the carriage of luggage necessary; and as responsible for goods only by contract when received expressly and paid for.[3]

General Post-Office not on footing of the Edict.

As the establishment of the GENERAL POST-OFFICE has been accompanied with a prohibition of the carriage of letters and packets by common carriers, stage-coachmen, and others, it is natural to maintain, that there should be a transfer of the responsibility as well as of the employment.[4] But it is necessary here to make an important distinction. Responsibility for *constructive* negligence, established against carriers for the public safety, has, in the case of the post-office, been superseded by other precautions; namely, the appointment of public officers, whose fidelity in their office is secured by penal statutes of more than ordinary rigour.[5] But the responsibility for negligence *actually committed* is reserved in full force; each person being liable in his department for the letters committed

[1] In MIDDLETON against FOWLIS, 1. Salkeld, 282., Lord Holt held a stage-coachman not to be within the custom as a carrier, unless where he takes a distinct price for the carriage of goods as well as of persons.

So in LIVETT against HOBBS, 2. Shower, 127., it was said, that when a stage-coachman commonly carries goods, and takes money for so doing, he is in the case of a common carrier, and is a carrier for that purpose, whether the goods be a passenger's or stranger's.

[2] In CLARK against GRAY, 1803, the point was taken for granted. 4. Espin. N. P. Cases, p. 177.; 1. Selwyn's N. P. 324. Note.

It seems agreed, at least, that where a custom prevails of charging for over-weight, stage-coachmen are common carriers.

[3] So held, in England, by Lord Holt, in UPSHARE against AIDEE, Com. Rep. 25.; 2. Comyn's Cont. 294.; 1. Selwyn, N. P. 323.; Jeremy, Law of Carriers, 13.

[4] The post-office was first established, in England, during the Usurpation, by an ordinance of Cromwell, in 1656; not entirely at first for public convenience and safer intercourse, but also with a political view to the whole correspondence of the kingdom being under official inspection, for the prevention of conspiracies. By 12. Charles II. c. 35. the establishment was more fully regulated. In the time of King William, the first Act was passed for a general post-office in Scotland, on much the same footing with that of England; 1695, c. 20. And by 9. Anne, c. 10. (1710), both the English and Scottish Act, relative to the general post-office, are recited and repealed, and a new general post-office established for the whole United Kingdom. By this Act the post-office has become a branch of the revenue, and a branch of police. Of the revenue, the surplus is for the public, after payment of the expense of the establishment; and it is secured to the public, by requiring, as a branch of police, that the whole correspondence of the kingdom shall be under government, and the direction and management of it committed to the Crown, and officers by the Crown appointed. The officers take the oath as public officers. They are subjected to heavy penalties; and what in common carriers is, in criminal jurisprudence, only a breach of trust, is with the officers of the post-office a capital felony.

[5] LANE against Sir R. COTTON, 1. Lord Raymond, 646. There was, in England, a case prior to the 9th Anne, in which it was questioned, Whether the post-master, in consequence of the hire he receives, was not liable for all the damage that might happen, whether owing to the negligence or dishonesty of the persons employed under him to conduct and carry on the business of the office? The action was for recovering the value of exchequer bills which had been enclosed in a letter put into the post-office. Lord Holt followed the analogy of the liability of a common carrier; confining the question to the case of a letter lost in the office. The rest of the Court denied the responsibility, except for actual negligence; and so the judgment went. The argument of Lord Holt is extremely elaborate.

WHITEFIELD against LE DESPENSER, 1778; Cowper, 754. In Lord Mansfield's time, the question was again brought forward, as on the establishment of 9. Anne. He delivered the opinion of the Court, denying the doctrine of Lord Holt, and representing the case of Lane and Cotton as a judgment on which the Bar and the country relied; and concluding, that 'if 'there could have been any doubt before that deter-'mination, the solemn judgment in that case having 'stood uncontroverted ever since, puts the matter 'beyond dispute.'

FARRIES against ELDER and SCOTT, 21st June 1799; 12. Fac. Coll. 297. (10103). The question came to trial, in Scotland, about twenty years after the decision of Whitefield's case; when the Court of Session, both on

to his charge.[1] The liability for servants does not hold here, as in the case of carriers: Each officer in the post-office, from the postmaster-general to the lowest letter-carrier, is regarded as an independent officer, liable in his own department.

Mail-coaches are in this sense no part of the establishment, but mere stage-coaches. See above, p. 467.

2. INNKEEPERS AND STABLERS.—1. Letters of lodgings were, by one decision of early date, held to fall under the description of innkeepers.[2] But in a recent case, the Court of Session, where the point was raised, declared the decision not to proceed on this ground.[3] Innkeepers are responsible, on the principle of the edict, for whatever is placed under their charge, or that of their servants; or brought into their inn by or for their guests, (although not otherwise than collaterally the source of gain to them), provided the guest does not himself undertake the exclusive care of his goods.[4] Where an article is given to an innkeeper, to be sent by a carrier or coach going from his house, he is liable for it.[5] But it has been doubted whether, under this law, an innkeeper is responsible for a parcel addressed to one who was not a guest, but merely called at his inn, and went on with post-horses.[6] Innkeepers and Stablers.

2. Stablers are liable not only for the horses placed under their charge, or that of their hostlers or servants, but also for the horse-furniture, &c. which is brought into their stables.

II. EXTENT OF RESPONSIBILITY.—The rule of the edict is, that a public carrier, innkeeper, or stabler, being once chargeable with the goods, &c. as received into his custody, must answer for their restitution in the same condition,[7] unless they have perished, or have suffered injury by inevitable accident. Extent of responsibility of Carriers, &c.

1. In the construction of this rule, a loss by ROBBERY is not to be received as an inevitable accident. Robbery is one of the main dangers against which the severity of this law

the general argument, and particularly on the English precedents, dismissed the action.

[1] Lord Mansfield makes the distinction in the case of WHITEFIELD. (See preceding Note.)—'As to an 'action on the case against the party really offend-'ing, there can be no doubt of it: for whoever does 'an act by which another person receives an injury, 'is liable in an action for the injury sustained. If the 'man who receives a penny to carry the letters to 'the post-office loses any of them, he is answerable: 'So is the porter in the business of his department: 'So is the postmaster for any fault of his own.' Cowp. 765.

On this distinction it will be observed, that a case decided by the Court of Session in 1724, July 28. SHORT against HAMILTON, Edgar, 105. (10091.), is not, as stated by the editor of the last edition of Erskine (p. 491. Note), contrary to that in Farries' case. For Short's was an action against the postmaster at Falkirk, for gold sealed up in a letter, and delivered to him as containing money, and of which there was no farther trace; but here there was the distinct negligence of the postmaster in not marking the letter as a money letter.

[2] MAY against WINGATE, 16th February and 5th July 1694; Fount. 1. 627. (9236.)

[3] WATHEY against M'DOUGAL, 16th June 1825; 4. Shaw and Dunlop, 83.

[4] See FARNWORTH against PACKWOOD, 1. Starkie, 249. BURGESS against CLEMENTS, ib. 257. Note.

[5] WILLIAMSON against WHITE, 21st June 1810; 15. Fac. Coll. 712. Here a parcel, containing money, was left with an innkeeper at Muirkirk, or his servants, to be sent by the carrier, who went from his house to Sanquhar. It was put on the cart, and afterwards removed and put into a cellar, where goods for that carrier were deposited. It was missing for 20 months; and when found, it contained no money. The innkeeper was made liable for it.

[6] MEIKLE against SKELLY, 16th February 1813; 15. Fac. Coll. 198. This was a money parcel, but without notice of its value, addressed to one who was not a guest, but had passed that way, and had post-horses at the house the day before. The parcel was received—left in the servants' hall of the inn—and lost. The innkeeper was held not liable, after much difference of opinion among the Judges.

[7] See the Cases, Notes [5], and [6].

was intended to operate as a preventive; yet our authors have spoken so loosely, that robbery might almost be taken as held by them to form an express exception from the responsibility.[1] The rule as laid down in England is, 'that nothing is an excuse except 'an act of God or of the King's enemies;'[2] and if an irresistible number of persons should commit the robbery, the carrier is nevertheless chargeable.[3]

Theft. 2. There never has been any doubt in Scotland, any more than in England, that the responsibility extends to THEFT.[4]

Fire. 3. FIRE is held as an inevitable accident in ordinary cases; but, looking to the policy of this law, it is not in England so regarded, and was not so held in the Roman law. Being by the act of man, it *may* be collusive, by the confusion, to favour depredations; and as there is a possibility of the carrier or innkeeper being participant in the crime, the risk is on them:[5] and this view of the responsibility certainly leads to a wholesome correctness and care, which might otherwise be utterly neglected. But it has, on the whole, appeared in Scotland, that this responsibility for fire is not to be held as within the true principle of the edict, as adopted by us. It is rather considered as damnum fatale, an inevitable accident, for which the carrier, &c. are not responsible.[6]

[1] Erskine says,—'The law is express, that if the 'goods perish even without his fault, he is liable, un- 'less the loss has happened *damno fatali* by an acci- 'dent which could be neither foreseen nor withstood.' This is the true rule. But he has added an *example* of damnum fatale, which may be doubted:—'If, ex. gr. 'they have been lost by storm, or *carried off forcibly* '*by pirates or house-breakers.*' 3. Ersk. 1. 28. He quotes no case for this.

See also Bankton, 1. Bank. 16. § 1. vol. i. p. 379.

These authors refer to the third law of this title of the Digest. But Ulpian there says,—'At hoc edicto om- 'nimodo qui recepit tenetur etiamsi sine culpa ejus '(levi scilicet, says Pothier, Pand. vol. i. p. 159.), res 'periit vel damnum datum est; nisi si quid damno 'fatali contingit. Inde Labeo scribit, si quid naufra- 'gio aut per vim piratarum perierit non esse iniquum 'exceptionem ei dari. Idem erit dicendum et si in 'stabulo aut in caupona vis major contigerit.' But the true meaning of the law, in using the words vis major, seems rather to be *hostile* force; with us, 'the 'king's enemies.' On this matter the commentators seem to differ. Voet is rather of opinion that the ana- logy holds with house-breakers, 'cui non absimile est 'si effracto per effractores fures domo vel stabulo res 'viatorum ablatæ.' But he adds, that the onus pro- bandi lies on the innkeeper to justify himself against all suspicion. 1. Voet, Comm. ad Pand. 301. Peckius, in his Commentary, '*In juris civilis titulos ad rem nau-* '*ticam pertinentes,*' says,—'Est autem vis major cui re- 'sisti non potest, qua ratione defendi posse existima- 'vero si exercitus præteriens seu hostis urbem vi occu- 'pans, res alicujus in hospitio depositas et fidei cau- 'ponis mandatas abstulerit.' *Opera*, p. 825.

But, in judging of the analogy in Scotland, the prin- ciple of expediency, as established by many practical illustrations in England, will undoubtedly be received as of more authority than hundreds of dicta rescued from the cobwebs of the civilians.

Stair, the best of all our lawyers, says,—'They were 'made liable for the loss or theft of such things abso- 'lutely, from which they were freed by no diligence, 'but were not liable for accident or force; *that is, sea* '*hazard must always be excepted.*' B. 1. tit. 13. § 3.

[2] Buller's N. P. p. 70. Sir William Jones, Bail- ment, 104.

FORWARD against PITTARD, 1. Term. Rep. 27. Lord Mansfield lays it down thus:—'Now, what is the act 'of God? I consider it to mean something in opposi- 'tion to the act of man: for every thing is the act of 'God that happens by his permission; every thing by 'his knowledge. But to prevent collusive litigation, 'and the necessity of going into circumstances im- 'possible to be unravelled, the law always presumes 'against the carrier, unless he shews the injury to have 'been done by the king's enemies, or by such act as 'could not happen by the intervention of man, as 'storms, lightnings, tempests,' &c.

[3] COGGS against BERNARD, Lord Raymond, 919.

[4] 1. *Case of Innkeeper.*—MASTER of FORBES against STEEL, 17th February 1687; 1. Fount. 448. (9233). GOODEN against MURRAY, 19th January 1700; 2. Fount. 82. 103. (9237-8). BROUSTER against LEES, 5th June 1707; 2. Fount. 369. (9240). CHISHOLM against FENTON, 10th December 1714; Dalr. 175. (9241).

2. *Case of Carrier.*—EWING against MILLER, July 1687, Harcarse, 261. (9235).

[5] Numerous cases in England are reported, in which the loss was by fire. In FORWARD against PITTARD, 1. Term. Rep. 27. the fire began at the distance of 100 yards, and without any negligence whatever being proved on the part of the carrier.

In HYDE against TRENT and MERSEY NAVIGATION COMPANY, 5. Term. Rep. 189. the loss was by fire.

[6] M'DONNELL against ETTLES, 15th December 1809; 15. Fac. Coll. 466. This was an action for the value of three horses consumed by fire. The fire began in the sta- ble, which was lighted by a lantern of the ordinary con- struction. The groom was the last person in the stable,

4. So far as the contract of carriage operates, the principal is liable for his servants and deputies, (see above, p. 464.); but the edict was extended to protect what may properly be said to be *deposited;* as in the case of luggage in an inn or stage-coach not paid for: And it extended the obligation (which, in deposit, does not make the depositary responsible for his servants) to a universal responsibility for all servants, and even strangers.[1]

Proof of Loss.

5. The value of the parcel or thing lost may occasion difficulty, if not regulated by a general rule. A person cannot always have direct and positive evidence of the sum which may have been in his pocket-book when stolen from an inn; or of the value of his luggage, taken from a coach. In order to get quit of the difficulty, a very clumsy and dangerous remedy formerly prevailed in Scotland; namely, that the person should, by his own oath, be allowed to establish that value against the carrier or innkeeper;[2] it being reserved to the Court to restrain the claim.[3] The principle on which Lord Stair places this is, that access may be refused to travellers, 'unless they shew what they have; and otherwise 'he (the carrier) is presumed to trust to their oath.' But this is not a practicable arrangement. It is not always safe; and, in the hurry of travelling, quite intolerable, that one should be required to shew money or jewels in the confusion of a coachyard, or to undo a package, or turn out the contents of a portmanteau, to satisfy a carrier or stage-coachman. These precautions are quite unsuitable to our times. And the matter seems fairly and equitably to resolve into these propositions:—1. That as to the luggage of a traveller, the coach-master must take his risk of the probable value, including such a sum of money as may reasonably be carried in his travelling portmanteau for the occasions of his journey. 2. That if the luggage be of extraordinary value, this ought to be stated; and, if demanded, a reasonable increase of hire paid, proportioned to the additional risk, otherwise the coach-master will not be liable beyond the value to be reasonably supposed.[4] 3. That when a loss happens, such evidence as the circumstances of the case may admit, added to the oath in litem, shall be shewn of the amount of the damage; in which inquiry care must always be taken to prevent the traveller from taking advantage of the accident to impose on the carrier. 4. That in the carriage of goods or parcels, although the carrier cannot insist to have the packages, which have been made up with care for safe transportation, undone; at least he may insist on seeing the invoice, and knowing the value. 5. That when he does not take

intoxicated, and smoking a pipe. He had locked it up and gone home. This was a strong case of possible, or rather probable, negligence, which the high responsibility of the edict might have prevented. But the Court held the edict not to apply.

[1] 'By this edict,' says Stair, 'positive law, for utili-'ty's sake, hath appointed that the custody of goods 'of passengers in ships, or strangers in inns or in 'stables, shall be far extended beyond the nature of 'depositation, which obliges for fraud only or supine 'negligence in them who have expressly contracted for 'their own part. But this edict, for public utility's 'sake, extends it, *first*, To the restitution of the goods 'of passengers and travellers, and reparation of any 'loss or injury done by mariners or servants of the 'ship, or by the servants of the inn or stable, &c. '*Secondly*, The edict extends this obligement even to 'the damages sustained by the fact of other passengers 'or strangers in the ship, inn, or stable, for which the 'master, innkeeper, or keeper of the stable, could be 'no ways obliged, but by virtue of this edict;' 1. Stair, 13. § 3.

[2] EWING against MILLER, July 1687; Harc. 261. (9235). This was even extended to the case of a packman or travelling merchant, though he should have been able to give some more unexceptionable evidence of the value.

[3] BROUSTER against LEES, 5th June 1707; 2. Fount. 369. (9240).
GOODEN against MURRAY, 19th January 1700; 2. Fount. 103. (9237).

[4] If the appearance of the goods necessarily indicate a considerable value, the carrier will be liable, though he may have endeavoured, by notice, to restrict his liability. See BECK against EVANS, 16. East, 244., as to a cask of brandy: Contrast with it the case of DOWN against FROMONT, 4. Camp. 40. So goods marked 'Glass;' WILSON against FREEMAN, 3. Camp. 527.

this precaution, he must be responsible for the value of the goods, as it may be established by evidence. And, 6. That where the carrier is deceived as to the value, and made to undertake a high responsibility, supposing it to be the ordinary risk, he will not be liable on the edict, but only for his own fraud; or, at least, not liable beyond the reasonable value, according to the appearance of the goods, and other circumstances.[1] And, finally, reasonable evidence will now be required of the nature and value of the thing lost, together with the employer's oath in litem, rather as a precautionary measure to prevent an extravagant demand, than as being of itself the evidence on which the demand is to rest.[2]

Limitation of responsibility.

III. LIMITATION OF RESPONSIBILITY.—The question, how far the responsibility of carriers and others is capable of limitation, and by what evidence such limitation may be established, is very important. A sense of the severe responsibility laid on common carriers has, within these twenty or thirty years, given admission to a sort of limitation by means of notices in newspapers, and placards in the carrier's office; which the Judges in England seem now to be sensible has been allowed to go too far, and against the evils of which they contemplate no remedy but by the legislature. There has not yet, in Scotland, been any encroachment on the principles which ought to regulate this matter; and the doctrine adopted seems at once consistent with the law of the contract, and with the public policy which has been introduced into this class of cases.

It seems to admit of no doubt, 1st, That, as matter of contract, carriers, innkeepers, stablers, and others, may, with the consent of those who employ them, undertake only certain risks and responsibilities. 2dly, That one desiring to be admitted to an inn, or to be transported in a public stage-coach, or to have his goods carried in a public waggon, is entitled to insist that the innkeeper, stage-coachman, or public carrier, shall comply with his request, unless his inn, or his vehicle, be fully occupied.[3] 3dly, It seems to be a part of the same rule, that such public servants cannot, within the line of their duty and public undertaking, unless with consent of the employer, insist on limiting their undertaking to a less extensive responsibility than the policy of the law has enjoined.[4] But, 4thly, Between these opposite principles there is another consideration which cannot be overlooked in this question. The extensive responsibility of the edict, proceeding on views of general policy and precaution, makes carriers and others answerable for fire, robbery, and other risks, although they may be innocent of any collusion or neglect, and the accidents may really be inevitable. But if it be allowable, on the one hand, to subject such persons to a heavy responsibility, in order to avoid possible evil, and repress combination and villany, it is fair, on the other, that the innocent should be indemnified for the danger they run; and this can be done only by an augmented hire, combining, in one payment, the price of labour and a premium for risk. And it is considered

[1] M'AUSLAND against DICK, 6th February 1787; 9. Fac. Coll. 476. (9246). M'Ausland sent by a stage-coach between Edinburgh and Glasgow L.200 in an ordinary parcel, which he booked, and for which he paid 6d. The coachman defended himself on the unusual hazard; the circumstance of there being no proper place at that time in coaches to preserve such valuable parcels from the frauds of passengers; and the ignorance in which he was suffered to remain of the great risk which he ran by having this parcel openly in the coach. He was held not liable.

[2] See case of WILLIAMSON against WHITE, supra, p. 469. Note [5].

[3] See Doctor and Student, 270. Noy's Maxims, 92. In the case of a common carrier, (JACKSON against ROGERS, 2. Shower, 327.), and in that of a coach-master, (LIVETT against HOBBS, 2. Shower, 127.), this doctrine was fully established.

[4] Ulpian, in commenting on the edict, (Dig. Lib. 4. tit. 9. l. 1. see above, p. 466.) has been thought to ground the reasonableness of the risk on the power which the persons to whom the edict applies have of refusing the employment. But modern lawyers more correctly ground the responsibility on the very circumstance, that such employment cannot be refused by those who, acting as public servants, exclude others.

also as equitable, that carriers should not be made, for a small hire, to undertake the care of packages of a much higher value than from their appearance is naturally to be inferred. Limitation of Responsibility.

It is partly under these last considerations, and partly, as it seems, under the power in certain descriptions of public servants to circumscribe their undertaking, that the whole doctrine of limitations by notice has grown up in England. Two points have been admitted: One is, that a carrier's general run of goods may be estimated, and notice given by him, that he will not be liable for those of a different description, as jewels, money, &c. of extraordinary value, unless he be informed of the value: Another is, that for the greater risk attending such goods, and the greater care required, a higher consideration, partly as hire, partly as insurance, should be given. But besides limitation admitted in this way, and apparently on sound and equitable grounds, the power of limiting by notice has been carried to a much greater extent in some particular lines. The proprietor of a coach running for the avowed purpose of carrying passengers, not as a common carrier of goods, may also undertake to carry parcels of a particular description; and this limitation, when fully made known, may undoubtedly constitute a special contract with the owner of goods. Whatever license there may be allowable to a common carrier to limit his responsibility, it seems not to be unlawful to restrict this undertaking. Lord Ellenborough, in summing up a case determined some years ago, gives this sketch of the history of such limitations:—'If this action had been brought twenty years ago, the 'defendant would have been liable; since, by the 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 servants of the carriers had, in the most wilful and wanton manner, destroyed 'the furniture intrusted 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 choose to send his goods to be carried after 'notice of the conditions. The question then is, Whether there was a special contract?'[1] '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.'[2]

The unhappy consequences of this doctrine are to be ascribed, as it would seem, to a wrong bias unfortunately admitted in the progress of its establishment, from not keeping a steady eye upon the principles which ought to have regulated the practice of giving notices. There seems to be only one point to which legitimately notices of public carriers can be admitted, viz. the regulation of the consideration for risk. Saving always the power of making an express contract, the effect of a mere notice ought justly to be restricted to this point; as to which alone it is competent for a carrier to refuse employment. On this principle the law would have proceeded conformably to the general system

[1] LEESON against HOLT, 1. Starkie, 187.

[2] MAVING against TOD, 1. Starkie, 79. On another occasion the question arose, Whether a wharfinger, held as in the same situation with a carrier, could avoid responsibility for fire?—'Holroyd sub-'mitted, whether the defendants could exclude their 'responsibility altogether;' and added, 'they were 'going farther than had been done in the case of car-'riers, who had only limited their responsibility to a 'certain amount.' Lord Ellenborough,—Since they can limit it to a particular sum, I think they may exclude it altogether, and that they may say, we have nothing to do with fire. Holroyd,—They were bound to receive the goods. Lord Ellenborough,—Yes; but they may make their own terms. I am sorry the law is so: it leads to very great negligence.

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of jurisprudence, and we should not have seen a sort of legislative power assumed by carriers. Any exorbitancy of charge would at once have been brought to a true standard by judicial determination; while the responsibilities of the carrier, under the common law of his contract, and on the principles of public policy, would have remained untouched but by positive agreement in each individual case. The operation of this law, however, might not have been very extensive, if held only to apply to those who are, strictly speaking, common carriers. The great extension of the doctrine of notice has been in regard to coaches of different descriptions; which are not, strictly speaking, within all the restraints to which common carriers are liable, in so far as they are employed to carry goods or parcels, not luggage of passengers; but are so to be considered only to the extent in which they profess to undertake that branch of Carriage.

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,[1] another even from the common responsibility of the contract for negligence.[2] One man is bound by a notice which has appeared in a newspaper that he has been accustomed to read;[3] another, because a large board was stuck up in the coach-office;[4] while a third is freed from the effect of the notice in the office, because hand-bills were circulated of a different import.[5] Then it is said, what if he cannot read? 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.

In the proper case of a common carrier, it does seem not only a very dangerous doctrine, and admissible only from absolute necessity, but a thing quite against the principles of law, that the whole public shall be bound to take notice of advertisements by individuals, under the penalty of being held bound by the terms of those advertisements; whether, in fact, they have seen them or not. But, above all, it is against legal principle, that persons acting in the capacity of public servants, and by the law itself declared liable to certain rules of responsibility for the safety of their employers, shall have this power in their hands. To such a person any of the public is entitled to go, as to one who, under the edict, is bound to extensive responsibilities; and to disregard utterly every protest which may have been made against those responsibilities, unless actually and personally intimated to him at the time. If a carrier, or other public servant, choose to express the terms of his contract separately in an advertisement, with a view of recommending himself to public favour, and making known what he means to insist on in each case, it is well: But the onus probandi must, in every case, remain on him to show, either that he has insisted on the terms announced, and that they have been agreed to; or that a fair consideration for extraordinary risk has been refused; in which case his responsibility will, in equity, stand limited to losses from fault or negligence, to the exclusion of risks concealed, or not paid for.[6] In England, it is held incumbent on a person wishing to rid himself of this

[1] MAVING against TOD, supra, p. 473. Note [2].

[2] LEESON against HOLT, supra, p. 473. Note [1].

[3] Same Case.

[4] CLERK against GRAY, 4. Esp. Rep. 177.

[5] COPDEN against BOLTON, 1809; 2. Camp. 103.

[6] The only case which has occurred in Scotland on this question, is still in dependence. It was this:—A gentleman travelling from Inverness to Edinburgh, made the waiter of the inn carry his portmanteau to the clerk of the mail-coach. He himself saw it entered, and placed under the care of the clerk and the guard; observed no placard, though it is believed there was one in the office; had no questions asked, or terms insisted for in limitation of the responsibility; and afterwards, on entering the coach, asked the guard whether his portmanteau was safe; and was answered, it was in the boot and quite safe. On arriving at Aberdeen, the portmanteau was missing; and, notwithstanding every search, could not be recovered. The gentleman brought

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responsibility, to prove effectual notice: A special contract is required to be proved; and whether it exists or not, is always a question for the jury.[1] The delivery of a printed paper, containing the notice, to every person bringing a parcel to the office, has been suggested as an effectual and easy method of giving notice.[2]

The true line of distinction seems to be, 1. That in the proper case of a common carrier, notice against responsibility, unless the value is stated and paid for, will save the carrier from every thing but the ordinary diligence of the contract,[3] and the reasonable amount of loss, according to the appearance of the package delivered, if the owner does not choose to pay the premium;[4] but that he cannot lessen that diligence, or relieve himself from responsibility altogether, without shewing a *special* agreement; or evidence, not merely of *notice*, but of *assent* to that notice. 2. That coachmasters, who carry passengers, are not strictly common carriers, further than in relation to luggage; as to which the same rule ought to be applied. And, 3. That in respect to the separate carriage of goods and parcels by coaches, steam-boats, &c., the proper business of which is the carriage of persons, it is lawful to limit responsibility by notice of the extent to which the carriage of goods is to be undertaken in that particular instance. And in England, in such cases, where goods of greater value than the restricted sum have been delivered to a coach, without paying for them the additional hire, it has been held that no action lies even for the restricted sum. This seems to proceed on the ground, that there is in such case a legitimate special contract, under the terms of which no action can lie.[5]

Evidence of a specific bargain, however, cannot justly be required on *each* occasion of

his action for the value of his portmanteau, in which were his travelling equipment and fifty guineas. The defence was rested on notices and advertisements, and the whole doctrine of limitation, as established in England. Lord Pitmilly held the contractors liable. COCKBURN against RICHARDSON; but the case was compromised without any judgment of the Inner-House.

[1] KEIR against WILLAN, 1817, 2. Starkie, 53., where a truss of goods had been delivered at the office of Willan, a carrier, at the Bull and Mouth Inn, London, to be carried to Dumfries. The defence was on a notice of limitation of responsibility. The answer was, the porter who delivered the truss could not read the notice. Lord Ellenborough said, that, 'by the common law, the carrier is responsible for loss of goods, 'unless he enter into a special contract, by which he 'limits that responsibility. This he may do by notice 'in the public papers, or by any other medium by 'which the party with whom he deals is effectually 'apprized of the terms on which he proposes to deal.' A verdict for plaintiff, L. 240. 15s. 6d. A rule for a new trial was refused. The Court said, that 'the necessity of giving effectual notice imposed considerable difficulty upon the carrier; but the difficulty 'arose from the attempt to depart from the old rule 'of common law, which had prevailed for ages, and 'which could not be avoided without great exertion. 'No doubt, 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.'

The same doctrine laid down by Lord Chief-Justice Abbot in DAVIS against WILLAN, 2. Starkie, 279. See MUNN against BAKER, 2. Starkie, 255. ROWLEY against HORNE, 1825; 3. Bingham, 2. It was held not enough that the defender had for years taken in a newspaper, in which this notice was advertised weekly.

[2] ROWLEY against HORNE, preceding Note.

[3] In BECK against EVANS, 3. Camp. 267., 16. East, a notice was found no defence against negligence, where the thing delivered was a cask known to contain brandy, &c. obviously above the value of L. 5.

In WILSON against FREEMAN, 3. Camp. 527., the book-keeper was told the value, and though no additional sum was paid, the notice held unavailing to restrict.

[4] BECK against EVANS, 16. East, 247. It does not seem to be very different even from the English doctrine. 'I think,' says Mr Justice Le Blanc, 'that the exemption of carriers from general responsibility, by reason of notices of this sort, has 'been carried to the utmost extent, and cannot be 'supported on any other ground than this, that they 'shall not be held liable to a large amount, where they 'only get a small reward for the carriage.'

[5] CLAY against WILLAN, 1. H. Blackst. 298. YATE against WILLAN, 3. East, 128. IZELL against MOUNTAIN, 1803; 4. East, 371. NICHOLSON against WILLAN, 1804; 5. East, 507.

sending goods by a carrier; or travelling in a particular coach; provided such specific contract or assent to the terms can be established on a previous occasion. It will be held that, till altered again by specific contract, the future employment continues on the footing once acquiesced in.

SECTION III.

OF MERCANTILE AGENTS OR FACTORS.

Some points in the law relative to mercantile agency have already been touched, in speaking of the effect of possession and reputed ownership on property in the hands of factors;[1] and under the doctrine of lien, the effects of that sort of security in giving a preference to factors for their general balance, or for special advances, shall be considered. In this place, the personal contract and its effects are to be discussed, independently of the questions which may arise as to the property or real rights of the several parties.

§ 1. GENERAL PRINCIPLES RELATIVE TO MERCANTILE AGENCY.

1. *Constitution of the Power.*

In the civil law, Mandate was a different contract from that by which, in modern practice, one appoints another to act as his representative, agent, or factor, in conducting his mercantile transactions; in buying or in selling goods; in sailing or in freighting ships; in effecting insurances; or doing any other mercantile act in which the ministry of another is required. The one was a gratuitous, the other is an onerous contract. And as the effects of this difference on the rights and obligations of the parties are important, it is material to observe, that the Roman jurisprudence relative to mandate, in questions arising between a merchant and his agent, is not on all occasions to be held as applicable in the decision of Scottish cases.

This is one of the contracts, in the application of which to the intercourse of life the different condition of ancient and of modern Europe is most apparent. In Rome, commerce and its relations and facilities were discouraged, or not regarded with favour: In the world as now constituted, they form the very object, and supply one of the ruling principles, of the jurisprudence of contracts. Instead of the amicable and gratuitous Mandate, there has been introduced the onerous contract of agency or factory, the relation of principal and agent; imposing duties more imperative; entitling the principal to more entire reliance on the performance of his orders; and raising, with third parties, relations of great extent and importance in trade. Instead of Society, an arrangement merely for the joint management of a common subject, the important contract of Partnership has brought into combined operation, for the extension of modern commerce, the skill, the industry, and the capital of many associated persons. The contract of Insurance may be said to be entirely modern, by which trading enterprise is so much encouraged and sustained; and the very circulating medium of a mercantile age, Paper Money, in its various forms of bills, and notes, and bank-checks, was utterly unknown in the ancient world.

In mercantile agency there is a vast variety of forms in which the authority of a principal is in daily practice delegated to others. Besides the occasional authority by Procu-

RATORY, or PROCURATION, to accept or draw bills of exchange,[1] the charge given to a clerk to manage a store or shop, which is called INSTITORIAL power, the extensive trust given to a shipmaster, called EXERCITORIAL power, the powers of FACTORS, AGENTS, BROKERS, are all included under this contract.

Factor. 1. A FACTOR is distinguished from a merchant in this, that a merchant buys and sells for his own direct mercantile profit; a factor only buys or sells on commission.[2] Again, a factor is distinguished from a broker, by being intrusted with the possession and apparent ownership, as well as with the management and disposal of the property of the principal. He is distinguished from an agent, in his authority being extended to the management of all the principal's affairs in the place where he resides, or in a particular department. He is distinguished from an institor, in being, in point of law, a person separate from his principal; whereas an institor (at least where that term is confined to shopkeepers and clerks) is assimilated, in all respects, to his master, so far as relates to his transactions in that character. A factor is generally the correspondent of a foreign house, or of a merchant or manufacturer at a distance from the place of sale; and he usually sells in his own name, without disclosing that of his principal, and has an implied authority so to do.[3] He receives consignments on the one hand, and makes sales and remittances in return; proceeding for a considerable course of time, and balancing, at regular intervals, his accounts with his principal; and in general he gives a del credere guarantee, and has a commission for it. Sometimes he makes large advances on goods consigned to him, while the sales of those goods are either made in his own name; or bills are drawn by his principal on the buyers, payable to the factor; or the bills are drawn by the principal, and sent to the factor to procure acceptance, with blank indorsations. The goods intrusted to a factor or agent, or the price of them, are impledged for his advances, and liable to retention for the general balance.

Agent. 2. An AGENT is one intrusted with the accomplishment of a particular act or course of dealing: As, the riding agent of a manufacturing house for taking commissions; or a supercargo, sent out with goods to sell or dispose of them; or one appointed specially to manage the sale of a cargo, the purchase of a commodity, or the effecting of an insurance. His powers within the range of the thing committed to him, unless where expressly limited, are similar to those of a factor.

These are, strictly speaking, the true descriptions of agent and factor, as contradistinguished: But the names are generally confounded in common speech; factors being included under the name of agents.

Brokers. 3. BROKERS are employed merely in the negociation of contracts relative to property, with the custody of which they have no concern. Having no property intrusted to him, the broker ought not to sell in his own name; he has no authority for it; and his principal is entitled to rely on his not doing so. The broker makes it his business to find out the buyers and sellers of commodities; to cultivate that sort of information which may best enable him to bring the buyer and the seller together; or the merchant and the insurer; or the bill-holder and him who is willing to buy bills. In this country, brokers are neither incorporated nor entered by any public authority. Their profession is private; and their success dependent on their integrity, intelligence, and skill. They take their distinguishing appellation from the particular object to which they attach themselves, as insurance-broker; stock-broker; bill-broker, &c. They are paid by an allowance or commission, called Brokerage.

[1] See above, p. 400. et seq.

[2] See LORD STOWELL'S argument in THE MATCHLESS, Haggard's Admiralty Rep. 101.

[3] See the distinction of Factor and Broker illustrated in BARING against CORRIE, 2. Barn. and Ald. 137.

Sometimes agents or factors act as the ostensible vendors of property belonging to merchants resident in the same place, having warehouses and places fit for exhibiting the goods for sale.

Factor's Lien. Sometimes they act as factors both for buyer and seller, the sale being perfected, and the delivery transferred, by delivery of the bills for the price, and an entry in the factor's books to the debit of the one party and the credit of the other.

The character of factor and broker is frequently combined; the broker having possession of what he is employed to sell, or being empowered to obtain possession of what he is employed to purchase. But, properly speaking, in these cases he is a factor.

Constitution of Mercantile Agency. The power of a factor, or agent, or broker, is conferred, either, *first*, In writing; formally by power of attorney, or more loosely in correspondence: Or, *secondly*, By parole agreement: Or, *thirdly*, By mere employment.

Powers. If the powers are special, they form the limits of the authority: If general, they will be more liberally construed, according to the necessities of the occasion, and the material, or ordinary, or reasonable course of the transaction and usage of trade.

Power of Attorney. 1. In the management of the affairs of a foreign merchant, especially where there is occasion to discharge debts, and receive money, or to carry on judicial proceedings, a power of attorney is the proper evidence of authority. It empowers the factor to represent the principal, and act as he might have done if present.

Letter. 2. But agents, or factors, or brokers, are generally appointed in mercantile affairs by letter. So, a confidential clerk is authorized to accept or indorse bills by a letter addressed to him. It is expressed in the simplest terms, and without either technical words, or the solemnities of a formal deed; the powers varying with the circumstances and intentions of the parties. The most extensive powers are sometimes thus conferred on a son, or a confidential clerk, and the mandate runs in some such form as this: 'With 'power to manage his trade and business in general, to accept bills, make promissory-'notes, indorse and discharge bills and notes, grant bills for money, subscribe policies, 'and every other thing to do relative to the granter's trade and business.' So, in the course of correspondence, goods are consigned from abroad, with directions to the consignee to sell them, and either to apply the proceeds in a particular way, or to place them to account: Or merchants or manufacturers, with an accumulation of goods on hand, place them with another, (ex. gr. a general agent or another merchant), who agrees to manage the sales, and to advance a certain proportion to be reimbursed out of the sales: Or one is desired to buy goods for another, and either intrusted with credit or money for that purpose, or left to make the purchases as he can, on his own or the principal's general credit: Or goods are sent to the warehouse of a general agent, with particular directions as to their disposal; or to be sold at the ordinary rate of the market.

2. *Implied Mandate and Actio Institoria.*

Implied Mandate. I. In the course of mercantile dealings, goods are placed with general agents, or sent to public warehouses, and the power of disposal intrusted to brokers; and so an agency to this effect is constituted without writing of any kind. Many merchants in London and elsewhere have neither goods nor warehouses in their possession; but intrusting all their goods to brokers and agents, confine their own attention to the great lines of commercial intercourse.

Where goods are consigned to one at a distance, there is an implied mandate to sell

at such price and time as may seem most beneficial;[1] and this is especially to be inferred where advances have been made on the goods.[2]

II. Mercantile agents have authority frequently conferred on them by mere implication.[3] This generally is grounded on the sanction given by the employer to credit raised by a person acting in his name. Such is the power implied from giving sanction to the acts of a procurator; as where a clerk accepts or indorses bills for his master, which that master pays as legitimately accepted, or allows to be as well transferred as if indorsed by himself.

Such also is the authority with which a domestic, or other servant, or a rider or travelling clerk, is invested, by his master's employing him in ordering or procuring articles, or in receiving orders for goods, and afterwards recognizing his act.[4] An agent or factor of any kind may in the same way be accredited.[5] But in all those cases, it is from the *recognition* of the act, that the authority is inferred.[6]

III. There is also a delegation of power by presumption of the law, where one places another at the head of an establishment, or in the management of a shop, or in the management or command of a ship. The maxim of the law here applies, Qui facit per alium facit per se.

1. A wife is by the law held to be præposita rebus domesticis while she remains in family with her husband. Things furnished on her order, within the range of domestic use, and proper for a family, are held as ordered by the husband. He is liable for the price as the sole debtor, although the articles may have been misapplied, or although he may have given to the wife money to provide them.[7] The presumption of this authority ceases, 1. Where the wife leaves her husband's family, and takes up her residence elsewhere;[8] and, 2. By the husband publicly depriving her of the administration by means of inhibition.[9]

Whoever is de facto at the head of the family, and in the management of the domestic establishment, is held as præposita.[10]

[1] O'Reilly, Hill, May and Company, against Jameson's Creditors, 7th June 1821; 1. Shaw and Ballantine, 60.

[2] Ure and Miller against Jaffray, Trustee for Jameson's Creditors, 31st January 1818. Jameson consigned goods to Jamaica, without any special directions; and Ure and Miller, a Glasgow house, partners of Ure and Miller of Jamaica, to whom they were consigned, made advances on them. The goods were laid in at prices too high; and after long trying the markets, Ure and Miller sold them at a great loss. They were held to have acted within the limits of their implied power, having acted fairly in all respects.

[3] A chief example of this is in the case of shipmasters. See below.

[4] Fenn against Harrison; 3. Term. Rep. 760. See also the distinction made by Lord Ellenborough between the case of a servant always furnished with cash beforehand to pay for the goods, from which no authority is to be inferred, and the case of a servant not so in cash. 5. Espinasse, 76.

[5] Todd against Robinson, 1825, before Abbot, Ch.-J.; 1. Ryan and Moody, 217. Linen-drapers in London had an order for goods, by Womoe, residing in London, for Robinson a shopkeeper in Yorkshire. There had been several former orders answered. Womoe appropriated the goods in the last order to himself. But verdict was given against Robinson, as bound by the order of his accredited agent.

Gilman against Robinson, ib. 226. was a case of the same complexion, disposed of in the same way, under Chief-Justice Best's direction.

[6] Courteen against Touse, 1. Camp. 43. n. a. It is said here to have been held by Lord Ellenborough, that although one had often signed policies for another, there being no evidence of a loss had on such policies, it was not sufficient. Yet there is some confusion about this case as stated by Campbell.

[7] 1. Ersk. 6. § 26.

[8] Even in this case, however, the husband is liable for the wife's necessaries, if he has not furnished her with the means of providing them; and for the expense of law proceedings between them to the dissolution of the marriage. Harman against M'Alister's Trustees, 6th July 1826; 4. Shaw and Dunlop, 799. This does not, however, depend on præpositura; but the husband is liable to these as proper burdens on the common stock under his administration.

[9] Ersk. ut supra.

[10] See Hamilton against Forrester, 22d February 1825; 3. Shaw and Dunlop, 572.

Institorial Power.

2. In the Roman jurisprudence, the prætor gave an action against the principal for the contracts and engagements of INSTITORS, or superintendents of shops and establishments for sale or purchase. And the principle of this remedy has been adopted in the law of Scotland. In England also, in the same class of cases, a *general* authority seems to be conferred as contradistinguished from a *limited*. Under this rule, in Scotland, are included, the superintendents of shops, manufactories, farms, banks, and all similar establishments for commercial purposes.[1]

Shop.

1. A clerk or shopman, having the management of the shop, is institor or præpositus, sells and receives the price, or buys articles in the course of the trade, so as to bind his master.

Wife.

2. A woman managing the shop of her husband, or keeping a shop herself, with his permission, is likewise institor; and for her contracts the husband is liable actione institoria.[2]

Bank Agents.

3. The manager of a bank, the officers placed there to deal with the public, or the agent managing a branch of the banking business at a distance from the head establishment, are all institors by whose acts the bank is bound. In this case, however, particular attention is necessary to avoid stretching this implied authority too far, considering the peculiar dangers attending money transactions; the precaution of the law, in requiring written proofs as evidence of payment in money; and the very particular regulations and checks under which banks always place their officers, especially in regard to their power of receiving money so as to charge the bank. When this question first occurred, the Court of Session applied the strict rules of the actio institoria, without any very critical examination of the vouchers on which money was paid into the hands of the bank agent. Taking his official place and station, as institor of the bank, to imply sufficient authority as a general agent to receive money for his principal, they held the bank chargeable with money so received.[3] On the next occasion on which the question arose, the Court at first viewed the matter differently, and held the bank chargeable only where the powers delegated to the agent were correctly exercised. But afterwards nearly the same views prevailed as in the former case.[4] On appeal to the House of Lords, a doctrine considerably

[1] BRUCE and Company against BEAT, 10th December 1765, Morr. 4056.; where Lee was held the institor of certain gentlemen in carrying on a theatre in Edinburgh, and they were held liable for articles furnished on his order.

[2] WILSON against DEANS, 17th December 1675; Gosford, M. 6021. See, in English law, ANDERSON against SANDERSON, 2. Starkie, 204.

[3] PAISLEY BANKING COMPANY against GILLON, 20th June 1798. This bank had a branch at Alloa under the care of Birnie, with whom, as agent for the bank, Gillon discounted several bills. They were indorsed to the bank and transmitted, and, when due, were returned to Birnie to recover payment of them. In this situation, Gillon remitted various sums to Birnie for the purpose of paying those bills; but Birnie did not enter those sums in the bank books, and the bills remained in his hands to be cancelled. He became bankrupt and absconded, and in the repositories of the bank the bills were found. The bank raised action against the parties in the bills, and the defence was payment. The question, therefore, was, Whether the bank was chargeable with the remittances sent to Birnie? The Court held that it was, and dismissed the bank's action.

[4] WATSON against BANK of SCOTLAND, 15th May 1806; Fac. Coll. M. App. 1. Mandate, No. 3. The Bank of Scotland had a branch at Brechin, under the management of James Smith and Sons, as their agents. The place of business was in a room, over the door of which was painted, 'The Bank of Scotland's Office.' Receipts for money paid to the bank were engraved, with blanks for sums and dates, and were signed 'James Smith and Son, agents for the Bank of 'Scotland.' The agents did much business, and in particular discounted bills, and, as bankers, received deposits of money on their own account. They transacted their business in the bank office, and they gave notes for sums deposited, engraved as the bank receipts were, dated 'Bank Office,' and signed 'James Smith and Sons.' Watson placed L.60 in the bank, and received a receipt of the latter description; and, on the failure of Smith and Sons, raised an action for the money as deposited with the bank. The Court found the bank liable for the contents of the receipt, chiefly on the ground, 'that it would be of dangerous 'consequence to the public, as well as contrary to the 'implied nature of such a business, if banks were not

different was applied to this class of cases: The notion of a general agency or implied authority, as in the actio institoria, was rejected; and the case of a bank agent placed on the footing of a limited agency, like any other limited mercantile agent or factor, his power being measured by his commission, and his principals no otherwise chargeable than as the authority granted to the agent gave him power to bind them.[1] And it is a strong confirmation of this view, that in all bank transactions, being dealings in money, the law requires correct written evidence, the terms and import of which the party must be bound to examine.

Traveller or Rider.

IV. Another case, in which it is sometimes contended that there is an implied power, somewhat of the nature of the institorial, is, where a mercantile or manufacturing house employs a RIDER or TRAVELLER to receive their debts, and take orders to be executed by the principal. The authority of such a person may depend either on the instructions which he receives, or on the custom of the trade, or on the extent to which his exercise of authority has been recognized. In general it appears, that a riding or travelling agent has not only authority to receive payment for his principal of the monies due to him, but to take orders by which the principal shall be bound as much as if he himself had accepted and bound the contract.[2]

3. *Commission and Diligence Prestable.*

Commission.

This contract, while it partakes of the contract of mandate, in so far as it involves a delegation of power, may be classed with locatio conductio, in so far as the skill, labour, and attention of the factor, agent, or broker, are purchased by the payment of a hire or commission. This commission is regulated either by stipulation or by usage. In England, the rate of brokerage is, in some cases, settled by statute; and it is enacted by the 12th Anne, statute 2. c. 16. which applies to Scotland, (in the second section), that the rate of brokerage for procuring a loan of money shall be limited to 5s. for L.100, under the penalty of L.20.[3] It is by the effects dependent on this admixture that the modern contract of commission or factory is contradistinguished from the mandate of the civil law.

Diligence prestable.

The diligence prestable by a proper mandatory, as understood in Scottish jurisprudence to be grounded on the equity of the Roman law, is only for his actual intromissions, and such diligence as he employs in his own affairs.[4] But the diligence implied in the

'answerable for the transactions at their known office 'by the clerks and servants employed by them in the 'common operations of banking.'

[1] BANK of SCOTLAND against WATSON, House of Lords, 26th March 1813; 1. Dow, 40. The Lord Chancellor said, 'There was nothing peculiar that he 'knew in bank agency to take it out of the rule, that the 'agent could not bind his principal beyond the limits 'of his authority. The Chief Justice Ellenborough 'had sat at the table at the hearing of the case, and 'had observed, that if it had come before him, it would 'not have occupied more than ten minutes. There 'were a variety of considerations and circumstances 'stated to raise a presumption in favour of the respon-'dent; but all of them appeared to him insufficient to 'show that this was an instrument by which the bank 'could be bound.' Lord Redesdale concurred in this opinion.

[2] MILNE against HARRIS, JAMES and Company, 14th June 1803; Fac. Coll. M. 8493. An order was given by Milne to Callender, a rider of Harris, James and Company, which was executed. In his next round, another order was given by Milne to Callender, which he transmitted to his principals. But they refused to execute it, as Milne had not settled the former dealing correctly. Milne immediately wrote that cash should be paid down, but his order was not answered. Harris, James and Company, defended the action by Milne, on the ground that Milne's offer was not accepted by them. The Court held the rider to have authority to receive orders, and to bind his principal to the execution of them. Some of the Judges held, that this general rule must admit the exception of a refusal for sufficient cause; and the irregularity of the former dealing they held sufficient; but this did not prevail. See TELFORD against JAMES, WOOD and JAMES, (Sup. 404.) 3. Shaw and Dunlop, 167.

[3] The 17. Geo. III. c. 26. does not apply to Scotland.

[4] 3. Ersk. 3. § 36.
Sir William Jones, in his Essay on the Law of Bail-

onerous office of a mercantile factor, agent, or broker, is that of a prudent man in managing his own affairs.[1]

Besides the ordinary commission, there is frequently stipulated a commission del credere; the responsibility under which has already been considered.[2]

4. *Extent of Authority.*

Extent of authority, and power of Factor.

In all those cases in which there is not a general authority implied, as in the case of institors, and others already treated of,[3] the extent of a factor's authority and his powers are to be gathered from the mandate under which he acts.

1. If the mandate be general, it is to be construed according to its object, as implying all powers within the scope of the employment;[4] if limited, it is to be executed strictly according to its terms.[5]

2. Even a special agent's authority is held to include all the necessary or usual means of executing it with effect. Thus, if one authorize his agent to get a bill discounted, without restraining him as to the way of doing it, this is an authority to indorse it in the principal's name, so as to bind him.[6] An order to send goods, implies a power to load them generally, so as to bind both the goods and the principal for the freight.[7]

3. An agent or factor cannot, without express power, or power necessarily implied in the circumstances, delegate his authority to another.[8] But delegation is sometimes necessarily implied: Thus, an order to an agent to recover a debt, implies a power to delegate the execution of the necessary diligence to the proper officer; or to delegate to the agents necessary or fit to be employed before the courts to which resort must be had: and the natural consequence is, an implied guarantee by the agent so delegating his authority, of remuneration to persons who may be utterly ignorant of the credit of the principal.[9]

4. The construction of mercantile commissions is to be extended, restrained, qualified, and, in general, assisted by the usage of trade. Thus, it is the custom to sell goods upon credit, and an agent, employed to sell without special restraint, may follow that course; but as it is the custom to sell stock only for ready money, a factor is not, without special authority, empowered to dispose of it otherwise.[10]

ments, has placed the obligation to stricter diligence than seems to accord with a gratuitous contract on its fair principle, namely, that an undertaking to do an act may happen to infer a degree of diligence beyond responsibility for the mere violation of good faith. P. 53.

[1] See above, p. 453.

[2] See above, p. 378.

[3] See above, p. 478.

[4] A very full argument on this point by Lord Loughborough will be found in HOWARD against BAILLIE, 2. H. Blackstone, 618.

[5] Ross against ROSE, 29th June 1791, where grain was sold on *credit* under a power to sell for *money;* and the agent was found liable for damages.

EAST INDIA COMPANY against HENSLEY, 1. Esp. Cases, 3.

[6] FENN against HARRISON, 4. Term. Rep. 177. But if he had himself refused to indorse it, and desired the agent to get it discounted or sold, it would be otherwise. Same case, 3. Term. Rep. 757.

[7] Molloy de Jure Maritimo, 442. § 9.

[8] 3. Ersk. 3. § 34.

[9] See CHALMERS against MASSON, 17th December 1824; where an Edinburgh solicitor before the Supreme Courts employed a solicitor before the Inferior Courts, on account of a client of his. On a report from the several law societies, it was held that the former was responsible for the latter; but this was altered on a specialty. 3. Shaw and Dunlop, 408.

[10] In WILTSHIRE against SIMS, 1. Camp. 258. Lord Ellenborough applied this doctrine to a case where a broker having sold L. 500 of the stock of the Commercial Road, on a credit of 14 days, by promissory-note, the plaintiff, in an action to have the stock transferred, was nonsuited.

Mr Justice Chambre lays down the law thus:— 'There is no doubt of the authority of a factor to sell

5. *Factor's Power to Pledge.*

It has been much questioned, both on the Continent and in Great Britain, what power a factor has to pledge the goods of his principal. In England, at common law, he had no such power. In Scotland, it has been decided that he has the power, to the effect of conferring on one who lends money on the security of the goods, an unexceptionable real right; or of raising to a sub-factor, or other person receiving the goods and advancing money on them, an effectual lien. And on this point the law of England has, by statute, been placed nearly on the footing of the law of Scotland.[1]

The doctrine of the law of Scotland on this subject may be reduced to the following propositions:—

Power to impledge his own lien.

1. Where a factor, having made advances on goods sent to him for sale, transfers to another the right of pledge or lien which he himself holds, the transfer is effectual. Even in England he is entitled to do this, provided he does it fairly and openly; for lien is not a mere jus incorporale, but is accompanied by possession of corporal subjects, and consists in the continuance of that possession. As the creditor to whom the lien is assigned holds only the qualified possession which his debtor was entitled to, his right, like that of the assignee to a liferent, expires with the original lien; but, to this extent, the security is as complete as the factor's own; that is to say, the creditor will be entitled to avail himself of the pledge to the extent of the balance due to the factor.[2]

To impledge for advances.

2. Although at first it was held, that a factor having goods in his possession could not pledge those goods, or receive advances on them, to the effect of constituting a lien available against the owner;[3] yet this soon yielded to views of commercial expediency, first in a foreign case, in deference to the laws of Holland,[4] and afterwards it was held, that a person holding goods in this country as factor for a trader abroad, could place those goods

'upon credit, though not particularly authorized by 'the terms of his commission so to do. HOUGHTON 'against MATHEWS, 3. Bos. and Pull. 489. SCOTT 'against SURMAN, Willes, 407. S. P. But this doc- 'trine is founded on "the constant and daily expe- 'rience, that factors do sell upon credit, without any 'special authority," and, therefore, confirms the gene- 'ral maxim, that when an agent is 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 stock-broker. An agent can in 'no case bind his principal by any act beyond the 'scope of his authority. FENN against HARRISON, '3. Term. Rep. 757.' 1. Camp. 259. Note.

See HOUGHTON against MATHEWS, 3. Bos. and Pull. 485.

[1] 4. Geo. IV. c. 83. as amended by 6. Geo. IV. c. 94.

[2] See the case of M'COMBIE against DAVIES, 7. East, 7, 8.; and MAN against SKIFFNER, 2. East, 529.

[3] MITCHELL against BURNET and MOWAT, 11th December 1746; Kilk. 206. (4498.) The goods were Mitchell's, but were lodged in a warehouse at Campvere in Holland by Sinclair. There they were arrested by creditors of Sinclair; and a competition arose between the arrestors and Burnet and Mowat, the owners of the warehouse, who alleged that the goods had been pledged to them by Sinclair for debt. The Court found the goods the property of Mitchell; and that the impignoration was neither proved, nor *relevant* to encumber Mitchell's property.

See next note.

[4] Lord Kilkerran says, on a review of the judgment, 'It seemed to be the opinion of the Court that the 'sentence had gone too far in finding the impignora- 'tion not relevant, at least so far as concerned L. 57 'advanced to Sinclair on the credit of the goods; for 'that, however, at common law, a man's property can 'only be affected by his own deed, and that the pre- 'sumption of property from possession cedit veritati, 'yet the expediency of trade and commerce requires, 'that wherever any person is vested in the nominal 'property by a bill of lading, third parties contracting 'with him as proprietor, whether by sale or pledge, 'should be safe. But as there was no proof of such 'impignoration, there was no occasion to give judgment 'upon this point.' The case finally terminated in favour of the pledgee, upon an allegation, that by the custom of Holland, a factor who gives credit on goods lodged with him, can detain them till he is paid; and this was allowed to be proved 'by four merchants in 'Edinburgh.'

with another, as his factor or consignee, and take advances on the security of them, to the effect of conferring an unexceptionable lien for the advances available against the true proprietor of the goods.[1]

Not to give Lien for general balance.

3. Where a factor, however, places goods in the hands of another as factor, or for any other purpose which, in the case of his own goods, would confer a lien for a general balance, the sub-factor, though ignorant of the true ownership of the goods, must, in so far as he has not made *actual advances* on the consignment, but claims only a *general*

[1] 1. COLQUHOUN against FINDLAY, DUFF and Company, 15th November 1816; 19. Fac. Coll. 208.; First Division. Twenty hogsheads of sugar were consigned by Mr Colquhoun from the West Indies to H. Crawford to be sold. The invoice was directed to him, and the bill of lading deliverable to him or his order. Crawford employed Findlay, Duff and Company, as brokers, to sell the sugars; and he gave an order on the keeper of the bonded warehouse to deliver them to their order. Findlay, Duff and Company, took the goods to be Crawford's, and made advances to him on the credit of them. The judgment of the Lord Ordinary, Alloway, 'finds, That by the bill of lading, the 'sugars in question appeared to be the sole property 'of Mr Crawford: That upon the 20th September 1814, 'Mr Crawford, by a regular invoice and order, desired 'the persons in whose warehouse the sugars were de-'posited, to deliver the same to the order of Messrs 'Findlay, Duff and Company; and that from this pe-'riod, when the said order was delivered, these persons 'continued to hold the sugars for behoof of Messrs 'Findlay, Duff and Company: That the possession of 'the sugars being thus transferred by Mr Crawford, 'apparently the unlimited proprietor, to the defenders, 'they were entitled either to sell the same, or to ad-'vance money to him to account of those sugars; and 'that having made advances to Mr Crawford, *bona* '*fide*, without ever having heard of the claim of the 'pursuer, who sent the sugars to Mr Crawford, they 'are entitled to retain and apply the proceeds of those 'sugars to account of the advances made by them; 'and are only liable to account to the pursuer for any 'balance of the proceeds of the sugars which may be in 'their hands beyond the amount of these advances; and 'decerns.' The Court adhered. 'Per curiam, the 'transaction cannot be correctly considered as a pledge. 'The factor did not exceed his powers: besides, it is 'clear that a factor authorized to sell can effectually 'pledge the goods of his constituent. The English 'authorities on this point ought to have no weight.'

2. EDE and BOND, against FINDLAY, DUFF and Company, 15th May 1818; 19. Fac. Coll. 509. In August 1814, Francis Garden and Son, extensive West India merchants, had, as consignees and importers, thirty-nine hogsheads of sugar in the bond-warehouse in their own name. They had thus an apparent ownership of those sugars; and having put them into the hands of Findlay, Duff and Company, with power to sell, and given an order of delivery, which was duly intimated at the king's cellars, Findlay, Duff and Company advanced L.1000 on the consignment. They afterwards sold them for L.1500; and Garden and Sons becoming bankrupt, Ede and Bond, of London, claimed the proceeds, as being the proprietors of the goods which Garden and Sons had held merely as factors, with no authority to pledge. The Lord Ordinary found, 'that Findlay, Duff and Company, were entitled 'to retain and apply the proceeds of the sugars to ac-'count of all advances made, or obligations come under 'by them, on the credit of these sugars.' To this judgment the Court adhered.

3. JOHNSON and MANLEY, against FINDLAY, DUFF and Company, 13th Feb. 1818. This was a similar decision in circumstances nearly the same. The goods (coffee) had been intrusted to Garden, Brothers and Company, as managing partners of a joint adventure. They consigned them to Findlay, Duff and Company, to be sold. Large advances were made by Findlay, Duff and Company, on the faith of this consignment. They insisted on a lien, both for those advances, and for their general balance on transactions with Garden, Brothers and Company, as their factors. Lord Pitmilly, as Ordinary, gave his 'opinion, that the bill of lading of the 'coffee having been made out in the name of Garden, 'Brothers and Company, and the coffee deposited in 'their names in the bond-warehouse in Leith, the de-'fenders, Findlay, Duff and Company, were entitled, 'on receiving an unqualified order for delivery of the 'coffee from Garden, Brothers and Company, to make 'advances to that company on the faith of the coffee 'thus delivered to and bona fide received by them.' But before pronouncing final judgment in the case, his Lordship ordered farther discussion of the right to retain for the general balance.

4. JOHNSON against JAMES SCOTT & SONS, Nov. 14. 1818; 19. F.C. 561. Johnson, residing at Wakefield, was desirous of turning his capital to account; and having applied to Hickson, he helped him to purchase a cargo of deals for Leith. It came consigned to James Scott and Son from Hickman, though Johnson was the true owner; and the consignees knew nothing of Johnson's interest. Hickman being partner of a company whose acceptance had been discounted by James Scott and Son, he wrote to Scott and Company that the Company could not pay the bill, and desired Scott and Company to retire it, and take reimbursement on the consigned cargo. They answered, that they would take up the bill, and pass it to account of the consignment. No reply was made: And, on Hickman's failure, James Scott and Son had notice of Johnson's right. They claimed retention for the bill, and sent the balance to Hickman. The Court held James Scott and Company to have an effectual security for the advanced money, holding the application of the proceeds by order of the consignor to be an advance.

balance, take the goods under the qualification of the limited right which the factor himself had in them.[1]

Foreign Laws.

But although these were the rules followed in Scotland, they had been established chiefly on grounds of public expediency, and from favour to commerce, though undoubtedly bottomed on a sound principle of law, by which property in moveables is presumed from possession. The same course was followed on the Continent; and, against authorities of great weight, the bias of favour and encouragement to the free transfer of goods in trade had influenced the whole practical jurisprudence of the trading nations of Europe. The general rule of the civil law was, 'Nemo plus juris ad alium transferre potest quam 'ipse haberet.'[2] And, under this general rule, the power to pledge was absolutely denied.[3] In France it was held, that one could not pledge the property of another for his own debt.[4] In Holland, the same law was established.[5] In Italy, also, this was held as law.[6]

Commercial expediency.

But an abstract rule laid down in law books sometimes does not square with the actual business of life; and in favour of commerce a relaxation of the above rule was introduced, to the effect of allowing the possessors of moveables, and those otherwise in the apparent right of commodities, not only to sell, but to pledge them.[7]

[1] Black and Company against M'Call and Company, 22d June 1820. In this case sugars were bought by Thomson, Gibson and Company, as agents or factors, for and to the use of a secret company or joint adventure of Thomson, Gibson and Company, Will. Tenant, and Gibson and Duncan, and were placed in the hands of M'Call and Company on a mere broker's commission, not as factors. They were the agents of Thomson, Gibson and Company, and had so acted for them on a large commission for occasional advances. Of course in these circumstances M'Call and Company made no advances on the faith of those sugars. But there being a considerable balance due to them on their account with Thomson, Gibson and Company, and all the parties becoming bankrupt, M'Call and Company claimed retention for their general balance against the creditors of the joint adventure. And so the question was, Whether they were entitled to exercise the same right for security of this balance, which by the above cases they would have had for advances on the goods? The Court drew the distinction clearly, and rejected the claim of lien on this principle, that either a factor may sell, or pledge, or take advances of money on the security of retention as a pledge; yet a sub-factor, whether he knew the true owner or not, can take, as a resulting security for his general balance, only such right as the primary factor has. This judgment was affirmed in the House of Lords. The affirmance cannot be taken as establishing the doctrine of the judgment in the Court of Session; but it does not invalidate it. The view taken in the House of Lords was, that, without inquiring into the right of M'Call and Company, had they in this acted as proper factors, there was sufficient ground for affirming the judgment in the fact, that the goods in question came into their hands not as factors, but on a brokerage commission, a character not entitling them to a lien. The judgment was moved by Lord Gifford, 4th May 1824. See Shaw's Appeal Cases of that date.

[2] Dig. lib. 50. tit. 17. De reg. juris, l. 54.

[3] Cod. lib. 8. tit. 16. Si aliena res pignori data sit, l. 6. Dig. lib. 20. tit. 3. Quæ res pignori vel hypothecæ datæ obligari non possunt, l. 2. 1. Voet, 880. Hienneccius Elem. secundum ord. Pandect. 4. No. 27. Observ. Theoretico-Practicæ ad Pand. p. 4. No. 27. vol. vi.

[4] Basnage, Tr. des Hypotheques, p. 4. and 6. Pothier, Tr. du Cont. de Nantissement, No. 27. vol. ii. p. 953.

[5] Van Leewin Censura forensis Theoretico-Practica, lib. 4. cap. 7. § 17. p. 472.

[6] So the law is laid down by the learned Professor Averannius of Pisa, Interpretat. Juris, lib. 4. c. 22. § 13. et seq.

Casaregi reports a case decided by himself, of a valuable string of pearls delivered by a lady to Maranna, a jeweller, to be sold, which he pledged to his creditor to prevent his imprisonment. The pledge was held bad, and the plea rejected, that, as a public dealer in jewels, Maranna was a person from whom the free course of trade entitled the pledgee to take those pearls. Discursus de Commercio, 106. vol. i. p. 334.

The same doctrine seems also established by a decision of the Court at Genoa. Rot. Genuæ de Mercatura, &c. Decisiones, No. 199.; a book which Casaregi says,—'In causis mercantilibus maximæ est 'auctoritatis.' Disc. 36. § 3.

[7] In Holland, this exception is asserted by some authors, while it is denied by others.

Groenwegen, in his Tract de Leg. abrogatis et inusitatis in Hollandia, p. 56. says,—'Si quis rem sibi 'traditam aut commodatam citra formam mandati 'vendat, aut quovis modo alienet, moribus hodiernis 'adversus eum qui rem justo titulo et bona fide ac- 'cepit actionem non habet rei dominus: aut si res 'non alienata sed tantum modo pignori data sit rei

In the inquiries ordered by Parliament concerning this matter it was found, that in foreign countries the rule of lien, as applied to moveable property, is, that 'Possession 'constitutes title;' and that persons making advances of money upon such property are not required to inquire to whom it belongs, and are fully protected for the advances they make.[1]

In England, the law had, towards the middle of the last century, taken a bias against the direction which it had received both here and abroad, and which is said not to have accorded with the spirit of the former law, and indeed to have proceeded rather from an erroneous report than from the judgment of the case by which it had been supposed to be established. This was the case of PATERSON against TASH, tried before Chief-Justice Lee, who is reported to have held, 'that though a factor had power to sell, and thereby bind 'his principal, yet he cannot bind or affect the property of the goods, by pledging them 'as a security for his own debt, though there is the formality of a bill of parcels and a 'receipt;' and so the jury found.[2] This doctrine appears to have been first shaken by the authority of Lord Eldon in 1800.[3] But still the course of decisions proceeded against

'suæ vindicationem non habet nisi pignus luat.' This Van Leewin vehemently reprehends as not correct:—'Qua in re non admodum perspecte judicasse mihi 'videtur Groenwegen.' P. 472. And speaking of a statute of Antwerp, to which that author refers, he says,—'Sed irrationabilis et odiosa mehercule hac in re est 'dicti statuti ratio in favorem forte mercaturæ ibidem 'contra dispositionem juris communis introducti quod 'sane ultra ejusdem civitatis territorium extendi mini-'me potest, quum vel alias statuta juris communis 'correctoria strictissimam accipiant interpretationem.'

In Italy, we have seen Casaregi deciding a case by the rule of law. But there are other cases reported by him, in which, on a very elaborate discussion, he gave full weight to the exception in mercantile law. The doctrine of an exception in favour of mercantile dealings he lays down in his 76th Dissertation, No. 4. et seq.; and in his Treatise, entituled, Il Cambisto Istruito, c. 3. No. 43. et seq.; and in the introduction to his judgment in the case of Greenwood and Cooper, Disc. 124. No. 1. et seq. In that case, David Cayrel had consigned from D. Vais Nunez a cargo of sugar, which he impledged with Greenwood and Cooper for his own debt. Nunez claimed the goods by rei vindicatio as theirs. The Court of Leghorn decided in favour of Greenwood and Cooper; and Casaregi, in a court of appeal, affirmed the sentence. In explaining the grounds of his judgment, he says,—'In istis impropriis 'furtis vel rebus dolose ac fraudulenter extortis, favore 'libertatis publici commercii præmittere pro indubita-'bili regula oportet, talium rerum aut mercium domi-'num rei vindicationis actione illarum restitutionem 'minime prætendere posse, nisi prius per eum persol-'vatur pretium vel pecunia mutuata vel quicquid aliud 'datum aut creditum restituatur illi cui respective 'venditæ, &c. dummodo hic de tempore venditionis, 'vel in solutum dationis vel hypothecæ aut hujusmodi 'nullam habuerit scientiam, rem aut mercem in eum 'perventam ad alios proprietatis ac dominii titulo spec-'tare.'

In another case, where a trader at Ferrara had consigned a bale of silk for sale to a Florentine merchant, who pledged it for a loan of money, and afterwards sold the bale to a third person, under burden of paying the loan; the Florentine merchant failed, and a question arose between the owner and the pledgee for the price in the hands of the purchaser. Casaregi adjudged the case for the pledgee, on the same grounds with the above cases; Disc. 187. To the arguments of the owner Casaregi says,—'Attamen respondebam hac 'nullatenus procedere inter mercatores, quia de eorum 'universali stylo, aut consuetudine, contrarium serva-'tur; et sic cum jure communi iste præcipuus stylus 'seu mercatorum mos prævalere debeat, ideo cessant 'omnes juris regulæ quæ desuper in contrarium alle-'gantur vel allegari possunt.' And he proceeds to say, that he was not only satisfied that this was the constant usage of merchants, from his own long continued practice in such cases, but from careful inquiries he had made.

Ansaldus treats of this question in the general dissertation with which he concludes his excellent work, De Commercio et Mercatura, edit. of 1751, p. 371.; and contends for a preference to mercantile usage over the rules of the common law; § 41. et seq.

[1] 'This,' the Committee says, 'may be taken to be 'the law of France, Portugal, Spain, Sardinia, Italy, 'Austria, Holland, the Hanse towns, Prussia, Den-'mark, Sweden, and Russia.' Report from the Select Committee on the Laws relating to Merchants, Agents, or Factors, &c. p. 20.

[2] PATERSON against TASH, in 1743; 2. Strange, 1178.

[3] Sir W. PULTNEY against KEYMER, 3. Espin. 182. Here Sir W. Pultney employed Petrie and Campbell as his agents in London for the sale of West India produce. Sugars were consigned to them, and they placed them with Keymer as a broker. He advanced money and bills on account of them to the extent of L.18,000. Sir William gave Keymer notice not to sell, and offered indemnification for any demand or advance on account of the sugars; but he did not offer to indemnify against the acceptances. He was nonsuited

the right implied in possession.[1] The bad effects of this doctrine on trade were so much felt, that the House of Commons named a committee of inquiry, who, after very extensive investigations into the law and practice of trade both at home and abroad, were inclined to report, 'that if no easy mode suggested itself for the alteration of the law, so as to 'remove the present inconvenience, consistent with other principles of our jurisprudence, 'it would not be unwise to adopt the principle of foreign laws, that "possession consti-'tutes title," because, though your committee are aware that some frauds would be the 'consequence of such an alteration in the law, yet the great and almost universal benefit 'to be derived by trade from the removal of injurious restrictions, would so enormously 'overbalance the disadvantage as to render it of comparatively little importance.' It was thought better, on the whole, considerably to limit the remedy, and the statute of the 4. Geo. IV. c. 83. was the result.[2] But the words of this Act were not held adequately to reach the full extent of the evil, and therefore the Act of the 6. Geo. IV. c. 94. was passed, whereby, 1. Any person intrusted for consignment or sale with goods, wares, or merchandise, who shall have shipt them in his own name, or any one in whose name goods shall be shipt by another, shall be deemed the true owner, to entitle the consignee of such goods to a lien thereon for money, &c. advanced for the use of such person, as if he were the true owner; provided the consignee shall have no notice by the bill of lading or otherwise, at or before the time of advance, that such person is not the true owner, &c. 2. Persons intrusted and in possession of bills of lading, dock-warrant, warehouse-keeper's certificate, &c. shall be deemed owners, so as to give validity to any contract for sale, in whole or in part, or for the deposit or pledge thereof as a security for money, &c.; provided there is no notice by the document, &c. 3. No one is to acquire by deposit, pledge, &c. of goods in the hands of an agent or factor, for any debts or demand previously due, any further or better right, title or interest, than was possessed by such person so possessed and intrusted at the time of the pledge or deposit. 4. That all persons may contract and agree with factors, known to be such, to the effect of purchasing and paying for articles intrusted with and in possession of such factors, provided the agreement be in the ordinary course of trade, and that such person shall not at the time have notice of the factor's power to sell. 5. That goods may be taken in pledge from known agents, but only to the effect of acquiring such interest as the factor has. 6. That the true owner shall be entitled to follow and demand his goods in the hands of his agent, or of assignees in bankruptcy, on paying the advances secured upon them. 7. That agents fraudulently pledging the goods of their principals shall be deemed guilty of a misdemeanor, and on conviction subject to transportation, not exceeding fourteen years. 8. But this not to apply to a case where the factor has impledged goods only to the amount of his own right over them, provided it be not for bills accepted but not paid.

by the direction of Lord Eldon, Chief-Justice, on the ground that he was bound to relieve them of the bills as well as cash, being both in the nature of charges on the goods.

[1] DAUBIGNY against DUVAL, 5. Term. Rep. 604. NEWSOM against THORNTON, 6. East, 17. MARTINI against COLES, 1. Maule and Selw. 140.

See also PICKERING against BUSK, 15. East, 38. M'COMBIE against DAVIES, 6. East, 538.; 7. East, 5. JOLLY against RATHBONE, 2. Maule and Selw. 298.

[2] By this Act,

1. Persons in whose name goods shall be shipped shall be deemed the true owners, to entitle the consignees to a lien thereon, in respect of their advances, or of money or negociable securities received by the shipper, provided the consignees have no notice that the consignors are not the actual proprietors of such goods.

2. All persons may take goods or bills of lading in deposit or pledge from consignee, to the effect of acquiring only such right, and no more, than the consignee has.

3. The true owner shall have right to follow his goods, whether in the hands of his agent or of the assignees of the agent in bankruptcy, and to recover them upon paying advances secured upon them.

6. *Termination of Factor's Powers.*

Determination of Factory.

The subsistence and determination of a factor's powers have been supposed to depend on certain metaphysical distinctions: And in attempting to settle the principles by which questions of this sort are to be determined, it has been said, on the one hand, that mandate operates by an incessant renewal of the consent which confers the authority—like the operation of gravity on a descending body; on the other hand, the force of mandate has been ascribed to the effect of the first act of will operating like impulse on a natural body, the motion from which continues after having been once communicated. The cases attempted to be distinguished or assimilated by these analogies are those of death and insanity; which give birth to many interesting difficulties in the law of mandate. Without entering into these subtilties, it may be observed, that no question of this sort, practically considered, can be settled on its true principles, without recollecting that there are three parties concerned, the principal, the factor, and the public: The interests arising to the public under delegated authorities giving birth to many exceptions to the ordinary rules, by which the authority of the factor, as in a question with the principal, is regulated.

General Rules as to the determination of Factory.

The general rules are, that the power expires,—1. By death; 2. By recall; 3. By renunciation.[1] But, the dealings of a commercial people do not present themselves in forms so simple, that general rules of this sort can always be usefully applied. The factor has begun operations before his death, or the principal dies after important contracts have been set in motion by the factor: The death of either happens in a foreign country, and is long unknown to the other: Or the mercantile world, trusting to the arrangement which has been formed, have proceeded, in good faith, with transactions, after the factor's powers have secretly expired. It is for the decision of cases of this complicated description that courts of law are resorted to; and digests of jurisprudence are defective where they do not supply rules on which such cases may be determined. It may be useful, in this view, to distinguish some of the more prominent cases.

General Power, Præpositura.

The first case to be distinguished is that of general mandate, præpositura, or institorial power. Under a power such as is occasionally conferred in this way,[2] the trade is managed, and the acts of the procurator relied on. To the recall of such a power two things are necessary,—1. The will or intention to recall; and, 2. Special notice or general notoriety.

Death.

1. DEATH is held to be a recall of such a power, sufficiently answering both requisites. Either it is, according to one hypothesis, the intended termination of the authority; or, according to the other, the cessation of that will, the continuance of which is necessary to the existence of the factor's power; while, on either supposition, the event is, or is supposed to be, notorious. But exceptions are admitted where the death is unknown, and the authority, in the meanwhile, is in action, and relied on.[3]

Bankruptcy.

2. BANKRUPTCY is a revocation of such powers, as of all delegated authority, by which the principal may be bound, or his property altered; and it also is notorious. But where a factor holds a power to sell, and has made advances on the consignment or goods in his

[1] Potissimæ causæ ex quibus mandatum solvitur hæ sunt: mors mandatorii; mors mandatoris; si mandator revocaverit mandatum; si mandatarius mandato renunciaverit. Pothier, Pand. Justin. vol. i. p. 473.

[2] See above, p. 478, et seq.

[3] Instit. lib. 3. tit. 27. § 10. De Mand. 3 Ersk. 3. § 41. Dictum of Mr Justice Buller in SALT against FIELD, 5. Term. Rep. 215. Pothier, Tr. des Oblig. No. 448. vol. i. p. 231. See also Pand. Justin. vol. i. p. 406., and Tr. du Cont. de Mandat. No. 109. vol. ii. p. 892.

A factor for one in the West Indies was held entitled to act (and his acts were accordingly sustained) until he receives authentic information of the death of his principal. CAMPBELL against HENDERSON, 7th December 1826; 5. Shaw and Dunlop, 86.

hands, the bankruptcy of the principal is not a recall of the mandate: The factor is still entitled to sell for his indemnification.[1]

Insanity.

3. INSANITY is not an implied natural termination to a mandate; nor is there an existing will to recall the former appointment; nor is the act notorious, by which the public may be aware of such failure of capacity. It was to this interesting question chiefly, that the metaphysical discussion already alluded to was applied: but the strong practical ground of good sense on which the question was disposed of, as relative to the public, was, that insanity, considered as terminating the agent's authority, is contradistinguished from death by the want of notoriety; that all general delegations of power on which a credit is once raised with the trading world, subsist in force to bind the granter till recalled by some public act or individual notice; and that while they continue in uninterrupted operation, relied on by the public, they are, in law, to be held as available generally; leaving particular cases to be distinguished by special circumstances of mala fides.[2] The question does not appear to have occurred in England; but the opinion of very eminent English counsel was taken on the case which was tried in Scotland, and they held the acts of the procurator to be effectual to the public against the estate of the person by whom the procuratory was granted.[3]

Express Revocation.

EXPRESS REVOCATION will not be available in such a case, unless it be publicly made known.[4] But it may be difficult to establish such publication: perhaps the analogy of the publication necessary in the dissolution of partnership would be followed; namely, special notice or circular letters to the customers; and advertisement to the world at large.

Particular occasion.

1. Where the authority has reference to a particular occasion, (as proceeding on a narrative of the granter's absence, or indisposition), the natural expiration of the power is on the return of the granter, or his reconvalescence: But the credit attached to general powers, when once raised, may be continued by mere permission, while the exercise of the authority is unchecked.[5]

Ordinary Mercantile Factor.

2. The next case is that of a common mercantile factor. Express or tacit revocation by act of the principal, or by death, bankruptcy, or insanity, will have no effect either to deprive the factor of the benefit of his authority, in extricating himself from transactions already begun, or from the consequences of his having acted: Or to deprive others, who have relied on his powers, of the benefit of the transactions on which they have previously entered with him: Or even to disturb transactions entered into, while he still appeared to hold his authority undiminished.

[1] BROUGHTON against STEWART, PRIMROSE and Company, 17th December 1814.

[2] POLLOCK against PATERSON, 10th December 1811; 16. Fac. Coll. 369. The case in which this question occurred to be tried was compromised, after the first decision given on the question. The opinions of the Judges are peculiarly worthy of perusal; not being confined to the narrow state of the question as it occurred technically, but extending to a large and comprehensive discussion of the general question as to the effect of insanity on such powers.

[3] After stating the terms of the procuration, and that, after the insanity of the granter, the procurator had continued to carry on the business of a banker for the principal, the question put was, 'Whether, in these 'circumstances, the transactions of Mr John Paterson, 'under his father's procuration, are good to those who 'transacted with him from the date of it to the period 'of stopping.' The answer by Sir Vicary Gibbs, (afterwards Lord Chief-Justice of the Common Pleas), Sir Samuel Romilly, and Mr Adam, (now Lord Chief-Commissioner of the Scottish Jury Court), was 'We 'think they are good.'

[4] Pothier says,—'Les préposés obligent leurs com-'mettants tant que leur commission dure; et elle est 'toujours censée durer jusqu'à ce qu'ils aient été re-'voqués, et que la revocation ait été connue dans le 'public.' Tr. des Oblig. No. 448. vol. i. p. 231.

[5] In the above case of Paterson, the procuration proceeded on the propriety of appointing one 'to act 'for the granter at any time when absent.'

Limited Mandates.

3. Limited mandates for doing a special act, expire by performance of the act; or by death or revocation; and are not, like general powers, capable of extension by mere inference and bona fides.

§ 2. CLAIMS UNDER THE CONTRACT OF COMMISSION OR MERCANTILE AGENCY.

Under the contract of mandate or mercantile agency, various claims may arise on a sudden disorder in the affairs of the several parties. These may be either on occasion of the bankruptcy of the principal, or on the bankruptcy of the factor or agent.

1. CLAIMS ON THE BANKRUPTCY OF THE PRINCIPAL.

Two classes of cases may arise on occasion of the bankruptcy of the principal; one, of cases involving the rights of the principal, now vested in his creditors, as in relation to the party with whom the factor has entered into contracts; and another, comprehending the claims which may competently be made against the principal's estate.

1. *Claims by the Creditors or Bankrupt Estate of the Principal.*

To the creditors or estate of the principal, claims may arise against third parties, or against the factor.

Claims of Principal against Third Parties.

1. CLAIM AGAINST THIRD PARTIES.—The creditors of the principal are entitled, against the party with whom the factor has contracted, to demand performance of the contract; but under certain qualifications. Thus, 1. Where the factor has acted in his own name, and has been relied on as principal, the third party cannot be deprived of the benefit of the securities which he could fairly contemplate as resulting from the contract: and so he may set off against the demand of the principal, for the price of goods sold by the factor, a debt due by the factor to himself.[1] 2. Where the contract is impeachable for fraud or concealment by the agent, the objection equally affects the principal. 3. Even where the bargain has been made as with a factor, the principal's claim will be affected by the factor's lien for his general balance, or by the factor's right to recover from the third party under a del credere commission.[2]

2. The creditors of the principal are entitled to recover from a third party to whom the agent has given over his goods, or paid his money, in the following cases:—1. Where the third party has the goods in temporary custody from the agent: But the demand will be subject to all legal liens, where the name of the principal was not disclosed. 2. Where the goods have been delivered, or money paid, on such mistake, misrepresentation, concealment, or fraud, as would give the agent a remedy had he been the principal: there is rei vindicatio or condictio indebiti to the principal as the true owner. 3. Where the contract is with the agent, factorio nomine, but beyond the terms of his power.

[1] See above, p. 267. See also below, p. 492. and Of Compensation.

MOORE *v.* CLEMENTSON, 1809; 2. Campbell, 24. It is not sufficient to alter this rule, that the factor or agent was known to act generally as an agent. Lord Ellenborough said,—'If the defendants had merely a general knowledge of this person being a factor, this, I think, would not be enough to deprive them of the privilege they derived from his actually selling these goods as a principal. A man who is in the habit of selling the goods of others, may likewise sell goods of his own; and where he sells goods as a principal, with the sanction of the real owner, the purchaser, who is thus led to give him credit, shall on no account afterwards be deprived of his set-off by the intervention of any third person.'

See distinction in the case of Brokers, p. 492.

[2] See as in the preceding Note.

3. The estate of the principal has the full benefit of the delivery of goods to the agent, where he is not merely an intermediate agent to forward the goods, but the person in whose administration the goods are to be after delivery.[1]

2. CLAIMS AGAINST THE FACTOR.—The rights of the principal's estate against the factor are to recover all the property intrusted to him, and to have an account of all the proceeds, and of the result of the contracts which he has entered into; under deduction of the commission, and of any balance that may arise on the factor's transactions.

Agent's Responsibility.

The responsibility of the agent is for ordinary diligence, according to the general rule already laid down. See above, p. 458. In applying this rule, the Court has pronounced two decisions, which may serve to illustrate it:—1. A gratuitous mandatory was found not responsible for theft, where extreme prudence and care might have prevented the loss.[2] And, 2. A common mechanic was found not responsible for a short delay in effecting an insurance which he was desired to get done; whereas a broker would have been held to stand to the loss.[3]

2. *Claims against the Estate of the Principal.*

On Principal's Estate.

The estate of the principal is liable to claims by the factor, and by third parties.

By Factor.

1. CLAIMS BY THE FACTOR.—The FACTOR or AGENT having no goods in his possession, or money in his hands, due to his principal, for his security or indemnification,[4] is entitled to claim on his estate,—1. For the balance in account between him and the principal; and, 2. For relief or indemnification from any liabilities which, as factor, he may have undertaken for the principal.

By those dealing with the Factor, In Principal's name.

2. CLAIMS BY THIRD PARTIES.—THIRD PARTIES, who have dealt with the factor, have a claim against the estate of the principal as if they had dealt with himself.

1. The agent's contract entered into as factor for a known principal, forms a good ground of action or claim against the principal, provided the power is proved and the limits duly observed. And there will be no action against the factor, unless the principal is abroad.[5] Such is the case of a rider to a manufacturing house: In taking an order in the name of the house, he binds the house to furnish the article.[6]

In such cases,—1. If the claim is against the principal, as the buyer of goods, for the price, it is merely for a dividend, even although the goods be still with the agent or factor distinguishable.[7] 2. If the claim is against the principal, as seller of the goods, for delivery, or for damages, it is also, in this case, merely personal. But if the agent act in a neutral capacity, as a general commission-agent, uniting the business of a custodier with that of a

[1] See p. 200. et seq.

[2] GRIERSON against MUIR, 17th February 1802; 12. Session Papers. This was in the case of a man who undertook gratuitously to carry a sum of money. The money, being L. 50, was delivered to him in Keltonhill fair, to be carried to Kirkcudbright, for the purpose of paying a bill there. Muir, who undertook it, put it in his pocket with some money of his own, and both were stolen or lost in the fair. Muir did not miss the money till he arrived at home, when he found his pocket cut. The Court held the circumstance of his having lost at the same time a sum belonging to himself, and a bill of L. 100, as, in all the circumstances of the case, sufficient proof of his not having been guilty of supine neglect.

[3] KAY against SIMPSON, 16th December 1801.

[4] For his right to retain or claim lien on the goods of the principal, see below, Of Retention or Lien.

[5] Where the principal is abroad, the factor will be liable directly. DE GAILLON *v.* L'AIGLE, 1. Bos. and Pull. 368. Pothier, Contr. de Mandat. No. 87. vol. ii. 188. It is otherwise with a shipmaster. See, Of Maritime Contracts, p. 496.

[6] MILL against HARRIS and Company, 14th June 1803; where the Court held it 'as a general rule, that 'a rider or travelling agent who receives an order, 'comes under an obligation for the merchant by whom 'he is accredited.'

[7] See above, p. 201. et seq.

broker acting for both parties, the property may, in such situations, be held as transferred, to the effect of vesting a real right in the buyer.[1]

In Factor's name.

2. Where the contract is not in the principal's name, but generally as with a factor, the election will be with the third party, to hold to the credit of the factor, or to seek his remedy against the principal.[2] And the remedy against the principal will not be hurt, either, *first*, By any private agreement between the principal and the factor, that the factor alone shall be responsible;[3] or, *secondly*, Where the principal has paid the price to his agent, who has squandered it;[4] unless the day of payment has been allowed to pass, and the principal has been led to believe that the agent alone was relied on;[5] or, *thirdly*, By the circumstance of the factor failing with a large balance due to the principal.[6]

Election of Agent.

3. Where notice is given of the principal, and the third party chooses to rely on the factor, he will be entitled so to do, but will not also have his claim against the principal.[7]

Unknown Principal.

4. Even where the factor contracts in his own name, the principal is bound to the third party, on his name and interest being disclosed.[8] But this is to be taken under these limitations:—1. That if he knowingly have elected the agent as his debtor, he will not have his remedy against the principal;[9] and, 2. That where the principal is induced to settle

[1] See above, p. 186.

[2] WARING *v.* FAVENGK, 1807; 1. Camp. 85.; where coffee was sold to a broker, but the principal's name not mentioned. The broker failed, and an action was brought against the principal. Lord Ellenborough held, that as the purchase had been made for the defendants by their agent, it was the same as if made directly by the defendants themselves; and that this was, therefore, the common case of goods sold and delivered.

[3] RICH *v.* COE, Cowper, 636. This rests on the principle of the actio utilis institoria. See Pauli Sentent. 11. 8. 2.

[4] KYMER *v.* SUWERCROOP, 1807; 1. Camp. 109.; where coffee was sold by auction to a broker, the principal not disclosed: there was no delay in asking payment, so as to lead the principal to believe the broker had got credit, and so to induce him to pay the broker. The question was, Whether a payment by the principal to the broker in that case discharged the claim against the principal? Lord Ellenborough said, A person selling goods is not confined to the credit of a broker who buys them, but may resort to the principal, on whose account they are bought; and he is no more affected by the state of accounts between the two, than I should be were I to deliver goods to a man's servant, pursuant to his order, by the consideration of whether the servant was indebted to the master or the master to the servant. If he lets the day of payment go by, he may lead the principal into a supposition that he relies solely on the broker; and if, in that case, the price of the goods has been paid to the broker, on account of this deception the principal shall be discharged. But here payment was demanded of the defender on the several days it became due, &c.

[5] See below, p. 493. Note [1].

[6] See preceding Note.

[7] Lord Mansfield says, in RICH *v.* COE, Cowp. 639. 'If it appeared that a tradesman had notice of a 'contract, by which the shipmaster was to keep the 'ship in repair, and, in consequence of it, gave credit 'to the captain individually, as the responsible person; 'particular circumstances of this sort might afford a 'ground to say he meant to absolve the owners, and 'to look singly to the personal security of the master.'

[8] 'The law (says Lord Ellenborough) has been set-'tled by a variety of cases, that an unknown principal, 'when discovered, is liable on the contracts which his 'agent makes for him;' 15. East, 68.

[9] PATERSON *v.* GANDASEQUI, 1812; 15. East, 62. Here Gandasequi, a Spanish merchant, being in London, employed Larrazabat and Company to purchase for him goods for the foreign market. They bought from Paterson, Gandasequi being present and examining the goods. They were invoiced to Larrazabat and Company as on their credit, and Larrazabat and Company debited Gandasequi with the amount. Larrazabat and Company failed before the credit expired, and the sellers brought an action against Gandasequi. Lord Ellenborough directed a nonsuit; and this was confirmed by the Court. Lord Ellenborough said, The court have not the least doubt, that if it distinctly appeared the defendant was the person for whose use and on whose account the goods were bought, and that the plaintiff knew that fact at the time of the sale, there would not be the least pretence for charging the defendant in this action. And the Court being clear that the jury did right in finding the election to have been made in knowledge of that fact, the rule was made absolute.

See ADDISON *v.* GANDASEQUI, 1812; 4. Taunt. 574. This was a case in Common Pleas, almost precisely like that in the King's Bench, and decided in the same way.

HOOD against Sir A. J. COCHRANE, 16th January 1816; Fac. Coll. This Scottish case was very similar

with the factor by means of documents, &c. furnished to the agent, the principal will be discharged.[1] Where the principal is made liable, he and the factor will reciprocally have the benefit of their private stipulations as to responsibility, and of their correlative rights in respect to the state of the balance in account between them. The third party is entitled to hold the factor as the principal, so that a purchaser of goods from a factor may resist a demand for the price by the principal, on the ground of compensation or set-off.[2] An exception is admitted to this rule in England in the case of a broker, who is so far different from a factor, that a factor is trusted with possession of the goods, and persons dealing with him cannot know whether he is proprietor or not; whereas a broker is not so trusted, and the employer is entitled to rely on his not selling in his own name, while third parties can be deceived only through their own neglect.[3]

Del Credere.

5. A del credere commission affects the settlement only between the principal and factor, relative to money to be recovered from third parties;[4] as a factor with a del credere is responsible that the buyer shall pay the price. But although the factor will, on the buyer's failure, (himself being solvent), have right to claim on the buyer's estate in satisfaction of his obligation to guarantee, he is not so much a creditor, as, on the one hand, to deprive the buyer of the benefit of retention or compensation against the principal; nor, on the other, to give to his own creditors the benefit of the claim against the buyer, while they pay only a dividend to the principal. In the former case, compensation or retention against the principal will discharge the guarantee, and so be a good answer to the factor's claim: In the latter, the principal will have his claim against the buyer in the bankruptcy, and also against the factor on his guarantee.

Acts of Agent binding.

6. Claims may sometimes be available to third parties against the estate of the principal, in consequence of the acts of the agent, though unauthorized by the principal. Thus, 1. Representations by the agent, in the strict course of the contract, will be taken to form a part of the contract with the principal; and the concealment or misrepresentation of the agent will also affect the principal.[5] 2. On the same principle, notice to a factor or agent will be held as notice to the principal, provided such factor has power to treat and negociate the contract. And, 3. The principal is liable civilly for the neglect or fraud of his agent, committed in execution of the authority given to him.

2. CLAIMS ON THE BANKRUPTCY OF THE FACTOR OR AGENT.

Claims on Bankruptcy of the Factor or Agent.

The claims which may thus arise are either,—1. By the estate of the factor against the principal or third party; or, 2. By the principal or third party against the estate of the factor.

1. *Claims by the Factor or Agent.*

The agent's estate may have a claim against third parties, or against the principal.

1. CLAIMS AGAINST THIRD PARTIES.—Against third parties the agent's estate has a right

to the above English case. Here goods were furnished for Sir A. J. Cochrane's estates in Trinidad, on the order and credit of Scott Moncrieff and Robertson, his agents in Scotland. Scott Moncrieff and Robertson became bankrupt, and Sir A. Cochrane settled accounts with them. The furnisher of the goods made a demand for the price of the goods. But the Court held, that he had elected the agents as his debtors, in the knowledge of the principal. The Court had the English case before them, and decided conformably.

[1] WYAT v. Marquis of HERTFORD, 3. East, 147.

[2] RABONE v. WILLIAMS, supra, p. 267. Note [1].

[3] BARING v. CORRIE, 1818; 2. Barn. and Ald. 137.

[4] See above, p. 377.

[5] FITZHERBERT v. MATHER, 1. Term. Rep. 12. STEWART against DUNLOP, 8th April 1785; affirmed in House of Lords.

of action, to the effect of preserving any lien or other security for indemnity against the principal.[1]

2. CLAIMS AGAINST THE PRINCIPAL.—Where the factor has made special advances on goods consigned to him, his creditors will be entitled to have the goods sold for repayment of the advances; as the factor himself might have insisted on proceeding with the sales, unless indemnified.[2] There may, however, be a difference in this respect, that if the factor be solvent, he cannot be deprived of his commission, on the faith of which he may have made his advances; whereas his bankruptcy, putting an end to his character as a trader, may perhaps entitle the principal to withdraw his goods, on merely indemnifying the factor for his advances.

2. *Claims against the Agent's Estate.*

The claims against the bankrupt estate of the factor or agent may be by third parties, or by the principal.

Claims against Third Parties.

1. CLAIMS BY THIRD PARTIES.—It is a general rule, that (unless in the case of shipmasters) agents properly authorized, contracting for a known principal, are not personally responsible on such contracts.[3] Therefore, where both the principal and the agent have failed, there is a claim only against the estate of the principal, not against that of the agent; unless the credit of the agent has been specially relied on; or the name of the principal has been concealed;[4] or the principal is abroad.[5]

But where the agent specially engages his personal credit; or where he exceeds his instructions; or where he is guilty of any fraud, or misrepresentation, or negligence, (whether the principal may be bound by such conduct or not), a claim will lie against his estate by the third party.

Claims by the Principal.

2. CLAIMS BY THE PRINCIPAL.—1. The estate of the factor or agent will be responsible to the principal, wherever he has so conducted himself as to bind the principal to third parties beyond the limits of his instructions. Thus, on the one hand, if an agent sell goods on credit, where he was authorized only to sell them for ready money, or where, by the course of trade, they ought to have been sold for money only, and the buyer fails; the principal will have a claim against the agent's estate: Or, on the other hand, if the agent buy with such authority as will bind the principal to a third party, but beyond the limitation as between themselves; the principal paying the price will have a claim for indemnification.

It may be questioned whether the claim of the principal may not, in some cases, stand excluded by the ranking of another creditor. Thus, 1. Where the agent discounts bills of his principal in his hands, a claim will be entered by the indorsee on the factor's estate in consequence of his indorsation: Can the principal also enter a claim in consequence of the

[1] See, however, STIRLING & SONS against DUNCAN and Co.; 1. Shaw's App. Cases, 389.

[2] This doctrine laid down broadly by Lord Mansfield in DRINKWATER *v.* GODWIN, Cowp. 2556. See also HOUGHTON *v.* MATTHEWS, 3. Bos. and Pull. 488.; Buller's N. P. p. 130. ATKYNS *v.* AMBER, 2. Espin. 493. BANFILL *v.* LEIGH, 8. Term. Rep. 571.

[3] BROWN against M'DOUGAL and Company; 13. Fac. Coll. 146.; M. Factor, App. No. 1.; where the opinion of English counsel was taken.

[4] See above, p. 491. 'Wherever (says Lord Kenyon) an order is given by one person for another, and he informs the tradesman who that person is for whose use the goods are ordered, he thereby declares himself to be merely an agent; and there is no foundation for holding him to be liable.' OWEN against GOOCH, 2. Espin. Cases, 567. See in the same case the exceptions pointed out.

[5] Buller's Nisi Prius, 130. England not a foreign country in this question. See BROWN's case, *supra*, Note [3]. Nor Ireland. LEVIT against WILSON, 27th May 1818; Sess. Papers.

loss suffered by the fraud of the agent, without being exposed to the objection of double ranking?

2. The estate of a factor acting under a del credere commission is liable to the principal, where the buyer or debtor has failed without paying the price.[1]

3. To ground a claim against the factor's estate for negligence, there must be either a breach of orders; gross negligence; or fraud. Claims grounded on neglect.

First, Not only where the agent commits a direct breach of his orders, in exceeding his limits, &c. but where he does *not* act as directed, he may be liable to an action; and so his bankrupt estate to a claim for the consequences of the neglect. The most frequent example of this is on occasion of orders to insure. The late Mr Justice Buller has well distinguished these cases:[2]—'It is now settled as clear law, that there are three instances 'in which such 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 has 'no effects in the hands of his correspondent; yet if the course of dealing between them 'be such, that the one has been used to send orders for insurance, and the other to com-'ply 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 send 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. 'It is true, as it has been observed, that unless something has been held out by the per-'son here to induce the other to think that he will procure insurance, he shall not be 'compelled to insure. But if the commission from the merchant abroad consist of two 'parts, the one to accept the bill of lading, the other to cause an insurance to be made, 'the correspondent here cannot accept it in part, and reject it as to the rest.' If, in such cases, he entirely neglect to insure, he becomes responsible. If he endeavour to procure insurance, but limit the broker to a premium so small that the insurance cannot be effected, he will be liable.[3] But it is sufficient if he do what is usual in order to get the insurance made.[4] Neglect to insure.

Secondly, Gross negligence will ground a claim against the agent; as where one undertakes to get a policy of fire insurance renewed in name of the purchaser of his premises, and applies for the renewal, but neglects to have the policy transferred from himself by the proper indorsement at the office, it is held that he is responsible.[5] So concealment by one broker, who employed another to get the insurance done, of material

[1] The principal will, in such a case, (under the 24th section of the 54. Geo. III. c. 137.), be obliged to value and deduct the claim against the debtor, in voting as a creditor on the factor's estate; but he will be entitled to rank on both estates, to the effect of drawing a full dividend from each, provided he does not, on the whole, draw more than the debt.

[2] SMITH *v.* LASCELLES, 2. Term. Rep. 187.

[3] WALLACE *v.* TELLFAIR, cor. Buller, J., 2. Term. Rep. 188. in note.

[4] Mr Justice Buller, in SMITH *v.* COLOGAN, told the jury, that 'if a person to whom such orders are 'sent, do what is usual to get the insurance made, 'that is sufficient; because he is no insurer, and is not 'obliged to get insurance at all events.' It must always be a question for the jury, whether what is usual has been done. In the case in which the above direction was given to the jury, the agent sent his broker to Lloyd's to get the insurance effected; but he could not get it done at any premium, on account of the ship's not being registered in Lloyd's. And the inclination of the Judge's opinion seems to have been, that if the agent had gone no farther, this would have been enough. 2. Term. Rep. 188. Note.

[5] So held in WILKINSON *v.* COVERDALE, 1. Espinasse's Cases, 74. In that case, the proof of an undertaking to have the policy renewed, failed; and so the action was unsuccessful.

information for procuring the insurance, will be a ground of responsibility against the first broker.[1]

Thirdly, Such fraud in the agent for the consignor, as will subject the principal for its consequences, will ground a claim against the agent's estate.

The consequence of the agent making himself responsible for the risk is, that he becomes the insurer himself; and he may avail himself of every defence which the underwriter would have had, if the insurance had been effected.[2]

CHAPTER IV.

OF MARITIME CONTRACTS.

INTRODUCTORY VIEW OF MARITIME LAW.

In the great department of national jurisprudence relative to maritime affairs, there is a great deficiency in the works of the institutional writers of Scotland.

One treatise exists in manuscript, professedly written on this subject, about the close of the sixteenth century, but of no very signal merit;[3] and amidst those preparations which appear to have been made, under the direction of Sir James Balfour, for completing a digest of the law of Scotland, in consequence of the legislative appointment of a commission for that purpose in the sixteenth century, there were collected some notes of sea laws, which are published in the book entitled Balfour's Practics.[4] But besides these we have nothing but occasional passages in our institutional writers, and the determinations of the Admiralty, and of the Supreme Court, to compose our national digest of maritime law.

The little which is to be found in Lord Stair's Institutions,[5] leaves room for sincere regret that this important subject had not received more attention from one so eminently qualified to illustrate it.

Lord Bankton, with less pretension to respect as an authority in Scottish jurisprudence, has more fully entered on some of the points of maritime law, as they stood connected with the subjects which, in the course of his work, he had occasion to consider.[6]

Erskine, our latest institutional writer, has, with his usual clearness and conciseness, touched the points of maritime law which came in his way; but so slightly, that the im-

[1] Seller *v.* Work, Marshall on Ins. p. 299.

[2] Marshall, p. 301.

[3] 'Tractatus Legum et Consuetudinum Navalium 'quæ apud omnes fere gentes in usu habentur, &c. 'auctore Alexandro Regio; in suprema Edinburgi 'curia advocato ac Amarantis delegati jurisdictionem 'in Scotia exercente.' MS. in Advocates' Library.

Mr Alexander King appears to have been admitted of the Faculty of Advocates, 20th December 1580; and Francis Stewart, earl of Bothwell, to whom, as admiral of Scotland, his work is inscribed, held that office from 1587 to 1592.

[4] 'The Sea-Lawis collectit furth of the Actis of 'Parliament, the Practiques and the Lawis of Oleron, 'and the Lawis of Wisbieg, and the Constitutionis of 'Francois king of France, anno 1543-1557.' There is no good authority for ascribing this book to Sir James Balfour, or for holding that it received his sanction, or was any thing more than the preparatory collections made for the use of him and the other commissioners for revising the laws.

[5] The second chapter of Book II. of Lord Stair's Institutions is a very valuable tract on Prize Law. But nothing more is to be found in that excellent work except a few scattered notices in the course of his systematical review of our jurisprudence. Thus, in treating of mandate, he bestows a single paragraph on exercitors. B. 1. tit. 12. § 18.

[6] B. 1. tit. 18. § 2.; and B. 1. tit. 19. § 2.